No. 17-5939

IN THE

SUPREME COURT OF THE UNITED STATES

Darrel Peter Pandeli,

Petitioner

v.

State of Arizona,

Respondent

Reply to Brief in Opposition to Petition for Writ of Certiorari to the Arizona Supreme Court

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The Brief in Opposition neatly summarizes why this Court should grant a writ of certiorari in this case. Brief in Opposition ("BIO"), p. 4. Respondents claim that "the Arizona Supreme Court did not refuse to review 'errors' in Pandeli's case cumulatively. . ." but that it instead "denied Pandeli's claims on *Strickland's deficient performance* prong; without considering prejudice. . .because it had found no error to consider cumulatively." *Id*., (emphasis in original). This is precisely the problem: the State Court has erected an unequivocal bar to considering cumulative prejudice. If the individual decisions and actions of an attorney do not each amount to error, the Court will not consider the effect on the whole case of those decisions and actions. But the Court cannot know whether the attorney performed deficiently because it is refusing to consider the performance in the context of the entire case.

The writ should be granted for at least two of the three reasons set forth in Rule 10, Rules of the United States Supreme Court. Mr. Pandeli has identified significant conflicts in the lower courts regarding the issues presented. He has also shown that the Arizona Supreme Court decided an important federal question in a manner that conflicts with relevant decisions of this Court or that the issues presented address important unsettled questions of federal law that this Court should decide.

Argument

I. The Arizona Supreme Court Evaded its Obligation to Look at Ineffective Assistance Cumulatively.

The State concedes that the Arizona Supreme Court found that "none of the acts or omissions [of Mr. Pandeli's resentencing counsel] constituted deficient performance." BIO, p. 7. In other words, that the State Court only considered the performance of trial counsel as discrete, individual acts. Conversely, Mr. Pandeli did not "concede that the court correctly rejected a number of his deficient-performance arguments." *Id*., citing Pet., at i, 5-8, 13, 19. Quite the reverse, Mr. Pandeli's position is that the State Court dodged the Sixth Amendment by parsing claims into separate parts and then

denying them individually rather than looking at them collectively. The State's Brief in Opposition misrepresents Mr. Pandeli's recognition that review of each individual action of counsel is not necessary, given that Mr. Pandeli asserted the cumulative error claim.

The State is wrong that it "directly contradicts *Strickland*" to request that a court examine all of counsels' actions together in determining whether counsel performed competently. BIO, p. 7. This is so because, often, an action by counsel might be perfectly reasonable in one context, but unreasonable in another. And which of these categories an action falls into can only be identified by an examination of the context of all of counsel's actions. Thus, Arizona's position is that a Court may 1) review trial counsel's actions one by one, without considering them together; 2) find that none of those actions alone constituted deficient performance; and 3) deny relief regardless of how unreasonable and prejudicial those actions were in the context of the case. This Court should address whether this scheme violates *Strickland*.

II. The Lower Courts Require Guidance in the Interaction of *Strickland*'s Two Prongs.

The State is flatly wrong that "Pandeli does not challenge the Arizona Supreme Court's finding that counsel did not perform deficiently[.]" Instead, Mr. Pandeli argued that the Arizona Supreme Court impermissibly avoided reaching the prejudice prong of *Strickland* by parsing the claim into separate instances of arguably-not-deficient conduct.

Arizona is doing the same thing as states or circuits that refuse to consider cumulative prejudice, but it is doing it using a different framework of language. The result is the same whether a court bounds its analysis in the refusal to cumulate actions or the refusal to cumulate the results of those action. Thus, the question regarding the relevant split in authority is presented squarely here. Whether a court disposes of a *Strickland* claim by rejecting the concept of cumulative prejudice or by refusing to consider counsel's actions cumulatively, *Strickland* is not properly applied because the court has avoided looking at the overall context of counsel's performance and its effect on the entire case. The

split in authority identified in the petition supports granting cert in this case to set forth a definitive rule that *Strickland* requires examination of all of the facts of a case in determining both its prongs.

Arizona's position is only constitutionally-palatable in a case in which a court could determine that counsels' performance could not have been deficient under any circumstances, if such a case exists. In other words, if a court is able to examine an action by counsel and determine there is no possible factual scenario and no other conceviable circumstances under which a particular action of counsel could ever be unreasonable, it is proper to deny relief without looking at the rest of counsel's actions. If, however, it is possible that other facts regarding counsel's action could render it unreasonable, the rest of the facts must be examined. As the State puts it, zero plus zero does equal zero. BIO, p. 9, n.6 (citation omitted). But a Court must first determine whether the values being added together are actually zero, which requires an understanding of the actions of counsel, and resulting prejudice, as a whole. Thus, while the State is correct that a *Strickland* claim may arguably be denied based on a failure of the first prong, the first prong determination cannot be made without looking at it in its entirety.[1]

III. The Prejudice Prong

Finally, the State argues that there could be no prejudice here because the aggravation was weighty and the mitigation that trial counsel did manage to present was compelling. BIO, p. 10-11. This is off base for two reasons. First, courts have found prejudice where the state proved significantly-weightier aggravation than here. *E.g. Earp v. Ornoski*, 431 F.3d at 1164-65, 1180

[1]The State attempts to paint this argument as not fairly included in the cert petition. BIO, p. 10, n.8. It is the precise question presented. See Pet., p. i. The relevant consideration in this case is whether a court may avoid the analysis of cumulative prejudice by creating a non-cumulative performance prong analysis. Although lower courts may find various ways of avoiding the consideration of the "totality of the evidence" in *Strickland* claims, the question presented is whether it is permissible to do so. The means a particular court employs to do so are "subsidiary question[s] fairly included" within the larger question Mr. Pandeli presented.

(finding prejudice where 18-month old victim died from multiple head blows or shaking, and had severe rectal and vaginal injuries consistent with sexual assault); *Stankewitz v. Woodford*, 365 F.3d 706 (9th Cir. 2004) (finding prejudice where defendant attacked a 70-year-old man, shot at a police officer, attacked a California Youth Authority counselor, stabbed a fellow inmate, and attacked several officers at a police station); *Douglas v. Woodford*, 316 F.3d 1079, 1091 (9th Cir. 2003) (even in a "gruesome" case, the death penalty is not necessarily "unavoidable[;]" finding prejudice where defendant forced teenage girl victims to have sex with each other at gunpoint, slit the throat of one victim with a razor blade and sucked the wound for ten minutes, then forced both victims to perform oral copulation on him before allowing one victim to bleed to death and choking the other to death); *Ainsworth v. Woodford*, 268 F.3d 868 (9th Cir.2001) (finding prejudice despite especially strong aggravating evidence; defendant shot the victim, held her captive for 24 hours, raped her, and dumped her body in the woods); *Correll v. Stewart (Correll I)*, 137 F.3d 1404 (9th Cir. 1998) (finding prejudice where petitioner and co-defendant bound and kidnapped four victims, taking them out to the desert after 45 minutes and killing two victims with gunshots and a third by strangulation; the fourth victim survived being shot in the head); *Correll II*, 539 F.3d 938 (9th Cir. 2008) (finding prejudice despite four aggravating factors including that the crime was especially cruel, heinous and depraved). No quantity of aggravation forecloses a finding of prejudice and ineffectiveness. Similarly, because the assessment of mitigation and whether a life sentence is the appropriate punishment is an individual, moral judgment and not a factual determination, the existence of compelling mitigation in the record cannot be said to moot the impact of additional mitigating evidence that could have been developed and presented by competent counsel.

Second, the State's argument assumes that the only way to demonstrate prejudice in an ineffective assistance of sentencing counsel claim is to show that different, or more, mitigation could have been presented. On the contrary, as to some such claims, including the one presented by Mr. Pandeli here, prejudice can be demonstrated in other ways as well. For example, prejudice was shown here by presenting evidence of what competent cross examination of the State's expert would have established. Had sentencing counsel challenged the insupportable, non-scientific testimony of the State's expert, there is a reasonable probability the outcome would have been different because the jury would have been more likely to find life was the appropriate sentence.

Further, the Arizona Supreme Court did not address the finding of the prejudice by the trial court. And that determination is not necessary to resolve the question presented in the cert petition. This Court may elect to leave the prejudice finding to the Arizona Supreme Court on remand, after granting cert and addressing the improper standard the Arizona Supreme Court employed in avoiding an analysis of the cumulative errors of sentencing counsel.

Conclusion

This Court should grant the petition for writ of certiorari to provide guidance to the state and lower federal courts on the role of cumulative error review in *Strickland* claims.

Respectfully submitted this 18th day of December, 2017.

s/Julie S. Hall
Counsel for Mr. Pandeli

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2017, one copy of the attached document was deposited in the United States mailbox, first-class postage prepaid, and addressed to counsel for the State of Arizona, Lacy Stover Gard, Office of the Attorney General, 1275 West Washington, Phoenix, AZ 85007. I further certify that all parties required to be served have been served.

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