NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

PAULA BENNETT,

Petitioner,

v.

SHAWN BREWER,

Respondent.

On Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In this case, the Michigan state court and reviewing federal courts have found trial counsel was constitutionally deficient for employing a fundamentally misguided defense strategy and for failing to impeach a key prosecution witness. Courts called this case a close one, where the sad fact is that Paula Bennett did very little to receive a non-parolable life sentence. The Sixth Circuit Court of Appeals, however, found no prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). The questions presented are:

1. Whether, under *Strickland*, a court may conduct a prejudice analysis that focuses solely on the sufficiency of the evidence presented, or must it instead consider the closeness of the case and whether there is a reasonable likelihood the outcome would have been different without counsel's errors.

2. Whether *Strickland* requires courts to consider the cumulative prejudicial impact of the totality of counsel's errors, as a majority of circuits have held, or instead the prejudice of each of trial counsel's errors in isolation, as held by the remaining minority.

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REFERENCE TO OPINIONS AND ORDERS BELOW

The October 8, 2019, opinion of the United States Court of Appeals for the Sixth Circuit is published as *Bennett v. Brewer*, 940 F.3d 279 (6th Cir. 2019). App. 1–15. The opinion of the United States District Court for the Eastern District of Michigan denying Bennett's pro se habeas petition is unpublished but available as *Bennett v. Warren*, No. 5:12-cv-12054, 2017 WL 1344775 (E.D. Mich. Apr. 12, 2017). App. 16–40. The Michigan State Supreme Court decisions declining to hear petitioner's claims on direct appeal and collateral review are published as *People v. Bennett*, 489 Mich. 897 (2011), and *People v. Bennett*, 498 Mich. 865 (2015), respectively. App. 50; App. 41. The Michigan Court of Appeals decision denying petitioner relief on direct appeal is published as *People v. Bennett*, 802 N.W.2d 627 (Mich. Ct. App. 2010). App. 51–70. These opinions and orders are reproduced in the appendix to this petition.

STATEMENT OF JURISDICTION

Petitioner seeks review of the October 8, 2019, judgment and opinion of the Sixth Circuit Court of Appeals. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI:

The Sixth Amendment to the Constitution of the United States provides, in pertinent part, "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."

28 U.S.C. § 2254(d)(1):

Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), a federal court may not grant a writ of habeas corpus on a claim that has been adjudicated on the merits by a state court unless the state court's adjudication of that 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."

STATEMENT OF THE CASE

Paula Bennett was nineteen years old with no criminal record when she received a mandatory, non-parolable life sentence for aiding and abetting a murder committed by her physically abusive then-boyfriend, Kyron Benson. Benson shot and killed his victim, Stephanie McClure, in a confrontation over stolen items. Bennett accompanied Benson to McClure's home and gave Benson directions to the trailer park where McClure lived—directions that he did not need, because he already knew the way there. App. 39.

Reviewing courts have been troubled by the case, stating:

"The hard truth here is that [Paula Bennett] did not do much to be required to serve a non-parolable life sentence." App. 38.

"There is no dispute that [Bennett] did not want her friend to be killed." App. 38.

"[T]here is little question that [Bennett's co-defendant] was the one calling all the shots." App. 38–39.

"[T]he assistance [Bennett] rendered . . . was almost inconsequential." App. 39.

The Michigan state courts and the Sixth Circuit Court of Appeals found Bennett's representation by her trial counsel objectively deficient in multiple regards. The prosecution's case turned on whether Bennett knew Benson intended to harm McClure. But Bennett's trial counsel did almost nothing to contest whether Bennett had the requisite knowledge for the offense. Instead, from the outset, Bennett's trial counsel adopted a strategy that the Honorable Douglas B. Shapiro of the Michigan Court of Appeals described as "bizarre." App. 68. For instance, counsel did not object to the prosecutor's proposal that Bennett and Benson be tried together with separate

juries—an approach Judge Shapiro recognized as "le[aving] Bennett with the worst of both worlds." App. 67.

Bennett's trial counsel then presented a "team" defense strategy with Benson's lawyer, despite representing a client with directly antagonistic interests: Benson, the shooter, and Bennett, his abused girlfriend. App. 68. For example, Bennett's attorney challenged whether Benson in fact shot Ms. McClure when "[t]here was overwhelming evidence" that he did so. App. 67. Throughout the trial, Bennett's counsel presented her case in a way that effectively linked her fate to Benson's, despite insurmountable evidence of Benson's guilt.

This "team" strategy was pursued to the exclusion of a defense that would have highlighted the very fact that would have led to Bennett's acquittal: that Bennett did not believe Benson intended to kill his victim, and she adamantly did not want him to do so. Most egregiously, Bennett's trial counsel failed to impeach the only witness that testified that Benson's threats toward his victim were serious, Breanna Kandler. App. 68–69. Counsel had Kandler's prior sworn statements that she "didn't really think he was gonna do it" and that she thought Benson's threats were him "just blowing off steam" but failed to introduce and use these statements at trial when Kandler testified to the contrary. App. 80–82.

In Bennett's direct appeal, the state appeals court rejected sufficiency of the evidence and prosecutorial misconduct claims and affirmed her conviction. App. 55–57. The majority's opinion came over an impassioned dissent that identified serious

deficiencies in trial counsel's performance. App. 61–70. The Michigan Supreme Court denied review. App. 50.

The Michigan trial court considered Bennett's Mich. Ct. R. 6.500 motion and concluded her trial counsel provided constitutionally deficient representation, based on his "team strategy" focusing on Benson's innocence and failure to impeach Kandler's trial testimony. App. 47. But when conducting the *Strickland* prejudice analysis, it relied on the earlier Michigan Court of Appeals' decision—primarily its sufficiency of the evidence analysis, performed on direct review with no consideration of counsel's errors—to conclude Bennett was not prejudiced by her counsel's deficiencies. App. 47. The state appellate courts did not review Bennett's collateral attack on her conviction. App. 41–42.

The United States District Court for the Eastern District of Michigan denied Bennett's pro se petition for a writ of habeas corpus but granted a certificate of appealability with respect to four claims: whether trial counsel was constitutionally ineffective for 1) adopting the trial strategy of Bennett's co-defendant; 2) failing to impeach a key witness; 3) failing to investigate and present evidence regarding battered woman syndrome; and 4) whether appellate counsel was ineffective for failing to raise the foregoing claims on direct appeal. App. 25–26, 38–39. The Sixth Circuit Court of Appeals determined trial counsel's strategy and failure to impeach constituted constitutionally deficient representation but concluded Bennett was not prejudiced because of the existence of two uncontroverted facts—that Bennett did not exit the car at McClure's home, and that she drove Benson away from the scene—by

which a jury could have found she was guilty. App. 11–13. The court did not consider the closeness of the case or the effect of counsel's errors on the verdict.

REASONS FOR GRANTING THE WRIT

Ineffective assistance of counsel claims are among the most frequently raised by state habeas petitioners. *See* Nancy J. King et al., *Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996*, at 5 (2007) (ineffective assistance of counsel claims raised in 81% of capital cases and 50.4% of non-capital cases). This Court's guidance regarding the proper application of *Strickland*'s prejudice standard would help lower courts more accurately and efficiently dismiss unmeritorious habeas petitions but also ensure state petitioners with valid claims of constitutional error receive proper review by and adequate protection from federal courts. Because the prosecution's case for Bennett's guilt is so tenuous, the penal consequences of ineffective counsel so severe, and the issue so cleanly presented, Bennett's case is an apt one for this Court's guidance on proper *Strickland* prejudice analysis.

I. The Sixth Circuit Misapplied *Strickland* by Conflating Prejudice Analysis with Sufficiency of the Evidence Review

The Michigan state court and Sixth Circuit agreed that Bennett's trial counsel was objectively deficient under *Strickland*. But by isolating and relying on facts that were sufficient for a jury to make the inferences necessary for a guilty verdict, without considering the weight of those facts in context of trial counsel's recognized errors,

both the Sixth Circuit and the Michigan court below conducted an "outcome-determinative" sufficiency of the evidence prejudice analysis rejected by the *Strickland* Court.

A. Both the Sixth Circuit and the Michigan Trial Court Tied the Prejudice of Counsel's Errors to the Sufficiency of the Evidence in the Record

A criminal defendant is not prejudiced by trial counsel's errors if those errors have no effect on the judgment. *Strickland*, 466 U.S. at 691. So, *Strickland*'s familiar test directs courts considering the prejudice prong to consider the totality of evidence—taking due account of the perverse effect of errors on factual findings or inferences drawn from factual evidence—and determine whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Under *Strickland*, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* But despite *Strickland*'s status as clearly established federal law, the panel below—and the Michigan court considering Bennett's ineffective assistance of counsel claims in the first instance—failed to account for the impact of counsel's errors on the jurors' deliberations.

The Michigan trial court (the last reasoned state opinion on Bennett's ineffective assistance claims) concluded there was "strong evidence" that Bennett's trial counsel rendered objectively deficient representation. App. 47. Nonetheless, the court relied on a prior sufficiency of the evidence analysis—rendered on direct appeal by a court without any ineffective assistance of counsel claims before it—to determine

Bennett was not prejudiced. App. 47. The prior sufficiency opinion had held that, because Bennett heard Benson make "serious" threats to kill the victim and saw him with a gun shortly before they drove to McClure's apartment, "there was considerable evidence from which the jury could have inferred that Bennett knew of Benson's intent." App. 47, 55.

The trial court made no effort to meaningfully weigh this evidence, nor did it take into account the impact that deficient representation had upon the jury's willingness to make the inferences necessary for a guilty verdict. Instead, the trial judge concluded "there is evidence to support the jury's inference." App. 47. This is a pure sufficiency of the evidence analysis—the court merely concluded that "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The Sixth Circuit panel below also treated *Strickland* prejudice analysis as a sufficiency of the evidence inquiry. The panel focused its attention on two different facts: first, that Bennett did not exit the car with Benson when they arrived at Stephanie McClure's home; and second, that she drove Benson away from the scene after she heard shots fired. App. 12. The panel concluded these two facts were sufficient for a jury to "reasonably surmise that, if Bennett believed Benson to have innocent intentions, she would have confronted McClure with him, and she would not have arranged their exit strategy." App. 12.

But, as with the Michigan trial court, the Sixth Circuit's analysis failed to take *any* (let alone proper) account of the impact of trial counsel's errors in its prejudice analysis and did not actually weigh the evidence as it stood in light of those errors. The Sixth Circuit acknowledged Bennett's attorney's failure to "highlight the various aspects of Bennett's behavior that suggested she lacked the requisite *mens rea*": that she had alerted the police to the stolen items just one day earlier; that she and Benson picked up Larvaidan on the way to McClure's; and that she experienced extreme emotional distress after hearing the shots fired at McClure's residence. App. 5. But just pages later, the panel concluded it was "crucial" that "the errors Bennett identifies in counsel's performance have no impact" on two facts, noting that they "would have been presented to the jury regardless," and that when taken together, these facts "undermine Bennett's assertion that she did not know of Benson's plan." App. 12.

It is true that those facts are unaffected; they were never in dispute. But Bennett's jury considered those facts against the backdrop of a bizarre, fundamentally misguided trial strategy—one that linked Bennett's fate to her co-defendant's and that left effectively unchallenged the testimony of the only witness who suggested that Benson's threats conveyed a serious intent to harm McClure.

The Sixth Circuit demonstrated an astute understanding of the significance of trial counsel's errors on the case presented to the jury. But its prejudice analysis did not correspondingly analyze "[t]he difference between the case that was and the case that should have been." *Stewart v. Wolfenbarger*, 468 F.3d 338, 361 (6th Cir. 2006).

In a trial where Bennett's counsel presented a reasonable, competent defense, and especially "in light of the dearth of evidence demonstrating that Bennett knew of Benson's intent," App. 11, there is a reasonable probability that those two facts would not have been weighty enough for a jury to conclude, beyond a reasonable doubt, that Bennett was guilty.

B. *Strickland*'s Prejudice Prong Must Be Sensitive to Concerns About the Fundamental Fairness and Reliability of a Trial's Outcome.

Strickland considers errors' effects on outcomes, but prejudice analysis is not just a "strict outcome-determinative test." *Strickland*, 466 U.S. at 697. Such a test, which was explicitly contemplated and rejected by the *Strickland* Court, ultimately would "impose[] a heavier burden on defendants" than true prejudice analysis. *Id.* Instead, because an ineffective assistance of counsel claim "asserts the absence of one of the crucial assurances that the result of the proceeding is reliable," a court must consider whether there has been a "breakdown in the adversarial process," jeopardizing our confidence in, and the justness of, particular results. *Id.*

As a result, the *Strickland* prejudice standard has "never been a sufficiency of the evidence test." *Johnson v. Scott*, 68 F.3d 106, 110 (5th Cir. 1995); *see also Crace v. Herzog*, 798 F.3d 840, 849 (9th Cir. 2015); *Richey v. Mitchell*, 395 F.3d 660, 687 (6th Cir. 2005); *Breakiron v. Horn*, 642 F.3d 126, 139–40 (3d Cir. 2011); *Tice v. Johnson*, 647 F.3d 87, 110–11 (4th Cir. 2011); *Jones v. United States*, 478 F. App'x 536, 540-–41 (11th Cir. 2011). As with a *Brady* materiality claim, a criminal defendant may prove prejudice by demonstrating that the impact of counsel's errors on evidentiary findings and inferences drawn from those findings "could reasonably

be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Johnson*, 68 F.3d at 110 (citing *Kyles v. Whitley*, 514 U.S. 419, 425 (1995)). "[O]verwhelming, untainted evidence of guilt" may be sufficient to demonstrate a lack of prejudice in some cases. *Jones*, 478 F. App'x at 542 n.6. But a defendant "need not show that [s]he could not have been convicted. Instead [s]he need only undermine our confidence in the trial's outcome." *Richey*, 395 F.3d at 687.

Courts' analyses must reflect the distinction between sufficiency and *Strickland* prejudice. A court cannot reasonably conclude an outcome is reliable, counsel's errors notwithstanding, if it merely "note[s] the sufficiency of the evidence without examining its weight." *Breakiron*, 642 F.3d at 140. Doing so would inappropriately tie the materiality of counsel's errors to the bare sufficiency of the remaining inculpatory evidence. *See, e.g.*, *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 304 (3d Cir. 2016).

II. The Panel Also Misapplied *Strickland* By Failing to Assess the Cumulative Prejudice of the Totality of Counsel's Errors

Bennett's panel also deviated from *Strickland*, and stepped into a circuit split, by assessing the prejudice of each of trial counsel's errors in isolation, rather than cumulatively. The Fourth, Sixth, and Eighth Circuits consider the prejudice from each of trial counsel's errors independently; the First, Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits, in contrast and in line with this Court's precedent, evaluate prejudice cumulatively. Granting certiorari would allow the Court to resolve this entrenched split and provide much-needed clarification on the proper application of *Strickland*'s prejudice prong.

A. A Majority of the Circuits Correctly Apply a Cumulative Analysis of Counsel's Errors.

A majority of the Courts of Appeals—the First, Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits—correctly apply *Strickland* by "consider[ing] the cumulative effect of counsel's errors in determining whether a defendant was prejudiced." *See Dugas v. Coplan*, 428 F.3d 317, 335 (1st Cir. 2005). These circuits evaluate counsels' errors for cumulative prejudice "because *Strickland* directs us to look at the 'totality of the evidence before the judge or jury,' keeping in mind that '[s]ome errors [ ] have . . . a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture.'" *See Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001) (quoting *Strickland*, 466 U.S. at 965–96).

Each of the above-noted circuits applies *Strickland* in a similar fashion. *See McNeil v. Cuyler*, 782 F.2d 443, 451 (3d Cir. 1986) (reviewing the "cumulative effect" of counsel's actions and omissions in *Strickland* prejudice analysis); *Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir. 1999) (holding 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"); *Sussman v. Jenkins*, 636 F.3d 329, 360–61 (7th Cir. 2011); *Sanders v. Ryder*, 342 F.3d 991, 1000–01 (9th Cir. 2003) (analyzing the "single errors of counsel" to "see whether their cumulative effect deprive the defendant of his right to effective assistance"); *Cargle v. Mullin*, 317 F.3d 1196, 1207 (10th Cir. 2003) (finding that all claims of prejudicial error "should be included in the cumulative error-calculus if they have been individually denied for insufficient prejudice"); *Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1269 (11th Cir. 2012)

("[T]he prejudice inquiry [is] a cumulative one as to the effect of all of the failures of counsel that meet the performance deficiency requirement . . . .").

This approach is faithful to the holding and language of *Strickland* and its progeny. The *Strickland* Court explained that a defendant must show "a reasonable possibility that, but for counsel's unprofessional *errors*, the result of the proceeding would have been different." 466 U.S. at 694 (emphasis added). The plural of "error" was used throughout the opinion in connection with the prejudice prong. *See, e.g.*, *id.* at 695 ("[T]he governing legal standard plays a critical role in defining the question to be asked *in assessing the prejudice from counsel's errors*.") (emphasis added). Similarly, in *Williams v. Taylor*, this Court assumed *Strickland* prejudice must be assessed cumulatively, noting that the state trial judge "was correct both in his recognition of the established legal standard for determining counsel's effectiveness, and in his conclusion that the entire postconviction record, viewed as a whole and cumulative of mitigation evidence" must be considered. 529 U.S. 362, 398–99 (2000).

The Court's choice of language in *Strickland* and in *Williams* is presumably purposeful and meant to impart a particular significance. "It is clear from the repeated reference to the plural 'errors' in the opinion that the Court contemplated cumulative consideration of counsel's . . . individual errors." J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: Confronting Adverse Authority*, 59 U. Miami L. Rev. 341, 358 (2005).

B. A Minority of Circuits Analyze the Prejudicial Impact of Counsel's Errors Independently.

At least two circuits—the Fourth and Eighth—misconstrue *Strickland* by assessing the prejudicial effect of each of counsel's errors in isolation. The Sixth Circuit's approach is inconsistent but has been characterized as following a similar approach to that of the Fourth and Eighth Circuits. 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 *Errors*, 61 Drake L. Rev. 447, 473–74, 480 (2013).

In *Fisher v. Angelone*, the Fourth Circuit ruled "ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively." 163 F.3d 835, 852 (4th Cir. 1998). The circuit "squarely foreclosed" the argument that "the *cumulative* effect of [a defendant's] ineffective assistance of counsel claims rather than whether each claim, considered alone, establishes a constitutional violation." *Mueller v. Angelone*, 181 F.3d 557, 586 n.22 (4th Cir. 1999). And, in *Middleton v. Roper*, the court noted that the Eighth Circuit has "repeatedly recognized" that *Strickland prejudice* cannot rest "on a series of errors, none of which would by itself meet the prejudice test.'" 455 F.3d 838, 851 (8th Cir. 2006) (quoting *Hall v. Luebbers*, 296 F.3d 685, 692 (8th Cir. 2002)).

The Sixth Circuit, though inconsistent, often aligns with this minority view. In *Campbell v. United States*, for example, the court refused to assess whether the cumulative effect of all the claimed deficiencies established prejudice after it determined that each error did not individually amount to *Strickland* prejudice. 364

F.3d 727, 730–36 (6th Cir. 2004); *see also Williams v. Anderson*, 460 F.3d 789, 819 (6th Cir. 2006) ("No matter how misguided [its] case law may be, [the] law of the [Sixth] Circuit is that cumulative errors are not cognizable on habeas because the Supreme Court has not spoken on this issue."). On the other hand, in *Lundgren v. Mitchell*, the Circuit's approach to *Strickland* prejudice was described as assessing "the combined effect of all acts of counsel found to be constitutionally deficient, in light of the totality of the evidence in the case." 440 F.3d 754, 770 (6th Cir. 2006).

C. In This Case, the Sixth Circuit Failed to Assess Whether the Cumulative Effect of Counsel's Deficiencies Amounted to *Strickland* Prejudice.

Here, the Sixth Circuit's *Strickland* analysis failed to consider the cumulative prejudicial effect of Bennett's trial counsel's errors. In her briefing, Bennett advocated for the panel to adhere to the majority approach and consider the cumulative prejudicial effect of trial counsel's deficient performance. App. 117–19. Bennett argued that the cumulative effect of a lack of a competent, individuated defense strategy; counsel's failure to impeach the State's strongest witness regarding Bennett's knowledge of Benson's intent; and counsel's failure to introduce evidence of partner abuse and testimony regarding its bearing on her intent all prejudiced her outcome at trial. App. 117–18.

Nevertheless, the Sixth Circuit did not perform cumulative analysis. After acknowledging Bennett's cumulative error claim, the court proceeded without clearly identifying its approach. App. 12–13. In its prejudice analysis, the court discussed the prejudicial effect of counsel's failure to impeach and lack of a competent defense

theory in passing, then quickly moved on to whether there was sufficient evidence to convict Bennett. App. 12. When it came to the evidence of partner abuse, the court overtly defied *Strickland* by assessing the prejudice of counsel's failure to elicit BWS evidence in isolation of the other two claims of prejudice. App. 12–13.

In sum, the court failed to articulate whether it would cumulate prejudice, performed a perfunctory prejudice analysis of only two of Bennett's claims, and declined to consider all three instances of deficient performance cumulatively. This Court should grant certiorari to correct this error and resolve the entrenched circuit split on this matter.

III. Bennett's Case Provides an Apt Vehicle for This Court to Address the Proper Application of *Strickland*'s Prejudice Prong.

Bennett's case is a worthy vehicle for this Court to clarify how courts should conduct a *Strickland* prejudice inquiry. Doing so would permit this Court to reaffirm that *Strickland*'s prejudice analysis materially differs from, and demands more than, sufficiency of the evidence review. Likewise, granting certiorari would allow the Court to provide much-needed instruction on whether *Strickland* demands that courts consider the cumulative prejudicial effect of counsel's errors.

First, because of the "dearth of evidence demonstrating that Bennett knew of Benson's intent," App. 11, and the pervasive nature of counsel's errors throughout Bennett's defense, Bennett's case is among those "rarest case[s]" impacted by the distinction between *Strickland* prejudice and outcome-determinative review. *Strickland*, 466 U.S. at 697.

At almost every stage of Bennett's case, the court entertaining her claims acknowledged her case was a close one—the type of case with "a verdict or conclusion only weakly supported by the record," making it "more likely to have been affected by errors than one with overwhelming record support." *See Strickland*, 466 U.S. at 696. The district court observed that the "hard truth here is that [Bennett] did not do much to be required to serve a non-parolable life sentence" and that "the assistance [Bennett] rendered Benson was almost inconsequential." App. 38–39. The Sixth Circuit panel again acknowledged "Bennett's case is a close one." App. 13.

The closeness of Bennett's case indicates that counsel's wholly inadequate performance had a prejudicial, if not determinative, impact on her conviction. It also makes proper application of *Strickland*'s prejudice prong critically important, because "[w]hen a case is as closely drawn as this, *the impact of potential errors become magnified*." App. 39. The opinions below leave no question that serious errors were committed; accurately measuring the impact of those errors, then, is paramount to safeguarding the Sixth Amendment's guarantee.

Second, the consequence of Bennett's inadequate representation was devastating: a mandatory non-parolable life sentence for a nineteen-year-old woman with no criminal history. Deficient performance by counsel is "particularly shocking" in death penalty cases. *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000). Bennett's is not a traditional capital case, but the result of counsel's deficient performance is Bennett's "death by incarceration"—making his neglect of his advocatory responsibilities similarly appalling. *See* Melissa Hamilton, *Some Facts About Life:*

The Law, Theory, and Practice of Life Sentences, 20 Lewis & Clark L. Rev. 803, 813–14 (2016) (noting that life imprisonment terms share some "critical similarities" to death sentences, particularly in the absence of "generous early release provisions"). Here, too, Bennett received the worst of both worlds. Because she was not eligible for, and did not technically receive, the death penalty, Bennett received none of the traditional procedural protections afforded to capital defendants that might alleviate, to a certain extent, the constitutional concerns created by counsel's inadequate representation. Despite a similarly and devastatingly final death-in-custody sentence, Bennett was denied "individualized consideration of the offender and the offense" and was precluded from introducing mitigating evidence that would calibrate her sentence to her culpability. *See* William W. Berry III, *The Mandate of* Miller, 51 Am. Crim. L. Rev. 327, 329 (2014).

Because she is technically a non-capital defendant, Bennett is also denied the protection inherent to the "heightened standard for attorney performance that is reserved for capital cases only" implied in this Court's recent ineffective assistance cases. *See* Stephen F. Smith, *Right to Effective Assistance of Counsel: Taking* Strickland *Claims Seriously*, 93 Marq. L. Rev. 515, 535–37 (2009). Mandatory, non-parolable life sentences like Bennett's heighten the need for competent representation at the guilt stage and amplify the importance of sound, analytically accurate, and appropriately deferential review of ineffective assistance claims in post-conviction proceedings.

Third, AEDPA's highly deferential standard of review will not hinder the Court's consideration of the issue presented. The Michigan trial court opinion at issue relied almost exclusively on (and quoted at length from) the Michigan Court of Appeals' sufficiency analysis on direct appeal to conclude that Bennett was not prejudiced by counsel's errors. This neatly presents the question of whether sufficiency of the evidence analysis is an acceptable application of *Strickland*'s prejudice prong. Moreover, because both the Michigan trial court and the Sixth Circuit panel reviewing Bennett's habeas petition expressly concluded that trial counsel's performance was objectively deficient, her ineffective assistance of counsel claims turn on whether she was prejudiced by the incompetent representation. As a result, Bennett's challenge to the lower courts' method of analysis gives this Court a clean vehicle for resolving an important, universally applicable question of process and not merely answering an individual question of outcome.

Fourth, this case is an important opportunity for this Court to resolve whether *Strickland* prejudice considers counsel's errors cumulatively or independently. The circuit split is entrenched, the law is well-defined on both sides, and courts and scholars are asking this Court to resolve the issue. *See, e.g.*, Michael C. McLauglin, *It Adds Up: Ineffective Assistance of Counsel and the Cumulative Deficiency Doctrine*, 30 Ga. St. U. L. Rev. 859, 882 (2014); *Williams v. Anderson*, 460 F.3d 789, 819 (6th Cir. 2006). And in a case like Bennett's, with scant evidence against her and multiple, critical instances of deficient representation, the importance of cumulatively assessing *Strickland* prejudice is clear. Granting certiorari would both remedy a

constitutional violation with devastating consequences and clarify an important area of *Strickland* analysis that has produced an inveterate split in the federal courts.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Originally submitted: December 19, 2019
Resubmitted: January [22], 2020