No. 20–7605

IN THE
SUPREME COURT OF THE UNITED STATES

CODY JAMES MARTINEZ,
PETITIONER,

-vs-

STATE OF ARIZONA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW*

1) Did the post-conviction court err by concluding Martinez had not shown he was prejudiced by lead trial counsel's failure to meet with him as often as he would have liked before trial?

2) Did the post-conviction court err by concluding that any alleged deficient performance of counsel affecting the premeditated first-degree murder verdict was non-prejudicial because of the unanimous felony first-degree murder verdict?

3) Was trial counsel deficient in defending against the A.R.S. § 13-703(F)(5) pecuniary gain factor?

4) Has the Arizona Supreme Court rejected the *Strickland* standard by failing to address whether multiple constitutionally-deficient acts can cumulatively amount to prejudice?

*The Petition for Writ of Certiorari filed by Petitioner Cody Martinez includes the erroneous notation "Capital Case." *See* Sup. Ct. R. 14.1(a). Martinez's death sentence was vacated. Pet. App. 8, 16. His resentencing proceedings are currently pending. This petition alleges only claims of ineffective assistance of counsel related to the guilt and aggravation phases. Because Martinez's death sentence will not "be affected by the disposition of the petition," this is not a "Capital Case." Sup. Ct. R. 14.1(a). Although not required to file a brief in opposition to a non-capital case petition, *see* Sup. Ct. R. 15.1, Arizona has chosen to do so.

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STATEMENT OF THE CASE

In June 2003, Martinez and several accomplices attacked Francisco Aguilar during a party in Tucson, Arizona. Pet. App. 17–18. Believing that Aguilar—known as "Cisco"—was a wealthy "baller," the group stole his money and jewelry, and proceeded to beat him. *Id.* at 18. Johnathon Summey-Montaño pointed a shotgun at Aguilar and Martinez hit Aguilar in the head with that shotgun. *Id.* When one of the group members declined to participate in the beating, Martinez threatened to kill him if he did not kick Aguilar. *Id.*

Martinez and Summey-Montaño then bound Aguilar's hands and feet, placed him in the trunk of a car, and drove to his home, which the two men then robbed. *Id.* at 18. When they returned to the car, Martinez demanded that Aguilar tell him "'where's the stuff; where's the shit?'—a reference to 'drugs, money, or whatever.'" *Id.* Martinez then entered the home again and returned with a computer printer. *Id.*

The men tried to leave but their car would not start. *Id.* They pushed the car to various locations, all while Aguilar remained in the trunk. *Id.* Eventually, some acquaintances arrived in a Ford Explorer. *Id.* Martinez and Summey-Montaño led Aguilar from the trunk of the car to the Explorer's cargo space. *Id.* Martinez poked Aguilar with a shotgun when he thought Aguilar was not crawling fast enough. *Id.*

Martinez directed the driver to go to the desert. *Id.* Along the way, the men taunted, mocked and laughed at Aguilar. *Id.* Summey-Montaño stabbed Aguilar in the hand. *Id.* Martinez announced that he planned to kill Aguilar and that he would kill anyone who tried to stop him. *Id.*

When the group arrived at the desert, the men pulled Aguilar from the car and began kicking and stomping on him. *Id.* Martinez demanded that Aguilar, who was begging for his life, march further into the desert and lie down. *Id.* at 18–19. Standing directly over Aguilar, Martinez fired the shotgun but missed and laughed. *Id.* at 19. While Martinez reloaded the shotgun, Summey-Montaño beat Aguilar with a tire iron and stabbed him in the belly. *Id.* Martinez fired the gun again, this time hitting Aguilar in the collarbone area, injuring him. *Id.* Martinez fired another shot into Aguilar's neck, which killed him. *Id.*

Martinez and Summey-Montaño ordered the other men to wipe out the footprints they had left, and they then piled trash onto Aguilar's body. *Id.* Martinez lit the pile on fire. *Id.* They returned to the Explorer and drove away. *Id.*

A nearby Tucson Airport Authority police officer noticed the smoke, saw the Explorer driving from that area, and initiated a traffic stop. *Id.* Martinez told the officer they were coming from a barbeque at "Cisco's." *Id.* During the traffic stop, Tucson firefighters had responded to the fire and reported that a body had been found. *Id.* Martinez was taken into custody. *Id.*

A jury found Martinez guilty of first-degree murder—under both premeditated and felony-murder theories—and kidnapping. *Id.* After finding two aggravating factors, *see* A.R.S. §§ 13–703(F)(5), (F)(6) (2003),[1] the jurors found Martinez's

[1] The Arizona Legislature recently repealed some aggravating factors and renumbered the remainder. *See* Ariz. Sess. Laws 2019, ch. 63, § 1. Respondent cites the versions in effect in 2003, when Martinez killed Aguilar.

mitigation not sufficiently substantial to warrant leniency and sentenced him to death. Pet. App. at 18.

After the Arizona Supreme Court affirmed Martinez's convictions and death sentence on direct appeal, Martinez filed a post-conviction petition for relief alleging ineffective assistance at all stages of trial. *See id.* at 2; 33 *see generally* Def.'s Pet. Post-Conviction Relief, dated 3/31/2014. In January 2015, the post-conviction court ordered an evidentiary hearing primarily on penalty-phase claims, but also the following issues: 1) whether counsel was ineffective for failing to meet with Martinez frequently enough, 2) whether counsel was ineffective for failing to challenge the A.R.S. § 13–703(F)(5) pecuniary-gain factor, and 3) the cumulative prejudicial effect of lead counsel Richard Parrish's purported ineffectiveness. Pet. App. 10; Order, dated 1/27/15. Following the evidentiary hearing, the court granted relief on several of the penalty-phase claims and vacated Martinez's death sentence. Pet. App. 16. The court found the remaining issues raised in the petition were precluded. *Id.* at 10.

Martinez filed a petition for review from the post-conviction court's guilt and aggravation-phase preclusion ruling. *See* Pet. App. 8. The Arizona Supreme Court accepted review, vacated the post-conviction court's preclusion ruling, and remanded Martinez's guilt and aggravation-phase ineffectiveness claims to be considered on the merits. *Id.* Following supplemental briefing, the post-conviction court denied relief on Martinez's guilt and aggravation-phase claims. Pet. App. 2–7. Martinez filed a petition for review to the Arizona Supreme Court. *See* Pet. App. 1. The Arizona Supreme Court denied review. Pet. App. 1. This petition followed.

REASONS FOR DENYING THE WRIT

This Court grants certiorari "only for compelling reasons," Sup. Ct. R. 10, and Martinez has not presented any such reasons. Although Martinez has already been granted partial relief by having his death sentence vacated, he asks this Court to review the post-conviction court's ruling on his guilt and aggravation phase claims. Because the Arizona Supreme Court denied review and issued no opinion, Martinez, as an initial matter, cannot show that Arizona's highest court decided an important federal question in conflict with another state court of last resort, a United States court of appeals, or this Court. *See* Sup. Ct. R. 10(a)–(b). Second, Martinez has not pointed to a decision from any jurisdiction applying a rule that conflicts with the post-conviction court's rulings. *See id*. Third, Martinez has not identified any decision from the post-conviction court that decided an important question of federal law "that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Lastly, as explained more fully below, the post-conviction court's ruling was correct on each of the issues Martinez challenges.

Martinez is effectively asking this Court to do exactly what the post-conviction court has already done: make extensive factual findings and apply a properly-stated rule of law. That he disagrees with the post-conviction court's findings and conclusions does not constitute a compelling reason to grant certiorari. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

I. Martinez's first question does not allege any conflict in law and is nothing more than a disagreement with the post-conviction court's correct factual findings.

In the first issue Martinez presents, he claims his lead trial counsel, Mr. Parrish, acted deficiently and prejudiced his case by failing to meet with him as often as Martinez would have liked prior to trial. Pet. 4–8. According to jail visitation logs, Mr. Parrish spent approximately one hour and eight minutes with Martinez before trial. Pet. 4–5; Pet. App. 3. However, other members of the defense team, including second-chair counsel, defense investigators, and the mitigation specialist, met with Martinez numerous times before trial, developed relationships with him, and ensured that Mr. Parrish had any information learned during those meetings. *See* R.T. 1/30/17, at 100, 141, 145; R.T. 2/1/17, at 100, 125–126; R.T. 2/2/17, at 79–80. The post-conviction court (who presided over both the trial and first post-conviction proceeding) found that even if counsel was deficient, Martinez had failed to demonstrate how he was prejudiced because he could "only speculate that the outcome would have been different if trial counsel spent more time with him." Pet. App. 3; *see Strickland v. Washington*, 466 U.S. 668, 693 (1984) (insufficient for defendant to show "errors had some conceivable effect on the outcome" and instead must show errors "actually had an adverse effect on the defense."); *see also Byrd v. Workman*, 645 F.3d 1159, 1168 (10th Cir. 2011) ("mere speculation" insufficient to provide *Strickland* prejudice); *State v. Leyva*, 389 P.3d 1266, 1273, ¶ 22 (Ariz. Ct. App. 2017) (same).

Martinez does not challenge the post-conviction court's finding that he presented only speculations of prejudice. Pet. 4–8. Martinez does not allege that any portion of

the ruling "decided an important federal question in a way that conflicts with the decision" of any other jurisdiction or that "has not been, but should be, settled by this Court." Pet. 4–8; Sup. Ct. R. 10(a)–(c). Martinez does not even contend the post-conviction court misapplied the decisions of this Court or the Arizona Supreme Court. Pet. 4–8. Martinez's only complaint is that he disagrees with the post-conviction court's factual findings and conclusions, which is not a sufficient reason for this Court to grant certiorari. *See* Sup. Ct. R. 10; *see also Exxon Co. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of very obvious and exceptional showing of error.").

Moreover, the post-conviction court did not err. At trial, testimony and evidence established that Martinez fired a shotgun at Aguilar at least two times at close range, missing once and killing Aguilar with the other. Pet. App. 19. Prior to killing Aguilar, Martinez and the others bound and restrained him and forced him into the trunk of a car. *Id.* During one of the beatings, Martinez took Aguilar's gold bracelet. *Id.* Martinez robbed Aguilar's home, interrogated him about the location of more property, and then reentered the home and took more property. *Id.* On the way to the desert, Martinez stated he "intended to kill Aguilar and anyone who tried to stop him." *Id.*

As to the aggravating factors, the Arizona Supreme Court concluded the evidence sufficiently supported the jury's findings. With regard to the (F)(5) factor that pecuniary gain be a motive for the murder, it stated:

> [The jury] heard substantial evidence that Aguilar was beaten and his jewelry taken. The jury heard that he was

> ferried, while bound, to his own home where more property was taken and was interrogated about the location of other property. In addition, the jury heard evidence that Martinez agreed to "rob" Aguilar. Martinez and his companions took steps throughout the course of the crime to conceal Aguilar from public view: Martinez kept him hidden in the trunk of a car and helped ensure their broken down car was moved to a side street before transferring Aguilar into the Explorer, which prevented the victim from being seen at the gas station. When Aguilar was conducted to the Explorer, Martinez parked the Explorer behind the other car to obscure it from view, and Aguilar was covered with a blanket. Finally, Aguilar's body was burned, an attempt to cover up the kidnapping, the robbery, and the murder itself.

Pet. App. 28–29.

Turning to the jury's finding that the murder was "especially heinous, cruel or depraved," the Arizona Supreme Court explained that "Martinez was a major participant in beating, kidnapping, and slaying Aguilar. Indeed, he pulled the trigger for the shot that ultimately killed Aguilar." *Id.* at 29. Further, "[t]he State conclusively established that Martinez's ongoing physical violence against Aguilar caused Aguilar mental anguish that Martinez knew or should have known would have occurred." *Id.* The jury thus "heard overwhelming evidence that the slaying was especially cruel." *Id.*

Accordingly, overwhelming evidence supports the jury's verdicts for kidnapping and premeditated and felony murder, as well as its findings that the murder was committed for pecuniary gain and was especially cruel, heinous or depraved. *See Strickland*, 466 U.S. at 694; *see also Reed v. Norris*, 195 F.3d 1004, 1006 (8th Cir. 1999) (defendant could not meet burden under *Strickland* in light of overwhelming evidence of guilt); *see also Matney v. Armontrout*, 956 F.2d 824, 827 (8th Cir. 1992) (same); *U.S.*

v. Harden, 846 F.2d 1229, 1231-32 (9th Cir. 1988) (same). Martinez supplies no evidence or argument that more meetings between himself and Mr. Parrish would have changed the outcome, especially where other team members were regularly communicating with Martinez. Pet. 4–8; *see Hill v. Mitchell*, 400 F.3d 308, 324–25 (6th Cir. 2005) (petitioner failed to explain how additional or longer meetings would have led to new or better theories of defense or otherwise affected the outcome); *Bowling v. Parker*, 344 F.3d 487, 506 (6th Cir. 2003) (petitioner failed to show how total of 1 hour of contact time affected outcome of trial). Martinez's speculation that his trial outcome might have been different had Mr. Parrish met with him more frequently is insufficient to show *Strickland* prejudice. *See Strickland*, 466 U.S. at 693; *see also Workman*, 645 F.3d at 1168; *Leyva*, 389 P.3d at 1273, ¶ 22. Thus any opinion from this Court on whether Mr. Parrish was per se deficient based on the amount of time he spent with Martinez pre-trial would be advisory only. *See Princeton University v. Schmid*, 455 U.S. 100, 102 (1982) ("We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us."); *see also Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.").

Martinez points to Mr. Parrish's behavior in other, unrelated cases. Pet. 6–8. But Mr. Parrish's actions in those other cases have no bearing on whether he was ineffective in *this* case or whether those actions prejudiced Martinez. *See Hill v.*

Lockhart, 474 U.S. 52, 59–60 (1985) (prejudice assessment "should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.'" (quoting *Strickland*, 466 U.S. at 695)); *see also Cook v. Schriro*, 538 F.3d 1000, 1016 (9th Cir. 2008) (evidence of counsel's reputation insufficient to establish ineffectiveness); *Jones v. Page*, 76 F.3d 831, 845 n.14 (7th Cir. 1996) (finding counsel's disbarment after defendant's trial for matters unrelated to that trial irrelevant to *Strickland* assessment); *Bonin v. Calderon*, 59 F.3d 815, 828–29 (9th Cir. 1995) (habeas petitioner cannot "transform what should be an inquiry into the reasonableness of counsel's performance at his trial into a general inquisition of defense counsel's record and reputation. . . . [T]the essential inquiry is whether the petitioner received objectively reasonable and conflict-free representation, evidence that the attorney may have erred or acted inappropriately in unrelated cases will normally have little, if any, probative value . . . ."). The post-conviction court correctly determined this information was not relevant to Martinez's claim. Pet. App. 4. In sum, there is simply no reason, let alone a compelling one, for this Court to grant certiorari. *See* Sup. Ct. R. 10.

II. Martinez's claims regarding the "flawed convictions" is unworthy of review because the post-conviction court's ruling does not conflict with that of another court, any opinion from this Court would be advisory only, and the ruling was correct on the merits.

Martinez's second claim is that the post-conviction court erred by relying on the felony-murder verdict to find there was no prejudice for the alleged error affecting the premeditated-murder verdict. Pet. 8–9. In his petition for post-conviction relief, Martinez argued that counsel was ineffective for failing to raise an adequate provocation defense based on his allegation that Aguilar was reputed to have molested

a child, which angered Martinez because he had himself been molested. Pet. 8. Martinez contended that this defense, in turn, would have allowed counsel to "argue more strenuously" to the jury that it should find Martinez guilty of the lesser-included charge of manslaughter. Pet. App. 4. The court rejected this claim, in part, for lack of prejudice because Martinez had unanimously been convicted of both premeditated and felony murder, and felony murder has no lesser-included offenses. Pet. App. 4–5.

To begin, Martinez's petition presents no valid reason on its face for this Court to accept certiorari. Martinez summarily concludes, without explanation, that the post-conviction court's reasoning "twist[ed] the harmless error doctrine." To the extent he is relying on the only two cases he cites, they relate to evidentiary—not ineffective assistance of counsel—issues. *See Brown v. United States*, 411 U.S. 223, 231 (improperly admitted testimony was harmless in light of "overwhelming and largely uncontroverted evidence properly before the jury"); *Schneble v. Florida*, 405 U.S. 427, 430-431 (1972) (erroneously admitted confession of codefendant harmless in light of overwhelming "independent evidence of guilt"). Moreover, those cases ultimately undermine Martinez's claim because, like in *Brown* and *Schneble*, the State presented overwhelming evidence of guilt as to both the felony and premeditated-murder verdicts, as described above. Martinez has not identified how the ruling "decided an important federal question in a way that conflicts with the decision" of any other court, or that "has not been, but should be, settled by this Court." Sup. Ct. R. 10(a)–(c).

Next, Martinez fails to address the post-conviction court's other findings supporting its ruling. First, the court found that a manslaughter instruction based on

the provocation defense was not warranted because "an unsubstantiated rumor alone (i.e. mere words) is insufficient to constitute adequate provocation." Pet. App. 5 (citing *State v. Runningeagle*, 859 P.2d 169, 178 (Ariz. 1993)); *see* A.R.S. § 13-1101(4) ("'Adequate provocation' means conduct or circumstances sufficient to deprive a reasonable person of self-control."). Second, the court found that "even if, hypothetically, [it] did set aside the premeditated murder verdict, Martinez did not successfully argue or present why there would have been a reasonable probability of a not guilty verdict on the felony murder side, if the jury was correctly instructed on felony murder." Pet. App. 4. Martinez has not challenged either of these grounds in his petition. Consequently, any opinion from this Court on the sole finding challenged by Martinez would not change the outcome. *See Princeton University*, 455 U.S. at 102; *see also Herb*, 324 U.S. at 126.

Moreover, Martinez's claim regarding the "flawed" felony-murder verdict is meritless because—as the post-conviction court pointed out—there is no reasonable probability the jurors would have found Martinez not guilty of felony murder if they had been instructed correctly. Pet. App. 4. The Arizona Supreme Court addressed the given instruction's language that "[i]t is enough if the felony and the killing were part of the same series of events." Pet. App. 21. As the court pointed out, the statute no longer includes this language and instead requires that a death occur in the course of and furtherance of the underlying felony. Pet. App. 21; A.R.S. § 13–1105(A)(2). No reasonable juror would have found that Martinez did not kill Aguilar in the course of and in furtherance of his kidnapping. *See State v. Miles*, 918 P.2d 1028, 1033 (Ariz.

1996) ("A death is 'in furtherance' of the underlying felony if the death resulted from an action taken to facilitate the accomplishment of one or more of the predicate felonies."). Martinez killed Aguilar, at least in part, to escape prosecution for the kidnapping offense. *See State v. Burns*, 344 P.3d 303, 323, ¶ 78 (Ariz. 2015) (jury could have found that defendant committed murder to prevent victim from reporting sexual assault and kidnapping); *see also Miles*, 918 P.2d at 1033 (kidnapping and robbery continued until murder, and murder was in furtherance of those offenses, where victim was carjacked, taken into desert, and shot to death and was therefore killed before completion of robbery). Consequently, the post-conviction court did not err. This Court should deny Martinez's request to revisit this ruling.

III. Martinez's third question presents no issues of law and is only a request that this Court revisit the post-conviction court's well-founded factual findings.

Martinez's third claim alleges that trial counsel was ineffective for failing to realize the State had alleged the (F)(5) pecuniary gain aggravator and more strongly rebut that factor during the presentation of evidence in the guilt phase. Pet. 12. While the court acknowledged that Mr. Parrish had "expressed uncertainty" as to whether the (F)(5) aggravator had been alleged, it concluded that he "[n]evertheless . . . competently defended Martinez" and that overwhelming evidence supported the aggravating factor. Pet. App. 6.

Martinez has not identified how this ruling conflicts with that of another court. *See* Sup. Ct. R. 10(a)–(b). Rather, like his previous claims, it focuses entirely on factual disputes already resolved by the court most well-suited to do so. Whether trial counsel

did or did not know that the pecuniary gain factor was being alleged by the State, and whether, if he did not know, there was a reasonable probability it affected the outcome of the trial, are fact-specific inquiries. This Court should deny Martinez's request to revisit the post-conviction court's factual findings. *See* Sup. Ct. R. 10; *see also Exxon Co.*, 517 U.S. at 841.

Moreover, the post-conviction court was correct to deny Martinez relief on this claim. As Martinez concedes, the State correctly alleged the (F)(5) factor before trial. Pet. 20. During trial, Mr. Parrish objected on relevancy grounds to a witness's testimony regarding jewelry that Martinez and Summey-Montaño had stolen from the apartment she shared with Aguilar. *See* R.T. 11/8/05, at 88. When counsel commented that there was "no pecuniary gain allegation," the prosecutor corrected him. *Id.*

Following the close of evidence, Mr. Parrish moved for judgment of acquittal, *see* Ariz. R. Crim. P. 20, arguing that Martinez had not killed Aguilar for pecuniary gain but instead because of Aguilar's alleged act of molestation, combined with the effects of Martinez's drug use. R.T. 11/8/05, 151–55. The trial court denied the motion, acknowledging that while the group may have had two motives for killing Aguilar (robbery and retaliation), robbery needed only be *a* motivating factor to satisfy the (F)(5) factor. *Id.* at 151–55. Mr. Parrish thereafter filed a written motion to preclude the pecuniary gain aggravating factor, which the court denied. R.T. 11/10/05, at 3, 8–9. During closing arguments on the aggravating factors, Mr. Parrish argued against the (F)(5) factor by highlighting evidence that Martinez was under the influence of drugs when he killed Aguilar. *Id.* at 47–52. During a later evidentiary hearing on Martinez's

motion for a new trial, second-chair counsel testified that he and Mr. Parrish were "very much aware" of the pecuniary gain aggravating factor during trial preparation but had mistakenly believed the State had withdrawn it. Mtn. New Trial Tr., dated 8/25/06, at 15–17. Thus, Mr. Parrish's surprise related to the revelation that the State had not withdrawn the aggravating factor, not to the discovery that it had been alleged in the first place. In light of these facts, the post-conviction court was correct that counsel's performance was not deficient.

Further, any effort to defend against the (F)(5) factor with a retaliation motive would have failed. In his petition, Martinez misrepresents and overstates the significance of the necklace presented at trial. Pet. 16–17. Although he asserts that his sentence was predicated at least partially on the allegation that he stole Aguilar's necklace, the evidence at trial established that Summey-Montaño, not Martinez, had stolen Aguilar's necklace. *Id.*; Pet. App. 18. Martinez was accused of taking Aguilar's bracelet. Pet. App. 18. At the first post-conviction hearing, Martinez admitted (consistent with the overwhelming trial evidence) that, when arrested, *he possessed the victim's stolen bracelet and several other items*, all of which supported the pecuniary-gain allegation. R.T. 2/2/17, at 81, 88–90. Counsel's failure to challenge such an insignificant piece of evidence like the necklace was neither deficient nor prejudicial. *See, e.g., Smith v. Puckett*, 907 F.2d 581, 585 n.6 (5th Cir. 1990) (failure to raise meritless claim neither deficient performance nor prejudicial). Martinez's arguments to the contrary, which are peppered with "could haves" and "might haves," *see* Pet. 20–23, are insufficient to prove prejudice, as they do not undermine the evidence showing

a robbery motive (even if other motives also existed). *See, e.g., Workman*, 645 F.3d at 1168; *Leyva*, 389 P.3d 1273, ¶ 22. Certiorari is not warranted on this issue.

IV. Arizona has not rejected the standard set out in *Strickland*.

Martinez's fourth and final issue alleges that Arizona has "rejected the *Strickland* standard of cumulative error." Pet. 21. To begin, the purported "rejection" to which Martinez refers is largely semantic and, at best, unsettled. In 2017, the Arizona Supreme Court discussed the cumulative error doctrine in the ineffective-assistance-of-counsel context. *State v. Pandeli*, 394 P.3d 2, 18, ¶ 69 (Ariz. 2017). It began by noting that it had not yet "recognized the cumulative error doctrine for [ineffective assistance of counsel] claims as it has for prosecutorial misconduct claims" based on "'the general rule that several non-errors and harmless errors cannot add up to one reversible error.'" *Id.* at ¶ 69 (quoting *State v. Hughes*, 969 P.2d 1184, 1191, ¶ 25 (Ariz. 1998)). It then observed that the Ninth Circuit had established "the cumulative effect of deficiencies may support a finding of prejudice, even when no single instance of [ineffectiveness] meets the prejudice standard." *Id.* ¶ 70. Turning to the claims raised by the defendant, the court concluded that because none of counsel's complained-of conduct was deficient, there could be no cumulative error. *Id.* ¶ 71.

The Arizona Supreme Court has not yet confronted a case in which a defendant presented multiple instances of constitutionally-deficient but individually non-prejudicial acts on which to squarely address this issue. Notably, it appears that in practice lower courts have recognized that the cumulative impact of multiple constitutionally-deficient acts can show prejudice. *See, e.g.*, *State v. Skaggs*, No. 2 CA–

CR 2017–0032–PR, 2017 WL 3122267, at *4, ¶ 15 (Ariz. Ct. App. Jul. 21, 2017) (mem.) ("[W]e are required to consider cumulatively the prejudice resulting from counsel's deficient conduct.") (citing *Strickland*, 466 U.S. at 694); *State v. Heinkel*, No. 1 CA–CR 16–0328 PRPC, 2017 WL 2806853, at *2, ¶ 10 (Ariz. Ct. App. June 29, 2017) (mem.) (noting that defendant had failed to "present[] any concrete instances of ineffective assistance of counsel that we could consider cumulatively"); *State v. Holden*, No. 2 CA-CR 2007-0032-PR, 2008 WL 4559872, at *13 n.9 (Ariz. Ct. App. Jan. 8, 2008) (mem.) (acknowledging "controlling jurisprudence" requires courts to consider cumulative prejudicial impact of multiple deficient acts). But given that the Arizona Supreme Court has not yet issued an opinion on the merits of this issue, let alone one that conflicts with a decision of this Court, certiorari is not warranted. Sup. Ct. R. 10(b)–(c).

Further, like in *Pandeli*, even if the doctrine were applied, Martinez cannot show cumulative error occurred, nor has he attempted to in his petition. Pet. 21–25. The errors he perceives are not errors at all for the reasons explained above. Combining multiple instances of adequate, non-prejudicial representation would not have altered the outcome under the cumulative error standard. *See Boyde v. Brown*, 404 F.3d 1159, 1176 (9th Cir. 2005) ("[P]rejudice may result from the cumulative impact of multiple deficiencies.") (internal quotation marks omitted); *see also Fisher v. Angelone*, 163 F.3d 835, 852 & n.9 (4th Cir. 1998) ("[C]umulative-error analysis evaluates only the effect of matters actually determined to be constitutional error, not the cumulative effect of all of counsel's actions deemed deficient."). This is especially true in light of the overwhelming evidence of Martinez's guilt and the jury's aggravation findings. *See*

Strickland, 466 U.S. at 696 ("[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"); *see also Norris*, 195 F.3d at 1006; *Matney*, 956 F.2d at 827; *Harden*, 846 F.2d 1229, 1231-32. Therefore, any ruling this Court might make on this issue would be advisory only. *See Princeton University*, 455 U.S. at 102; *see also Herb*, 324 U.S. at 126.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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