No.

In the Supreme Court of the United States

BRANDON WASHINGTON,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Petition for a Writ of Certiorari to the Alabama Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under *Strickland v. Washington*, 466 U.S. 668 (1984), a court assessing the prejudice resulting from trial counsel's errors should consider each error in isolation or should consider the cumulative effect of the errors.

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JURISDICTION

The Alabama Court of Criminal Appeals entered its judgment on April 20, 2018, and denied Mr. Washington's timely application for rehearing on May 11, 2018. The Supreme Court of Alabama denied Mr. Washington's petition for a writ of certiorari on July 13, 2018. On September 28, 2018, Justice Thomas extended the time to file a petition for a writ of certiorari to and including December 10, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL 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 have 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.

U.S. Const. amend. VI.

STATEMENT OF THE CASE

Federal and state courts are divided on whether the prejudice suffered by a criminal defendant from multiple errors made by an attorney must be considered cumulatively under *Strickland v. Washington*, 466 U.S. 668 (1984). In acknowledged conflict with the decisions of most other courts, the Alabama state courts adopted the minority view and refused to cumulate prejudice. This petition provides an ideal opportunity to resolve the conflict because the federal question is cleanly presented and is free from the complications attending federal habeas petitions under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214.

In January 2005, someone robbed a RadioShack in Birmingham and fatally shot employee Walter Justin Campbell. Birmingham police arrested Petitioner Brandon Washington, an eighteen-year-old college student with no criminal history, despite the absence of any physical evidence linking him to

the crime. A jury convicted Mr. Washington on one count of capital murder during a robbery.

The Sixth Amendment to the United States Constitution guaranteed that Mr. Washington would be represented effectively while facing a capital-murder charge. But he was not. In numerous ways, counsel failed to provide Mr. Washington with the minimum level of assistance the Constitution requires. Among other things, counsel deficiently failed to (1) object to the use of a key witness's out-of-court statements as substantive evidence; (2) object to a detective's improper vouching for the veracity of that witness's out-of-court statements; (3) object to prosecutorial misconduct, including the prosecutor's misstatement of a witness's testimony in closing argument; and (4) object to improper victim-impact testimony from the victim's wife.

Because of counsel's ineffective assistance, Mr. Washington was convicted of capital murder. He was later sentenced to life without the possibility of parole after his death sentence was twice overturned.

On post-conviction review, Mr. Washington alleged numerous errors by his trial counsel. Both the state trial and appellate courts summarily dismissed his petition, concluding that even if Mr. Washington's allegations were true and his counsel had performed deficiently, he had not suffered prejudice from any single instance of deficient performance that was sufficient to undermine confidence in the verdict. Therefore, Mr. Washington did not even have an opportunity to prove his claims. But neither court properly considered the effect of

counsel's errors *cumulatively*. Had the Alabama courts appropriately considered the cumulative prejudice flowing from counsel's multiple errors, Mr. Washington would have been entitled to pursue his post-conviction claims for relief.

A. The case against Mr. Washington was weak.

The State's case against Mr. Washington was weak. The only evidence connecting Mr. Washington to the crime was the testimony of two witnesses who claimed that Mr. Washington had confessed: April Eatmon, Mr. Washington's ex-girlfriend, and Verrick Taylor, Mr. Washington's former social worker. R. 666, 779-80.[1]

Both witnesses had a financial incentive to testify against Mr. Washington: a $25,000 reward from RadioShack. R. 227, 755, 822. And their accounts varied in important respects: Ms. Eatmon testified, for example, that Mr. Washington told her he shot Mr. Campbell in the back of the store and threw the gun off a cliff, while Mr. Taylor testified that Mr. Washington told him he shot Mr. Campbell in the front of the store and buried the gun. *See* R. 680, 683, 685, 698, 753-54, 761-64.

Moreover, the State's theory was implausible. The State argued that Mr. Washington shot the victim at

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[1] Citations to the record in Mr. Washington's direct appeal in *Washington v. State*, 106 So. 3d 423 (Ala. Crim. App. 2007), are designated "R." Citations to the clerk's record for Mr. Washington's post-conviction proceedings are designated "C."

close range, drove to his friend Michael Dixon's house in his bloody clothes, and later burned the bloody clothes and disposed of the gun. *See* R. 635-36, 780-81, 812, 821, 830-33; State's Appellate Br. 28-29.

But that sequence of events would have been nearly impossible. There was no dispute that Mr. Campbell was alive at 5:16 PM, because investigators found a financial report he completed at that time. R. 378-80, 832. Two witnesses called by the government—Mr. Dixon and his stepfather, Leon Oden—testified that Mr. Washington arrived at Mr. Dixon's house between 5:00 and 5:30 PM. R. 485, 495. A third government witness testified that it takes about ten minutes to drive between the RadioShack and Mr. Dixon's house. R. 673-74. Therefore, under the most favorable version of the State's theory, Mr. Washington would have had to enter the RadioShack, order Mr. Campbell to the back room, kill Mr. Campbell, empty the till, and remove the surveillance tapes all within a four-minute span (between 5:16 and 5:20 PM) in order to arrive at Mr. Dixon's home by 5:30 PM. R. 651-52, 717, 816, 831. If he arrived at Mr. Dixon's house earlier, he would have had even less time. And he would have had to perform all of those tasks without leaving *any* physical evidence at the scene, in his car, or at Mr. Dixon's house (despite allegedly driving from the RadioShack to Mr. Dixon's house in the bloody clothes).

The State's case is even weaker considering the evidence counsel failed to investigate and present to the jury. Although Mr. Washington does not rely on counsel's *investigative* failures here, the undisclosed

(or insufficiently developed) evidence further undermines the prosecution's case.

- A clerk working in a store two doors down identified a person *other than Mr. Washington* suspiciously casing her store just minutes before the robbery and murder. C.135-37; R. 611-12. The suspicious person so frightened the store clerk that she immediately locked the store after the person departed. *Id.*

- Photographs showed that Mr. Washington did not burn his clothes. Mr. Washington's foster mother took photographs of Mr. Washington at a birthday party the afternoon of the murder. C. 133. That night, she observed him return home in the same set of clothes he was wearing earlier (and the same set of clothes that were later recovered from Mr. Washington's dorm room). *Id.*; R. 553-54. This evidence would have shown that the clothes he wore bore no trace evidence of the crime and contradicted Mr. Taylor's and Ms. Eatmon's assertion that Mr. Washington confessed to burning his clothes. R. 555-56. To account for this evidence, the State would have had to make the implausible argument that Mr. Washington exchanged his first set of clothes for a second set and *carried his first set of clothes with him*, drove to Mr. Dixon's house without changing out of his bloody clothes, and changed back into his *original set of clothes* he carried with him to Mr. Dixon's house—all without leaving any physical evidence connected to the murder.

- Mr. Washington's relationship with Mr. Taylor had ended poorly, and case files from the agency that oversaw Mr. Washington's foster care confirmed their deteriorating relationship. C. 154-55.

- Mr. Washington's relationship with Ms. Eatmon was similarly strained. C. 151-52. Moreover, Mr. Washington informed counsel that Ms. Eatmon's mother—who had been romantically involved with the lead detective's brother—had pressured Ms. Eatmon to testify against him. C. 151.

- Billing records from the cell phone Mr. Washington used show that he placed three calls just after the crime occurred. C. 146. The recipients of those calls would have confirmed that Mr. Washington was calm and discussed socializing later that evening, conduct inconsistent with that of someone who just committed a murder. C. 146-47.

B. Mr. Washington's trial attorney committed multiple errors.

"[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. Here, even setting aside the evidence counsel failed to investigate and present, Mr. Washington's counsel made a series of additional errors during trial. Given the weakness of the State's case, the cumulative prejudice flowing from those errors undermines confidence in the verdict.

First, counsel failed to object to the prosecution's use of Mr. Dixon's out-of-court statement as substantive evidence of Mr. Washington's guilt.

Mr. Washington told Detective Roy Bristow, the lead investigator on the case, that on the day of the crime, he was at a family birthday party and then at Mr. Dixon's house watching a football game. R. 577-78. About a week later, Detective Bristow interviewed Mr. Dixon, as well as Mr. Dixon's sister and stepfather, both of whom were also at the house that night. R. 624-25. All three witnesses told Detective Bristow that Mr. Washington was at Mr. Dixon's house between 5:00-5:30 and 10:00 PM, and that nothing out of the ordinary happened. R. 486-87, 497-98, 624-26.

Two days later, twenty police officers stormed into Mr. Dixon's house, dragged Mr. Dixon out of bed, and took him to the police station for a second interview. R. 478, 487. At the station, the police told Mr. Dixon, falsely, that they had found blood in his home and bloody shoes in his backyard that were connected to the crime. R. 489, 554, 556, 629-30. The police also told Mr. Dixon that they believed that Mr. Washington was involved. Detective Bristow then gave Mr. Dixon a choice: implicate Mr. Washington or police could charge Mr. Dixon with capital murder, "lock up" his mother, "lock up" his sister, and take his sister's baby away to foster care. R. 488, 560, 628-29, 631.

Mr. Dixon told Detective Bristow that he hadn't done anything wrong—nor had his mother, his sister,

or Mr. Washington. R. 633. But the police insisted that he accept their version of events. They told him that they knew that Mr. Washington brought a gun to Mr. Dixon's house and that Mr. Washington showed Mr. Dixon a large amount of cash. R. 631-32. And they told him that if he wanted to go home, he had to tell them what Mr. Washington did in the house. R. 489.

Faced with the detectives' false statements and threats to arrest him and his family for the crime, Mr. Dixon reluctantly agreed with their version of events. R. 488, 632-33. He agreed that Mr. Washington had a gun when he came over that evening, threw money on Mr. Dixon's bed, and admitted to killing the RadioShack employee. *Id.*

At trial, the prosecution called Mr. Dixon to testify. On direct examination, he told the jury what he originally told the police: that Mr. Washington was at his house until around 10:00 PM and that Mr. Washington did not have a gun, did not show him any money, and did not mention the RadioShack. R. 474-77. When he finished testifying, the prosecutor immediately introduced Mr. Dixon's second statement to Detective Bristow, which implicated Mr. Washington. R. 478-83. On redirect, the prosecutor asked Mr. Dixon to repeat his out-of-court statement implicating Mr. Washington. R. 490-91.

A witness's unsworn statement to police may be admitted only to impeach his or her testimony; it cannot be used to prove the truth of the matter asserted. *See, e.g.*, *Lindley v. State*, 728 So. 2d 1153, 1155 (Ala. 1998). In the State's closing argument,

however, the prosecutor repeatedly urged the jury to convict Mr. Washington based on the truth of Mr. Dixon's out-of-court statement. Indeed, the prosecutor told the jury that it could convict Mr. Washington based *solely on Mr. Dixon's prior statement to police*, R. 783, which Mr. Dixon had recanted in his testimony. The prosecutor urged the jury to credit the substance of Mr. Dixon's out-of-court statement because of Mr. Dixon's close relationship with Mr. Washington. *Id.* He also argued that Mr. Dixon's statement to police enhanced the credibility of Ms. Eatmon and Mr. Taylor: "[A]ll three of the statements say the same thing." *Id.* Yet counsel failed to object. *Id.*

The prosecutor began his closing argument by declaring, "This case is about three witnesses"—"three witnesses that said the Defendant did this." R. 779-80. The prosecutor then mischaracterized Mr. Dixon's testimony as though it were consistent with the State's theory of Mr. Washington's guilt. R. 780-81.

In his rebuttal argument, the prosecutor again urged the jury to convict Mr. Washington based on the alleged truth of Mr. Dixon's out-of-court statement:

> Michael Dixon wanted to do what was right, but he had a hard time turning in his best friend, his brother, he didn't want to do that. . . . But he did the right thing, he told the truth. His statement . . . is the same as the other two [witnesses].

R. 790. Yet, again, counsel failed to object to any of the State's improper and prejudicial arguments. *Id.*

Counsel also failed to object when the State falsely asserted that Mr. Dixon had testified that Mr. Washington had a gun:

> Michael Dixon on the stand said it was a .357 that Brandon had that day. Michael Dixon, the day he gave his statement to Detective Bristow, said it was a .357 that Brandon had that day.

R. 788. Mr. Dixon never so testified; his testimony was that Mr. Washington did not have a gun. R. 477.

By urging the jury to believe that Mr. Dixon's out-of-court statement to police was "the truth," the State transparently used that hearsay statement for the opposite of its proper evidentiary purpose—to impeach Mr. Dixon's credibility. Counsel's failure to object to the State's blurring of the distinction between Mr. Dixon's testimony and his out-of-court statement fell below minimal standards of advocacy.

Counsel's deficient performance was prejudicial to Mr. Washington's defense. Allowing the State to argue that Mr. Dixon had testified against his best friend left the jury with the impression that there were three witnesses who testified against Mr. Washington. And it left the impression that the State had presented evidence that Mr. Washington possessed a gun matching the type of gun that, according to the ballistics expert, could have been used in the shooting. Mr. Dixon's hearsay statement about the gun was the *only* evidence connecting Mr.

Washington to a weapon, and the prosecutor argued that this statement was "[o]ne of the most important things" Mr. Dixon said. R. 817. Indeed, the improperly used evidence was so persuasive—and therefore prejudicial—that both the State on appeal and the trial court relied on it to "corroborate" other evidence, not merely to impeach Mr. Dixon. State's Appellate Br. 28-29; C. 21.

Second, counsel failed to object when Detective Bristow was asked and offered his inadmissible opinion about the truth of Mr. Dixon's out-of-court statement implicating Mr. Washington. The prosecutor asked Detective Bristow which statement he believed: Mr. Dixon's first statement to police, which matched Mr. Dixon's trial testimony, or the inadmissible statement that he provided after Detective Bristow threatened to arrest Mr. Dixon and his family members. R. 559. Detective Bristow said he believed the second statement. *Id.* Mr. Washington's attorney failed to object to this improper vouching testimony.

Third, counsel failed to object to the prosecutor misstating in closing argument Mr. Oden's testimony. During the trial, Mr. Dixon and Mr. Oden both testified that Brandon arrived at their house between 5:00 and 5:30 PM. In closing, the prosecutor stated that Mr. Oden testified that Mr. Washington arrived between 5:30 and 5:45 PM. R. 832. This misstatement left the jury with the impression that Mr. Washington had more time to commit the crime than he actually did.

Fourth, counsel failed to timely object to improper victim-impact testimony. The prosecutor asked Mr. Campbell's wife, "What kind of husband was Justin?" Counsel did not object. Then the witness testified that Mr. Campbell was a "very good, very devoted and very caring" husband. Counsel then objected, but it was too late because the jury had already heard the testimony. Then the prosecutor asked the witness, "What kind of father was Justin?" Ms. Campbell replied, "He was a good father. He loved playing with [his son] and teaching him things and just having fun with him." R. 329-30. Counsel did not object to this question or the answer.

Mr. Washington was convicted of capital murder and sentenced to death. Finding the presentence report inadequate, the Alabama Court of Criminal Appeals remanded for a new sentencing hearing. *See Ex parte Washington*, 106 So. 3d 441, 443 (Ala. 2011). On remand, the trial court again sentenced Mr. Washington to death, *see id.*, and the Alabama Court of Criminal Appeals affirmed, *see Washington v. State*, 106 So.3d 423 (Ala. Crim. App. 2007). The Supreme Court of Alabama granted certiorari, held that the admission of victim-impact testimony during the penalty phase was plain error, reversed Mr. Washington's death sentence, and remanded for a new sentencing hearing. *See Ex parte Washington*, 106 So. 3d 441 (Ala. 2011). After the State declined to seek the death penalty on remand, Mr. Washington was sentenced to life imprisonment without the possibility of parole.

C. The trial court recognized that counsel had committed multiple errors, but its purported cumulative review of those errors was flawed.

In 2013, Mr. Washington filed a petition for postconviction relief alleging that his trial counsel committed numerous errors and that the cumulative effect of those errors prejudiced his defense. *See* C. 172-73.[2]

The trial court agreed that Mr. Washington likely adequately alleged at least two instances of counsel's deficient performance. First, it found error in counsel's failure to object to Detective Bristow's vouching testimony, stating that "the prosecutor's question to the detective might have been improper, and objectionable, as well the answer." App. 56a. The court nonetheless concluded that "this error alone [did] not constitute ineffective assistance," presumably because, in the court's view, it did not undermine confidence in the verdict. *Id.* Second, the court concluded that counsel's failure to timely object to the victim-impact testimony "was not proven overly prejudicial." *Id.* The court thus implicitly found deficiency in counsel's "late" objection, *id.*, and acknowledged at least some prejudicial effect from that deficiency, but concluded that counsel's error was not "overly" prejudicial—i.e., not sufficiently

[2] Mr. Washington renewed these arguments in briefing before the Alabama Court of Criminal Appeals, *see* Appellate Br. 83-86; Reply Br. 32-34, and in his petition for certiorari to the Supreme Court of Alabama, *see* Cert. Pet. 18-25.

prejudicial, in itself, to undermine confidence in the verdict.

The court later agreed "that under *Strickland*, [Mr. Washington] need not show that any single mistake prejudiced the defense," and that "the Court should evaluate the totality of the evidence in assessing whether a different outcome was reasonably probable." App. 58a. But the court then purported to review an entirely separate set of counsel's errors. Specifically, the court evaluated the cumulative effect of counsel's multiple failures to *investigate* rather than the cumulative effect of counsel's errors made *at trial*. *See id.*[3]

D. The Alabama Court of Criminal Appeals declined to analyze cumulatively the prejudice flowing from multiple instances of deficient performance.

The Alabama Court of Criminal Appeals affirmed the trial court's conclusion that counsel erred in failing to object to Detective Bristow's vouching testimony. *See* App. 26a (concluding that counsel's "isolated error" in failing to object to Detective Bristow's vouching "did not constitute ineffective assistance of counsel" because the error was not sufficiently prejudicial). Then the court rejected Mr.

[3] To be sure, there is some ambiguity in the trial court's decision; it refers to "counsel's failure to investigate," but also cites to sections of Mr. Washington's petition describing additional errors. App. 56a. Regardless, even if the trial court purported to review all of counsel's errors cumulatively, the Alabama Court of Appeals declined to follow suit.

Washington's allegations with respect to three additional instances of ineffectiveness by concluding that even if they constituted deficient performance, Mr. Washington was not prejudiced.

First, the court concluded that the introduction of victim-impact testimony did not undermine confidence in the verdict because Mr. Washington failed to show how "that isolated testimony, when viewed in the context of the entire trial, so inflamed the jury to the point that his defense was prejudiced". App. 30a.

Next, the court acknowledged that the prosecutor's use of Mr. Dixon's out-of-court statement as substantive evidence "may have been improper," and noted that Mr. Dixon's testimony "was undoubtedly prejudicial." *See* App. 25a, 28a. But, it nonetheless declined to find that "counsel was ineffective for failing to object," and then quoted a case observing that "[i]f every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand." *See* App. 28a (quotation marks omitted). The import of the court's ruling is that counsel's failure to object to the prosecutor's improper use of Mr. Dixon's out-of-court statement, although likely deficient, was not in itself sufficiently prejudicial to undermine confidence in the verdict. This interpretation comports with the court's statement that "even if counsel had raised objections to these comments, the trial court would not have committed *reversible error* by overruling them." App. 29a (emphasis added). In other words, although overruling an objection to the improper use of Mr. Dixon's out-of-court statement

would likely have been erroneous, the error would not have been of sufficient gravity to require a new trial. *See* Ala. R. App. P. 45 (error not reversible unless it "probably injuriously affected substantial rights of the parties"); *Reversible Error*, Black's Law Dictionary (10th ed. 2014) (defining "reversible error" as "[a]n error that affects a party's substantive rights or the case's outcome, and thus is grounds for reversal if the party properly objected at trial").

Finally, the court further agreed that the prosecutor had "misstated" Mr. Oden's testimony regarding when Mr. Washington arrived at Mr. Dixon's house. *See* App. 32a. It nonetheless concluded that Mr. Washington "failed to plead facts demonstrating that he was *prejudiced* by counsel's failure to object" because "[n]othing in Washington's petition indicate[d] that the jury gave more credence to the prosecutor's isolated statement than it did to Oden's testimony." App. 33a. (emphasis added). Again, the court implicitly acknowledged deficiency but excused it on the ground that counsel's failure to object to the prosecutor's "isolated statement" did not undermine confidence in the verdict.

While "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies," it must consider the cumulative effect of *all* of counsel's alleged errors before dismissing an ineffective-assistance claim for lack of prejudice. *Strickland*, 466 U.S. at 697. A court may not dispose of the claim on the ground that no single error, standing alone, deprived the defendant of a fair trial. Yet, the Alabama Court of Criminal

Appeals adopted just such an impermissible approach in this case.

Rather than follow this Court's precedent and consider the effect of counsel's alleged errors cumulatively, the court cited an Alabama decision suggesting that cumulative review is not required and noting that "[o]ther states and federal courts are not in agreement as to whether the 'cumulative effect' analysis applies to *Strickland* claims." App. 36a. In declining to perform a cumulative analysis, the Alabama court joined the minority of other courts to reject cumulative review of *Strickland* claims and affirmed the dismissal of Mr. Washington's post-conviction petition. App. 42a-43a.

Mr. Washington's application for rehearing was denied, and the Supreme Court of Alabama denied his petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

The Sixth Amendment right to counsel exists to protect the right to a fair trial. *Strickland*, 466 U.S. at 684. It is common sense that the accumulation of multiple errors can render a trial fundamentally unfair. *Strickland* thus instructs that counsel's errors must be considered together, requiring courts to assess "counsel's *errors*" (plural) and analyze "the *totality of the evidence* before the judge or jury." *Id.* at 695 (emphasis added).

Most federal and state courts follow *Strickland* in holding that cumulative review is required for ineffective-assistance claims. But several courts,

including the Alabama Court of Criminal Appeals here, decline to consider the cumulative prejudice flowing from counsel's errors. Among the federal courts, the First, Second, Third, Fifth, Seventh, Tenth, and Eleventh Circuits weigh counsel's errors in the aggregate; the Fourth, Sixth, and Eighth Circuits do not. Among the state courts, twenty-six states cumulate counsel's errors; six states do not. This case presents the opportunity to resolve the deep and long-standing conflict.

In resolving the split, the Court should confirm that the majority view is correct. *Strickland*'s focus on counsel's *errors*, in the aggregate, is consistent with the Court's recognition that the cumulative effect of multiple errors can undermine confidence in the judicial process and the resulting verdict. The Court has long held, for example, that "the cumulative effect" of multiple *trial* errors may "violate[] the due process guarantee of fundamental fairness." *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978). Similarly, whether the government's suppression of evidence deprives a defendant of a fair trial "turns on the *cumulative effect of all such evidence* suppressed by the government." *Kyles v. Whitley*, 514 U.S. 419, 421 (1995) (emphasis added). The same logic obtains here—the accumulation of multiple errors by counsel can undermine confidence in the verdict in the same way as the accumulation of multiple trial-court errors and the suppression of multiple pieces of evidence favorable to the defense. The Court should grant certiorari to confirm this common-sense proposition.

Mr. Washington's petition presents an ideal vehicle for two reasons. *First*, the question is cleanly presented because the Alabama Court of Criminal Appeals refused to consider the cumulative effect of counsel's errors, and cumulative review would have made a decisive difference in this case. *Second*, AEDPA does not complicate this Court's review.

I. COURTS ARE DIVIDED ON WHETHER COUNSEL'S ERRORS SHOULD BE ASSESSED CUMULATIVELY UNDER *STRICKLAND*

Federal and state courts are divided on whether counsel's errors should be assessed individually or cumulatively under *Strickland*. Granting certiorari would allow the Court to resolve this deep and longstanding split.

A. Federal appellate courts are divided on whether counsel's errors should be assessed cumulatively.

Seven Circuits—the First, Second, Third, Fifth, Seventh, Tenth, and Eleventh Circuits—follow *Strickland* in assessing counsel's errors cumulatively. The Second Circuit, for example, considers counsel's errors in the aggregate because "*Strickland* directs [courts] to look at the 'totality of the evidence before the judge or jury.'" *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001).[4] Similarly,

[4] Some courts that cumulate error, like *Lindstadt*, do so under both prongs of *Strickland*. This petition, however, asks the Court to resolve only whether cumulative review is required in assessing prejudice under *Strickland*'s second prong.

the Ninth Circuit reasons that "[s]eparate errors by counsel at trial and at sentencing should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance." *Sanders v. Ryder*, 342 F.3d 991, 1001 (9th Cir. 2003). And the Fifth Circuit has held that the central question under *Strickland* is "whether the cumulative errors of counsel rendered the jury's findings, either as to guilt or punishment, unreliable." *Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir. 1999), *superseded by statute on unrelated grounds*. The First, Third, Seventh, Tenth, and Eleventh Circuits are in accord. *See Dugas v. Coplan*, 428 F.3d 317, 335 (1st Cir. 2005) ("*Strickland* clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced"); *McNeil v. Cuyler*, 782 F.2d 443, 451 (3d Cir. 1986) (citing *Strickland* and "reviewing the cumulative effect of [counsel's] actions and omissions"); *Kubat v. Thieret*, 867 F.2d 351, 370 (7th Cir. 1989) ("*Strickland* clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced."); *Gonzales v. Tafoya*, 515 F.3d 1097, 1126 (10th Cir. 2008) ("Under *Strickland*, all acts of inadequate performance may be cumulated in order to conduct the prejudice prong." (quotation marks omitted)); *Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1269 (11th Cir. 2012) ("While the prejudice inquiry should be a cumulative one as to the effect of all of the failures of counsel that meet the performance deficiency requirement, only the effect of counsel's actions or inactions that do meet that deficiency requirement are considered in determining prejudice.").

The Fourth, Sixth, and Eighth Circuits, by contrast, reject cumulative review of ineffective-assistance claims. In *Fisher v. Angelone*, 163 F.3d 835 (4th Cir. 1998), the Fourth Circuit held that none of the instances of deficient performance individually caused prejudice and refused to determine whether, if viewed in the aggregate, counsel's deficiencies would have undermined confidence in the verdict. It then "specifically stated" that "ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively." *Id.* at 852.[5] Likewise, in *Campbell v. United States*, 364 F.3d 727 (6th Cir. 2004), the Sixth Circuit held that because the petitioner "ha[d] not shown that any of the alleged instances of ineffective assistance of counsel deprived him of a fair trial, a trial whose result is reliable, he [could not] show that the accumulation of these non-errors warrant[ed] relief." *Id.* at 736 (alterations, citation, and internal quotation marks omitted).[6] A later panel observed

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[5] In a footnote, the Fourth Circuit described "legitimate" cumulative-error analysis as the aggregation "of the *actual* constitutional errors that individually had been found to be harmless, and therefore not reversible," to determine "whether their cumulative effect on the outcome of the trial was such that collectively they could no longer be determined to be harmless." *Id.* at 852 n.9. Nonetheless, *Fisher* has been interpreted as "squarely foreclos[ing]" the argument that the "cumulative effect of [a petitioner's] ineffective assistance of counsel claims" can establish a constitutional violation. *Mueller v. Angelone*, 181 F.3d 557, 586 n.22 (4th Cir. 1999).

[6] Yet even within the Sixth Circuit it appears that the case law is not entirely consistent. *See Lundgren v. Mitchell*, 440 F.3d 754, 770 (6th Cir. 2006) ("In making this determination as to [*Strickland*] prejudice, this Court examines the combined

that, "[n]o matter how misguided [its] case law may be," the "law of [the Sixth] Circuit is that cumulative error claims are not cognizable on habeas because the Supreme Court has not spoken on this issue." *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006). Similarly, the Eighth Circuit has held that "[n]either cumulative effect of trial errors nor cumulative effect of attorney errors are grounds for habeas relief." *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996).

B. State courts are divided on whether counsel's errors should be assessed cumulatively.

The state courts are similarly divided. At least twenty-six states cumulate counsel's errors in assessing *Strickland* claims: Alaska,[7] California,[8] Colorado,[9] Georgia,[10] Idaho,[11] Indiana,[12] Iowa,[13]

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effect of all acts of counsel found to be constitutionally deficient, in light of the totality of the evidence in the case.").

[7] *See State v. Savo*, 108 P.3d 903, 916 (Alaska Ct. App. 2005).

[8] *See In re Jones*, 13 Cal. 4th 552, 588 (1996).

[9] *See People v. Cole*, 775 P.2d 551, 555 (Colo. 1989); *People v. Gandiaga*, 70 P.3d 523, 529 (Colo. App. 2002), *cert. denied Gandiaga v. People*, No. 02SC897, 2003 WL 21260832 (Colo. June 2, 2003).

[10] *See Schofield v. Holsey*, 642 S.E.2d 56, 60 n.1 (Ga. 2007).

[11] *See Adamcik v. State*, 408 P.3d 474, 487 (Idaho 2017).

[12] *See Weisheit v. State*, 109 N.E.3d 978, 992 (Ind. 2018).

[13] *See State v. Clay*, 824 N.W.2d 488, 500 (Iowa 2012).

Kansas,[14] Maryland,[15] Massachusetts,[16] Michigan,[17] Nebraska,[18] New Hampshire,[19] New Jersey,[20] New Mexico,[21] New York,[22] Ohio,[23] Pennsylvania,[24] South Dakota,[25] Tennessee,[26] Texas,[27] Utah,[28] Vermont,[29] West Virginia,[30] Wisconsin,[31] and Wyoming.[32]

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[14] *See Taylor v. State*, 834 P.2d 1325, 1335 (Kan. 1992), *overruled on other grounds by State v. Orr*, 940 P.2d 42, 51 (Kan. 1997).

[15] *See Bowers v. State*, 578 A.2d 734, 744 (Md. 1990).

[16] *See Commonwealth v. Alcide*, 33 N.E.3d 424, 438-40 (Mass. 2015).

[17] *See People v. LeBlanc*, 640 N.W.2d 246, 255 (Mich. 2002).

[18] *See State v. Nolt*, 906 N.W.2d 309, 328 (Neb. 2018).

[19] *See State v. Wilbur*, No. 2017-0512,___ A.3d___, 2018 WL 5289716, at *7 (N.H. Oct. 25, 2018).

[20] *See State v. DiFrisco*, 804 A.2d 507, 529–30 (N.J. 2002); *State v. Preciose*, 609 A.2d 1280, 1286–87 (N.J. 1992).

[21] *See State v. Trujillo*, 42 P.3d 814, 831 (N.M. 2002).

[22] *See People v. Brown*, 300 A.D.2d 314, 315 (N.Y. App. Div. 2002), *leave to appeal denied by People v. Brown*, 795 N.E.2d 43 (N.Y. 2003).

[23] *See State v. Gondor*, 860 N.E.2d 77, 90 (Ohio 2006).

[24] *See Commonwealth v. Watkins*, 108 A.3d 692, 735 (Pa. 2014).

[25] *See State v. McBride*, 296 N.W.2d 551, 555-56 (S.D. 1980).

[26] *See Patton v. State*, No. E2017-00886-CCA-R3-PC, 2018 WL 1779382, at *19-20 (Tenn. Crim. App. Apr. 13, 2018), *appeal denied*, Sept. 13, 2018.

[27] *See Ex Parte Aguilar*, No. AP-75,526, 2007 WL 3208751, at *3-4 (Tex. Crim. App. Oct. 31, 2007).

[28] *See State v. Campos*, 309 P.3d 1160, 1176 (Utah Ct. App. 2013), *cert. denied*, 320 P.3d 676 (Table) (Utah 2014).

[29] *See In re Brooks*, No. 2017-253, 2018 WL 3022683, at *6-7 (Vt. June 15, 2018).

[30] *See State ex rel. Daniel v. Legursky*, 465 S.E.2d 416, 424 n.7 (W. Va. 1995).

[31] *See State v. Thiel*, 665 N.W.2d 305, 310–11 (Wis. 2003).

[32] *See Woods v. State*, 401 P.3d 962, 971 (Wyo. 2017).

By contrast, six states reject cumulative-error review for claims of ineffective assistance, requiring that courts assess *Strickland* prejudice independently for each alleged error of counsel. Those states are Alabama,[33] Arkansas,[34] Missouri,[35] Montana,[36] Louisiana,[37] and Virginia.[38]

The remaining eighteen states fall somewhere in between or have yet to resolve the question. Kentucky has adopted a hybrid approach; its courts consider errors cumulatively to determine *Strickland* prejudice, but only those errors in which "some prejudice, however slight, could have resulted."[39] Six states—Arizona,[40] Connecticut,[41] Nevada,[42] North

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[33] *See supra* at 16-18; *see also Carruth v. State*, 165 So. 3d 627, 651 (Ala. Crim. App. 2014).

[34] *See Lacy v. State*, 545 S.W.3d 746, 752 (Ark. 2018), *petition for cert. docketed*, No. 18-6344 (Oct. 16, 2018).

[35] *See State v. Brooks*, 960 S.W.2d 479, 500 (Mo. 1997).

[36] *See Notti v. State*, 176 P.3d 1040, 1052 (Mont. 2008), *overruled on other grounds by Whitlow v. State*, 183 P.3d 861 (Mont. 2008).

[37] *See State v. Reeves*, No. 2018-KP-0270, 2018 WL 5020065, at *8 (La. Oct. 15, 2018).

[38] *See Prieto v. Warden of Sussex I State Prison*, 748 S.E.2d 94, 109 (Va. 2013).

[39] *Marquez v. Commonwealth*, No. 2003-CA-001431-MR, 2005 WL 195188, at *1 (Ky. Ct. App. Jan. 14, 2005); *see also Salfi v. Commonwealth*, No. 2016-CA-000292-MR, 2017 WL 652109, at *4 (Ky. Ct. App. Feb. 17, 2017).

[40] *See State v. Pandeli*, 394 P.3d 2, 18-19 (Ariz. 2017), *cert. denied*, 138 S. Ct. 645 (2018).

[41] *See Breton v. Comm'r of Corr.*, 159 A.3d 1112, 1147-48 (Conn. 2017).

[42] *See McConnell v. State*, 212 P.3d 307, 318 & n.17 (Nev. 2009).

Dakota,[43] Oregon,[44] and South Carolina[45]—expressly recognize that the issue is an open question. Five states—Delaware,[46] Florida,[47] Illinois,[48] Mississippi,[49] and Washington[50]—appear to have reached mixed results, with some courts reviewing errors cumulatively and others suggesting that each individual error must be prejudicial before it will figure into the cumulative analysis. Other states appear to have no clear authority on point.

C. The splits are well recognized and ripe for this Court's review.

Although characterized somewhat differently by different authorities, these splits are well recognized. Multiple courts, for example, have pointed to

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[43] *See Garcia v. State*, 678 N.W.2d 568, 578 (N.D. 2004).

[44] *See Lotches v. Premo*, 306 P.3d 768, 771 n.4 (Or. Ct. App. 2013), *review denied* 354 Or. 597 (2013).

[45] *See Lorenzen v. State*, 657 S.E.2d 771, 779 n.3 (S.C. 2008), *overruled on other grounds by Smalls v. State*, 810 S.E.2d 836 (S.C. 2018).

[46] *Compare Hoskins v. State*, 102 A.3d 724, 735 (Del. 2014), *with State v. Worley*, No. 132,2016, 2016 WL 908913, at *3 (Del. Super. Ct. Mar. 9, 2016), *aff'd*, 151 A.3d 898 (Del. 2016).

[47] *Compare Monlyn v. State*, 894 So. 2d 832, 838 (Fla. 2004) (per curiam), *with Harvey v. Dugger*, 656 So. 2d 1253, 1257 (Fla. 1995) (per curiam).

[48] *Compare People v. Madej*, 685 N.E.2d 908, 928 (Ill. 1997), *overruled on other grounds by People v. Coleman*, 701 N.E.2d 1063 (Ill. 1998), *with People v. Perry*, 864 N.E.2d 196, 222 (Ill. 2007).

[49] *Compare Ross v. State*, 954 So. 2d 968, 1018-19 (Miss. 2007), *with Moffett v. State*, 156 So. 3d 835, 861 (Miss. 2014).

[50] *Compare State v. Reed*, No. 49164-8-II, 2017 WL 4266739, at *7 (Wash Ct. App. Sept. 26, 2017), *with State v. BoneClub*, 107 Wash. App. 1038 (2001), *and State v. McAllister*, 183 Wash. App. 1036 n.11 (2014).

divisions among the state and federal courts on the question whether *Strickland* requires a cumulative analysis of counsel's errors. *See, e.g.*, *Dodson v. Stephens*, 611 F. App'x 168, 179 n.3 (5th Cir. 2015) ("The other circuits to have considered the issue are split as to whether *Strickland* calls for a cumulative prejudice analysis."); *United States v. Gray-Burriss*, 251 F. Supp. 3d 13, 26 n.6 (D.D.C. 2017) ("Since the Supreme Court established a constitutional right to *effective* counsel, the Circuits have split as to whether the cumulative error doctrine applies when considering individual ineffective-assistance-of-counsel claims, i.e. if independent errors should be assessed collectively as well as individually when determining if counsel were constitutionally ineffective."); *Williams v. Superintendent, SCI Greene*, No. CIV.A. 11-4319, 2012 WL 6057929, at *1 (E.D. Pa. Dec. 4, 2012) (noting a "distinct circuit split" on the question whether federal courts examining habeas petitions should "look to ineffectiveness claims in the aggregate"); *Brooks v. State*, 929 So. 2d 491, 514 (Ala. Crim. App. 2005) ("Other states and federal courts are not in agreement as to whether the 'cumulative effect' analysis applies to *Strickland* claims.").

Scholars have similarly recognized the federal-court split and have urged this Court to review the question. *See, e.g.*, Eric O'Brien, Jennings v. Stephens *and Judicial Efficiency in Habeas Appeals*, 10 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 21, 22 (2015) (calling on the Court to address the "deep circuit split over whether an attorney's errors can be considered cumulatively in ineffective assistance of counsel cases"); Michael C. McLaughlin, *It Adds Up:*

Ineffective Assistance of Counsel and the Cumulative Deficiency Doctrine, 30 GA. ST. U. L. REV. 859, 879 (2014) ("[T]he Supreme Court should grant a certiorari petition in order to resolve the circuit split over whether the prejudice arising from multiple errors by defense counsel should be cumulated to determine whether counsel rendered ineffective assistance under the *Strickland v. Washington* standard."); Ruth A. Moyer, *To Err Is Human; to Cumulate, Judicious: The Need for U.S. Supreme Court Guidance on Whether Federal Habeas Courts Reviewing State Convictions May Cumulatively Assess* Strickland *Error*s, 61 DRAKE L. REV. 447, 448 (2013) ("[T]he Supreme Court should resolve the circuit split by holding that courts may cumulatively review an attorney's errors to determine the existence of *Strickland* prejudice.").

II. THE COURT SHOULD CONFIRM THE MAJORITY VIEW THAT THE CUMULATIVE PREJUDICE FLOWING FROM COUNSEL'S ERRORS UNDERMINES THE RIGHT TO A FAIR TRIAL

The majority view is correct. The accumulation of multiple errors by trial counsel undermines a defendant's right to a fair trial. The Alabama state courts thus erred in declining to consider the cumulative prejudice flowing from counsel's many errors.

"[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466

U.S. 668, 684 (1984). Accordingly, "[t]he benchmark for judging any claim of ineffectiveness [is] 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." *Id.* at 686. To succeed on a claim of ineffective assistance, the defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Id.* at 687. The first component "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* The second component "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

"[C]ommon sense dictates that cumulative errors can render trials fundamentally unfair." *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006). The accumulation of multiple errors can undermine confidence in the outcome of a trial to the same extent as a single reversible error. *See* Cumulative Effect of Errors, 5 Am. Jur. 2d Appellate Review § 668 (May 2013).

Because the cumulative effect of several errors can render a trial unreliable, *Strickland* repeatedly instructs courts to consider counsel's "errors," "deficiencies," "acts," and "omissions"—all in the plural.[51] This language makes clear that courts must

[51] *See, e.g.*, 466 U.S. at 687 (demonstrating deficient performance "requires showing that counsel made *errors* so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" (emphasis

assess the prejudice flowing from counsel's errors, in the aggregate, in determining whether "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 (emphasis added).

Strickland further states that in weighing whether the factfinder would have had a reasonable doubt respecting guilt absent counsel's errors, courts must consider "the *totality of the evidence* before the judge or jury." 466 U.S. at 695 (emphasis added).

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added)); *id.* (demonstrating prejudice "requires showing that counsel's *errors* were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable" (emphasis added)); *id.* at 690 ("A convicted defendant making a claim of ineffective assistance must identify the *acts* or *omissions* of counsel that are alleged not to have been the result of reasonable professional judgment." (emphasis added)); *id.* ("The court must then determine whether, in light of all the circumstances, the identified *acts* or *omissions* were outside the wide range of professionally competent assistance." (emphasis added)); *id.* at 694 ("The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the *errors* of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." (emphasis added)); *id.* at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the *errors*, the factfinder would have had a reasonable doubt respecting guilt.") (emphasis added); *id.* at 696 ("Taking the unaffected findings as a given, and taking due account of the effect of the *errors* on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the *errors*." (emphasis added)); *id.* at 697 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged *deficiencies*." (emphasis added)).

Again, this instruction requires courts to take a wholistic view of the proceedings and the effect of counsel's errors on those proceedings. The Court has repeated this formulation in a series of cases involving counsel's failure to investigate and present mitigating evidence in capital-sentencing proceedings, reiterating that courts must consider the *totality of the evidence*—including the totality of the mitigating evidence counsel failed to present—in assessing whether counsel's errors prejudiced the defense. *See Sears v. Upton*, 561 U.S. 945, 955-56 (2010); *Porter v. McCollum*, 558 U.S. 30, 41 (2009); *Rompilla v. Beard*, 545 U.S. 374, 393 (2005); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000).

Strickland's focus on the totality of counsel's errors is consistent with the Court's recognition that the "the cumulative effect" of multiple *trial* errors may "violate[] the due process guarantee of fundamental fairness." *Taylor*, 436 U.S. at 487 n.15. In *Taylor*, for example, the trial court refused the defendant's request for jury instructions explaining the presumption of innocence and the indictment's lack of evidentiary value. *Id.* at 479. The Court did not reach the defendant's claim that the refusal to instruct on the indictment's lack of evidentiary value "independently constituted reversible error" because it determined that "the cumulative effect of the potentially damaging circumstances of th[e] case"—i.e., "the combination of the skeletal instructions, the possible harmful inferences from the references to the indictment, and the repeated suggestions that petitioner's status as a defendant tended to establish his guilt"—"violated the due process guarantee of

fundamental fairness in the absence of an instruction as to the presumption of innocence." *Id.* at 487 & n.15.

The Court likewise considered the cumulative effect of multiple errors in *Chambers v. Mississippi*, 410 U.S. 284 (1973). The defendant in *Chambers* was denied the opportunity to cross-examine a witness and to call witnesses on his own behalf. The Court declined to decide whether the error with respect to cross-examination "alone would occasion reversal since [the defendant's] claimed denial of due process rest[ed] on the ultimate impact of that error when viewed *in conjunction with* the trial court's refusal to permit him to call other witnesses." *Id.* at 298 (emphasis added). The combination of errors "denied [the defendant] a trial in accord with traditional and fundamental standards of due process." *Id.* at 302.

Similarly, the Court has held that "the state's obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose evidence favorable to the defense . . . turns on the *cumulative effect* of all such evidence suppressed by the government." *Kyles*, 514 U.S. at 421 (emphasis added). That the Court has applied a cumulative analysis in the *Brady* context is particularly significant because the "laws governing the right to counsel and suppression of evidence . . . [share] the same core value, reliability of outcomes." John H. Blume & Christopher Seeds, Reliability Matters: *Reassociating* Bagley *Materiality*, Strickland *Prejudice, and Cumulative Harmless Error*, 95 J. CRIM. L. & CRIMINOLOGY 1153, 1155 (2005). There is no principled reason why cumulative review, which courts apply under *Brady* to determine

whether the trial was fair, should not apply under *Strickland* to answer the same question.

Likewise, the federal appellate courts uniformly cumulate the effect of multiple *trial* errors—*i.e.*, errors committed by the trial court or the prosecution, rather than errors committed by counsel—when reviewing convictions on direct appeal. Those courts recognize that "even if certain trial errors, taken in isolation, appear harmless, the accumulation of errors effectively undermines due process and demands a fresh start." *United States v. Sepulveda*, 15 F.3d 1161, 1195 (1st Cir. 1993); *see also*, *e.g.*, *United States v. Rahman*, 189 F.3d 88, 145 (2d Cir. 1999); *Marshall v. Hendricks*, 307 F.3d 36, 94 (3d Cir. 2002); *United States v. Lighty*, 616 F.3d 321, 371 (4th Cir. 2010); *United States v. Martinez*, 277 F.3d 517, 534 (4th Cir. 2002); *United States v. Delgado*, 672 F.3d 320, 343-44 (5th Cir. 2012); *United States v. Warman*, 578 F.3d 320, 349 (6th Cir. 2009); *United States v. Rogers*, 89 F.3d 1326, 1338 (7th Cir. 1996); *United States v. Anwar*, 428 F.3d 1102, 1115 (8th Cir. 2005); *United States v. Wallace*, 848 F.2d 1464, 1475 (9th Cir. 1988); *Darks v. Mullin*, 327 F.3d 1001, 1018 (10th Cir. 2003); *United States v. Hands*, 184 F.3d 1322, 1334 (11th Cir. 1999) *United States v. Celis*, 608 F.3d 818, 847 (D.C. Cir. 2010).

So too here, the accumulation of multiple errors by trial counsel can deprive a defendant of the effective representation guaranteed by the Sixth Amendment and undermine confidence in the outcome of the trial. This case presents the opportunity to confirm that basic proposition and answer an important question of federal law.

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS THE NECESSITY OF CUMULATIVE REVIEW UNDER *STRICKLAND*

Two factors make this petition an ideal vehicle through which this Court can clarify the necessity of cumulative review under *Strickland*. *First*, the question is cleanly presented because (i) the Alabama Court of Criminal Appeals declined to cumulate prejudice and (ii) cumulative review would have made a decisive difference in this case.

Second, because this petition comes to the Court directly from the Alabama state courts rather than through federal habeas proceedings, AEDPA does not complicate the Court's review. There is no need to determine, for example, whether the state court's adjudication of Mr. Washington's claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Instead, the Court can simply answer the question presented: must the prejudice flowing from counsel's errors be considered cumulatively in assessing whether counsel provided ineffective assistance in violation of the Sixth Amendment?

Relief from this Court would not require a new trial. Rather, it would merely provide Mr. Washington an opportunity to present evidence proving his allegations that his counsel was deficient. Remanding here would provide Mr. Washington with

the chance to secure the hearing he deserves while also clarifying an important area of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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