No. 18-742

In the Supreme Court of the United States

BRANDON WASHINGTON,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, under *Strickland v. Washington*, 466 U.S. 668 (1984), a court assessing 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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STATEMENT

Brandon Washington murdered Walter Justin Campbell at a RadioShack store in 2005 with a .357 pistol. Washington was a disgruntled RadioShack employee who had worked at the store until he was fired shortly before the murder. Campbell was the temporary manager of the store who was closing up for the night. Washington made Campbell turn over the store's daily proceeds—about $1,000—then shot him execution-style on the floor. He also took the store's surveillance tape out of the VCR.

Over the next few days, Washington confessed his crime to three people on different occasions. First, on the night of the murder itself, he went to his good friend Michael Dixon's house and told him what he had done. Dixon's house is only ten minutes away from the Radioshack store where the murder took place. Second, a few days later, Washington told his on-again-off-again girlfriend, April Eatmon, that he had murdered Campbell, stolen the money, destroyed the gun, and fled to Dixon's house. Third, the weekend of the murder, Washington confessed to Verrick Taylor that he had murdered Campbell and destroyed the gun. Taylor had been Washington's case manager when Washington was in foster care. Moreover, Michael Dixon's step-father discovered that his .357 pistol was missing and reported it stolen.

The police discovered these witnesses themselves, not because the witnesses came forward to receive a reward. The police received an anonymous phone call reporting that Brandon Washington had committed the murder. That anonymous phone caller led

them to Verrick Taylor who had previously disclosed Washington's confession to friends. After they began investigating Washington, the police questioned April Eatmon who also revealed Washington's confession to her. And, for his part, Dixon initially provided an alibi for Washington—stating that Washington was with him from 5pm to 10pm on the night of the murder. At a second round of questioning, however, Dixon admitted that Washington had come to his house immediately *after* the murder and had confessed the murder to him as well.

About a dozen witnesses testified as part of the prosecution's case at trial, including Dixon, Eatmon, and Taylor. When Dixon reverted to his alibi story, the prosecution impeached him with his second statement and suggested that Dixon had changed his story because he was Washington's best friend. Defense counsel sought to rehabilitate Dixon, establish an alibi, and cast blame for the second statement on the police's aggressive questioning. Eatmon and Taylor testified that Washington had confessed to the murder. The only difference in Washington's confession to Eatmon and his confession to Taylor was the method that Washington confessed to destroying the murder weapon. The defense forcefully cross-examined Eatmon and Taylor, suggesting that their stories were inconsistent and that they were motivated by a $25,000 reward.

At closing, defense counsel emphasized Dixon's alibi story and the lack of any physical evidence linking Washington to the crime, including fingerprints or a murder weapon. The prosecution emphasized the statements of Taylor and Eatmon:

> You want to throw out what Michael Dixon says, that's all right, that's fine. You've got Verrick Taylor and April Eatmon . . . do you really think that these two, who don't know each other, who have absolutely no connection, they are making it up individually at the same time?

R. 822.

Washington was convicted for murder during the course of a robbery. His conviction was affirmed and, after direct appeal, his sentence was set at life-without-parole.

Washington filed a post-conviction petition under Rule 32 of the Alabama Rules of Criminal Procedure, arguing that his counsel was ineffective for failing to object to various unrelated questions and comments. Rule 32.3, Ala. R. Crim. P., provides that "[t]he petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." Further, Rule 32.6(b), Ala. R. Crim. P., provides that "[e]ach claim in the petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings."

Washington's first amended Rule 32 petition alleged approximately 25 separate claims and subclaims of ineffective assistance of counsel. Section E

of the petition is a four-page section titled: "Trial Counsel's Ineffectiveness Prejudiced Mr. Washington During the Guilty/Innocence Phase." C. 119. In that section, the petition asserts that the "cumulative effect" of all the previous alleged errors prejudiced Washington. C. 173.

The state Rule 32 court (which was the same judge who tried the case) dismissed Washington's petition without holding a hearing. With respect to the cumulative error claim in Part E of the amended petition, the court wrote:

> In 1E the Petitioner reclaims that trial counsel's ineffectiveness prejudiced the Defendant during the guilt phase of the trial. The Petitioner correctly argues that under *Strickland*, the Petitioner need not show that any single mistake prejudiced the defense, but that the Court should evaluate the totality of the evidence in assessing whether a different outcome was reasonably probable, but for counsel's professional lapses. *Williams v. Taylor*, 529 U.S. 362, 397 (2000). The likelihood of a different result must be substantial, not just conceivable. *Harrington v. Richter*, 2011 WL 148587, at *18 (Jan. 19, 2011). Moreover, there is a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance. The presumption of competence of trial counsel must be disproved by the Rule 32 petitioner, and

> the petitioner continually bears the burden of persuasion on this issue. *Hunt v. State*, 940 So. 2d 1041, 1059 (Ala. Crim. App. 2005) This Court has not been so persuaded, and does not find any ineffectiveness as required under the *Strickland* standard, that resulted in counsel's failure to investigate as set forth in the Petition at 1A, B, C, D, or E.

App. 58a.

The Alabama Court of Criminal Appeals affirmed in an unpublished memorandum opinion. That court held that Washington had not sufficiently pled deficient performance or prejudice with respect to any of his allegations of ineffective assistance. As relevant here, the Alabama Court of Criminal Appeals held: (1) it was proper under state law for the prosecution to impeach Dixon's testimony through his inconsistent statements (App. 25a), (2) trial counsel's failure to object when a police detective testified that he believed Dixon's statement "did not constitute ineffective assistance of counsel" (App. 26a), (3) trial counsel was not ineffective for failing to object to the prosecutor's references to Dixon during closing argument because "even if counsel had raised objections to these comments, the trial court would not have committed reversible error by overruling them" (App. 29a), and (4) counsel was not ineffective for declining to object to the victim's widow's "brief testimony regarding her husband's characteristics," which was part of her testimony about the victim's

phone calls and movements on the night of the murder (App. 30a).

After addressing each of Washington's ineffective assistance claims one-by-one, the court of appeals then addressed Washington's separate claim that "the cumulative effect of defense counsel's errors entitled him to relief." App. 36a. The court's analysis is a block quote from a previous decision. In relevant part, the block quote says:

> [T]his Court has noted: "Other states and federal courts are not in agreement as to whether the 'cumulative effect' analysis applies to *Strickland* claims"; this Court has also stated: "We can find no case where Alabama appellate courts have applied the cumulative-effect analysis to claims of ineffective assistance of counsel." More to the point, however, is the fact that even when a cumulative-effect analysis is considered, only claims that are properly pleaded and not otherwise due to be summarily dismissed are considered in that analysis. A cumulative-effect analysis does not eliminate the pleading requirements established in Rule 32, Ala. R. Crim. P. An analysis of claims of ineffective assistance of counsel, including a cumulative-effect analysis, is performed only on properly pleaded claims that are not summarily dismissed for pleading deficiencies or on procedural grounds. Therefore, even if a cumulative-effect

> analysis were required by Alabama law, that factor would not eliminate Taylor's obligation to plead each claim of ineffective assistance of counsel in compliance with the directives of Rule 32.

App. 38a (internal citations omitted).

The Alabama Supreme Court denied certiorari.

ARGUMENT

Washington appeals from an unpublished decision of an intermediate state appellate court that, he says, implicates a circuit split. His petition ignores the strength of the prosecution's case against him, overstates the significance of his counsel's purported "errors," and misunderstands the reasoning of the lower courts' decisions. And, in any event, the split at issue is mostly semantic. The petition for writ of certiorari should be denied for at least four reasons.

First, the purported circuit split about cumulative prejudice under *Strickland* is largely semantic. In practice, courts are treating "cumulative" claims the same way. That is, no court is citing a hodgepodge of unrelated "non-errors" to justify reversing a conviction. *Campbell v. United States*, 364 F.3d 727, 736 (6th Cir. 2004). But, at the same time, seemingly all courts recognize that prejudice should be evaluated in light of *all* of a counsel's "constitutionally deficient" acts and the "totality of the evidence in the case." *Lundgren v. Mitchell*, 440 F.3d 754, 770 (6th Cir. 2006). *See also Jones v. State*, 753 So. 2d 1174, 1197 (Ala. Crim. App. 1999)("whether counsel's performance is constitutionally deficient depends upon

the totality of the circumstances" (quotations and citation omitted)); *State v. Harrison*, 404 S.W.3d 830, 833 (Ark. 2012)("In making a determination on a claim of ineffective assistance of counsel, this court considers the totality of the evidence."); *Williams v. State*, 524 S.W.3d 553, 564 (Mo. Ct. App. 2017)("Williams has not established that the alleged errors affected the totality of the evidence such that there is a reasonable probability that the jury verdict would have been different."). The petition implicitly concedes that there is no clean split here. *See* Pet. 26 (conceding that the split is "characterized somewhat differently by different authorities"). Instead, it appears lower courts are using different language to reach consistent results.

Second, the intermediate court of appeals' unpublished decision did not pick a side in the purported circuit split. Neither the decision of the Rule 32 court nor the decision of the court of appeals was primarily about prejudice at all. Instead, the lower courts held that Washington failed to plead that his counsel made errors that rise to the level of deficient performance. The lower courts addressed each of Washington's approximately 25 claims individually and held, for various reasons, his counsel had performed adequately. Then, as to Washington's standalone claim of cumulative prejudice, the courts held that, even if a petitioner can raise such a claim, Washington's cumulative claim would fail because it is based on meritless underlying claims. That is, the lower courts held that even a large number of non-errors does not add up to an error. This is how the Alabama Court of Criminal Appeals routinely resolves such "cumulative prejudice" claims. *See, e.g.,*

Thompson v. State, No. CR-16-1311, 2018 WL 6011190, at *18 (Ala. Crim. App. Nov. 16, 2018) ("If we were to evaluate the cumulative effect of the instances of alleged ineffective assistance of counsel, we would find that [the appellant's] substantial rights had not been injuriously affected, because we have found no error in the instances argued in the petition.").

And, for what it's worth, the lower courts were clearly correct that Washington's counsel was not deficient. Consider Washington's argument that defense counsel should have objected to the prosecution's discussion of Michael Dixon's testimony during closing argument. Pet. 9-10. Competent defense counsel often decline to make objections and demand limiting instructions that focus a jury's attention on negative evidence. *See United States v. Lindsay*, 157 F.3d 532, 536 (7th Cir. 1998) ("lawyers often make the strategic choice not to request limiting instructions, because they wish to avoid underscoring the troublesome material for the jury"). Dixon was Washington's alibi witness and played a large role in defense counsel's closing argument too. The court of appeals reasoned that, "[h]ad defense counsel repeatedly brought attention to the fact that Dixon had given inconsistent statements to police, the jury could have completely discounted his testimony, including the testimony that was beneficial to Washington." App. 28a. Moreover, as the court of criminal appeals noted, the prosecutor frequently told the jury that it could discount Dixon's statement entirely and rely instead on Taylor's and Eatmon's testimony, so the prosecutor's discussion of Dixon was not objectionable in any event. App. 27a.

Third, even applying cumulative prejudice review and assuming for the sake of argument that counsel's performance was deficient, the result would not change. Washington's claims are little more than a few unrelated quibbles about stray questions and statements to which his counsel did not object. On the other hand, Washington's trial counsel developed a strong trial theory—emphasizing the absence of forensic evidence through vigorous cross examination, hammering the circumstantial nature of the state's case at closing, and establishing a potential alibi. But he had to face the powerful fact that two credible witnesses who did not even know each other both testified that Washington confessed to the crime at separate times. None of the claims in Washington's certiorari petition have anything to do with the testimony of these two witnesses who unequivocally testified that he confessed to the murder. No matter how one examines the trial of this case, it is impossible to conclude that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Finally, there are a whole host of vehicle problems, in addition to the above. For one, the Alabama Supreme Court has never addressed the question presented, and the two lower courts suggested that they would decide the question presented *in favor of Washington*. *See* App. 58a ("Petitioner need not show that any single mistake prejudiced the defense, but that the Court should evaluate the totality of the evidence . . ."); App. 37a ("even when a cumulative-effect analysis is considered, only claims that are properly pleaded and not otherwise due to be sum-

marily dismissed are considered in that analysis"). The real problem in this case is about state-law pleading rules, not constitutional doctrine. Despite heightened state-law pleading requirements, Washington's state post-conviction petition erroneously pled a stand-alone "cumulative" claim that addressed prejudice only. The problem, according to the Court of Criminal Appeals, was that Washington failed to "plead each claim of ineffective assistance of counsel in compliance with the directives of Rule 32 [of the Alabama Rules of Criminal Procedure]." App. 37a-38a.

If the Court wanted to resolve the question presented, it would be best to do so in a case where the question was meaningfully litigated, decided by a court of last resort, and controlling as to the outcome. That is not this case.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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