No. 11-_____

IN THE
Supreme Court of the United States

NICHOLAS T. SUTTON,

Petitioner,

v.

ROLAND COLSON, WARDEN

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether the prejudice arising from multiple errors committed by defense counsel should be considered cumulatively for purposes of deciding whether counsel rendered ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984).

LIST OF PARTIES

The appellant below, who is the Petitioner in this Court, is Nicholas T. Sutton. The appellee below was Ricky Bell, in his official capacity as warden; Mr. Bell has now been replaced as warden by Roland Colson, who is the Respondent in this Court in his official capacity.*

* The case caption used in the opinions below lists Ricky Bell rather than Roland Colson.

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The decision of the United States Court of Appeals for the Sixth Circuit is reported at 645 F.3d 752 (6th Cir. 2011), and is reproduced at Pet. App. 1a-41a. The post-conviction decision of the Court of Criminal Appeals of Tennessee is available at 1999 WL 423005 (Tenn. Crim. App. June 25, 1999), and is reproduced at Pet. App. 42a-112a. The unreported post-conviction decision of the Criminal Court for Morgan County, Tennessee is reproduced at Pet. App. 113a-47a. The decision of the Supreme Court of Tennessee on direct appeal is reported at 761 S.W.2d 763 (Tenn. 1988), and is reproduced at Pet. App. 148a-165a.

JURISDICTION

The Sixth Circuit entered judgment in this case on June 8, 2011, Pet. App. A, and denied a timely petition for rehearing on August 26, 2011, *id.* at 166a-167a. On November 4, 2011, Justice Kagan granted an application to extend the time to file a petition for a writ of certiorari to January 23, 2012. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of

the accusation; 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 defence." U.S. Const. amend. VI.

This case also involves 28 U.S.C. § 2254(d)(1), which permits habeas relief where the state court "adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

INTRODUCTION

There is a deep circuit split over whether the prejudice arising from multiple errors by defense counsel should be cumulated to determine whether counsel rendered ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). In this case, the Sixth Circuit did not assess the cumulative weight of the multiple errors committed by Mr. Sutton's defense counsel at trial. The Sixth Circuit's position is consistent with that of the Fourth and Eighth Circuits, which have both held that cumulation is impermissible when analyzing prejudice under *Strickland*. But it is inconsistent with the rule in the First, Second, Fifth, Seventh, and Tenth Circuits, which have held that consideration of the *combined* prejudice arising from defense counsel's errors is the proper way to determine whether there is a reasonable probability that the outcome would have been different if counsel had performed competently. The highest

state courts, too, are divided on whether prejudice should be cumulated in determining whether defense counsel's assistance is effective.

The cumulation issue makes a real difference in this case. The various errors committed by defense counsel here, taken together, sent the jury a strong message that Mr. Sutton was too dangerous to be allowed to live. Defense counsel failed to object to extraordinarily high levels of courtroom security; failed to take any action when the prosecution provoked counsel himself, as well as the many armed guards nearby, to react to Mr. Sutton with fear before the jury; failed to object to improper prosecution statements that the death penalty was the only way for society to defend itself from Mr. Sutton; and failed to present available mitigating evidence that would have meaningfully countered the prosecution's portrait of Mr. Sutton as a violent, incorrigible killer. On post-conviction review, the state appellate court held that the cumulated prejudice from these errors was insufficient to meet the *Strickland* standard – but the Sixth Circuit, having decided not to cumulate, never addressed whether this state court holding was based on an unreasonable interpretation of the *Strickland* prejudice requirement. In fact, there is little question that the state court set the prejudice bar too high, and there is a reasonable probability that in the absence of *any* of the interrelated errors at least one juror would have decided against the death penalty.

The cumulation question is not just important in this case; it is also critically important to the administration of justice in courts across the country. The question arises frequently, and it goes to the heart of the *Strickland* analysis. The courts of appeals have been unable to arrive at a consensus – and, as a result, criminal defendants in different parts of the country are subject to varying levels of Sixth Amendment protection. Moreover, in the Sixth Circuit and in other jurisdictions in which prejudice is not cumulated, the application of *Strickland* is in significant tension not only with the language of *Strickland* itself but also with this Court's *Strickland*-derived *Brady* jurisprudence, which commands the cumulation of prejudice arising from the prosecution's improper withholding of evidence.

This Court has rarely, if ever, been presented with an opportunity to decide the *Strickland* prejudice-cumulation issue where AEDPA is no barrier – let alone where, as here, the various errors are interrelated, so as to give rise to cumulative prejudice that is greater than the sum of its parts. This Court should step in and resolve the prejudice-cumulation issue once and for all.

STATEMENT OF THE CASE

A. Pre-Trial and Trial Proceedings

On January 15, 1985, prison guards at the Morgan County Regional Correctional Facility ("MCRCF") in Morgan County, Tennessee discovered the body of inmate Carl Estep in his cell during a routine "shakedown." Pet. App. 151a. Mr. Estep had been serving a sentence for child molestation; he died

from stab wounds. *Id.* Nearby, investigating officers found homemade knives – called "shanks" in prison jargon – that matched the wounds on Mr. Estep's body. *Id.*; *see also id.* at 157a. At MCRCF, weapons were readily available, and a shank was as "common as a pair of shoes." 6th Cir. JA at 215-16.

Following an investigation, inmates Nicholas Sutton, Thomas Street, and Charles Freeman were charged with the murder, and were eventually tried jointly. Pet. App. 149a-150a. All three faced the death penalty. The jury acquitted Mr. Freeman, convicted Mr. Street and sentenced him to life, and convicted Mr. Sutton and imposed a death sentence. *Id.*

1. Prior to trial, John Appman was appointed to represent Mr. Sutton. 6th Cir. JA at 283. Unlike the attorneys for the other inmates, Mr. Appman declined the trial court's offer to appoint co-counsel. Pet. App. 87a-88a.

Mr. Appman's preparations for Mr. Sutton's capital murder trial left much to be desired. Mr. Appman did not succeed in locating and interviewing all of the potential witnesses identified by the State through discovery. 6th Cir. JA at 188-89. He did file a "Motion for Funds for [an] Independent Psychiatric or Clinical Psychologist" to evaluate Mr. Sutton, but failed to give any reason why such an evaluation would be helpful. *Id.* at 16-18. At the motion hearing, Mr. Appman explained that he had "no particular information that Mr. Sutton [was] suffering from any particular mental impairment," but nonetheless "request[ed] a private examination"

due to "the seriousness of the offense with which [Mr. Sutton] is charged." *Id.* at 191. The court denied the motion. *Id.* After this denial, Mr. Appman did little to no investigation to uncover mitigating evidence.

2. The trial began on February 19, 1986. The trial court permitted an extraordinary level of security in and around the small rural courthouse in Wartburg, Tennessee. The Tennessee Department of Corrections ("TDOC") sent 28 uniformed, armed correctional officers to work at the trial alongside the two courtroom bailiffs, *id.* at 32, 415, 469, and the Morgan County Sheriff's Department provided a number of additional officers, *id.* at 415. According to one attorney, the courthouse was like "an armed fortress." *Id.* at 416.

Outside the courthouse, at each of the four corners of the town square, there were uniformed prison guards with short-barreled, pump-action shotguns. *Id.* at 417-18, 421-22, 467-68. Uniformed guards armed with pistols were stationed at each of the three entrances to the courtroom. *Id.* at 418, 424, 461, 466. At the main public entrance to the courtroom, there were also "at least two or three officers in the hallway operating handheld metal detectors." *Id.* at 463, 465-66.

Inside the small courtroom, even more armed guards were on duty. *Id.* at 457. There were at least 14 officers stationed inside the courtroom. *Id.* at 276. Three unarmed TDOC officers sat within reach of the three defendants. *Id.* at 417, 424-25. These officers were backed up by one uniformed, armed

TDOC officer. *Id.* at 425. There were two armed TDOC officers in the balcony. *Id.* at 417, 426, 462-63. There were armed TDOC officers stationed on the wall around the lower portion of the courtroom. *Id.* at 417, 466. There were also armed TDOC officers – some in uniform and some not – sitting among the spectators in the crowded courtroom. *Id.* at 466. An armed TDOC officer sat next to the jury. *Id.* at 425-26. Finally, an armed TDOC officer patrolled and moved about the courtroom. *Id.* Most of the armed guards inside the courtroom had side arms, but some had shotguns. *Id.* at 418, 426. Mr. Sutton's counsel failed to object to this excessive security either before or during the trial.

Counsel also failed to object or take other action when the prosecutor provoked the guards and counsel *himself* to react to Mr. Sutton with fear. As the prosecution was well aware, the high level of security included a directive to keep potentially dangerous objects away from the defendants. Indeed, the court instructed defense counsel in a pretrial conference to use only felt tip pens, not pencils, so that the defendants could not use the pencils as weapons. Pet. App. 60a. Nevertheless, at one point during the guilt phase of the trial, when the State was introducing a set of prison shanks as an exhibit, the prosecutor approached the defense table and dumped the shanks in front of Mr. Sutton and his counsel, who were sitting directly facing the jury. 6th Cir. JA at 351-52, 354, 420.

The prosecutor's action and the clattering of the knives triggered an immediate response from the

guards, who "all reacted very promptly and swiftly." *Id.* at 420. One spectator recalled hearing some of the guards with shotguns working the pumps, loading shells into the chambers. *Id.* at 34.

Defense counsel also visibly reacted. When the shanks were dropped in front of him, Mr. Appman immediately jerked back, away from his client. *Id.* As Mr. Appman later explained, "it was my job to defend Mr. Sutton, but I did not want to become a hostage." *Id.* at 352-53.

All of this took place in full view of the jury. *Id.* at 39. An attorney for one of Mr. Sutton's co-defendants noticed that the jurors had a "wide-eyed" reaction. R. 12, Add. 10, P.C. Transcript, Vol. IV, p. 804. Yet Mr. Appman did not make a motion for a mistrial or otherwise raise the issue in any way. Pet. App. 60a.

3. To link Mr. Sutton to the murder, the State of Tennessee depended on the sometimes contradictory and evasive testimony of several inmates. *Id.* at 152a. Inmate Scoggins testified that Mr. Estep had sold the defendants some bad marijuana, which led to an altercation in which the defendants took some of Mr. Estep's property. *Id.* at 153a-154a. According to Mr. Scoggins, Mr. Estep then threatened to kill Mr. Sutton. Mr. Scoggins further testified that he saw Mr. Sutton and the other defendants enter Mr. Estep's cell and kill him. *Id.* at 154a-155a. Inmates Meadows and Green also claimed that they saw Mr. Sutton enter Mr. Estep's cell at the time of the murder. *Id.* at 152a-153a.

Mr. Sutton's counsel pursued two inconsistent

defense theories: first, that Mr. Sutton was not involved in Mr. Estep's murder; and second, that Mr. Sutton acted in self-defense because officials at MCRCF could not provide proper security and Mr. Estep had threatened his life. In support of this second theory, Mr. Sutton's attorney offered the testimony of Carl Crafton, a long-term prison inmate whom the trial court qualified as an expert on prison life. *Id.* at 64a-65a. Mr. Crafton testified about the seriousness of a death threat from one inmate to another. He concluded that when an inmate receives such a threat, the only recourse is to make an offensive move. 6th Cir. JA at 215.

4. During closing arguments in the guilt phase, the prosecution made several improper arguments – and Mr. Sutton's counsel failed to object to any of them. First, the prosecutor improperly undermined the presumption of innocence by implying that Mr. Sutton was guilty because he was "locked up" immediately after the murder:

> Now, use your common sense here for a moment. Who was locked up immediately after this body was found and the very first information received? They are sitting right over there. Do you think Mr. Worthington said, "Oh, let's see, we got a dead man here, lock up Street, Sutton and Freeman." Do you any of you all believe that?

Id. at 234.

Second, the prosecutor made improper statements that went to the heart of the theory that Mr. Sutton had acted in self-defense. That theory relied heavily on the expert testimony of Mr. Crafton, who

discussed actual prison conditions rather than opining on what prison conditions should be. Pet. App. 96a. But the prosecutor told the jury that Mr. Crafton *advocated* violent prisons where inmates lived by their own rules:

> Do you, as jurors, want to accept that kind of person as an expert; as someone who is going to tell you the way things, not normally are, but should be in the prison system? . . . Are you willing for the citizens of Morgan County to accept the kind of prison system that he seems to think you ought to have? . . . And apparently he does not put any value or significance to the rules of society and the laws that we all have to live under. . . . What was the last thing he said when asked, "Well, who is supposed to run the prisons?" . . . "By the Warden's rules." And you all know what rules the Warden has. The same rules that you and I have; the same laws that you and I have.

6th Cir. JA at 249-51.

5. The jury acquitted Mr. Freeman but found Mr. Sutton and Mr. Street guilty of first-degree murder. *Id.* at 277. Later that day, the penalty phase began in front of the same jury that had rendered the guilty verdicts. *Id.*

In attempting to make a case for a life sentence, Mr. Sutton's counsel presented testimony from three members of the Burchett family, whose son had befriended Mr. Sutton in high school. Pet. App. 49a-50a. Defense counsel presented no other testimony or records related to Mr. Sutton's background.

Indeed, counsel could not have presented such evidence, because he had failed to even research other aspects of Mr. Sutton's deprived childhood or the dangerous prison conditions that Mr. Sutton had experienced. *See infra* pp. 13-18.

Under Tennessee law, the State's case for death had to be based upon certain specified aggravating circumstances. Tenn. Code Ann. § 39-13-204(i), *formerly codified as* Tenn. Code Ann. § 39-2-203(i) (1986). According to the State, three aggravating circumstances applied here: Mr. Sutton was previously convicted of violent felonies; the killing was heinous, atrocious, and cruel; and the killing occurred in a place of lawful confinement. 6th Cir. JA at 15. The State did not, however, restrict itself to the statutory factors. Instead, the State explicitly and repeatedly urged the jury to impose the death sentence based upon impermissible nonstatutory circumstances. *Id.* at 266. The prosecutor argued that the death penalty was warranted on the grounds of Mr. Sutton's future dangerousness and society's right to self-defense:

> What do we do? If a person is already in the penitentiary, already serving time for Armed Robbery or a life sentence for Murder, what is the next step? The days of chaining people to a wall in the dungeon are gone because that would violate their rights; it would be cruel and inhuman treatment. . . . If they are going to be in that penitentiary and they are going to be in contact with other people, then ask yourselves and ask the Defense to tell you what they would

> have you do with people in that situation . . . . [W]hat are you, as jurors, now going to do, send them to the penitentiary? What are you going to do to Nicholas Sutton, give him a life sentence? . . . .
>
> Society has certain rights and the State simply asks that you exercise society's right to self-defense. These men are already locked up. Mr. Nicholas Sutton is already serving a life sentence.

6th Cir. JA at. 264-66.

The State also told the jury that "the law . . . does not allow sympathy" as a mitigating circumstance. *Id.* at 258. The State urged the jury not to take responsibility for imposing a death sentence, asking "[i]s it an umpire's fault if a team loses a game?" and asserting that if Mr. Sutton "receives a death sentence, it will not be your fault." *Id.* at 256. And in the last words the jury heard before it began its penalty-phase deliberations, the prosecutor argued that capital punishment was the only way to "protect ourselves":

> [W]e suggest to you that persons who are armed robbers and first degree murderers are already conditioned to kill people. . . . The legislature of this state, as well as the legislature of almost every other state, has given all of us the right of self-defense; not just personally, but as a group, and that is called, 'Capital Punishment'. When we get to the point that we have done everything possible to protect ourselves and there is nothing else we can reasonably do that would protect ourselves from people like Nicholas Todd

> Sutton . . . then we have the right of self-defense and that is where capital punishment comes in. We do ask you to consider it and we do ask you to consider it carefully with regard to these Defendants.

Id. at 273-74.

In post-conviction proceedings, the Tennessee courts would eventually find all of these arguments to be "obviously inappropriate." *Id.* at 63. Yet Mr. Sutton's counsel failed to object to any of these clearly improper remarks.

Moreover, defense counsel made barely any effort to counter the prosecution's presentation. Mr. Appman's closing argument filled only three pages of transcript. *Id.* at 205-08. He never mentioned any of the aggravating circumstances or why they should carry little weight. Instead, he commented on the heroism of Vietnam veterans, even though Mr. Sutton was not a Vietnam veteran – a mistake that was seized upon and ridiculed by the prosecution. R. 12, Add. 1, Trial Transcript Vol. 23, p. 2647.

The jury sentenced Mr. Sutton to death, but sentenced Mr. Street to life imprisonment. The trial court denied Mr. Sutton's motion for a new trial, and the Tennessee Supreme Court affirmed Mr. Sutton's conviction and sentence on direct appeal. 6th Cir. JA at 237; Pet. App. 148a-165a.

B. State and Federal Habeas Proceedings

1. In state post-conviction proceedings, Mr. Sutton argued that his trial counsel rendered ineffective assistance, asserting that counsel's

performance was deficient and that there was a reasonable probability of a different outcome absent counsel's errors. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Mr. Sutton raised claims and presented evidence that trial counsel was ineffective for a variety of reasons, including failing to object to excessive armed security at the trial and to the events surrounding the prosecutor's placement of the shanks on the defense table, Pet. App. 58a-63a; failing to object to improper jury instructions, *id.* at 90a-92a, failing to object to clearly improper statements by the prosecution during the guilt and penalty phases, *id.* at 96a-99a; and failing to investigate and present mitigation evidence, *id.* at 67a-85a.

During the post-conviction hearing, Mr. Sutton presented ample evidence that Mr. Appman conducted almost no mitigation investigation in preparation for the capital trial. *Id.* at 68a-69a. Mr. Sutton also presented a wealth of mitigating evidence during the post-conviction hearing that was never presented to the jury. This evidence – including expert psychological testimony and expert testimony on prison conditions, as well as medical and other records – would have been readily available had trial counsel been reasonably diligent.

First, the evidence developed for the first time at the post-conviction stage showed that Mr. Sutton had an extremely difficult childhood, characterized by a series of abandonments and marked by violence. Dr. Gillian Blair, an expert clinical psychologist, testified at the post-conviction hearing that Mr.

Sutton was raised in an unstable, often violent and threatening home where the supervision and structure were inadequate. Pet. App. 74a. She chronicled Mr. Sutton's early life and the effects that traumatic events had on his psychological development.

As detailed in the testimony of Dr. Blair, Mr. Sutton was abandoned by his mother before he was one year old. He lived briefly with his maternal grandparents before going to live with his paternal grandparents and, intermittently, with his severely mentally ill father. *Id.* at 74a-75a. Mr. Sutton's father was frequently institutionalized due to schizophrenia and was often violent towards Mr. Sutton and others; he was an extremely unstable and volatile force in Mr. Sutton's life. 6th Cir. JA at 375; *see also id.* ("[Mr. Sutton] was exposed as a child to intermittent explosive violence from his father who was seriously mentally ill and was hospitalized extensively at a psychiatric hospital between 1969 [and] 1976. In 1973, there was a restraining order against the father after he held his mother and [Mr. Sutton] at gun point and had a standoff with the police. . . . [W]hen [Mr. Sutton's] father was not being violent, he would be overindulgent and encourage inappropriate behavior. In 1977, [his] father died of hypothermia and exposure. The death certificate indicated that alcohol abuse was a contributing factor in his death."). Although Mr. Sutton's paternal grandmother met all of his material needs, she did not display emotion or physical affection, and he felt unloved. Pet. App. 78a-79a.

Mr. Sutton suffered a number of acute physical injuries as he grew up in this chaotic environment. He was "shot in the eye at the age of 9. He had several head injuries which led to a loss of consciousness. One such incident involved a motorcycle accident when [he] was 12. [He] also suffered sporting accidents at age 13 and 15. In addition, [he] was shot in the knee at the age of 16." *Id.* at 76a.

By early adolescence, Mr. Sutton began using a wide variety of drugs. *Id.* at 75a. His lack of control was exacerbated by his drug use. *Id.* At the age of 15, he was deeply impacted by his father's death. *Id.* at 79a; 6th Cir. JA at 427. He turned even more heavily to drugs and alcohol in response. Pet. App. 79a.

As Dr. Blair explained, as a result of Mr. Sutton's violent childhood and troubled adolescence, he was highly vulnerable to stress, especially under difficult conditions in which he felt threatened or abandoned by authority figures. *Id.* at 76a-77a.

Second, Mr. Sutton's post-conviction counsel presented expert testimony by Frank Wood, a career corrections officer and administrator, about the deplorable conditions in Tennessee's prisons around the time of Mr. Estep's murder – conditions with which Mr. Sutton was especially unsuited to cope. As Mr. Wood explained, the prisons were "overcrowded, dangerous, uncomfortable, and unsafe." 6th Cir. JA at 28-29. Violence was systemic, with a high frequency of assaults on both staff and inmates. Pet. App. 64a. Prison staff were

too overwhelmed, due to a lack of resources and experience, to be in any position to help the inmates.[1] 6th Cir. JA at 442. In such conditions, inmates had no sense of safety and devoted their thoughts to their survival. *Id.* at 441.

The information presented by Mr. Wood at the post-conviction stage was readily available at the time of Mr. Sutton's trial. Indeed, Mr. Wood drew some of his expertise from his role as a state-selected prison evaluator during *Grubbs v. Bradley*, a federal case about Tennessee prison conditions during the late 1970s and early 1980s that was a matter of public record. *See* 552 F. Supp. 1052 (M.D. Tenn. 1982); *see also* R. 12, Add. 10, PC Transcript, Vol. XI, pp. 1280-83. Although Mr. Appman recognized that prison conditions played a role in Mr. Estep's murder, he did nothing to familiarize himself with the *Grubbs* litigation or to obtain other evidence that would have substantiated the argument that a threat from Mr. Estep had to be taken seriously and that Mr. Sutton could not expect protection from prison officials. 6th Cir. JA at 330-31. This type of evidence would have neutralized the prosecution's improper argument that Mr. Sutton and his expert Mr. Crafton were advocating for a prison system run by the inmates.

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[1] Indeed, the evidence here showed that prison officials were aware that Mr. Estep had threatened Mr. Sutton, but took no action in response – despite the fact that prison regulations required some action to prevent violence and protect the safety of the inmates. R. 12, Add. 1 Trial Transcript Vol. 22, pp. 2541-42.

In fact, the evidence in mitigation that was available to trial counsel, had he conducted a competent investigation, could have been used to make a compelling thematic presentation at the penalty phase of Mr. Sutton's trial. Competent counsel could have argued that Mr. Sutton was abandoned at a tender age by those who should have seen to his security and safety. As a child, he was constantly exposed to instability and violence. Once in the prison system, he was again exposed to instability and violence and was again abandoned by any authority that could have protected him. While this did not excuse the crime, it could well have led at least one juror to vote for life. Instead, the image burned into jurors' minds was one of danger – extraordinary security seemed to be necessary to keep everyone safe, and even Mr. Sutton's own attorney seemed to be afraid of him. The prosecution's improper argument about society's need for protection was underscored by the atmosphere and events in the courtroom.

2. Following the post-conviction hearing, the trial court denied Mr. Sutton's petition. The Tennessee Court of Criminal Appeals affirmed, finding that Mr. Sutton was not prejudiced by any deficiencies in trial counsel's performance.[2] The appellate court concluded that no single error made by counsel

[2] The Court of Criminal Appeals touched on the issue of whether counsel's performance was deficient with respect to one error that Mr. Sutton identified, *see* Pet. App. 93a-100a (stating that counsel's failure to object to prosecutorial misconduct amounted to deficiency), but otherwise did not consider the deficiency prong of the ineffectiveness analysis.

resulted in sufficient prejudice to call the result of the trial into question. Pet. App. 58a-100a. It also concluded that the cumulative effect of the errors was insufficiently prejudicial, stating that "[b]ased on our review of the issues raised regarding ineffective assistance of counsel, we reject the petitioner's contention that the cumulative effect of any errors found would require reversal." *Id.* at 100a.

3. On November 3, 2000, Mr. Sutton filed a federal habeas petition in the United States District Court for the Eastern District of Tennessee. R. 16. Mr. Sutton raised claims of ineffective assistance of counsel with respect to counsel's failure to object to the level of courtroom security; his failure to take action after the shanks incident; his failure to support the motion for a psychological evaluation; his failure to investigate and present mitigation evidence; his failure to object to prosecutorial misconduct; and his failure to object to the aggravating circumstance involving murders that are "heinous, atrocious, or cruel." *Id.*

The district court granted the State's motion for summary judgment and dismissed Mr. Sutton's habeas petition. R. 40-41. The district court then granted a certificate of appealability ("COA") on two particular ineffectiveness-related issues: whether trial counsel was ineffective for failing to object to the high level of courtroom security or the shanks incident, and whether counsel was ineffective for failing to object to the aggravating circumstance of heinousness. *Id.*

Mr. Sutton filed his notice of appeal on December 31, 2002. 6th Cir. JA at 187. He requested an expanded COA, explaining that "whether prejudice flows from the constitutional violations [of the Sixth Amendment] infecting a criminal trial cannot be determined by examining each violation in isolation . . . . Prejudice must be determined by examining the detrimental effect of those constitutional violations cumulatively." *See* Application for Expansion of COA at 3-4 (6th Cir. June 13, 2003) (citing *Strickland* and *Kyles v. Whitley*, 514 U.S. 419 (1995)). The Sixth Circuit granted this request and expanded the COA to encompass additional issues regarding ineffective assistance of counsel, including counsel's failure to support the motion for a psychological evaluation; counsel's failure to investigate and present mitigation evidence; counsel's failure to object when the prosecutor attributed a violent prison system to individuals like Mr. Sutton; counsel's failure to object when the prosecutor stated that Mr. Sutton was guilty because he was "locked up" immediately after the murder; counsel's failure to object when the prosecutor commented about Mr. Sutton's future dangerousness; and counsel's failure to object when the prosecutor commented upon society's right to self-defense against individuals like Mr. Sutton.

In a 2-1 decision, the Sixth Circuit affirmed the district court's denial of habeas relief. *Sutton v. Bell*, 645 F.3d 752 (6th Cir. 2011). Rather than considering the cumulative impact of trial counsel's various errors on Mr. Sutton's right to a fair trial represented by competent counsel, the majority

opinion (authored by Judge Boggs) considered each of the individual errors in isolation, and concluded that the state court was correct in determining that none of them standing alone was sufficiently prejudicial to warrant relief under *Strickland*. Judge Boggs first concluded that Mr. Sutton had failed to show any prejudice with respect to counsel's failure to object to excessive courtroom security. In reaching this conclusion, Judge Boggs considered only the presence of the uniformed officers in the courtroom and left out of the equation the other security officers in and around the courthouse. Pet. App. 6a-7a. Next, Judge Boggs dismissed the prejudicial impact of the failure of court-appointed counsel to object or move for a mistrial after he reacted to the prosecutor's placement of shanks on the defense table by jumping away from his own client while the numerous guards reached for their guns – all in view of the jury. *Id.* at 7a-8a. Judge Boggs then examined trial counsel's failure to object to objectively "improper" prosecutorial comments during the guilt phase and the penalty phase, but ruled that this failure was also insufficiently prejudicial. *Id.* at 10a-15a. Finally, Judge Boggs determined that counsel's failure to investigate or present mitigating evidence that could have painted Mr. Sutton in a more sympathetic light at the penalty phase did not prejudice Mr. Sutton, noting that there was a remote chance that presentation of that evidence would have opened the door to a rebuttal detailing Mr. Sutton's previous crimes. *Id.* at 15a-17a.[3]

[3] Judge Boggs also stated that counsel's failure to object to

In a concurring opinion, Judge Daughtrey focused solely on rejecting the argument that Mr. Sutton was prejudiced by trial counsel's failure to discover and present mitigating evidence. She expressed the view that under Tennessee law it was likely that the State would have been allowed to elicit testimony about Mr. Sutton's past crimes if Mr. Sutton had attempted to introduce mitigation evidence about his troubled background. *Id.* at 28a (Daughtrey, J., concurring). She concluded that the presentation of evidence about Mr. Sutton's troubled childhood or "[Mr.] Sutton's need to resort to violence for self-protection" would not have convinced even one juror to vote against imposing the death penalty. *Id.* at 32a-33a.

Judge Martin dissented. He noted that "a capital trial marred with no less than four instances of ineffective assistance cannot possibly leave one confident in the outcome or the appearance of justice." *Id.* at 38a n.3. He also stated that counsel's failure to investigate and present evidence of Mr. Sutton's troubled and violent background, standing alone, was sufficiently prejudicial to entitle Mr. Sutton to habeas relief. *Id.* at 35a-36a (Martin, J., dissenting) (citing *Williams v. Taylor*, 529 U.S. 362 (2000), and *Wiggins v. Smith*, 539 U.S. 510 (2003)). "Nicholas Sutton's childhood was horrific. . . . Had the jurors been confronted with the mitigating evidence of Sutton's extremely troubled childhood, the probability that at least one juror would not have decided that the aggravating circumstances of the

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penalty-phase jury instructions on the "heinous, atrocious, and cruel" aggravator was not prejudicial. *Id.* at 15a-16a.

case outweighed the mitigating circumstances beyond a reasonable doubt is a probability sufficient to undermine confidence in the outcome." *Id.* at 33a, 35a. As Judge Martin explained, under Tennessee precedent competent counsel could have presented this crucial mitigation evidence without opening the door to harmful evidence on rebuttal. *Id.* at 37a-38a.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve The Deep Split Regarding Whether A *Strickland* Analysis Should Cumulate The Prejudice Arising From Multiple Errors Committed By Defense Counsel

In assessing whether Mr. Sutton suffered prejudice within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984), the Sixth Circuit's decision in this case failed to assess the *cumulative* weight of the multiple errors committed by Mr. Sutton's defense counsel at trial. The Court of Appeals thus took an approach consistent with that of the Fourth and Eighth Circuits (and the highest courts of some states), but departed from the rule applied in the First, Second, Fifth, Seventh, Ninth, and Tenth Circuits (and the highest courts of other states). This Court should step in to resolve this deep split on an issue fundamental to the correct application of the test for ineffective assistance of counsel – which is in turn fundamental to ensuring the fair administration of criminal trials.

1. In this case, the panel majority addressed each of the errors committed by Mr. Sutton's counsel in isolation, ultimately ruling that no single error was sufficiently prejudicial to satisfy the *Strickland*

standard. Pet. App. 6a-27a. In other words, in the court's view, there was not a reasonable probability that the result of the proceeding would have been different but for any one of the multiple errors that Mr. Sutton identified – and the court utterly disregarded the prejudicial effect of all of the errors combined. *See id.*; *see also, e.g.*, *Campbell v. United States*, 364 F.3d 727, 736 (6th Cir. 2004) ("Because Campbell has not shown that any of the alleged instances of ineffective assistance of counsel deprived him 'of a fair trial, a trial whose result is reliable[,]' *Strickland*, 466 U.S. at 687 . . . , he cannot show that the accumulation of these non-errors warrant relief.").

That approach was not mandated by AEDPA deference to the state court. The Tennessee Court of Criminal Appeals did discuss each error one by one – but it *also* separately addressed whether all of counsel's errors, considered together, cast doubt on the outcome in Mr. Sutton's case. Pet. App. 100a ("we reject the petitioner's contention that the cumulative effect of any errors found would require reversal"). Because the Sixth Circuit takes the view that prejudice should not be cumulated, it failed even to evaluate whether the state court unreasonably applied this Court's decision in *Strickland* in ruling that the cumulative prejudice did not rise to a high enough level – that is, that there was no reasonable probability of a different outcome in light of the combined effect of all of counsel's errors. *See* 28 U.S.C. § 2254(d)(1) (permitting habeas relief where state court "adjudication of the claim . . . resulted in a decision that . . . involved an unreasonable

application of, clearly established Federal law, as determined by the Supreme Court of the United States").

In failing to cumulate prejudice, the Sixth Circuit joined two other courts of appeals. Both the Fourth and Eighth Circuits have held that courts must isolate each error committed by trial counsel and consider it in light of the entirety of the evidence of a defendant's guilt, regardless of whether the cumulative prejudice associated with all of counsel's errors would be sufficient to meet the requirements of *Strickland*. Thus, in *Fisher v. Angelone*, 163 F.3d 835 (4th Cir. 1998), the Fourth Circuit ruled that "[t]o the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now." *Id.* at 852. Similarly, in *Middleton v. Roper*, 455 F.3d 838 (8th Cir. 2006), the Eighth Circuit held that the district court could not cumulate multiple errors by counsel under the prejudice prong of *Strickland* because "a habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test." *Id.* at 851 (internal quotation marks omitted).[4]

A number of other courts of appeals have taken the opposite approach. The First, Second, Fifth,

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[4] The highest courts in some states also have ruled that consideration of prejudice only on an error-by-error basis, not cumulatively, is proper. *See, e.g.*, *Weatherford v. State*, 215 S.W.3d 642, 649-50 (Ark. 2005) (refusal to cumulate the prejudice prong is not "inconsistent with *Strickland*").

Seventh, Ninth, and Tenth Circuits have all expressly ruled that the errors made by counsel should be cumulated for purposes of evaluating *Strickland*'s prejudice prong. *See, e.g.*, *Dugas v. Coplan*, 428 F.3d 317, 335 (1st Cir. 2005) ("*Strickland* clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced." (internal quotation marks omitted)); *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001) ("We need not decide whether one or another or less than all of these four errors would suffice, because *Strickland* directs us to look at the 'totality of the evidence before the judge or jury,' keeping in mind that '[s]ome errors [] have . . . a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture . . . .'" (alterations in original)); *White v. Thaler*, 610 F.3d 890, 912 (5th Cir. 2010) (the "combined prejudicial effect" of counsel's failure to object to various pieces of evidence "inexorably leads us to conclude" that there was a *Strickland* violation); *Goodman v. Bertrand*, 467 F.3d 1022, 1030 (7th Cir. 2006) ("While each of these errors considered in isolation may not have been prejudicial to [the defendant], viewed in their totality, they create a clear pattern of ineffective assistance, the existence of which 'l[ies] well outside the boundaries of permissible differences of opinion.'"); *Harris v. Wood*, 64 F.3d 1432, 1439 (9th Cir. 1995) ("By finding cumulative prejudice, we obviate the need to analyze the individual prejudicial effect of each deficiency."); *Welch v. Sirmons*, 451 F.3d 675, 710 (10th Cir. 2006) ("Because we have identified

additional error, and because the [state court] could not have considered the aggregate prejudice impact of the individual errors, we must review Mr. Welch's cumulative error claim de novo.").[5] Indeed, courts taking this approach have cumulated regardless of whether the errors made by counsel were related to each other in some way or were totally unrelated. *See, e.g.*, *White*, 610 F.3d at 912 (cumulating prejudice arising from counsel's failure to object to "evidence of the murder victim's pregnancy" and "testimony of [the defendant's] post-arrest silence").

2. In this case, there is no question that the Sixth Circuit's failure to cumulate made a real difference in the outcome. Trial counsel made at least four egregious errors, all of which sent a single, damning message to the jury: that Mr. Sutton was so dangerous that he should not be allowed to live.[6] First, counsel failed to object to the excessive security in the courtroom during the trial, or to

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[5] The highest courts of various states also have ruled that cumulation is appropriate. *See, e.g.*, *State v. Gondor*, 860 N.E.2d 77, 90 (Ohio 2006) (cumulation is proper because "*Strickland* directs us to look at the 'totality of the evidence'"); *Ex Parte Aguilar*, No. AP-75,526, 2007 Tex. Crim. App. Unpub. LEXIS 408, at *10-11 (Tex. Crim. App. Oct. 31, 2007) (improper under *Strickland* not to cumulate errors to assess prejudice).

[6] The Sixth Circuit did not reach the question of whether all of these various significant errors actually amounted to deficient performance by counsel within the meaning of *Strickland* – and neither did the state appellate court. *See supra* note 2. There is little question that counsel's representation was deficient. That issue can be resolved *de novo* by the Sixth Circuit on remand. *See, e.g.*, *Porter v. McCollum*, 130 S. Ct. 447, 452 (2009).

request a mistrial after the incident when the prosecutor purposefully dropped the shanks on the defense table – an event that caused the security officers to respond with guns at the ready and caused defense counsel to physically demonstrate to the jury that he was afraid of his own client. *See supra* pp. 7-8. Second, counsel failed to object to improper comments made by the prosecutor during the guilt phase. The prosecutor told the jury that Mr. Sutton was obviously guilty because he "was locked up immediately after th[e] body was found," and suggested that the jury should ignore the testimony of Mr. Sutton's expert witness on prison conditions because "apparently he does not put any value or significance to the rules of society and the laws we all have to live under." Pet. App. 10a, 12a; *see also supra* pp. 9-10. Third, counsel failed to object to improper statements in the prosecutor's closing at the penalty phase that Mr. Sutton was likely to be dangerous in the future and that the death penalty was the only way to prevent additional murders. Pet. App. 12a-15a; *see also supra* pp. 11-13. Finally, counsel failed to even investigate – much less present at the penalty phase – available mitigating evidence of Mr. Sutton's deeply troubled childhood and resulting psychological issues, which would have humanized Mr. Sutton in the jury's eyes and countered the prosecution's portrait of him as an irredeemable killer. *See supra* pp. 13-18.[7]

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[7] With respect to the question of whether presentation of this mitigating evidence would have opened the door to past-crimes evidence on rebuttal, one member of the Sixth Circuit panel concluded that competent counsel would not have opened the

Taken together, these intertwined errors do give rise to a reasonable probability of a different outcome. Each error built on the one before – and all of them combined to leave the jury with the unrelieved impression that Mr. Sutton was extraordinarily dangerous. Had the jury not been given reason to believe that Mr. Sutton could not be trusted to sit next to his own counsel even with numerous armed officers in close proximity, and had the jury not been expressly told that Mr. Sutton was certainly guilty and would kill again, and had the jury heard some mitigating explanation of why Mr. Sutton behaved the way he did, then the jury may well have decided against the death penalty. *See generally Holbrook v. Flynn*, 475 U.S. 560, 567-72 (1986) (explaining that "the sight of a security force within the courtroom might under certain conditions create the impression in the minds of the jury that the defendant is dangerous or untrustworthy," and acknowledging the "threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial" (internal quotation marks omitted)); *Estelle v. Williams*, 425 U.S. 501, 504-05 (1976) (explaining that a "constant reminder of the accused's condition [as a prisoner] . . . may affect a juror's judgment"); *id.* at 518 (Brennan, J., dissenting) (warning of danger of branding a defendant at trial "with an unmistakable mark of guilt"); *Williams v. Taylor*, 529 U.S. 362, 398-99 (2000) (holding that there was "a

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door, and another panel member concluded that it was very unlikely that the door would have been opened. *See supra* pp. 22-23.

reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence"); *Porter v. McCollum*, 130 S. Ct. 447, 453 (2009).

As Judge Martin's dissent put it, "[a] capital trial marred with no less than four instances of ineffective assistance cannot possibly leave one confident in the outcome or the appearance of justice." Pet. App. 38a n.3 (Martin, J., dissenting); *cf. Goodman*, 467 F.3d at 1030 (noting a "clear pattern of ineffective assistance, the existence of which 'l[ies] well outside the boundaries of permissible differences of opinion'" (alterations in original)). That is particularly true where – as here – the death penalty could not have been imposed if even *one* juror had decided to vote against it. *See* Tenn. Code Ann. § 39-13-204(h) (death sentence must be unanimous), *formerly codified as* Tenn. Code Ann. § 39-2-203(i) (1986).[8]

To be sure, the relevant question for the Court of Appeals under AEDPA was whether the state court unreasonably applied *Strickland* in concluding that

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[8] The same jury was exposed to the multiple errors committed by Mr. Sutton's counsel during the guilt and penalty phases. Thus, it is appropriate to cumulate the prejudice from the errors committed in both phases in determining whether there was a reasonable probability of a different sentence absent the errors. *See, e.g.*, *Moore v. Johnson*, 194 F.3d 586, 619-22 (5th Cir. 1999). Such cumulation is especially appropriate where, as here, all of the errors were related to each other, and all contributed to a picture of the defendant as a violent, incorrigible killer who terrified even his counsel and needed to be stopped.

the cumulative prejudice from these errors was not sufficiently weighty. But the Sixth Circuit never even asked that question, let alone answered it. Given the nature and extent of the errors by counsel at trial, it seems plain that (for all the reasons discussed above) the state court's conclusion was indeed an unreasonable application of the clearly established precedent of this Court – one that set an unreasonably high bar for establishing prejudice, and essentially required a certainty, rather than simply a reasonable probability, of a different outcome. *See Strickland*, 466 U.S. at 693 (making clear that the "reasonable probability" standard does not require a defendant to "show that counsel's deficient performance more likely than not altered the outcome").[9] If all of trial counsel's errors here taken together do not meet the *Strickland* standard, then it is difficult to imagine any scenario in which a combination of errors (none of which is necessarily sufficient in and of itself to establish prejudice) would do so. In reviewing the question presented, it would be open to this Court to decide whether the state court unreasonably applied *Strickland* in

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[9] That conclusion is bolstered by the state court's repeated statements that particular errors did not "'affect[] the verdict,'" Pet. App. 10a n.3 – a formulation that does not inspire confidence that the state court was actually applying the "reasonable probability" standard. The Sixth Circuit gave the state court the "benefit of the doubt" and assumed that it was not simply concluding that the error "did not change the outcome" – but given the unreasonable result the state court ultimately reached, the extent to which that benefit should be extended is questionable. *See id.* (internal quotation marks omitted).

determining whether the cumulative prejudice established by Mr. Sutton was sufficient; in the alternative, this Court could remand to the Sixth Circuit to answer that question in the first instance.

3. Because the cumulation question is potentially outcome-determinative here, this case presents the Court with the perfect opportunity to resolve the long-running and deep-seated disagreement among the lower courts. The question of whether the prejudice associated with errors by counsel should be cumulated for purposes of a *Strickland* analysis is one that unquestionably will continue to recur – indeed, it arises, and is likely to continue to arise, in a substantial majority of habeas challenges. It is a basic question, central to the way in which courts apply *Strickland* and its bedrock constitutional guarantee of effective assistance at a trial that places life and liberty in jeopardy. *See, e.g.*, *Strickland*, 466 U.S. at 685 ("The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to the counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled." (internal quotation marks omitted)); *Gideon v. Wainwright*, 372 U.S. 335, 339-40 (1963). And the courts of appeals plainly will not be able to resolve their differences as to that question without this Court's intervention – so that, absent this Court's review, criminal defendants in different parts of the country will continue to have their Sixth Amendment rights assessed very differently. This Court's ruling will eliminate that problem, guiding both state and

federal courts and ensuring the uniform application of the *Strickland* standard nationwide. It is therefore critically important for this Court to step in to resolve the prejudice-cumulation issue.

II. Under *Strickland*, Prejudice Should Be Assessed Cumulatively Rather Than Piecemeal

On the crucial question of whether the prejudicial effect of various errors by trial counsel should be cumulated for purposes of assessing *Strickland* prejudice, the Sixth Circuit's approach is wrong. This Court's own decision in *Strickland* – which does not expressly rule on the cumulation issue – strongly suggests as much, as does this Court's direction in *Kyles v. Whitley*, 514 U.S. 419 (1995), to cumulate prejudice in the highly analogous *Brady* context.

When describing how prejudice should be assessed, *Strickland* itself asks whether "but for counsel's unprofessional *errors*, the result of the proceeding would have been different" – referring to all of the errors together, not each error separately. *Strickland*, 466 U.S. at 694 (emphasis added). This "errors" formulation recurs throughout the opinion. *See, e.g.*, *id.* (courts "making the determination whether the specified errors resulted in the required prejudice . . . presume . . . that the judge or jury acted according to law"); *id.* at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."); *id.* at 696 ("a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the

decision reached would reasonably likely have been different absent the errors"); *see also, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (quoting "errors" language); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (same); *Williams*, 529 U.S. at 391 (same). Several of the Circuits that have held that a cumulative prejudice analysis is proper have relied on this language. *See Dugas*, 428 F.3d at 335; *Lindstadt*, 239 F.3d at 199; *Kubat v. Thieret*, 867 F.2d 351, 370 (7th Cir. 1989); *Gonzales v. McKune*, 247 F.3d 1066, 1078 n.4 (10th Cir. 2001), *vacated in part on other grounds*, 279 F.3d 922, 925-26 (10th Cir. 2002) (en banc).[10]

This Court's adoption of a cumulative error standard in the *Brady* context further supports the use of a cumulative prejudice standard in ineffective assistance of counsel cases. This Court has held that the *Strickland* prejudice standard supplies the proper test for assessing whether evidence withheld by a prosecutor is sufficiently "material" under *Brady v. Maryland*, 373 U.S. 83 (1963), to warrant relief for the defendant. *See United States v. Bagley*, 473 U.S. 667, 682-83 & n.13 (1985) (holding that "[t]he [withheld] evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," with "[a] 'reasonable

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[10] A number of state supreme courts also have interpreted this language to require cumulation. *See, e.g., Gondor*, 860 N.E.2d at 90; *Ex Parte Aguilar*, 2007 Tex. Crim. App. Unpub. LEXIS 408, at *10-11; *Potter v. State*, 684 N.E.2d 1127, 1135 (Ind. 1997); *Bowers v. State*, 578 A.2d 734, 744 (Md. 1990).

probability'" defined as "a probability sufficient to undermine confidence in the outcome" (quoting *Strickland*, 466 U.S. at 694-95)). In developing that prejudice standard in *Brady*-violation cases, this Court has explained that the prejudice inquiry is a cumulative one, not one that should be conducted piecemeal with respect to every item of withheld evidence. As the Court stated in *Kyles v. Whitley*, 514 U.S. 419 (1995), "we follow the *established rule* that the state's obligation under *Brady* . . . to disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government." *Id.* at 421 (emphasis added); *see also id.* at 436 (stressing *Bagley*'s discussion "of suppressed evidence considered collectively, not item by item"). Since the test for *Brady* materiality was drawn directly from *Strickland*, it would be odd indeed if the two tests diverged with respect to the critical question of cumulation.

Moreover, as the *Brady*-related cases recognize, any rule forbidding cumulation for purposes of assessing prejudice is extraordinarily unfair. There is no question that in carrying out the prejudice analysis a court must consider *all* of the evidence of a defendant's guilt, not just some of that evidence. *See, e.g.*, *Strickland*, 466 U.S. at 695 ("a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury"); *Kyles*, 514 U.S. at 436. If the effect of *all* of counsel's errors is not taken into account in assessing whether the jury would be reasonably likely to reach a different outcome, then the scales are weighted against a finding of a Sixth Amendment violation.

Only a holistic analysis of both the evidence of guilt and the prejudice resulting from deficient representation can accurately determine whether a different outcome was reasonably probable. And only such an analysis adequately protects a defendant's constitutional right to effective assistance of counsel, while also giving due recognition to competing concerns about finality and punishment of the guilty. *See Strickland*, 466 U.S. at 685.

The Sixth Circuit's departure from these principles in this case provides another reason for this Court to step in and clarify the way that the *Strickland* prejudice standard should be applied in cases involving multiple errors by trial counsel. The Sixth Circuit's approach – like that of the Fourth and Eighth Circuits and certain state courts – undermines *Strickland* and creates considerable tension with this Court's *Strickland*-derived *Brady* jurisprudence.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the petition for certiorari be granted.

Respectfully submitted,

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