No. 18-742

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES

INTRODUCTION

Federal and state courts are divided on whether prejudice must be considered cumulatively under *Strickland v. Washington*, 466 U.S. 668 (1984). Alabama's attempt to minimize the split is startling. The State not only ignores myriad cases in direct and open conflict, *see* Pet. 20–26, but also departs from the position it has advanced at *every stage* of this litigation: that "[a] cumulative-effect analysis of *Strickland* claims is not required [in] Alabama." State's Appellate Br. 94. Alabama instead acknowledges, for the first time, that prejudice must be evaluated in light of the totality of the evidence in the case. Opp. 7. Alabama's about-face confirms that, by failing to analyze prejudice cumulatively, the Alabama Court of Criminal Appeals ("appellate court") positioned itself on the wrong side of the split in conflict with *Strickland*.

Contrary to Alabama's assertion, this case presents a strong vehicle through which the Court should resolve the split. The appellate court declined to consider prejudice cumulatively, instead rejecting Mr. Washington's ineffective-assistance claim on the ground that none of counsel's alleged errors, *considered in isolation*, would undermine confidence in the verdict. A cumulative assessment of prejudice, by contrast, would have established a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

Mr. Washington respectfully requests that the Court grant his petition and settle a deep and

longstanding split on an important question of constitutional law.

ARGUMENT

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

Mr. Washington's petition provides a comprehensive catalog of the federal and state court decisions on opposite sides of the split. *See* Pet. 20–26. Alabama does not seriously engage with this authority, brushing aside the stark divisions as "largely semantic." Opp. 7. Not so. The cases cited in the petition are irreconcilable.

In *Isom v. State*, 682 S.W.2d 755 (Ark. 1985), for example, the petitioner alleged that trial counsel committed multiple errors. Despite implicitly acknowledging at least two errors, the court rejected petitioner's ineffective-assistance claim because none of the alleged errors, standing alone, "demonstrably affected the petitioner's right to a fair trial." *Id*. at 758; *see also id*. at 757–58. The court then declined to consider petitioner's assertion that "the errors and omissions of counsel were 'cumulatively prejudicial,'" flatly stating that "[t]his Court does not recognize cumulative error in allegations of ineffective assistance of counsel." *Id*. at 758. The Supreme Court of Arkansas has maintained this position for the past three decades. *See, e.g., Lacy v. State*, 545 S.W.3d 746, 752 (Ark. 2018) ("This court does not recognize cumulative error in allegations of

ineffective assistance of counsel."); *Huddleston v. State*, 5 S.W.3d 46, 50 (Ark. 1999) ("[E]ach allegation of counsel's incompetence must be evaluated separately."). Likewise, the Eighth Circuit, which encompasses Arkansas, holds 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).

In *Schofield v. Holsey*, 642 S.E.2d 56 (Ga. 2007), by contrast, the Supreme Court of Georgia rejected the view that "each individual error by counsel should be considered in a vacuum," and cited *Strickland* in holding that "it is the prejudice arising from 'counsel's *errors*' that is constitutionally relevant." *Id*. at 60 n.1 (emphasis added). The court also expressly "disapproved" of cases in which lower courts had failed to consider "the cumulative effect of counsel's errors." *Id.* There would have been no need for the court to disapprove of those cases if the difference in approach were purely "semantic." Similarly, in *Commonwealth. v. Alcide*, 33 N.E.3d 424 (Mass. 2015), the Supreme Judicial Court of Massachusetts reviewed counsel's errors together before concluding that "the cumulative effect of th[ose] errors" undermined confidence in the verdict. *Id*. at 438, 440; *see also, e.g., Lindstadt v. Keane*, 239 F.3d 191, 199, 204–05 (2d Cir. 2001) (same).

Without multiplying examples, it is clear that there is a genuine conflict in the courts concerning how to assess prejudice under *Strickland*. Multiple courts and scholars have recognized the split and called on this Court to resolve it. *See* Pet. 26–28.

Indeed, in rejecting Mr. Washington's ineffective-assistance claim in this case, the appellate court quoted with approval an earlier decision acknowledging that "states and federal courts are not in agreement as to whether the 'cumulative effect' analysis applies to *Strickland* claims." App. 36a–37a (quoting *Bryant v. State*, 181 So. 3d 1087, 1104 (Ala. Crim. App. 2011)).

In downplaying the split, Alabama argues that "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.'" Opp. 7 (quoting *Lundgren v. Mitchell*, 440 F.3d 754, 770 (6th Cir. 2006)).[1] Alabama thus concedes that *Strickland* does, in fact, require a cumulative assessment of prejudice. Alabama's belated recognition of the proper standard contradicts the argument it made below, where it maintained that "[a] cumulative-effect analysis of *Strickland* claims is not required [in] Alabama." State's Appellate Br. 94. It further urged that "each ineffective assistance of counsel claim must be analyzed individually." *Id.*; *see also id.* at 91 ("Contrary to Washington's contentions, under Alabama law, a trial court nor an appellate court is required to conduct a cumulative-effect analysis of ineffective assistance of counsel claims."). Agreeing with Alabama, the appellate court declined to

[1] The language from Lundgren quoted in Alabama's opposition is at odds with other Sixth Circuit authority, and this intra-circuit conflict reinforces the need for this Court's intervention. See Williams v. Anderson, 460 F.3d 789, 816 (6th Cir. 2006); Campbell v. United States, 364 F.3d 727, 736 (6th Cir. 2004).

consider the cumulative prejudicial effect of the errors Mr. Washington pleaded. Its failure to do so, as Alabama now acknowledges, was error.

There is thus a clear split, and Alabama is on the wrong side of it. The Court should grant review to clarify the law and correct the courts that have gone astray.

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

Unable to seriously contest the split, Alabama next raises the specter of purported vehicle problems. But there are no obstacles that would impede the Court's review of the legal question presented. To the contrary, the appellate court declined to cumulate prejudice in violation of *Strickland*, and a cumulative assessment of prejudice would have made a meaningful difference in this case.

A. The question is squarely presented because the appellate court declined to cumulate prejudice in violation of *Strickland*.

According to Alabama, no cumulative-prejudice assessment was required because the appellate court purportedly found no errors "ris[ing] to the level of deficient performance." Opp. 8. Alabama is mistaken. The appellate court rejected Mr. Washington's ineffective-assistance claim because he failed to show *prejudice* with respect to each alleged error, not

because he failed to allege *deficient performance*. Dismissing an ineffective-assistance claim after considering only the effect of each individual error, as the court did here, is precisely what *Strickland* forbids.

Specifically, the appellate court first affirmed the trial court's conclusion that counsel erred in failing to object to Detective Bristow's vouching testimony. *See* Pet. 15; App. 26a. The court then rejected Mr. Washington's allegations with respect to three additional errors by concluding no single error—standing alone—was sufficiently prejudicial to undermine confidence in the verdict. *See* Pet. 16–17; App. 25a, 28a–33a. Because the court found each alleged error insufficiently prejudicial, it did not determine whether the alleged errors were, in fact, instances of deficient performance.[2]

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 counsel's alleged errors before dismissing an ineffective-assistance claim for lack of prejudice. *Strickland*, 466 U.S. at 697. It may not dispose of the claim on the ground that no single error, standing alone, deprived the defendant of a fair trial. Yet that is what the appellate court did

[2] Alabama argues that the Alabama Court of Criminal Appeals routinely resolves "cumulative prejudice" claims by holding that "even a large number of non-errors does not add up to an error." Opp. 8. That the appellate court did not do so here is yet a further indication that it did *not* reject Mr. Washington's claim for failure to allege deficient performance.

here, and it is what Mr. Washington asks this Court to review.

Relatedly, Alabama contends that "[t]he real problem in this case is about state-law pleading rules, not constitutional doctrine." Opp. 11. In support, Alabama quotes from a block quotation in the appellate court's decision, which in turn quotes from yet another case. The thrice-quoted language, describing a *different petitioner's* allegations, reads,

> 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.

Opp. 6–7 (quoting App. 37a–38a).

But Alabama omits the crucial opening paragraph, which states,

> It is well settled in Alabama that an ineffective-assistance-of-counsel claim is a general claim that consists of several

> different allegations or subcategories, and, for purposes of the pleading requirements in Rule 32.3 and Rule 32.6(b), *each subcategory is considered an independent claim that must be sufficiently pleaded.*

App. 36a (emphasis added).

This paragraph makes clear that what Alabama courts (and Alabama in opposition) have characterized as a "state-law pleading rule" is merely a substantive interpretation of *Strickland*. It confirms that, to state a claim for ineffective assistance, Alabama courts require a petitioner to allege that each individual error—standing alone—caused sufficient prejudice to undermine confidence in the verdict. In other words, contrary to Alabama's suggestion that issues of state law are at play, the appellate court was simply applying (incorrectly) the *Strickland* standard. *See id.* at 10a–11a (citing *Strickland* as supplying the governing standard for an ineffective-assistance claim).

Notably, Alabama's so-called "pleading requirement" is found nowhere in Alabama's procedural rules. Rule 32 of the Alabama Rules of Criminal Procedure, cited in the block quotation, merely requires that a petitioner (1) plead facts, rather than conclusory assertions of law, in support of his claim, Ala. R. Crim. P. 32.6(b) and (2) bear the burden of pleading and proving those facts, *id.* 32.3. And here the appellate court simply held that the facts alleged, even if true, did not satisfy *Strickland* because no single error was sufficiently prejudicial.

That Alabama refers to this erroneous interpretation of *Strickland* as a "state-law pleading rule" does not immunize it from federal review.

Relying on the same passage, Alabama next argues that the appellate court "suggested that [it] would decide the question presented *in favor of Washington*." Opp. 11. Alabama again misses the mark. Even if the appellate court purported to leave open the question whether a cumulative assessment of prejudice is required,[3] there can be no dispute that the appellate court did *not* conduct such an assessment in this case. Mr. Washington was thus deprived of his constitutional right to have the prejudice flowing from multiple alleged errors considered cumulatively.

Finally, that Mr. Washington "appeals from an unpublished decision of an intermediate state appellate court," Opp. 7, is no obstacle to this Court's review. *See, e.g.*, *Madison v. Alabama*, No. 17-7505 (granting certiorari to review an unpublished decision from an Alabama trial court); *Grady v. North Carolina*, 135 S. Ct. 1368 (2015) (reviewing unpublished opinion of the North Carolina Court of Appeals); *Miller v. Alabama*, 567 U.S. 460, 469 (2012) (noting grant of certiorari to Alabama Court of

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[3] The block quotation merely states that the petitioner at issue in the quoted case would lose "even if a cumulative-effect analysis were required by Alabama law," which it is not. App. 37a (emphasis added). In any event, the quoted passage makes clear that to the extent Alabama courts would perform a "cumulative-effect analysis," they would do so only when such an analysis would be meaningless—i.e., when a petitioner alleged an error that, standing alone, would require a new trial.

Criminal Appeals); *Comm'r of Internal Revenue v. McCoy*, 484 U.S. 3, 7 (1987) ("[T]he fact that the [Sixth Circuit] Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case").

B. Analyzing prejudice cumulatively would have made a meaningful difference in this case.

Contrary to Alabama's assertion, *see* Opp. 10–11, cumulative-prejudice review would have made a meaningful difference in this case. No physical evidence connected Mr. Washington to the crime, the prosecution's theory of the case was implausible, and the credibility of the two witnesses who claimed that Mr. Washington had confessed was subject to serious doubt. *See* Pet. 4–7. Given the weakness of the prosecution's case, the cumulative prejudice flowing from counsel's errors undermines confidence in the verdict.

One of counsel's critical errors was his failure to object to the prosecution's use of Mr. Dixon's out-of-court statement as substantive evidence of Mr. Washington's guilt. *See* Pet. 8–12. Those statements were admissible only to impeach Mr. Dixon's testimony, not for their truth. Yet the prosecutor repeatedly urged the jury to convict Mr. Washington based on the truth of Mr. Dixon's out-of-court statements to the police, which were given in response to coercive interrogation tactics. *See id.* He also used those statements to (i) enhance the credibility of Ms. Eatmon and Mr. Taylor, the two witnesses who claimed Mr. Dixon had confessed, and

(ii) link Mr. Washington to the type of gun that might have been used to commit the crime (the only such evidence presented). *Id.* at 11.

There can be no doubt that counsel's failure to object to the prosecution's use of Mr. Dixon's out-of-court statements was prejudicial. Counsel's deficient performance allowed the prosecution to argue that *three* witnesses had testified against Mr. Washington, one of whom was his best friend, and to link Mr. Washington to the potential murder weapon. *Id.* The improperly used evidence was so persuasive—and therefore prejudicial—that both Alabama on appeal and the trial court below relied on it to "corroborate" other evidence. State's Appellate Br. 28-29; C. 21. Indeed, Alabama *again* relies on Mr. Dixon's out-of-court statements as substantive evidence in its brief to this Court. *See* Opp. 1 (asserting that Mr. Washington "confessed his crime to three people" and told his "good friend Michael Dixon . . . what he had done"); *id.* at 2 ("Dixon admitted that Washington . . . had confessed the murder to him as well").

Nor was the prejudice eliminated when the prosecutor told the jury that it need not consider that evidence (having just told the jury why the evidence was so important). As an initial matter, Alabama's premise—that a prosecutor can sidestep the evidence rules by first presenting inadmissible evidence and later telling the jury it may disregard that evidence—is fallacious. Advocates would otherwise present inadmissible evidence with impunity, safe in the knowledge that they can later cure any prejudice by simply offering that the jury may ignore it. Further,

the prejudice was not eliminated here because after the prosecutor told the jury it did not need to consider Mr. Dixon's out-of-court statements, he *returned to the same use*, emphasizing that "[o]ne of the most important things" was Mr. Dixon's out-of-court statement linking Mr. Washington to a gun. R. 817.

Alabama also theorizes that counsel made the strategic decision to allow the improper use of Mr. Dixon's out-of-court statements because he wanted to limit the jury's focus on negative evidence and allow Mr. Dixon to serve as an alibi witness. Opp. 9. But Alabama's discussion about alleged counsel "strategy" is premature, misplaced, and purely speculative. The pleadings control at this stage, and Mr. Washington has alleged that counsel had no strategy in failing to object. If there was no strategy, as pleaded, and counsel was simply derelict, there is no doubt that his performance was deficient.[4]

The prejudice from this error was compounded by at least three additional instances of deficient performance: (1) counsel's failure to object when

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[4] In any event, Alabama's hypothesis fails for a variety of reasons. First, any strategy counsel may have had was deficient because it was based on an inadequate pretrial investigation. Second, other witnesses could have testified about Mr. Washington's alibi. Third, counsel could have let Mr. Dixon testify about Mr. Washington's alibi and later objected to the introduction of his inadmissible out-of-court statements for their truth. Fourth, counsel could have objected to the prosecutor's repeated misuse of the out-of-court statements and requested a limiting instruction; once the prosecutor highlighted the evidence, as he did repeatedly, there was no reason for counsel to remain silent.

Detective Bristow vouched for the truth of Mr. Dixon's inadmissible out-of-court statements; (2) counsel's failure to object to the prosecutor's mischaracterization of Mr. Oden's testimony, which created the impression that Mr. Washington had more time to commit the crime than he actually did; and (3) counsel's failure to object to improper victim-impact testimony. Considered *together*, there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

Moreover, even if the state courts ultimately conclude that Mr. Washington's conviction should stand, they must at least assess Mr. Washington's ineffective-assistance claim under the proper standard by considering the cumulative effect of counsel's alleged errors.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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