No. 11-981

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

REPLY BRIEF

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There is a pressing need to resolve the deep split over whether the prejudice arising from multiple errors committed by defense counsel must be considered cumulatively to evaluate whether counsel rendered ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). There is no barrier to the Court's consideration of that issue in this case. First, the issue of the correct legal standard for assessing the prejudice arising from counsel's multiple errors was part and parcel of the Sixth Circuit's grant of a Certificate of Appealability ("COA") as to multiple claims of ineffective assistance of counsel. Second, Respondent casts no doubt on the existence of a fundamental divergence on the cumulation issue in the lower courts; indeed, if anything, Respondent's assertion that there is an *intra*-circuit conflict in certain courts of appeals only underscores the need for this Court to step in and resolve the confusion. Finally, nothing in AEDPA bars review of the cumulation issue here. In failing to apply the cumulative error standard in its prejudice analysis, the Sixth Circuit abdicated its duty under AEDPA to determine whether the state court had acted contrary to law by unreasonably applying the correct legal standard to the facts of the case. This Court should grant review to determine once and for all whether a defendant's fundamental right to counsel requires that prejudice under *Strickland* be assessed cumulatively rather than piecemeal.

I. The Cumulative Prejudice Standard Is Subsumed In The Grant Of A COA Regarding Multiple Errors By Counsel

Respondent argues that because the Sixth Circuit did not grant a COA as to a separate cumulative prejudice claim in Mr. Sutton's habeas petition, the cumulation question was not properly before the Sixth Circuit and therefore is not properly before this Court. Opp. 8-10. That is wrong. The COA in this case as to multiple errors by counsel *necessarily* includes the question of the correct legal framework for assessing whether the errors constituted ineffective assistance – that is part and parcel of the COA itself. Indeed, here Mr. Sutton argued to the Sixth Circuit that the COA should be expanded to include consideration of additional errors by counsel precisely *because* the errors had a cumulatively prejudicial effect, and the Sixth Circuit duly expanded the COA in just that fashion. In that context, a COA as to a stand-alone cumulative error claim would have been wholly superfluous.

1. The question of the correct legal standard for addressing a constitutional claim is part and parcel of a COA granting review of that claim. It would make no sense to require that a COA list separately both the specific constitutional issue presented and the legal standard by which that issue must be decided.

The Sixth Circuit applies this "part and parcel" analysis in evaluating the scope of a COA. As one judge on that court has explained, the question of "harmless error is certainly part and parcel of

[petitioner's] *Confrontation Clause* claims" and therefore is subsumed into a COA granting review of those constitutional claims. *Calvert v. Wilson*, 288 F.3d 823, 838 n.4 (6th Cir. 2002) (Cole, J., concurring) (explaining that the question of whether the state had waived the harmless error defense was squarely at issue) (emphasis in original); *see also id.* at 832-33 (Stafford, J.) (applying the harmless error standard as a matter of course in evaluating the Confrontation Clause issue); *cf. Pinchon v. Myers*, 615 F.3d 631, 639-40 (6th Cir. 2010) ("Although it is a statutory requirement that a COA reference the specific issue to be addressed on its face, a procedural issue that possibly bars addressing an underlying constitutional claim is an appropriate matter to be addressed under a COA." (quoting *Lordi v. Ishee*, 384 F.3d 189, 193-94 (6th Cir. 2004)) (internal quotation marks omitted)).

The same analysis applies here. The question of what legal standard applies in determining the prejudice arising from multiple errors by counsel is subsumed in the grant of a COA on Mr. Sutton's claims that he suffered from more than one such error. Any other rule would force habeas petitioners to create extensive and redundant lists of COA requests that identify separately the nature of their claims and the legal rules – including the multiple subparts of such rules – that govern such claims. That is not – and should not be – the law. *Cf. Brown v. McKee*, 2012 U.S. App. LEXIS 4398, at *14-15, 23-24 (6th Cir. Feb. 29, 2012) (analyzing ineffective assistance of counsel claim under *Strickland* even though the COA did not expressly incorporate the

standard). To apply *Strickland* to the multiple claims of defense-counsel error included in Mr. Sutton's COA, the Sixth Circuit had to evaluate prejudice – and in order to do that, it was confronted with the question of exactly *how* prejudice should be weighed against the prosecution's evidence in order to determine whether there was a reasonable probability of a different outcome in the absence of the asserted errors.

2. That conclusion is bolstered by examination of the Application for Expansion of COA ("COA Application") that Mr. Sutton filed in the Sixth Circuit, which presented the cumulative-prejudice standard as a *reason* why the court of appeals should add additional errors by defense counsel – including those named in Claims 23, 24, 25(q)(5), 25(q)(8), 25(q)(13), and 25q(14) – to the district court's existing COA.

It is true that Mr. Sutton made a cumulative error claim – Claim 26 – in his habeas petition in the district court. It is also true that he included claim 26 in the last, catch-all sentence of his COA Application, which listed by number twenty-four separate ineffective-assistance-related claims in that petition as to which the district court had not already granted a COA. But the body of his COA Application, which substantively discussed various claims not encompassed in the COA grant from the district court, did not press Claim 26 as an independent ground for a COA. *Compare* COA Application at 31 *and* COA Application at 9-11, 19-21. Instead, Mr. Sutton wove the cumulative

prejudice standard into his argument in support of granting review of various *individual* errors by counsel that Mr. Sutton claimed amounted to ineffective assistance. *Id.* at 6 ("Because the district court failed to consider the cumulative detrimental effect of these [specific] errors, and because it is subject to debate among jurists of reason whether that cumulative effect establishes prejudice, Petitioner is entitled to a certificate of appealability as to the denial of each claim for which it is now sought."); *see also id.* at 2-6, 11-14, 17-18, 19, 24-25.

In granting the COA as to a number of these errors, the Sixth Circuit implicitly accepted that overarching framework, making a separate COA on Claim 26 superfluous. Certainly, the court of appeals did not expressly reject the argument that review of additional errors by counsel was necessary due to their cumulatively prejudicial effect. Indeed, had it done so, it would have impermissibly narrowed the proper inquiry under *Strickland* when analyzing multiple errors.

3. Contrary to Respondent's crabbed reading, Opp. 9, this Court's reasoning in *Gonzales v. Thaler*, 132 S. Ct. 641 (2012), supports review of the cumulative-prejudice issue here. *See id.* at 649-50; *see also Keeling v. Warden*, 2012 U.S. App. LEXIS 3932, at *10 (6th Cir. Feb. 14, 2012) (recommended for publication) (applying *Gonzales*). This Court explained in *Gonzales* that "[a] petitioner, having successfully obtained a COA, has no control over how the judge drafts the COA and, as in Gonzalez's case, may have done everything required of him by law."

132 S. Ct. at 650. Here, Mr. Sutton told the Sixth Circuit that granting his COA as to counsel's various specific errors was necessary to understand the full picture of the cumulative prejudice arising from those errors, and the court proceeded to expand the COA to include a number of them, without a separate and unnecessary COA as to cumulative prejudice itself. In this context, it would be deeply unfair to Mr. Sutton and wasteful of the judiciary's resources to bar consideration of the cumulation issue in this Court.

II. There Is A Deep Split Regarding Whether *Strickland* Analysis Must Cumulate The Prejudice Arising From Multiple Errors Committed By Defense Counsel

As the Petition explains, there is a deep split in the circuit courts and the highest state courts regarding whether the prejudice arising from multiple errors must be cumulated under *Strickland*. In this case, the Sixth Circuit took an approach consistent with the Fourth and Eighth Circuits, as well as the highest courts of some states, that was in direct conflict with the rule applied in the First, Second, Fifth, Seventh, Ninth, and Tenth Circuits, as well as the highest courts of other states. Respondent does not seriously challenge the existence of this split, instead suggesting in a footnote that there also may be some confusion *within* the circuits that have rejected the cumulative error standard. To the extent such confusion exists, it only underscores the need for this Court to address

the cumulation issue so as to provide clarity in an area that is rife with confusion and uncertainty.

1. In the decision below, the Sixth Circuit joined the Fourth and Eighth Circuits, as well as the highest courts of some states, in examining each of multiple errors by defense counsel in isolation, and weighing every *separate* error against the totality of the evidence supporting the verdict and sentence. *See, e.g.*, *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998); *Middleton v. Roper*, 455 F.3d 838, 851 (8th Cir. 2006); *see also, e.g.*, *Weatherford v. State*, 215 S.W.3d 642, 649-50 (Ark. 2005). In contrast, the First, Second, Fifth, 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); *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001); *White v. Thaler*, 610 F.3d 890, 912 (5th Cir. 2010); *Goodman v. Bertrand*, 467 F.3d 1022, 1030 (7th Cir. 2006); *Harris v. Wood*, 64 F.3d 1432, 1438-39 (9th Cir. 1995); *Welch v. Sirmons*, 451 F.3d 675, 710 (10th Cir. 2006); *see also, e.g.*, *State v. Gondor*, 860 N.E.2d 77, 90 (Ohio 2006); *Ex Parte Aguilar*, No. AP-75,526, 2007 Tex. Crim. App. Unpub. LEXIS 408, at *10-11 (Oct. 31, 2007).

2. Nothing in the Opposition resolves this split. At most, Respondent suggests that there may be an intra-circuit split as well as an inter-circuit and inter-state split on the prejudice-cumulation question. *Compare* Opp. 11-12 n.8 *with* Pet. 23-27 & nn.4-5. There is no question that in this case the

Sixth Circuit failed to cumulate the prejudice arising from counsel's errors. *See* Pet. 23-24; Opp. 9. Moreover, other panels of the Sixth Circuit previously have concluded that no cumulation is required under *Strickland*. *See, e.g.*, *Keith v. Mitchell*, 455 F.3d 662, 679 (6th Cir. 2006); *Campbell v. United States*, 364 F.3d 727, 736 (6th Cir. 2004). That Respondent cites one Sixth Circuit decision reaching a different conclusion than both earlier and later panels of that court, Opp. 11 n.8 (citing *Lundgren v. Mitchell*, 440 F.3d 754, 770 (6th Cir. 2006)), does not change the fact that the Sixth Circuit did not perform the proper analysis here. No en banc directive from the Sixth Circuit has addressed cumulation under *Strickland* – indeed, the Sixth Circuit declined the opportunity to do so in denying Mr. Sutton's petition for rehearing en banc on that very issue.

To the extent that different decisions of the Sixth Circuit come out different ways on the cumulation question, that only *intensifies* the need for this Court's review. Plainly the lower courts are in complete disarray on the foundational *Strickland* issue of whether prejudice arising from multiple errors should be cumulated, and there is no question that there is widespread disagreement.[1] This Court

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[1] Respondent attempts to suggest that the Fourth and Eighth Circuits have not, in fact, refused to cumulate. Opp. 11-12 n.8. That is wrong. There are at least two published cases in the Fourth Circuit examining the potential prejudice of individual errors and then refusing to cumulate that prejudice. *See, e.g.*, *Mueller v. Angelone*, 181 F.3d 557, 580-86 & n.22 (4th Cir. 1999); *Fisher*, 163 F.3d at 849-53. The one unreported Fourth

should step in to require that all courts take the same approach – and should make clear that *Strickland* requires cumulation. Otherwise, certain unlucky defendants will be bereft of the fundamental constitutional protections afforded to similarly situated defendants in other cases.

3. Notably, Respondent never addresses the argument that cumulation is required to assess prejudice under *Strickland*, attempting instead to raise procedural roadblocks to addressing this critical issue. For the reasons set forth in the Petition, *Strickland* does require the court to balance the prejudice arising from *all* of counsel's errors with the totality of the evidence against the defendant – and the courts that fail to cumulate prejudice in this fashion run afoul of *Strickland* itself, create serious tension with *Brady* jurisprudence, and reach unfair and erroneous outcomes. Pet. 33-36.

III. AEDPA Is No Barrier To Review

Finally, Respondent's passing argument that AEDPA creates some bar to review of the question

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Circuit case cited by Respondent clearly misunderstands the rationale in *Fisher*, which had looked to the prejudice question as an alternative ground. *Compare United States v. Russell*, 34 F. App'x 927, 927-28 (4th Cir. 2002) (per curiam), *with Fisher*, 163 F.3d at 849-53. Similarly, the one Eighth Circuit case cited by Respondent is contrary to the earlier and later holdings of other Eight Circuit cases. *Compare Becker v. Luebbers*, 578 F.3d 907, 914 n.5 (8th Cir. 2009), *with Middleton*, 455 F.3d at 851, *and Kennedy v. Kemna*, 666 F.3d 472, 485 (8th Cir. 2012). In any event, even to the extent that there is indeed intra-circuit confusion in these courts of appeals, that does not in any way obviate the need for this Court's clarifying review.

presented is wrong. *See* Opp. 10-11. Here, because the Sixth Circuit did not cumulate prejudice itself, it never even assessed the relevant question under AEDPA: whether the state court unreasonably applied *Strickland* in concluding that the cumulated prejudice from all of counsel's errors did not meet the *Strickland* standard for ineffective assistance of counsel. This Court's review of the cumulation issue would therefore determine whether the Sixth Circuit decision can stand or whether further proceedings are necessary. Moreover, just as this Court made clear once and for all that the "established rule" under *Brady* was to cumulate prejudice, *Kyles v. Whitley*, 514 U.S. 419, 421 (1995), this Court's review would have the salutary effect of resolving a split and clarifying a bedrock constitutional issue for every court in the country.

1. As relevant in this case, AEDPA permits the grant of habeas if the state court's decision (1) was contrary to federal law, or (2) involved an unreasonable application of federal law. *See* 28 U.S.C. § 2254(d)(1). The first issue relates to whether the state identified the correct legal standard. *See id.* The second relates to whether, despite having identified the proper law, the state court unreasonably applied it to a particular case. *See id.*; *see also Williams v. Taylor*, 529 U.S. 362, 407-08 (2000) (plurality op.) (explaining that a state-court decision results in an unreasonable application of clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case").

A federal court cannot decide the "unreasonable application" question if the federal court is itself applying an incorrect legal standard. Respondent would have the Court assume that there is no issue appropriate for review so long as the state court stated that it must "consider the cumulative effect of counsel's deficiencies" – even if the subsequent federal review did not evaluate whether the state court's decision that the cumulative prejudice was insufficient constituted a reasonable application of the *Strickland* prejudice prong. Opp. 11. Because the Sixth Circuit takes the view that prejudice should not be cumulated, it failed to ask whether the state court unreasonably applied *Strickland* in ruling that the cumulative prejudice arising from counsel's multiple errors *still* did not meet the *Strickland* threshold for prejudice. AEDPA does not bar this Court from requiring the Sixth Circuit to apply the correct legal standard itself in evaluating the state court decision.

2. Had the Sixth Circuit performed the correct analysis under AEDPA, it would have made a real difference here. When properly cumulated, counsel's multiple errors give rise to a reasonable probability of a different outcome because those errors – each prejudicial in its own right – intertwined to give jurors a picture of Mr. Sutton as an irredeemable killer who was too dangerous to live. Defense counsel failed to object to the presence of an extraordinary number of uniformed and armed officers in the courtroom; failed to object even after the prosecution provoked counsel, and the armed guards, to display their fear of Mr. Sutton to the

jury; failed to object to improper prosecution statements urging the jury to conclude that society had to defend itself against Mr. Sutton; and failed to even investigate available mitigating evidence that would have placed Mr. Sutton's actions in the context of his horrific childhood. Pet. 27-30. In the absence of these errors, it is reasonably probable that at least *one* juror would have come to a different conclusion about the imposition of the death penalty. *See* Tenn. Code Ann. § 39-13-204(h) (death sentence must be unanimous), *formerly codified as* Tenn. Code Ann. § 39-2-203(i) (1986).[2]

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition be granted.

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[2] In reviewing the cumulative prejudice question, this Court need not decide itself whether the state court was unreasonably applying *Strickland* when it decided that the combined prejudice from all of the errors was insufficient to establish a constitutional violation. The Court could reach that question should it wish to do so, however – especially in light of the egregious and interrelated nature of counsel's multiple errors.

Respectfully submitted,

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