

No. 25-1176
(Capital Case)

In the Supreme Court of the United States

MARION ALEXANDER LINDSEY,

Petitioner,

v.

SOUTH CAROLINA,

Respondent.

**On Petition for a Writ of Certiorari to the
Supreme Court of South Carolina**

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The petition demonstrated that the Court should review two independently important questions: *First*, whether *Strickland* prejudice analysis requires considering counsel's deficiencies cumulatively, and, *second*, whether a trial court may uncritically adopt a State's proposed order without any judicial guidance or substantive change consistent with the Due Process Clause or Eighth Amendment.

The State's opposition mounts effectively no defense on the merits, fails to engage with the clear divisions among lower courts on each question presented, and identifies no barriers to review of these important questions in this capital case.

On the *first* question, the petition demonstrated clear division among lower courts over the analytical framework for prejudice and that the decision below wrongly assessed the effect of counsel's deficiencies in isolation, rather than cumulatively. Pet. 16-27. The State provides no coherent theory why the Court should not grant plenary review—or summarily reverse.

The State cannot deny that courts have split over prejudice analysis; it instead attempts a sleight of hand by discussing the other courts' deficient-performance analysis. But that is irrelevant; the decision below assumed defective performance on most errors and, as a result, it could not find a lack of prejudice without assessing the cumulative effect of the assumed deficiencies. Indeed, the State effectively concedes the merits by admitting that *Strickland* requires cumulative assessment of the prejudicial effect of deficiencies—but without identifying any such analysis in the decision below. Opp. 14, 16.

The State's purported vehicle defects are also plainly wrong. Petitioner repeatedly presented prejudice as a cumulative assessment that requires weighing the totality of the case that could have been presented but for the defects. And the fact that the state supreme court could have decided on alternative performance grounds is for remand, not refusing review of the decision actually rendered.

On the *second* question, the petition demonstrated (at 27-36) division over a court's ability to uncritically adopt a State's proposed order in its entirety. The State, again, presents no clear theory as to why review is unwarranted. It nowhere disputes that this is a suitable vehicle for review. As to the split, it addresses only one of the cases we identified (Pet. 27-31). But it fails to show consistency: it insists there is no split because only four, rather than all five, of the material factors are present here. But nothing in the Eleventh Circuit's decision suggests it found that factor dispositive. Had it, it surely would have said so. The State also has nothing to say on the merits, other than to claim petitioner challenges a state "procedural rule." But that is no answer to whether that procedure violates the federal Constitution—an important question on which this Court's review is essential.

A. Review is warranted to address whether prejudice from ineffective assistance is assessed cumulatively.

1. The State cannot deny the lower court divergence over prejudice analysis.

As the petition explained (at 17-21), lower courts are divided over whether the *Strickland* analysis requires aggregating counsel's actual and assumed deficiencies to assess prejudice cumulatively, or whether

courts may dissect each deficiency and consider prejudice in isolation. The South Carolina Supreme Court took the latter approach—assuming most errors were defective performance but assessing prejudice from each in isolation. See Pet. 21; Pet. App. 36a-47a.

The State relegates its circuit split analysis to the end (Opp. 20-22) and declines entirely to address the split we identified over prejudice analysis. Instead, the State discusses (at 21-22) how each case found various deficiencies in counsel’s performance. But that is immaterial: the South Carolina Supreme Court here repeatedly *assumed* defective performance on errors petitioner identified so it could skip to the prejudice step—and it then conducted that analysis on an individual error-by-error basis, rather than cumulatively. See Pet. 13-15. The State cannot paper over lower court division by suggesting that the decision below could have adopted entirely different reasoning than it did—that is a matter for remand, not denial of review. This Court’s review is essential to resolve the split regarding prejudice analysis, the proper use of which would have likely changed the outcome below, as the dissent explained at length (Pet. App. 49a-119a).

2. *The decision below is wrong.*

The petition also demonstrated (at 24-27) that the decision below is wrong.

The State concedes that “*Strickland* and its progeny require[]” “considering all the evidence in context” to assess prejudice. Opp. 16. But it then mounts no real defense of the decision below. All it says is that the court “precisely followed” the *Strickland* prejudice analysis and “consider[ed] all the evidence in context.” *Ibid.* (citing Pet. App. 47a).

But the decision below reflects precisely the opposite. The State cites only the single conclusory sentence in the “conclusion” stating there was no prejudice. Pet. App. 47a. But prejudice assessments require an “analysis” of “the strength of all the evidence and a comparison of the weight of aggravating and mitigating factors.” *Thornell v. Jones*, 602 U.S. 154, 171-172 (2024). In that regard, the substance of the opinion comprises only separate holdings that each instance of deficient performance considered in isolation did not cause prejudice. Pet. App. 36a-47a. By definition, that was not an “evaluation of the strength of all the evidence and a comparison of the weight of aggravating and mitigating factors.” *Thornell*, 602 U.S. at 171-172. Only the dissent undertook *that* type of analysis—and it would have found prejudice. See Pet. App. 49a-119a.

3. *There is no vehicle issue.*

The State makes only two other arguments, but neither poses a barrier to review.

First, the State suggests that petitioner “did not argue” below that *Strickland* prejudice must be assessed cumulatively. Opp. 17-18. That is wrong and no reason to deny review. This Court may review any issue “pressed” or “passed upon” below. See *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)); *Hemphill v. New York*, 595 U.S. 140, 148 (2022) (review is available so long as the “federal claim ‘was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.’” (quoting *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (per curiam))). This error meets both tests.

A cumulative prejudice assessment is exactly how petitioner presented his case to the state supreme court and post-conviction relief court. His opening brief to the state supreme court explained why the overall presentation prejudiced petitioner as did each error on its own. See S.C. Pet. Br. 77-106 (“Trial counsel’s failure to investigate and prepare a complete and coherent mitigation presentation prevented the jury from hearing substantial evidence that could have resulted in a life sentence”; “The PCR court ignored the evidence and witnesses that trial counsel should have presented to the jury at sentencing.”); *id.* at 118-119 (“prejudice is established when ‘there is a reasonable probability that, absent [counsel’s] errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.’” (ultimately quoting *Strickland v. Washington*, 466 U.S. 668, 695 (1984))).

Petitioner’s post-hearing memorandum of law also argued the same thing. See S.C. App. 3293-3294 (“In evaluating whether there exists a reasonable probability of a different outcome, the Court must consider ‘the totality of the available mitigation evidence’ and weigh it against the evidence in aggravation. The ‘totality of available mitigation evidence’ consists of the evidence presented during the original trial and the evidence presented during post-conviction proceedings.”); S.C. App. 3342-3343 (“In considering the totality of the mitigation, the representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”).

Lindsey needed to do no more than that—especially given the State’s concession here that “*Strickland* and its progeny require[]” “considering all the evidence in context” to evaluate prejudice. Opp. 16. That being the law, petitioner plainly presented it. A petitioner can of course expand on the argument before this Court when the decision below introduced this deviation from what the State now concedes *Strickland* “requires.” See *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 535 (1992) (“Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.”).

Beyond that, the issue was clearly passed upon. The majority decision assessed each error for prejudice in isolation. Pet. App. 36a-47a. Indeed, that was the dissent’s central criticism of the majority opinion. Pet. App. 49a-119a. This Court can likewise review “an issue not pressed so long as it has been passed upon.” *Lebron*, 513 U.S. at 379. Considering the entirety of the dissent turned on a prejudice analysis focused on weighing all the evidence that effective counsel should have presented—and the majority instead assessed prejudice from each missing piece in isolation—the issue was clearly passed upon below.

Second, the State argues that the state supreme court made a different error—that it should have applied a presumption of reasonable representation and affirmed for lack of deficient performance. Opp. 18-20.

The State’s invocation of this theoretical alternative ground for affirmance not reached below is irrelevant to whether to grant certiorari. Instead, the proper approach is for the Court to resolve the question presented and, if petitioner prevails, “remand for

resolution of any claims the lower courts’ error prevented them from addressing.” *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012); see also, e.g., *Doe v. Dynamic Physical Therapy, LLC*, 607 U.S. 11, 11 (2025) (per curiam) (reversing and remanding; “Plaintiff’s federal claims may well fail on other federal grounds. But that is for the [state] courts to decide in the first instance.” (citations omitted)).

* * *

As we pointed out (at 22), this Court has previously granted review on an indistinguishable question (see *Banks v. Dretke*, 540 U.S. 668 (2004)) but did not resolve it. The State does not deny this, and—as we showed—the division persists. The Court should grant once again in light of the continued confusion—confusion that is repeated in the decision below.

B. Review is warranted to settle the extent to which courts may uncritically adopt a State’s proposed order.

1. Courts are divided over the question presented.

As the petition showed (at 27-31), the decision below diverges from cases decided by two federal circuits and two state supreme courts.

The State does not even mention the decisions from the Ohio Supreme Court, Mississippi Supreme Court, and Fourth Circuit. See Pet. 29-30. Had the Ohio Supreme Court considered petitioner’s case, it would have seen a lack of “independent and thorough review” that implicates “the essence of due process.” *State v. Riley*, 253 N.E.3d 92, 97-98 (Ohio 2024). The Mississippi Supreme Court would have similarly been “concern[ed]” and required the trial judge to “issue his

own Findings of Fact and Conclusions of Law.” *Chase v. State*, 112 So. 3d 421, 422 (Miss. 2013). See also *Burr v. Jackson*, 19 F.4th 395, 406 (4th Cir. 2021) (only accepting a proposed-order adoption where a trial judge did “reconsider[]” and “made both major and minor changes throughout”). The State does not deny that these courts would have viewed this case fundamentally differently than the decision below.

As for the only case the State does address (at 24-26)—the Eleventh Circuit’s remand decision in *Jefferson*—the State cannot show lack of disagreement.

The *Jefferson* court set out exactly the factors that drove its decision:

- The judge “did not provide a preliminary memorandum outlining his essential findings of fact or conclusions of law”;
- “Nor did he state anything in open court about how he viewed the case”;
- “[H]e did not provide any guidance to the [state] about how the proposed order was to be drafted or what was to be included”;
- He requested the order *ex parte* and did not request a proposed order from the petitioner; and
- “[O]ther than altering the concluding sentence and including the date and his signature, [the judge] made no changes to the proposed order, notwithstanding the many glaring errors it contained.”

Jefferson v. GDCP Warden, 941 F.3d 452, 475 (11th Cir. 2019). Of these five factors, four are plainly present here: the judge did not provide a preliminary

memorandum, did not state his views in open court before twice adopting the State's proposed order,¹ did not provide guidance about how the order should be drafted, and made no changes despite glaring errors (including, contrary to the State's suggestion (Opp. 25), a substantive one misattributing testimony (see Pet. 35-36)). The sole factor present in *Jefferson* not present here was that the judge copied petitioner's counsel when requesting the State's proposed order and ultimately accepted a proposed order from petitioner. See Pet. App. 121a, 393a.

The State cannot show that, despite finding these five factors to be the material ones, the Eleventh Circuit thought the fourth factor was dispositive. Opp. 256-26. That court suggested no such thing.

Nor can the State distinguish *Jefferson* based on the trial judge here having had a second chance to render an appropriate order. The same four factors found material in *Jefferson* remain entirely present for the amended order below. The judge still never provided a preliminary memorandum containing his own thoughts, did not state anything in open court about his views before signing the amended order, did not provide guidance on how the order should be done, and made essentially no changes other than typographical errors petitioner had pointed out, while leaving other glaring errors. See Pet. 10-12, 35-36. Far from the remand being ground for distinction, the

¹ The State suggests the judge did state his views in open court (Opp. 24) but omits the fact that that occurred only *after* signing both the original and the amended order as part of a hearing on whether to grant a new post-conviction hearing before a different judge. Pet. 12.

judge’s conduct on remand only highlights the lack of basic fairness.²

2. *The decision below is wrong.*

The Due Process Clause and Eighth Amendment prohibit uncritical adoption of the State’s proposed order. See Pet. 32-36. The State has nothing to say about these federal constitutional protections. See Opp. 23-24.

Instead, the State claims that petitioner challenges a “state procedural rule” and that, as a result, it is insulated from review. Opp. 23-24. That premise is demonstrably wrong, as the opposition itself confirms. Whatever “broad latitude” a state may have to establish procedural rules, that latitude “has limits.” *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). States may craft procedural rules—but they are “subject to the minimum requirements of the Fourteenth Amendment.” *Smith v. Robbins*, 528 U.S. 259, 273 (2000); see also *Burgett v. Texas*, 389 U.S. 109, 113-114 (1967) (“The States are free to provide such procedures as they choose * * * provided that none of them infringes a guarantee in the Federal Constitution.”).

It is no response to a State’s obligation to comport with the Fourteenth and Eighth Amendments to restate only that states may create their own procedural rules (Opp. 23-24), which is all the State musters. The State’s failure to address the merits of these federal

² The State suggests that *Jefferson* only concerned deference to state court findings (Opp. 26)—but, as we noted (Pet. 28 n.2), the inquiry specifically included whether the petitioner was “denied due process of law” under the then-operative Section 2254(d)(7). See *Jefferson*, 941 F.3d 473 n.6 (quoting 28 U.S.C. § 2254(d)(7) (1966)).

constitutional protections confirms the Court should grant review to weigh in on this important federal question that has divided lower courts. Pet. 27-31.

Contrary to the State’s suggestion (at 23-24), petitioner’s position is not that the Constitution forbids courts from requesting and considering proposed orders—they surely can. What petitioner submits is that the Due Process Clause and Eighth Amendment prohibit blindly affixing a signature without exercising critical review and independent judgment. See Pet. 32-36; see also *Jefferson v. Upton*, 560 U.S. 284, 294 (2010); *Jefferson*, 941 F.3d at 474-477.

The State cannot deny that this Court has left open the “lawfulness” of such practices. See *Jefferson*, 560 U.S. at 294. The petition demonstrated at length why the process here violates due process and Eighth Amendment principles (Pet. 32-36), and this petition presents an excellent vehicle for the Court to consider the question it previously left open.

CONCLUSION

The Court should grant the petition and set the case for plenary briefing and argument. In the alternative, it may wish to summarily reverse.

Respectfully submitted.

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