THIS IS A CAPITAL CASE

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BRANDON EUGENE LACY,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Petition For A Writ Of Certiorari
To The Arkansas Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Arkansas Supreme Court misapplied this Court's ruling in *Strickland v. Washington*, 466 U.S. 688 (1984) by finding it reasonable for trial counsel to forego consultation with a neuropsychological specialist despite numerous red flags pointing to Lacy's brain damage and the express recommendation of another mental-health expert to do so.

2. And, whether trial counsel's deficiencies should be considered individually or cumulatively in assessing Sixth Amendment ineffective-assistance-of-counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984).

PARTIES TO THE PROCEEDING

Petitioner Brandon Eugene Lacy is a prisoner on Death Row at the Varner Supermax Unit in Varner, Arkansas. Respondent is the State of Arkansas, who maintains custody of the Varner Supermax Unit, represented by Assistant Attorney General Pamela Rumpz with the Arkansas Attorney General's Office.

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PETITION FOR A WRIT OF CERTIORARI

Brandon Eugene Lacy respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court (App. 1) is reported at 545 S.W.3d 746. The trial court's order denying Lacy's petition for postconviction relief (App. 16) is not reported.

JURISDICTION

The Arkansas Supreme Court entered its judgment on May 17, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment, as applied to the states through the Fourteenth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

This case arises from Brandon Eugene Lacy's claim that he received ineffective assistance of counsel during his jury trial for capital murder. Lacy has a history of substance abuse and head trauma, each of which has resulted in substantial neuropsychological damage. The jury never had an opportunity to consider this critical evidence in mitigation because Lacy's trial attorneys failed to secure neuropsychological testing and present the results to the jury despite noting several red flags indicative of neurological damage and being expressly recommended to consult a neuropsychologist. In fact, not a single mental-health expert testified at Lacy's trial. The Arkansas Supreme Court misapplied this Court's holding in *Strickland v. Washington*, 466 U.S. 668 (1984), in looking to the number of experts that trial counsel consulted rather than the type of experts in finding he was not deficient on this claim.

Counsel's failure to develop mitigation was just one of multiple attorney errors. Counsel's performance throughout the penalty phase was deficient. Trial counsel failed to adequately present and emphasize the mitigation evidence that was available to him. His closing argument highlighted several aggravating factors and failed to emphasize almost anything in the way of mitigation, essentially agreeing with the prosecution's "spin" on the case. (Ark. CR-09-1340 R. 3195-3202).

However, the Arkansas Supreme Court followed its longstanding rule that attorney errors must be viewed in isolation. The case presents the

question whether courts, when determining if counsel's performance was ineffective under *Strickland*, should restrict their inquiry to the effect of each individual alleged deficiency in isolation or should consider the cumulative effect of such alleged deficiencies. This Court previously granted certiorari to address this question in *Banks v. Dretke*, 540 U.S. 668 (2004), but resolved the case on other grounds.

1. **Lacy's Medical History and Trial**

Lacy, along with a co-defendant, Broderick Laswell, killed Randall Walker during an extreme state of intoxication in August 2007. Although Lacy turned himself in to the police and confessed to the crime, it quickly became apparent to trial counsel that Lacy may or may not have had independent memories of the facts to which he confessed. App. 12. Trial counsel suspected that Lacy suffered from an amnesia-related condition known as memory confabulation, potentially stemming from Lacy's alcohol abuse since childhood. App. 12. Counsel learned that Lacy had a long history of substance abuse dating back to early adolescence. Trial counsel's mitigation investigation revealed that Lacy's mother left him in the care of strangers when he was just months old, which resulted in her losing custody of him; that Lacy was a longtime daily blackout drinker who began drinking alcohol regularly at age ten; that Lacy began using harmful drugs at age 15; that Lacy "got [physically] beat up on most of his life"; and that Lacy had a brick smashed over his head

and suffered head trauma several years prior to his arrest, resulting in hospitalization and leaving his head with a large scar. App. 12-13.

Initially, Dr. Robin Ross and Dr. Jeffery Gould evaluated Lacy, and diagnosed him with depressive disorder, alcohol dependence, and drug dependence. App. 19. Trial counsel then retained Dr. Curtis Grundy, a forensic psychologist, who also diagnosed Lacy with cannabis abuse, anxiolytic abuse, opioid abuse, amphetamine abuse, and inhalant abuse. App. 19. None of these three experts is a neuropsychologist. Dr. Grundy specifically recommended trial counsel consult with Dr. Harold Hall at the University of Hawaii, a neuropsychologist. App. 13. Dr. Grundy referred trial counsel to Dr. Hall based on trial counsel's specific concern about Lacy's potential memory confabulation, and told trial counsel to contact Dr. Hall to identify an appropriate amnesia specialist, which would have been a neuropsychologist. (Ark. CR-15-171 R. 1274, 1293, 1557). Despite this express recommendation Lacy's trial counsel never consulted with a single neuropsychological specialist prior to Lacy's jury trial. App. 13.

At trial, the jury did not hear from a single mental-health expert regarding Lacy's mental condition. The jury heard about Lacy's poor upbringing from his family members, including that Lacy was supplied alcohol and other drugs by older family members beginning in childhood and began drinking regularly around age 11 (Ark. CR-15-171 R. 375, 377-79, 1390-92), but never heard how this history of neglect and substance abuse resulted in

substantial neuropsychological damage. Not one of the jurors found that Lacy suffered from an extreme mental or emotional disturbance at the time of the crime, and only one juror or part of the jury found that Lacy committed the crime while his capacity was impaired as a result of mental disease or defect, intoxication, or drug abuse. (Ark. CR-15-171 R. 373). The jury convicted Lacy of both capital murder and aggravated robbery, and sentenced him to death on the capital count and life imprisonment for aggravated robbery. Lacy then appealed to the Arkansas Supreme Court, which affirmed his convictions. 377 S.W.3d 227 (Ark. 2010).

2. Postconviction Proceedings in State Court

Lacy then filed a petition for postconviction relief under Rule 37 of the Arkansas Rules of Criminal Procedure in the trial court alleging ineffective assistance of counsel during both phases of trial, which was denied without hearing. App. 1-2.

The Arkansas Supreme Court reversed and remanded for the trial court to conduct a hearing on Lacy's petition. App. 2. The petition alleged trial counsel was ineffective by failing to investigate and present the affirmative defense of mental disease or defect, by failing to put before the jury little, if any mitigation evidence during the penalty phase of trial, and based on trial counsel's cumulative errors throughout both phases of Lacy's trial. App. 18, 27, 34. At the hearing, Dr. Barry Crown, a neuropsychologist, testified he found Lacy to suffer from organic brain damage dating back to childhood following a

battery of neuropsychological tests. The prosecution offered its own neuropsychological expert to challenge these findings, although he never personally examined Lacy. App. 5-7; Ark. CR-15-171 R. 1378.

Following the hearing, the trial court denied Lacy's petition as to guilt phase, but granted the petition as to the penalty phase and ordered resentencing. The trial court found counsel's performance during the penalty phase ineffective and referred him to the Arkansas Office of Professional Conduct based on his ineffective performance. App. 2, 14.

The State appealed, and the Arkansas Supreme Court reversed the lower court's finding of ineffectiveness during the penalty phase because it was based on trial counsel's subjective assessment of his own performance. App. 2. On remand, the trial court entered an order denying the petition in its entirety. App. 2.

3. The Arkansas Supreme Court Opinion

Lacy then appealed, and the Arkansas Supreme Court affirmed. App. 2.

First, the Arkansas Supreme Court found that trial counsel was not ineffective for failing to pursue neuropsychological testing for Lacy or to present neuropsychological mitigation evidence to the jury. App. 6. The Court acknowledged that one mental-health expert specifically recommended trial counsel consult with a neuropsychologist, but pointed to two other mental-health evaluators that did not find mental disease or neurological issues. App.

6. Neither of these evaluators was a neuropsychologist, and each only examined Lacy for the purpose of determining fitness to stand trial.

Next, the Court found that the trial court was entitled to give greater weight to the State's neuropsychological expert, Dr. Jack Price, who disagreed with Lacy's neuropsychological expert that Lacy suffered from organic brain damage and substantial neurological impairment. App. 5, 7. However, Dr. Price never having personally examined Lacy and thus was unable to formally diagnose him. (Ark. CR-15-171 R. 1378).

The Court found that trial counsel was not deficient by failing to call any expert witnesses during sentencing, and instead relying exclusively on Lacy's family members to establish mitigating evidence. App. 7. The Court also found that trial counsel's closing arguments were not ineffective. App. 9.

Lastly, the Arkansas Supreme Court found that there were no errors committed by trial counsel during the penalty phase, and declined to review the alleged deficiencies cumulatively. App. 9-10. The majority did not once mention the American Bar Association's guidelines for capital defense.

The dissent found that trial counsel was deficient for failing to secure neuropsychological testing and present the resulting neuropsychological mitigation evidence. App. 12. The dissent pointed to both the American Bar Association's guidelines for capital defense and the numerous red flags trial counsel noted during his initial investigation. App. 12. The dissent noted trial counsel's failure to obtain neuropsychological testing was not attributable to

any reasonable defense strategy, but rather to counsel's simple lack of diligence and attention. App. 13. Trial counsel acknowledged that he was not prepared for Lacy's trial, instead focusing on another capital case that was believed to be more important because he believed Lacy would receive a favorable offer from the prosecution. App. 13. The dissent noted trial counsel was barred from further work on capital cases following Lacy's trial. App. 14.

The dissent found the failure to conduct this testing and present its results prejudicial because "Lacy suffered from organic brain damage of the sort that would have affected his level of guilt and culpability for the charged offenses." App. 14. The dissent noted that Dr. Crown conducted dozens of in-depth neuropsychological evaluations with Lacy in late 2011, finding "significant neurological damage" and "brain damage [that likely] occurred during childhood." App. 14-15. The dissent pointed out the relevant question was not whether the trial court believed one neuropsychologist's testimony over the other, but whether the fact none of this evidence was ever presented to the jury undermines confidence in its decision. App. 15. The dissent found the prejudice resulting from trial counsel's deficient investigation to be "obvious and undeniable." App. 15.

REASONS FOR GRANTING THE WRIT

The Arkansas Supreme Court misapplied this Court's ruling in *Strickland v. Washington*, 466 U.S. 668 (1984), by finding that trial counsel's failure to secure

neuropsychological testing for Lacy and to present the results of such testing did not fall below an objective standard of reasonableness. The fact that the other mental-health experts who were not neuropsychologists found Lacy fit to proceed to trial was irrelevant. Trial counsel's failure to investigate and present this information was objectively deficient given that he identified numerous neurological red flags during his initial investigation and was expressly advised to consult a neuropsychologist by one of his retained mental-health experts, and based on the American Bar Association's guidelines regarding capital defense.

Further, this case presents a question that lies at the heart of protecting a criminal defendant's constitutional right to effective counsel. The circuits are divided eight to three on how to assess Sixth Amendment ineffective-assistance-of-counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984), specifically whether to consider trial counsel's alleged deficiencies individually or cumulatively.

Here, trial counsel failed to investigate and present the strongest mitigation evidence in Lacy's case, but also did not adequately present the mitigation evidence that was known to him at trial. The court below followed its longstanding rule in refusing to consider cumulative error. App. 9. This decision of the Arkansas Supreme Court is in direct conflict with the majority of other American jurisdictions to consider the issue, and inconsistent with federal standards for determining when trial error undermines confidence in the reliability of the proceeding in the *Brady* context.

Whether or not trial counsel's alleged deficiencies should be analyzed cumulatively goes to the heart of the *Strickland* test and its viability in protecting the right to effective assistance of counsel. The majority approach properly applies *Strickland*, which made clear the primary concern in assessing ineffectiveness is "the fundamental fairness of the proceeding" and that the reviewing court should consider "the totality of the evidence." *Strickland*, 466 U.S. at 695-96. The minority approach is an incorrect application of *Strickland* in light of these overarching concerns. Because this case sharply illustrates the difference between the two approaches, it is the appropriate vehicle to resolve this split.

The circuit split is mature. The positions of eleven federal circuits are well-defined. There are a range of differing state approaches to the issue, with the majority considering cumulative error in some form. This split is one that can only be resolved by this Court, and one which has massive implications for safeguarding the right to effective assistance of counsel for criminal defendants nationwide.

I. THE ARKANSAS SUPREME COURT MISAPPLIED *STRICKLAND* IN FINDING TRIAL COUNSEL'S FAILURE TO SECURE NEUROPSYCHOLOGICAL TESTING FOR LACY REASONABLE DESPITE NUMEROUS RED FLAGS AND THE EXPRESS RECOMMENDATION BY A MENTAL-HEALTH EXPERT TO DO SO.

The Arkansas Supreme Court found that trial counsel consulted numerous mental-health experts, and thus did not fall below an objective standard of reasonableness by failing to secure a neuropsychological examination specifically. App. 6-7. The Arkansas Supreme Court misapplied *Strickland* in focusing on the number rather than the type of experts involved, given what counsel knew about

the client's mental difficulties. This single error poisoned Lacy's trial as his counsel was unaware of and thus unable to present valuable mitigating evidence of Lacy's organic brain damage in either phase of trial.

Here, there were numerous circumstances indicating it was both appropriate and necessary to have Lacy neuropsychologically examined. Trial counsel's initial investigation yielded numerous red flags calling for the expertise of a neuropsychologist. Trial counsel found reported instances of Lacy abusing alcohol since age 11; huffing since age 15; having diagnoses of depressive disorder, alcohol dependence, and amnestic order; and prior incidents of major head trauma. (Ark. CR-15-171 R. 962-63, 981). Trial counsel was aware Lacy was involved in a major car accident; had a rock smashed over his head during a fight; was diagnosed with alcohol amnestic disorder in 2005 following a suicide attempt; attempted suicide on multiple occasions, including just prior to his arrest; and that Lacy had serious alcohol-dependency and withdrawal issues dating back more than a decade prior to the crime. (Ark. CR-15-171 R. 962-66, 973-76, 981). Trial counsel also had a copy of Dr. Grundy's examination report, which noted Lacy had numerous amnestic episodes and "black outs," including at the time of the offense. (Ark. CR-15-171 R. 972-74). Jay Saxton, one of Lacy's trial attorneys who was not responsible for the penalty phase, testified that the trial team was aware of these neurological red flags from early on in the representation. (Ark. CR-15-171 R. 1179-80, 1182-83). The information known to counsel was an obvious red flag to any competent capital

counsel that more in-depth analysis as to Lacy's neuropsychological status was required.

Trial counsel was so convinced that Lacy's memories were formed based on discussions with his codefendant that occurred after the crime rather than his own memories that he went so far as to request the trial court send Lacy to the Arkansas State Hospital for memory-confabulation testing. (Ark. CR-09-1340 R. 231-32). This request fell flat when trial counsel's own expert testified at a hearing on this motion that no institution anywhere in the State of Arkansas offered such testing. (Ark. CR-09-1340 R. 571-72). At this point when trial counsel's mitigation investigation concluded, he was acutely aware of Lacy's history of head trauma, hypoxic episodes, use of organic solvent inhalants, and excessive use of alcohol starting at an early age. Trial counsel knew an additional specialist was needed, yet perplexingly failed to consult the right one, a neuropsychologist.

Further, one of trial counsel's retained experts, Dr. Grundy, recommended that trial counsel consult with Dr. Harold Hall, a neuropsychologist, regarding the possibility of memory confabulation and/or brain damage. App. 13. Not only did trial counsel fail to consult with Dr. Hall specifically, he failed to consult with *any* neuropsychologist. Based on the ABA guidelines for capital defense and counsel's own investigation, trial counsel was objectively deficient by failing to do so. The Arkansas Supreme Court's finding to the contrary, focusing on the number of experts rather than the type, is an incorrect application of *Strickland*. *See Caro v. Calderon*, 165 F.3d 1223, 1226-27 (9th Cir. 1998) (reversing denial of capital

defendant's petition for writ of habeas corpus for hearing on his claim that trial counsel was ineffective by failing to investigate his neurological damage because none of counsel's four retained experts was a neurologist or toxicologist).

Trial counsel's failure to secure neuropsychological testing was objectively deficient based on the American Bar Association's ("ABA") guidelines regarding capital defense, which *Strickland* noted are "guides to determining what is reasonable" in assessing ineffectiveness claims. 466 U.S. at 688-89. Specifically, the ABA guidelines note:

> Counsel must compile extensive historical data, as well as obtain a thorough physical and neurological examination. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary.

Am. Bar Ass'n, ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 4.1 commentary (2003).

Counsel "needs to explore" medical history including "neurological damage." *Id.* at Guideline 10.7 commentary. Counsel should "remain current on developments in fields such as neurology and psychology . . . ." *Id.* at Guideline 10.11 commentary. Further:

> At least one member of the team must have specialized training in identifying, documenting and interpreting symptoms of mental and behavioral impairment, including *cognitive defects*, mental illness, developmental disability, *neurological deficits*, long-term consequences of deprivation, neglect and maltreatment during developmental years; social, cultural, historical, political, religious, racial, environmental and ethnic influences on behavior; effects of substance abuse and the presence, severity and consequences of exposure to trauma. Team members acquire knowledge, experience, and skills in these areas

> through education, professional training and properly supervised experience.

Am. Bar Ass'n, Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, Guideline 5.1E. (2008) (emphases added). The guidelines thus require trial counsel to engage the appropriate experts in order to effectively represent a capital client, which counsel utterly failed to do in this case. It is the quality rather than quantity of experts that is indicative of whether counsel conducted an adequate mitigation investigation.

Had trial counsel consulted a neuropsychologist, the mitigation evidence it uncovered would have been significant enough to "undermine confidence in the outcome" of Lacy's trial. It also would have rebutted the prosecution's argument that Lacy's spotty memory of the crime was evidence that he was uncooperative with law enforcement. (Ark. CR-09-1340 R. 3178-80).

It was only years after Lacy's conviction that Dr. Barry Crown, a neuropsychologist, examined him extensively on two separate occasions in December 2011, and found "significant neuropsychological impairment impacting multiple functional areas," including "delayed memory, reasoning, judgment, and language-based critical thinking"; that Lacy "has a significantly impaired RBANS profile" that is "clearly consistent with organic brain damage"; that "the voluntariness of his intoxication episodes is brought into question due to his brain damage"; that "a significant portion of his brain damage occurred during childhood and early adolescence"; and that Lacy's conditions "could only have been worse pre-trial and at the trial period." App. 14-15. He also found that Lacy had "a cerebral

disturbance with significant constructional impairments and language-based problems." (Ark. CR-15-171 R. 1440). Even the State's expert, Dr. Price, testified that Lacy likely suffered from "some compromising of the cognitive abilities due to alcohol." (Ark. CR-15-171 R. 1339-40). Lacy was more than a mere alcoholic. The only neuropsychologist to personally examine Lacy found he was brain-damaged since adolescence—bringing the voluntariness of his drinking into question—and his extreme history of substance abuse only exacerbated it.

The jury heard absolutely nothing about Lacy's brain damage and how it affected his cognitive processes, and this prejudiced Lacy's case. A proper investigation with even the slightest sense of issue-spotting would have revealed that there was far more to Lacy than simply being an alcoholic. The Arkansas Supreme Court misapplied *Strickland* in finding that trial counsel's failure to investigate and present such evidence was not ineffective. Issuance of the writ is necessary to correct this misapplication of federal law.

II. THE CIRCUITS AND STATES ARE DIVIDED ON THE QUESTION WHETHER COUNSEL'S DEFICIENCIES SHOULD BE ASSESSED INDIVIDUALLY OR CUMULATIVELY IN CONSTRUING INEFFECTIVENESS CLAIMS.

In *Strickland*, this Court announced the standard for reviewing claims of ineffective assistance of counsel: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional *errors*, the result of the proceeding would have been different." 466 U.S. at 694 (1984) (emphasis added). Prejudice is determined by analyzing whether counsel's errors "undermine confidence in the outcome" of the trial. *Id.* The "ultimate focus of inquiry must be

on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696.

Since *Strickland*, courts have divided on whether instances of deficient attorney performance may be viewed cumulatively when determining prejudice under *Strickland*. There is a significant lack of uniformity, both within and among the states and federal circuits.

Arkansas and the Eighth Circuit are in the extreme minority of American jurisdictions that refuse to consider cumulative error in ineffectiveness claims. The Arkansas Supreme Court first ruled it would not consider cumulative-error claims in *Henderson v. State*, 281 Ark. 406, 412, 664 S.W.2d 451, 455 (1984), which predated *Strickland* and offered no rationale. In considering the claim numerous times since, the Court has never announced its reason for refusing do so.

The Eighth Circuit is one of only three federal circuits that refuses to consider cumulative error in ineffectiveness claims. *See* Ryan A. Semerad, *What's the Matter with Cumulative Error?: Killing a Federal Claim in Order to Save It*, 76 OHIO ST. L.J. 966, 988-91 (2015) (only the Fourth, Sixth, and Eighth Circuits do not consider cumulative error). The Eighth Circuit has provided no basis for its refusal to consider such claims other than stating that "[e]rrors that are not unconstitutional individually cannot be added together to create a constitutional violation." *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996).

Similarly, the Fourth Circuit has failed to provide any basis for its refusal to consider cumulative-error claims. *See Fisher v. Angelone*, 163 F.3d 835, 852-53 (4th

Cir. 1998) (citing *Wainwright, supra*); *Mueller v. Angelone*, 181 F.3d 557, 586 n.22 (4th Cir. 1999). Despite the express rule announced in these cases, the Fourth Circuit has performed cumulative-error analysis in a subsequent case. *See Hedrick v. True*, 443 F.3d 342, 359 (4th Cir. 2006) ("even when considering these alleged deficiencies as a whole, we find no prejudice from their collective effect").

While the Sixth Circuit has expressly rejected the notion of cumulative-error analysis, *see, e.g., Campbell v. United States*, 364 F.3d 727, 736 (6th Cir. 2004); *Davis v. Burt*, 100 F. App'x 340, 351 (6th Cir. 2004) ("Cumulative error is not a basis for granting habeas relief in non-capital cases."); *Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir. 2000), it too has seemingly engaged in subsequent cumulative-error analysis. *See Mackey v. Russell*, 148 F. App'x 355, 367 (6th Cir. 2005) (holding that "any prejudice resulting from [one] error must be considered in combination with other errors, if any" and that evaluation of "the cumulative effect of all of [counsel]'s errors" was "in accord" with *Strickland*); *see also Cooper v. Sowders*, 837 F.2d 284, 288 (6th Cir. 1988).

Only a small handful of state courts refuse to consider cumulative error in ineffectiveness claims. Aside from Arkansas, only Alabama, Arizona, and Connecticut have expressly ruled that they will not consider cumulative error. *See Carruth v. State*, 165 So. 3d 627, 651 (Ala. Crim. App. 2014); *State v. Pandeli*, 394 P.3d 2, 19 (Ariz. 2017) ("We reiterate the general rule that several non-errors and harmless errors cannot add up to one reversible error. We also clarify the fact that this general rule does not apply when the court is evaluating a claim that

prosecutorial misconduct deprived defendant of a fair trial."); *Diaz v. Comm'r of Corr.*, 6 A.3d 213, 222-23 (Conn. App. Ct. 2010).

The vast majority of federal jurisdictions, however, do consider cumulative-error claims, in some fashion or form. In *Dugas v. Coplan*, the First Circuit held *Strickland* "clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced." 428 F.3d 317, 335 (1st Cir. 2005) (quoting *Kubat v. Thieret*, 867 F.2d 351, 370 (7th Cir. 1989)).

In *Lindstadt v. Keane*, the Second Circuit considered counsel's "errors in the aggregate" because "*Strickland* directs us to look at the totality of the evidence before the judge or jury." 239 F.3d 191, 199 (2d Cir. 2001) (quotation omitted).

In *Marshall v. Hendricks*, the Third Circuit held "the cumulative effect of the alleged errors may violate due process . . . whereas any one alleged error considered alone may be deemed harmless." 307 F.3d 36, 94 n.44 (3d Cir. 2002) (quotation omitted).

The Fifth Circuit considers cumulative error, but only when 1) individual errors involved constitutional issues rather than issues of state law; 2) the errors were not procedurally defaulted for habeas purposes; and 3) the errors "so infected the entire trial that the resulting conviction violates due process." *Derden v. McNeel*, 978 F.2d 1453, 1454 (5th Cir. 1992).

The Seventh Circuit has considered cumulative error in ineffectiveness claims since 1989, *see Kubat*, 867 F.2d at 370, and has reaffirmed that holding numerous times. *See Goodman v. Bertrand*, 467 F.3d 1022, 1030 (7th Cir. 2006);

Earls v. McCaughtry, 379 F.3d 489, 495-96 (7th Cir. 2004).

In *Harris v. Wood*, the Ninth Circuit found "cumulative prejudice," thus "obviat[ing] the need to analyze the individual prejudicial effect of each deficiency. 64 F.3d 1432, 1439 (9th Cir. 1995) (pointing to *Strickland*'s overriding focus "fundamental fairness"); *see also Silva v. Woodford*, 279 F.3d 824, 834 (9th Cir. 2002).

The Tenth Circuit considers claims of cumulative error, but cumulates only "actual errors" that would have independently led to reversal. *See United States v. Rivera*, 900 F.2d 1462, 1470-71 (10th Cir. 1990) (en banc).

The Eleventh Circuit considers cumulative error, but requires petitioners to first show their trial was "fundamentally unfair" before reaching a substantive cumulative-error claim. *See Cargill v. Turpin*, 120 F.3d 1366, 1386-87 (11th Cir. 1997).

Many states consider the cumulative analysis to be dictated by the language of *Strickland*. *See, e.g.*, *Schmitt v. State*, 779 A.2d 1004, 1014 (Md. Ct. Spec. App. 2001) (concluding *Strickland* made clear "it is the totality of circumstances or cumulative effect of all errors that must be assed in ruling on ultimate trial prejudice"); *State v. Gondor*, 860 N.E.2d 77, 90 (Ohio 2006).

Other jurisdictions focus on *Strickland*'s use of the plural "errors" in its prejudice description. *See Schofield v. Holsey*, 642 S.E.2d 56, 60 n.1 (Ga. 2007) (citing *Strickland*, 466 U.S. at 687), *cert. denied sub nom. Holsey v. Hall*, 128 S. Ct. 728 (2007); *Ex Parte Aguilar*, No. AP-75526, 2007 WL 3208571, at *3 (Tex. Crim.

App. Oct. 31, 2007).

Even in states that consider cumulative-error claims, there is no uniformity as to what specifically to cumulate. For example, New Mexico and California aggregate alleged deficiencies in determining whether to proceed to the prejudice analysis. *See, e.g.*, *State v. Trujillo*, 42 P.3d 814, 828 (N.M. 2002); *People v. Cox*, 809 P.2d 351, 374 (Cal. 1991).

More than one-half of the States consider cumulative error when assessing ineffectiveness claims in some form or fashion.[1]

This Court should grant certiorari to resolve this massive jurisdictional split. Only this Court can resolve this split presenting a question that lies at the heart of protecting a criminal defendant's constitutional right to effective assistance of counsel. *Strickland* itself was an attempt by this Court to consolidate the varying approaches to assessing ineffectiveness employed by varying courts throughout this country. 466 U.S. at 683-84. This case provides the Court a similar opportunity to bring the nation's courts back into conformity when it comes to protecting a criminal defendant's fundamental right to effective assistance of counsel.

In several other criminal contexts, courts consider the cumulative effect of

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[1] *Stumpf v. State*, 749 P.2d 880 (Alaska 1988); *People v. Gandiaga*, 70 P.3d 523, 529 (Colo. App. 2002); *Wright v. State*, 405 A.2d 685, 690 (Del. 1979); *State v. Mark*, 231 P.3d 478 (Haw. 2010); *Stevens v. State*, 327 P.3d 372 (Idaho Ct. App. 2013); *People v. Madej*, 685 N.E.2d 908 (Ill. 1997); *Grinstead v. State*, 845 N.E.2d 1027, 1036 (Ind. 2006); *State v. Clay*, 824 N.W.2d 488, 500 (Iowa 2012); *State v. Bowen*, 323 P.3d 853 (Kan. 2014); *Wilson v. State*, 21 So.3d 572, 591 (Miss. 2009); *McDaniel v. State*, 460 S.W.3d 18, 34 (Mo. Ct. App. 2014); *State v. Howard*, 265 P.3d 606 (Mont. 2011); *McConnell v. State*, 212 P.3d 307 (Nev. 2009); *State v. Seymour*, 673 A.2d 786 (N.H. 1996); *Malone v. State*, 293 P.3d 198, 218 (Okla. Crim. App. 2013); *State v. Clark*, 452 S.W.3d 268, 299 (Tenn. 2014); *State v. Lucero*, 328 P.3d 841, 849 (Utah 2014); *In re Pers. Restraint of Cross*, 327 P.3d 660 (Wash. 2014); *State ex rel. Bess v. Legursky*, 465 S.E.2d 892, 901 n.10 (W. Va. 1995); *State v. Thiel*, 665 N.W.2d 305 (Wis. 2003); *Eaton v. State*, 192 P.3d 36, 79 (Wyo. 2008).

errors to determine whether the reliability of a verdict was undermined.

First, in the context of evidence withheld by the prosecution in violation of the standards set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), there is uniformity as to consideration of cumulative error. Under *Kyles v. Whitley*, courts must review the net effect of all withheld evidence. 514 U.S. 419, 436-37 (1995).

The *Strickland* test for prejudice is firmly rooted in the test for materiality of undisclosed exculpatory information under *Brady*. 466 U.S. at 694. In *United States v. Bagley*, this Court explicitly adopted the *Strickland* standard to determine materiality under *Brady*. 473 U.S. 667, 682 (1985).

Despite the identical language governing these standards, they are not applied the same way in many federal and state courts. The uniform law of the land is that *Brady* materiality must be considered cumulatively, *Kyles*, 514 U.S. at 436-37, 454, whereas the law regarding *Strickland* prejudice is anything but uniform. Notwithstanding their identical language, the standards are applied in divergent ways.

There is no reason that the cumulative analysis applicable in the *Brady* context should not apply in the *Strickland* context to answer the same question: whether confidence in the trial has been undermined. Accordingly, the cumulative approach should apply to both. This Court should look to its own *Brady* caselaw in resolving this circuit split, and to several of its opinions finding the combined effect of multiple trial errors violative of due process even where no single error rose to the level of a constitutional violation. *See Wiggins v. Smith*, 539 U.S. 510, 538

(2003) (assessing prejudice in the penalty phase of a capital case based on "the available mitigating evidence, taken as a whole"); *Williams v. Taylor*, 529 U.S. 362, 397-99 (2000); *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978) ("Because of our conclusion that the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness . . . ."); *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3, 298, 302-03 (1973).

III. THE CIRCUIT SPLIT PRESENTS AN IMPORTANT QUESTION WHETHER CUMULATIVE-ERROR ANALYSIS IS NECESSARY TO ENSURE THE "FUNDAMENTAL FAIRNESS OF THE PROCEEDINGS."

Whether or not trial counsel's deficiencies are analyzed cumulatively is central to the evaluation of *Strickland* prejudice and to the guarantee of effective assistance of counsel under the Sixth Amendment. What should be uniform constitutional rights of criminal defendants are actually addressed in significantly different ways dictated by the mere happenstance of geography or whether a case is being heard by a federal or state court.

For example, a criminal defendant in a West Virginia *state* court is entitled to have his attorney's errors considered cumulatively. *See State ex rel. Bess v. Legursky*, 465 S.E.2d 892, 901 n.10 (W. Va. 1995). However, a criminal defendant in a West Virginia *federal* court just down the street is only entitled to have the same trial errors considered individually. *See Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998).

Considering cumulative error is in line with *Strickland*'s primary concern of fundamental fairness based on the totality of the evidence. Isolation of each of

counsel's errors in a vacuum leads to a mechanical test that focuses, as the Arkansas high court did here, exclusively on whether or not there is a reasonable probability that a single error determined the outcome of the trial, rather than on the fundamental fairness of the proceeding.

The Arkansas Supreme Court never considered the cumulative impact of all of trial counsel's deficiencies. Beyond failing to secure neuropsychological testing, trial counsel's performance during the penalty phase was deficient. Trial counsel testified at the evidentiary hearing on Lacy's petition that he was unprepared for Lacy's trial because he felt a different capital case he was working on was "a lot more important" and that most of Lacy's defense team—including him—believed Lacy would ultimately be offered a plea deal. (Ark. CR-15-171 R. 994).

Trial counsel described his closing argument during the penalty phase as "one of the worst" he'd given in his career, a "trainwreck." (Ark. CR-15-171 R. 992). This poor review may have been generous, and was the basis for the trial court originally granting resentencing. Counsel's closing argument was meandering and off-topic, and focused almost entirely on things other than mitigating circumstances. Trial counsel spent nearly all of his short closing argument discussing his own physical disability; stating that he understood the prosecutor's "spin" on the case; focusing on the overwhelming evidence of Lacy's guilt; attempting to educate the jury regarding the use of capital punishment outside of Arkansas; and expressing gratitude for the jury's patience throughout the trial. (Ark. CR-09-1340 R. 3195-3202). Trial counsel suffered from physical complications

associated with a recent motorcycle accident throughout Lacy's trial, and had to take a seat during his examination of several penalty-phase witnesses. (Ark. CR-09-1340 R. 3086, 3112; Ark. CR-15-171 R. 1185, 1249).

Though trial counsel requested 45 minutes to close, he concluded far sooner, noting that he was "physically, mentally, [and] emotionally exhausted" and that he was "beat dead." (Ark. CR-09-1340 R. 3122; Ark. CR-15-171 R. 992). In addition to going through the overwhelming evidence of Lacy's guilt, he referred to Lacy as "just a whiny kid" whom he "really didn't care for." (Ark. CR-09-1340; R. 3196). Trial counsel's closing argument made zero mention of Lacy's alcohol abuse from age 11 onward or extensive history of substance abuse. (Ark. CR-15-171 R. 1204-05). This closing argument was deficient by objective standards as it failed to neutralize any of the aggravating factors and essentially bolstered the State's request for a death sentence. Counsel also failed to question Lacy's family members in detail about Lacy's preteen abuse of alcohol; chronic use of alcohol and other substances since his early introduction; nor the noticeable effects of that abuse on his cognitive functioning, particularly his memory.

Trial counsel's failure to investigate Lacy's serious neuropsychological issues prevented the jury from receiving critical mitigating evidence regarding Lacy's brain damage that would have dispelled several of the prosecutor's claims regarding the sincerity of Lacy's confession. His performance during the penalty phase failed to adequately present and emphasize the mitigating evidence that was available to him. Together, the failure to adduce the most significant mitigating evidence

coupled with the failure to highlight the mitigating evidence that was available to the jury destroyed Lacy's chance at avoiding the death penalty. The cumulative effect of trial counsel's errors all but ensured the jury imposed death.

These deficiencies are more than enough to "undermine confidence in the outcome" of Lacy's trial—*if* the prejudicial impact of Harper's errors is addressed cumulatively. This case exposes the substantial difference in the approaches of the American courts and the ultimate effect such difference has on the underlying standard of *Strickland* prejudice. There is a deep lack of uniformity between American courts on this issue. Issuance of the writ of certiorari is necessary to resolve this important question and to harmonize the application of criminal defendants' constitutional right to a fundamentally fair trial throughout the nation.

CONCLUSION

For the foregoing reasons, the Writ should be granted.

Dated, this the 12th day of October, 2018.

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APPENDIX

Cite as 2018 Ark. 174

SUPREME COURT OF ARKANSAS

No. CR-17-404

BRANDON EUGENE LACY APPELLANT	Opinion Delivered: May 17, 2018
V.	APPEAL FROM THE BENTON COUNTY CIRCUIT COURT [04CR-07-1550]
STATE OF ARKANSAS APPELLEE	HONORABLE ROBIN F. GREEN, JUDGE
	AFFIRMED IN PART; REVERSED AND DISMISSED IN PART.

ROBIN F. WYNNE, Associate Justice

Brandon Lacy appeals from an order of the Benton County Circuit Court denying his petition for postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.5. He argues on appeal that the trial court's decision to deny his petition is clearly erroneous. We affirm in part and reverse and dismiss in part.

Lacy was convicted of capital murder and aggravated robbery and sentenced to death. His convictions were affirmed on direct appeal. *Lacy v. State*, 2010 Ark. 388, 377 S.W.3d 227 (*Lacy I*). Lacy subsequently filed a petition under Rule 37.5 in which he alleged the following grounds for postconviction relief: 1) defense counsel was constitutionally ineffective for failing to investigate and present the affirmative defense of not guilty by reason of mental disease or defect; 2) defense counsel was constitutionally ineffective for putting before the jury little, if any, mitigation evidence during the penalty

phase of the trial; and 3) the cumulative-error rule should be recognized in Arkansas and applied in his case. The trial court denied the petition without a hearing. Lacy appealed, and this court reversed and remanded, holding that Lacy was entitled to an evidentiary hearing. *Lacy v. State*, 2013 Ark. 34, 425 S.W.3d 746 (*Lacy II*).

After a hearing on the petition was held, the trial court entered an order denying the petition as to the claim that trial counsel was ineffective for failing to present the affirmative defense and granting a new sentencing hearing based on the claim that counsel was ineffective during the penalty phase. The State appealed, and Lacy cross-appealed. This court affirmed the denial of relief on the ground that trial counsel was ineffective for failing to present the affirmative defense of not guilty by reason of mental disease or defect. *State v. Lacy*, 2016 Ark. 38, 480 S.W.3d 856 (*Lacy III*). We reversed the finding that Lacy had received ineffective assistance during the penalty phase because the finding was based entirely on counsel Steven Harper's subjective assessment of his performance. *Id.* We reversed and remanded on this point for the trial court to apply an objective legal standard in determining whether Lacy received effective assistance of counsel during the penalty phase.[1] *Id.* On remand, the circuit court entered an order denying the petition in its entirety. This appeal followed.

We do not reverse the grant or denial of postconviction relief unless the circuit court's findings are clearly erroneous. *Sales v. State*, 2014 Ark. 384, 441 S.W.3d 883. A

[1]The trial court was also ordered on remand to make specific written findings regarding each issue raised in the petition, in compliance with Rule 37.5(i).

finding is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Id.*

We assess the effectiveness of counsel under the two-prong standard set forth by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984). *Sartin v. State*, 2012 Ark. 155, 400 S.W.3d 694. Under this standard, the petitioner must first show that counsel's performance was deficient. *Id.* This requires a showing that counsel made errors so serious that counsel deprived the petitioner of the counsel guaranteed to the petitioner by the Sixth Amendment to the United States Constitution. *Id.* Second, the deficient performance must have resulted in prejudice so pronounced as to have deprived the petitioner a fair trial whose outcome can be relied on as just. *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992).

There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and the petitioner has the burden of overcoming that presumption by identifying the acts and omissions of counsel which, when viewed from counsel's perspective at the time of trial, could not have been the result of reasonable professional judgment. *Feuget v. State*, 2015 Ark. 43, 454 S.W.3d 734. Even if counsel's conduct is shown to be deficient, the judgment will stand unless the petitioner demonstrates that the error had a prejudicial effect on the actual outcome of the proceeding. *Id.* The petitioner must show that there is a reasonable probability that, but for

counsel's errors, the decision reached would have been different. *Id.* A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial. *Id.*

Prior to trial, Lacy was evaluated by Dr. Robin Ross, who indicated that Lacy did not have a mental disease or defect. Lacy's counsel had him evaluated by Dr. Curtis Grundy, who diagnosed him with major depressive disorder and abuse of multiple substances. In his report, Dr. Grundy states that Lacy is able to engage in rational decision making. Trial counsel also consulted with Dr. Robert Forrest, seeking an oral opinion regarding whether Lacy had any brain dysfunction. According to counsel's notes, after reviewing Lacy's records and speaking with Dr. Grundy, Dr. Forrest believed neuropsychological testing was not necessary and that he doubted "very seriously that [neuropsychological] testing would indicate anything significant." Dr. Jack Randall Price, a neuropsychologist retained by the State, echoed Dr. Forrest's opinion at the Rule 37 hearing when he testified that, based on his review of Lacy's records, he did not believe neuropsychological testing was necessary because evidence of a brain injury was not present.

Dr. Bhushan Agharkar, a forensic psychiatrist who examined Lacy as part of the postconviction proceedings, submitted a letter to Lacy's postconviction counsel stating that Lacy exhibited "soft signs" of neurologic damage, particularly organic brain damage. In the letter, Dr. Agharkar states that the findings are preliminary and would require further confirmatory testing. Dr. Agharkar did not testify at the Rule 37 hearing. Dr. Jeff Gould

examined Lacy as part of the postconviction proceedings and diagnosed him with depressive disorder, alcohol dependence, and cannabis dependence. These are essentially the same diagnoses as were provided by Dr. Ross and Dr. Grundy.

Dr. Barry Crown, a neuropsychologist retained by Lacy's postconviction counsel, performed a neuropsychological evaluation of Lacy. Dr. Crown found significant neuropsychological impairment impacting multiple functional areas and diagnosed Lacy with cognitive disorder, not otherwise specified. According to Dr. Crown, functional impairments were noticed in the areas of delayed memory, reasoning, judgment, and language-based critical thinking. Dr. Crown testified that he was not provided with any records regarding Lacy and that he considered such to be irrelevant. Dr. Price testified that such records were necessary to deliver opinions with certainty. Dr. Price was critical of the tests given by Dr. Crown, describing them as brief screening tests. According to Dr. Price, there were no clinically significant findings of compromised brain function. He testified that the records and data that he reviewed do not support an opinion that Lacy has brain damage.

Lacy's first argument is that the trial court clearly erred in finding that trial counsel's failure to investigate and present the affirmative defense of not guilty by reason of mental disease or defect was not ineffective assistance of counsel. In *Lacy III*, this court considered whether the trial court erred in finding that the failure to present the affirmative defense was not ineffective assistance of counsel. We affirmed the finding of the circuit court. This issue was not remanded to the circuit court in that opinion. On remand, a circuit

court is vested with jurisdiction only to the extent conferred by our opinion and mandate. *Ward v. State*, 2017 Ark. 215, 521 S.W.3d 480. Any proceedings on remand that are contrary to the directions contained in the mandate from the appellate court may be considered null and void. *Dolphin v. Wilson*, 335 Ark. 113, 983 S.W.2d 113 (1998). In *Lacy III*, our remand was limited to the incorrect standard applied by the trial court to the claim that Lacy received ineffective assistance of counsel during the penalty phase of the trial and the trial court's failure to make the findings required by Rule 37.5. Because the issue of the affirmative defense was not remanded to the trial court in *Lacy III*, the trial court did not have jurisdiction to consider it on remand. Therefore, we reverse and dismiss as to this issue.

Lacy next argues that the trial court clearly erred in finding that trial counsel's failure to investigate and present mitigation evidence to the jury was not ineffective. Lacy contends his counsel was ineffective for failing to pursue neuropsychological testing and present neuropsychological mitigation evidence to the jury. He further contends that, if counsel had done so, members of the jury potentially would have found as mitigating circumstances that he suffered from extreme emotional or mental disturbance and may also have found that he was impaired by mental disease.

As recounted above, neither the report from Dr. Ross nor the report from Dr. Grundy indicate that Lacy suffered from any mental disease or neurological deficits. Dr. Grundy did suggest to counsel that a neuropsychological consult might be needed. According to Dr. Grundy's testimony at the Rule 37 hearing, this is what led counsel to

consult with Dr. Forrest. Dr. Forrest indicated that he did not believe neuropsychological testing would be beneficial. Far from ignoring the issue of neuropsychological testing, counsel explored it and was told by an independent expert that it was not needed. This conclusion was repeated during the Rule 37 proceeding by Dr. Price, who testified that he saw no indication of brain damage and was highly critical of the conclusions reached by Dr. Crown. Given the information that counsel had at the time of trial, as well as the other evidence in the record, we affirm the denial of relief on the claim that counsel failed to adequately investigate Lacy's alleged neuropsychological issues.

Lacy argues that the trial court erred by ignoring the testimony of Dr. Crown and relying on the testimony by Dr. Price. Lacy mischaracterizes the trial court's order. In its order, the trial court does not ignore Dr. Crown's testimony. Instead, it explains why it credits Dr. Price's testimony over that by Dr. Crown. As we noted in *Lacy III*, the trial court was entitled to give more weight to the criticism by Dr. Price in its order. 2016 Ark. 38, at 8, 480 S.W.3d at 861. We see no error by the trial court on this point.

Lacy next argues that counsel erred by relying exclusively on testimony by family members and failing to call expert witnesses during the sentencing phase. He contends that counsel was aware that the family members were unreliable witnesses and that expert testimony was necessary to explore Lacy's substance-abuse problems in greater detail. Generally, the decision to call a witness is a matter of trial strategy. *See Stiggers v. State*, 2014 Ark. 184, 433 S.W.3d 252. In his petition, Lacy faults trial counsel for failing to

explore the information contained in the reports by Dr. Donnie Holden[2] and Dr. Grundy during sentencing. Trial counsel attempted to secure Dr. Holden to testify, but was unable to do so. Trial counsel also attempted to introduce Dr. Holden's report but was unsuccessful in that effort as well. Counsel made a strategic decision not to call Dr. Grundy during sentencing out of concern that information elicited from Dr. Grundy on cross-examination could damage Lacy's efforts at mitigation. Dr. Grundy potentially would have been subject to cross-examination regarding statements Lacy made to him about other crimes he remembered committing as well as statements about the crime for which he was convicted that would have been damaging to Lacy's mitigation efforts. Considering this, we hold that the trial court did not err in finding that the decision not to call Dr. Grundy was a matter of trial strategy and did not constitute ineffective assistance of counsel.

Regarding the decision to call the family members, counsel elected to rely on testimony from family because they would be less susceptible to damaging cross-examination. The family members who testified spoke to Lacy's history of substance abuse as well as his troubled upbringing. At least one juror found that several different mitigators existed regarding Lacy's history of drug and alcohol abuse, so clearly the evidence was put before the jury by trial counsel. Lacy contends that the family members who testified were unprepared; we agree with the trial court's conclusion that this is not borne out by the record. As the trial court notes in its order, trial counsel was more

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[2]According to the petition, Dr. Holden had diagnosed Lacy with alcohol amnestic disorder in 2005 following a suicide attempt.

effective in eliciting information from the family members than postconviction counsel, as postconviction counsel was unable to elicit testimony that was submitted at trial regarding abuse Lacy was subjected to as a child. We see no error by the trial court on this point.

Lacy next argues that Steven Harper's closing argument was ineffective. The State responds that this argument cannot be considered on appeal because it was not raised in the Rule 37 petition. Lacy counters that the issue was clearly argued at the hearing and referenced by this court in *Lacy III*, resulting in it being ripe for review. We conclude that the trial court's conclusion that Harper's performance at trial was not deficient is not clearly erroneous. Although Harper referred to the closing argument as one of the worst he had ever given, a review of the closing reveals that he made strenuous efforts to convince the jury to impose a life sentence as opposed to the death penalty. The jury elected to impose the death penalty despite his efforts.

Finally, Lacy contends that cumulative errors by trial counsel warrant a determination that his trial counsel was ineffective. This court does not recognize cumulative error in allegations of ineffective assistance of counsel. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). Lacy admits this, but asks us to overrule our precedent, contending that it would bring us into conformity with the majority of jurisdictions across the nation. A party asking this court to overrule a prior decision has the burden of showing that the refusal to overrule the prior decision would result in injustice or great injury. *Houghton v. State*, 2015 Ark. 252, 464 S.W.3d 922. Lacy has not demonstrated that his counsel committed any errors during the penalty phase, much less that an

accumulation of error should result in his receiving a new sentencing hearing. We decline Lacy's invitation to overrule our prior decisions regarding the cumulative-error doctrine.

Affirmed in part; reversed and dismissed in part.

HART, J., dissents.

JOSEPHINE LINKER HART, Justice, dissenting. I dissent. Lacy's trial counsel was deficient for failing to adequately investigate a viable path for Lacy's defense, his mental-health condition. This inadequate investigation was prejudicial to Lacy because the jury, which convicted Lacy and sentenced him to death, never received any of the information that could have and should have been discovered through counsel's investigation. In light of the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), as well as the American Bar Association Guidelines, Lacy did not receive effective assistance of counsel. Effective counsel would have obtained and presented this evidence to the jury. Had he done so, the jury's decision may very well have been different. Accordingly, we should remand this case to the circuit court for further proceedings.

Per *Strickland*, we look to the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty* Cases (ABA Guidelines) for assistance in determining whether counsel's representation meets the deficiency requirement. 466 U.S. 688–89. The ABA Guidelines provide that defense counsel in a capital case must investigate possible affirmative defenses, such as insanity.[3] Furthermore, the ABA Guidelines provide that

[3] *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 1.1.G cmt. (2003), http://ambar.org/2003Guidelines.

"[t]he mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses [and] decisions about the need for expert evaluations."[4]

With particular application to this case, the ABA Guidelines on capital defense also provide:

> Counsel must compile extensive historical data, as well as obtain a thorough physical and neurological examination. Diagnostic studies, *neuropsychological testing, appropriate brain scans*, blood tests or genetic studies, and *consultation with additional mental health specialists may also be necessary*.[5]

The ABA Guideline commentary specifically provides that defense counsel "needs to explore" medical history, including "neurological damage."[6] Further, counsel should "remain current on developments in fields such as neurology and psychology . . . ."[7] In 2008, the ABA supplemented the ABA Guidelines, adding the following to its guidelines for capital defense:

> At least one member of the team must have specialized training in identifying, documenting and interpreting symptoms of mental and behavioral impairment, including *cognitive defects*, mental illness, developmental disability, *neurological deficits*, long-term consequences of deprivation, neglect and maltreatment during developmental years; social, cultural, historical, political, religious, racial, environmental and ethnic influences on behavior; effects of substance abuse and the presence, severity and consequences of exposure to trauma. Team members acquire knowledge,

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[4] *Id.* § 10.7 cmt.

[5] *Id.* § 4.1 cmt. (emphases added) (citing Douglas S. Liebert, Ph.D., and David V. Foster, M.D., *The Mental Health Evaluation in Capital Cases: Standards of Practice*, 15:4 Am. J. Forensic Psychiatry, 43–64 (1994)).

[6] *Id.* § 10.7 cmt.

[7] *Id.* § 10.11 cmt.

> experience, and skills in these areas through education, professional training and properly supervised experience.[8]

When we apply *Strickland*'s standard of objective reasonableness and consider the guidance from the ABA Guidelines, it should be plain that Lacy's trial counsel was deficient for his failure to obtain neuropsychological testing for his client. In this case, there were numerous circumstances indicating that it was both appropriate and necessary to obtain an assessment of Lacy's neurological status. Although Lacy confessed to these crimes shortly after the police first made contact with him, it quickly became apparent that Lacy may or may not have had actual independent memories of the facts to which he had confessed. It was suspected that Lacy suffered from an amnesia-related condition known as memory confabulation, potentially stemming from Lacy's alcohol abuse.

The investigation that was conducted revealed, among other things, that Lacy's mother had left him in the care of strangers when he was just a few months old, which resulted in her losing custody of Lacy; that Lacy was a long-time daily blackout drinker who began consuming alcohol regularly at the age of ten; that Lacy began regularly huffing and using harmful narcotics at age fifteen; that Lacy "got [physically] beat up on most of his life"; and that Lacy had a brick smashed over his head and suffered other serious head trauma many years before his arrest. Lacy's head injuries resulted in his hospitalization and

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[8] *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* § 5.1(E) (2008) (emphases added), https://www.americanbar.org /content/dam/aba /migrated/2011_build/death_penalty_representation/2008_july_cc1_guidelines.authcheckdam.pdf.

left him with a large scar stretching across the right side of his head through the temple, as well as other smaller scars.

I disagree with the majority's characterization of Lacy's trial counsel's investigation of his client's mental-health status. While Dr. Grundy, who examined Lacy after the memory-confabulation concerns first arose, did opine that Lacy was competent for purposes of standing trial, he nonetheless instructed Lacy's trial counsel to consult with Dr. Hall at the University of Hawaii about the specifics of Lacy's mental-health situation. Dr. Grundy, who is not a neuropsychologist, did not give Lacy's trial counsel these instructions to have Dr. Hall himself testify on Lacy's behalf. Dr. Grundy made this recommendation specifically so that Dr. Hall could refer Lacy's trial counsel to the correct specialists to properly address Lacy's particular mental-health conditions and symptoms, which in this case would have been a neuropsychological specialist. Lacy's trial counsel never contacted Dr. Hall or consulted with any neuropsychological specialist.

Counsel's failure to obtain neuropsychological testing was not attributable to any reasonable defense strategy, but to counsel's simple lack of diligence and attention. At Lacy's Rule 37 hearing, Lacy's trial counsel himself acknowledged that the "attitude" before trial was that the prosecution would come forward with an acceptable plea offer that would render Lacy's trial unnecessary. He testified that he was more focused on another capital case he was working on during the same time period that was believed to be "a lot more important," and stated flatly, "I don't think I was prepared when I came into this trial . . . [We thought,] 'no one is going to give [Lacy] the death penalty,' and no, we weren't

prepared, no." Lacy's trial counsel rated his own representation of Lacy as a 1.5 out of 10. The executive director for the Capital Conflict Office removed Lacy's trial counsel from all capital cases after Lacy's trial, and the trial judge herself referred Lacy's trial counsel to the Arkansas Office of Professional Conduct after Lacy's Rule 37 hearing.

This failure to investigate was prejudicial to Lacy. When Lacy finally did receive the appropriate examinations from actual neuropsychological specialists *after he had already been sentenced to death*, those examining physicians found that Lacy suffered from organic brain damage of the sort that would have affected his level of guilt and culpability for the charged offenses.

On November 3, 2011, before filing his Rule 37 petition, Lacy was interviewed by Dr. Bhushan Agharkar, a forensic psychiatrist. Dr. Agharkar opined that Lacy "exhibits 'soft signs' of neurologic damage, particularly organic brain damage," though he added that his findings were "preliminary at this point and require further confirmatory testing." A month after Dr. Agharkar's examination of Lacy, Lacy was subjected to dozens of in-depth neuropsychological evaluations by Dr. Barry Crown at the Varner Unit in December 2011. Dr. Crown's evaluation reports concluded that Lacy has "a significant neuropsychological impairment impacting multiple functional areas," including "delayed memory, reasoning, judgment, and language-based critical thinking"; that Lacy has "a significantly impaired RBANS profile" of the sort that "is clearly consistent with organic brain damage"; that "the voluntariness of his intoxication episodes is brought into question due to his brain damage"; that "it is likely that a significant portion of his brain damage occurred during

childhood and early adolescence"; and that Lacy's conditions "could only have been worse pre-trial and at the trial period." Indeed, this evidence would have been paramount to Lacy's defense. Lacy has established *Strickland*'s prejudice requirement. The jury never heard any evidence about Lacy's brain damage.

Furthermore, it was wholly inappropriate for the circuit court to usurp the role of the jury in determining whether this evidence was credible and the weight to be assigned to it. The relevant question was not whether the circuit court at Lacy's Rule 37 hearing believed Dr. Price's testimony over Dr. Crown's, but whether the fact that none of this evidence was ever presented to the jury undermines confidence in its decision. *Strickland*, 466 U.S. at 687–88. Plainly, it does. The jury was deprived of any information about Lacy's organic brain damage and how it could have impacted his level of guilt or culpability before they sentenced him to death. The prejudice resulting from Lacy's trial counsel's inadequate investigation is obvious and undeniable.

I would reverse.

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
DIVISION I

STATE OF ARKANSAS PLAINTIFF

VS. CR 2007-1550-1(A)

BRANDON EUGUNE LACY DEFENDANT

ORDER DENYING DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF PURSUANT TO ARK. R. CRIM. P. 37.5

Comes now on this 25th day of January, 2017, the Court considering Petitioner's Petition for Post-Conviction Relief Pursuant to Ark. R. Crim. P. 37.5, the State's Response, the Evidentiary Hearing, and the subsequent post-Evidentiary Hearing briefs submitted by both parties, as well as the Record herein, and hereby finds and Orders as follows:

PROCEDURAL AND FACTUAL HISTORY

Petitioner was convicted of Capital Murder and Aggravated Robbery following a jury trial in this Court on May 13, 2009. He was sentenced to life in prison for the Aggravated Robbery, and he was sentenced to death for the Capital Murder. He subsequently appealed those convictions to the Supreme Court of Arkansas, which affirmed this trial court in an opinion dated October 21, 2010. *See Lacy v. State*, 2010 Ark. 388 (2010)(rehearing denied Dec. 2, 2010).

On September 6, 2011, Petitioner, through appointed counsel, filed his Petition for Post-Conviction Relief under Ark. R. Crim. P. 37.5. That Petition was denied by this Court on October 19, 2011, in a lengthy and detailed Order. Petitioner then appealed to the Supreme Court of Arkansas, which remanded for an Evidentiary Hearing to be conducted. *See Lacy v. State*, 2013 Ark. 34 (2013). This Court then conducted that Evidentiary Hearing

on September 16 – 19, 2014. Following that Hearing both parties submitted briefs addressing each of Petitioner's grounds for relief.

This Court granted Petitioner's Petition for Post-Conviction Relief Pursuant to Ark. R. Crim. P. Rule 37.5 in an Order dated December 23, 2014, finding that it had no choice but to grant Petitioner's prayer for relief and order a new Sentencing Hearing for Petitioner based upon the testimony and actions of Attorney Harper at the Evidentiary Hearing. This Court also forwarded a copy of Attorney Harper's testimony at the Evidentiary Hearing to the Office of Professional Conduct for further investigation and appropriate action.

The State appealed this Order and the Petitioner cross-appealed from this Court's denial of his claim for relief based on counsel's failure to present an affirmative defense of mental disease or defect. The Arkansas Supreme Court, in an opinion delivered February 4, 2016, and its Mandate issued October 11, 2016, reversed and remanded finding that an objective standard of analysis should be applied. *See State v. Lacy*, 2016 Ark. 38. On the matter of Petitioner's cross-appeal, the Supreme Court affirmed this Court's ruling that Petitioner was not entitled to relief on the ground that his trial counsel was deficient for failing to present an affirmative defense of mental disease or defect. *Id.*

Effectiveness of counsel is assessed for Rule 37.5 analysis under the two-prong standard set forth by the United States Supreme Court in *Strickland v. Washington*, 486 U.S. 688 (1984). *See also State v. Rainer*, 2014 Ark. 306, 440 SW3d 315 (2014). The Petitioner must show that counsel's performance was deficient and requires a showing that counsel made errors so serious that counsel's performance was not as guaranteed by the Sixth Amendment, and that Petitioner was prejudiced as a result. *See Williams v. State*, 2011 Ark. 489, 385 SW3d 228 (2011). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Scott v. State*, 2010 Ark. 199, 406 SW3d 1 (2012). A

defendant claiming ineffective assistance of counsel has the burden of overcoming that presumption by identifying the acts and omissions of counsel which, when viewed from counsel's perspective at the time of the trial, could not have been the result of professional judgment. The Arkansas Supreme Court has further noted that counsel should be "evaluated according to professional standards of reasonableness, not by his own subjective assessment of his performance." *Howard v. State*, 367 Ark. 18, 238 S.w.3d 24, 36 (2006). Thus, it is an objective standard of reasonableness that must be considered when determining whether counsel's performance was ineffective. *Mancia v. State*, 2015 Ark. 115, 459 SW3d 259 (2015).

PETITIONER'S GROUNDS FOR POST-CONVICITON RELIEF

Ground One: "Defense counsel was constitutionally ineffective when they failed to investigate and present the affirmative defense of mental disease or defect."

1. Petitioner's first ground for relief asserts that defense counsel was Constitutionally ineffective for failing to investigate and present the defense of mental disease or defect. Specifically, Petitioner argues that there were numerous records available to counsel prior to trial establishing that Petitioner was an abuser of alcohol from age eleven, and engaged in numerous forms of substance abuse. Additionally, it states that Petitioner experienced at least two head injuries resulting in a loss of consciousness during adolescence, an additional head injury as a result of a vehicle accident, and falls where he received trauma to his head. Finally, it states that Petitioner was receiving medications for depression and other reasons.
2. Petitioner alleges that a more in-depth analysis as to a mental disease or defect was needed; however, this Court finds that Petitioner's trial counsel thoroughly investigated the defense of mental disease or defect. Not only did trial counsel have

the opinions of three different doctors that such a defense did not exist, trial counsel were also strategically precluded from presenting that defense at trial.

3. Testimony and the Record reveal that Petitioner's trial counsel moved for a mental evaluation (T. 173) wherein the Petitioner was diagnosed by Dr. Robin Ross with depressive disorder and alcohol dependence, as well as drug dependence. (T. 215). Similarly, Dr. Jeffery Gould evaluated the Petitioner and reached the same diagnosis.[1] (T. 277). Trial counsel for Petitioner then retained Dr. Curtis Grundy, a forensic psychologist. His findings were also consistent with Dr. Ross in diagnosing the Petitioner with alcohol dependence and depressive disorder. He also diagnosed Petitioner with cannabis abuse, anxiolytic abuse, opioid abuse, amphetamine abuse, and inhalant abuse. (T. 450). Neither Dr. Ross, Dr. Gould, nor Dr. Grundy diagnosed Petitioner with a mental disease or defect.

4. Dr. Grundy's testimony in the Evidentiary Hearing established the following:

    a. That he examined Petitioner on two different occasions over a period of eight hours, in July, 2008 and again in October 2008 (T.449, 464);

    b. That trial counsel provided him with collateral documents for his review, including school records, previous mental health records, police reports, and that he interviewed at least four of Petitioner's family members in order to get a complete history of the patient he was evaluating (T. 448);

    c. That he diagnosed the Petitioner consistently with Dr. Ross finding

[1] It should be noted that in his Petition for Post-Conviction Relief Under Ark. R. Crim. P. 37.5 filed on September 6, 2011, Petitioner asserts that Dr. Shawn Agharkar, forensic psychologist, would be reviewing the records, evaluating the Petitioner, and was anticipated to offer testimony. The Petitioner appears to have substituted Dr. Jeffery Gould for Dr. Agharkar.

alcohol abuse and depressive disorder, as well as cannabis abuse, anxiolytic abuse, opioid abuse, amphetamine abuse, and inhalant abuse (T. 450);

d. That Attorney Harper told him of trial counsel's concerns over amnesia and that he later learned Attorney Harper believed Petitioner did not have his own independent memories of the murder (T. 450, 451);

e. That Attorney Harper consulted him about treatment to recover Petitioner's memories and that the hypnosis treatment Attorney Harper was hoping to use was a highly controversial form of medical treatment which may have not even been admissible (T. 257, 258);

f. That Dr. Grundy *does* believe Petitioner has his own independent memories of the murder for which he is convicted, and that he previously testified as such in this Court on March 20, 2009, and that he told Attorney Harper it was his opinion that while Petitioner might have partial amnesia surrounding the murder due to alcohol, in his opinion Petitioner does have some memories. (T. 498, 451);

g. That Petitioner told him a lot of detail with regard to what he remembered from the murder and that this would have been presented to the jury if he had testified in Petitioner's trial and subject to cross-examination (T.460);

h. That he did not diagnose Petitioner with any sort of amnesia (T. 450, 501).

5. Petitioner asserts that Dr. Donnie Holden, psychiatrist, diagnosed Petitioner with

Alcohol Amnestic Disorder in 2005, after an attempted suicide. However, both attorneys Saxton and Harper testified that they were unsuccessful in securing Dr. Holden's testimony at trial. (T. 199). Attorney Harper testified that he attempted to admit Dr. Holden's report through a record keeper but it was not allowed. (T. 199). As noted by the State in their post-Evidentiary Hearing brief, Dr. Holden was listed as a witness by Petitioner for the Evidentiary Hearing but his testimony was not produced.

6. Petitioner alleges that Dr. Grundy could have made a diagnosis of Alcohol Amnestic Disorder; however, Dr. Jeffery Gould, a medical doctor testifying for Petitioner, testified at the Evidentiary Hearing that he did not and was not able to diagnose Petitioner with any amnestic disorder related to his alcohol abuse. (T. 287). Dr. Gould further testified that Petitioner did not exhibit any signs of neurological deficits or defects during his evaluation. (T. 288). Dr. Gould's testimony did not support Petitioner's argument that a "memory confabulation" defense should have been presented to the jury.

7. Attorney Harper testified at the Evidentiary Hearing that because he had a strong belief that Petitioner had adopted the story of what happened during the murder from his co-defendant, he consulted with a third doctor, Dr. Robert Forrest, MD, forensic psychiatry. (T. 181, 254). Attorney Harper testified that Dr. Forrest reviewed Dr. Grundy's report and discussed that report with Dr. Grundy, in addition to discussing it with Attorney Harper. (T. 207). Attorney Harper testified that Dr. Forrest told him Petitioner did well on memory testing given to him by Dr. Grundy and that it is not uncommon to bring memories back with cues. (T. 177, 254).

8. Petitioner alleges that a neuropsychologist should have been retained by trial counsel to test Petitioner for brain damage. Dr. Barry Crown, a neuropsychologist testified at the Evidentiary Hearing that Petitioner has a "cognitive disorder intellect, not otherwise specified." (T. 308). Dr. Crown testified that he was presented with no collateral information about the Petitioner, such as school records, medical records, police reports, copies of Petitioner's statements to law enforcement, etc. and that collateral information was "irrelevant" to his assessment of Petitioner. (T. 328). Dr. Randall Price, also a neuropsychologist, testified on behalf of the State in the Evidentiary Hearing. Dr. Price took issue with the very limited objective information admittedly utilized by Dr. Crown in reaching his diagnosis and with the limited duration of Dr. Crown's evaluation of Petitioner. (T. 521, 523). Dr. Price disagreed with Dr. Crown's findings and testified that he did not believe there was evidence establishing that Petitioner had a brain injury. (T. 569, 570). Dr. Price testified that though there is evidence of the Petitioner's substance abuse, the medical records and data do not support the diagnosis of brain damage or any sort of neuropsychological disorder. (T. 570, 571, 581).

9. Petitioner alleges that a review of the Diagnostic and Statistical Manual IV (DSM IV) is corroborative of the position anticipated to be taken by Dr. Shawn Agharkar. As was noted previously, Dr. Argharkar appears to have been replaced by Dr. Jeffery Gould and did not provide any testimony or evidence in these proceedings.

10. Petitioner also alleges that his trial counsel did not properly investigate and present a family history of mental disease or defect and such an investigation would have revealed that family members were not asked about Petitioner's alcohol and substance abuse or the effects of that abuse on his memory; however, the testimony

at the Evidentiary Hearing does not support this argument. Petitioner lists three family members that could have provided evidence of what he concludes is "classic memory confabulation."

a. Kathy Delafuente: Petitioner alleges she would testify that Petitioner would have no memory of how he arrived places when he woke up and that she would be able to give an example of how he once arrived at her home, fell asleep, woke up and had no idea how he got there or how his car had been damaged or the events leading up to it. Ms. Delafuente's testimony was inconsistent with that allegation. (T. 126, 132, 134). Additionally, she testified that in Petitioner's twenty-eight years she could only think of one example to support Petitioner's "memory confabulation" defense.[2] (T.138, 139).

b. Virginia Lacy: Petitioner alleges she would testify to numerous instances in which Petitioner would "black out" and then seek information to fill in gaps of his lost memory.

Ms. Lacy did not testify at the Evidentiary Hearing; however, she did testify in Petitioner's trial and Attorney Harper testified in the Evidentiary Hearing that he was, in fact, able to get helpful mitigating information from Ms. Lacy. (T. 257).

c. Jamie Booher: Petitioner alleges she would testify to numerous events in which Petitioner would "black out" after drinking and that she was the first person visited by the Petitioner and co-defendant following the murder. According to the Petitioner, Ms. Booher

[2] Petitioner was twenty-eight (28) at the time he is alleged to have committed the murder.

would be able to testify that Petitioner was unable to recall what happened during the murder expect that he had blood on his shoes and they'd thrown some weapons in a lake, but that he had no specific knowledge of the events and his co-defendant would "fill in the blanks" about what Petitioner did, and that every fact was supplied by the co-defendant.

Ms. Booher's testimony was not at all consistent with that allegation and established severe credibility issues had she been called as a witness in trial. (T. 89, 92, 93, 96). Specifically, Ms. Booher admitted to having committed perjury on numerous occasions. (T. 66, 67, 68). Ms. Booher did testify that Petitioner and his co-defendant came to her house after the murder but she did not testify that she was the first person they visited, nor was she able to testify to a single fact that the co-defendant was "filling in" for the Petitioner. When this Court specifically questioned her as to what, specifically, the Petitioner's co-defendant had said while at her house she said that he was just walking around smirking and saying comments out loud. (T. 96). Her testimony was devoid of any facts supporting Petitioner's "memory confabulation" argument. Petitioner alleges that the witnesses referenced above would provide evidence of classic "memory confabulation," arguing that Petitioner's lack of memory makes him susceptible to suggestion and supports a number of diagnoses, including Amnestic Disorder. Petitioner alleges that the testimony of Dr. Grundy would substantiate this

argument; however, as discussed earlier in this Order, that is not the case.

11. It should be noted that Kitty Barnhill, Petitioner's mother, while not listed in the Petition, did testify in the Evidentiary Hearing but was not able to testify about Petitioner's alleged blackouts. She did testify that Petitioner sometimes did and did not remember things when he was intoxicated. (T. 36). Her testimony did not support the memory confabulation argument and most of her answers regarding Petitioner's drinking demonstrated her lack of knowledge about this alcohol and substance abuse. (T. 35, 36).

12. Petitioner alleges having experienced at least two head injuries resulting in a loss of consciousness during adolescence, an additional head injury as a result of a vehicle accident, and falls where he received trauma to the head. Petitioner alleges that evidence of most of this can be found in Dr. Grundy's report, however, Petitioner failed to introduce evidence of this at the Evidentiary Hearing. Further, Dr. Grundy testified under cross-examination that medical records available from one car wreck indicated no loss of consciousness and no head injury, as did Dr. Crown. None of the witnesses who testified in the Evidentiary Hearing provided any specific evidence that Petitioner actually had any such injury or suffered any such loss of consciousness. (T. 38, 39, 40, 41).

13. Petitioner alleges that an affirmative defense of mental disease or defect was "likely" present, and that Petitioner had a right to present it; however, as stated in *Strickland v. Washington*, to prevail on a claim of ineffective assistance of counsel, a petitioner has the burden to prove that trial counsel's performance was deficient and that that prejudiced resulted from the deficient performance. 466 U.S. 668 (1984). To argue

that a defense of mental disease or defect was "likely" present falls short of that burden, but further, Petitioner was not able to put on any evidence through experts or family members that such defense existed. Attorneys Saxton and Harper both testified that they pursued and investigated this defense but were unable to find a doctor who would testify that Petitioner had a mental disease or defect. Additionally, they testified that any doctor who testified on this matter would be subjected to cross-examination about Petitioner's very detailed memories of the crime, rebutting the idea that he suffered a cognitive mental disorder involving memory loss. Further, any doctor testifying would face cross-examination with Petitioner's statement that he enjoyed the killing—a statement not presented during the State's case-in-chief but which could have been allowed for impeachment purposes with a witness testifying that Petitioner had no memory of the murder. (T. 213, 384, 385). The Petitioner also fails to establish that family members could have presented a history of mental disease or defect. The witnesses whom Petitioner would call for this purpose were limited in their knowledge or observations, or in the case of Ms. Booher, with severe credibility issues. (T. 67, 68). Further testimony revealed that Attorney Harper himself questioned whether Petitioner's parents and grandparents were reliable sources of information. (T. 218).

14. Petitioner cannot establish that trial counsel made errors so serious that they were not functioning as guaranteed by the Sixth Amendment and he fails to overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and thus fails to establish any resulting prejudice.

Ground Two: **"Trial counsel was Constitutionally ineffective for failing to put before a jury little, if any, mitigation evidence during the penalty phase of trial."**

15. Petitioner alleges that the reports of Drs. Holden and Grundy give "great insight into the life" of Petitioner leading up to his conviction in this matter, including his dysfunctional family history, mental and physical abuse, chronic substance abuse, and mental health history. Petitioner claims none of these topics were "fleshed out or delved into." Petitioner also alleges that the witnesses who did testify were not prepared, nor was Attorney Harper. The Petitioner asserts that the penalty phase presented at trial was non-existent when compared to the amount of mitigation available, and was thus Constitutionally deficient. Evidence and testimony presented at the evidentiary hearing belies those assertions.

16. As was noted previously in this Order, Dr. Holden's testimony could not be secured for trial despite the attempts of Attorneys Harper and Saxton. Further, Attorney Harper attempted to introduce Dr. Holden's report through a keeper of records but was unsuccessful. Moreover, Dr. Holden did not testify at the Evidentiary Hearing, despite being listed as a witness for Petitioner. Dr. Grundy's testimony at the Evidentiary Hearing was addressed previously in this Order. The evidence presented in the Evidentiary Hearing illustrated the strategic reasoning for not calling Dr. Grundy to testify at trial where he would be subject to cross-examination on many of the details of Petitioner's statement, including that he enjoyed the killing. (T. 213, 384, 385). Further, Attorney Harper testified that the decision was made to introduce evidence of Petitioner's substance abuse through his family members because they would be harder to impeach than experts and also because they could not be cross-examined with Petitioner's incriminating statements. (T.

256, 257).

17. Petitioner alleges that the witnesses called by trial counsel to testify were "clearly not prepared." However, Attorney Harper testified that he met with Petitioner's family members eight to ten times prior to trial. (T. 185). Petitioner's family members testified that Attorney Harper had multiple family meetings and gave the family jobs to do prior to trial, such as writing down occasions when Petitioner could not remember things that happened when intoxicated. (T. 129, 130, 131). Attorney Harper testified that he even had a "mock trial" with Petitioner's family members to prepare them for their testimony. (T. 218). Attorney Saxton testified that Attorney Harper met with Petitioner's family "a lot." (T. 389).

18. Petitioner argues that Petitioner's family members had a story to tell that was not explored and that his trial attorneys must not have been prepared to question them, however, Petitioner called some of these same witnesses to testify at the Evidentiary Hearing and was able to extract far less information from them than trial counsel did at trial. For example, Kitty Barnhill could not provide testimony as to Petitioner's drinking from age eleven or even how often or how much he drank. (T. 44, 45). Further, she admitted under-cross examination that she could not provide any details of Petitioner's alleged head injuries. (T. 38, 39, 40, 41). Ms. Barnhill also testified that she remembered meeting with Attorney Harper and his mitigation specialist Carol Hathaway several times, along with four or five other family members. (T. 29, 30).

19. Petitioner alleges that mitigation evidence concerning Petitioner's "mental and physical abuse" should have been presented at trial; however, Kathy Delafuente testified at the Evidentiary Hearing that she and her husband were firm with

Petitioner but treated him fairly well. (T. 123). Ms. Delafuente also acknowledged that Attorney Harper asked family members to try to remember times Petitioner suffered memory issues when drinking and she was not sure whether family members followed through. (T. 129, 130, 131).

20. Petitioner alleges that "Miss Brewer" [sic], referring to Jamie Booher, and other family member gave statements demonstrating that Petitioner had a "very difficult life, that he was repeatedly rejected by a self-absorbed mother, went from house to house all of his life, and was a good father to his daughter when he was with her." As was previously addressed, Ms. Booher is a self-admitted perjurer and her testimony at the Evidentiary Hearing was inconsistent at best. It is also noted that Ms. Booher's testimony at the Evidentiary Hearing regarding alcohol and substance abuse was that Petitioner did not begin drinking to the point of passing out until age eighteen, only "huffed" substances on a few occasions that she was aware of, and had no head injuries involving loss of consciousness. (T. 54, 55, 75). The Court also notes that Petitioner's daughter testified at the Evidentiary Hearing that she only had "bits and pieces" of memories from spending time with Petitioner prior to his arrest and that lasted for "like five seconds." (T. 116). This testimony is in contradiction to the Petitioner's argument that evidence of his good parenting should have been submitted to the jury.

21. Petitioner asserts that Attorney Harper was unprepared in the penalty phase of trial; however, the record is replete with Attorney Harper's preparations in regard to mitigation. Attorney Harper testified that he met with Petitioner in preparation for trial anywhere from twelve to twenty times, and also that he met with Petitioner's family between eight and ten times prior to trial. (T. 177, 185). Petitioner's family

members testified that he had multiple family meetings and gave the family jobs to do for trial (129, 130, 131). Attorney Harper testified that he had a "mock trial" with Petitioner's family members in which he asked them the types of questions they might hear in trial. (T. 218). Additionally, Attorney Harper testified that he recalled having concerns, as early as June of 2008, that Petitioner's family members were not reliable sources of information and that they were vague when it came to historical evidence. (T. 218, 389). It is also noted that Attorney Harper met with some of Petitioner's school teachers and former employers and that a lot of people were not cooperative. (T. 221, 222). Attorney Harper testified that he did not call Petitioner's daughter to testify at trial because Petitioner did not want her called, although he did strategically present her in the courtroom so that the jury could see her (T. 184, 223). The Petitioner's daughter's testimony at the Evidentiary Hearing was that she had very limited memories with her father, which indicates yet another reason for not utilizing her as a witness at trial. (T. 116).

22. Attorneys Harper and Saxton testified that their strategy at trial was to begin presenting mitigating evidence early, during the guilt phase. (T. 201, 385). They agreed to cross-examine the State's witnesses regarding Petitioner's alcoholism and difficult upbringing at every opportunity, as well as calling their own witnesses. Attorney Harper testified to having called Virginia Lacy, Gary Lacy, a co-worker of Petitioner, as well as two police officers to testify to Petitioner's severe alcoholism. (T. 197, 198). Regarding the penalty phase, Attorney Harper testified to having called Petitioner's mother, Kitty Barnhill, to the stand and having her admit to abandoning Petitioner when he was a baby, that he was surrounded by drug and alcohol use in his life, and that he had an alcohol problem. (T. 199). Attorney

Harper also testified that he called Gary Lacy to establish that Petitioner was given alcohol at a young age and drank to intoxication from a young age. (T. 199, 255). Attorney Harper also testified to having called Chief Rob Taylor to talk about Petitioner's time as a fire-fighter, Petitioner's cousin Jennifer Hubbard to discuss her recollections of Petitioner's rough upbringing and home life, and Petitioner's stepfather Doug Barnhill to talk about drug use and drinking, all in mitigation. (T. 199, 200).

23. Petitioner asserts that evidence presented in the penalty phase was "non-existent;" however, attorney Harper testified that at least one of the jury members found each of the following mitigating factors to be true based on the testimony elicited during the trial, testimony primarily elicited during the penalty phase:

    (1) Petitioner's capacity to appreciate the wrongfulness or conform his conduct was impaired as a result of mental disease or defect, intoxication, or drug use;
    (2) Petitioner had no significant history or prior criminal activity;
    (3) Petitioner was born to an unmarried teen mother;
    (4) Petitioner was a witness to physical abuse;
    (5) Petitioner was the victim of psychological abuse;
    (6) Petitioner was a victim of physical abuse;
    (7) Petitioner was a victim of verbal abuse;
    (8) Petitioner's mom and stepdad had substance abuse problems;
    (9) Petitioner was supplied alcohol by his Uncle John;
    (10) It was not uncommon for Petitioner to drink with his uncle all weekend;
    (11) In his early 20's Petitioner began using methamphetamine;
    (12) Petitioner attempted suicide;
    (13) Petitioner was cared for primarily by his grandparents and uncle;
    (14) Petitioner turned himself in and cooperated fully with law enforcement officials;
    (15) Petitioner showed remorse for Randall Walker's death. (T. 202, 203).

24. The Court notes that while Attorney Harper testified that he performed poorly in this trial and considered his closing argument to be "one of the worst I have ever given," under cross examination Attorney Harper did not deny: (1) making the

statement, "I am a death penalty opponent and I will do all that I can to prevent this; and (2) that he would like to see Petitioner get a new trial. (T.183, 185, 187, 240, 244). While both Attorney Saxton and Didi Sallings, former Executive Director of the Public Defender Commission, gave Attorney Harper's performance mixed reviews and some criticism, they suggested that he was adequately prepared for trial. (T. 441). The Arkansas Supreme Court has held that counsel should be "evaluated according to professional standards of reasonableness, not by his own subjective assessment of his performance." *Howard v. State*, 367 Ark. 18, 22, 238 S.W.3d 24, 36 (2006). This Court must apply an objective test in reviewing and evaluating trial counsel's effectiveness, rather than relying on Attorney Harper's own self-evaluation.

25. Petitioner asserts that there is "no strategic or 'tactical' justification for failing to call Dr. Grundy in the penalty phase," however, this Court finds that the reasons for not calling him in the first phase of trial are just as applicable to the penalty phase. Among the mitigators submitted by Petitioner to the jury was that, "Petitioner showed remorse for Randall Walker's death" and "Petitioner had no significant history of prior criminal activity." If Dr. Grundy had been called to testify in the penalty phase he would have been subject to cross-examination on Petitioner's statement that he enjoyed the killing. Additionally, Dr. Grundy would have been subject to cross-examination on statements Petitioner made while in treatment that he has memories of doing violent things when he was drunk such as injuring a friend and dragging him out in the yard to die, as well as trying to rob a business and setting it on fire when he was unsuccessful. (T. 213, 214). These statements would certainly have undermined the Petitioner's submitted mitigators.

26. Petitioner alleges that Ms. Brewer [sic], (referring again to Ms. Booher), would have testified that Petitioner was horrified when he learned in detail what he was supposed to have done to Mr. Walker as it was being recalled by his co-defendant, and that Petitioner agonized over what he believed he had done. As has been noted previously in this Order, Ms. Booher had severe credibility issues as a witness. Further, she was unable to testify to a single fact that the co-defendant was "filling in" for the Petitioner. When this Court specifically questioned her as to what, specifically, the Petitioner's co-defendant said while at her house she said that he was just walking around smirking and saying comments out loud. (T. 96). At one point in her testimony Ms. Booher denied that Petitioner and his co-defendant had even confessed a murder. (T. 89). Her testimony at the Evidentiary Hearing was contradictory with itself and inconsistent with Petitioner's assertions.

27. Petitioner's trial counsel testified that their strategy was to begin presenting mitigating evident as early as jury selection. They did this not only through the testimony of six of Petitioner's family members and friends, but also through cross-examination of the State's witnesses regarding Petitioner's severe intoxication at the time of his arrest, as well as his desire to be held accountable for the murder by turning himself in. The jury found fifteen mitigating factors to be true about the Petitioner as a result of the evidence presented. Attorney Harper met with family members on multiple occasions and worked to prepare their trial testimony by conducting a "mock trial." Testimony from the Evidentiary Hearing established that trial counsel did in fact conduct a full investigation into Petitioner's life in an effort to find and produce mitigating evidence. They told the "story" that was available to be told on behalf of the Petitioner. The Petitioner is not entitled to

relief because of the limited mitigation evidence in his life which was available to trial counsel. Further, while Attorney Harper was critical of his performance in trial, the evidence presented in the mitigation phase and the mitigating factors found by the jury belie his personal, or subjective, opinion.

28. The Petitioner fails to show that trial counsel was unprepared or that their performance was deficient or further that their deficient performance resulted in prejudice so pronounced as to have deprived him a fair trial. The testimony at the Evidentiary Hearing established that Petitioner's attorneys made a full investigation into Petitioner's life and successfully used the information that was available to them. The Petitioner's assertion that, "[T]he probable result of effective representation would be that the Defendant would have received a life sentence[.]" is simply not supported by the evidence.

Ground Three: "The cumulative error rule in ineffective assistance cases should be overruled and applied to this case."

29. Petitioner asserts that the cumulative error rule should be overturned in cases where ineffective assistance of counsel is alleged, and that rule should be applied to the case at bar. This Court follows the precedent set by the Arkansas Supreme Court and finds that the cumulative error rule is inapplicable. *See Huddleston v. State*, 338 Ark. 266, 5 SW3d 46 (1999).

CONCLUSION

The performance at trial of Petitioner's trial counsel was not deficient and the Petitioner suffered no prejudice. The pleadings, testimony and evidence presented at the Evidentiary Hearing, when viewed objectively, along with the Record at trial demonstrate conclusively: (1)that the Petitioner's attorneys were not deficient; (2) that Petitioner's Constitutional rights were satisfied; and (3) that the Petitioner suffered no prejudice. Accordingly, the Petitioner

is not entitled to relief.

IT IS SO ORDERED

Robin Green
ROBIN F. GREEN
CIRCUIT JUDGE

January 25, 2017
DATE ENTERED

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
FIRST DIVISION

STATE OF ARKANSAS — Plaintiff-Respondent

v. No. CR 2007-1550-1 (A)

BRANDON LACY — Defendant-Petitioner

PETITION FOR POST-CONVICTION RELIEF UNDER ARK. R. CRIM. P. 37.5

Defendant-Petitioner, Brandon Lacy, ADC SK#973, is in custody on a conviction from this court, and petitions for post-conviction relief on the ground that his conviction was obtained in violation of the Constitutions and laws of the State and United States, and he states as follows:

1. Defendant was tried and convicted of capital murder and aggravated robbery and was sentenced to death and life, respectively.

2. The Arkansas Supreme Court affirmed Defendant's convictions on October 21, 2010 and rehearing was denied on December 2, 2010. *Lacy v. State*, 2010 Ark. 388, 2010 WL 4126900 (2010).

3. Counsel was appointed on June 7, 2011. Therefore, under Rule 37.5(e), this petition is timely filed if filed on or prior to September 6, 2011. This petition complies with the parameters set out in Ark. R. Crim. P., Rule 37, *et seq.*

Strickland's Standard of Review: The Burden of Proof of an Ineffectiveness Claim–Not a Preponderance Standard, but Does It Undermine Confidence In The Outcome?

4. Under *Strickland v. Washington*, 466 U.S. 668 (1984), a person claiming ineffective assistance of counsel must show two things: (1) defense counsel's performance was deficient or did not satisfy constitutional standards, and (2) petitioner was prejudiced by that failure. Petitioner satisfies these standards in all issues presented. Since this is a death penalty case the standard is also governed by *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 545 U.S. 374 (2005).

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Judge JPA

5. Under *Strickland*, it is not required that defendant show that the result of his trial "would have been different," but for counsel's errors. Instead, it is sufficient that we show a "reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[1] And, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[2] Defense counsel's performance is still judged under an "objective standard of reasonableness."[3]

6. With regard to the required showing of prejudice, the Court said that the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[4] A reasonable probability is a probability sufficient to undermine confidence in the outcome,

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[1] *Id.*, 466 U.S. at 694, followed in *Williams v. Taylor*, 529 U.S. 362, 390, 394, 398-99 (plurality opinion), 414 (concurring opinion of Justice O'Connor) (2000), and *v. Smith*, 539 U.S. 510, 524 (2003) (counsel's error was from inattention and not reasoned tactical judgment, so it was error under *Strickland*; lower court finding counsel's conduct was tactical "resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing").

[2] *Strickland*, 466 U.S. at 686.

[3] *Id.* at 687-88. *Accord: Florida v. Nixon*, 543 U.S. 175, 189 (2005).

[4] *Strickland*, 466 U.S. at 685.

The reasonable probability of a different outcome standard is the norm: *Strickler v. Greene*, 527 U.S. 263, 280 (1999); *Smith v. Robbins*, 528 U.S. 259, 263-64 (2000); *Roe v. Flores-Ortega*, 528 U.S. at 486; *Williams v. Taylor*, 529 U.S. at 391; *Glover v. United States*, 531 U.S. 198, 203 (2001); *Mickens v. Taylor*, 535 U.S. 162, 166 (2002); *Bell v. Cone*, 535 U.S. 685, 695 (2002); *Woodford v. Visciotti*, 537 U.S. 19, 22 (2002); *Wiggins v. Smith*, 539 U.S. at 524 (2003); *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003); *Holland v. Jackson*, 542 U.S. 649, 654 (2004).

but just "some conceivable effect on the outcome" would not be enough.[5] Moreover, it is *not* a preponderance of the evidence standard where defendant has to show it is more likely than not the outcome would be different.[6] Finally, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.[7]

7. Under *Strickland v. Washington,* defense counsel's "strategy" is neither absolute nor bulletproof. There is a presumption that it was valid,[8] but that presumption obviously can be overcome.[9] When making strategic decisions, counsel's conduct still must be reasonable.[10]

> But we have consistently declined to impose mechanical rules on counsel—even when those rules might lead to better representation— not simply out of deference to counsel's strategic choices, but because "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, ... [but rather] simply to ensure that criminal defendants receive a fair trial." 466 U.S., at 689. The relevant question is not whether counsel's choices were strategic, but whether they were reasonable. See id., at 688 (defendant must show that counsel's representation fell below an objective standard of reasonableness). We expect that courts evaluating the reasonableness of counsel's performance using the inquiry we have described will find, in the vast majority of cases, that counsel had a duty to consult with the defendant about an appeal. We differ from Justice Souter only in that we refuse to make this determination as a per se (or "almost" per se) matter.[11]

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[5] *Strickland,* 466 U.S. at 695.

[6] *Holland v. Jackson,* 542 U.S. at 654; *Kyles v. Whitley,* 514 U.S. 419, 434 (1995).

[7] *Strickland,* 466 U.S. at 695.

[8] *Id.* at 689.

[9] *Id.* at 690-91.

[10] *Roe v. Flores-Ortega,* 528 U.S. 470, 481 (2000); *Wiggins v. Smith,* 539 U.S. 510, 522-23 (2003).

[11] *Roe,* 528 U.S. at 581.

GROUNDS FOR POST-CONVICTION RELIEF

Ground 1: Defense counsel was constitutionally ineffective when they failed investigate and present the affirmative defense of mental disease and defect.

8. The records available to counsel prior to trial clearly establishes that Defendant was an abuser of alcohol since approximately eleven (11) years of age. In addition to alcohol, the file shows that Defendant often engaged in numerous forms of substance abuse, including "huffing." Further, the file revealed that Defendant had experienced at least two head injuries resulting in a loss of consciousness during adolescence; an additional head injury as a result of a vehicle accident; and falls where he received trauma to the head. Defendant was receiving a number of prescribed medications for depression, etc. Most of this is outlined in psychologist Dr. Curtis T. Grundy's report. (R. 3459-3468)

9. As the Court is aware, psychiatrist Dr. Donnie Holden diagnosed Defendant with Alcohol Amnestic Disorder back in 2005, after one of his attempted suicides. (R. 3454-3458). The information contained in these reports were an obvious red flag to any competent defense counsel that a more in depth analysis as to a mental disease or defect was needed.

10. Dr. Shawn Agharkar, a board certified forensic psychiatrist, testify to the following as of this date[12]:

a. Dr. Grundy is not sufficiently qualified to determine whether organic brain damage resulted from Defendant's long term use of alcohol. A medical doctor, at a minimum, should have been retained by trial counsel.

b. A neuro-psychologist should have been used to test for brain damage. The tests that Dr. Grundy conducted do not rule out the possibility of brain damage and it should have "absolutely" been explored with Defendant based upon his substance abuse history; "huffing;" and previous head trauma.

c. That Defendant's use of alcohol as early as age 11 suggested a likely

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[12] Dr. Agharkar is currently reviewing all records and will do a thorough evaluation of Defendant in approximately 4-6 weeks. This information will be provided to the Court in a Amended Petition for Rule 37 Relief, which will be prayed for below.

mental illness versus an alcohol problem.

d. Despite Dr. Grundy's testimony to the contrary, he could have absolutely made a diagnosis of Alcohol Amnestic Disorder by history instead of Defendant being drunk in front of him.

e. "Memory confabulation" is a real concern regarding Defendant and should have been addressed. Memory confabulation consists of the creation of false memories, perceptions, or beliefs about the self or the environment—usually as a result of neurological or psychological dysfunction.

f. A diagnosis of Amnestic Disorder, secondary to alcohol/substance abuse is likely to involve organic brain damage.

11. A review of the Diagnostic and Statistical Manual IV (DSM IV), corroborates Dr. Agharkar's position and outlines a number of diagnostic and associative features that Defendant exhibited throughout his life; including memory loss. The DSM IV also shows that the diagnosis is exacerbated by no treatment and continued substance/alcohol abuse. Any competent defense lawyer needs to both have a copy of the DSM IV in his or her office, and should always be on the alert for potential mental health issues with the client.

12. Counsel's investigation of family history was constitutionally inadequate. It would have revealed that family members were not asked in detail about Defendant's pre-teen abuse of alcohol; the chronic use of alcohol and other substances since his initial introduction; nor the noticeable effects of that abuse on his cognitive functioning, particularly his memory. This includes not only temporary memory loss, but memory loss that stretched out over periods of days. This testimony will include:

a. Kathy Delafuente, Defendant's aunt, will testify at the hearing that he would have no memory on how he arrived at locations when he awoke nor what happened in the days leading up to his awakening. She will also testify that he would fill in gaps of memory loss with "possible" explanations for his acts or resulting behavior. For example, on one occasion he arrived at his aunt's home and fell asleep. Upon awakening, he had no idea how he arrived at his aunt's residence. Further, he noticed that his car had significant damage from an apparent accident. He had no recollection as to the accident or the events leading up to it. His aunt said, "it looks like you hit an eighteen wheeler...." From that moment on, Defendant would say the damage was the result of him hitting "an eighteen

wheeler." There were no facts to support his position, merely a suggestion of a possible scenario by his aunt.

b. Virginia Lacy, Defendant's grandmother, will testify to numerous instances where Brandon would "black out" and would seek out information to fill in gaps of memory lost over the course of previous.

c. Jaime Brewer (aka, Mallard), his ex-wife, will testify that she can recall numerous events in which Defendant "blacked out" after drinking and that is was very common. It wasn't daily at the time they divorced, but became daily soon after – approximately 8 years prior to his arrest. She was interviewed by trial counsel on September 4, 2008. Her statement reveals that she was the first person visited by Defendant and his co-defendant, Brody Laswell. During this visit, Defendant was unable to recall what happened, save that he had blood on his shoes and that they threw some weapons in a lake. The statement indicates that Defendant had no specific knowledge of the events and that Laswell would "fill in the blanks," as to what Brandon did. She would have testified that Defendant had no memory of the actual event and that every fact was supplied by Brody Laswell.

13. What is outlined above is classic "memory confabulation." Not only would Defendant be susceptible to suggestion, but would likely cave to those suggestions because Defendant would have no memory to dispute otherwise. Again, these tendencies are consistent a number of diagnoses, including Amnestic Disorder. Further supporting this belief was the testimony of Dr. Grundy.

14. Dr. Grundy was called as a witness by the defense in a pre-trial hearing dated March 12, 2009. (R. 551) He was merely called in an effort to get treatment for the Defendant, however, his testimony was telling. He stated that there were "multiple events in his life ... when [he was] under the influence of alcohol and he [didn't] store and retain and [wasn't] able to retrieve information in his memory." (R. 554-555) Regarding his involvement crime, Grundy stated that he was "severely intoxicated at the time ..." (R. 574) and when in such a state "he won't have memories." (R. 576) He elaborated that after someone sobers that they can become susceptible to filling in gaps of their memory with what others say and that Defendant appeared to be "somewhat susceptible of (sic) that." (R. 581)

15. An affirmative defense of mental disease or defect was likely present, and

Defendant had an absolute right to present it according to the standards set forth in the defense. Ark. Code Ann. §5-2-312; *Roberts v. State*, 352 Ark. 489, 102 S.W.3d 482 (2003); *Baumgarner v. State*, 316 Ark. 373, 872 S.W.2d 380 (1994).

Performance prong: Strickland's performance prong is established. A proper investigation with the slightest sense of issue spotting would have revealed that there was more to the Defendant than he was an alcoholic. This failure was compounded by not utilizing and retaining the appropriate experts. All of the information was available to trial counsel, and it was ineffective assistance of counsel to fail to pursue these issues.

Prejudice prong: Strickland's prejudice prong is also established. A cursory review of just some of the relevant information revealed to defense counsel and to Dr. Agharkar that an affirmative defense under § 5-2-312 was overlooked. A defense that would have required trial counsel to only prove by a preponderance of the evidence—the lowest standard under the law. There is a reasonable probability that the result would have been different.

Ground 2: Trial counsel was constitutionally ineffective for failing to put before a jury little, if any, mitigation evidence during the penalty phase of trial.

16. Defendant hereby incorporates by reference all allegations raised in Ground 1 of this petition. The above information outlines what these witnesses would have testified to if called by trial counsel in the penalty phase. *Pyle v. State*, 340 Ark. 53, 8 S.W.3d 491 (2000); *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995).

17. The reports by Drs. Holden and Grundy give great insight to the life of the Defendant leading up to his conviction in this matter. All of which was relevant; telling; and mitigating. They are replete of mitigating facts, including his dysfunctional family history beginning from birth to present. Defendant's mental and physical abuse; his chronic substance abuse; his mental health history—all fair game in the penalty phase. These topics were barely touched on. There was a comment here or a comment there, but nothing was fleshed out or delved into. The witnesses called were clearly not prepared to testify and, quite honestly, Harper was not prepared prior to them taking the stand. The penalty phase that was presented was non-existent when compared to the amount of mitigation that was available. The penalty phase was constitutionally deficient.

18. Miss Brewer and other family members, in addition to the above, gave state-

ments that Defendant had a very difficult life, that he was repeatedly rejected by a self absorbed mother, went from house to house all of his life, and was a good father to his daughter when he was with her. It is apparent that his addiction impacted his personal life – a story that was right there for the telling, but never told.

19. Trial counsel's primary function, in the penalty phase of the trial is to neutralize aggravating circumstances and present mitigating evidence. *Sanford v. State*, 342 Ark. 22, 25 S.W.3d 414 (2000). Ironically, there is language within this citation that Harper utilized to justify his not calling Dr. Grundy. (R. 2961) However, there is no strategic or "tactical" justification to fail to call him in the penalty phase that Counsel could discern.

20. Miss Brewer will testify that she was sitting in the hallway during the whole trial. She could have outlined most if not all of Defendant's history to the jury. She would have testified how horrified he was when he learned in detail what he supposedly done to Mr. Weaver as it was being told to her by Laswell. She could have explained how he agonized over what he believed he had done.

Performance Prong: Trial counsel was not prepared. It is that simple. The evidence outlined above alone paints a better picture than the one that was presented to the jury during the penalty phase. More mitigation was offered regarding the witnesses who testified than there was for the Defendant.

Prejudice Prong: Under the standards outlined by *Strickland* and *Wiggins*, above establish that Defendant was prejudiced by trial counsel's ineffectiveness. The jury took approximately thirteen (13) hours to decide between life and death based upon what can only be described at best as a lack luster sentencing phase. The probable result by effective representation would be that the Defendant would have received a life sentence.

Ground 3: The cumulative error rule in ineffective assistance cases should be overruled and applied to this case.

21. Petitioner understands that the cumulative error rule does not apply to ineffective assistance cases, but the rule has outlived its usefulness and its logic, and it should be overruled. Applying it to this case, if no single ground is sufficient, the cumulative error rule would provide relief.

Further relief: The record in this matter contains sixteen (16) volumes; the defense file was contained within six (6) bank boxes. The time to file the petition Rule outlined in

Rule 37.5 is not sufficient for effective presentation of all issues within 90 days from day of appointment of counsel. It is an insurmountable task. Therefore, Defendant prays that the Court allow Counsel to prepare an Amended Petition at a later date, which will include further testing by experts.

CONCLUSION

For any of the reasons stated, the petitioner should be granted a new trial or, in the alternative, a new sentencing hearing.

Respectfully submitted,

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AFFIDAVIT

The Petitioner states under oath that he has read the foregoing petition for post-conviction relief and that the facts stated in the petition are true, correct, and complete to the best of Petitioner's knowledge and belief.

Brandon Lacy

STATE OF ARKANSAS)
COUNTY OF ~~JEFFERSON~~ LINCOLN) SS:

Sworn and subscribed to before me on September 2, 2007.

My commission expires:
03-09-2021

Delania Darlene Burchfield
Notary Public

DELANIA DARLENE BURCHFIELD
NOTARY PUBLIC-STATE OF ARKANSAS
DESHA COUNTY
My Commission Expires 03-09-2021
Commission # 12382200

CERTIFICATE OF SERVICE

I certify that I have emailed or mailed copies to those outlined in 37.5(f) of the Arkansas Rules of Criminal Procedure on or about September 2, 2007.

Patrick J. Benca

THIS IS A CAPITAL CASE

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BRANDON EUGENE LACY,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I have served all parties required to be served with the Petition for a Writ of Certiorari. Specifically, in compliance with S. Ct. R. 29.3, I emailed and hand-delivered a copy of this document to below-listed counsel on October 12, 2018:

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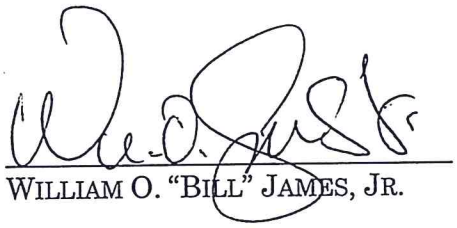

WILLIAM O. "BILL" JAMES, JR.