No. 21-6184

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

MARK BITZAN, PETITIONER

VS.

PATTI WACHTENDORF, AND IOWA STATE PENITENTIARY,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE EIGITH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Where the U.S. Court of Appeals for the Eight Circuit (Eighth Circuit) granted permission to file an overlength Petition for Rehearing and then denies the Petition for being overlength; is that a denial of Due Process, Equal Protection of the law, and an Abuse of the Court's discretion?

II. Where the Eighth Circuit denied the Petition for Rehearing as overlength, after the Court already granted permission to file the Petition as overlength, should the Court have provided fair notice that it had rescinded its previous Order and allowed Bitzan a short time extension to file his Petition, but without an enlargement granted?

III. Should the Martinez v. Ryan "exception" apply to ineffective Federal Habeas Counsel? In this case, new evidence was discovered during Federal Habeas proceedings that State Postconviction Counsel could have obtained, but failed to. Once Federal Habeas counsel was appointed, they failed to effectively pursue ineffective assistance of State Postconviction counsel for failing to effectively present the ineffective trial counsel claims. They also failed to pursue the newly discovered evidence, thereby failing to complete the record, and allowed the Habeas Court to rule on an incomplete record.

IV. Should the U.S. Supreme Court reconcile a split between the Courts? Eight U.S. Courts of Appeals, and the Iowa Supreme Court, favor a cumulative review of Strickland prejudice. The Eighth Circuit and two other U.S. Courts of Appeals split with the majority and refuse a cumulative review of Strickland prejudice. In this case, the Monona County District Court and Iowa Court of Appeals found *deficient performance* of trial counsel for 2 issues in each Court during State Postconviction proceedings, but the cumulative effect of all 4 issues together was never properly considered; the Federal Courts refused to review this issue under Eighth Circuit precedent.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mark Bitzan, (Bitzan) an inmate at the Iowa State Penitentiary in Fort Madison, Iowa, proceeding *pro se,* respectfully Petitions this Honorable Court for a Writ of Certiorari to review an Order denying his Petition for Rehearing and Rehearing *En Banc,* by the U.S. Court of Appeals for the Eighth Circuit.

Bitzan requested permission from the Eighth Circuit to file an overlength Petition, which was granted on June 1, 2021. He then filed the overlength Petition on July 7, 2021, which was subsequently denied for being "overlength" in an Order entered by the Eighth Circuit on August 2, 2021.

CITATION TO OPINIONS AND ORDERS BELOW

The United States District Court for the Northern District of Iowa (District Court) denied both Bitzan's *pro se* 28 U.S.C. §2254 Petition for Habeas Corpus and a Certificate of Appealability (COA). See: Bitzan v. Wachtendorf, 2020 U.S. Dist. LEXIS 156312 (Aug. 27, 2020), (Exhibit J; Appx. Pages 20-45).

Appointed Counsel Jennifer Frese submitted an unsuccessful Application for COA in the Eighth Circuit generally arguing that a substantial showing had been made concerning all claims. The Judgment is attached at (Exhibit F, Appx. Page 12).

Frese withdrew as counsel 3 days prior to the Petition for Rehearing filing deadline; the Eighth Circuit granted two time extensions, (1) through May 7, 2021 for Bitzan to proceed *pro se,* and (2) through June 7, 2021. The Orders are attached at (Exhibits D, E; Appx. Pages 8 & 10). The Eighth Circuit granted both a final time extension to July 7, 2021 and permission to submit an overlength Petition; Bitzan filed a timely overlength Petition for Rehearing and Rehearing *En Banc* on July 7, 2021. The Orders and Petition are attached at (Exhibits B, Y, Z; Appx. Pages 4, 129-169, 171-172).

On August 2, 2021, the Eighth Circuit rescinded permission to submit an overlength Petition, and denied Bitzan's timely *pro se* Petition for Rehearing and Rehearing *En Banc* as overlength. The Order is attached at (Exhibit A; Appx. Page 2).

JURISDICTION

August 27, 2020—The U.S. District Court denied Habeas Relief.

March 26, 2021—The Eighth Circuit denied the Application for COA.

June 1, 2021—The Eighth Circuit authorized permission to submit an overlength *pro se* Petition for Rehearing and Rehearing *En Banc.*

August 2, 2021—The Eighth Circuit rescinded permission to submit an overlength *pro se* Petition for Rehearing and denied it as overlength.

This Petition for a Writ of Certiorari is timely filed within ninety days of the Eighth Circuit's August 2, 2021 Judgment. This Court's jurisdiction is invoked under 28 U.S.C. §1257; Jurisdiction may also apply to some issues under 28 U.S.C. §1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS

U.S. Constitution, Amendment V provides:

> "*No person shall be* held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be *deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation." (Italics & emphasis added)

U.S. Constitution, Amendment VI provides:

> "*In all criminal prosecutions, the accused shall enjoy the right* to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the Assistance of Counsel for his defence.*" (Italics & emphasis added) See also: Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)

U.S. Constitution, Amendment XIV provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*" (Italics & emphasis added)

Federal Rule of Appellate Procedure 35(b)(2)(A), states:

> "(2) *Except by the court's permission:* (A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3900 words:" (Italics & emphasis added)

Federal Rule of Appellate Procedure 40(b)(1), states:

> "(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. *Except by the court's permission:* (1) a petition for panel rehearing produced using a computer must not exceed 3900 words:" (Italics & emphasis added)

Eighth Circuit Local Rule 28A(k), states:

> "Motions to File Overlength Briefs. Motions for leave to file overlength briefs will be granted only in extraordinary cases. A motion for permission to file an overlength brief must be submitted at least 7 days prior to the brief's due date.

STATEMENT OF THE CASE

This case began in the Iowa District Court for Monona County, on June 19, 2011, where Mark Bitzan was charged with (Count I), First-Degree Kidnapping, and, (Count II), Second-Degree Sexual Abuse. An Amended Trial Information was filed July 21,

2011, and the jury trial concluded with a guilty verdict on January 17, 2012, for (Count I). The jury also concluded that Bitzan used a weapon during the offense and that he had committed a prior offense. He was sentenced to life in prison without parole. (Exhibits Q, Y; Appx. Pages 69-71, 134-135)

Bitzan unsuccessfully sought Direct Appeal in the Iowa Court of Appeals and Further Review of their denial in the Iowa Supreme Court; Procedendo issued on September 23, 2013. (Exhibits R, S, T, Y; Appx. Pages 73-82, 84, 86-87, 135-137)

On August 11, 2014, Bitzan filed for Postconviction Relief (PCR) in the Iowa District Court for Monona County. Attorney James McGuire entered and amended the petition asserting (12) ways that trial counsel provided ineffective assistance. The State District Court found trial counsel failed to object to the lead investigator's testimony implying Bitzan went on a local rape spree and got away with a separate crime, and that trial counsel failed to consult a medical expert regarding a minute vaginal tear of the victim, but ruled that there was insufficient prejudice, and that the cumulative effect of errors also caused insufficient prejudice. (Exhibits U, Y; Appx. Pages 89-105, 138-141)

Bitzan appealed and the Iowa Court of Appeals found that trial counsel failed to challenge juror 21 who was represented by the Prosecuting Attorney in a current civil litigation; that highly critical expert witness vouching for the victim's truth and credibility occurred; but that prejudice was insufficient, and that the cumulative effect of errors caused insufficient prejudice. (Exhibit V; Appx. Pages 107-120)

Bitzan sought Further Review in the Iowa Supreme Court arguing both Courts failed to properly conduct the prejudice review, and failed to conduct an aggregate or cumulative prejudice review of all 4 claims that were deemed a *deficient performance.* They denied relief. See: Bitzan v. State, 912 N.W.2d 855 (Iowa 2018)

On March 26, 2018, Bitzan filed a Federal Habeas Petition asserting (13) Claims. (Exhibit Y; Appx. Page 141) He fought a prolonged period of litigation concerning the Discovery of a "confidential" record of evidence critical to his ineffective assistance of trial counsel claims that had been set at a security level in the State Court system which prevented access to Bitzan and his defense counsel. (Exhibit Y; Appx. Pages 141-144)

Through this process Bitzan discovered that State PCR Counsel McGuire was unprepared and failed to obtain the complete case file from trial counsel, or to even take steps to obtain these "confidential" records. (Exhibit Y; Appx. Pages 143-144, 147-149)

Bitzan filed a Motion to Compel production of all "confidential" records, and the State replied by requesting counsel for Bitzan. The District Court appointed Jennifer Frese, who failed to adequately communicate, verify the record before the Court, or pursue the "confidential" records, and simply acquiesced to the State's position concerning the scope of relevant evidence. (Exhibit Y; Appx. Pages 144-151)

Frese was also simultaneously representing other clients including the defendant in the high-profile Mollie Tibbits murder trial that President Trump kept commenting on. Frese then submitted an inaccurate and incomplete Brief and Bitzan tried to submit a *pro se* Supplemental Brief which the District Court struck as he had been appointed counsel. On August 27, 2021, the District Court denied Habeas Relief and a COA based on an incomplete, inaccurate, and undeveloped record; an Order that Frese *never* served on Bitzan. (Exhibits J, Y; Appx. Pages 20-45, 145-146, 149-155)

Unknown to Bitzan, Frese filed a timely Notice of Appeal on September 24, 2020, and a successful request to be appointed as counsel in the Eighth Circuit. (Exhibit I; Appx. Page 18) Once Bitzan became aware of what was happening, he filed for new counsel in the Eighth Circuit which was denied, and he appealed to the U.S. Supreme

Court which never received a response. (Exhibits G, Y; Appx. Pages 14, 152-153) Frese then filed an Application for COA which the Eighth Circuit denied specifically stating that their *Judgment* is based on having "[r]eviewed the original file of the district court..." (Exhibits F, Y; Appx. Pages 12, 147, 153)

Bitzan repeatedly attempted to contact Frese seeking her withdrawal, had a legal assistant and his family contact her, and filed an Iowa Attorney Disciplinary Board Complaint; Frese withdrew on April 6, 2021. (Exhibits E, Y; Appx. Pages 10, 147, 153-155) The Eighth Circuit granted permission for Bitzan to file a *pro se* Petition for Rehearing, several time extensions, and permission to submit an overlength Petition by July 7, 2021. (Exhibits B, C, D, Y; Appx. Pages 4, 6, 8, 147, 154)

Bitzan submitted an overlength *pro se* Petition for Rehearing and Rehearing *En Banc* in a timely manner, and after it had been submitted, the Eighth Circuit rescinded permission to submit an overlength Petition and subsequently denied the Petition as overlength. (Exhibits A, Y, Z; Appx. Pages 2, 129-169, 171-172)

I. This case presents the question of whether it violates Bitzan's rights to Due Process and Equal Protection when a Federal Court grants permission to do a particular act, he complies with the Order, and is then denied relief for following the Order that authorized the act. Moreover, the permission that the Court granted which compelled Bitzan to perform the act, was rescinded after the act was completed, with no advance warning, as though the permission had never been granted. Is it constitutionally acceptable for a Court to change an Order capriciously, at will, without fair notice?

II. This case presents the question of whether the Martinez v. Ryan "cause" and "prejudice" exception applies to ineffective assistance of Federal Habeas counsel. If State PCR counsel fails to properly present ineffective trial counsel claims during State

proceedings in violation of Strickland; does it violate Due Process and Equal Protection, if Federal Habeas counsel also fails to properly bring the same claims in Federal proceedings, especially when newly discovered evidence has only just become available?

III. This case presents the question of whether ineffective assistance of counsel claims under Strickland should properly accumulate the prejudice of counsel's *deficient performance* in the aggregate. Where multiple ineffective assistance of counsel claims are asserted during each respective phase of the proceedings, i.e., pretrial, jury selection, or merits phase; should the -prejudice of the claims accumulate under each phase? Or, should prejudice accumulate separately for all claims where a *deficient performance* is found, no matter which phase of trial they occurred?

REASONS TO GRANT THE WRIT

I. THE *EIGHTH CIRCUIT'S* AUGUST 2, 2021 ORDER DENIES *DUE PROCESS,* DENIES *EQUAL PROTECTION,* FAILS TO PROVIDE *FAIR NOTICE* & CONFLICTS WITH SUPREME COURT PRECEDENT.

i. The fundamental requirement of *Due Process* is the opportunity to be heard at a meaningful time and in a meaningful manner. Matthews v. Eldridge, 424 U.S. 319 at 333, 96 S. Ct. 893, 47 L. Ed. 2d 18, (1976) Bitzan has a right to *Due Process* and a fair hearing on his potentially meritorious Postconviction Relief claims of ineffective assistance of counsel and actual innocence.

ii. On May, 28, 2021, Bitzan filed two timely Motions in the Eighth Circuit; (1) Seeking an extension of time through July 7, 2021 to file his intended Petition for Rehearing and Rehearing *En Banc;* and (2) Asking for permission to file an enlarged Petition, exceeding the word-limit, because "the present situation is rare and extraordinary and to apprise the Court of all necessary facts and resulting prejudice

requires an increased word-limit of 7,000 words or at least a substantial increase as determined by the Court." (Exhibits AA, BB; Appx. Pages 174-176, 178-180)

Under the Federal Rules of Appellate Procedure, Bitzan's Petition for Rehearing and Rehearing *En Banc* is considered a single collective document. Fed. R. App. P. 35(b)(3) As such, an overlength Petition is allowed to be filed "by the court's permission..." See: Fed. R. App. P. 35(b)(2)(A); and Fed. R. App. P. 40(b)(1). The Eighth Circuit Local Rules also require a motion for leave to file an overlength brief to be submitted at least 7 days prior to the filing deadline and they will grant such a request only "in extraordinary cases." Eighth Circuit Local Rule 28A(k).

On June 1, 2021, the Eighth Circuit granted "an extension of time until July 7, 2021, to file a petition for rehearing" and ruled that "[a]ppellant's motion to file an overlength petition for rehearing is also granted." (Exhibit B; Appx. Page 4)

On July 7, 2021, Bitzan handed his Petition for Rehearing and Rehearing *En Banc* to a corrections officer for mailing; it was received by the Eighth Circuit on July 9, 2021, and timely filed under the mailbox rule. (Exhibit Y; Appx. Pages 129-169)

On August 2, 2021, the Eight Circuit entered an Order stating "The motion to file an overlength petition for rehearing is denied. The petition for rehearing is denied as overlength." (Exhibit A; Appx. Page 2)

Bitzan complied with all applicable rules! He filed a motion for permission to submit an overlength Petition on May 28, 2021, *nine* days prior to the June 7, 2021 filing deadline, and simultaneously requested an extension of time through July 7, 2021, which pushed the filing deadline *forty* days beyond the date of the request to submit an overlength Petition. Additionally, the Court granted the request to submit an overlength Petition *without* defining the specific word-limit as requested in the motion.

Bitzan's overlength Petition was submitted within a reasonable word-limit of the Court's unclarified discretion yet it was ultimately denied for complying with the Order itself! Had he known the Court would change its Order, Bitzan would have kept the Petition under the word-limit in the Federal Rules, but he considered that the Court had granted permission to exceed the word-limit and submitted the Petition accordingly.

It's inexplicable that the Eighth Circuit denied the Petition because it was overlength, and then stated that the request to file an overlength Petition was denied, despite the fact that the very same Court had just previously granted permission to file an overlength Petition. If the Eighth Circuit was intent on denying permission for Bitzan to submit and overlength Petition they should have provided fair notice that they changed the Order, rescinded permission to submit an overlength Petition, and then allow a short time extension to comply with the Court's new Orders.

Bitzan is serving a life sentence for crimes that he did not commit. After a lengthy battle he was finally able to have appointed Counsel Jennifer Frese removed from his Federal Habeas case and located new evidence that could potentially exonerate him. In an effort to present this new evidence which both former counsels at the State and Federal levels failed to even seek out, the Eighth Circuit granted him permission to file his crucial *pro se* Petition for Rehearing and Rehearing *En Banc*. The Court even granted him permission to file an overlength Petition, which he complied with.

This makes no sense and is a deprivation of Bitzan's constitutional right to have his potentially meritorious PCR claims fairly heard on the merits. Bitzan timely complied and followed the Court's Orders, and for reasons unknown, he was penalized for complying with the Court's very Orders. Bitzan is not asking for anything that the Court did not already grant him.

II. THE *MARTINEZ V. RYAN* 'CAUSE' AND 'PREJUDICE' EXCEPTION MUST SPECIFICALLY RECOGNIZE AND INCLUDE INEFFECTIVE ASSISTANCE OF, OR NO ASSISTANCE OF, FEDERAL HABEAS CORPUS COUNSEL.

i. Before a Federal Court can hear a State prisoner's 28 U.S.C. §2254 Habeas Corpus Claim, it must be exhausted in any available State Postconviction proceedings or the Claim will become procedurally defaulted and the Federal Court precluded from hearing it. Coleman v. Thompson, 501 U.S. 722 (1991)

However, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 1320, 182 L.Ed.2d 272 (2012) A procedurally defaulted claim may be heard if there was "cause" to excuse the failure to raise it, and the petitioner would be "prejudiced" if the Court declined to hear it. Id. 132 S. Ct. at 1315. For a claim to be "substantial," it must have "some merit" which requires a basic showing that it "was debatable among jurists of reason." Miller-El v. Cockrell, 537 U.S. 322 (2003) As it relates to cause, it must be shown that counsel during the State collateral-review-proceeding was ineffective under Strickland v. Washington, 466 U.S. 668 (1984).

ii. In the present case, Iowa State law specifically requires all ineffective assistance of trial counsel claims to be raised in State PCR proceedings. Iowa Code §814.7. (Exhibit Y; Appx. Pages 164-165) The Iowa statute's plain language makes it impossible to present an ineffective assistance of trial counsel claim on Direct Review which satisfies the procedural aspect of the Martinez exception.

Turning to the "substantial" and "some merit" prong, Bitzan had numerous extraordinarily strong and legitimate ineffective assistance of trial counsel claims. (Exhibit Y; Appx. Pages 138-141) State PCR Counsel McGuire was also aware that the State withheld a "confidential" file during State PCR proceedings but made little effort to obtain these documents, many of which are crucial to Bitzan's ineffective assistance of trial counsel and actual innocence claims. (Exhibit Y; Appx. Pages 147-149)

McGuire failed to obtain the complete file from trial counsel, failed to file for *in camera review*, and failed to request that the security level be lowered in order to obtain the "confidential" files, which the State did successfully during the Federal proceedings. (Exhibit Y; Appx. Pages 143-144) Had McGuire filed such a Motion, the request would have likely been granted and the files produced. As such, McGuire was unprepared for the State PCR Hearing and unable to present significant crucial evidence in support of Bitzan's actual innocence and ineffective assistance of trial counsel claims.

Once Bitzan filed the Federal Habeas Petition, appointed Counsel Jennifer Frese also failed to pursue the "confidential" documents, failed to verify the accuracy of the documents that were actually provided to the District Court, and as a result, she filed a woefully incomplete and inaccurate Brief based on an incomplete record upon which Bitzan's Habeas Petition and COA were denied. (Exhibit Y; Appx Pages 141-149)

Also, Frese failed to communicate with Bitzan about crucial matters, failed to provide him with copies of the Briefs she filed, failed to provide him with the Court's subsequent Orders, and accordingly he was unable to file necessary replies or confer with Frese about necessary responses. (Exhibit Y; Appx. Pages 150-154)

This was largely due to Frese handling numerous cases simultaneously with Bitzan's case, including the Mollie Tibbits murder case. *Id.* Despite many attempts to

contact her to file necessary responses or remove herself from the case, she simply didn't respond, and Bitzan's *pro se* attempts of filing with the Court were categorically stricken as Frese was appointed as his counsel. (Exhibit Y; Appx. Pages 152-155) Most egregious was her agreement with the State that Bitzan didn't need the missing records.

Bitzan never received full and adequate consideration of all his potentially meritorious PCR claims to which he was entitled during the reviews that occurred during both State PCR proceedings and Federal Habeas Corpus Review. Bitzan's ineffective assistance of trial counsel claims should have been, and could have been, effectively presented during both State PCR proceedings and Federal Habeas Corpus Review, but neither counsel at either level fully and adequately presented these claims. The result was extremely prejudicial to Bitzan's entire Postconviction review at all levels.

Because the District Court in denying both Habeas Relief and a COA, didn't have the complete record before it—(or the record that was before the District Court was incomplete, (Exhibit Y; Appx. Pages 147-149))—Bitzan was denied a full and adequate hearing and denied his right to Due Process. This includes the Eighth Circuit's silent denial of his COA, which tacitly relied on the District Court's denial based on an incomplete and undeveloped record. (Exhibit F; Appx. Page 12)

iii. The recent decision in Harris v. Wallace, 984 F.3d 641 (8th Cir. 2021) is on the right pathway, where the Eighth Circuit cited the District Court's failure to recognize the *pro se* Habeas Petitioner's ineffective assistance of counsel claim and remanded the case back to the District Court to hold an evidentiary hearing to determine whether the Martinez exception applied and would properly exclude procedural default.

Bitzan's case takes the next step as *both* his State PCR and Federal Habeas Attorneys failed to adequately develop the record which prevented a review on the

merits of the ineffective assistance of trial counsel claims and resulted in a denial of *both* the Habeas Petition and COA. Had counsel at either level provided effective assistance, the record would have been developed, the record provided would have been identified as incomplete, steps would have been taken to complete the record, and the ineffective assistance of trial counsel claims would have resulted in a more favorable outcome.

iv. In particular, we must consider whether Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L.Ed.2d 272 (2012), and Trevino v. Thaler, 569 U.S. 413, 133 S. Ct. 1911, 185 L.Ed.2d 1044 (2013), should not be limited only to State Postconviction Counsel but held to include ineffective Habeas Counsel, or, no counsel under 28 U.S.C. §2254, or, similar petitions by Federal prisoners under 28 U.S.C. §2255, under limited circumstances, so as to apply the "exception" equally to ineffective assistance of Postconviction Counsel at both the State level and during Federal Habeas proceedings.

If Martinez and Trevino have an animating principle, it's that a prisoner must be afforded at least one opportunity to present their ineffective assistance of trial counsel claims, *with the assistance of effective counsel.* Martinez pointed out that "if counsel's errors in an initial-review-collateral-proceeding do not establish cause to excuse [a] procedural default in a federal habeas proceeding, no court will review the prisoner's claims." Id. 132 S. Ct. at 1316. Trevino reiterated that "failure to consider a lawyer's 'ineffectiveness' during an initial-review-collateral-proceeding as a potential 'cause' for excusing a procedural default will deprive the defendant of any opportunity at all for review of an ineffective-assistance-of-trial-counsel claim." Id. 133 S. Ct. at 1921.

In Bitzan's case, if one agrees that Frese was ineffective in failing to research and attach the supporting newly discovered evidence of Bitzan's ineffectiveness claims to the Habeas Petition, Bitzan will have completed his journey through the *entire* Court system

without ever having had a chance to present a colorable ineffective assistance of trial counsel claim to a Court with the aid of an effective lawyer, which seems to be the exact problem Martinez and Trevino sought to remedy.

Whether the concerns that motivated Martinez and Trevino apply equally to Postconviction procedures of State prisoners who have ineffective counsel that was appointed during Federal Habeas Review, is a question worth examining. Like the State systems Martinez and Trevino discussed, the Federal system discourages ineffective trial counsel claims on direct appeal. See: U.S. v. Mathison, 760 F.3d at 831 (8th Cir. 2014)

As such, Bitzan's 28 U.S.C. §2254 Habeas Petition was his first opportunity to bring an ineffective assistance of trial counsel claim. *Martinez* was clear that Habeas review for similarly situated prisoners convicted in State Court shouldn't be foreclosed unless they were represented by an effective attorney in bringing their ineffectiveness claims. Id. 132 S. Ct. at 1317 ("To present a claim of ineffective assistance at trial in accordance with the State's procedures...a prisoner likely needs an effective attorney.") Bitzan was denied effective assistance of counsel at *both* the State and Federal levels which violates his right to Due Process and Equal Protection, and requires a remand to the District Court to develop the record and present the ineffective trial counsel claims.

III. THE SPLIT BETWEEN U.S COURTS OF APPEALS (AND THE EIGHTH CIRCUIT & IOWA SUPREME COURT) MUST BE RECONCILED TO RECOGNIZE CUMULATIVE ERROR REVIEW OF *STRICKLAND* PREJUDICE DURING POST-CONVICTION *HABEAS* CORPUS PROCEEDINGS AS A CONSTITUTIONAL CLAIM.

i. The U.S. Supreme Court has *never* expressly accepted or rejected cumulative error review of ineffective assistance of counsel claims in the Federal Habeas context.

ii. In the context of Strickland's two-prong analysis which requires both "deficient performance" and "prejudice" to prevail, cumulative error analysis of ineffective assistance claims might take the following forms:

> (1) Consideration of all of counsel's alleged errors to determine whether their cumulative effect was deficient performance;
> (2) Consideration of ostensibly separate ineffective assistance claims as different facets of the *same* claim, such that they may be considered in the aggregate to determine whether deficiencies of counsel found by the reviewing court caused sufficient prejudice;
> (3) Consideration of all of counsel's alleged errors to determine whether their cumulative effect was prejudicial, whether or not those errors were found to constitute deficient performance;
> (4) Consideration of all errors of counsel actually found to be deficient performance to determine whether their cumulative effect was sufficiently prejudicial. Id. 466 U.S. at 687-88, 697.

iii. As to whether all of counsel's alleged errors may be considered to determine if their cumulative effect was *deficient performance*, the question is whether individual decisions of counsel that were not unreasonable in isolation could constitue deficient performance when considered cumulatively or in the aggregate. Id. 466 U.S. at 688 (holding that, to establish deficient performance, a person challenging a conviction must show "counsel's representation fell below an objective standard of reasonableness"). Cumulative determination of *deficient performance* alone cannot provide a basis for relief because prejudice must also be proved. Id. 466 U.S. at 687-688, 697.

iv. In Strickland, the Supreme Court considered Washington's ineffective counsel claims as a *single* multifaceted claim, Id. 466 U.S. at 675, and described that his State petition presented a *single* claim of "ineffective assistance at the sentencing proceeding," consisting of failure "in six respects." Id. The Supreme Court also noted during Federal Habeas Corpus that Washington "advanced numerous grounds for relief, among them

ineffective assistance of counsel based on the same errors, except for failure to move for a continuance, as those he had identified in State Court." Id. at 678.

They also noted the Federal District Court "held an evidentiary hearing to inquire into trial counsel's efforts to investigate and to present mitigating circumstances," Id. at 679, and the Federal District Court rejected the ineffective assistance claim stating that "there does not appear to be a likelihood, or even a significant possibility, that any errors of trial counsel had affected the outcome of the sentencing proceeding." Thus, even the Federal Habeas Courts perceived the alleged errors of Washington's counsel in the sentencing proceeding as a *single*, multifaceted ineffective counsel claim. Id.

v. Whether all of counsel's alleged errors may be considered in the aggregate to determine the cumulative effect of prejudice is a question worth examining in pursuit of Fundamental Fairness because it is the Animating Principle of the Sixth Amendment right to effective assistance of counsel. Id. 466 U.S. at 696. However, this will certainly require a balance with the concerns of finality in criminal proceedings.

Such a balanced review could be defined by limiting the aggregate review to ineffective assistance of counsel as a single multifaceted claim asserted for relief during one single phase of proceedings, i.e., pretrial; jury selection; merits; mitigation; or sentencing. The reviewing Court should make the determination of all the ways in which counsel's conduct has been challenged under each respective phase, and determine prejudice in an aggregate, cumulative manner under each individual phase.

Or, perhaps, even more balanced and equitable, we must consider ineffective counsel claims which have been asserted for relief during multiple phases of proceedings, but only where counsel's conduct has been deemed *deficient performance,* or has fallen below an objective standard of reasonableness, during only pretrial, jury

selection, and/or trial proceedings, to be considered for a cumulative determination of prejudice in the aggregate when linked by a common thread.

Anything less risks a scenario where the overall conduct of counsel falls below an objective standard of reasonableness violating Fundamental Fairness, but where the review was conducted of each way that counsel's assistance was challenged, as an individual claim, and where each way is deemed individually insufficient to overturn the conviction, and such a conviction is allowed to stand.

Whether this be coined "cumulative error review" or another term, a nuance in words shouldn't provide a basis to deny the right to be heard at a meaningful time and in a meaningful manner. See: 424 U.S. at 333. As such, all pre-trial and trial errors in which a reviewing Court has concluded a *deficient performance* has occurred, and which are linked by a common thread, must be held to constitute ineffective assistance of counsel as if they are a single claim, under which *all* Courts must collectively assess prejudice in the aggregate when determining Strickland prejudice—otherwise we forfeit a meaningful review that truly upholds the principle of Fundamental Fairness.

vi. The Eighth Circuit would reject any of these forms of cumulative error review, where it has explicitly rejected cumulative consideration of ineffective assistance claims to determine prejudice. See: U.S. v. Robinson, 301 F.3d 923, 925 (8th Cir. 2002) (citing Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir.), cert. denied, 519 U.S. 968, 117 S. Ct. 395, 136 L. Ed. 2d 310 (1996)) ("the numerosity of the alleged deficiencies does not demonstrate by itself the necessity for *habeas* relief."); See also: Worthington v. Roper, 631 F.3d 487, 506 n. 12 (8th Cir. 2011) (expressly foreclosing consideration of all of counsel's alleged errors whether or not the errors were found to constitute deficient performance to determine whether their cumulative effect was prejudicial)

The Eighth Circuit has also foreclosed a review on the cumulative effect of all errors of counsel actually found to be *deficient performance*. See: Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2005) (holding that accumulating prejudice from multiple ineffective counsel claims during *habeas* review is an "erroneous interpretation of Supreme Court precedent"; that it "contradicts Eighth Circuit precedent," and that "a *habeas* petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test.")

The Eighth Circuit fails to recognize that several performance deficiencies which individually do not result in Strickland prejudice could cumulatively cause Strickland prejudice—that is, generate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different—and thus warrant relief, because they satisfy both prongs of Strickland. Id. 466 U.S. at 694.

vii. The U.S. District Court in Bitzan's case outright refused to review this issue, citing the above Eighth Circuit precedent for authority. (Exhibit J; Appx. Pages 43-44) However, this case presents a scenario where two different State Courts during State Postconviction review determined that trial counsel breached an essential duty in two different ways in each Court, but that prejudice is insufficient both individually and cumulatively to overcome the Strickland prejudice prong. Neither State Court considered the totality of all four issues, nor did they consider if they have a common thread that links them when making their cumulative error analysis, and they denied relief stating Bitzan failed to establish sufficient prejudice.

viii. The Supreme Court should use 'Supervisory Power' to administer the Federal Courts, reconcile a split in the Circuit Courts of Appeals, and reconcile the split between the Eighth Circuit and the Iowa Supreme Court.

A. The Split within the United States Courts of Appeals.

As shown above, the Eighth Circuit affirmatively rejects any type of aggregate or cumulative effect of prejudice analysis from multiple claims of ineffective counsel as a claim for *habeas* review.

Two other U.S. Courts of Appeals have similar holdings:

- 4th Circuit - Fisher v. Angelone, 163 F.3d 835, at 852 (4th Cir. 1989) ("[I]t has long been the practice of this Court to individually assess claims under [Strickland].")
- 5th Circuit - Westley v. Johnson, 83 F.3d 714, at 725 (5th Cir. 1996) (noting that "[m]eritless claims or claims that are not prejudicial cannot be cumulated, regardless of the total number raised")

At least four claims were found prejudicial in Bitzan's case by lower Courts during both the pretrial and trial phases which should have been properly reviewed to determine whether they amount in the aggregate, to Strickland prejudice. He's not asserting that meritless claims must be accumulated in a way to inequitably overturn a conviction. In fact, eight U.S. Courts of Appeals favor an interpretation of aggregate or cumulative error review concerning Strickland prejudice in line with Bitzan's position.

- First Circuit - Dugas v. Coplan, 428 F.3d 317, 335 (1st Cir. 2005) (quoting Kubat v. Thieret, 867 F.2d 351, 370 (7th Cir. 1989) stating Strickland "clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced")
- Second Circuit - Gersten v. Senekowski, 426 F.3d 588, 611 (2nd Cir. 2005) ("In evaluating prejudice, we look to the cumulative effect of all of counsel's unprofessional errors.")
- Third Circuit - Moore v. Sec'y, Pa. Dep't of Corr., 457 F. App's 170, 181 (3rd Cir. 2012) ("Under Strickland's clear mandate, the prejudice of these errors assessed cumulatively.")
- Sixth Circuit - Mackey v. Russell, 148 F. App'x 355, 365 (6th Cir. 2005) ("[T]he Strickland test requires that prejudice be evaluated in light of the cumulative effect of all constitutionally infirm actions by counsel.")

- Seventh Circuit - Hough v. Anderson, 272 F.3d 878, 891 n.3 (7th Cir. 2001) (stating that "prejudice may be based on the cumulative effect of multiple errors")
- Ninth Circuit - Pizzuto v. Arave, 385 F.3d 1247, 1260 (9th Cir. 2004) ("[I]ndividual deficiencies in representation which may not by themselves meet the Strickland standard may, when considered cumulatively, constitute sufficient prejudice to justify issuing the writ.")
- Tenth Circuit - Hooks v. Workman, 689 F.3d 1148, 1188 (10th Cir. 2012) (applying a cumulative prejudice approach)
- Eleventh Circuit - Evans v. Sec'y, Fla. Dep't of Corr., 699 F.3d 1249, 1269 (11th Cir. 2012) (stating that the prejudice inquiry "should be a cumulative one")

B. The Split between Eighth Circuit and Iowa Supreme Court.

The Eighth Circuit's holding conflicts with the Iowa Supreme Court's holding that was established in Schrier v. State, 347 N.W.2d 657, 668 (Iowa 1984), where the Iowa Supreme Court reviewed six ineffective assistance of trial counsel claims, stating that they "have reviewed the effect of the various claims both individually and cumulatively."

The Iowa Supreme Court later reiterated this position stating, "[i]n other words, if a claimant raises multiple claims of ineffective assistance of counsel, the cumulative prejudice from those individual claims should be properly assessed under the prejudice prong of Strickland. The court should look at the cumulative effect of the prejudice arising from all the claims." State v. Clay, 824 N.W. 2d 488, 500-502 (Iowa 2012)

ix. This honorable Court should administer the Federal Courts to recognize the cumulative effect of the errors that are deemed a *deficient performance* as a constitutional claim worthy of review in all cases where ineffective assistance of counsel has been asserted for relief in more than one way or claim. The Supreme Court should make this decision and remand Bitzan's case back to the U.S. District Court for a decision on the merits of the issues.

CONCLUSION

i. For the foregoing reasons, Petitioner Mark Bitzan respectfully requests that the Supreme Court issue a Writ of Certiorari to review the Judgment of the Eighth Circuit Court of Appeals, reverse its decision to deny Bitzan's previously granted permission to file an overlength Petition, and *Order* the Eighth Circuit to consider his Petition on the merits. Alternatively, Bitzan should have been provided fair notice that the permission to file an overlength Petition was somehow rescinded (he received no notice at all), and he must be allowed to now file his Petition for Rehearing *En Banc* staying within the established word-limit.

ii. A ruling should be entered with language that specifically includes the ineffective assistance of Federal Habeas Counsel as an exception to procedural default under Martinez v. Ryan and Bitzan's case should be remanded to the Eighth Circuit for a determination upon the merits of this issue.

iii. The Supreme Court should administer the Federal Courts, reconcile a split between U.S. Courts of Appeals—(and between the Eighth Circuit and the Iowa Supreme Court)—and define a specific framework to consider and determine the cumulative effect of ineffective assistance of counsel errors.

WHEREFORE, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Dated: October 31, , 2021

Signed: Mark Bitzan

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