No. _____

IN THE
Supreme Court of the United States

DANNY LEE JONES,
Petitioner,

vs.

RYAN THORNELL, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, REHABILITATION & REENTRY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI CAPITAL CASE

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****CAPITAL CASE****

QUESTION PRESENTED

After a panel of Ninth Circuit Court of Appeals granted Danny Lee Jones habeas relief finding that his Sixth Amendment right to the effective-assistance-of-counsel was violated at his 1993 capital sentencing proceeding when his trial lawyer failed to secure a defense mental health expert (Claim 1) and failed to seek neurological and neuropsychological testing before sentencing (Claim 2), this Court reversed. *Thornell v. Jones*, 602 U.S. 154 (2024). In so doing, this Court held that Jones failed to demonstrate that his trial lawyer's failures at issue in Claims 1 and 2 prejudiced him within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984).

However, this Court's decision in *Jones* only addressed ineffective-assistance-of counsel Claims 1 and 2 and did not address Jones's remaining certified penalty phase ineffective-assistance-of-counsel claim, certified Claim 3; nor did *Jones* address whether *Strickland* requires a cumulative assessment of prejudice—a question this Court has never answered but which has divided the lower state and federal courts. The Second, Seventh, Ninth, and Tenth Circuits all recognize and apply a cumulative prejudice analysis when considering ineffective-assistance-of-counsel claims. The Fourth and Eighth Circuits do not. Meanwhile, 26 states assess prejudice under *Strickland* cumulatively, while six states do not. In the remaining states, the highest state courts of last resort have yet to address the question. *Jones* did not address this issue because the Ninth Circuit never reached it. *Jones v. Ryan*, 52 F.4th 1104, 1137 (9th Cir. 2022) ("Because we have determined that Jones is entitled to relief and resentencing on the basis of Claims 1 and 2, . . . we need not reach the merits of any of Jones's other claims"), *rev'd sub nom. Jones*, 602 U.S. 154.

On remand from this Court, the Ninth Circuit affirmed the district court judgment "[p]ursuant to the Supreme Court's opinion" in *Jones* without further review. *Jones v. Ryan*, 106 F.4th 1010 (9th Cir. July 10, 2024).

This petition presents the following question:

> Whether the Sixth Amendment requires a court reviewing an ineffective-assistance-of-counsel claim to consider the cumulative prejudice stemming from the totality of trial counsel's deficiencies under *Strickland v. Washington*, 466 U.S. 668 (1984).

PARTIES TO THE PROCEEDING

In the proceedings below, Danny Lee Jones was the petitioner/appellant and Ryan Thornell was the defendant/appellee. Neither party is a corporation.

RELATED PROCEEDINGS

U.S. Supreme Court

Thornell v. Jones, 602 U.S. 154 (2024) (reversing court of appeals' grant of habeas relief)

Ryan v. Jones, 563 U.S. 932 (2011) (mem.) (granting petition for writ of certiorari, vacating the court of appeals' grant of habeas relief, and remanding for further consideration in light of *Cullen v. Pinholster*, 563 U.S. 170 (2011)

U.S. Court of Appeals for the Ninth Circuit

Jones v. Thornell, No. 18-99005 (9th Cir. Dec. 10, 2024) (denying petition for panel rehearing)

Jones v. Thornell, No. 18-99005 (9th Cir. July 10, 2024) (affirming district court judgment denying habeas relief pursuant to *Thornell v. Jones*, 602 U.S. 154 (2024))

Jones v. Ryan, No. 18-99005 (9th Cir. Nov. 7, 2022) (reversing district court judgment denying habeas relief)

Jones v. Ryan, No. 07-99000 (9th Cir. Oct. 2, 2009) (reversing district court judgment denying habeas relief)

United States District Court for the District of Arizona

Jones v. Ryan, No. CV-01-00384-PHX-SRB (D. Ariz. May 24, 2018) (denying habeas relief on remand from the court of appeals)

Jones v. Schriro, No. CV-01-00384-PHX-SRB (D. Ariz. Sept. 1, 2006) (denying petition for writ of habeas corpus)

Arizona Supreme Court

State v. Jones, No. CR-00-0512-PC (order denying petition for review of lower court's order denying postconviction relief filed on Feb. 15, 2001)

State v. Jones, No. CR-93-0541-AP917 P.2d 200 (affirming convictions and death sentence on direct appeal filed on May 7, 2006)

Superior Court of Arizona in and for the County of Mohave

State v. Jones, No. CR-14141 (judgment of guilt and sentences entered Dec. 9, 1993

State v. Jones, No. CR-14141 (order denying postconviction relief filed on May 23, 2000)

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PETITION FOR A WRIT OF CERTIORARI

Danny Lee Jones is on Arizona's death row and respectfully petitions this Court for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals affirming the district court's judgment denying habeas relief "pursuant to the Supreme Court's opinion" *in Thornell v. Jones*, 602 U.S. 154 (2024), without assessing the cumulative prejudice stemming from the totality of trial counsel's penalty-phase deficiencies which the Sixth Amendment required the court of appeals to consider under *Strickland v. Washington*, 466 U.S. 668 (1984), and which *Jones* neither addressed nor dispositively resolved.

Jones reversed the court of appeals' grant of habeas relief on two out of the four certified ineffective-assistance-of-counsel ("IAC") claims that Jones raised on appeal stemming from his trial lawyer's penalty phase deficiencies at his 1993 capital sentencing proceeding. *See* App. 4 ("Because we have determined that Jones is entitled to relief and resentencing on the basis of Claims 1 and 2, . . . we need not and do not reach the merits of any of Jones's other claims"). Since not all of Jones's penalty-phase IAC claims were before this Court in *Jones*, that decision neither addressed nor adjudicated adversely the cumulative prejudice under *Strickland* resulting from the combined instances of trial counsel's deficient performance, inclusive of Jones's appellate IAC Claims 1, 2, 3, and 7.

This Court's review is needed to resolve whether the Sixth Amendment required the court of appeals to assess the cumulative impact of all the deficiencies in trial counsel's performance, and whether those cumulated errors rendered Jones's sentencing proceeding fundamentally unfair even though the discrete instances of

trial counsel's deficiencies addressed by this Court in *Jones* were inadequate by themselves to establish prejudice under *Strickland*.

OPINIONS BELOW

The court of appeals' per curiam decision affirming the district court's denial of habeas relief is reported as *Jones v. Ryan*, 106 F.4th 1010 (9th Cir. 2024). App. 116–18. The court of appeals' decision denying Jones's petition for panel rehearing is unreported. App. 119. The court of appeals' decision reversing and remanding the district court's denial of habeas relief is reported as *Jones v. Ryan*, 52 F.4th 1104 (9th Cir. 2022), *rev'd sub nom. Thornell v. Jones*, 144 S. Ct. 1302 (2024). App. 1–115.

JURISDICTION

The court of appeals affirmed the district court's judgment denying habeas relief in a per curiam opinion on July 10, 2024. App. 116–18. The court denied a timely petition for rehearing on December 10, 2026. App. 119. On March 3, 2025, the Honorable Justice Kagan granted Jones's application to extend the time within which to file a petition for a writ of certiorari up to and including May 9, 2025.

This Court has jurisdiction under 28 U.S.C. §1254(1), which grants it authority to review decisions of the United States Courts of Appeal by writ of certiorari.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

U.S. Const. amend. XIV:

> "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 . . . 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."

STATEMENT OF THE CASE

I. Introduction

This petition arises from a conflict in the lower state and federal courts over whether the Sixth Amendment requires a court reviewing IAC claims under *Strickland* to assess the cumulative prejudice stemming from the totality of trial counsel's errors in a given case. Despite guiding language in *Strickland* that the "ultimate focus" of the prejudice inquiry "must be on the fundamental fairness of the proceeding whose result is being challenged," 466 U.S. at 696, whether a reviewing court must cumulatively assess attorney errors in determining prejudice remains an outstanding question this Court should resolve. *See* Sup. Ct. R. 10.

"The right to the effective assistance of counsel at trial is a bedrock principle in our justice system." *Martinez v. Ryan*, 566 U.S. 1 (2012). As such, the question whether the Sixth and Fourteenth Amendments require courts adjudicating IAC claims to assess the cumulative prejudice stemming from trial counsel's failures under *Strickland* is important to all criminal defendants seeking to enforce the protections promised under the Constitution. It is of even greater consequence to defendants like Jones under a sentence of death where there is a corresponding requirement under the Eighth Amendment for "a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); *see also Strickland*, 466 U.S. at 686–87 (the right to effective assistance of counsel extends to the penalty phase).

II. Factual and procedural background

On March 26, 1992, after spending the day drinking and using crystal methamphetamine, Jones and his friend, Robert Weaver, got into a violent altercation in Weaver's garage. Evidence at trial showed that Jones hit Weaver over the head with a bat, killing him. Jones also struck Weaver's grandmother in the head when he entered the house from the garage. Jones then made his way to a bedroom where he found Weaver's seven-year-old daughter. Although Jones denied killing her, the State presented evidence at trial that Jones hit the seven-year-old in the head, and either strangled or suffocated her with a pillow. A jury convicted Jones of two counts of first-degree murder.

A sentencing hearing before the trial judge was scheduled for three months later. At both the trial and sentencing phase, Jones was represented by a public defender who was barely three years out of law school and who had never been lead counsel on a death penalty case. Trial counsel presented two witnesses at the sentencing hearing, Jones's stepfather and his trial investigator. The investigator testified only about a third-party's involvement, while the stepfather testified second-hand about Jones's difficult birth, abuse at the hands of his first stepfather, drug abuse, and head injuries, while omitting his own physical and mental abuse of Jones. Trial counsel did not provide the court with information about Jones's sexual abuse by his step-grandfather, nor did trial counsel provide the court with records objectively proving Jones's history of serious mental illness, explosive outbursts, and head injuries. Trial counsel also failed to secure the assistance of a defense mental health expert.

Instead, trial counsel relied on the examination of the court-appointed expert and, on that expert's recommendation, moved the trial court for the appointment of a defense mental health expert, on the eve of sentencing stating, "It's not a delay tactic ... [I]t's not something I planned on doing until ... very recently after the report was done, after talking with [the court-appointed expert]." App. 11. That request was denied. After the hearing, Jones received two death sentences.

The Arizona Supreme Court affirmed Jones's convictions and sentences on direct appeal. *State v. Jones*, 917 P.2d 200, 222 (Ariz. 1996). On independent review of Jones's death sentence, the Arizona Supreme Court rejected Jones's proffered mental illness mitigation on the grounds that he "did not, . . . provide any *documented* instances of his alleged mental illness." *Id.* at 221 (emphasis added). "Thus," the court held, "defendant has not established mental illness by a preponderance of the evidence, and we do not give it mitigating weight." *Id.* The Arizona Supreme Court also never mentioned either "cognitive impairment" or "brain damage" as either proffered or proved mitigating circumstances, instead agreeing with the trial court which only gave "some mitigating weight to defendant's injuries in that it found the heard injuries may have aggravated defendant's substance abuse problem." *Id.* at 220–21.

On state postconviction review ("PCR"), Jones raised IAC claims that were denied following an evidentiary hearing. The Arizona Supreme Court subsequently denied a petition for review.

Once in federal court, the district court granted Jones an evidentiary hearing

on three claims of ineffective-assistance-counsel at sentencing—Claim 1 (counsel's failure to secure a defense mental health expert), Claim 2 (counsel's failure to timely move for neurological and neuropsychological testing), and Claim 3 (counsel's failure to present additional mitigating evidence, including witness testimony). The district court denied relief finding "that it [was] unnecessary to assess the quality of counsel's performance under the first prong of *Strickland* because [Jones] [] failed to meet his burden under the second prong, which requires that he affirmatively prove prejudice." *Jones v. Schriro*, 450 F. Supp. 2d 1023, 1042–43 (D. Ariz. 2006), *rev'd sub nom. Jones v. Ryan,* 583 F.3d 626 (9th Cir. 2009) (internal citation omitted).

After a timely appeal, a panel of the Ninth Circuit reversed the district court and concluded that Jones received ineffective-assistance-of-counsel as set out in Claims 1, 2 and 3. *Jones v. Ryan*, 583 F.3d 626, 636 (9th Cir. 2009), *cert. granted, judgment vacated*, 563 U.S. 932 (2011). The panel further found that because it granted relief on these three claims it would "not address the remainder of [Jones's] claims on appeal." *Id.* at 647.

This Court vacated the panel's decision and remanded the case for consideration in light of *Pinholster*.[1] *See Ryan v. Jones*, 563 U.S. 932 (2011). After additional briefing and a short remand under *Martinez*,[2] the panel again granted Jones relief on Claims 1 and 2. App. 24, 65.

This Court again reversed the panel's opinion, finding that it "all but ignored

[1] *Cullen v. Pinholster*, 563 U.S. 170 (2011).
[2] *Martinez v. Ryan*, 566 U.S. 1 (2012).

the strong aggravating circumstances in this case" which should have led to "affirm[ing] the decision of the District Court denying habeas relief" and remanded the case for further proceedings. *Thornell v. Jones*, 602 U.S. 154, 158, 172 (2024). Upon remand, the panel immediately and without further briefing issued a per curiam opinion affirming the district court's judgment "[p]ursuant to the Supreme Court's opinion" in *Jones* (App. 118), even though this Court only resolved Claims 1 and 2 and did not address Claims 3 and 7, or whether a cumulative assessment of prejudice under *Strickland* nevertheless entitled Jones to relief. [3] The panel denied Jones's request for reconsideration of its decision. App. 119.

This petition follows.

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[3] Although Claim 7 was not certified by the district court, the Ninth Circuit construes briefing of an uncertified issue as a motion to expand the district court's grant of a certificate of appealability. *Floyd v. Filson*, 949 F.3d 1128, 1152 (9th Cir. 2020) (citing 9th Cir. R. 22-1(e)). The panel ordered supplemental briefing on Claim 7 which was fully briefed.

REASONS FOR GRANTING THE PETITION

In the more than four decades since this Court decided *Strickland*, division among the lower federal and state courts has emerged over whether the cumulative impact of multiple deficiencies in trial counsel's performance must always be assessed under *Strickland*'s prejudice prong. This Court should resolve that division and answer the question presented here affirmatively.

I. The state and lower federal courts of appeals are divided over whether the Sixth Amendment requires a court reviewing an ineffective-assistance-of counsel claim under *Strickland* to consider the cumulative prejudice stemming from the totality of trial counsel's deficiencies.

Critical to the analysis of prejudice under *Strickland* is whether the combined errors in trial counsel's representation impacted a criminal defendant's trial in a manner that violated the fundamental fairness guarantee under the Sixth and Fourteenth Amendments. In *Strickland*, this Court instructed lower courts to consider whether trial counsel's errors (plural) impacted the trial in a manner that violated the Sixth Amendment; it did not instruct that each individual error should be reviewed for prejudice, but rather the opposite. *See Strickland*, 466 U.S. at 687 (stating that prejudice "requires showing that counsel's *errors* were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable") (emphasis added); *see also id.* at 693 ("[I]f a defendant shows that particular *errors* of counsel were unreasonable . . . the defendant must [also] show that they actually had an adverse effect on the defense.") (emphasis added); *id.* at 694 (noting that "defendant must show that there is a reasonable probability that, but for counsel's unprofessional *errors*, the result of the proceeding would have been different") (emphasis added); *id.*

at 695 ("The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's *errors*.") (emphasis added). However, there has been a long-standing split among the Circuit Courts of Appeals over whether a habeas court reviewing an IAC claim should cumulatively assess an attorney's errors in determining *Strickland* prejudice.

The majority of Circuits – the First, Second, Third, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits – require a cumulative review of counsel's errors in determining prejudice under *Strickland*. *Dugas v. Coplan*, 428 F.3d 317, 334-35 (1st Cir. 2005); *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001); *McNeil v. Cuyler*, 782 F.2d 443, 451 (3d Cir. 1986); *Richards v. Quarterman*, 566 F.3d 553, 571-72 (5th Cir. 2009); *U.S. v. Dado*, 759 F.3d 550, 563 (6th Cir. 2014); *Sussman v. Jenkins*, 636 F.3d 329, 360-61 (7th Cir. 2011); *Sanders v. Ryde*r, 342 F.3d 991, 1000-01 (9th Cir. 2003); *Cargle v. Mullin*, 317 F.3d 1196, 1206-07 (10th Cir. 2003). These Circuits recognize that *Strickland* itself compels a cumulative review of prejudice. *See Dugas*, 428 F.3d at 335 ("*Strickland* clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced.") (internal quotation marks omitted). However, the Fourth and Eighth Circuits have explicitly rejected that *Strickland* requires a cumulative review of attorney errors. *Fisher v. Angelone*, 163 F.3d 835, 852, 852 n.9 (4th Cir. 1998) (stating that "[t]o the extent this Court has not specifically stated that ineffective-assistance-of-counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now"); *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996) ("Neither

cumulative effect of trial errors nor cumulative effect of attorney errors are grounds for habeas relief.").

The state courts are similarly split on this question. Twenty-six states do cumulatively assess counsel's errors[4], while six states reject that position.[5] In the remaining states, the courts have yet to address the question or precedent is unclear. *See, e.g., Garcia v. State*, 678 N.W.2d 568, 578 (N.D. 2004) (noting the conflicting

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[4] At least 26 states cumulate the errors of counsel in addressing ineffective assistance: Alaska, California, Colorado, Georgia, Idaho, Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. *See State v. Savo*, 108 P.3d 903, 916 (Alaska Ct. App. 2005); *In re Jones*, 13 Cal. 4th 552, 588 (1996); *People v. Cole*, 775 P.2d 551, 555 (Colo. 1989); *Schofield v. Holsey*, 642 S.E.2d 56, 60 n.l (Ga. 2007); Adamcik v. State, 408 P.3d 474, 487 (Idaho 2017); *Weisheit v. State*, 109 N.E.3d 978, 992 (Ind. 2018); *State v. Clay*, 824 N.W.2d 488, 500 (Iowa 2012); *Taylor v. State*, 834 P.2d 1325, 1335 (Kan. 1992), *overruled on other grounds by State v. Orr*, 940 P.2d 42, 51 (Kan. 1997); *Bowers v. State*, 578 A.2d 734, 744 (Md. 1990); *Commonwealth v. Alcide*, 33 N.E.3d 424, 438-40 (Mass. 2015); *People v. LeBlanc*, 640 N.W.2d 246, 255 (Mich. 2002); *State v. Nolt*, 906 N.W.2d 309, 328 (Neb. 2018); *State v. Wilbur*, 197 A.3d 1125, 1134 (N.H. 2018); *State v. DiFrisco*, 804 A.2d 507, 529-30 (N.J. 2002); *State v. Preciose*, 609 A.2d 1280, 1286-87 (N.J. 1992); *State v. Trujillo*, 42 P.3d 814, 831 (N.M. 2002); *People v. Brown*, 300 A.D.2d 314, 315 (N.Y. App. Div. 2002); *State v. Gondor*, 860 N.E.2d 77, 90 (Ohio 2006); *Commonwealth v. Watkins*, 108 A.3d 692, 735 (Pa. 2014); *State v. McBride*, 296 N.W.2d 551, 555-56 (S.D. 1980); *Patton v. State*, No. E2017-00886-CCA-R3-PC, 2018 WL 1779382, at *19-20 (Tenn. Crim. App. Apr. 13, 2018); *Ex Parte Aguilar*, No. AP-75, 526, 2007 WL 3208751, at *3-4 (Tex. Crim. App. Oct. 31, 2007); *State v. Campos*, 309 P.3d 1160, 1176 (Utah Ct. App. 2013); *In re Brooks*, No. 2017-253, 2018 WL 3022683, at *6-7 (Vt. June 15, 2018); *State ex rel. Daniel v. Legursky*, 465 S.E.2d 416, 424 n.7 (W. Va. 1995); *State v. Thiel*, 665 N.W.2d 305, 310-11 (Wis. 2003); *Woods v. State*, 401 P.3d 962, 971 (Wyo. 2017).

[5] At least six states reject cumulative error review for *Strickland* claims: Alabama, Arkansas, Missouri, Montana, Louisiana, and Virginia. *See Carruth v. State*, 165 So. 3d 627, 651 (Ala. Crim. App. 2014); *Lacy v. State,* 545 S.W.3d 746, 752 (Ark. 2018), *State v. Brooks*, 960 S.W.2d 479, 500 (Mo. 1997); *Notti v. State,* 176 P.3d 1040, 1052 (Mont. 2008)*, overruled on other grounds by Whitlow v. State,* 183 P.3d 861 (Mont. 2008); *State v. Reeves*, No. 2018-KP-0270, 2018 WL 5020065, at *14 (La. Oct. 15, 2018); *Prieto v. Warden of Sussex I State Prison,* 748 S.E.2d 94, 117-118 (Va. 2013).

positions in federal courts, but failing to reach the issue).

The lack of guidance from this Court, on a frequently reoccurring issue, has not gone unnoticed: "[t]he Supreme Court has not directly addressed the applicability of the cumulative error doctrine in the context of an ineffective-assistance-of-counsel claim." *Forrest v. Florida Dept. of Corrections,* 342 Fed. Appx. 560, 564 -65 (11th Cir. 2009). In *Banks v. Dretke*, 540 U.S. 668 (2004), the Court granted certiorari on, but did not resolve, the question whether the prejudicial effect of counsel's errors in the penalty phase of a capital case must be assessed individually or cumulatively. Although this Court frequently accepts review of ineffective-assistance-of-counsel claims, it has never answered this critical question.

Most state and federal post-conviction claims involve ineffective-assistance-of-counsel. But because of the existing and unresolved Circuit and state court split over whether *Strickland* requires a court to cumulatively assess prejudice, defendants are entitled to varying levels of Sixth Amendment protection merely by function of location rather than content of the Constitution. *See Kansas v. Marsh*, 548 U.S. 163, 185 (2006) (noting that ignoring conflicting constitutional interpretations results in a "crazy quilt" of governing law) (Scalia, J., concurring). Given the long-standing nature of the split, and frequent recurrence of this question, this Court should conclusively resolve this issue. In the alternative, the Court should remand this case with instructions to assess the cumulative prejudice stemming from the totality of trial counsel's errors at issue in Jones's appellate IAC Claims 1, 2, 3, and 7.

II. Cumulatively reviewing trial counsel's errors for prejudice is necessary to enforce the Sixth Amendment's protections. This Court's case law in the *Strickland* context confirms this.

Conducting a cumulative review of prejudice from trial counsel's deficiencies is consistent with the Sixth Amendment and *Strickland*, 466 U.S. 668. Courts should not conduct a piecemeal analysis, addressing each contention of deficient performance and prejudice in a vacuum, without considering the spillover effect of the various errors. *Sanders*, 342 F.3d at 1001 ("Separate errors by counsel at trial and at sentencing should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance."). Even if prejudice does not result from an individual error, it may nevertheless result from cumulative errors. *Boyde v. Brown*, 404 F.3d 1159, 1176 (9th Cir. 2005); *see also Dado,* 759 F.3d 550, 563 (6th Cir. 2014) ("[E]xamining an [IAC] claim requires the court to consider 'the combined effect of all acts of counsel found to be constitutionally deficient, in light of the totality of the evidence in the case.'") (quotation omitted); *Goodman v. Bertrand*, 467 F.3d 1022, 1030 (7th Cir. 2006) ("Rather than evaluating each error in isolation, . . . the pattern of counsel's deficiencies must be considered in their totality.").

Strickland itself instructs that a petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." 466 U.S. at 690. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id*. *Strickland* thus requires a court to assess the totality of counsel's acts and omissions when deciding whether the representation

was deficient and rendered the proceeding under review fundamentally unfair.

Later cases affirm this interpretation. In *Williams v. Taylor*, the petitioner asserted that multiple and discrete deficiencies in trial counsel's presentation of mitigating evidence resulted in prejudice, including the failure to investigate and present available records of childhood abuse and evidence of borderline intellectual ability. 529 U.S. 362, 396–97 (2000). In assessing the prejudice analysis conducted by the state court, this Court noted that it "failed to accord appropriate weight to the *body of mitigation evidence available* to trial counsel," explicitly recognizing that *Strickland* requires a cumulative approach to analyzing prejudice. *Id*. at 398 (emphasis added). Similarly here, although Claims 1 and 2 focused on trial counsel's deficiencies with respect to the investigation and presentation of expert testimony and mental health diagnoses, certified Claim 3, which was never resolved by the panel, pertains to trial counsel's deficiencies with respect to available mitigation in medical records, life history records, and additional lay witnesses. Because these penalty-phase IAC claims are all inexorably intertwined—attacking the fundamental fairness of Jones's sentencing proceeding as a result of trial counsel's various deficiencies—the court of appeals' failure to address certified Claim 3 at all, and its failure to assess prejudice cumulatively, contravenes *Strickland* and the Sixth Amendment.

Again, in *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court emphasized that in determining prejudice from sentencing counsel's errors, the evidence is reweighed by considering "the totality of available mitigating evidence." *Id.* at 534. The

deficiencies alleged by the petitioner in that case also covered multiple areas of mitigating evidence:

> Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care. The time Wiggins spent homeless, along with his diminished mental capacities, further augment his mitigation case. Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability.
> *Id.* at 535.

Despite the multiple and discrete failures of counsel, this Court analyzed the failures cumulatively, noting that "[i]n order for counsel's inadequate performance to constitute a Sixth Amendment violation, petitioner must show that counsel's *failures* prejudiced his defense." *Id.* at 534 (emphasis added). The Court concluded that the totality of mitigation trial counsel deficiently failed to investigate and present, described as an "excruciating life history," created a reasonable probability of a life sentence thus rendering Wiggins' sentencing proceeding fundamentally unfair. *Id.* at 537.

Again, in *Porter v. McCollum*, 558 U.S. 30 (2009), this Court examined the myriad ways in which counsel was alleged to have performed deficiently in the investigation and presentation of mitigation: "the new evidence described his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity." *Id.* at 33. In analyzing the prejudice from these various failures, this Court grouped the various types of mitigation together, finding that the cumulative weight of the new mitigating evidence created a reasonable probability of a life sentence, hence

undermining the Court's confidence in the fundamental fairness of the penalty phase. *Id.* at 40–44.

III. The prejudice analysis in the analogous context of *Brady* claims supports a cumulative prejudice analysis for *Strickland* claims.

This Court's decisions applying *Brady v. Maryland,* 373 U.S. 83 (1963), are instructive because the *Strickland* prejudice inquiry mirrors the *Brady* materiality analysis for an unconstitutional prosecutorial suppression of evidence. *See Strickland*, 466 U.S. at 694 ("[T]he appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution[.]") (citing leading *Brady* precedent). In that context, this Court has held that instead of considering the effect of suppressed evidence on an item-by-item basis, the analysis should instead focus on "the cumulative effect of all such evidence suppressed by the government[.]" *Kyles v. Whitley*, 514 U.S. 419, 421 (1995); *see also Wearry v. Cain*, 577 U.S. 385, 394 (2016) ("the state postconviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively") (citation omitted). There is no principled or Constitutional basis for a different analysis to apply to courts' assessment of the prejudice stemming from the various errors of counsel under *Strickland.*

Brady is concerned with "a trial resulting in a verdict worthy of confidence." *Kyles,* 514 U.S. at 434. *Strickland*'s concern is almost identical, asking whether the lawyer's ineffective performance "deprive[d] the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. Given that the underlying purpose of the prejudice assessment in both contexts is to ensure a fair trial, it stands to reason

that a cumulative review of prejudice is proper. *See* John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating Bagley Materiality, Strickland Prejudice, and Cumulative Harmless Error*, 95 J. Crim. L. & Criminology 1153, 1155 (2005) (noting that "laws governing the right to counsel and suppression of evidence have long shared the same core value, reliability of outcomes."). Given that the *Brady* and *Strickland* standards are nearly identical, and their purpose the same, the cumulative approach should be uniformly adopted for both.

IV. The panel opinion left unresolved a certified IAC claim that this Court's decision in *Jones* never addressed, and failed to consider the cumulative prejudice stemming from the totality of trial counsel's penalty phase deficiencies in Jones's case.

Although this Court reversed the court of appeals' grant of relief on appellate Claims 1 and 2, it never addressed certified Claim 3, which challenged trial counsel's deficiencies in failing to investigate and present substantial mitigating evidence that was available in medical records, other documents, and through additional lay witnesses. The panel opinion which this Court reversed also did not address certified Claim 3, finding it unnecessary because of its grant of relief on Claims 1 and 2. *Jones v. Ryan*, 52 F.4th 1104, 1137 (9th Cir. 2022), *overruled by Thornell v. Jones*, 602 U.S. 154 (2024).

After *Jones* reversed the court of appeals' grant of relief on Claims 1 and 2, on remand from this Court the panel should have decided certified Claim 3, and the cumulative prejudice stemming from the totality of trial counsel's errors that are the subject of Claims 1, 2, 3, and 7. Instead of doing so, the court of appeals abdicated its appellate duty and left Claim 3 and the cumulative prejudice question under

Strickland unresolved. In addition, the panel left unresolved Claim 7 which challenges trial counsel's failure to object to the trial court's refusal to consider and give effect to all mitigating evidence. *See Tennard v. Dretke*, 542 U.S. 274 (2004) (finding unconstitutional a requirement that precludes all relevant, available mitigation from being considered by the sentencer).

By leaving half of Jones's IAC claims unaddressed, the court of appeals necessarily neglected to cumulate the prejudice resulting from counsel's errors and failed to answer whether Jones's sentencing proceeding was fundamentally unfair.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari, vacate the panel opinion, and remand this case with instructions to consider the cumulative prejudice under *Strickland* stemming from the totality of trial counsel's errors in Jones's case that are the subjects of Claims 1, 2, 3, and 7.[6]

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[6] The Eleventh Circuit has considered aspects of an IAC claim on which there was no COA, including counsel's ineffectiveness during his punishment phase closing argument, "because it is plainly an integral part of [petitioner's] claim that trial counsel was ineffective at the penalty phase." *Ferrell v. Hall*, 640 F.3d 1199, 1223 n.15 (11th Cir. 2011).

Respectfully submitted this 9th day of May, 2025.

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