No. 07-1566

IN THE

Supreme Court of the United States

RICHARD LOUIS MARCRUM,

Petitioner,

v.

DON ROPER,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY SUPREME COURT PRACTICUM
37 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

JEFFREY T. GREEN
REBECCA K. WOOD*
NORINA IRANI EDELMAN
AMY L. HANKE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Amicus Curiae

* Counsel of Record

July 17, 2008

QUESTION PRESENTED

Whether, in assessing Sixth Amendment ineffective assistance of counsel claims under *Strickland* v. *Washington*, 466 U.S. 668 (1984), errors by trial counsel must be considered individually or cumulatively.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and appropriate application of criminal statutes in accordance with the United States Constitution. Consistently advocating for the fair and efficient administration of criminal justice, members of the NACDL have a keen interest in assuring that Sixth Amendment ineffective assistance of counsel issues are addressed uniformly and that trial counsel error is addressed in a realistic manner that does not segregate individual errors in an artificial manner, but instead looks to the overall effect of error to determine confidence in the fairness of a trial.

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that counsel of record for both parties received timely notice of *amicus curiae*'s intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

REASONS FOR GRANTING THE PETITION

This case presents a question that lies at the heart of safeguarding a criminal defendant's constitutional right to effective counsel. Under *Strickland* v. *Washington*, 466 U.S. 668 (1984), prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," where a "reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Since that decision, both state and federal courts have disagreed on the question of how properly to analyze prejudice.

The Eighth Circuit, applying its settled approach, concluded that because each alleged error of counsel in isolation would not have been reasonably likely to change the jury's mind, the defendant had not stated a *Strickland* claim. See, *e.g.*, Pet. App. 36-37, 48-49. Also pursuant to that settled approach, the court below refused to consider whether the overall fairness of the proceeding was undermined by the cumulative effect of the numerous errors committed by counsel.

This Court's review is warranted. In addition to the split among the federal courts identified by petitioner, Pet. 21-27, the States also are divided about the appropriate standard for determining *Strickland* prejudice. At least fourteen States to have addressed the issue disagree with the Eighth Circuit and employ some version of a cumulative analysis. In contrast, only one State appears to use an individual analysis consistent with the Eighth Circuit's approach. Other States have internal inconsistencies or have failed to resolve the issue. Simply put, there is a deep lack of uniformity between state courts, further necessitating review by this Court.

The decision of the Eighth Circuit also conflicts with the underlying rationale of other standards used to determine the reliability of a criminal trial's outcome, in which courts overwhelmingly focus on the cumulative effect of errors. In particular, courts generally consider error on a cumulative basis to determine the materiality of withheld *Brady* evidence; to determine whether multiple harmless errors undermined the fairness of the trial; and to consider whether prosecutorial misconduct warrants a new trial. The Eighth Circuit's decision is in conflict with this general trend in the criminal context that errors should be reviewed cumulatively to determine whether confidence in the outcome of the trial has been undermined.

Finally, the decision below violates the logical principle know as the "fallacy of composition." The fallacy of composition recognizes that the whole, when taken as a whole, can be different than its parts. Analyzing individual errors by counsel in isolation falls prey to this fallacy. Although any given error may not, by itself, be serious enough to call the reliability of a verdict into question, a series of such errors viewed as a whole and in relation to one another may do so.

For all of these reasons, as explained more fully below, this Court should grant review.

ARGUMENT

I. STATE COURT STANDARDS FOR ADDRESSING CLAIMS OF *STRICKLAND* PREJUDICE CONFLICT.

1. Of the States that appear to have addressed the question presented, at least fourteen—California, Colorado, Georgia, Illinois, Indiana, Iowa, Maryland,

New Jersey, New Mexico, New York, Ohio, Texas, West Virginia, and Wisconsin—have followed some iteration of a cumulative approach to *Strickland* error. Even within these States, however, courts in at least two States (Illinois and California) have held that the cumulative analysis can be applied only where there is sufficient prejudice as to at least one individual error.

In contrast, at least one State (Arkansas) has expressly rejected the cumulative approach—applying something similar to the Eighth Circuit's approach—and at least one State (Kentucky) uses a hybrid approach. In addition, there appears to be an intrastate conflict in at least one State (Florida) about the appropriate analysis.

This variety in the application of what should be a single federal constitutional standard, transforms what should be "the uniform 'law of the land' into a crazy quilt." *Kansas* v. *Marsh*, 548 U.S. 163, 185 (2006) (Scalia, J., concurring); accord *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.").

The majority view makes sense, as cumulative consideration of errors ensures "confidence in the outcome" of the trial, which is the hallmark of the *Strickland* prejudice analysis. *Strickland*, 466 U.S. at 694; see also, *e.g.*, *State* v. *Thiel*, 665 N.W.2d 305, 327-28 (Wis. 2003) (finding that the cumulative effect of counsel's deficiencies prejudiced the defense to an extent that it "undermines our confidence in the outcome of the trial").

Further, many States have considered the cumulative analysis to be dictated by the language of *Strickland*. See, *e.g.*, *Schmitt* v. *State*, 779 A.2d 1004, 1014 (Md. Ct. Spec. App. 2001) (concluding that *Strickland* itself made clear that "it is the totality of circumstances or cumulative effect of all errors that must be assessed in ruling on ultimate trial prejudice"). For example, the Ohio Supreme Court concluded that "*Strickland* directs an examination of the "totality of the evidence" and "therefore considers claimed counsel's errors in the aggregate." *State* v. *Gondor*, 860 N.E.2d 77, 90 (Ohio 2006). Similarly, the Georgia Supreme Court focused on *Strickland*'s use of the plural "errors" in its prejudice description to conclude that "not . . . each individual error by counsel should be considered in a vacuum." *Schofield* v. *Holsey*, 642 S.E.2d 56, 60 n.1 (Ga.) (citing *Strickland*, 466 U.S. at 687), *cert. denied sub nom. Holsey* v. *Hall*, 128 S. Ct. 728 (2007); see also *Ex Parte Aguilar*, No. AP-75526, 2007 WL 3208751, at *3 (Tex. Crim. App. Oct. 31, 2007) (observing that *Strickland* embraces a cumulative analysis because its treatment of prejudice "is replete with the use of the plural tense, referring to counsel's alleged 'errors'").

2. As detailed in the accompanying appendix, at least fourteen States appear to consider counsel's errors cumulatively. See App. at 1a-4a. Even within those States, however, the cumulative analysis has been applied differently. For example, in California and Illinois, notwithstanding the general application of a cumulative approach, there is at least one state supreme court decision suggesting that cumulative analysis only will be undertaken if there are individual claims of error that alone meet the *Strickland* standard—which is not really a

cumulative analysis at all. In one California Supreme Court decision, the court stated that the defendant "failed to meet his burden of establishing inadequate representation and resulting prejudice as to each claim of ineffective assistance of counsel. Accordingly, we can find no cumulative deficiency assessing these contentions in the aggregate." *People* v. *Cox*, 809 P.2d 351, 374 (Cal. 1991). Similarly, the Illinois Supreme Court rejected defendant's claims of ineffective assistance of counsel in one case because it concluded that counsel's performance was not deficient or, even if deficient, did not result in prejudice under *Strickland*, observing that "[b]ecause we have rejected every [individual] claim of error, cumulative-error analysis is not necessary." *People* v. *Perry*, 864 N.E.2d 196, 222 (Ill. 2007). If a court reserves examination of the cumulative prejudice of individual errors to circumstances in which it already has deemed those individual parts independently to meet the *Strickland* prejudice standard, however, that is not a cumulative analysis in any meaningful sense.

At least one State, Arkansas, expressly rejects the cumulative analysis under *Strickland*, instead requiring that *Strickland* prejudice be assessed independently for each alleged error of counsel, and not cumulatively. See *Howard* v. *State*, 238 S.W.3d 24, 50 (Ark. 2006) ("[T]his court has held that we do not recognize cumulative error in allegations of ineffective assistance of counsel.").

Another State, Kentucky, has adopted a hybrid approach. Kentucky courts will consider errors cumulatively to determine *Strickland* prejudice, but only those errors in which "some prejudice, however slight, could have resulted" will be included in the cumulative analysis. *Marquez* v. *Commonwealth*, No.

2003-CA-001431-MR, 2005 WL 195188, at *1 (Ky. Ct. App. Jan. 14, 2005). Accordingly, Kentucky sets a minimum threshold for prejudice even to enter the cumulative calculus.

In at least two States, South Carolina and North Dakota, the appropriate standard for determining *Strickland* prejudice is expressly recognized to be an open issue. See, *e.g., Lorenzen* v. *State*, 657 S.E.2d 771, 779 n.3 (S.C. 2008) (noting that whether the culmination of several errors that "themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina"); *Garcia* v. *State*, 678 N.W.2d 568, 578 (N.D. 2004) (citing conflicting opinions as to whether errors should be considered cumulatively for purposes of the *Strickland* analysis but not reaching the issue because both standards were satisfied).

Finally, in at least one State (Florida) there is an intrastate conflict (or, at least, intrastate inconsistency) with no clear rule from the State's highest court. The Florida Supreme Court has observed both that the fact that a defendant did not satisfy the *Strickland* standard as to individual claims undermined any claim of cumulative prejudice and also that an evidentiary hearing may be necessary because the cumulative effects of ineffective assistance of counsel claims could establish prejudice. *Compare Monlyn* v. *State*, 894 So. 2d 832, 838 (Fla. 2004) (per curiam), *with Harvey* v. *Dugger*, 656 So. 2d 1253, 1257 (Fla. 1995) (per curiam).

3. As this discussion illustrates, there is a significant lack of uniformity, both within and among the States. These differing rules in state—and federal, see Pet. 21-27—courts lead to truly anomalous, inconsistent, and unfair results. What

should be uniform constitutional rights of criminal defendants are actually addressed in significantly different ways dictated by the mere happenstance of geography or whether a case is being heard by a federal or state court. For example, a criminal defendant in West Virginia *state* court is entitled to have counsel's errors considered cumulatively. See *State ex rel. Daniel* v. *Legursky*, 465 S.E.2d 416, 424 n.7 (W. Va. 1995). In contrast, a criminal defendant in a West Virginia *federal* court down the street is only entitled to have the same trial errors considered individually. See *Fisher* v. *Angelone*, 163 F.3d 835, 852 (4th Cir. 1998); see Pet. 23-24. Similarly, two defendants convicted for the same crime in different States, say Arkansas and Georgia, would face quite different review standards. Counsel for each defendant may have behaved in exactly the same way in each defendant's trial, even with the same evidence and same overall case. Yet that same error will be viewed quite differently depending on whether the appeal is heard in Georgia, where it will be considered cumulatively, see *Schofield*, 642 S.E.2d at 60 n.1, or Arkansas, where only a sufficient individual error would entitle the defendant to relief, see *Howard*, 238 S.W.3d at 48. Such a "crazy quilt" of constitutional law, *Marsh*, 548 U.S. at 185 (Scalia, J., concurring), currently governs resolution of claims asserting constitutionally inadequate counsel. Criminal defendants' constitutional rights should not vary by the happenstance of their location.

Thus, there is both a conflict and significant confusion among the States as to the proper standard for determining whether a defendant has received the constitutionally promised effective counsel. This Court should grant certiorari to resolve the conflict in state—and federal—courts and provide much needed

guidance as to the proper application of the Sixth Amendment as interpreted in *Strickland*.

II. THE EIGHTH CIRCUIT'S APPROACH CONFLICTS WITH OTHER FEDERAL STANDARDS FOR DETERMINING WHEN ERROR SUFFICIENTLY UNDERMINES CONFIDENCE IN TRIAL RELIABILITY.

In several criminal contexts other than *Strickland*, courts are called upon to determine whether errors undermine confidence in the outcome of a trial, or affect the reliability of a verdict. In each of these contexts, detailed below, this Court and the courts of appeals generally have required consideration of the *cumulative* effect of errors to determine whether the reliability of the verdict has been undermined.

1. First, and perhaps most telling, is an examination of the analysis used to determine whether evidence withheld by the prosecution in a criminal trial is material and thus amounts to a violation of the standards of *Brady* v. *Maryland*, 373 U.S. 83 (1963). *Brady* governs a prosecutor's duty to disclose evidence favorable to the defense. *Id.* at 83. The Court has explained that a defendant must show that evidence withheld is "material" in order to make out a *Brady* violation. See, *e.g.*, *United States* v. *Bagley*, 473 U.S. 667 (1985). Under *Kyles* v. *Whitley*, 514 U.S. 419, 436-37 (1995), courts must review the combined effect of all withheld evidence.

The standards for *Brady* materiality and *Strickland* prejudice have developed together. As the Court observed in *Strickland*, the "appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution." 466 U.S. at 694. In *Bagley*, the Court explicitly adopted the *Strickland*

standard to determine materiality under *Brady*. *Bagley*, 473 U.S. at 694. Accordingly, the language of the *Brady* and *Strickland* standards is the same. *Compare Bagley*, 473 U.S. at 682 (to establish materiality, a defendant must show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome"), *with Strickland*, 466 U.S. at 694 (to establish prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

Despite the nearly identical language governing these standards, they are not applied the same way in many federal and state courts. As for *Brady* errors, as noted, this Court has held that evidence must be considered cumulatively to determine whether a *Brady* violation was material and thus amounted to a constitutional violation. *Kyles*, 514 U.S. at 436-37. As this Court explained, even if "confidence that the verdict would have been the same could survive" considering only a single piece of the withheld evidence, "confidence that the verdict would have been unaffected cannot survive when" the suppressed evidence *in toto* may well have allowed the jury to reach a different conclusion. *Id.* at 454. Thus, the uniform law of the land is that *Brady* materiality must be determined cumulatively. In contrast, as detailed above and in petitioner's papers, the law of the land on the similar *Strickland* analysis has become anything but uniform. See Pet. 21-27; § I, *supra*. Thus, notwithstanding identical language

setting forth the two standards, they are applied in divergent ways.

There is no reason that the cumulative analysis, applicable in the *Brady* context to determine whether confidence in the trial has been undermined, should not apply in the *Strickland* context to answer the very same question. The "laws governing the right to counsel and suppression of evidence have long shared the same core value, reliability of outcomes." John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating Bagley Materiality, Strickland Prejudice, and Cumulative Harmless Erro*r, 95 J. Crim. L. & Criminology 1153, 1155 (2005). Not only is the language setting forth the standards nearly identical, but the focus of the inquiries and the ultimate question to be answered—whether confidence in the reliability of the verdict has been undermined—is the same. Accordingly, the cumulative approach should apply to both.

2. The decision below also is in tension with the approach of the majority of federal courts of appeals to harmless error review in criminal trials, which consider whether multiple errors cumulatively amount to a constitutional violation, rather than viewing them in isolation. As these courts recognize, the "effect of multiple errors in a single trial may cast such doubt on the fairness of the proceedings that a new trial is warranted, even if no single error requires reversal." *United States* v. *Rahman*, 189 F.3d 88, 145 (2d Cir. 1999); see also *United States* v. *Munoz*, 150 F.3d 401, 418 (5th Cir. 2005) ("an aggregation of non-reversible errors . . . can yield a denial of the constitutional right to a fair trial"); *Darks* v. *Mullin*, 327 F.3d 1001, 1018 (10th Cir. 2003) (observing that the "cumulative effect of two or more individually harmless errors has the potential to

prejudice a defendant to the same extent as a single reversible error"). The cumulative error rule was suggested by this Court in *Taylor* v. *Kentucky*, where it reached the "conclusion that the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness." 436 U.S. 478, 488 n.15 (1978). This rule both makes sense and comports with the purpose of ensuring a fundamentally fair trial. Perhaps for these reasons, every federal circuit considers the effect of cumulative errors on direct review.[2] Most courts of appeals to address the issue also apply cumulative error analysis in the review of *habeas corpus* petitions.[3]

---

[2] *See United States* v. *Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993); *Rahman*, 189 F.3d at 145; *Marshall* v. *Hendricks*, 307 F.3d 36, 94 (3d Cir. 2002), *cert. denied sub nom. Cathel* v. *Marshall*, 574 U.S. 1035 (2006); *United States* v. *Martinez*, 277 F.3d 517, 534 (4th Cir. 2002); *United States* v. *Munoz*, 150 F.3d 401, 418 (5th Cir. 1998); *United States* v. *Trujillo*, 376 F.3d 593, 614 (6th Cir. 2004); *United States* v. *Rogers*, 89 F.3d 1326, 1338 (7th Cir. 1996); *United States* v. *Johnson*, 968 F.2d 768, 771 (8th Cir. 1992); *United States* v. *Wallace*, 848 F.2d 1464, 1475-76 (9th Cir. 1988); *Darks* v. *Mullin*, 327 F.3d 1001, 1018 (10th Cir. 2003); *United States* v. *Adams*, 74 F.3d 1093, 1099-1100 (11th Cir. 1996); *United States* v. *Jones*, 482 F.2d 747, 749 & n.2, 755 (D.C. Cir. 1973).

[3] *See Mello* v. *DiPaulo*, 295 F.3d 137, 151-52 (1st Cir. 2002); *Marshall* v. *Hendricks*, 307 F.3d 36, 94 (3d Cir. 2002); *Fisher* v. *Angelone*, 163 F.3d 835, 852-53 & n.9 (4th Cir. 1998); *Bell* v. *Duckworth*, 861 F.2d 169, 170 (7th Cir. 1988), *cert. denied*, 489 U.S. 1088 (1989); *Karis* v. *Calderon*, 283 F.3d 1117, 1132 (9th Cir. 2002); *Miller* v. *Mullin*, 354 F.3d 1288, 1301 (10th Cir. 2004) (per curiam); *see also Davis* v. *Zant*, 36 F.3d 1538, 1546 (11th Cir. 1994) (considering cumulative effect of prosecutorial misconduct claim on *habeas* review). Although the Fifth Circuit also considers cumulative errors on *habeas* review, it limits the types of errors to be considered. *See Westley* v. *Johnson*, 83 F.3d 714, 726 (5th Cir. 1996) (recognizing a claim for cumulative

3. A cumulative approach also is widely applied in determining whether prosecutorial misconduct necessitates a new trial. This Court, for example, looked to allegations of prosecutorial misconduct *in toto* in *Berger* v. *United States*, 295 U.S. 78 (1935). That case considered the trial as a whole and concluded that prosecutorial error warranted a new trial because this was not a case "where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." *Id.* at 84-89.

Many courts of appeals have expressly taken a cumulative approach. See, *e.g.*, *Davis* v. *Zant*, 36 F.3d 1538, 1546 (11th Cir. 1994) (looking to whether "the prosecutor's conduct as a whole violated the Fourteenth Amendment due process right to a fair trial").[4] In the prosecutorial misconduct context, even

---

error on *habeas* relief only where the individual errors involved matters of constitutional dimension, rather than violations of state law; the errors were not procedurally defaulted; and the errors infected the trial to the point that the resulting conviction violated due process). The Sixth Circuit has taken a hybrid approach. *Compare Cooper* v. *Sowders*, 837 F.2d 284, 288 (6th Cir. 1988) ("This court has found that the trial court committed error with regard to each of petitioner's claims. We hold that, when considered cumulatively, these errors produced a trial setting that was fundamentally unfair."), *with Davis* v. *Burt*, 100 F. App'x 340, 351 (6th Cir. 2004) ("Cumulative error is not a basis for granting habeas relief in non-capital cases."). The Eighth Circuit has rejected the cumulative analysis in the *habeas* context. *Wainwright* v. *Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996).

[4] *See United States* v. *Mooney*, 315 F.3d 54, 61 (1st Cir. 2002); *Fahy* v. *Horn*, 516 F.3d 169, 198-99 (3d Cir. 2008); *Slagle* v. *Bagley*, 457 F.3d 501, 515 (6th Cir. 2006), *cert. denied*, 127 S. Ct.

the Eighth Circuit recognizes a cumulative error rule, in conflict with its rule for *Strickland* prejudice. See *United States* v. *Crumley*, 528 F.3d 1053, 1064 (8th Cir. 2008); *United States* v. *Johnson*, 968 F.2d 768, 771 (8th Cir. 1992) ("Prejudice sufficient to warrant reversal may result from the cumulative effect of repeated improper comments by the prosecutor."). This approach makes sense because the purpose of the analysis is to determine whether the misconduct as a whole infected the proceeding, such that the reliability of the proceeding is in doubt.

Thus, in many criminal contexts, this Court and lower appellate courts recognize that to determine accurately whether the fairness of a trial has been undermined, courts must consider the cumulative effect of alleged errors. This follows because, as further explained below, "a column of errors may sometimes have a logarithmic effect, producing a total impact greater than the arithmetic sum of its constituent parts." *United States* v. *Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993). This Court should grant certiorari to correct the Eighth Circuit and other courts' contrary approach and to harmonize the application of criminal defendants' constitutional right to a trial that is fundamentally fair.

III. THE EIGHTH CIRCUIT'S RULE VIOLATES FUNDAMENTAL PRINCIPLES OF LOGIC.

Viewing trial counsel errors in artificial isolation, rather than cumulatively, also violates the logical principle know as the "fallacy of composition." This logical error involves "an invalid inference from the

---

2977 (2007); *Fields* v. *Woodford*, 309 F.3d 1095, 1109 (9th Cir. 2002); *United States* v. *Blunt*, 187 F. App'x 821, 833 (10th Cir.), *cert. denied sub nom. Copeman* v. *United States*, 127 S. Ct. 453 (2006).

nature of the parts to the nature of the whole." C. Stephen Layman, *The Power of Logic* 143 (McGraw Hill 3d ed. 2005) (emphasis omitted); see *The Cambridge Dictionary of Philosophy* 432 (Robert Audi ed., Cambridge Univ. Press 2d ed. 1999) (the fallacy of composition is "the error of arguing from a property of parts of a whole to a property of the whole"). The fallacy of composition exists because the whole, when taken as a whole, can be different (whether greater or lesser) than its parts when taken separately. Accordingly, as a logical matter, "the following argument form is *not* in general valid: 'Each part of *X* has attribute *Y*; therefore, *X* itself has attribute *Y*.'" Layman, *supra*, at 143.

One well-known aspect of the fallacy of composition is that "the whole may be greater than the sum of its parts." *Union Pac. R.R. Co.* v. *Hadley*, 246 U.S. 330, 332 (1918); see *Sepulveda*, 15 F.3d at 1196 (observing that "a column of errors may sometimes have a logarithmic effect, producing a total impact greater than the arithmetic sum of its constituent parts"). A classic example of this fallacy "arises where each passenger on a lifeboat seeks to add one more piece of luggage." *Fontaine* v. *Ryan*, 849 F. Supp. 190, 194 n.2 (S.D.N.Y. 1993). Although each individual passenger's bag may not matter, in the aggregate, a number of different passengers' extra bags can literally sink the lifeboat. Another example of the fallacy is the following statement: "Each of the parts of this airplane is very light. Therefore, the airplane itself is very light." Layman, *supra*, at 143. This inference is wrong, of course, because if enough light parts are joined together, the airplane itself may become quite heavy. Courts and commentators have recognized many similar examples. See, *e.g.*, *A&A Mech., Inc.* v. *Thermal Equip. Sales Inc.*, 998 S.W.2d

505, 513 n.6 (Ky. Ct. App. 1999) (giving the following example of the fallacy of composition: "Because the atoms of this book are invisible, the book must be invisible"). Accordingly, a fundamental teaching of this fallacy is that individual parts, if viewed in isolation, may present a distorted picture of the whole.

The Eighth Circuit's (and other courts') practice of analyzing individual errors by counsel in isolation from one another is emblematic of this fallacy. Although any given error may not, by itself, be serious enough to call the reliability of a verdict into question, a series of such errors viewed as a whole and in relation to one another may do so. Simply put, "[i]f one focused on the reliability-impact of each individual error, one would, in essence, fail to see the forest for the trees." Blume & Seeds, *supra*, at 1157.

This fundamental logical error made a difference to the ruling below, as it will in many cases. As petitioner's brief details, a key aspect of the defense at trial was petitioner's mental competence and propensity for violence when not taking antipsychotic medications. Pet. 4-6. Viewing each of trial counsel's alleged errors individually, the Eighth Circuit concluded that none standing alone was sufficiently prejudicial to warrant relief. Pet. App. 41-49 & n.9. In particular, as detailed in the District Court opinion, trial counsel made the following errors: the failure to list several witnesses (including petitioner's treating physicians) in time to call them to testify; the failure to cross-examine the prosecution's mental health expert witness who testified (wrongly) that there was no evidence to connect petitioner's psychosis with violent behavior; and the failure to introduce petitioner's extensive mental health medical records into evidence. *Id.* at 92-95. Yet the

appellate court below dissected each individual alleged error, without viewing it in relation to the overall picture. It failed to acknowledge that the pieces of evidence the jury did not see were important not only on their own, but also because they would have reinforced each other and created an overall picture more meaningful than the sum of the parts.

For example, the medical records would have provided a context in which statements by petitioner's treating physicians and the government's own expert could establish a mental health pattern of violence when petitioner was not using antipsychotic medications. Testimony from petitioner's treating physicians could have clarified the meaning of his mental health medical records. Evidence from the state's own expert that supported the defense theory of the case, had it been elicited on cross-examination, would have cast greater plausibility on the whole body of evidence and lent greater weight to the testimony from the physicians and the evidence in the medical records. Had it not been for this compilation of trial counsel error, a comprehensive picture could have emerged illustrating a connection between the defendant's failure to take medication and his resulting seizures and psychotic and violent behavior. See Pet. App. 92-97, 99.

Viewing each of these errors in isolation, however, the court below failed to see the way that they build on each other. The logic of the court's decision is that because correcting any individual error would not have done enough to alter the outcome of the trial, then correcting all of them would similarly fail to make a difference. This is a classic example of the fallacy of composition.

Finally, although the court below failed to recognize that the whole could be greater than its parts, we do

not suggest that viewing error cumulatively always will result in finding increased harm to the defendant. To the contrary, a single error that seems weighty in isolation may be neutralized by the totality of the overall context. That is, in some cases, the whole may be less than its parts. See generally Layman, *supra*, at 143; *Smith* v. *Farley*, 59 F.3d 659, 668 (7th Cir. 1995) (although "[t]he whole is sometimes greater than the sum of the parts, . . . having considered all the alleged errors . . . we are unpersuaded that [defendant] was deprived of any of his rights under the U.S. Constitution").

CONCLUSION

For these reasons, and those stated by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY SUPREME COURT PRACTICUM
37 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

JEFFREY T. GREEN
REBECCA K. WOOD*
NORINA IRANI EDELMAN
AMY L. HANKE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Amicus Curiae

July 17, 2008

* Counsel of Record

APPENDIX

State Courts Applying A Cumulative Approach*

California. See *In re Jones*, 917 P.2d 1175, 1193 (Cal. 1996) (concluding that counsel's deficient performance, considered in the aggregate, sufficiently undermined confidence in the outcome of the trial).

Colorado. See *People* v. *Gandiaga*, 70 P.3d 523, 529 (Colo. App. 2003) (recognizing that "prejudice may result from the cumulative impact of multiple attorney errors").

Georgia. See *Schofield* v. *Holsey*, 642 S.E.2d 56, 60 n.1 (Ga. 2007) (concluding that trial counsel's errors should be considered together as one issue under the *Strickland* prejudice prong and disapproving prior cases holding to the contrary).

Illinois. See *People* v. *Foster*, 660 N.E.2d 951, 959-62 (Ill. 1995) (applying cumulative error analysis to ineffective assistance of counsel claims and finding no "cumulative error" and thus no prejudice under *Strickland*).

Indiana. See *Grinstead* v. *State*, 845 N.E.2d 1027, 1036 (Ind. 2006) ("Certainly, the cumulative effect of a number of errors can render counsel's performance ineffective."); *Smith* v. *State*, 547 N.E.2d 817, 819-20 (Ind. 1989) ("In an ineffective assistance of counsel context . . . while each alleged error or omission may be reviewed separately under the substandard performance prong of *Strickland*, we then assess the cumulative prejudice accruing to the accused to see whether the compilation of counsel's errors has rendered the result unreliable, necessitating reversal under *Strickland*'s second prong.").

---

* Where a state court of last resort had not opined, we have included relevant intermediate appellate court decisions.

Iowa. See *State* v. *McGee*, 707 N.W.2d 336 (Iowa Ct. App. 2005) (unpublished table decision), *available at* 2005 WL 2508416 (considering "whether the 'errors' cumulatively and in light of the 'totality of the evidence' resulted in prejudice" to the defendant); cf. *Smothers* v. *State*, No. 01-0452, 2002 WL 700959, at *5 (Iowa Ct. App. Apr. 24, 2002) (addressing defendant's claim that "if insufficient individually, the cumulative effect of the errors was so prejudicial that it denied him a fair and impartial trial, as well as effective assistance of counsel. We conclude Smothers received effective assistance of counsel. Accordingly, we find there was no cumulative error.").

Maryland. See *Bowers* v. *State*, 578 A.2d 734, 744 (Md. 1990) (concluding that lower court's decision to review "each charge of deficient performance and consequent prejudice, and to decide that no one charge alone was serious enough to meet both *Strickland* tests" was incorrect and that "[e]ven when individual errors may not be sufficient to cross the threshold, their cumulative effect may be").

New Jersey. See *State* v. *Marshall*, 690 A.2d 1, 88 (N.J. 1997) (holding that defendant could not show that "but for [counsel's] alleged deficiencies, individually and cumulatively, there is a reasonable probability that the result of the trial would have been different").

New Mexico. See *State* v. *Trujillo*, 42 P.3d 814, 828 (N.M. 2002) (stating that the court considers each individual allegation of ineffective assistance as well as their cumulative effect).

New York. See *People* v. *Brown*, 752 N.Y.S.2d 347, 348-49 (N.Y. App. Div. 2002) ("While no single error on counsel's part would constitute ineffective assistance of counsel, the cumulative effect of these

errors deprived the defendant of meaningful representation.").

Ohio. See *State* v. *Gondor*, 860 N.E.2d 77, 90 (Ohio 2006) ("The trial court properly considered the cumulative effect of trial counsels' errors.").

Texas. See *Ex Parte Aguilar*, No. AP-75526, 2007 WL 3208751, at *1 (Tex. Crim. App. Oct. 31, 2007) ("We hold, as we have indicated in the past, that such errors should be considered cumulatively.").

West Virginia. See *State ex rel. Bess* v. *Legursky*, 465 S.E.2d 892, 901 n.10 (W. Va. 1995) ("Even if we were to apply the *Strickland/Miller* analysis that an accused must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different, we would reverse this conviction because the Appellant has proven prejudice as a result of the cumulative impact of multiple deficiencies in defense counsel's performance."); *State ex rel. Daniel* v. *Legursky*, 465 S.E.2d 416, 424 n.7 (W. Va. 1995) ("In making the requisite showing of prejudice, 'a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was substantial enough to meet *Strickland*'s test.'") (quoting *Williams* v. *Washington*, 59 F.3d 673, 682 (7th Cir. 1995)).

Wisconsin. See *State* v. *Thiel*, 665 N.W.2d 305, 322 (Wis. 2003) ("Just as a single mistake in an attorney's otherwise commendable representation may be so serious as to impugn the integrity of a proceeding, the cumulative effect of several deficient acts or omissions may, in certain instances, also undermine a reviewing court's confidence in the outcome of a proceeding. Therefore, in determining whether a defendant has been prejudiced as a result of counsel's

deficient performance, we may aggregate the effects of multiple incidents of deficient performance in determining whether the overall impact of the deficiencies satisfied the standard for a new trial under *Strickland*.").