Case No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

TERRY LYNN KING,

Petitioner,

v.

TONY MAYS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORI

– CAPITAL CASE –

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-CAPITAL CASE -

QUESTIONS PRESENTED

The courts below identified more than five legal errors that impacted Petitioner's capital trial and sentencing. They examined each error in isolation, found none that individually affected the verdict, and then dismissed them, one-by-one, as "harmless." The federal courts found nothing wrong with that approach. According to their logic, nothing prevents a state from executing someone following a trial during which every piece of evidence was introduced in violation of the Constitution, so long as no single piece of evidence, considered in isolation, could be said to have rendered the trial fundamentally unfair. That cannot be correct. *See Grant v. Trammell*, 727 F.3d 1006, 1026 (10th Cir. 2013) (Gorsuch, J.) (cumulative error doctrine is rendered a "nullity" if prejudice not "considered additively").

This petition presents the following questions:

(1) Whether the Due Process Clause of the Fourteenth Amendment requires that courts consider the aggregate effect of multiple legal errors, as the First, Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits have held, or whether the effect of each error may be considered in isolation, as the Fourth, Sixth, and Eighth Circuits have held.

(2) Whether the Cruel and Unusual Punishment Clause of the Eighth Amendment requires that courts consider the aggregate effect of multiple legal errors when reviewing a capital sentence.

LIST OF ALL RELATED PROCEEDINGS

Trial and Direct Appeal

Tennessee v. Terry Lynn King, No. 21126 (Knox Co. Crim. Ct. Feb. 11, 1985) (trial, judgment of conviction, and sentence of death).

Tennessee v. Terry Lynn King, 718 S.W.2d 241 (Tenn. July 28, 1986) (direct appeal).

State Post-Conviction Proceedings

Tennessee v. Terry Lynn King, No. 33878 (Knox Co. Crim. Ct. Oct. 31, 1995) (denial of state post-conviction petition).

Terry Lynn King v. Tennessee, No. 03C01-9601-CR-00024, 1997 WL 416389 (Tenn. Crim. App. July 14, 1997) (Tenn. Dec. 8, 1997) (appeal of denial of state post-conviction petition).

Terry Lynn King v. Tennessee, 989 S.W.2d 319 (Tenn. Apr. 12, 1999) (appeal to Tennessee Supreme Court of denial of state post-conviction petition).

Terry Lynn King v. Tennessee, 528 U.S. 875 (1999) (denying cert).

Federal Habeas Proceedings Pursuant to 28 U.S.C. § 2254

Terry Lynn King v. Ricky Bell, No. 3:99-CV-454, 2011 WL 3566843 (E.D. Tenn. Aug. 12, 2011) (petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254).

Terry Lynn King v. Bruce Westbrooks, No. 13-6387 (6th Cir. Oct. 28, 2014) (order on application for certificate of appealability).

Terry Lynn King v. Bruce Westbrooks, 847 F.3d 788 (6th Cir. Feb. 9, 2017) (appeal of denial of petition for writ of habeas corpus).

Terry Lynn King v. Tony Mays, No. 13-6387, 2022 WL 3718003 (6th Cir. Aug. 15, 2022) (denying consolidated petition for panel rehearing).

Successive State Post-Conviction Petitions

Terry Lynn King v. Tennessee, No. E201900349CCAR3PD, 2021 WL 982503 (Tenn. Crim. App. Mar. 16, 2021) *appeal denied* (July 12, 2021) (granting motion to reopen state post-conviction petition, denying reopened state post-conviction petition, and appeal thereof).

Terry Lynn King v. Tennessee, 142 S. Ct. 1146 (2022) (denying cert).

Successive Federal Habeas Petitions

In re: Terry Lynn King, No. 16-5601 (6th Cir. Aug. 11, 2016) (denying application for permission to file second or successive habeas petition pursuant to 28 U.S.C. § 2254(b)(3)(A)).

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The opinion of the court of appeals is reported at *King v. Westbrooks*, 847 F.3d 788 (6th Cir. 2017) and appears as Appendix B, p. A3–18; the order denying rehearing is unreported but is available in an electronically accessible database, *King v. Mays*, No. 13-6387, 2022 WL 3718003 (6th Cir. Aug. 15, 2022), and appears as Appendix C, p. A19–20. The relevant ruling of the district court is also available in an electronically accessible database, *King v. Bell*, No. 3:99-CV-454, 2011 WL 3566843 (E.D. Tenn. Aug. 12, 2011), and appears as Appendix D. p. A21–107.

JURISDICTION

The judgment for the court of appeals was entered on February 19, 2017. The petition for rehearing was denied on August 15, 2022, and the mandate issued on August 23, 2022. Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to, and including, January 12, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right … 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 defense.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> 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.

STATEMENT OF THE CASE

A habeas petitioner and a judge are seated beside each other on a transcontinental flight. Not long after takeoff, the pilot comes over the intercom to announce bad news: One of the plane's four engines has gone out. "Not to worry," says the pilot, "we can still make it to our destination—but instead of twelve hours, the flight will take sixteen." The two passengers, in no hurry, think little of the announcement. But when the pilot reports that a second—and then a third—of their four engines has gone out, their mood darkens. "Not to worry," says the pilot, "we can still make it to our destination, but instead of sixteen hours, the flight will take twenty hours." Worried, the petitioner turns and says, "I sure hope that fourth engine doesn't go out." The judge, nodding gravely, says, "Me, too—we'd be up here all day!"

That, more or less, is how three circuit courts of appeal deal with legal errors. One may be concerning, and two or three unsettling, but so long as no single error is enough in-and-of-itself to bring the plane down, the convictions stand. These circuits engage in this reasoning no matter how many errors are uncovered, even when the petitioner's life is at stake. According to them, a man could be executed following a trial where every piece of evidence was introduced in violation of the Constitution, so

long as no single piece of evidence, considered in isolation, was of enough importance to warrant reversal. Planes in these circuits keep flying long after all the engines have flamed out.

That cannot be correct. In *Chambers v. Mississippi*, this Court held that the Due Process Clause requires consideration of the "cumulative effect" of two distinct constitutional errors. 410 U.S. 284, 289–94 (1973). A few years later, in *Taylor v. Kentucky*, this Court granted similar relief in light of the prejudicial effect of a "combination" of legal errors. 436 U.S. 478, 487–88 (1978). The principle uniting *Chambers* and *Taylor*—that prejudice accumulates—runs beneath a broad swath of this Court's precedent. *See, e.g.*, *Berger v. United States*, 295 U.S. 78, 84 (1935) (aggregating prejudice from multiple instances of prosecutorial misconduct); *Chapman v. California,* 386 U.S. 18 (1967) (same); *Kyles v. Whitley*, 514 U.S. 419, 420 (1995) (*Brady* claims "turn[] on the cumulative effect of all such evidence suppressed by the government"). In death penalty cases, that principle is backstopped by "protections that the Constitution nowhere else provides." *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991); *see also Ring v. Arizona,* 536 U.S. 584, 614 (2002) (Breyer, J., concurring).

Nonetheless, a mature and entrenched circuit split remains. The majority rule, followed by eight circuits, gets it right: the cumulative error doctrine is rendered a "nullity" if prejudice is not "considered additively." *Grant*, 727 F.3d at 1026. This Court should grant certiorari to correct the three that get it wrong. As a person convicted of a capital crime seeking review of the errors in his case, Petitioner, and

those like him, should not receive fewer constitutional protections simply because they were convicted in a minority circuit that does not conduct cumulative error review.

Petitioner's case is a compelling vehicle. The state trial court committed a bevy of legal errors over the course of Petitioner's capital proceedings. To name a few: it permitted the introduction of irrelevant and highly prejudicial testimony in violation of state decisional law; it allowed the state to cross-examine Petitioner about his juvenile record in violation of a state statute; it permitted Petitioner's co-defendant to submit inculpatory testimony without taking the stand in violation of the Confrontation Clause; it permitted the jury to sentence Petitioner to death for the same reason it found him death-eligible in violation of the Eighth Amendment; and it instructed the jury to apply an unconstitutionally vague aggravating circumstance in violation of the Fourteenth Amendment. There is no question as to whether these were errors—reviewing courts conclusively determined they were. But the reviewing courts also determined that each error, in isolation, was harmless. No court has ever assessed whether the trial during which all of those errors occurred—or the resulting death sentence—was, as a whole, fundamentally fair. No one has asked: should this plane still be flying?

I. BACKGROUND

The Due Process Clause prohibits the States from depriving "any person of life, liberty, or property, without due process of law." Twice, this Court has interpreted that provision to require consideration of the aggregate effect of two (or more) distinct

constitutional errors. It first did so in *Chambers v. Mississippi*, 410 U.S. at 294, where the petitioner's attempts to introduce exculpatory evidence were thwarted on two occasions—first by a state evidentiary rule that prevented him from cross-examining an alternative suspect in violation of the Sixth Amendment's Confrontation Clause, and then by an application of the hearsay rule which, this Court reasoned, violated the Due Process Clause. *Id.* at 289–94 (citing, *inter alia, Webb v. Texas*, 409 U.S. 95 (1972)). Because Chambers's claim rested "on the cumulative effect of those rulings" and the way they together "frustrat[ed] his efforts to develop an exculpatory defense," *id.* at 290 n.3, this Court concluded that "the exclusion of this critical evidence, *coupled with* the State's refusal to permit Chambers to cross-examine [the alternative suspect], denied him a trial in accord with traditional and fundamental standards of due process," *id.* at 302 (emphasis added). In other words: this Court cumulated the effect of multiple, distinct constitutional errors. *See Parle v. Runnels*, 505 F.3d 922, 927–29 (9th Cir. 2007) (citing *Chambers*, 410 U.S. at 287–302) (*Chambers* clearly establishes a due process right to cumulative error review). It later reinforced the concept that the cumulative effective of individual errors can be prejudicial when clarifying the *Chambers* holding in *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996) ("[E]rroneous evidentiary rulings can, *in combination*, rise to the level of a due process violation.") (emphasis added).

This Court again required cumulative error analysis across multiple, distinct constitutional violations in *Taylor v. Kentucky*, 436 U.S. 478. There, Taylor requested that the trial court instruct the jury both that the law presumed him innocent and

that the indictment was not evidence. *Id.* at 480–81. The trial court declined both requests. *Id.* at 481. This Court found that only the former ruling violated the Due Process Clause—but held that "the *combination* of the skeletal instructions, the possible harmful inferences from the references to the indictment, and the repeated suggestions that petitioner's status as a defendant tended to establish his guilt" warranted relief. *Id.* at 487–88 & n.15 (declining to reach petitioner's claim regarding the refusal to instruct that an indictment is not evidence). As two circuit courts have concluded, *Taylor* clearly establishes a due process right to cumulative error review. *United States v. Salameh,* 152 F.3d 88, 157 (2d Cir. 1998) (citing *Taylor*, 436 U.S. at 487 & n. 15 (1978)); *Alvarez v. Boyd,* 225 F.3d 820, 824 (7th Cir. 2000) (citing *Taylor,* 436 U.S. at 487 n. 15).

Chambers and *Taylor* are two specific implementations of a broader principle that runs beneath much of this Court's precedent and reasoning: the aggregate effect of multiple errors is different than the isolated effect of each error on its own, and the former is prejudicial in a way that the latter is not. That principle emanates from the commonsense observation that an error's prejudicial effect on the jury, no matter how small, never completely dissipates. For instance, in *Berger v. United States*, the prosecuting attorney repeatedly overstepped his bounds, "misstating the facts in his cross-examination of witnesses," "putting into the mouths of such witnesses things which they had not said," and (among other things) "suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered." 295 U.S. 78, 84 (1935). In light of misconduct that was "pronounced and

persistent," this Court considered the "probable cumulative effect upon the jury" and granted the defendant a new trial. *Id.* at 89. In *Chapman v. California,* despite concluding that there "may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may … be deemed harmless," 386 U.S. at 22, this Court considered the "continuous[] and repeated[]" instances in which the prosecution had commented on the petitioner's failure to testify, holding that the "machine-gun repetition of a denial of constitutional rights" could not be considered harmless. *Id.* at 25–26. And in *Cupp v. Naughten,* 414 U.S. 141, 147 (1973), this Court held that in determining the effect of a jury instruction on the validity of the conviction of a habeas petitioner, "a single instruction ... may not be judged in artificial isolation, but must be viewed in the context of the overall charge."

Still other examples of this principle's application abound. *Brady* claims "turn[] on the cumulative effect of all such evidence suppressed by the government." *Kyles*, 514 U.S. at 420. Ineffective-assistance-of-counsel-claims depend on whether multiple errors had a "pervasive effect on the inferences to be drawn from the evidence," or rather whether the errors had only "an isolated, trivial effect." *Strickland v. Washington*, 466 U.S. 668, 695 (1984).

Despite its repeated invocation of that principle, and its opinions in *Chamber* and *Taylor*, a few remaining circuits still hold that this Court has never squarely required cumulative error review. As a result, people with convictions emanating from Tennessee (like Petitioner) remain on death row, while similar people across the

border in Alabama or Mississippi do not. This Court should grant certiorari to settle the circuit split.

II. PROCEDURAL HISTORY

A. State Proceedings

1. Trial and Sentencing

Petitioner and his co-defendant, Randall Sexton, were jointly tried for the murder of Diana Smith. Both were convicted of her murder and related charges on February 1, 1985. TR Vol. XIII, p. 465–66.[1] Five days later, at the conclusion of a joint sentencing proceeding, Sexton was sentenced to life imprisonment. *Id.* at 957. Petitioner was sentenced to death. *Id.*

2. Direct Appeal

The Tennessee Supreme Court reviewed Petitioner's conviction and sentence the following year. *State v. King,* 718 S.W.2d 241, 245 (Tenn. 1986); App. K, p. A166–75. It uncovered two errors. *See id*. First, it held that testimony from a witness named Lori Eastman Carter was erroneously admitted. *King*, 718 S.W.2d at 246 (citing *Bunch v. State,* 605 S.W.2d. 227 (Tenn. 1980)); App. K, p. A171–72. Ms. Carter was not involved in Petitioner's underlying criminal case. Her testimony, which alleged criminal conduct pertaining to a different incident, was not relevant to any matter "actually in issue in the case on trial." *Id.* The Tennessee Supreme Court found that her testimony had a "tenuous" connection "at best" to any issue before the jury, and

[1] Citations to the trial record will read "TR" followed by the volume followed by the page number.

it "would have been better for the trial judge to have excluded the testimony."[2] *Id*. The court nonetheless deemed the error "harmless." *King*, 718 S.W.2d at 246–47; App. K, p. A172. As discussed in below, the Sixth Circuit took a more realistic view of Ms. Carter's testimony, finding it "very devastating." *King v. Westbrooks*, 847 F.3d 788, 796–98 (6th Cir. 2017); App. B, p. A13–14 (referring to the Tennessee Supreme Court's understanding of Ms. Carter's testimony as "inaccurate.").

The second error recognized on direct review related to Petitioner's juvenile criminal record. *King*, 718 S.W.2d at 248–9; App. K, p. A173. On cross-examination during the penalty phase of the trial, the trial court permitted the prosecutor to ask Petitioner a series of questions about three juvenile adjudications that had occurred when he was seventeen years old. TR Vol. XVI, p. 707–710. The prosecution brought them up again on re-cross. TR Vol. XVI, p. 726. The Tennessee Supreme Court later determined, and the State ultimately conceded, that was error: Tennessee law flatly prohibits the introduction of juvenile adjudications in adult proceedings.[3] Tenn. Code Ann. § 37-1-133 (1982). *See also King,* 718 S.W.2d at 248; App. K, p. A173. But again, the court found that error harmless. *Id*.

[2] Ms. Carter's testimony was also highly unreliable. Ms. Carter alleged a serious assault took place—yet when she ultimately sought a warrant, it was for misdemeanor assault and battery. The warrant contained none of the details to which she testified at Petitioner's trial. TR Vol. XI, p. 281–291. Ms. Carter also admitted that she blamed Petitioner for the State taking her children away from her, bragged that she would be the "star witness" at Petitioner's trial, and said she would make sure Petitioner "fried in the electric chair." *Id.*; TR Vol. XII, p. 333–35.

[3] Two of Petitioner's juvenile adjudications were for armed robbery, and one was for sexual misconduct. The adjudication for sexual misconduct was ultimately withdrawn on appeal by the very prosecutor in Petitioner's capital case.

While examining this second error, the court turned a blind eye to the first. *See id.* It never considered whether the prejudice from the first error might have combined with the prejudice from the second error in a way that warranted a new sentencing phase—even if the prejudice from each of them individually did not. *See id.* The jurors in Petitioner's case heard inadmissible testimony about alleged prior criminal conduct from Ms. Carter, and then again heard inadmissible evidence of criminal conduct regarding Petitioner's juvenile adjudications in the penalty phase. Satisfied that each error, on its own, was insufficient to warrant reversal, the Tennessee Supreme Court confirmed Petitioner's conviction and sentence. *King,* 718 S.W.2d at 245; App. K, p. A169.

3. State Post-Conviction Proceedings

The Tennessee Supreme Court uncovered two more errors during state post-conviction proceedings. The first was a *Bruton* error. Randall Sexton, Petitioner's co-defendant, had submitted a written statement in lieu of testifying at trial. TR Vol. IX, p. 89–93. In it, he said that Petitioner said he killed the victim "because he was afraid he would get into the same trouble he got into with Lori [Carter]." TR Vol. IX, p. 90. This narrative amplified the prejudicial effect of Ms. Carter's erroneously admitted testimony, and was missing from Petitioner's statement, making the reliability suspect. TR Vol. IX, p. 98–99; TR Vol. X, p. 100–105. *See King v. State*, 989 S.W.2d 319, 329 (Tenn. 1999); App. H, p. A121–22. Sexton's statement was important enough to the jury's deliberations that it sent a note asking to review it. TR Vol. XIII, p. 463. But because Sexton did not take the stand, Petitioner was unable to confront

him on cross examination. *See id.* That, the Tennessee Supreme Court determined, was clear error under *Bruton v. United States*, 391 U.S. 123 (1968) and *Cruz v. New York*, 481 U.S. 186 (1987).

But, as it had done before, the Tennessee Supreme Court found that error harmless, too. *King*, 989 S.W.2d at 330; App. H, p. A121–23. As discussed in Section II, *infra*, it never considered the aggregate prejudicial effect of Sexton's statement and Ms. Carter's testimony. *See King,* 989 S.W.2d at 330. Nor did it consider the especially devastating way those two pieces of information combined. *See infra*, § II.

The second error brought to light during state post-conviction proceedings had to do with the felony-murder rule. One of the aggravating circumstances found by the jury was that Petitioner committed the murder while engaged in the commission of a "rape, robbery, larceny or kidnapping." Tenn. Code Ann. § 39–2–203(i)(2), (5), (6), and (7) (1985); *King*, 718 S.W.2d at 241; App. K, p. A173. As the Tennessee Supreme Court recognized in *State v. Middlebrooks*, that aggravator occasionally permits problematic reasoning: if a defendant is convicted of murder under the felony murder rule, the same criminal conduct that rendered him death-eligible at the guilt phase might also deliver him a death sentence at the penalty phase. 840 S.W.2d 317 (Tenn. 1992). That, the Tennessee Supreme Court held, fails to implement the narrowing process required by the Eighth Amendment. *See id.*; *Furman v. Georgia*, 408 U.S. 238, 239 (1972); *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988).

Petitioner's case was a good example. Petitioner had been convicted of murder on the theory that the victim had died in the course of a kidnapping (i.e., under the

felony murder rule), meaning it was possible the jurors had relied on the same kidnapping as justification for his death sentence. *King*, 989 S.W.2d at 324; App. H, p. A117–19. The Tennessee Supreme Court applied *Middlebrooks* and found its fourth error, concluding that the aggravator was used against Petitioner in violation of his Eighth Amendment rights. *King*, 989 S.W.2d at 325; App. H, p. A118. But again, looking at each error in isolation, it determined the error was harmless. *Id.* at 323–27; App. H, p. A117–19.

Petitioner asked the Tennessee courts to consider these errors cumulatively with those found on direct appeal. *See, e.g.,* Brief of the Appellant, *King v. State*, No. 03C01-9601-CR-204 at 131 (Tenn. Ct. Crim. App. Jul. 18, 1996); Rule 11 Application for Permission to Appeal Judgment of the Court of Criminal Appeals, *King v. State*, No. 03C01-9601-CR-204 (Tenn. Sept. 12, 1997). But the Tennessee Supreme Court declined, refusing to ask whether Petitioner's trial could still be considered fundamentally fair under the Fourteenth Amendment (or whether his death sentence was still consistent with the Eighth Amendment). *See King,* 989 S.W.2d at 327; App. H, p. A113.

B. Federal Proceedings

1. Habeas Petition

A fifth error was uncovered during federal habeas. During the sentencing phase, Petitioner's jury was asked to determine whether the murder of Diana Smith was "especially heinous, atrocious or cruel." *See* TR Vol. XVIII, p. 946. At the time, Tennessee law listed "especially heinous, atrocious, or cruel" as an aggravating

circumstance justifying the imposition of the death penalty. *See* Tenn. Code Ann. § 39–13–204(i)(5) (1985) (repealed). It was later determined to be unconstitutionally vague. *Houston v. Dutton*, 50 F.3d 381, 383 (6th Cir. 1995) (finding the aggravator "too vague and uninformative to properly guide the jury in reaching a death verdict"); *see also Maynard v. Cartwright,* 486 U.S. 356, 361 (1988) (application of facially vague "heinous, atrocious, or cruel" aggravator violated Due Process Clause of the Fourteenth Amendment).

The federal district court found that the error had been cured—but via a legal fiction. Long after Petitioner's trial, this Court held that state courts could cure such errors on appeal by applying a narrowing construction to the statutory language used in the aggravator. *Bell v. Cone,* 543 U.S. 447, 455–60 (2005). State courts could even do so implicitly so long as they had consistently applied narrowing language in the past. *Id*. at 456. Since the Tennessee Supreme Court had previously interpreted the heinous-atrocious-or-cruel aggravator in a way that narrowed it to require "torture" or "depravity of mind," *see State v. Williams,* 690 S.W.2d 517, 529–30 (Tenn. 1985), the federal district court determined it must have conducted a similar narrowing construction when it reviewed that aggravator during the direct appeal in Petitioner's case (even though it did not do so explicitly). *King v. Bell*, No. 3:99-CV-454, 2011 WL 3566843, at *15–18 (E.D. Tenn. Aug. 12, 2011); App. D, p. A45–50, *aff'd sub nom. King v. Westbrooks*, 847 F.3d 788 (6th Cir. 2017); App. B, p. A3.

While the federal district court found that the trial court must have cured the legal error, it failed to account for the deeper problem identified here: no court ever

considered whether that underlying error, in combination with the others, affected the jury's deliberations in a way that offended the Fourteenth or Eighth Amendments. Instead, the district court examined the problem in isolation, determined it was "cured," and then assumed away the additional prejudicial effect that vague aggravator had had on the jury's deliberations. *Id.* at *17; App. D, p. A49.

Against this backdrop, Petitioner's federal habeas petition again requested cumulative error review. Amended Petition for Writ of Habeas Corpus, *King v. Bell,* No. 3:99-cv-454 (E.D. Tenn. Nov. 15, 2000) at 43–48. Repeating the claim he raised during state post-conviction proceedings, Petitioner chronicled the various errors found by the state courts and asked that they be considered alongside those alleged on federal habeas, including the additional error that the district court had found to exist. Petitioner then cited Supreme Court precedent and precedent from other circuits around the country allowing for cumulative review based on the principles of due process and fairness in capital sentencing, and asked the district court to find that the state court's refusal to aggregate the prejudice from multiple legal errors was an unreasonable application of federal law under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Id.* Among other suggestions for ways to conduct an appropriate cumulative review, *id.* at 48, Petitioner recommended the Tenth Circuit's approach: "merely aggregate[] all the errors that individually have been found to be harmless, and therefore not reversible, and [] analyze[] whether their cumulative effect on the outcome of the trial is such that collectively, they can no longer be

determined to be harmless." *Id.* at 47 (quoting *United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990)).

The district court declined. *King*, No. 3:99-CV-454, 2011 WL 3566843, at *19 (citing *Clemons v. Mississippi*, 494 U.S. 738, 741 (1990)); App. D, p. A53. Like the Tennessee Supreme Court, it held that the Due Process Clause of the Fourteenth Amendment does not require courts to cumulate the prejudice resulting from multiple legal errors. *See id.* at *49; App. D, p. A107 ("because there is no Supreme Court precedent in this regard, King cannot demonstrate that the Tennessee Court of Criminal Appeals' rejection of his cumulative effect argument was either contrary to, or an unreasonable application of, clearly established federal law").

2. Application for Certificate of Appealability

Petitioner then sought review of this issue in the Sixth Circuit. Protective Application for a Certificate of Appealability at § IV, *King v. Carpenter*, No. 13-6387 (6th Cir. Mar. 28, 2014). Petitioner restated the claim, analyzed Sixth Circuit precedent (which at the time recognized cumulative error claims in some criminal and civil contexts, but refused to consider it under AEDPA on the theory that this Court had never before required such review, *see id.* at 41), compared Sixth Circuit precedent to that of other circuits around the country, listed the legal errors committed at Petitioner's trial and sentencing, *id.* at 43, and asked the Sixth Circuit to grant a certificate of appealability. *Id.* at 44. The Sixth Circuit declined to do so. Order at 2, *King v. Carpenter,* No. 13-6387 (6th Cir. Oct. 28, 2014); App. A, p. A1.

3. Appeal to the Sixth Circuit

Although it denied Petitioner's motion for a certificate of appealability with regard to the issue of cumulative error review, the Sixth Circuit granted a certificate of appealability on two other issues. *See id.* The Sixth Circuit's denial of relief on those claims became final on August 23, 2022. This Court now has jurisdiction to review the 2014 denial of a certificate of appealability on the cumulative error claim at issue here. *See Hohn v. United States*, 524 U.S. 236, 253 (1998); *Lozado v. Deeds*, 498 U.S. 430 (1991) (per curiam).

REASONS FOR GRANTING THE PETITION

The decision below implicates a circuit conflict on the question of whether courts must aggregate the prejudicial effect of multiple legal errors. That long-standing and well-defined split, regarding an important question of constitutional law premised on fundamental rights and basic tenets of logic, warrants review. So does Petitioner's case, which was wrongly decided below, and which is emblematic of the ways multiple individually insufficient errors can render a trial fundamentally unfair.

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THAT COURTS CONSIDER THE AGGREGATE EFFECT OF MULTIPLE LEGAL ERRORS.

A. The Decision Below Implicates a Conflict Among the Courts of Appeals.

In considering whether to aggregate the prejudicial effect of multiple legal errors, the First, Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits are in conflict with the Fourth, Sixth, and Eighth Circuits. Under the majority rule,

the prejudicial effects of two or more legal errors are aggregated and considered together. Under the minority rule, they are examined only in isolation.

1. Majority Rule

a. Tenth Circuit

The Tenth Circuit is the standard-bearer. Its method for analyzing cumulative error claims is representative and its reasoning is illuminative. The lead case is *Grant v. Trammell*, 727 F.3d 1006 (10th Cir. 2013) (Gorsuch, J.). There, the petitioner's jury had imposed the death penalty at the conclusion of a trial during which three separate constitutional violations had occurred. *Id.* at 1015. The first, a Sixth Amendment confrontation-clause violation, had prevented petitioner from cross-examining one of the state's experts about a different doctor's report. *Id.* The second, an Eighth Amendment violation, had permitted the introduction of victim-impact statements in which the victims directly asked the jury to impose a death sentence. *Id.* at 1016. The third, a Sixth Amendment right-to-counsel violation, had deprived the jury of background mitigation evidence about Grant's life. *Id.* at 1018.

Then-Judge, now Justice, Gorsuch, writing for the Tenth Circuit, devised a method for aggregating those errors. *Id.* at 1025–26. At the outset, the court acknowledged that to "accumulate error … is undoubtedly more subtle than simply counting up the number of errors discovered," because some errors may be more substantial (or of a different type) than others. *Id.* at 1025–26 (although "the cumulative error doctrine looks simple enough" at "first glance," it "admits of few easy answers in application"). From there, it recognized that, although there may be cases

in which an "inherent synergistic effect" multiplies the prejudice resulting from two or more errors, such an effect is not necessary to prevail:

> The reason why becomes clear if we understand prejudice in terms of probabilities. One might "accumulate" probabilities by adding them together, taking into account the *disjunctive* probabilities of each error. One might also "accumulate" probabilities by multiplying them and finding reversible error only in the space where all errors are *conjunctively* appearing all at once. If the cumulative error doctrine means anything, it must be that prejudice can be accumulated *disjunctively*—that all a defendant needs to show is a strong likelihood that the several errors in his case, when considered additively, prejudiced him. If it were otherwise, the cumulative error doctrine would be a nullity. A finding that one error wasn't prejudicial would necessarily preclude a finding that all of the errors were prejudicial. So while one error may make another error in the same direction more egregious, a defendant can still show cumulative error by accumulating unrelated errors if their probabilistic sum sufficiently undermines confidence in the outcome of the trial.

Id. at 1026 (internal citation omitted). With those principles in mind, the court added the three errors together. *Id*. While doing so, it asked whether the errors together "had a substantial and injurious effect or influence" on the case's outcome and looked to the relationship between the errors with "special mind to the fact that the errors [can have] 'an inherent synergistic effect.'" *Id.* (*citing Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Since "none of the three errors was anything more than modest on its own terms," the court concluded that they did "not collectively call into question the compelling case the government put on" nor "rob Mr. Grant of the ability to present anything more than a modest case for mitigation." *Id.* But it nonetheless observed, "[a]dding them together *undoubtedly* leads to a somewhat less modest

sum." *Id*. (emphasis added). Each of the other seven circuits in the majority take a similar approach.

b. First Circuit

In *United States v. Sepulveda,* the First Circuit considered a case where the trial court had committed two legal errors: failing to suppress illegally seized evidence and allowing the introduction of statements unsupported by the requisite extrinsic evidence. 15 F.3d 1161, 1196 (1st Cir. 1993) (Selya, J.). Adopting the majority approach, the First Circuit recognized that "certain trial errors, taken in isolation" may "appear harmless," but that the "accumulation" of those same errors may "nonetheless effectively undermine[] due process and demand[] a fresh start." *Id*. at 1195–96 ("In other words, a column of errors may sometimes have a logarithmic effect, producing a total impact greater than the arithmetic sum of its constituent parts."). It instructed reviewing tribunals to take into account "the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the district court dealt with the errors as they arose (including the efficacy—or lack of efficacy—of any remedial efforts); and the strength of the government's case," as well as the length of the trial (since a "handful of miscues" packs a "greater punch in a short trial."). *Id.* at 1196. It nonetheless declined to grant relief, calling the errors little more than "a few benign bevues." *Id.*

c. Second Circuit

United States v. Haynes is demonstrative of the Second Circuit's approach. 729 F.3d 178 (2d Cir. 2013). There, the trial court committed four errors: it improperly

shackled the defendant, *id.* at 188–91, failed to investigate potential jury misconduct, *id.* at 191–92, delivered an improper *Allen* charge, *id.* at 192–94, and committed other "serious evidentiary errors." *Id.* at 194–196. The Second Circuit concluded, "[i]ndividually, these errors may not provide a basis for vacating the defendant's conviction," but "considered together, in the context of this trial, these errors call into serious doubt whether the defendant received the due process guarantee of fundamental fairness." *Id.* at 197. *See also United States v. Guglielmini,* 384 F.2d 602, 607 (2d Cir. 1967) (cumulative error doctrine requires reversal where the "total effect of the errors … found … cast[s] … a serious doubt on the fairness of the trial"); *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 147 (2d Cir. 2008) (same); *Salameh*, 152 F.3d at 157.

d. Third Circuit

In *Fahy v. Horn*, the Third Circuit held that "[i]ndividual errors that do not entitle a petitioner to relief may do so when combined, if cumulatively the prejudice resulting from them undermined the fundamental fairness of his trial and denied him his constitutional right to due process." 516 F.3d 169, 205 (3d Cir. 2008). And in *Albrecht v. Horn,* the Third Circuit not only recognized that cumulative errors may together have a "substantial and injurious effect or influence in determining the jury's verdict," it grounded that rule in this Court's clearly established precedent. 471 F.3d 435, 468 (3d Cir. 2006) (citing 28 U.S.C. § 2254(d); *Brecht v. Abrahamson*, 507 U.S. 619 (1993)). As a result, cumulative error review is required in all Third Circuit

habeas proceedings. *See Collins v. Sec'y of Pa. Dep't of Corr.,* 742 F.3d 528, 542 (3d Cir. 2014).

e. Fifth Circuit

The Fifth Circuit's leading case, *Derden v. McNeel*, sets forth a four-pronged standard: the errors must have been errors, not just unfavorable rulings or events; they must not be procedurally barred; they must not be errors of state law (federal violations only); and the reviewing court must consider them in light of the record as a whole. 978 F.2d 1453, 1458 (5th Cir. 1992). With those rules in mind, the Fifth Circuit considered Derden's claims—that comments by the trial judge, prosecutorial misconduct, and a *Brady* violation had rendered his trial fundamentally unfair, *id.* at 149—and dispatched with each, determining that the judge's comments were imprudent but not erroneous, *id.* at 1459; that the prosecutor's actions were violations of state law, not the Constitution, *id.*; and that no *Brady* violation occurred at all. *Id.* at 1459–60. *See also United States v. Stephens*, 571 F.3d 401, 412 (5th Cir. 2009).

f. Seventh Circuit

In *Alvarez v. Boyd,* the Seventh Circuit held that "[t]rial errors which in isolation are harmless might, when aggregated, alter the course of a trial so as to violate a petitioner's right to due process of law." 225 F.3d 820, 824 (7th Cir. 2000). To assess the cumulative effect of multiple errors, the Seventh Circuit applies a two-element test: the petitioner must establish that "(1) at least two errors were committed in the course of the trial; [and that] (2) considered together, along with the

entire record, the multiple errors so infected the jury's deliberation that they denied the petitioner a fundamentally fair trial." *Id. See also United States v. Powell,* 652 F.3d 702, 706 (7th Cir. 2011) (recognizing same principle on direct review).

g. Ninth Circuit

The Ninth Circuit also requires cumulative error review in habeas cases. In *Parle v. Runnels*, evidence supporting the petitioner's defense (i.e., evidence about the victim's history of violence) was erroneously excluded, and evidence tending to undermine his defense (i.e., evidence the petitioner had made violent threats to police officers in the past) was erroneously admitted. 505 F.3d 922, 930 (9th Cir. 2007). The Ninth Circuit, observing that the "cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal," held that "where the combined effect of individually harmless errors renders a criminal defense 'far less persuasive than it might [otherwise] have been,' the resulting conviction violates due process." *Id.* at 929. (quoting *Chambers*, 410 U.S. at 294). It then overturned the underlying conviction, finding that the "plainly one-sided prejudice" resulting from those errors, and their "direct relevance to the *only* contested issue before the jury," warranted reversal. *Id.* at 930 (emphasis in original). *See also Killian v. Poole,* 282 F.3d 1204, 1211 (9th Cir. 2002) (habeas relief granted because of cumulative effect of the failure to disclose impeachment evidence, a witness's perjury, and prosecutorial misconduct).

h. Eleventh Circuit

Lastly, the Eleventh Circuit requires cumulative error review in habeas proceedings as well. The Eleventh Circuit reconsiders the validity of each claimed error individually before examining those errors "in the aggregate and in light of the trial as a whole to determine whether the appellant was afforded a fundamentally fair trial." *Morris v. Sec'y Dep't of Corr.*, 677 F.3d 1117, 1132 (11th Cir. 2012) (citing *United States v. Calderon*, 127 F.3d 1314, 1333 (11th Cir. 1997)); *see also Insignares v. Sec'y, Fla. Dep't of Corr.,* 755 F.3d 1273, 1284 (11th Cir. 2014); *Tarleton v. Sec'y, Fla. Dep't of Corr.*, 5 F.4th 1278, 1292 (11th Cir. 2021) (recognizing potential habeas claim premised on aggregate effect of three ineffective-assistance-of-counsel claims and one Confrontation Clause claim).

2. Commonalities Among the Courts in the Majority

Many of the circuit courts that apply the majority rule root the right to cumulative error in this Court's clearly established precedent. *See Salameh,* 152 F.3d at 157 (citing *Taylor,* 436 U.S. at 487 & n. 15); *Marshall v. Hendricks,* 307 F.3d 36, 78 (3d Cir. 2002) (citing *Berger,* 295 U.S. 78, and *Chapman,* 386 U.S. at 20); *Alvarez,* 225 F.3d at 824 (7th Cir. 2000) (citing *Taylor,* 436 U.S. at 487 n. 15); *Parle,* 505 F.3d at 927–29 (9th Cir. 2007) (citing *Chambers*, 410 U.S. at 287–302, *Montana,* 518 U.S. at 53, and *Taylor*, 436 U.S. at 487 n. 15); *Darks v. Mullin,* 327 F.3d 1001, 1017 (10th Cir. 2003) (citing *Delaware v. Van Arsdall,* 475 U.S. 673, 681 (1986), *Taylor,* 436 U.S. at 487–88 n.15, and *Donnelly v. DeChristoforo,* 416 U.S. 637, 639 (1974)); *Grant,* 727 F.3d at 1026 (10th Cir. 2013) (citing *Kotteakos*, 328 U.S. at 776).

The majority rule reflects a simple, commonsense principle: Prejudice accumulates. Just as each piece of evidence offered at trial has a cumulative effect on the guilt or innocence of a defendant, each piece of erroneously admitted evidence has a cumulative—and prejudicial—effect. Since the jury was not instructed to disregard the erroneously admitted evidence at trial (the trial judge believed no error had been made), its decision was presumably influenced by the aggregate effect of not only the properly admitted evidence, but the erroneously admitted evidence as well. The majority rule implements that straightforward understanding of how juries operate.

Each of the circuits that applies the majority rule also applies that same principle in myriad related settings. *See, e.g., Dunn v. Perrin,* 570 F.2d 21, 25 (1st Cir. 1978) (granting habeas relief because the "cumulative effect of [] three errors," each of which affected the jury charge, "was to obfuscate one of the 'essentials of due process and fair treatment'") (quoting *In re Winship*, 397 U.S. 358, 359 (1970)); *United States v. Padilla-Galarza*, 990 F.3d 60, 85 (1st Cir. 2021) ("justice" occasionally "requires the vacation of a defendant's conviction even though the same compendium of errors, considered one by one, would not justify such relief"); *Mello v. DiPaulo*, 295 F.3d 137, 151 (1st Cir. 2002) (upholding, as a not-unreasonable application of clearly established federal law, state court's determination that the trial was not "so riddled with error that it lacked the appearance of fairness and impartiality necessary to satisfy due process"); *United States v. Centeno-Gonzalez*, 989 F.3d 36, 50 (1st Cir. 2021) (prejudicial effect of multiple erroneous evidentiary rulings must be considered in the aggregate); *Turner v. United States*, 699 F.3d 578, 584 (1st Cir. 2012)

(prejudicial effect of multiple instances of ineffectiveness-of-counsel must be considered in the aggregate); *United States v. Baptiste*, 8 F.4th 30, 40 (1st Cir. 2021) (same); *Gilday v. Callahan*, 59 F.3d 257, 261 (1st Cir. 1995) (prejudicial effect of multiple unconstitutional jury instructions, and prejudicial effect of multiple pieces of suppressed evidence, must be considered in the aggregate); *Lindstadt v. Keane*, 239 F.3d 191, 202 (2d Cir. 2001) (prejudicial effect of multiple instances of ineffectiveness-of-counsel must be considered in the aggregate); *Pavel v. Hollins*, 261 F.3d 210, 225 (2d Cir. 2001) (same); *United States v. Birbal*, 62 F.3d 456 (2d Cir. 1995) (prejudicial effect of multiple unconstitutional jury instructions must be considered in the aggregate); *Gaines v. Kelly*, 202 F.3d 598, 610 (2d Cir. 2000) (same); *Richards v. Quarterman,* 566 F.3d 553, 571–72 (5th Cir. 2009) (prejudicial effect of multiple instances of ineffectiveness-of-counsel must be considered in the aggregate); *Martin v. Cain*, 246 F.3d 471, 477 (5th Cir. 2001) (prejudicial effect of multiple pieces of suppressed evidence must be considered in the aggregate); *Myers v. Neal*, 975 F.3d 611, 623 (7th Cir. 2020), *cert. denied,* 141 S. Ct. 2507 (2021) (prejudicial effect of multiple instances of ineffectiveness-of-counsel must be considered in the aggregate); *Kubat v. Thieret*, 867 F.2d 351, 370 (7th Cir. 1989) (same); *Snow v. Pfister*, 880 F.3d 857, 867 (7th Cir. 2018) (prejudicial effect of multiple pieces of suppressed evidence must be considered in the aggregate); *Sanchez v. City of Chicago*, 880 F.3d 349, 361 (7th Cir. 2018) (cumulating the harmful effect of multiple constitutional violations in a civil rights suit under 42 U.S.C. § 1983); *Harris v. Wood,* 64 F.3d 1432, 1438 (9th Cir. 1995) (prejudicial effect of multiple instances of ineffectiveness-of-counsel must

be considered in the aggregate); *Allen v. Sec'y, Fla. Dep't of Corr.*, 611 F.3d 740, 748 (11th Cir. 2010) (prejudicial effect of multiple pieces of suppressed evidence must be considered in the aggregate).

3. Minority Rule

a. Eighth Circuit

Three circuits do not recognize cumulative error claims in habeas cases. The Eighth Circuit's approach is simple: for many decades, it has consistently and flatly refused to recognize cumulative error as a basis for habeas relief. *Scott v. Jones*, 915 F. 2d 1188, 1191 (8th Cir. 1990). There, "[e]ach habeas claim must stand or fall on its own." *Wharton-El v. Nix*, 38 F.3d 372, 375 (8th Cir. 1994) (quoting *Scott,* 915 F.2d at 1191).

b. Fourth Circuit

The Fourth Circuit almost uniformly refuses to conduct cumulative error review. In *Fisher v. Angelone,* it joined the Eighth Circuit in rejecting all cumulative error review in habeas cases. 163 F.3d 835, 852–53 (4th Cir. 1998); *Mueller v. Angelone*, 181 F.3d 557, 586 n.22 (4th Cir. 1999); *see also Allen v. Lee,* 366 F.3d 319, 348 (4th Cir. 2004) (en banc) (Gregory, J., concurring) (the approach taken in the majority opinion did not "appear to adequately acknowledge the possible cumulative impact of the additional mitigating factors"). *But see United States v. Woods*, 710 F.3d 195, 208 (4th Cir. 2013). It nonetheless recognizes the principle of cumulative prejudice in analogous circumstances, such as where multiple pieces of evidence were suppressed in violation of *Brady v. Maryland,* 373 U.S. 83 (1963). *Basden v. Lee*, 290 F.3d 602, 611 (4th Cir. 2002) (citing *Kyles*, 514 U.S. at 436).

c. Sixth Circuit

Lastly, the circuit at issue here—the Sixth—does not conduct cumulative error review in habeas cases either. *Keith v. Mitchell*, 455 F.3d 662, 679 (6th Cir. 2006); *Abdur'Rahman v. Colson*, 649 F.3d 468, 473 (6th Cir. 2011) (same). Its reasoning is based on the conclusion that this Court has never clearly established a right to cumulative error review for habeas petitioners. *Lorraine v. Coyle,* 291 F.3d 416, 447 (6th Cir. 2002), *opinion corrected on denial of reh'g*, 307 F.3d 459 (6th Cir. 2002) ("The Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief."); *Williams v. Anderson*, 460 F.3d 789, (6th Cir. 2006) ("[T]he law of this Circuit is that cumulative error claims are not cognizable on habeas because the Supreme Court has not spoken on this issue. No matter how misguided this case law may be it binds us."); *Scott v. Elo*, 302 F. 3d 598, 607 (6th Cir. 2002). Reaching the opposite conclusion of that the Third Circuit reached in *Marshall v. Hendricks,* 307 F.3d 36, 78 (3d Cir. 2002), the Sixth Circuit determined that *Berger*, 295 U.S. 78, does not require consideration of the aggregate effect of multiple legal errors. *Lorraine,* 291 F.3d at 447.

In this case, the Eastern District of Tennessee cited Sixth Circuit precedent as the reason it could not consider the prejudicial effect of cumulative error on federal habeas review:

> The Supreme Court has not held that a district court may look to the cumulative effects of trial court errors in deciding whether to grant habeas corpus relief. *See Williams v. Anderson,* 460 F.3d 789, (6th Cir. 2006) (death-penalty decision stating, "[T]he law of this Circuit is that cumulative error claims are not cognizable on habeas

> because the Supreme Court has not spoken on this issue. No matter how misguided this case law may be it binds us.")

King, No. 3:99-CV-454, 2011 WL 3566843, at *49; App. D, p. A106, *aff'd sub nom. King,* 847 F.3d 788; App. B, p. A3.

B. State Courts and Secondary Sources

The state supreme courts are split, too. While many require cumulative error analysis (among them Delaware, Pennsylvania, Florida, Idaho, Illinois, Minnesota, Montana, New Jersey, and Utah, *see Starling v. State,* 130 A.3d 316, 336 (Del. 2015); *Commonwealth v. Lesko*, 15 A.3d 345, 417 (Pa. 2011); *Adamcik v. State*, 408 P.3d 474, 487 (Idaho 2017); *State v. Radke*, 821 N.W.2d 316, 330 (Minn. 2012); *Hurst v. State*, 18 So. 3d 975, 1015 (Fla. 2009); *Cramer v. State*, 153 P.3d 782, 787 (Utah 2006); *People v. Jackson*, 793 N.E.2d 1, 23 (Ill. 2001); *State v. Marshall*, 690 A.2d 1, 90 (N.J. 1997); *Vernon Kills On Top v. State*, 928 P.2d 182, 187 (Mont. 1996), many others (among them Arkansas, New Mexico, and Georgia) do not. *See, e.g.*, *Lacy v. State*, 545 S.W.3d 746, 752 (Ark. 2018); *State v. Lattin*, 428 P.2d 23, 27 (N.M. 1967); *Schofield v. Holsey*, 642 S.E.2d 56, 60 (Ga. 2007) (declining to conduct cumulative error review in any context other than the combined effects of trial counsel's errors under *Strickland*).

The circuit split on this issue is no secret. Scholars have recognized and commented upon the disagreement for decades. *See, e.g.,* Ryan A. Semerad, *What's the Matter with Cumulative Error?: Killing A Federal Claim in Order to Save It*, 76 Ohio St. L.J. 965, 981 (2015); John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating Bagley Materiality, Strickland Prejudice, and Cumulative*

Harmless Error, 95 J. Crim. L. & Criminology 1153, 1185 n.117 (2005). The circuit courts have, too. *See Derden,* 978 F.2d at 1456–57 (5th Cir. 1992); *Alvarez,* 225 F.3d at 824 & n.1 (7th Cir. 2000); *Morris v. Sec'y, Dep't of Corr.*, 677 F.3d at 1132 n.3 (11th Cir. 2012).

C. The Decision Below is Incorrect.

Petitioner's case demonstrates the folly of the minority approach. Each of the five errors discussed above combined to prejudice Petitioner. And in Petitioner's case, some of the errors exhibited a "synergistic" effect, compounding the prejudice of other errors. *See Grant,* 727 F.3d at 1026. The trial and capital sentencing that unfolded amidst them was not fundamentally fair.

1. Guilt Phase

At the guilt phase of the trial, the jurors heard two pieces of inadmissible evidence: Lori Eastman Carter's highly unreliable testimony (*see supra,* n.2) and Sexton's statement (which was never subjected to cross-examination). Ms. Carter told the jury, in violation of Tennessee law, that Petitioner had once beaten her with a stick while asking, "how it felt to be dying, so that the next woman he killed he would know how she felt." *King,* 989 S.W.2d at 331. The Tennessee Supreme Court found her testimony "harmless," reasoning that it "could not have affected in any way the results of the trial or the sentence imposed." *Id.*

That was an unusually skeptical take. The Sixth Circuit called Ms. Carter's testimony "very devastating." *King*, 847 F.3d at 796–98; App. B, p. A13–14 (referring to the Tennessee Supreme Court's understanding of Ms. Carter's testimony as

"inaccurate."). Beyond its obvious impact on the jury, Ms. Carter's testimony had a momentous behind-the-scenes effect: it forced Petitioner's counsel to abandon their entire trial strategy. Up until that point, counsel's strategy had been to argue in closing that Petitioner was intoxicated when he shot the victim—but because Ms. Carter made it sound as though Petitioner had been sober when he attacked her, trial counsel no longer believed that strategy would be convincing. *King,* 989 S.W.2d at 331. So instead, "he revised the defense theory solely in response to the surprise testimony of Ms. Carter." *Id.* He, too, did not consider her testimony harmless; he found it "totally unexpected and devastating." *King*, No. 3:99-CV-454, 2011 WL 3566843, at *22; App. D, p. A59.

The second guilt-phase error involved Sexton's statement—which, again, was inadmissible, largely self-serving, and presented to the jury without the benefit of cross-examination. According to Sexton, Petitioner had suggested he needed to kill the victim in order to make sure he avoided "the same mess he got into with Lori [Carter]." *See King*, 989 S.W.2d at 329; App. H, p. A122; TR Vol. IX, p. 90. The State, aware of the import of those (inadmissible, untested) words, focused on them heavily during their closing: "If I may refer to [Sexton's] statement 'Terry wasn't going to let her go, because he was afraid he would into the same mess he got into with Lori.'" TR Vol. XIII, p. 432.

The Tennessee Supreme Court decided the *Bruton* error was harmless. It reasoned that, "[i]n cases where *the properly admitted* evidence of guilt is overwhelming, and the prejudicial effect of the codefendant's confession is

insignificant by comparison … the improper admission is harmless beyond a reasonable doubt." *King,* 989 S.W.2d at 329–30 (emphasis added) (internal citations omitted); App. H, p. A122–23.

That analysis misses the mark. To begin with, at least some of the other evidence the jurors considered (e.g., the testimony of Lori Eastman Carter) was *not* properly admitted. Further, the evidence in question (a co-defendant's unchallenged, self-serving statement and a former girlfriend's unrelated claims against Petitioner) was unreliable, untested, and prejudicial in numerous other regards. But most pertinently, the Tennessee Supreme Court's insistence on considering Sexton's statement in isolation failed to account for the way the jury considered that statement: in combination with Ms. Carter's testimony (and the various other pieces of erroneously admitted evidence). When all of that evidence is considered together, its effect was much more harmful than any one piece considered in isolation.

The prosecutor at Petitioner's trial understood this. When he drew an objection by referencing Ms. Carter's testimony in his closing argument, he simply tied the reliability of the Ms. Carter's testimony to Sexton's statement: "Your Honor, I believe I am referring to Mr. Sexton and that is in his statement." TR Vol. XIII, p. 434. In the process, he demonstrated the "inherent synergistic effect" that rendered Sexton's statement and Carter's testimony uniquely prejudicial. *Grant,* 727 F.3d at 1026.

2. Penalty Phase

The effect of the two guilt-phase errors carried over into the penalty phase. There, three more errors occurred: Petitioner's juvenile record was introduced, the

jury was permitted to impose the death penalty for the same conduct that was the grounds for the Petitioner being found guilty, and the jury was instructed to apply an unconstitutionally vague aggravator (i.e., whether the murder was particularly heinous, atrocious or cruel). Considered in the aggregate—as no court has yet considered them—these five errors rendered Petitioner's sentence constitutionally infirm.

Petitioner did not begin the penalty phase with a clean slate. Instead, the jurors were explicitly instructed that they were free consider the evidence from the guilt phase when deciding whether to impose the death penalty. TR Vol. XIII. p. 470 ("Members of the jury, the proof that you heard in the first phase of this trial may be considered by you in this phase for the purposes of sentence."). *See also Weeks v. Angelone,* 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions."). That evidence, of course, included the improperly admitted statement from Sexton and the improperly admitted testimony of Ms. Carter—both of which the prosecution explicitly relied on to argue in favor of the death penalty. TR Vol. XVII, p. 899 ("You've heard Mr. Sexton state Mr. King told him that he didn't want to get in the same situation again that he'd got into with Lori [Carter].").

Still other erroneously admitted evidence prejudiced Petitioner during his sentencing. There, the jurors heard inadmissible evidence regarding Petitioner's juvenile adjudications for violent crimes. With that evidence in the record, the universe of inadmissible facts available to the jury—Ms. Carter's statement about unrelated alleged criminal conduct, Sexton's inadmissible self-serving statement that

Petitioner was afraid of getting in trouble "again," and Petitioner's juvenile adjudications for violent crimes—was considerable.[4]

The jury then turned to the aggravating circumstances, where the improperly admitted evidence factored into their determination of whether to impose the death penalty. For instance, that evidence affected the jury's consideration of whether the murder was particularly heinous, atrocious or cruel, by providing a motive that ostensibly explained the more gruesome aspects of the victim's death. It also provided support for the State's theory that Petitioner had (in line with one of the aggravating circumstances) killed the victim in order to "flee[] after committing …. any rape," TR Vol. XVIII, p. 950–5.1 His juvenile adjudications suggested he had committed similar acts in the past (and had experienced their criminal fallout, giving him a reason to want to avoid a similar result following the victim's supposed rape) and Sexton's statement and Ms. Carter's testimony purported to show that Petitioner had explicitly admitted to killing the victim for the very same purpose mentioned in the aggravating circumstance (i.e., to avoid "the same mess he got into with Lori [Carter]." TR Vol. IX, p. 90). Petitioner's case was thus one of the rare cases where an "inherent synergistic effect" among the various errors multiplied their prejudice. *Grant,* 727 F.3d at 1026. But even without that synergistic effect, the many errors,

[4] The cumulative effect of all this inadmissible evidence regarding Petitioner's criminal history had an effect on the jurors. How could it not? The State wanted this evidence admitted for the very fact that it is prejudicial; in the aggregate it paints Petitioner as a violent career criminal with a propensity to commit violent crimes. That evidence is inadmissible in Tennessee and federal courts. (Tenn. R. Evid. 404; Fed. R. Evid. 404).

considered in the aggregate across both the guilt and penalty phases, show that Petitioner's due process right to a fundamentally fair trial was violated.

* * *

There is indisputably substantial disagreement among the circuits on whether to accumulate prejudice across multiple legal errors. This Court should intervene to resolve this longstanding conflict on an important question of constitutional law.

II. THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMEMDMENT REQUIRES THAT COURTS CONSIDER THE AGGREGATE EFFECT OF MULTIPLE LEGAL ERRORS WHEN REVIEWING A CAPITAL SENTENCE.

Petitioner's death sentence is inconsistent with the Eighth Amendment. This Court has repeatedly emphasized that the death penalty, because of its unique severity and irrevocability, is qualitatively different from any other punishment and, therefore, requires especially reliable procedures. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("'[T]he penalty of death is qualitatively different' from any other sentence. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.") (quoting *Woodson*, 428 U.S. at 305); *Beck v. Alabama*, 447 U.S. 625, 637 (1980) (noting "significant constitutional difference between the death penalty and lesser punishments").

This fundamental principle that "death is different," *see Ford v. Wainwright,* 477 U.S. 399, 411 (1986), gives rise to heightened constitutional and procedural

protections. Virtually all of the Supreme Court's capital jurisprudence has been characterized by a particular "sensitiv[ity] to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). Not only do these safeguards take into account the qualitative difference between the death penalty and other punishments, *see Furman*, 408 U.S. at 306 (Stewart, J., concurring), they also ensure that death sentences are not "inflicted in an arbitrary and capricious manner." *Gregg*, 428 U.S. at 188. *See also Ake v. Oklahoma,* 470 U.S. 68, 87 (1985) ("In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases.") (Burger, C.J., concurring in judgment). Given the severity and irrevocability of the death penalty, courts in capital cases must "impose protections that the Constitution nowhere else provides." *Harmelin,* 501 U.S. at 994. The Eighth Amendment compels the application of "special procedural safeguards" whenever the death penalty is sought. *Ring,* 536 U.S. at 614.

This Court's precedent does not directly hold that the Eighth Amendment requires cumulative error review. But the principles announced in its capital jurisprudence nonetheless dictate that—especially where the death penalty is at issue—some form of cumulative error review is necessary. To execute a death sentence without the assurance that the accused received a fundamentally fair trial would "permit this unique penalty to be . . . wantonly and . . . freakishly imposed." *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990).

CONCLUSION

For these reasons, under the Fourteenth and Eighth amendments, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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