No. 17–5939

IN THE
SUPREME COURT OF THE UNITED STATES

DARREL PETER PANDELI,
PETITIONER,

-vs-

STATE OF ARIZONA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF IN OPPOSITION

MARK BRNOVICH
ATTORNEY GENERAL

DOMINIC E. DRAYE
SOLICITOR GENERAL

LACEY STOVER GARD
CHIEF COUNSEL
CAPITAL LITIGATION SECTION
(COUNSEL OF RECORD)
400 W. CONGRESS, BLDG. S-315
TUCSON, ARIZONA 85701-1367
LACEY.GARD@AZAG.GOV
CADOCKET@AZAG.GOV
TELEPHONE: (520) 628-6520

ATTORNEYS FOR RESPONDENTS

CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Has Pandeli shown a compelling reason for this Court to grant certiorari to determine whether the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), requires a court to consider the cumulative impact of errors by counsel, where the Arizona Supreme Court rejected Pandeli's claims on *Strickland*'s deficient-performance prong alone and did not consider prejudice?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i
TABLE OF AUTHORITIES iii
OPINION BELOW 1
STATEMENT OF JURISDICTION 1
PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 1
REASON FOR DENYING THE WRIT 4
CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases

Brady v. Maryland, 373 U.S. 83 (1963) 7
Brooks v. State, 929 So.2d 491 (Ala. Crim. App. 2005) 9, 10
Buck v. Davis, 137 S. Ct. 759 (2017) 6
Butler v. McKellar, 494 U.S. 207 (1990) 4
Dugas v. Coplan, 428 F.3d 317 (1st Cir. 2005) 8
Ex Parte Aguilar, 2007 WL 3208751 (Tex. Ct. Crim. App. 2007) 8
Fisher v. Angleone, 163 F.3d 835 (4th Cir. 1998) 9
Garcia v. State, 678 N.W.2d 568 (N.D. 2004) 9
Goodman v. Bertrand, 467 F.3d 1022 (7th Cir. 2006) 8
Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995) 8
Howard v. State, 238 S.W.3d 24 (Ark. 2006) 9
Hurst v. State, 18 So.3d 975 (Fla. 2009) 8
In re Jones, 917 P.2d 1175 (Cal. 1996) 8
Johnson v. State, 510 S.E.2d 918 (1999)) 9
Kyles v. Whitley, 514 U.S. 419 (1995) 7
Lindstadt v. Keane, 239 F.3d 191 (2d Cir. 2001) 10
Lorenzen v. State, 657 S.E.2d 771 (S.C. 2008) 9
Marquez v. Commonwealth, 2005 WL 195188 (Ky. Ct. App. Jan. 14, 2005) 8
Moore v. Parker, 425 F.3d 250 (6th Cir. 2005) 9
Mullen v. Blackburn, 808 F.2d 1143 (5th Cir. 1987) 9
Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206 (1998) 9
Pandeli (II) v. Arizona, 536 U.S. 953 (2002) 2
People v. Cox, 809 P.2d 351 (Cal. 1991) 10
People v. Doolin, 198 P.3d 11 (Cal. 2009) 10
People v. Gandiaga, 70 P.3d 523 (Colo. App. 2002) 8
People v. Perry, 864 N.E.2d 196 (Ill. 2007) 8, 10
Ring (II) v. Arizona, 536 U.S. 584 (2002) 2
State ex rel. Bess v. Legursky, 464 S.E.2d 892 (W. Va. 1995) 8

State v. Clay, 824 N.W.2d 488 (Iowa 2012) 8
State v. Gondor, 860 N.E.2d 77 (Ohio 2006) 8
State v. Hampton, 140 P.3d 950 (2006) 11
State v. Hughes, 969 P.2d 1184 (Ariz. 1998) 3
State v. Pandeli (I), 26 P.3d 1136 (Ariz. 2001) 1
State v. Pandeli (II), 65 P.3d 950 (Ariz. 2003) 2
State v. Pandeli (III), 161 P.3d 557 (Ariz. 2007) 1, 2, 3, 11
State v. Pandeli, 394 P.3d 2 (Ariz. 2017) 1
State v. Ring (III), 65 P.3d 915 (Ariz. 2003) 2
State v. Salazar, 146 Ariz. 540, 707 P.2d 944 (1985) 4
State v. Trujillo, 42 P.3d 814 (N.M. 2002) 10
Strickland v. Washington, 466 U.S. 668 (1984) ..... passim
Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996) 9
Weatherford v. State, 215 S.W.3d 649 (Ark. 2005) 9
White v. Thaler, 610 F.3d 890 (5th Cir. 2010) 8
Yee v. City of Escondido, Cal., 503 U.S. 519 (1992) 9

Statutes

28 U.S.C. 1254(1) 1
A.R.S. § 13–751(F)(2) 2
A.R.S. § 13–751(F)(6) 2
A.R.S. § 13–751(F)(8) 11

Rules

Rule 32, Ariz. R. Crim. P. 3
U.S. Sup. Ct. R. 10 1
U.S. Sup. Ct. R. 14.1(a) 10

Constitutional Provisions

U.S. const. amd. 6th 1, 2, 6
U.S. const. art. III, § 2 1

OPINION BELOW

On May 15, 2017, the Arizona Supreme Court unanimously reversed a lower-court ruling granting post-conviction relief and reinstated Pandeli's death sentence in an opinion reported at *State v. Pandeli (V)*, 394 P.3d 2 (Ariz. 2017). (Pet. App. A.) On June 5, 2017, the court denied Pandeli's motion to reconsider. (Pet. App. B.)

STATEMENT OF JURISDICTION

Pandeli timely filed his petition for writ of certiorari on September 5, 2017. This Court thereafter granted Respondent's application for a 30-day extension of time to file a brief in opposition. This Court has jurisdiction under United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.

PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

In September 1993, Petitioner Darrel Peter Pandeli murdered Holly Iler. *See State v. Pandeli (IV)*, 161 P.3d 557, 563, ¶ 2 (Ariz. 2007). Pandeli beat Iler, slit her throat, excised her nipples, and left her nude body in a Phoenix alley.[1] *Id.* A jury found Pandeli guilty of first-degree murder, a judge sentenced him to death, and the Arizona Supreme Court affirmed his conviction and sentence. *State v. Pandeli (I)*, 26 P.3d 1136, 1141, 1153–54, ¶¶ 1, 94 (Ariz. 2001). While Pandeli's certiorari petition was

[1] Iler's murder was not Pandeli's first: in January 1992, he killed Theresa Humphries. *Pandeli IV*, 161 P.3d at 563, ¶ 3, He was convicted of second-degree murder for that offense and sentenced to 20 years imprisonment. *Id.*

pending, this Court recognized a Sixth-Amendment right to have a jury find death-qualifying aggravating factors. *Ring (II) v. Arizona*, 536 U.S. 584 (2002). This Court granted certiorari in Pandeli's case, vacated the judgment, and remanded for further consideration in light of *Ring II*. *Pandeli (II) v. Arizona*, 536 U.S. 953 (2002). On remand, the Arizona Supreme Court reviewed the *Ring II* error in Pandeli's sentencing proceeding for harmlessness under the procedure the court established in *State v. Ring (III)*, 65 P.3d 915, 936, ¶ 53 (Ariz. 2003). *State v. Pandeli (III)*, 65 P.3d 950, 951–53, ¶¶ 1–11 (Ariz. 2003). Because it could not find the error harmless beyond a reasonable doubt, the court remanded for a jury resentencing. *Id.* at 953, ¶¶ 10–11.

After a jury found two death-qualifying aggravating factors,[2] Pandeli's resentencing counsel presented significant mitigating evidence through both fact and expert witnesses. They established that Pandeli had endured a difficult childhood, during which his mother neglected him and his biological father physically abused him, before abandoning the family. *Pandeli IV*, 161 P.3d at 574, ¶ 70. They also established that Pandeli was "extensively sexually abused throughout his youth" by at least five different men. *Id.* at 574–75, ¶ 71. And they established that Pandeli had a history of drug and alcohol abuse, suffered from learning disabilities and mental impairment (including depression and severe Attention Deficit Hyperactivity Disorder), behaved well in prison, and was able to maintain positive relationships. *Id.* at 575–76, ¶¶ 73–83. The jurors found this mitigation insufficient to warrant leniency and sentenced

[2] The jurors found that Pandeli had previously been convicted of a serious offense (Humphreys' murder), *see* A.R.S. § 13–751(F)(2), and that he had murdered Iler in an especially heinous or depraved manner, *see* A.R.S. § 13–751(F)(6). *Pandeli IV*, 161 P.3d at 563–64, ¶ 4.

Pandeli to death. *Id.* at 563, ¶ 1. The Arizona Supreme Court independently reviewed the aggravating and mitigating factors and found that Pandeli was "an extremely damaged individual"; however, the court determined that Pandeli's mitigation did not call for leniency in light of the weighty aggravation. *Id.* at 576, ¶ 84.

Pandeli then sought post-conviction relief under Arizona Rule of Criminal Procedure 32. (Pet. App. A, at 2, ¶ 2.) Among other claims of trial court and prosecutorial error, Pandeli argued that his attorneys were ineffective in 15 different ways at his resentencing trial. (*Id.*) Following an evidentiary hearing, the post-conviction court granted relief on these ineffective-assistance claims and ordered that Pandeli again be resentenced.[3] (*Id.*; *see also* Pet. App. C; Resp. App. A.)

The Arizona Supreme Court thereafter granted Respondent's petition for review and reversed the post-conviction court's ruling. (Pet. App. A, p. 1, ¶ 2.) After disposing of Pandeli's individual claims on the deficient-performance prong of *Strickland v. Washington*, 466 U.S. 668 (1984) (*see id.* at pp. 15–23, ¶¶ 9–68), the court rejected Pandeli's argument that the alleged errors, considered cumulatively, warranted relief (*id.* at 24–25, ¶¶ 69–72). The court observed that it had not recognized the cumulative-error doctrine outside the context of prosecutorial misconduct. (*Id.* at 24–25, ¶¶ 69–70 (citing *State v. Hughes*, 969 P.2d 1184, 1190–91, ¶ 25 (Ariz. 1998).). Without deciding whether to extend the doctrine to ineffective-assistance claims, the court found that none of counsel's challenged acts or omissions constituted error in the first place,

[3] Pandeli includes in his appendix the post-conviction court's minute entry granting relief, but omits the accompanying findings of fact and conclusions of law. Respondent has attached that document hereto at Appendix A. Respondent has attached as Appendix B an order denying its motion to clarify the post-conviction court's ruling.

precluding a finding of cumulative error, and expressly declined to consider *Strickland*'s prejudice prong:

> Here … all of the conduct at issue was within the requisite bounds of competence. Although in hindsight counsel may have done certain things differently, their decisions all were grounded in reason or strategy and were not shown to be the product of ineptitude, inexperience, or lack of preparation. As a result, there is no cumulative error.
>
> Because the actions and decisions complained of are within the bounds of professional competence, we do not need to determine whether they prejudiced Pandeli. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). We reverse the [post-conviction] court's conclusion that Pandeli received inadequate representation. The cumulative decisions about which Pandeli complains do not amount to [ineffective assistance].

(*Id.* at 25, ¶¶ 69–72.)

REASONS FOR DENYING THE WRIT

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." U.S. SUP. CT. R. 10. Accordingly, this Court grants certiorari "only for compelling reasons," including that a "state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." *Id.*; *see Butler v. McKellar*, 494 U.S. 407, 429 (1990) (Brennan, J., dissenting) ("[T]he Supreme Court's burden and responsibility are too great to permit it to review and correct every misstep made by the lower courts in the application of accepted principles.").

Pandeli has failed to show a compelling reason for this Court to grant certiorari. Pandeli accuses the Arizona Supreme Court of "refusing" to consider the cumulative prejudicial impact of counsel's alleged errors, proposes that there is "a deep split"

among the state courts of last resort and the federal circuit courts on whether cumulative-error analysis is appropriate on *Strickland*'s prejudice prong, and claims that *Strickland* "requires" a cumulative assessment of prejudice. (Pet., at i, 4–19.) But the Arizona Supreme Court did not refuse to review "errors" in Pandeli's case cumulatively—it instead found that no errors had occurred. Consistent with *Strickland*, the court denied Pandeli's claims on *Strickland*'s *deficient-performance* prong, without considering prejudice, and rejected his cumulative-error argument because it had found no error to consider cumulatively. Accordingly, this case does not present the question whether *Strickland*'s prejudice prong requires a court to consider the cumulative effect of counsel's errors. This Court should deny certiorari.

I. THE ARIZONA SUPREME COURT FOUND NO DEFICIENT PERFORMANCE AND, CONSISTENT WITH *STRICKLAND*, DECLINED TO CONSIDER PREJUDICE.

Pandeli first asks this Court to review the Arizona Supreme Court's decision because he believes that court erroneously "refus[ed]" to review the effect of counsel's "errors" cumulatively to evaluate *Strickland* prejudice. (Pet., at 5–8.) In a related argument, he asserts that *Strickland* "requires" a cumulative-prejudice assessment, and laments that the court below was "extraordinarily unfair" by failing to engage in one. (*Id.* at 13–19.) But Pandeli's desire to correct these alleged errors is not a "compelling reason" for certiorari review. *See* U.S. SUP. CT. R. 10. And even if it were, the state court here did not err—to the contrary, *Strickland* expressly authorizes the procedure the court employed.

Under *Strickland*, a defendant must prove deficient performance by establishing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687; *see also id.* at 688 (defendant must prove that "counsel's representation fell below an objective standard of reasonableness"); *id.* at 690 (requiring defendant to identify specific acts and omissions that constitute deficient performance and court to consider whether those acts and omissions fell outside the wide range of reasonable representation). He must *also* prove that counsel's "deficient performance prejudiced the defense." *Id.* at 687. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The defendant must establish a reasonable probability of a different outcome absent counsel's errors. *Id.* at 694.

Unless a defendant proves *both* deficient performance and prejudice, "it cannot be said that the … death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687; *see also, e.g., Buck v. Davis*, 137 S. Ct. 759, 775 (2017) ("A defendant who claims to have been denied effective assistance must show both that counsel performed deficiently *and* that counsel's deficient performance caused him prejudice.") (emphasis added). For this reason, a court is not required to "address both components of the inquiry" if a defendant makes "an insufficient showing on one." *Strickland*, 466 U.S. at 697.

Here, Pandeli misunderstands *Strickland* and misinterprets the Arizona Supreme Court's opinion. Consistent with *Strickland*'s express terms, the Arizona

Supreme Court rejected Pandeli's claims for lack of deficient performance alone and elected not to consider prejudice. (Pet. App. A, at 25, ¶¶ 71–72.) Pandeli mistakenly construes the court's decision as employing a cumulative-prejudice inquiry focused on "whether each of [counsel's] actions could be individually rationalized." (Pet., at 8.) In reality, the court "rationalized" counsel's individual acts and omissions in rejecting the cumulative-error argument only to reiterate that none of the acts or omissions constituted deficient performance. (Pet. App. A, at p. 25, ¶ 71.) As a result, there were no errors to cumulate. (*See id.*)

Pandeli does not ask this Court to review the Arizona Supreme Court's findings that he failed to prove deficient performance on his individual claims—in fact, he appears to concede that the court correctly rejected a number of his deficient-performance arguments. (Pet., at i, 5–8, 13–19.) He contends instead that the court should have reviewed counsel's acts and omissions for their cumulative prejudicial impact under *Strickland* notwithstanding the lack of deficient performance. (*Id.*) But this position directly contradicts *Strickland* which, as discussed above, does not require a prejudice assessment when no deficient performance is found.[4] This Court should deny certiorari of the state court's routine, and entirely correct, application of *Strickland*.

[4] Because the Arizona Supreme Court was not required to conduct a prejudice assessment given the lack of deficient performance, there is no tension between the Arizona Supreme Court's opinion and *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles v. Whitley*, 514 U.S. 419 (1995), as Pandeli contends. (Pet., at 14–16.)

II. PANDELI HAS NOT IDENTIFIED A GENUINE SPLIT IN AUTHORITY DISPOSITIVE OF THIS CASE.

As stated above, Pandeli does not challenge the Arizona Supreme Court's finding that counsel did not perform deficiently (and in fact appears to concede the deficient-performance prong for some claims). (*See* Pet. at i, 5–8, 13–19.) Instead, he cites authority concerning *Strickland*'s *prejudice prong* (which the state court did not reach), and contends that the state and federal courts are "wildly inconsistent" on the necessity and scope of cumulative-error review to resolve that prong. (Pet., at 8–13.) Some jurisdictions, Pandeli asserts, review the prejudicial effect of counsel's errors cumulatively but apply inconsistent tests to do so.[5] (*Id.*) Other jurisdictions, he

[5] In all the cases Pandeli cites as applying cumulative-prejudice analysis, courts either found, or recognized the need for a showing of, deficient performance. *See White v. Thaler*, 610 F.3d 890, 902–12 (5th Cir. 2010) (evaluating, after finding deficient performance, the "combined prejudicial effect" of counsel's failure to object to evidence); *Goodman v. Bertrand*, 467 F.3d 1022, 1029–31 (7th Cir. 2006) (considering multiple acts of counsel error which, while not prejudicial alone, cumulatively required relief); *Dugas v. Coplan*, 428 F.3d 317, 326–35 (1st Cir. 2005) (noting, after finding deficient performance, that considering cumulative effect of errors may establish prejudice); *Harris v. Wood*, 64 F.3d 1432, 1438–39 (9th Cir. 1995) (finding cumulative prejudice, without considering whether each found act of deficiency was independently prejudicial); *State v. Clay*, 824 N.W.2d 488, 494–501 (Iowa 2012) (recognizing cumulative-error doctrine for *Strickland*'s prejudice prong but affirming need to also show deficient performance); *Hurst v. State*, 18 So.3d 975, 1015–16 (Fla. 2009) ("[w]here multiple errors are found, even if deemed harmless individually," court must conduct cumulative-error review); *People v. Perry*, 864 N.E.2d 196, 222 (Ill. 2007) (concluding that cumulative-error review was unnecessary because court had found no deficient performance); *Ex Parte Aguilar*, 2007 WL 3208751, *1–*17 (Tex. Ct. Crim. App. 2007) (finding several acts of deficient performance and considering the cumulative effect of those errors to determine *prejudice*); *State v. Gondor*, 860 N.E.2d 77, 90, ¶ 72 (Ohio 2006) (considering the "cumulative effect of trial counsel's *errors*") (emphasis added); *Marquez v. Commonwealth*, 2005 WL 195188, *1 (Ky. Ct. App. Jan. 14, 2005) (agreeing that cumulative-error review is appropriate but including in such review only counsel's mistakes that carried the potential of causing even slight prejudice); *In re Jones*, 917 P.2d 1175, 1177, 1193–96 (Cal. 1996) ("finding multiple deficiencies and that "the cumulative impact of counsel's shortcomings … was *prejudicial*") (emphasis added); *People v. Gandiaga*, 70 P.3d 523, 529 (Colo. App. 2002) ("*[P]rejudice* may result from the cumulative impact of multiple attorney *errors*.") (emphasis added); *State ex rel. Bess v. Legursky*, 464 S.E.2d 892, 901 n.10 (W. Va. 1995) (presuming prejudice and alternatively finding prejudice based on "cumulative impact of multiple deficiencies in defense counsel's performance").

continues, refuse to review errors cumulatively at all.[6] (*Id.*) And at least three jurisdictions, he claims, have left open the question whether cumulative-error review is required.[7] (*Id.*)

At most, Pandeli has identified a split in authority on the question whether, after finding deficient performance, a court should view the *prejudicial impact* of counsel's errors cumulatively or individually. However, that question is not presented here. As discussed above, the Arizona Supreme Court, consistent with *Strickland*, declined to evaluate prejudice because it had found no deficient performance. *See Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212–13 (1998) (Supreme Court generally does not consider issues not addressed below); *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 553 (1992) (same). Accordingly, this is not an appropriate case to provide guidance on whether, and if so how, courts should review errors by counsel cumulatively to assess *Strickland* prejudice.

---

[6] These cases are persuasively-reasoned and should be adopted by this Court at the appropriate time, as they recognize the adage that "zero plus zero equals zero." *See Fisher v. Angleone*, 163 F.3d 835, 852–53 (4th Cir. 1998) (requiring individual consideration of *Strickland* claims and stating, "it would be odd, to say the least, to conclude that these same actions [that did not warrant relief individually], when considered collectively, deprived [the defendant] of a fair trial"); *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005) (refusing to recognize cumulative error doctrine in case arising under the Anti-terrorism and Effective Death Penalty Act); *Howard v. State*, 238 S.W.3d 24, 50 (Ark. 2006) (refusing to recognize cumulative-error doctrine for ineffective-assistance claims); *Weatherford v. State*, 215 S.W.3d 642, 649–50 (Ark. 2005) (finding that refusal to recognize cumulative-error review is consistent with *Strickland*, despite that case's reference to "'errors' in plural"). As the Fifth Circuit stated, recognizing the cumulative-error doctrine Pandeli proposes "would encourage [defendants] to multiply claims endlessly in the hope that, by advancing a sufficient number of claims, they could obtain relief even if none of these had any merit …. Twenty times zero equals zero." *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987)); *see also Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996) ("Errors that are not unconstitutional individually cannot be added together to create a constitutional violation.").

[7] *See Lorenzen v. State*, 657 S.E.2d 771, 779 n.3 (S.C. 2008); *Brooks v. State*, 929 So.2d 491, 514 (Ala. Crim. App. 2005); *Garcia v. State*, 678 N.W.2d 568, 578, ¶ 23 (N.D. 2004).

Pandeli has failed to establish a "deep split" in authority on the precise topic this case presents: whether, when a court finds no deficient performance, it must still review counsel's challenged (non-erroneous) acts and omissions for *Strickland* prejudice. (Petition, at 8–13.) In fact, one of the cases Pandeli cites correctly recognizes that cumulative-error review is unnecessary when there is no error in the first place. *See Perry*, 864 N.E.2d at 222. And Pandeli's position conflicts with both logic and *Strickland* itself which, as previously discussed, permits a court to deny relief for lack of deficient performance alone, without considering prejudice.[8] Because there is no outcome-determinative conflict in authority on an issue this case squarely presents, this Court should deny review.

III. ANY ERRORS BY COUNSEL WERE NOT PREJUDICIAL, EVEN WHEN VIEWED CUMULATIVELY.

Contrary to Pandeli's opinion, counsel's disputed acts or omissions, even if erroneous and viewed cumulatively, did not result in prejudice. (Pet. at 5–8, 16–22.) Pandeli points to counsel's failure to cross-examine the State's mental-health expert,

---

[8] To the extent Pandeli suggests that multiple acts or omissions by counsel that do not alone amount to *deficient performance* may cumulatively satisfy that prong, that question is not squarely presented. *See* U.S. SUP. CT. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Nor has Pandeli identified a division of authority on that specific issue. In fact, only four of the cases he cites even discuss the cumulative-error doctrine in the deficient-performance context, and none of them directly analyze whether counsel's individually-reasonable actions must be considered cumulatively to assess *Strickland*'s deficient-performance prong. *See Lindstadt v. Keane*, 239 F.3d 191, 199–204 (2d Cir. 2001) (finding several significant errors by counsel and concluding that they proved deficient performance when reviewed in the aggregate); *Brooks*, 929 So.2d at 514 (leaving open question whether court should consider cumulative impact of ineffectiveness in assessing deficient performance); *State v. Trujillo*, 42 P.3d 814, 828 (N.M. 2002) (reviewing claims cumulatively to determine if counsel performed deficiently but not addressing whether such analysis was required); *People v. Cox*, 809 P.2d 351, 374 (Cal. 1991), *disapproved on other grounds by People v. Doolin*, 198 P.3d 11, 36 n.22 (Cal. 2009) (determining that defendant had failed to prove deficient performance or prejudice and finding "no cumulative deficiency assessing these contentions in the aggregate" but not deciding whether such analysis is required).

call a rebuttal expert, ask certain questions on *voir dire*, and secure a "functioning" mitigation specialist.[9] (*Id.*) But as discussed in the State's pleadings below, Pandeli either failed to present evidence on these claims at the post-conviction hearing or offered evidence that duplicated that presented at his resentencing.

Moreover, the aggravation in this case (which Pandeli no longer appears to contest) is exceptionally weighty, particularly because it involves a prior homicide. *See Pandeli IV*, 161 P.3d at 576, ¶ 84 (citing by analogy *State v. Hampton*, 140 P.3d 950, 968, ¶ 90 (2006), in which the court gave "extraordinary weight" to the A.R.S. § 13–751(F)(8) multiple murders aggravating circumstance). As discussed above, the Arizona Supreme Court found Pandeli's mitigation profile compelling (a testament to counsel's effectiveness), but insufficient to warrant leniency "[i]n light of the prior murder of Humphreys and the brutality of the Iler murder." *Pandeli IV*, 161 P.3d at 576, ¶ 84. Nothing about Pandeli's post-conviction evidence changes that calculus. This Court should deny certiorari.

CONCLUSION

Based on the foregoing authorities and arguments, Respondents respectfully request that this Court deny the petition for writ of certiorari.

…
…
…

[9] Pandeli has abandoned his state-court arguments that counsel committed errors in addition to those identified in the petition. (*See* Pet. App. A.)

Respectfully submitted,

MARK BRNOVICH
Attorney General

Dominic E. Draye
Solicitor General

s/ Lacey Stover Gard
Chief Counsel

Attorneys for RESPONDENT

6610124