No. 24–7190

In the Supreme Court of the United States

DANNY LEE JONES,

Petitioner,

v.

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

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED FOR REVIEW

Petitioner Danny Lee Jones was convicted and sentenced to death for the 1992 killings of Robert Weaver and his 7-year-old daughter Tisha. After Jones unsuccessfully sought relief in state court, the Ninth Circuit twice granted his federal habeas petition. But after each grant of relief, this Court intervened and reversed the Ninth Circuit. In the wake of the last remand, the Ninth Circuit heeded this Court's command that "it … had no choice but to affirm the decision of the District Court denying habeas relief." *Thornell v. Jones*, 602 U.S. 154, 172 (2024).

The question presented is:

Does *Strickland v. Washington*, 466 U.S. 668 (1984) compel reviewing courts to *sua sponte* consider cumulative prejudice?

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INTRODUCTION

There is no compelling reason to grant certiorari here. First, because Jones failed to argue for cumulative prejudice review below, he is asking this court to hold that *Strickland* mandates such review *sua sponte*. This cannot be the case, because *Strickland* places the burden on the petitioner to demonstrate prejudice and concepts of party presentation counsel restraint in the face of unraised theories.

But even if this Court were to sanction such review, certiorari is still not appropriate because Jones received cumulative prejudice review in the district court. After this Court remanded this case in 2024, the Ninth Circuit panel summarily affirmed the district court's denial, which included the lower court's judgment that Jones had failed to demonstrate cumulative prejudice. The Ninth Circuit was well within its discretion to summarily affirm the district court after this Court's disposition, and Jones was accorded all the process he was due.

STATEMENT OF THE CASE

This Court laid out the factual and procedural history of this case in its recent opinion reversing the Ninth Circuit. *See Thornell v. Jones*, 602 U.S. 154, 158–63 (2024). After this Court reversed the judgment of the Ninth Circuit and remanded for further proceedings consistent with its opinion, the Ninth Circuit summarily affirmed the district court, thereby denying Jones' federal habeas petition. *See Jones v. Ryan*, 106 F.4th 1010 (9th Cir. 2024). Jones then moved for panel rehearing and argued that rehearing was warranted because the panel was obligated to conduct cumulative prejudice review for Jones' ineffective assistance of counsel claims. Pet. App. 128a–131a. The panel denied Jones' petition for panel rehearing without comment. Pet. App. 119a.

REASONS FOR DENYING THE PETITION

This Court grants certiorari "only for compelling reasons," and Jones has presented no such reason. Sup. Ct. R. 10. Jones has failed to demonstrate either that the Ninth Circuit "decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals," or that it "decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(b), (c). Instead, Jones asks this Court to correct purported errors committed by the Ninth Circuit, but general error correction does not offer a compelling reason for certiorari review. 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."); *see also* S. Shapiro, et al., *Supreme Court Practice* § 5.12(c)(3), p. 352 (10th ed. 2013) ("[E]rror correction ... is outside the mainstream of the Court's functions and ... not among the 'compelling reasons' ... that govern the grant of certiorari"). Even setting that aside, Jones has identified no error committed by the Ninth Circuit.

Because the Ninth Circuit acceded to this Court's instruction in *Thornell v. Jones* that it "had no choice but to affirm" the denial of Jones' habeas petition after engaging the "analysis required by *Strickland*," *Jones*, 602 U.S. at 172, this Court should deny Jones' latest request for review.

I. *Strickland* does not require *sua sponte* cumulative prejudice review.

As an initial matter, Jones' identification of a purported circuit split is overblown. *See* Petition at 9–12. While both the Fourth and Eighth Circuits have explicitly stated that they do not apply cumulative prejudice review for ineffective assistance of counsel claims, the application of *Strickland* in those circuits suggest that those circuits are in fact considering all of trial counsel's *related* deficiencies in determining whether or not the petitioner has demonstrated prejudice. *See e.g.*, *United States v. Freeman*, 24 F.4th 320, 331–32 (4th Cir. 2022) (discussing counsel's failure to raise "several meritorious objections" to presentence report in finding that the petitioner had proved prejudice); *Stokes v. Stirling*, 10 F.4th 236, 254–56 (4th Cir. 2021), (considering deficient aspects of trial counsel's mitigation investigation *and* decision to not present mitigation in determining that petitioner has proven prejudice), *cert. granted, judgment vacated*, 142 S. Ct. 2751 (2022); *Sinisterra v. United States*, 600 F.3d 900, 906–08 (8th Cir. 2010) (assessing prejudice for distinct ineffectiveness claims that trial counsel failed to conduct a mitigation investigation and failed to present mitigation evidence). The distinction may be related to the view that unrelated instances of deficient performance cannot be cumulated, but related instances of deficient performance in the same class of claim—i.e. failure to

investigate and present mitigating evidence—can be. *See Johnson v. United States*, 860 F. Supp. 2d 663, 756–60 (N.D. Iowa 2012).[1]

This may all be a distinction without a difference, because both the Fourth and Eighth Circuits still evaluate prejudice, as *Strickland* dictates, based on the totality of the evidence. *See Springs v. Payne*, 95 F.4th 596, 602 (8th Cir. 2024) ("We assess whether there is a substantial likelihood of a different result by reweighing the aggravating evidence against the totality of available mitigating evidence."); *United States v. Runyon*, 994 F.3d 192, 209 (4th Cir. 2021) ("The prejudice inquiry would require us to consider the totality of the available mitigation evidence — both that adduced at trial, and the evidence adduced in the habeas proceeding — and reweigh it against the evidence in aggravation.") (internal quotation marks omitted) (citing *Porter v. McCollum*, 558 U.S. 30, 41 (2009)). And the same is true in many of the states Jones identifies. *See* Petition at 11 n.6; *see e.g.*, *Jones v. State*, 753 So. 2d 1174, 1197 (Ala. Crim. App. 1999) (assessing prejudice based on the totality of the circumstances); *State v. Harrison*, 404 S.W.3d 830, 833 (Ark. 2012) (same); *Williams v. State*, 524 S.W.3d 553, 564 (Mo. Ct. App. 2017) (same). But on the other side of the purported split, courts are not relying on

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[1] Jones argues that this Court's precedents dictate cumulative prejudice review for ineffective assistance of counsel claims. Petition at 13–16. While the answer to this question ultimately has no bearing on the instant petition, it bears noting that each Supreme Court case Jones relies on involved a single, albeit multifaceted, ineffective assistance of sentencing counsel claim. *See Strickland v. Washington*, 466 U.S. 668, 675 (1984); *Williams v. Taylor*, 529 U.S. 362, 395–96 (2000); *Wiggins v. Smith*, 539 U.S. 510, 514 (2003); *Porter v. McCollum*, 558 U.S. 30, 33 (2009).

the cumulation of unrelated "non-errors" to demonstrate prejudice, *see United States v. Boukamp*, 105 F.4th 717, 749 (5th Cir. 2024), *cert. denied*, 145 S. Ct. 595 (2024); *Williams v. Filson*, 908 F.3d 546, 570 (9th Cir. 2018), but rather assessing "all acts of counsel found to be constitutionally deficient, in light of the totality of the evidence in the case," *Lundgren v. Mitchell*, 440 F.3d 754, 770 (6th Cir. 2006). This is all to say that, because the circuits and state courts all generally agree that assessing prejudice under *Strickland* requires review based on the totality of the evidence, any alleged split works less mischief than Jones avers.

Whether or not a meaningful split even exists, Jones' argument should be understood through the correct lens. While Jones first argued in the Ninth Circuit that *Strickland* prejudice should be reviewed cumulatively, he later abandoned that argument after this Court's last remand. The question therefore, as framed above, is whether a reviewing court has the obligation to conduct cumulative *Strickland* prejudice review *sua sponte*. And while Jones has noted the application of cumulative prejudice review in various circuits and states, he has not identified a single jurisdiction which requires such review in the absence of affirmative argument from the petitioner. *See e.g.*, *United States v. Dado*, 759 F.3d 550, 567 (6th Cir. 2014) ("Finally, *Defendant argues* that the district court erred in concluding that the collective impact of trial counsel's errors did not surmount the high standard for proving ineffective assistance of counsel under *Strickland*.") (emphasis added).

Nor can Jones identify such a jurisdiction, because *Strickland* by its nature places the onus on the petitioner to establish that counsel performed deficiently and that but for counsel's deficiencies there is a reasonable probability of a different outcome. *See Strickland*, 466 U.S. at 696 ("Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors."); *Wong v. Belmontes*, 558 U.S. 15, 27 (2009) ("*Strickland* places the burden on the defendant, not the State, to show a "reasonable probability" that the result would have been different.") There is therefore no split, at least of the kind Jones lays out, on this reframed issue. Accordingly, this Court's review is not warranted.

II. Jones abandoned his cumulative prejudice argument.

Jones' burden under *Strickland* aside, his criticism of the Ninth Circuit's alleged failure to *sua sponte* cumulate prejudice flies in the face of concepts of party presentation. As this Court has recognized, our adversarial system follows the principle of party presentation and "is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *United States v. Sineneng-Smith*, 590 U.S. 371, 375–76 (2020) (quoting *Greenlaw v. United States*, 554 U.S. 237, 386 (2008) (Scalia, J. concurring in part and concurring in judgment)) (internal bracketing omitted).

Jones previously argued for cumulative prejudice review and the Ninth Circuit applied it. *See Jones v. Ryan*, 583 F.3d 626, 647 (9th Cir. 2009) ("[W]hile we hold that the lack of neuropsychological testing, partisan mental health experts, and the failure to accurately present Danny's life history each would be sufficient to undermine confidence in the sentence on their own, in combination there can be no question that the deficiencies were fatal."). But after this Court vacated the Ninth Circuit's prior decision and remanded this case, Jones failed to re-urge his cumulative prejudice argument.[2]

Here, the Ninth Circuit was obligated to not reach Jones' abandoned cumulative prejudice argument lest they engineer a "takeover of the appeal." *Sineneng-Smith*, 590 U.S. at 379. And to the extent Jones argues that he re-urged his cumulative prejudice argument in his petition for panel rehearing, he is incorrect. The purpose of a petition for panel rehearing under Federal Rule of Appellate Procedure 40 is to draw the court's attention to "each point of law or facts that the petitioner believes the court has overlooked or misapprehended." Fed. R. App. P. 40(a)(2); *see also United States v. Mageno*, 786 F.3d 768, 774 (9th Cir. 2015). The petition is not, however, intended to serve as "a vehicle for a party to study and

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[2] Jones argued that "*Strickland* requires this Court to consider the prejudice resulting from those deficiencies collectively" in his merits reply brief below. Record in No. 18-99005 (9th Cir. Aug. 26, 2019), ECF Doc. 32, p. 8. This was insufficient to preserve the issue for review. *See Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990) ("It is well established in this circuit that the general rule is that appellants cannot raise a new issue for the first time in their reply briefs.") (internal quotations and alternations omitted).

reargue his case anew." *Mageno*, 786 F.3d at 775. The petition for panel rehearing therefore did not properly place the cumulative prejudice argument in front of the panel, and the panel was well within its discretion to not take up Jones' new argument.

Because Jones did not ask the Ninth Circuit to review the cumulate prejudice from his trial counsel's purported deficiencies, he abandoned the argument and no error occurred. Review is therefore not proper.

III. The federal courts examined the cumulative prejudice of Jones' ineffective assistance of counsel claims.

Setting aside the lack of any split and in spite of abandonment, certiorari is also not warranted here because the federal courts *did* cumulate prejudice for Claims 1, 2, and 3. In its August 31, 2006, order dismissing Claims 1, 2, and 3, the district court announced that it:

> [H]as assessed prejudice with respect to Petitioner's sentencing-stage IAC *claims* by reevaluating Petitioner's sentence in the light of the evidence introduced in these habeas proceedings. The Court concludes that the new information is largely inconclusive or cumulative: it "barely . . . alter[s] the sentencing profile presented to the sentencing judge." *Strickland*, 466 U.S. at 700. Petitioner has failed, therefore, to affirmatively demonstrate a reasonable probability that this additional information would alter the trial court's sentencing decision after it weighed the totality of the mitigation evidence against the strong aggravating circumstances proven at trial. Therefore, Petitioner is not entitled to habeas relief on the following claims.

Record in No. 2:01–cv–00384 (D Ariz., Feb. 13, 2006), ECF Doc. 220, p. 30 (emphasis added). The Ninth Circuit then affirmed the district court's determination, *Jones*, 106 F.4th 1010, and while Jones may not be satisfied with the outcome or the Ninth

Circuit's brevity in its last decision, he cannot deny that he has received the review he now seeks.

Furthermore, Jones' split identification is a distraction from the fact that he received cumulative prejudice review. Jones argues that "[i]n *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." Petition, at 9. But as Jones identifies, the Ninth Circuit subscribes to the notion that *Strickland* requires cumulative prejudice review. Petition at 10. Nothing in the panel's decision affirming the district suggests that they chose to flout circuit precedent and ignore the cumulative impact of trial counsel's alleged deficiencies. To the contrary, and as described above, the panel's decision affirming the district court's judgment suggests the opposite. The panel was not obligated to cite every reason for which they agreed with the district court, and considering the thorough treatment this Court gave the question of prejudice in this case just last year, there was hardly anything left for them to say. *See* Fed. R. App. P. 36(b) ("On the date when judgment is entered, the clerk must serve on all parties a copy of the opinion--or the judgment, *if no opinion was written*--and a notice of the date when the judgment was entered.") (emphasis added). *See also Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972) ("[T]he courts of appeals should have wide latitude in their decisions of whether or how to write opinions[,]" which, "is especially true with respect to summary affirmances."); *Sumner v. Mata*, 449 U.S. 539, 548 (1981)

("Undoubtedly, a court need not elaborate or give reasons for rejecting claims which it regards as frivolous or totally without merit.").[3]

Jones' dissatisfaction with the district court's decision on, and the Ninth Circuit's affirmance of, the cumulative prejudice question does not present the rare case where this Court's review is called for. The Ninth Circuit was within its rights, and indeed practically bound, "to affirm the decision of the District Court denying habeas relief." *Thornell v. Jones*, 602 U.S. 154, 172 (2024). This Court's review is therefore not warranted and Jones' petition should be denied.

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[3] This reasoning applies equally, and perhaps more so, to Jones' uncertified Claim 7. As Jones notes, his inclusion of uncertified Claim 7 was just a motion to expand the certificate of appealability. Petition at 8. The panel was well within its rights to dispose of this claim summarily, and Jones cannot point to authority suggesting otherwise. *See* Ninth Circuit Rule 22–1(e) ("Uncertified issues raised and designated in this manner will be construed as a motion to expand the COA *and will be addressed by the merits panel to such extent as it deems appropriate*.") (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted this 11th day of June 2025.

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