

No. 22-6534

IN THE
SUPREME COURT OF THE UNITED STATES

TERRY LYNN KING,
Petitioner,
vs.
TONY MAYS, WARDEN,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

JONATHAN SKRMETTI
Attorney General and Reporter
State of Tennessee

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

JOHN H. BLEDSOE
Deputy Attorney General
Federal Habeas Corpus Division
Counsel of Record
500 Dr. Martin L. King Jr. Blvd.
P.O. Box 20207
Nashville, Tennessee 37202-0207
John.Bledsoe@ag.tn.gov
(615)741-4351

Counsel for Respondent

CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Whether the petitioner can overcome deferential review of the state-court rejection of his cumulative-error claim when that adjudication neither contravened nor unreasonably applied clearly established federal law and, in any event, the petitioner cannot prove cumulative error under the record.

LIST OF DIRECTLY RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 15.2, the respondent supplements the list of proceedings provided by the petitioner under Supreme Court Rule 14.1(b)(iii) with the following matters:

King v. State, No. 72987 (Knox Co. Crim. Ct. Mar 10, 2003) (order denying motion to reopen post-conviction petition).

King v. State, No. E2003-00701-CCA-R28-PD (Tenn. Crim. App. Jul. 8, 2003), *perm. app. denied* (Tenn. Nov. 24, 2003) (order denying permission to appeal from order denying motion to reopen post-conviction petition).

King v. State, No. 101842 (Knox Co. Crim. Ct. Jun. 23, 2014) (order denying petition for writ of error coram nobis).

King v. State, No. E2014-01202-CCA-R3-ECN, 2015 WL 3409486 (Tenn. Crim. App. May 28, 2015), *perm. app. denied* (Tenn. Sep. 16, 2015) (opinion affirming order denying petition for writ of error coram nobis).

King v. Tennessee, 136 S. Ct. 2449 (2016) (denying certiorari in error coram nobis appeal).

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	ii
LIST OF DIRECTLY RELATED PROCEEDINGS.....	iii
INTRODUCTION	1
STATEMENT OF THE CASE.....	2
ARGUMENT.....	13
I. This Case Is Not a Proper Vehicle for Establishing a Constitutional Cumulative-Error Claim Because King’s Claim Is Subject to AEDPA Deference.....	14
II. This Case Is a Poor Vehicle Because King Cannot Establish Cumulative Error on this Record.....	17
CONCLUSION.....	21

TABLE OF CITED AUTHORITIES

Cases

<i>Albrecht v. Horn</i> , 485 F.3d 103 (3rd Cir. 2007)	14
<i>Ali v. Grounds</i> , 236 F. Supp. 3d 1241 (S.D. Cal. 2017).....	14
<i>Bruton v. United States</i> , 391 U.S. 123 (1968).....	7
<i>Cruz v. New York</i> , 481 U.S. 186 (1987).....	7
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011).....	14, 15, 16
<i>Johnson v. Williams</i> , 568 U.S. 289 (2013).....	15
<i>King v. Bell</i> , No. 3:99-cv-00454, 2011 WL 356643 (E.D. Tenn. Aug. 12, 2011).....	11, 17
<i>King v. State</i> , 989 S.W.2d 319 (Tenn. 1999)	passim
<i>King v. State</i> , No. 03C01-9601-CR-00024, 1997 WL 416389 (Tenn. Crim. App. Jul. 14, 1997).....	8, 9, 15
<i>King v. State</i> , No. E2019-003490-CCA-R3-PD, 2021 WL 982503 (Tenn. Crim. App. Mar. 16, 2021)	12
<i>King v. Westbrook</i> , 847 F.3d 788 (6th Cir. 2017)	12
<i>Parker v. Randolph</i> , 442 U.S. 62 (1979).....	7
<i>Parle v. Runnels</i> , 505 F.3d 922 (9th Cir. 2007)	17
<i>Sanchez v. McDowell</i> , ___ F. Supp. 3d ___, 3:22-cv-00192, 2023 WL 27360 (S.D. Cal. Jan. 3, 2023).....	17
<i>Scott v. Elo</i> , 302 F.3d 598 (6th Cir. 2002)	14

<i>Shinn v. Kayer</i> , 141 S. Ct. 517 (2020).....	15
<i>Sneed v. Beard</i> , 328 F. Supp. 3d 412 (E.D. Penn. 2018).....	14
<i>State v. Banks</i> , 271 S.W.3d 90 (Tenn. 2008)	8
<i>State v. Howell</i> , 868 S.W.2d 238 (Tenn. 1993)	20
<i>State v. King</i> , 718 S.W.2d 241 (Tenn. 1986)	passim
<i>State v. Middlebrooks</i> , 840 S.W.2d 317 (Tenn. 1992)	7, 8
<i>State v. Miller</i> , 638 S.W.3d 136 (Tenn. 2021)	8
<i>Virginia v. LeBlanc</i> , 137 S. Ct. 1726 (2017).....	16
<i>Wilson v. Sellers</i> , 138 S. Ct. 1188 (2018).....	15
<i>Woods v. Donald</i> , 575 U.S. 312 (2015).....	14, 16
Statutes	
28 U.S.C. § 2254(d).....	1, 13, 14
Tenn. Code Ann. § 39-2-203(g).....	5
Tenn. Code Ann. § 39-2-203(i).....	5

INTRODUCTION

On collateral review, the state courts adjudicated Terry Lynn King's cumulative-error claim on the merits and rejected it. On federal habeas corpus review, the district court denied relief on the claim because the state-court adjudication was not contrary to or an unreasonable application of clearly established federal law as determined by this Court. Relying on various approaches taken by other courts when presented with claims of cumulative error, King asks the Court to establish a claim for relief due to cumulative error under the Due Process Clause of the Fourteenth Amendment or the Cruel and Unusual Punishment Clause of the Eighth Amendment.

The Court should deny review. First, federal-court consideration of the claim is limited by the deferential review under the Antiterrorism and Effective Death Penalty Act of 1986 (AEDPA), as codified in 28 U.S.C. § 2254(d). King cannot show that the state-court rejection of his cumulative-error claim either contravened or unreasonably applied clearly established federal law. Moreover, King concedes that this Court has never held that cumulative-error review is required by the Eighth Amendment.

Second, King cannot establish cumulative error under the record. As the state courts held, even accumulating the four particular harmless errors in this case would not provide King any relief. The proof against King—including his own detailed confession to the murder and overwhelming proof establishing multiple aggravating circumstances—simply outweighs the harmless errors regardless of whether they are considered individually or in the aggregate.

STATEMENT OF THE CASE

State Trial Proceedings

One afternoon nearly forty years ago, the victim, Diana Smith, left her home to buy food for her family at a nearby McDonalds. She did not return. Her 1979 Camaro was eventually located off the road in a heavily wooded area. *State v. King*, 718 S.W.2d 241, 243 (Tenn. 1986). Two days later, a passerby at a quarry in the area detected a strange odor from a yellow tarpaulin in the water near the bank. She alerted law enforcement officers, who discovered the victim's partially decomposed body. The officers later determined that the victim died from one or more gunshot wounds to the back of the head from a high-powered rifle. *Id.* at 243, 245.

The day after the victim went missing, King asked Jerry Childers if he knew anyone interested in purchasing parts from a 1979 Camaro. According to Childers, King confessed that he killed the vehicle's owner after she threatened to charge him with rape. King told Childers that he ordered the victim out of the car trunk, where he had confined her, and that he directed her to lie face down on the ground. She faced King, begged him not to shoot her, and offered him money. King ordered her to turn her head away, and when she did so, he shot her in the back of the head. He took forty dollars from her, as well as her vehicle. *Id.* at 243-44.

Four days after this conversation, Childers relayed King's confession to a third party. Childers eventually went to the location where King claimed to have killed the victim, and he found something there with hair on it. *Id.* at 244. Childers then reported King's confession to law enforcement officers, and he met officers at the location where King admitted to killing the victim. An initial search of the area gleaned pieces of bone, hair, and bloodstains. A later, more thorough search resulted in the discovery of bullet fragments and additional bone fragments. *Id.*

Law enforcement officers interviewed both King and his co-defendant, Randall Sexton, and each gave written statements about the offenses, which “were markedly similar for the time the two men were together.” *Id.* According to King, he and his cousin, Don King, picked up the victim the day she went missing, and King drove her vehicle to Don’s trailer, arriving around 7:00 p.m. Thereafter, King called Eugene Thornhill, “who came to the trailer and left with defendant to obtain LSD and quaaludes.” *Id.* Both King and the victim took drugs, and he, Don, and Thornhill each had sex with the victim. *Id.*

After several hours at Don’s home, King and the victim left in her vehicle, and he drove to a wooded area, where the two had sex again. Next, they went to a service station for gas, at which time the victim grabbed the keys to the automobile. King told her to get back in the car, and she complied. They returned to the wooded area and again had sex, and King took forty dollars from her. She asked King, “Why did you rape me?” *Id.* In his statement, King acknowledged that, at this point, “he knew what he was going to do.” *Id.*

King ordered the victim into the trunk and drove to Sexton’s house, where he told Sexton that “he had a woman in the trunk of the automobile and needed Sexton’s help.” *Id.* King procured a rifle and a shovel from Sexton, and the two left Sexton’s house in different vehicles. After stopping to buy gas, the two drove to a wooded area near where he told Childers that he killed the victim. King drove the victim’s Camaro off the road, where it became stuck. He had the victim get out of the trunk, and he pointed the loaded rifle at her. He made her lie on the ground, but he assured her that he was not going to kill her. He told her that others were coming to have sex with her. *Id.*

Sexton left, and while he was gone, King shot the victim in the back of the head. Upon Sexton’s return, and after getting the victim’s car unstuck, both King and Sexton rummaged

through the victim's effects and burned her identification. They attempted to bury her body but gave up doing so due to the hardness of the ground. *Id.* The next morning, they wrapped the victim's body in a tent, weighted it down with cinder blocks, and dumped the victim's body into the quarry where law enforcement later found her body. The victim's vehicle was hidden near Sexton's home. *Id.* at 244-45.

After giving his written statement, King traveled with law enforcement officers to where he left the victim's car and to the hollow tree where he hid the vehicle's license plate. He also showed the officers where he shot the victim and where he and Sexton placed the victim's body in the quarry. *Id.* at 245. Subsequent forensic firearm examination showed that at least two bullets had been fired, that a metal bullet jacket recovered from the crime scene matched Sexton's rifle, and that fragments recovered from the scene "were fired from a rifle with the same rifling characteristics as Sexton's rifle." *Id.*

From the above evidence, the jury convicted King and Sexton of (1) first-degree felony murder in the perpetration of a kidnapping by confinement and (2) armed robbery. Although neither testified during the guilt phase of the trial, both King and Sexton testified in the penalty phase, when they "repeated in substance the facts set forth in the statements given the police officers in their statements." *Id.* at 244, 248. At that time, King clarified that he did not form an intent to kill the victim before arriving at Sexton's house and that Sexton urged him to take the rifle. But he acknowledged that he "formed the intent to kill Mrs. Smith after he took her to the place she was shot." *Id.* at 248. He explained that he confessed to Childers "because it was bothering him," but he denied telling Childers that the victim begged for her life. *Id.*

During the sentencing phase, the State also presented evidence that King and Sexton were each convicted of (1) first-degree felony murder in the perpetration of an armed robbery by use of

a firearm and (2) aggravated kidnapping for their killing of another victim less than one month *before* they killed Diana Smith. The State further showed that King was convicted of assault with intent to commit aggravated kidnapping, which King committed just three days *after* he killed Diana Smith. *Id.* at 247-48. King also admitted to committing two armed robberies in January 1980 (three years before the murder) when he was a juvenile. *Id.* at 248. The defense presented proof on King's drug and alcohol use and his purported remorse. *Id.*

At the conclusion of the sentencing phase, the jury sentenced King to death on the first-degree murder conviction, finding the following aggravating circumstances beyond a reasonable doubt:

1. The defendant was previously convicted of one or more felonies, other than the present charge, which involved the use or threat of violence to the person.
2. The murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind.
3. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of the defendant or another.
4. The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any rape, robbery, larceny or kidnapping.

Id. (citing Tenn. Code Ann. § 39-2-203(i)(2), (5), (6), and (7)). The jury found no mitigating circumstances sufficiently substantial so as to outweigh the aggravating circumstances. *Id.* (citing Tenn. Code Ann. § 39-2-203(g)).

The jury sentenced Sexton to life imprisonment. The trial court subsequently sentenced both King and Sexton on the armed robbery conviction to 125 years confinement. *Id.* at 243 n.1.

State Direct Appeal

In the direct appeal of King's convictions, the Tennessee Supreme Court affirmed. As relevant here, the court concluded that the trial court erred during the guilt phase by admitting testimony from Lori Eastman Carter that King assaulted and attempted to kill her the year before the murder of Diana Smith. She testified that he "hit her with a slapstick numerous times, while repeatedly asking her 'how it felt to be dying, so that the next woman he killed he would know how she felt.'" *Id.* at 245. She lost consciousness, and she heard King tell his cousin that he had killed her and needed help to put her in a quarry and burn her automobile. *Id.* Other witness testimony disputed Ms. Carter's account. *Id.* The court found her testimony's relevance "tenuous at best" and noted that "it would have been better for the trial judge to have excluded the testimony in view of the strength of other evidence on these issues." *Id.* at 246. Nevertheless, any error in the testimony's admission "was harmless beyond a reasonable doubt and could not have affected in any way the results of the trial or the sentence imposed." *Id.* at 246-47.

In the sentencing phase, the Tennessee Supreme Court concluded that the trial court erred by admitting evidence of King's juvenile offenses. The error was harmless and could not be prejudicial to King because the evidence at trial overwhelmingly established the four aggravating circumstances. As for the prior-violent-felony aggravator specifically, King's more recent, adult convictions for first-degree felony murder in the perpetration of an armed robbery by use of a firearm, aggravated kidnapping, and assault with intent to commit an aggravated kidnapping fully supported that aggravating circumstance. *Id.* at 248-49.

State Post-Conviction Review

Upon the completion of the direct appeal, King filed a petition for post-conviction relief in the convicting court, which ultimately denied collateral relief. As relevant here, the trial court

found no basis for relief on King’s claim that the admission of Sexton’s statement during the guilt phase of their joint trial violated the Confrontation Clause, as construed in *Bruton v. United States*, 391 U.S. 123 (1968), and *Cruz v. New York*, 481 U.S. 186 (1987). (Pet. Appx. 147, 156-157.) King argued that admitting Sexton’s written statement violated King’s Sixth Amendment right to confrontation because he could not cross-examine Sexton about statements inculcating King, specifically Sexton’s professed belief that King was not going to release Ms. Smith because of King’s prior entanglement with Lori Eastman Carter. The trial court concluded that, if the then-recent, intervening decision in *Cruz* applied retroactively to King’s case on collateral review and if the admission of Sexton’s statement was error, it was harmless error beyond a reasonable doubt due to the overwhelming evidence of King’s guilt. (Pet. Appx. 156-157.)¹

King also raised a sentencing claim under *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992), due to the jury’s application of the felony-murder aggravating circumstance on his felony murder conviction. In *Middlebrooks*, the Tennessee Supreme Court concluded that applying Tennessee’s felony-murder aggravating circumstance to a first-degree felony murder conviction violates the Eighth Amendment and article I, section 16 of the Tennessee Constitution because it “duplicates the elements of the offense” and fails to sufficiently narrow the population of death-

¹On direct appeal, Petitioner challenged the admission of Sexton’s statement under *Bruton*, but the Tennessee Supreme Court found no error. Applying *Parker v. Randolph*, 442 U.S. 62 (1979), the court explained that “*Bruton* is not violated when the defendant confesses and his confession ‘interlocks’ in material aspects with the confession of the co-defendant.” *King*, 718 S.W.2d at 247. Because King’s and Sexton’s statements were “interlocking in the crucial facts of time, location, felonious activity, and awareness of the overall plan or scheme,” the court found no *Bruton* violation. Thereafter, in *Cruz*, this Court clarified that, “where a nontestifying codefendant’s confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant’s own confession is admitted against him.” *Cruz*, 481 U.S. at 194 (citation omitted). King then reasserted his *Bruton* claim on post-conviction review, under *Cruz*.

eligible offenders. *Id.* at 346.² The trial court found error under *Middlebrooks* but concluded that the error was harmless beyond a reasonable doubt in view of the overwhelming evidence supporting King’s guilt and the remaining three aggravating circumstances. (Pet. Appx. 147-148, 157-159.) On his claim that he was deprived of a fair trial due to cumulative error, the trial court concluded that King “raised no grounds for which relief should be granted, therefore, cumulative effect also fails as an argument.” (Pet. Appx. 159-160, 165.)

On appeal, the Tennessee Court of Criminal Appeals affirmed. The court determined that, even if the admission of Sexton’s statement violated *Bruton* and *Cruz*, any error was harmless beyond a reasonable doubt. Sexton’s statement about Lori Eastman Carter concerned whether King formed premeditation to kill Ms. Smith and what his motive for doing so was, issues not directly pertinent to whether King committed first-degree felony murder in the perpetration of a kidnapping by confinement, the offense on which the jury convicted him.³ And the evidence of King’s guilt for that offense was overwhelming, not including Sexton’s statement. *King v. State*, No. 03C01-9601-CR-00024, 1997 WL 416389, at *7-*10 (Tenn. Crim. App. Jul. 14, 1997), *perm. app. granted* (Tenn. Dec. 8, 1997).

As for harmless error in the sentencing phase, Sexton’s statement did not inform whether the aggravating circumstances applied to King beyond the other, overwhelming evidence

²Post-*Middlebrooks*, the Tennessee General Assembly amended the felony-murder aggravating circumstance, and the Tennessee Supreme Court has upheld application of the amended version in first-degree felony murder cases. *State v. Miller*, 638 S.W.3d 136, 164-65 (Tenn. 2021) (citing *State v. Banks*, 271 S.W.3d 90, 152 (Tenn. 2008)).

³The indictment charged the defendants with first-degree premeditated murder and two counts of first-degree felony murder in the perpetration of a kidnapping, and the jury convicted the defendants on first-degree felony murder in the perpetration of a kidnapping by confinement. *King*, 718 S.W.2d at 245.

establishing them. Nor did Sexton’s statement—which was consistent with his own sentencing phase testimony—contradict or damage King’s mitigation proof. *Id.* at *10-*11.

On the *Middlebrooks* issue, the state appellate court found no error in application of the felony-murder aggravating circumstance. Nevertheless, it concluded that any error would be harmless beyond a reasonable doubt because the trial evidence strongly supports the remaining three aggravating circumstances. *Id.* at *2-*6. Finally, regarding cumulative error, the court considered the individual harmless-error determinations made in King’s case and concluded that, “when viewed cumulatively, we do not find that the sum total of these errors robbed the petitioner of a fair trial at either the guilt or penalty phases.” *Id.* at *18.

On appeal, the Tennessee Supreme Court affirmed. On the *Bruton/Cruz* issue, the court concluded that, even if *Cruz* applied retroactively to this case, the trial court’s erroneous admission of Sexton’s statement was harmless error beyond a reasonable doubt. The court noted that Sexton’s and King’s respective statements were “substantially similar as to the facts and circumstances involving the murder,” and King’s statement included greater detail on the actual shooting. *King v. State*, 989 S.W.2d 319, 329 (Tenn. 1999). In view of Jerry Childers’s testimony and the physical evidence developed from that testimony, “the objective evidence against [King] was overwhelming.” *Id.* at 329-30. “There is no question that the evidence of [King’s] guilt was overwhelming even without consideration of the two written confessions.” But considering King’s statement along with this proof, any error in admitting Sexton’s statement was harmless beyond a reasonable doubt. *Id.* at 330.

As for the *Middlebrooks* issue, the court concluded that application of the felony-murder aggravating circumstance was error but that it qualified as harmless error beyond a reasonable doubt because “[t]he remaining three aggravating circumstances were properly applied and

strongly supported by the evidence.” *Id.* at 325. First, as to the prior-violent-felony aggravator, the court reiterated its holding on direct appeal that this aggravator was not “somehow tainted” by the trial court’s erroneous admission of King’s juvenile offenses because their introduction “had no bearing on the outcome of [King’s] trial.” *Id.* And his violent felony convictions committed more contemporaneously with this offense “reflect complete disregard for human life and strongly support the . . . aggravator.” *Id.* Second, as to the aggravating circumstance that King committed the murder to avoid, interfere with, or prevent a lawful arrest or prosecution, King admittedly killed the victim in response to her accusation of rape, which strongly supported the aggravator. *Id.* Despite King’s argument to the contrary, erroneously admitted testimony from Lori Eastman Carter in no way undermined that conclusion when King’s own statement and sentencing testimony alone support it. *Id.* at 326. Third, the heinous-atrocious-and-cruel aggravator was properly applied because “the manner of Ms. Smith’s death involved severe mental pain and anxiety as contemplated by the . . . aggravator.” *Id.* From its own independent review of the record, the court expressed “confiden[ce] that the weighing of the mitigating evidence against the three remaining aggravators would have resulted in the same sentence of death.” *Id.* at 327.

On the cumulative-error claim, the court acknowledged that King had claimed that he is “entitled to a new trial and/or a new sentencing hearing based upon cumulative errors in the record.” *Id.* at 323. In resolving the claim, the court focused on King’s sentencing-phase request that the court broaden the analysis adopted under *Middlebrooks* and its progeny for assessing harmless error on the improper application of the felony-murder aggravating circumstance to a first-degree felony murder conviction. On that point, the court declined to modify the existing harmless error analysis and reiterated its finding of harmless error on the *Middlebrooks* violation. *Id.* at 327-28.

Federal Habeas Corpus Review

King filed a habeas corpus petition in the United States District Court for the Eastern District of Tennessee, which ultimately dismissed the petition. *King v. Bell*, No. 3:99-cv-00454, 2011 WL 356643 (E.D. Tenn. Aug. 12, 2011). On the cumulative-error issue, the district court recognized that King raised the claim on post-conviction review and secured an adjudication on the merits. Under binding precedent from the United States Court of Appeals for the Sixth Circuit, the district court determined that King could not overcome AEDPA deference on the Tennessee Court of Criminal Appeals' rejection of the claim because this Court had not "clearly established," at the time of the state-court adjudication, a claim for relief under the federal constitution due to cumulative error. "[B]ecause 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." *Id.* at *48-*49. As for King's argument—rejected by the Tennessee Supreme Court—that the state court should accumulate harmless errors for consideration on a *Middlebrooks* violation, the district court found no basis for habeas corpus relief on the state court's rejection. *Id.* at *19.⁴

On appeal, the Sixth Circuit declined King's request for a certificate of appealability on the cumulative-error claim, instead granting a certificate of appealability on certain allegations of ineffective assistance of counsel. Ultimately, the Sixth Circuit considered those claims, rejected them, and affirmed the judgment. Following a stay for exhaustion on an unrelated issue in King's

⁴Applying AEDPA deference to the state-court adjudications of harmless error beyond a reasonable doubt, the district court denied relief on the *Bruton/Cruz* issue and the *Middlebrooks* issue. *Id.* at *7-*14, *18. It rejected King's claim that application of the heinous-atrocious-and-cruel aggravating circumstance was erroneous. Instead, the factor, as instructed, construed, and applied in King's case, was not unconstitutionally vague. *Id.* at *14-*17.

reopened post-conviction petition, the Sixth Circuit denied rehearing. *King v. Westbrooks*, 847 F.3d 788 (6th Cir. 2017), *rehearing denied* (6th Cir. Aug. 15, 2022).⁵

⁵The state court denied relief on the reopened post-conviction petition. *King v. State*, No. E2019-003490-CCA-R3-PD, 2021 WL 982503 (Tenn. Crim. App. Mar. 16, 2021), *perm. app. denied* (Tenn. July 21, 2021), *cert denied*, 142 S. Ct. 1146 (2022).

ARGUMENT

Relying on the Due Process Clause of the Fourteenth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment, King requests that this Court resolve whether either provision provides relief to a criminal defendant due to cumulative error. In so doing, he makes no mention that his cumulative-error claim was adjudicated on the merits in state court. By extension, he fails to recognize the limited role that federal courts play on habeas corpus review under 28 U.S.C. § 2254(d), with regard to a federal claim adjudicated on the merits in state court. In effect, King asks the Court to consider and adopt a federal constitutional claim for cumulative error without appreciating how deferential review limits the Court's ability to assess the claim in his case.

Because the state courts adjudicated King's cumulative-error claim on the merits during the post-conviction review process, this case is a poor vehicle for consideration of the questions presented. The pertinent issue for King is not whether the Court should recognize a constitutional claim for cumulative error. The question is whether the state-court adjudication rejecting his cumulative-error claim either contravened or unreasonably applied clearly established federal law. Because it did not, the district court rightly denied the claim, and Petitioner has not even attempted, much less shown, a need for this Court's review of that denial under AEDPA.

Furthermore, this case is not a suitable vehicle for the Court to consider, even untethered from the constraints of AEDPA deference, whether it should construe the Due Process Clause or the Cruel and Unusual Punishment Clause to provide relief in some way on a claim of cumulative error. The unique facts and circumstances of this case could not support a claim for cumulative error, however the Court might define such a claim. For these reasons, the Court should deny the petition for writ of certiorari.

I. This Case Is Not a Proper Vehicle for Establishing a Constitutional Cumulative-Error Claim Because King’s Claim Is Subject to AEDPA Deference.

King urges the Court to resolve a purported split among the circuits and state courts about whether cumulative error gives rise to a constitutional claim. But King’s cumulative-error claim was adjudicated in state court on the merits, and it is therefore subject to AEDPA deference. *Albrecht v. Horn*, 485 F.3d 103, 139 n.17 (3rd Cir. 2007); *Scott v. Elo*, 302 F.3d 598, 607 (6th Cir. 2002); *Sneed v. Beard*, 328 F. Supp. 3d 412, 445-46 (E.D. Penn. 2018); *Ali v. Grounds*, 236 F. Supp. 3d 1241, 1265-66 (S.D. Cal. 2017). That makes this case an inappropriate vehicle to consider the underlying constitutional issue because AEDPA precludes the Court from addressing it.

Under 28 U.S.C. § 2254(d)(1), a federal court may not grant habeas corpus relief on a claim adjudicated on the merits in state court unless the state-court decision is contrary to, or involves an unreasonable application of, “clearly established Federal Law, as determined by the Supreme Court of the United States.” This standard is “intentionally difficult to meet.” *Woods v. Donald*, 575 U.S. 312, 316 (2015) (internal quotation marks omitted). “To satisfy this high bar, a habeas petitioner is required to ‘show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.’” *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

This deferential standard applies to King’s cumulative-error claim. As discussed above, King claimed in his post-conviction petition that he is entitled to collateral relief because cumulative error deprived him of a fair trial. The trial court denied the claim. (Pet. Appx. 159-160, 165.) On appeal, the Tennessee Court of Criminal Appeals considered and rejected the claim, as well: “Even when viewed cumulatively, we do not find that the sum total of these errors robbed

the petitioner of a fair trial at either the guilt or penalty phases.” *King*, 1997 WL 416389, at *18. Upon further review by the Tennessee Supreme Court, that court denied relief. Although it recognized the broad nature of the cumulative-error claim presented on post-conviction review, *King*, 989 S.W.2d at 323, the court limited its discussion to the portion of the claim that concerned the proposed consideration of cumulative error when assessing a *Middlebrooks* violation at sentencing. *Id.* at 327-28. King’s cumulative-error claim was fully adjudicated on the merits in state court.

That the Tennessee Supreme Court elected to narrow the focus of its analysis does not mean that it did not adjudicate the broader cumulative-error claim presented to it on the merits. At this juncture, federal courts presume that a state court’s rejection of a claim was an adjudication on the merits. *See Richter*, 562 U.S. at 92, 99 (“When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.”). This is also true when “a state court rules against the defendant and issues an opinion that addresses some issues but does not expressly address the federal claim in question.” *Johnson v. Williams*, 568 U.S. 289, 292 (2013). Moreover, this Court has also held that, if successive state courts considered a federal claim and if “the relevant state-court decision on the merits, say, a state supreme court decision, does not come accompanied with . . . reasons,” the federal court “should ‘look through’ the unexplained decision to the last state-court decision that does provide the relevant rationale . . . [and] presume that the unexplained decision adopted the same reasoning,” subject to rebuttal. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018); *see also Shinn v. Kayer*, 141 S. Ct. 517, 524 n.1 (2020) (“Unreasoned dispositions by appellate courts sometimes qualify as

adjudications on the merits. In those cases, we apply a rebuttable presumption that the appellate court’s decision rested on the same grounds as the reasoned decision of a lower court.”).

From the above, the Court must presume not only that the Tennessee Supreme Court adjudicated King’s broader cumulative-error claim on the merits but also that it adopted the reasons provided by the Tennessee Court of Criminal Appeals when rejecting it, in addition to those that the court gave specifically regarding the *Middlebrooks* violation. There is no basis to overcome the dual presumptions applicable here and to conclude that the Tennessee Supreme Court resolved the broader claim on some non-merits basis.⁶

Because AEDPA limits the Court’s review, this case is not a proper vehicle for creating a new constitutional claim as King seeks. The AEDPA framework precludes the Court from addressing the merits of an underlying constitutional issue that has not been clearly established. *See, e.g., Virginia v. LeBlanc*, 137 S. Ct. 1726, 1729 (2017) (noting that the arguments about expanding an existing constitutional rule “cannot be resolved on federal habeas review”); *Woods*, 575 U.S. at 319 (“Because we consider this case only in the narrow context of federal habeas review, we express no view on the merits of the underlying Sixth Amendment principle.” (internal quotation marks and alteration omitted)). Thus, the Court cannot establish in this case, for the first time, that the cumulative-error doctrine creates a constitutional claim. Furthermore, even if the law were clearly established for AEDPA purposes, Petitioner cannot show that the state-court rejection of his cumulative-error claim is “so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Richter*, 562 U.S. at 103.

⁶Even if King may disagree and believe that he can overcome the dual presumptions in some way, a dispute over the preliminary issue of AEDPA deference itself further undermines the case’s suitability for this Court’s review.

The question presented by King focuses broadly on whether the Fourteenth or Eighth Amendments compel cumulative-error review, and he points to what he says is a split among the circuits and state courts that has persisted for decades. (Pet. at ii and 28). But he openly admits that the Court has never held that the Eighth Amendment requires cumulative-error review. (*Id.* at 35.) Because review is limited by AEDPA in any event, the Court should deny certiorari for this reason alone.⁷

II. This Case Is a Poor Vehicle Because King Cannot Establish Cumulative Error on this Record.

Beyond the impact of AEDPA deference on this case, its facts and circumstances provide no reason to support a finding of cumulative error, which further undermines any professed need for review here. King grounds his argument on four errors deemed harmless in state court—two from the guilt phase and two from the penalty phase—as well as one finding by the district court of no error at all. For the latter, there is certainly no basis to weigh a finding of no constitutional error alongside other, harmless errors here. And for the remaining, essentially for the same reasons

⁷Although not clear from the questions presented, King also appears to suggest that there is a split of authority among habeas courts about whether this Court has *already* clearly established that cumulative-error review is constitutionally required. (Pet. at 17-23, 26-28 (discussing the approach of some circuits in habeas cases).) But King has not presented a well-developed split of authority among the circuits on that narrower question. He relies on just one case, out of the Ninth Circuit, that has directly addressed and held that the cumulative-error doctrine is clearly established for federal habeas purposes. *Parle v. Runnels*, 505 F.3d 922, 930 (9th Cir. 2007). But even there, at least one lower court from the Ninth Circuit has cast doubt on *Parle* due to intervening decisions by this Court. *Sanchez v. McDowell*, ___ F. Supp. 3d ___, ___, 3:22-cv-00192, 2023 WL 27360, at *39-*40 (S.D. Cal. Jan. 3, 2023). The other cases King cites as being in line with *Parle* either explicitly reserved the question, did not clearly address it, or were not subject to AEDPA's constraints at all. The only other cases he discusses that directly address the issue in habeas review hold that cumulative error has *not* been clearly established. The district court, applying binding precedent from the Sixth Circuit, understandably concluded that cumulative error had not been clearly established. *King*, 2011 WL 3566843, at *49. King fails to present a split of authority that calls for the Court's review. And again, King cannot overcome AEDPA deference even if the law were clearly established in his favor at the time of the state-court adjudication.

that the Tennessee Supreme Court found harmless error, a claim of cumulative error must fail as well.

First, the Tennessee Supreme Court on direct appeal found harmless error beyond a reasonable doubt in the trial court's state-law violation for admitting testimony by Lori Eastman Carter during the guilt phase of trial that King assaulted her and attempted to kill her approximately ten months before this offense. *King*, 718 S.W.2d at 246-47. Consideration of that testimony—which, at best, went to King's intent—could not have adversely affected the jury's verdict on King's conviction for first-degree felony murder in the perpetration of a kidnapping by confinement. The indictment charged the defendants with first-degree premeditated murder and two counts of first-degree felony murder in the perpetration of a kidnapping, and the jury convicted the defendants on this felony murder count. *Id.* at 245. King's confession to Childers and his lengthy written statement to law enforcement officers, as well as confirming forensic and firearm evidence, amounted to overwhelming proof that he kidnapped and confined the victim and that he killed her while perpetrating that offense. Ms. Carter's testimony could have had no impact on that determination.

King nevertheless argues that Ms. Carter's testimony was "devastating" and negatively impacted trial counsel's choice of defense. Again, nothing about Ms. Carter's testimony undermines the overwhelming evidence of King's guilt for felony murder. Nor did it preclude trial counsel from pursuing whatever defenses that counsel deemed appropriate. And Ms. Carter's testimony certainly had even less impact in the sentencing phase when King provided detailed testimony largely confirming his prior inculpatory statements *and* when her testimony did not genuinely speak to any of the aggravating circumstances.

Second, the Tennessee Supreme Court on direct appeal found harmless error under state law during the penalty phase in the State's admission, through King's cross-examination, of his two juvenile offenses of armed robbery approximately three-and-a-half years before the murder in this case. *Id.* at 248-49. The only possible impact that this could have had was to the jury's consideration of the prior-violent-felony aggravating circumstance. But the State did not rely upon these offenses to prove it. As noted above, King's convictions for first-degree felony murder in the perpetration of an armed robbery by use of a firearm and for aggravated kidnapping (committed less than one month before this offense) and his conviction for assault with an intent to commit aggravated kidnapping (committed three days after this offense) overwhelmingly established the aggravated circumstance.

Third, the Tennessee Supreme Court on post-conviction review found harmless error beyond a reasonable doubt in the guilt phase of trial from the admission of Sexton's written statement against King in the guilt phase of their joint trial. *King*, 989 S.W.2d at 328-30. What is most pertinent here—whether considered for harmless error or cumulative error—is that Sexton was not present when King killed the victim and, thus, could not provide evidence as to King's guilt for felony murder. That proof came from King's own statements, among other evidence. And what Sexton stated that King told him about the victim's killing matched what King told both Childers and law enforcement officers. Any portion of Sexton's statement that concerned King's motivation for the killing, which might impact a finding of premeditation, could have played no role in the jury's determination of guilt for felony murder. And it would have had no impact during the penalty phase because Sexton himself testified at that time, curing any *Bruton/Cruz* infirmity, if any.

Fourth, the Tennessee Supreme Court concluded on post-conviction review that erroneous application of the felony-murder aggravating circumstance was harmless beyond a reasonable doubt because the remaining aggravating circumstances supported the sentence and the jury would have rendered the same sentence without its inclusion. *Id.* at 323-27. In so doing, it followed the process that it adopted in *State v. Howell*, 868 S.W.2d 238, 260-62 (Tenn. 1993), “to determine beyond a doubt whether the appellant’s sentence would have been the same had the jury given no weight or consideration to the felony murder aggravating circumstance,” by examining “the entire record for the presence of factors which potentially influenced the sentence imposed.” *King*, 898 S.W.2 at 325. This assessment included “the number and strength of remaining valid aggravating circumstances, the prosecution’s argument at sentencing, the evidence admitted to establish the felony murder aggravator, and the nature, quality, and strength of any mitigation evidence.” *Id.*

After thoroughly reviewing each of these factors and considering any possible basis on which the inclusion of the felony-murder aggravating circumstance could have impacted the sentencing decision, the court found harmless error beyond a reasonable doubt. In fact, it considered both Ms. Carter’s testimony and the juvenile offenses when reaching this conclusion. *Id.* at 325-26. The state court’s decision under this level of review undermines any assertion of cumulative error.

In sum, the state courts properly concluded that these errors, even considered cumulatively, were harmless beyond a reasonable doubt. This is therefore a poor vehicle for considering whether the Constitution compels the cumulative-error review the state courts already and reasonably undertook.

CONCLUSION

For the reasons stated, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

JONATHAN SKRMETTI
Attorney General and Reporter
State of Tennessee

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

/s/ John H. Bledsoe
JOHN H. BLEDSOE
Deputy Attorney General
Federal Habeas Corpus Division
Counsel of Record
500 Dr. Martin L. King Jr. Blvd.
P.O. Box 20207
Nashville, Tennessee 37202-0207
John.Bledsoe@ag.tn.gov
(615)741-4351

Counsel for Respondent