TO ERR IS HUMAN; TO CUMULATE, JUDICIOUS:[1] THE NEED FOR U.S. SUPREME COURT GUIDANCE ON WHETHER FEDERAL HABEAS COURTS REVIEWING STATE CONVICTIONS MAY CUMULATIVELY ASSESS *STRICKLAND* ERRORS

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ABSTRACT

Under the Sixth Amendment of the U.S. Constitution, criminal defendants are entitled to effective assistance of counsel at various stages of the criminal adjudication process. As the Supreme Court explained in Strickland v. Washington*, defendants may challenge their convictions by alleging that their defense attorneys were ineffective under the Sixth Amendment. In order to successfully allege counsel's ineffectiveness, the defendant must demonstrate (1) deficient performance and (2) prejudice.*

Federal appellate courts disagree about whether they may cumulatively assess Strickland *errors to establish prejudice when reviewing state convictions on federal habeas review pursuant to 28 U.S.C. § 2254. Importantly, this Article confronts the issue of cumulation of* Strickland *errors within the specific context of § 2254 review. The unique structure of federal habeas review of state convictions requires consideration of the* Strickland *cumulation issue through the lens of § 2254.*

The majority of federal circuits have held that federal courts on § 2254 review may cumulatively assess an attorney's errors as part of the Strickland *prejudice analysis. Yet, at least two circuits have rejected this approach, and the Eleventh Circuit has not yet addressed the issue. This circuit split calls for the Supreme Court to determine whether cumulation of an attorney's* Strickland

1. ALEXANDER POPE, AN ESSAY ON CRITICISM 31 (The Floating Press 2010) (1711) ("To err is human, to forgive, divine.").

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errors is appropriate on § 2254 review. This intervention by the Supreme Court is particularly critical given that when a lower federal court grants § 2254 relief from a state conviction, it may rely upon only Supreme Court case law.

This Article argues that the Supreme Court should resolve the circuit split by holding that courts may cumulatively review an attorney's errors to determine the existence of Strickland *prejudice. Such a decision would allow federal habeas courts to properly apply the practice to their review of state convictions. Furthermore, this Article proposes a framework to guide the cumulation analysis in order to maintain well-established constraints on the* Strickland *prejudice assessment.*

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I. INTRODUCTION

The criminal justice system is fundamentally "human," in not only its purpose[2] and structure, but also in its capacity for error. As the U.S. Supreme Court has perceptively noted, the criminal justice system, "like any human endeavor, cannot be perfect."[3] Legal representation for those accused of crimes constitutes the means "through which the other rights of [the accused] are secured."[4] As a result, a criminal defendant's attorney undeniably constitutes a critical human component of the criminal justice system. Like any human participant in the criminal justice system, a defense attorney possesses the potential to err; sufficiently serious errors

2. *See* JOHN KAPLAN & JEROME H. SKOLNICK, CRIMINAL JUSTICE: INTRODUCTORY CASES AND MATERIALS 29 (3d ed. 1982) (noting that goals of the criminal justice system include "retribution, deterrence, incapacitation and rehabilitation").

3. Dist. Att'y's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 75 (2009).

4. United States v. Cronic, 466 U.S. 648, 653 (1984).

by a defendant's counsel challenge the integrity and reliability of a criminal proceeding.

The Sixth Amendment to the U.S. Constitution guarantees criminal defendants the right to the effective assistance of counsel at various stages of the criminal adjudication process.[5] The 1984 U.S. Supreme Court decision in *Strickland v. Washington* instructed that a defendant may challenge his or her conviction by alleging ineffective assistance of counsel under the Sixth Amendment.[6] In order to establish constitutionally ineffective counsel, the defendant must demonstrate (1) deficient performance by counsel and (2) prejudice as a result of such deficient performance.[7]

As a general matter, "cumulative error" occurs when the cumulative effect of "two or more individually harmless errors" prejudices a party "to the same extent as a single reversible error."[8] Jurisdictions disagree about the extent to which multiple defense attorney errors may be cumulated in order to establish *Strickland* prejudice.[9] More precisely (and problematically), however, the lower federal courts disagree about whether they may cumulatively assess *Strickland* errors to establish prejudice when reviewing state convictions on federal habeas review.[10]

Specifically, federal courts possess jurisdiction to review state convictions through the writ of habeas corpus, codified at 28 U.S.C. § 2254.[11] A federal court may grant habeas relief when the state court's decision denying relief "[i]s contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the

5. U.S. CONST. amend. VI; Lafler v. Cooper, 132 S. Ct. 1376, 1385 (2012).

6. Strickland v. Washington, 466 U.S. 648, 687 (1984).

7. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993); Nix v. Whiteside, 475 U.S. 157, 164 (1986); see *infra* Part II.B for an overview of the doctrine of ineffective assistance of counsel.

8. Wilson v. Sirmons, 536 F.3d 1064, 1122 (10th Cir. 2008) (quoting Duckett v. Mullin, 306 F.3d 982, 992 (10th Cir. 2002)) (internal quotation marks omitted); see *infra* Part II.C for an overview of the cumulative-error doctrine.

9. *See, e.g.*, Taylor v. State, No. CR-05-0066, 2010 WL 3834347, at *6 (Ala. Crim. App. Oct. 1, 2010) (noting that other states and federal courts are not in agreement as to whether the cumulative-effect analysis applies to *Strickland* claims); Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioner at 2, Marcrum v. Roper, 555 U.S. 1068 (2008) (No. 07-1566), 2008 U.S. LEXIS 9117 (noting a "deep lack of uniformity" among state courts, further necessitating Supreme Court review).

10. See *infra* Part II.D for a discussion of this circuit split.

11. See *infra* Part II.A for an overview of federal habeas review.

Supreme Court of the United States."[12] Thus, in granting relief under § 2254, the lower federal courts are largely confined to assessing whether a state court's decision contradicts Supreme Court case law.[13]

As some federal courts have correctly observed, the U.S. Supreme Court has not yet held that an attorney's errors may be cumulated for purposes of the *Strickland* prejudice analysis.[14] Therefore, this Article recognizes that cumulation within the *Strickland* prejudice analysis does not presently constitute "clearly established Federal law" within the meaning of § 2254.[15] Consequently, without an enabling Supreme Court decision, federal habeas courts are currently prevented from concluding that a state court's failure to cumulatively assess an attorney's errors was "unreasonable."

The First, Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits have held that federal courts on § 2254 review may cumulate an attorney's errors as part of the *Strickland* prejudice analysis; the Fourth Circuit has indicated, albeit indirectly, its approval of the practice.[16] By contrast, the Sixth and Eighth Circuits have rejected the cumulation of *Strickland* errors in order to determine the existence of prejudice on § 2254 review.[17] The Eleventh Circuit, however, has not yet addressed the issue.[18] This disagreement among the federal circuit courts "suggests a potentially 'cert-worthy' issue as to whether the Supreme Court's seminal statement on Sixth Amendment ineffective assistance contemplates cumulative-error analysis of counsel's multiple flaws or permits lower courts to employ harm analysis in examining each claimed instance of deficient performance

12. 28 U.S.C. § 2254(d)(1) (2006).

13. *See id.*

14. See *infra* Part III.B for a discussion of the doctrine's failure to constitute "clearly established Federal law" for purposes of § 2254 review.

15. *See infra* Part III.B. Yet, at least one observer has stated: "[F]ailure to cumulate defense counsel errors in *Strickland* prejudice analysis, is really a non-problem. The Court's recent decisions applying *Strickland* show that with respect to ineffective assistance of counsel claims defense counsel's conduct 'taken as a whole' must be considered in assessing prejudice." John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating* Bagley *Materiality*, Strickland *Prejudice, and Cumulative Harmless Error*, 95 J. CRIM. L. & CRIMINOLOGY 1153, 1155 (2005) (footnote omitted).

16. See *infra* Part II.D.1 for a discussion on the circuit courts that apply cumulation on § 2254 review.

17. See *infra* Part II.D.2 for a discussion of federal circuit courts that have rejected cumulation on § 2254 review.

18. See *infra* Part II.D.3 for a discussion of the Eleventh Circuit.

individually."[19]

This Article critically confronts the issue of cumulation of *Strickland* errors within the context of § 2254 review. It may be asked why this Article focuses its analysis of *Strickland* cumulation within the current § 2254 review circuit split.[20] As this Article explains, the unique structure and analytical challenges of federal habeas review of state convictions mandates consideration of the *Strickland* cumulation issue through the lens of § 2254 review.[21]

This Article argues that the U.S. Supreme Court should resolve the circuit split by holding that a federal court reviewing a state conviction under § 2254 may cumulatively review an attorney's errors to determine the existence of *Strickland* prejudice; such a Supreme Court decision would render the practice of cumulation within the *Strickland* context as clearly established law.[22] The Court should hold that the cumulative-error analysis applies to the *Strickland* prejudice analysis for several reasons.

First, although the cumulation of *Strickland* errors is not currently clearly established law, the Supreme Court's recognition of this doctrine would comport with the Court's ineffective assistance of counsel jurisprudence.[23] Second, cumulation of an attorney's errors is necessary given that the criminal justice system is comprised of human actions and institutions.[24] As many scholars have observed, an overly linear or piecemeal causal analysis is not helpful in assessing causation within the context of human actions and institutions.[25] The cumulative-error analysis

19. J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: The "Ethical" Issue of Issue Selection*, 80 DENV. U. L. REV. 155, 188 (2002) (footnote omitted).

20. Certainly, a Supreme Court decision concerning *Strickland* cumulation in the § 2254 context will unavoidably have the ancillary effect of providing guidance as to whether federal habeas courts reviewing ineffectiveness claims resulting from federal prosecutions may also cumulate *Strickland* errors. Additionally, a Supreme Court decision concerning *Strickland* cumulation will provide guidance to state courts reviewing state convictions independent of § 2254 review.

21. *See infra* Part III.A.

22. See *infra* Part IV for an explanation of why the Supreme Court should hold that an attorney's errors must be cumulated.

23. See *infra* Part IV.A for a discussion of this jurisprudence.

24. See *infra* Part IV.B for a discussion of causation with human actions and institutions.

25. *See, e.g.*, DOROTHY EMMET, THE EFFECTIVENESS OF CAUSES 64–65, 67 (1985) ("This attempt to isolate a cause can therefore have its uses, but it can also have its dangers, when a unique cause is looked for in a situation where there are multiple

properly recognizes that an effect, such as a prejudicial trial, may be the result of multiple errors, or causes, by an attorney.[26] Third, rejection of the cumulative-error analysis constitutes a fallacy of composition; it is premised on the erroneous assumption that because each individual error by counsel was not prejudicial, then all errors, when considered collectively, also fail to be prejudicial. Yet, logic and practical experience dictate that individual nonprejudicial errors by counsel, when considered collectively, may be prejudicial.[27]

At the same time, however, a clear framework must guide the cumulation analysis in order to maintain well-established constraints on the *Strickland* prejudice assessment.[28] The errors that a § 2254 court cumulates to establish *Strickland* prejudice must be actual errors of a constitutional dimension.[29] Also, as a general rule, an attorney's errors should be cumulated within the context of each proceeding.[30] For example, trial counsel errors must be cumulated independently of appellate counsel errors.

Moreover, an attorney's errors must be cumulated independently of other non-*Strickland* errors, such as trial court errors or *Brady* violations.[31] Nevertheless, once a court has cumulated an attorney's errors under the *Strickland* prejudice analysis, it may permissibly view this cumulation against the backdrop of the rest of the proceeding.[32]

Furthermore, a federal habeas court should be permitted to consider

interacting factors . . . .").

26. *See id.* at 68–69.

27. See *infra* Part IV.C for a discussion of the fallacy of composition.

28. See generally *infra* Part V for a discussion of these limits.

29. *See infra* Part V.A (discussing this limitation). *But see* Rachel A. Van Cleave, *When Is an Error Not an "Error"? Habeas Corpus and Cumulative Error Analysis*, 46 BAYLOR L. REV. 59, 90–91 (1994) (applying an inaptly broad definition of error that includes "any violation of an objective legal rule" and asserting that courts should "evaluate the relevance of individually non-constitutional errors." (quoting United States v. Rivera, 900 F.2d 1462, 1470 n.7 (10th Cir. 1990) (en banc)) (internal quotation marks omitted)).

30. See *infra* Part V.B for an explanation of "proceeding-specific" cumulation.

31. See *infra* Part V.C for a discussion of why *Strickland* errors must be cumulated independently of other errors. *But see* Blume & Seeds, *supra* note 15, at 1153, 1156, 1174 (asserting that "all errors at the trial that impact verdict reliability" should be included "in the scope of cumulative error analysis").

32. See *infra* Part V.D for a discussion of this approach to exhaustion of *Strickland* cumulation claims.

a defaulted ineffectiveness claim as part of its *Strickland* cumulation analysis when a petitioner establishes sufficient cause for the defaulted claim.[33] Finally, a § 2254 petitioner does not need to raise a specific claim of cumulative error in state court as a prerequisite for federal habeas review; instead, consistent with this Article's proposed Supreme Court holding, cumulation should be considered automatically subsumed within the *Strickland* prejudice analysis.[34]

II. OVERVIEW OF EXISTING LAW

Several general principles are necessary to resolving whether federal courts, in reviewing state convictions on habeas review, may cumulate the errors of a defendant's counsel.

A. *Federal Habeas Review of State Convictions*

Once a judgment of sentence has been imposed after a state criminal prosecution, it is "subject to review in multiple forums."[35] Each state provides for direct appeal and postconviction review following a state court conviction.[36] Ordinarily, a defendant may raise during the state direct appeal *only* those claims that appear within the record of the trial; these claims frequently are allegations of trial court error, including, for example, the erroneous admission of evidence.[37] As a general matter, "an error not raised and preserved [on the record] at trial *will not* be considered on appeal."[38]

Additionally, nearly every state jurisdiction has postconviction or "collateral review" procedures through which defendants can raise "post-appeal challenges to their convictions and sentences on . . . limited grounds."[39] In contrast to state direct appellate review, state postconviction courts may permissibly hear new evidence that *was not* within the trial

33. See *infra* Part V.E for a discussion of defaulted *Strickland* claims as part of the cumulation analysis when sufficient cause is shown for the default.

34. See *infra* Part V.F for a discussion of this "backdrop" approach.

35. Lackawanna Cnty. Dist. Att'y v. Coss, 532 U.S. 394, 402 (2001).

36. *See, e.g.*, *id.*

37. *See, e.g.*, JAMES A. STRAZZELLA, CRIMINAL APPELLATE PROCEDURE: CASES AND MATERIALS 254 (2011); *see also* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 1315–18 (5th ed. 2009) (noting exceptions to this general record-based rule, including "plain error").

38. LAFAVE ET AL., *supra* note 37, at 1314 (emphasis added) (quoting Yakus v. United States, 321 U.S. 414, 444 (1944)).

39. *Id.* at 1333.

record.[40]

After unsuccessfully litigating his or her federal constitutional claims through the state judicial system, a state criminal offender may petition for habeas corpus relief in a federal district court.[41] If the federal district court denies relief, the state convict can appeal to "federal courts of appeals and then to the Supreme Court."[42]

The federal "writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law."[43] Congress has codified federal habeas corpus review in 28 U.S.C. §§ 2241–2255.[44] Section 2255 allows those convicted of *federal offenses* to challenge their federal convictions.[45] Section 2254, by contrast, creates the principal means through which *state* convicts challenge the constitutionality of their state convictions in a federal forum.[46]

Section 2254 provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus [on] behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.[47]

In 1996, Congress, seeking to limit the availability of federal habeas review of state convictions, passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA).[48] The revised version of § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable

40. STRAZZELLA, *supra* note 37, at 15.

41. 28 U.S.C. § 2254(b)(1) (2006).

42. CARY FEDERMAN, THE BODY AND THE STATE: HABEAS CORPUS AND AMERICAN JURISPRUDENCE, at ix (2006).

43. Harrington v. Richter, 131 S.Ct. 770, 780 (2011).

44. 28 U.S.C. §§ 2241–2255.

45. *Id.* § 2255.

46. *See* FEDERMAN, *supra* note 42, at 1.

47. 28 U.S.C. § 2254(a).

48. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218–19 (1996).

> application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[49]

The "clearly established" language in § 2254(d)(1) "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision."[50] Thus, "clearly established Federal law" under § 2254(d) constitutes "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision."[51]

When Congress amended § 2254 in 1996, it specifically limited "the area of relevant law to that determined by the Supreme Court of the United States."[52] Therefore, if the Supreme Court "has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar."[53] Congress's 1996 limitation constituted a "retrenchment from former practice which allowed [lower federal courts] to rely on their own jurisprudence in addition to that of the Supreme Court."[54] In short, the phrase "clearly established Federal law," as determined by the Supreme Court of the United States, fundamentally restricts the "source of doctrine on which a federal court may rely in addressing the application for a writ."[55]

Furthermore, a federal habeas court may not issue the writ "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly."[56] Instead, the state court's application of Supreme Court

49. 28 U.S.C. § 2254(d)(1)–(2).

50. Carey v. Musladin, 549 U.S. 70, 74 (2006) (quoting Williams v. Taylor, 529 U.S. 362, 412 (2000)) (internal quotation marks omitted).

51. Lockyer v. Andrade, 538 U.S. 63, 71–72 (2003).

52. *Williams*, 529 U.S. at 381 (quoting 28 U.S.C. § 2254(d)(1) (Supp. III 1994)) (internal quotation marks omitted).

53. *Id.*

54. *Id.* (quoting Lindh v. Murphy, 96 F.3d 856, 869 (7th Cir. 1996)) (internal quotation marks omitted).

55. *Id.* (quoting *Lindh*, 96 F.3d at 869) (internal quotation marks omitted).

56. *Lockyer*, 538 U.S. at 75–76 (quoting *Williams*, 529 U.S. at 411) (internal quotation marks omitted); *see also Williams*, 529 U.S. at 410 (noting that "*unreasonable* application of federal law is different from an *incorrect* application of federal law").

precedent "must be objectively unreasonable."[57]

When determining whether a state court's application of Supreme Court precedent is unreasonable, "the range of reasonable judgment can depend in part on the nature of the relevant rule that the state court must apply."[58] The more general the rule implicated, "the greater the potential for reasoned disagreement among fair-minded judges,"[59] and the greater the latitude for state courts in "reaching outcomes in case-by-case determinations."[60] Disagreement among lower federal courts may be a telling indication of the lack of guidance from the Supreme Court.[61]

Nevertheless, "rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule."[62] As the Supreme Court explained in *Williams v. Taylor*:

> If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. . . . Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.[63]

To that extent:

> A state court's decision is "contrary to" clearly established [federal] law if it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or if it confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [Supreme Court]

57. *Lockyer*, 538 U.S. at 75 (citing *Williams*, 529 U.S. at 409); *see also* Wiggins v. Smith, 539 U.S. 510, 520–21 (2003) (citations omitted); *Williams*, 529 U.S. at 409.

58. Renico v. Lett, 130 S. Ct. 1855, 1864 (2010) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)) (internal quotation marks omitted).

59. *Id.*

60. *Id.* (quoting *Yarborough*, 541 U.S. at 644) (internal quotation marks omitted).

61. Carey v. Musladin, 549 U.S. 70, 76 (2006).

62. *Williams*, 529 U.S. at 382.

63. *Id.* (quoting Wright v. West, 505 U.S. 277, 308–09 (1992) (Kennedy, J., concurring)) (internal quotation marks omitted).

precedent.[64]

Thus, § 2254 "preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents."[65] Section 2254(d)(1) establishes a "highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt."[66]

As a final important matter, a state prisoner must satisfy a critical procedural requirement in order to obtain the privilege of § 2254 review. Before a federal court may review the merits of a § 2254 claim, the petitioner must exhaust all available remedies in state court.[67] Under the exhaustion doctrine, a § 2254 petitioner "must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition."[68] Thus, a state petitioner may not obtain § 2254 relief unless he "has properly presented his . . . claims through one complete round of the State's review process."[69] If state court remedies are no longer available because the petitioner failed to comply with procedural requirements, then the petitioner is generally barred from federal review of the merits of his claim.[70]

Procedural default constitutes the sanction for a § 2254 petitioner's failure to exhaust state remedies properly.[71] Critically, however, a state convict may obtain § 2254 review of a procedurally defaulted claim "by showing cause for the default and prejudice."[72] Alternatively, the petitioner must demonstrate that a fundamental "miscarriage of justice" will result

64. Mitchell v. Esparza, 540 U.S. 12, 15–16 (2003) (per curiam) (citations omitted) (quoting *Williams*, 529 U.S. at 405–06) (internal quotation marks omitted).

65. Harrington v. Richter, 131 S. Ct. 770, 786 (2011).

66. Hardy v. Cross, 132 S. Ct. 490, 491 (2011) (per curiam) (quoting Felkner v. Jackson, 131 S. Ct. 1305, 1307 (2011) (per curiam)) (internal quotation marks omitted).

67. 28 U.S.C. § 2254(b)(1) (2006); O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999).

68. *Boerckel*, 526 U.S. at 842; *see also* Casey v. Moore, 386 F.3d 896, 916 (9th Cir. 2004) (instructing that a § 2254 claim must be properly exhausted through direct appellate procedure, post-conviction procedure, or both).

69. Woodford v. Ngo, 548 U.S. 81, 92 (2006) (quoting *Boerckel*, 526 U.S. at 845) (internal quotation marks omitted).

70. *Id.* at 92.

71. *Id.* at 93.

72. Martinez v. Ryan, 132 S. Ct. 1309, 1316 (2012) (citing Coleman v. Thompson, 501 U.S. 722, 750 (1991)).

without federal habeas review.[73]

B. *Ineffective Assistance of Counsel*

The U.S. Supreme Court has instructed that "errors that undermine confidence in the fundamental fairness of the state adjudication certainly justify the issuance of the federal writ."[74] The "deprivation of the right to the effective assistance of counsel . . . is such an error."[75]

The Sixth Amendment to the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[76] The Sixth Amendment right to counsel ensures a criminal defendant's "fundamental right to a fair trial."[77] Legal representation for the accused helps to ensure that the other fundamental rights of the accused are secured.[78] A criminal defendant's right to counsel "is the foundation for our adversary system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged."[79]

In addition to the trial itself, a defendant has a right to counsel during "critical stages of a criminal proceeding,"[80] including, for example, the appellate process.[81] The right to counsel also applies to the pre-trial

73. Bradshaw v. Richey, 546 U.S. 74, 79 (2005); 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §§ 26.3–.4 (6th ed. 2011) (providing an overview of "cause and prejudice" and "miscarriage of justice" exceptions to procedural default).

74. Williams v. Taylor, 529 U.S. 362, 375 (2000) (citations omitted).

75. *Id.* at 375 (citing Strickland v. Washington, 466 U.S. 668, 686, 697–98 (1984)). The Court held that a § 2254 petitioner was denied his constitutionally guaranteed right to effective assistance of counsel when his attorneys failed to investigate and present substantial mitigating evidence during the sentencing phase of a capital murder trial. *Id.* at 390, 399.

76. U.S. CONST. amend. VI.

77. Lockhart v. Fretwell, 506 U.S. 364, 368 (1993) (quoting Strickland v. Washington, 466 U.S. 668, 684 (1984)) (internal quotation marks omitted).

78. United States v. Cronic, 466 U.S. 648, 653 (1984).

79. Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012) (citing Powell v. Alabama, 287 U.S. 45, 68–69 (1932)); *see also* Kimmelman v. Morrison, 477 U.S. 365, 377 (1986) ("The right of an accused to counsel is beyond question a fundamental right." (citing Gideon v. Wainwright, 372 U.S. 335, 344 (1963)).

80. Lafler v. Cooper, 132 S. Ct. 1376, 1385 (2012).

81. Evitts v. Lucey, 469 U.S. 387, 397 (1985); *see also* LAFAVE ET AL., *supra* note 37, § 11.2(b) (discussing right to effective counsel on state direct appeal); Tom

process, including "arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea."[82] Likewise, a defendant has a right to counsel during sentencing in both noncapital and capital cases.[83] Nevertheless, there is no Sixth Amendment right to effective counsel in federal or state postconviction collateral relief proceedings.[84]

Critically, the "right to counsel is the right to *effective assistance of counsel*."[85] In *Strickland v. Washington*, the Supreme Court provided a two-element test[86] for ascertaining "whether counsel has rendered constitutionally ineffective assistance."[87] The two components include "(1) deficient performance and (2) prejudice."[88]

"[T]o establish deficient performance, a petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness."[89] As one observer has cogently noted, "There are as many ways to be ineffective as there are lawyers and defendants in the criminal justice system."[90] Some common examples of attorney ineffectiveness include failure to interview an important eyewitness,[91] failure to seek the exclusion of inadmissible evidence,[92] or failure to advise a client adequately

Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425, 441 (2011) (noting that the "list of possible errors by counsel extends to the appeal stage").

82. Missouri v. Frye, 132 S. Ct. 1399, 1405 (2012).

83. *Lafler*, 132 S. Ct. at 1385–86.

84. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); *see also* 28 U.S.C. § 2254(i) (2006) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.").

85. Strickland v. Washington, 466 U.S. 668, 686 (1984) (emphasis added) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)) (internal quotation marks omitted); *see also* Kimmelman v. Morrison, 477 U.S. 365, 377 (1986).

86. *Strickland*, 466 U.S. at 687.

87. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993).

88. *Id.* (summarizing the *Strickland* test).

89. Wiggins v. Smith, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688) (internal quotation marks omitted). The Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead ha[s] emphasized that [t]he proper measure of attorney performance remains simply reasonableness under prevailing profession norms." *Id.* (alteration in original) (quoting *Strickland*, 466 U.S. at 688) (internal quotation marks omitted).

90. Zimpleman, *supra* note 81, at 439–41 (footnotes omitted) (noting the range of attorney errors).

91. Anderson v. Johnson, 338 F.3d 382, 394 (5th Cir. 2003).

92. Kimmelman v. Morrison, 477 U.S. 365, 372–73 (1986).

about whether to accept a plea offer.[93]

As a general rule,[94] in order for this inadequate performance to constitute a Sixth Amendment violation, the petitioner must affirmatively demonstrate that counsel's errors *prejudiced* his defense.[95] The petitioner must demonstrate 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."[96] In justifying the prejudice requirement, the Supreme Court has explained:

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.[97]

A defendant alleging prejudice must demonstrate "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[98] Thus, the *Strickland* prejudice analysis does not focus solely on "mere outcome determination";[99] instead, the prejudice inquiry analyzes whether the defense attorney's deficient performance

93. Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012).

94. *Strickland* identified narrow instances in which prejudice may be presumed, including the "[a]ctual or constructive denial of the assistance of counsel altogether" as well as "various kinds of state interference with counsel's assistance." *Strickland*, 466 U.S. at 692. Prejudice may also be presumed when the defendant demonstrates an actual conflict of interest that adversely affected an attorney's performance. *Id.* (citing Cuyler v. Sullivan, 446 U.S. 335, 345–50 (1980)).

95. Wiggins v. Smith, 539 U.S. 510, 534 (2003) (citing *Strickland*, 466 U.S. at 692).

96. *Strickland*, 446 U.S. at 694. To that extent, a petitioner does not need to demonstrate that his "counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693.

97. *Id.* at 691–92 (citing United States v. Morrison, 449 U.S. 361, 364–65 (1981)).

98. *Id.* at 687.

99. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993); *see also Strickland*, 466 U.S. at 693 (noting that "not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding").

renders the proceeding unreliable or unfair.[100] Within the context of trial counsel's ineffectiveness, for example, "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated."[101]

To illustrate, within the context of capital sentencing, courts assess the probability of a different outcome under *Strickland* by weighing "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig[h] it against the evidence in [aggregation]."[102] Similarly, where a defendant rejects a guilty plea because of his or her counsel's ineffectiveness, the defendant must demonstrate a "reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time."[103]

In short, the right to the effective assistance of counsel is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."[104] When this "adversarial testing" has occurred, despite defense counsel's errors, the requirements of the Sixth Amendment have been satisfied.[105]

As a general rule, most states now require that state convicts first raise *Strickland* claims during state collateral review proceedings and not on state direct appeal.[106] Review of an attorney's ineffectiveness is often impractical on direct appeal for several reasons:

> [T]he basis for the claim may not appear on the record even where new counsel is appointed or retained for direct appeal. Claims of ineffectiveness based upon omissions by counsel frequently require fact-finding and, in many cases, an evidentiary hearing in which trial counsel has an opportunity to explain his strategy. . . . Collateral review . . . provides an opportunity to develop a factual basis for a

100. Williams v. Taylor, 529 U.S. 362, 393 n.17 (2000) (citations omitted).

101. United States v. Cronic, 466 U.S. 648, 658 (1984) (citations omitted).

102. Sears v. Upton, 130 S. Ct. 3259, 3266 (2010) (first alteration in original) (quoting Porter v. McCollum, 130 S. Ct. 447, 453–54 (2009) (per curiam)) (internal quotation marks omitted).

103. Missouri v. Frye, 132 S. Ct. 1399, 1409 (2012).

104. *Cronic*, 466 U.S. at 656.

105. *Id.*

106. *See* LAFAVE ET AL., *supra* note 37, at 1315; Thomas M. Place, *Deferring Ineffectiveness Claims to Collateral Review: Ensuring Equal Access and a Right to Appointed Counsel*, 98 KY. L.J. 301, 312–13 (2009–2010).

claim that counsel's performance at trial did not meet the standard for effective assistance of counsel.[107]

C. *Defining the Cumulative-Error Doctrine*

Cumulative error occurs when the aggregate effect of "two or more individually harmless errors" prejudices a party "to the same extent as a single reversible error."[108] As one court has explained, "a column of errors may sometimes have a logarithmic effect, producing a total impact greater than the arithmetic sum of its constituent parts."[109]

When applied to criminal prosecutions, the cumulative-error doctrine instructs that "an aggregation of non-reversible errors [such as harmless errors] can yield a denial of the constitutional right to a fair trial, which calls for reversal."[110] Thus, "[i]ndividual errors that do not entitle a petitioner to relief may do so when combined, if cumulatively the prejudice resulting from them undermined the fundamental fairness of his trial and denied him his constitutional right to due process."[111]

Importantly, however, the accumulation of *non-errors* generally fails to rise to the level of a due process violation.[112] As one court has explained, "Briefing a number of isolated errors that turn out to be insufficient to warrant reversal does not automatically require the court to consider whether the cumulative effect of the alleged errors prejudiced the

107. Place, *supra* note 106, at 312 (footnotes omitted). The U.S. Supreme Court noted in *Massaro v. United States* that a collateral proceeding is "preferable to direct appeal" for determining whether counsel was constitutionally effective. Massaro v. United States, 538 U.S. 500, 504–05 (2003).

108. Wilson v. Sirmons, 536 F.3d 1064, 1122 (10th Cir. 2008) (quoting Duckett v. Mullin, 306 F.3d 982, 992 (10th Cir. 2002)) (internal quotation marks omitted); *see also* Pursell v. Horn, 187 F. Supp. 2d 260, 374 (W.D. Pa. 2002) ("[T]he reliability of a state criminal trial can be substantially undermined by a series of events, none of which individually amounts to a constitutional violation . . . .").

109. United States v. Sepulveda, 15 F.3d 1161, 1196 (1st Cir. 1993).

110. United States v. Munoz, 150 F.3d 401, 418 (5th Cir. 1998) (citations omitted); *see also* Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (noting that "[t]he cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal"); J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: Confronting Adverse Authority*, 59 U. MIAMI L. REV. 341, 358–59 (2005).

111. Fahy v. Horn, 516 F.3d 169, 205 (3d Cir. 2008) (citing Albrecht v. Horn, 471 F.3d 435, 468 (3d Cir. 2006)); *see also* Buehl v. Vaughn, 166 F.3d 163, 180 (3d Cir. 1999).

112. *See, e.g.*, United States v. Hall, 455 F.3d 508, 520 (5th Cir. 2006); United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990).

petitioner."[113]

Lower federal courts often cite the 1973 Supreme Court decision in *Chambers v. Mississippi*[114] as affirmation of the cumulative-error doctrine.[115] The *Chambers* petitioner, after a jury trial in a Mississippi court, was convicted of murdering a police officer.[116] He alleged that another person had confessed to the murder to three people but that the trial court excluded the testimony of these three people.[117] The petitioner also claimed that he had not been permitted to cross-examine the person who had confessed to the murder.[118] In granting federal habeas relief, the Supreme Court stated, "We need not decide however, whether this error alone [concerning cross-examination] would occasion reversal since Chambers' claimed denial of due process rests on the ultimate impact of that error when viewed in conjunction with the trial court's refusal to permit him to call other witnesses."[119]

More explicitly, the Supreme Court endorsed the notion of cumulative error as to *Brady* claims in its 1995 decision in *Kyles v. Whitley*.[120] As a matter of well-established constitutional law, suppression by the prosecution of material evidence violates the due process rights of a criminal defendant.[121] In *Kyles*, the Supreme Court held that the prejudice resulting from evidence the prosecution improperly suppressed "turns on the cumulative effect of all such evidence."[122] The Court granted the *Kyles* petitioner a new trial because the "net effect of the evidence withheld by the State . . . raise[d] a reasonable probability that its disclosure would have produced a different result."[123]

Furthermore, federal appellate courts cumulate errors when reviewing federal convictions on direct appeal.[124] Additionally, some

113. Wooten v. Kirkland, 540 F.3d 1019, 1025 (9th Cir. 2008).
114. Chambers v. Mississippi, 410 U.S. 284 (1973).
115. *See, e.g.*, *Parle*, 505 F.3d at 927.
116. *Chambers*, 410 U.S. at 285.
117. *Id.* at 292–93.
118. *Id.* at 291.
119. *Id.* at 298.
120. Kyles v. Whitley, 514 U.S. 419 (1995).
121. Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused" violates due process); *see also* United States v. Bagley, 473 U.S. 667, 682–84 (1985).
122. *Kyles*, 514 U.S. at 421–22.
123. *Id.*
124. *See, e.g.*, United States v. Lighty, 616 F.3d 321, 371 (4th Cir. 2010); United

federal courts cumulate errors that occurred in a federal criminal proceeding, including counsel's ineffectiveness, in order to determine if federal habeas relief under § 2255 is appropriate.[125]

"[I]n the federal habeas context, cumulative-error analysis applies only to cumulative *constitutional* errors."[126] Thus, consistent with "traditional due process principles, cumulative error warrants habeas relief only where the errors have so infected the trial with unfairness as to make the resulting conviction a denial of due process."[127]

As this Article explores, federal appellate courts disagree about whether during § 2254 review, the court may permissibly cumulate an attorney's errors in determining whether the petitioner has established *Strickland* prejudice.[128] Yet, a more general circuit split exists concerning whether courts hearing claims under § 2254, may cumulate errors—both *Strickland* and non-*Strickland*—in order to grant federal habeas relief.[129] The lower federal courts disagree as to "whether, under the current state of Supreme Court precedent, cumulative-error claims reviewed through the lens of the AEDPA can ever succeed in showing that the state court's decision on the merits was contrary to or an unreasonable application of clearly established law."[130] As one federal district court has noted, "[t]here is no clearly established Supreme Court precedent requiring states to consider the cumulative effect of alleged constitutional errors in order to

States v. Warman, 578 F.3d 320, 348–49 (6th Cir. 2009); United States v. Villarreal, 324 F.3d 319, 328 (5th Cir. 2003); United States v. Hands, 184 F.3d 1322, 1334 (11th Cir. 1999); United States v. Rahman, 189 F.3d 88, 145 (2d Cir. 1999); United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990).

125. *See, e.g.*, Yu Tian Li v. United States, 648 F.3d 524, 533 (7th Cir. 2011); United States v. Gonzalez, 596 F.3d 1228, 1244 (10th Cir. 2010); United States v. Cox, 83 F.3d 336, 341–42 (10th Cir. 1996). *But see* United States v. Brown, 528 F.3d 1030, 1034 (8th Cir. 2008).

126. Young v. Sirmons, 551 F.3d 942, 972 (10th Cir. 2008) (emphasis added) (citing Jackson v. Jackson, 194 F.3d 641, 655 n.59 (5th Cir. 1999)); *see* Livingston v. Johnson, 107 F.3d 297, 309 (5th Cir. 1997) (citing Derden v. McNeel, 978 F.2d 1453, 1454 (5th Cir. 1992) ("[W]e have previously held that we will not grant federal habeas relief where the cumulative errors complained of are not of a constitutional dimension.")).

127. Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)) (internal quotation marks omitted).

128. *See infra* Part II.D.

129. *See, e.g.*, Morris v. Sec'y, Dep't of Corr., 677 F.3d 1117, 1132 n.3 (11th Cir. 2012) (noting a more general circuit split).

130. *Id.*; *see also* Ballard v. McNeil, 785 F. Supp. 2d 1299, 1336 n.22 (N.D. Fla. 2011) (describing how various circuit courts have analyzed cumulative error).

determine whether a criminal defendant has received due process of law."[131]

To illustrate, in the 2012 Eleventh Circuit decision of *Morris v. Secretary, Department of Corrections*, the § 2254 petitioner raised multiple claims of trial court error as well as his counsel's ineffectiveness.[132] The Eleventh Circuit noted, "[T]he State further argues that, in the absence of Supreme Court precedent speaking to the issue of cumulative error claims in federal habeas, [the petitioner's] cumulative error claim does not even present a cognizable claim upon which habeas relief may be granted under AEDPA."[133] The *Morris* court concluded:

> We need not determine today, whether under the current state of Supreme Court precedent, cumulative errors claims reviewed through the lens of AEDPA can ever succeed in showing that the state court's decision on the merits was contrary to or an unreasonable application of clearly established law. For our purposes, it is enough to say that [the petitioner's] cumulative error claim clearly fails in light of the absence of any individual errors to accumulate.[134]

By contrast, the Ninth Circuit has asserted, "The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair."[135] The Ninth Circuit has explained that although it has "never expressly stated that *Chambers* clearly establishes the cumulative error doctrine, [it] ha[s] long recognized the due process principles underlying *Chambers*."[136]

D. *The Circuit Split Concerning the Cumulation of Errors for the* Strickland *Prejudice Determination on § 2254 Review*

The U.S. Circuit Courts of Appeals disagree about the propriety of applying the cumulative-error doctrine to assess *Strickland* prejudice on § 2254 review of state convictions. The majority of circuits cumulate

131. Ford v. Schofield, 488 F. Supp. 2d 1258, 1368 (N.D. Ga. 2007) (citing Jenkins v. Byrd, 103 F. Supp. 2d 1350, 1382 (S.D. Ga. 2002)).

132. *Morris*, 677 F.3d at 1119–20 (citations omitted).

133. *Id.* at 1132 n.3.

134. *Id.*

135. Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing Chambers v. Mississippi, 410 U.S. 284, 298, 302–03 (1973)).

136. *Id.* at 927 n.5 (citations omitted).

counsel's errors to determine if the defendant suffered prejudice.[137] Other circuits have declined to cumulate counsel's errors when determining whether a § 2254 petitioner has satisfied the *Strickland* prejudice requirement.[138]

1. *Majority View*

The First Circuit has applied a cumulative approach to the *Strickland* prejudice analysis.[139] In *Dugas v. Copland,* the § 2254 petitioner, who was convicted of arson in a New Hampshire court, alleged multiple instances of his trial counsel's ineffectiveness.[140] The First Circuit instructed that "*Strickland* clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced."[141]

The Second Circuit has similarly held that cumulative errors properly inform the *Strickland* analysis.[142] The petitioner in *Lindstadt v. Keane* was convicted in a New York court of sexually abusing his daughter; the petitioner alleged in his § 2254 petition that his trial counsel had been ineffective.[143] The *Lindstadt* petitioner noted his trial counsel's "inept opening statement" and failure to investigate a rebuttal to the prosecution's expert witness adequately.[144] The *Lindstadt* petitioner further alleged that his trial counsel failed to effectively cross-examine the child even though the child's testimony had "significant factual errors that made it vulnerable to cross-examination."[145] Instructing that "the impact of these errors" must be assessed "in the *aggregate*," the Second Circuit concluded, "[t]aken together, ineffectiveness permeated all the evidence."[146]

137. *See infra* Part II.D.1; *see also* Sullivan, *supra* note 110, at 359.

138. *See infra* Part II.D.2–3.

139. *See* Dugas v. Coplan, 428 F.3d 317, 335 (1st Cir. 2005).

140. *Id.* at 319.

141. *Id.* at 335 (quoting Kubat v. Thieret, 867 F.2d 351, 370 (7th Cir. 1989)) (internal quotation marks omitted) (vacating and remanding the district court's denial of § 2254 relief for further proceedings to determine whether prejudice occurred). Upon remand, the district court concluded that no prejudice had occurred, and the First Circuit affirmed. Dugas v. Coplan, 506 F.3d 1, 3 (1st Cir. 2007).

142. *See* Lindstadt v. Keane, 239 F.3d 191, 194 (2d Cir. 2001).

143. *Id.*

144. *Id.* at 194, 203–05.

145. *Id.* at 203–05.

146. *Id.* at 203–04; *see also* Rodriguez v. Hoke, 928 F.2d 534, 538 (2d Cir. 1991) (demonstrating the Second Circuit's pre-AEDPA approval of cumulative-error analysis for *Strickland* prejudice on § 2254 review).

Likewise, the Third Circuit has applied a cumulative-effect analysis on § 2254 review in order to determine whether repeated instances of an attorney's ineffectiveness created *Strickland* prejudice.[147] In *McNeil v. Cuyler*, the defendant, who was convicted of first-degree murder in a Pennsylvania court, alleged in his § 2254 petition that his trial counsel had been ineffective.[148] He asserted that his trial counsel had wrongfully introduced his prior aggravated battery conviction, failed to present evidence that the murder victim had been convicted of aggravated assault, and also failed to object to an incomplete instruction concerning voluntary manslaughter.[149] The Third Circuit concluded:

> Upon reviewing the cumulative effect of these actions and omissions . . . we do not think there is a 'reasonable probability' that without them, the result of the trial would have been different. It is possible that the outcome would have been different, of course, but the possibility is not sufficient to undermine confidence in the outcome.[150]

Notably, the Third Circuit has indicated that when a petitioner alleges his counsel's ineffectiveness as well as other non-*Strickland* errors, *all* of the errors should be considered collectively.[151] The Third Circuit has reasoned that the harmless-error standard, which is applied to many non-*Strickland* errors, is essentially the same as the *Strickland* prejudice standard.[152]

The Fourth Circuit's approval of the cumulation of an attorney's errors to establish *Strickland* prejudice on § 2254 review has been comparatively more ambiguous. In *Fisher v. Angelone*, the § 2254 petitioner, convicted in Virginia of murder and sentenced to death, alleged that his trial counsel had been ineffective.[153] He argued that the "cumulative effect of his trial counsel's individual actions deprived him of a

147. *See, e.g.*, McNeil v. Cuyler, 782 F.2d 443, 451 (3d Cir. 1986). *McNeil* concluded that "[u]pon reviewing the cumulative effect" of the defense attorney's numerous "actions and omissions," no "reasonable probability" existed that "without them, the result of the trial would have been different." *Id.*

148. *Id.* at 445.

149. *See id.* at 445–46.

150. *Id.* at 451 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)) (internal quotation marks omitted).

151. *See, e.g.*, Breakiron v. Horn, 642 F.3d 126, 132 n.5 (3d Cir. 2011); Albrecht v. Horn, 485 F.3d 103, 138–39 (3d Cir. 2007).

152. *Albrecht*, 485 F.3d at 139. *But see infra* Part V.C.2 (explaining critical differences between harmless-error standard and *Strickland* prejudice standard).

153. Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998).

fair trial."[154] In response, the Fourth Circuit instructed, "To 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."[155] Yet, the Fourth Circuit seemingly indicated that it may approve of cumulative analysis in order to establish prejudice for ineffectiveness claims.[156] The Fourth Circuit stated:

> [The petitioner] relies, in part, on cases considering the cumulative effect of matters actually determined to be constitutional error. In these cases, however, the courts in question merely aggregated all of the *actual* constitutional errors that individually had been found to be harmless, and therefore not reversible, and analyzed whether their cumulative effect on the outcome of the trial was such that collectively they could no longer be determined to be harmless. Thus, legitimate cumulative-error analysis evaluates only the effect of matters actually determined to be constitutional error, not the cumulative effect of all of counsel's actions deemed deficient.[157]

In contrast to the Fourth Circuit's somewhat vague directive, the Fifth Circuit has clearly instructed that in order to determine the existence of *Strickland* prejudice, courts hearing claims under § 2254 should analyze counsel's cumulative errors.[158] Likewise, the Seventh Circuit has held that when a defendant's counsel commits multiple errors, *Strickland* prejudice must be assessed based on "the cumulative impact of this error when

154. *Id.*

155. *Id.* (footnote omitted); *see also* Mueller v. Angelone, 181 F.3d 557, 586 n.22 (4th Cir. 1999).

156. *Fisher*, 163 F.3d at 852 ("[I]t would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived [the petitioner] of a fair trial.").

157. *Id.* at 852 n.9. Notably, in *Oken v. Corcoran*, the Fourth Circuit apparently indicated its approval of cumulative-error analysis on § 2254 review for *Strickland* prejudice purposes. *See* Oken v. Corcoran, 220 F.3d 259, 271 (4th Cir. 2000). *Oken* noted, "Even were we to find one or more of these purported instances of objectively unreasonable performance by counsel to be such, either individually or cumulatively, we still could not say that [*Strickland* prejudice has been established]." *Id.* (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)); *see also* Hoots v. Allsbrook, 785 F.2d 1214, 1223 (4th Cir. 1986) (Ervin, J., dissenting) ("*Strickland* requires that this court consider together all of counsel's deficiencies in determining reasonable probability." (footnote omitted) (internal quotation marks omitted)).

158. *See* Richards v. Quarterman, 566 F.3d 553, 571–72 (5th Cir. 2009) (basing its decision on "review of the record and consider[ation of] the cumulative effect of [counsel's] inadequate performance").

combined with counsel's [other errors]."[159] The Seventh Circuit has reasoned that prejudice assessments are "necessarily fact-intensive determinations peculiar to the circumstances of each case."[160]

In the § 2254 case *Malone v. Walls*, for example, the Seventh Circuit instructed that an attorney's failure to impeach a witness alone may not create a "reasonable probability that it affected the outcome of the trial."[161] Yet, *Strickland* prejudice "may be based on the cumulative effect of multiple errors. Although a specific error, standing alone, may be insufficient to undermine the court's confidence in the outcome, multiple errors together may be sufficient."[162]

Likewise, the Ninth Circuit has applied the cumulative-error doctrine to the *Strickland* prejudice analysis on § 2254 review.[163] In *Sanders v. Ryder*, the Ninth Circuit instructed, "When we examine whether trial counsel gave effective assistance, we examine all aspects of the counsel's performance at different stages, from pretrial proceedings through trial and sentencing."[164] *Sanders* elaborated:

> Separate errors by counsel at trial and at sentencing should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance. They are, in other words, not separate claims, but rather different aspects of a single claim of ineffective assistance of trial counsel.[165]

Additionally, the Tenth Circuit has instructed that when a § 2254 petitioner has established at least two or more of the individual

159. Sussman v. Jenkins, 636 F.3d 329, 360–61 (7th Cir. 2011); *see also* Goodman v. Bertrand, 467 F.3d 1022, 1023 (7th Cir. 2006) ("[T]he cumulative effect of counsel's errors constituted ineffective assistance of counsel.").

160. Williams v. Washington, 59 F.3d 673, 684 (7th Cir. 1995) (citing Nealy v. Cabana, 764 F.2d 1173, 1179 (7th Cir. 1988)).

161. Malone v. Walls, 538 F.3d 744, 762 (7th Cir. 2008).

162. *Id.* (quoting Hough v. Anderson, 272 F.3d 878, 891 n.3 (7th Cir. 2001)) (internal quotation marks omitted).

163. Sanders v. Ryder, 342 F.3d 991, 1000–01 (9th Cir. 2003); *see also* Jeffrey Levinson, Note, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 166–67 (2001) (noting that the Ninth Circuit applies cumulative-error analysis when determining whether "defense counsel's total poor performance met the two *Strickland* prongs for ineffective assistance of counsel").

164. *Sanders*, 342 F.3d at 1000 (citing United States v. Leonti, 326 F.3d 1111, 1116–17 (9th Cir. 2003)).

165. *Id.* at 1001 (citations omitted).

constitutional errors, the cumulative-error doctrine is applicable.[166] Like the Third Circuit, the Tenth Circuit has instructed that *all* purported constitutional errors that occurred in a case must be cumulated in order to determine prejudice.[167] Thus, for example, when a § 2254 petitioner alleges prosecutorial misconduct, ineffective assistance of counsel, and the admission of improper victim-impact evidence, prejudice must be assessed by evaluating all of the claims in their totality.[168]

As the Tenth Circuit explained in *Cargle v. Mullin*,

> A cumulative-error analysis aggregates all errors found to be harmless and analyzes whether the cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless. Consistent with the unqualified reference to *all errors*, our cases reflect application of cumulative-error review to legally diverse claims . . . .[169]

Cargle elaborated that these "particular types of error . . . are governed in the first instance by substantive standards which already incorporate an assessment of prejudice with respect to the trial process as a whole."[170] Therefore,

> such claims should be included in the cumulative-error calculus if they have been individually denied for insufficient prejudice. Indeed, to deny cumulative-error consideration of claims unless they have first satisfied their individual substantive standards for actionable prejudice would render the cumulative error inquiry meaningless, since it [would] . . . be predicated only upon individual error already requiring reversal.[171]

Furthermore, *Cargle* approved combining trial counsel's errors that occurred in the guilt proceeding and the sentencing proceeding for purposes of the cumulative-error analysis when the "prejudicial effect of

166. *See, e.g.*, Thacker v. Workman, 678 F.3d 820, 849 (10th Cir. 2012); Young v. Sirmons, 551 F.3d 942, 972 (10th Cir. 2008).

167. *See, e.g.*, *Young*, 551 F.3d at 972.

168. *See, e.g.*, DeRosa v. Workman, 679 F.3d 1196, 1206 (10th Cir. 2012).

169. Cargle v. Mullin, 317 F.3d 1196, 1206–07 (10th Cir. 2003) (citations omitted) (internal quotation marks omitted).

170. *Id.* at 1207.

171. *Id.* (alteration in original) (quoting Willingham v. Mullin, 296 F.3d 917, 935 (10th Cir. 2002)) (internal quotation marks omitted).

the [trial] influenced the jury's determination of sentence."[172]

As a general consideration, some of the circuits comprising the majority view have cautioned that a § 2254 petitioner who "argues that the cumulative effect of his trial attorney's purported errors resulted in . . . constitutionally deficient representation," must exhaust this cumulative-error claim.[173] In *Knight v. Spencer*, the First Circuit declined to review whether a defense attorney's purported errors cumulatively constituted prejudice when the § 2254 petitioner failed to present a cumulative-error claim in state court and thus procedurally defaulted the claim.[174]

2. *Minority View*

Within the context of § 2254 review, the Eighth Circuit has rejected the assertion that cumulative errors can establish *Strickland* prejudice.[175] In the Eighth Circuit, "a habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test."[176] Instead, "[n]either cumulative effect of trial errors nor cumulative effect of attorney errors are grounds for habeas relief."[177]

In *Pryor v. Norris*, the defendant was convicted in an Arkansas court of delivering cocaine and was sentenced to fifty-five years in prison.[178] After exhausting state remedies, the defendant sought federal § 2254 review, alleging ineffective assistance of counsel at trial and on direct appeal.[179] Pryor alleged that her trial counsel had (1) failed to timely object to the chain of custody of the cocaine; (2) failed to request a mistrial immediately following improper testimony from a prosecution witness; and

172. *Id.* at 1208.

173. Knight v. Spencer, 447 F.3d 6, 18 (1st Cir. 2006); s*ee also* Bunton v. Atherton, 613 F.3d 973, 990 (10th Cir. 2010); Wooten v. Kirkland, 540 F.3d 1019, 1026 (9th Cir. 2008). See *supra* notes 67–73 and accompanying text for a brief discussion of exhaustion and procedural default.

174. *Knight*, 447 F.3d at 18.

175. *See, e.g.*, Kennedy v. Kemna, 666 F.3d 472, 485 (8th Cir. 2012) (noting that Eighth Circuit "precedent forecloses this claim").

176. Hall v. Luebbers, 296 F.3d 685, 692 (8th Cir. 2002) (citations omitted); *see also* Sullivan, *supra* note 19, at 188 ("[T]he Eighth Circuit has apparently rejected cumulative error analysis, at least for claims of ineffective assistance of counsel raised in the context of habeas corpus." (footnote omitted)).

177. Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir. 1996) (citations omitted).

178. Pryor v. Norris, 103 F.3d 710, 711 (8th Cir. 1997).

179. *Id.*

(3) opened the door to the prosecutor's prejudicial remarks during summation concerning her potential sentence.[180] Furthermore, the defendant contended that her appellate counsel was ineffective for "not challenging the introduction of a transcript, rather than the original tapes," of audio-recorded drug transactions.[181]

The Eighth Circuit concluded that "counsel's supposed missteps" did not prejudice the outcome of the petitioner's trial or direct appeal.[182] The Eighth Circuit also rejected the petitioner's contention that the "cumulative effect of her trial counsel's alleged errors" created prejudice.[183] Instead, "cumulative error does not call for habeas relief, as each habeas claim must stand or fall on its own."[184] In its 2006 *Middleton v. Roper* decision, the Eighth Circuit again rejected the argument that *Strickland* and its progeny mandated cumulative-error analysis for ineffectiveness claims.[185]

The Sixth Circuit has also declined to recognize that the cumulative-effect doctrine is applicable to its review of constitutional errors, including ineffectiveness, through § 2254 review.[186] The Sixth Circuit has astutely recognized that the Supreme Court's failure to hold that *Strickland* prejudice may be cumulatively assessed has attained greater significance given the AEDPA's "clearly established" law requirement.[187] In *Moore v. Parker*, the § 2254 petitioner alleged multiple instances of counsel's ineffectiveness and trial court error.[188] Yet, the Sixth Circuit rejected this claim, stating, "[W]e have held that, post-AEDPA, not even constitutional errors that would not individually support habeas relief can be cumulated to support habeas relief."[189] As the Sixth Circuit has correctly noted, "[t]he Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief. Thus, it cannot be said that the judgment of [a state court's rejection of cumulative error] is contrary . . . to any . . .

180. *Id.* at 711–12.
181. *Id.* at 712.
182. *Id.* at 714.
183. *Id.* at 714 n.6.
184. *Id.* (quoting Girtman v. Lockhart, 942 F.2d 468, 475 (8th Cir. 1991)) (internal quotation marks omitted).
185. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006).
186. *See* Moore v. Parker, 425 F.3d 250, 256 (6th Cir. 2005).
187. *See id.*
188. *Id.*
189. *Id.* (citations omitted).

Supreme Court decision so as to warrant relief under the AEDPA."[190]

3. *Eleventh Circuit*

The Eleventh Circuit has not yet explicitly determined whether cumulative errors may establish *Strickland* prejudice for purposes of § 2254 review. In *Borden v. Allen*, the petitioner asked that the court "determine whether a claim of ineffective assistance of counsel may be based on the 'cumulative effect' of multiple non-prejudicial errors by counsel."[191] Yet, because the *Borden* petitioner had "not sufficiently pled" any errors, the Eleventh Circuit "decline[d] to elaborate further on the concept of 'cumulative effect' for fear of issuing an advisory opinion on a hypothetical issue."[192]

Critically, however, district courts within the Eleventh Circuit have noted the absence of precedent issued by the Supreme Court concerning the cumulative analysis of *Strickland*.[193] Nevertheless, at least one district court within the Eleventh Circuit has cumulatively assessed an attorney's errors on § 2254 review, reasoning that "Supreme Court precedent suggests a federal district court analyzing an ineffective assistance of counsel claim should look at the individual allegations of ineffective assistance and their cumulative effect."[194]

III. THE ANALYTICAL CROSSROADS OF *STRICKLAND* CUMULATION, § 2254 REVIEW, AND CLEARLY ESTABLISHED SUPREME COURT LAW

As a critical preliminary matter, the issue of whether an attorney's

190. Lorraine v. Coyle, 291 F.3d 416, 447 (6th Cir. 2002); *see also Moore*, 425 F.3d at 256 (noting that because "no Supreme Court precedent obligat[es] the state court to consider the alleged trial errors cumulatively, [the court] cannot grant relief on this ground" (footnote omitted)); Baze v. Parker, 371 F.3d 310, 330 (6th Cir. 2004) (noting that the Supreme Court has not held that "errors can be considered in the aggregate").

191. Borden v. Allen, 646 F.3d 785, 823 (11th Cir. 2011).

192. *Id.*

193. Ballard v. McNeil, 785 F. Supp. 2d 1299, 1335 n.20 (N.D. Fla. 2011). To that extent, at least one federal district court in the Eleventh Circuit has concluded that "[b]ecause there is no clearly established Supreme Court precedent" mandating the cumulation of an attorney's errors for the *Strickland* prejudice analysis, "this ground [is] insufficient to state a claim for habeas corpus relief." Jenkins v. Byrd, 103 F. Supp. 2d 1350, 1382 (S.D. Ga. 2000).

194. Hammonds v. Allen, 849 F. Supp. 2d 1262, 1306 (M.D. Ala. 2012) (citing Williams v. Taylor, 529 U.S. 362, 398 (2000); Strickland v. Washington, 466 U.S. 668, 690 (1984)).

errors should be cumulated for purposes of the *Strickland* prejudice analysis must be considered within the unique analytical context of federal habeas review of state convictions. Furthermore, the Supreme Court has not yet rendered cumulative analysis of an attorney's errors to determine *Strickland* prejudice as clearly established federal law. As a result, under current Supreme Court jurisprudence, lower federal courts, when reviewing § 2254 petitions, may not cumulatively assess an attorney's errors as part of the *Strickland* prejudice analysis.[195] Specifically, under current law, a lower federal court, on habeas review of a state conviction, may not conclude that the state court's denial of relief was unreasonable when the state court either failed to cumulate the attorney's *Strickland* errors or cumulated the errors incorrectly.[196]

A. *Federal Habeas Review of State Convictions Provides Critical Context for* Strickland *Cumulation Issues*

The uncertainty that courts currently face concerning the propriety of *Strickland* cumulation with regard to § 2254 review demands that the Supreme Court resolve the circuit split. Concomitantly, however, federal habeas review of state convictions pursuant to § 2254 provides a necessary analytical lens through which to analyze the issue of whether an attorney's errors should be cumulated for *Strickland* prejudice purposes.

Of course, a Supreme Court decision concerning *Strickland* cumulation in the § 2254 context will unavoidably have the ancillary effect of providing guidance as to whether federal habeas courts reviewing ineffectiveness claims resulting from federal prosecutions may cumulate *Strickland* errors. Likewise, a Supreme Court decision concerning *Strickland* cumulation will provide guidance to state courts reviewing state convictions. It may be asked then why § 2254 review provides such a compelling analytical perspective for the issue of *Strickland* cumulation. Why not, for example, consider the issue of *Strickland* cumulation as a more general matter? The unique structure and analytical challenges of federal habeas review of state convictions requires consideration of the *Strickland* cumulation issue within the § 2254 context.

First, the "vast majority of criminal cases in the U.S. are prosecuted in state courts"; therefore, "certain kinds of important federal constitutional issues may arise more frequently—or nearly exclusively—in state court

195. *See Lorraine*, 291 F.3d at 447.

196. *See id.*; *Hammonds*, 849 F. Supp. 2d at 1306.

criminal proceedings."[197] State convicts challenging their convictions through § 2254 review "make ineffective assistance of counsel claims more frequently than any other type of claim. Indeed, habeas litigants make ineffective assistance of counsel arguments so frequently that those claims have largely eclipsed any other assertion of a deprivation of constitutional rights."[198] Most habeas petitions "present at least one claim of ineffective assistance of counsel, almost always as a way of indirectly presenting some other constitutional issue."[199] The inextricable relationship between § 2254 review to *Strickland* jurisprudence and of *Strickland* jurisprudence to § 2254 review cannot be overstated. Thus, it is particularly appropriate—and necessary—for the Supreme Court to address the *Strickland* cumulation issue within the context of § 2254 review.

Even more substantively, however, the structural constraints that the AEDPA imposed on § 2254 review mandate consideration of the *Strickland* cumulation issue through the § 2254 lens. Some circuits refusing to cumulatively assess an attorney's errors on § 2254 review have done so not because they reject the notion of cumulative error.[200] Instead, these courts have correctly noted that the Supreme Court has not yet rendered the doctrine clearly established as to *Strickland* claims.[201]

Before the 1996 enactment of the AEDPA, "lower federal courts and

197. Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 WM. & MARY L. REV. 211, 242–43 (2008) (footnote omitted).

198. Zimpleman, *supra* note 81, at 433 (footnotes omitted); *see also* Ellen Henak, *When the Interest of Self, Clients, and Colleagues Collide: The Ethics of Ineffective Assistance of Counsel Claims*, 33 AM. J. TRIAL ADVOC. 347, 347 (2009) (noting that ineffective assistance of counsel claims constitute "the most frequently raised issues in postconviction motions in criminal cases" (footnotes omitted)).

199. Zimpleman, *supra* note 81, at 427, 433–39 (footnotes omitted). Consequently,

> [t]he substance of post-conviction petitions has thus come to revolve around the performance of a petitioner's trial counsel, claiming that at some stage of the pre-trial, trial, or appeal process, counsel failed to make a critical argument respecting a petitioner's rights and thus failed to meet the Sixth Amendment's floor for adequate performance.

Id. at 429 (citing Porter v. McCollum, 130 S. Ct. 447, 453 (2009)).

200. *See supra* Part II.D.2.

201. *See, e.g.*, Borden v. Allen, 646 F.3d 785, 823 (11th Cir. 2011); Moore v. Parker, 425 F.3d 250, 256 (6th Cir. 2005); *Lorraine*, 291 F.3d at 447.

state courts contributed to doctrinal development [of federal constitutional law] by engaging in a dialogue."[202] This dialogue interpreted and articulated "the broad constitutional principles set forth in Supreme Court precedent."[203] Yet, the AEDPA "effectively ended the conversation, because under AEDPA [lower] federal courts lack the power to resolve emerging constitutional issues in the context of state prisoners' federal habeas petitions."[204] As a result, "only Supreme Court precedent can provide the basis for federal habeas relief under AEDPA."[205] Therefore, "it is more important for open questions to be presented to the Supreme Court."[206] More specifically, and as discussed previously, the AEDPA limited the source of applicable authority of § 2254 review to "clearly established Federal law, as determined by the Supreme Court of the United States."[207] This provision incontrovertibly heightened the importance of Supreme Court precedent in articulating federal constitutional standards.

It is therefore imperative that the Supreme Court provide guidance concerning *Strickland* cumulation. Without a Supreme Court directive, even a lower federal court that endorses *Strickland* cumulation will be unable to apply the cumulation analysis properly in the process of reviewing a state court decision that either declines to apply *Strickland* cumulation or that does so incorrectly.

As a related matter, the Supreme Court must provide guidance concerning *Strickland* cumulation within the context of the discrete § 2254 standard of review.[208] A federal habeas court may not grant § 2254 relief unless the state court's decision denying relief "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[209] Therefore, a Supreme Court *Strickland* cumulation decision within the § 2254 context will have the additional benefit of providing guidance as to what constitutes an unreasonable application of the *Strickland* cumulation principle.

202. Shay & Lasch, *supra* note 197, at 211.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 211–12.

207. *Id.* at 214–15 (citing 28 U.S.C. § 2254 (2002)); *see supra* Part II.A.

208. *See* 28 U.S.C. § 2254(d)(1) (2006) (allowing relief if decision is inconsistent with "clearly established Federal law, *as determined by the Supreme Court*" (emphasis added)).

209. *Id.*

Furthermore, as discussed above, a more general circuit split exists concerning whether § 2254 courts are permitted to cumulatively assess all errors that occurred in a state prosecution, including *Strickland* errors.[210] As this Article explains, *Strickland* errors must be cumulated independently of other, non-*Strickland* errors.[211] Therefore, given this interrelated circuit split, it is critically important that the Supreme Court resolve the circuit split concerning *Strickland* cumulation within the § 2254 context.

As a final consideration that transcends the § 2254 context, the Supreme Court must provide guidance about *Strickland* cumulation for the benefit of state courts confronting this unsettled issue. State courts are not obligated to "follow precedent established by the lower federal courts, but can instead develop their own views on the meaning of federal law unless or until the Supreme Court resolves the matter for the nation."[212] Given that "state courts are not obliged to follow their local federal court of appeals on questions with a circuit split,"[213] disagreement exists among state courts concerning cumulation of *Strickland* errors.

Although some states have applied the cumulative-error analysis to *Strickland* prejudice,[214] other states have expressly declined to do so.[215] To

210. See *supra* Part II.D for a discussion of this general circuit split.

211. See *infra* Part V.C for a discussion of why *Strickland* errors must be cumulated separately from non-*Strickland* errors.

212. Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 743 (2010) (footnote omitted).

213. Zimpleman, *supra* note 81, at 456.

214. *See, e.g.*, *In re* Jones, 917 P.2d 1175, 1193 (Cal. 1996) ("In examining whether the cumulative effect of defense counsel's errors at the guilt phase of the trial undermines our confidence in the outcome under the [*Strickland*] standard . . . our analysis is framed by those specific contentions, related to petitioner's claim that his defense counsel rendered ineffective assistance at trial, that we have determined to be meritorious." (citing Strickland v. Washington, 466 U.S. 668, 694 (1984))); People v. Gandiaga, 70 P.3d 523, 529 (Colo. App. 2002) ("[P]rejudice may result from the cumulative impact of multiple attorney errors." (citing Cooper v. Fitzharris, 586, F.2d 1325, 1333 (9th Cir. 1978))); 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." (citing Smith v. State, 511 N.E.2d 1042, 1046 (Ind. 1987))); State v. Trujillo, 42 P.3d 814, 828 (N.M. 2002) ("We review each of the Defendant's allegations of ineffective assistance of counsel individually in addition to considering their cumulative effect."); State *ex rel.* Bess v. Legursky, 465 S.E.2d 892, 901 n.10 (W. Va. 1995) ("[T]he appellant has proven prejudice as a result of the cumulative impact of multiple deficiencies in defense counsel's performance.").

215. *See, e.g.*, Diaz v. Comm'r of Corr., 6 A.3d 213, 222–23 (Conn. App. Ct.

illustrate, the Arkansas Supreme Court has instructed, "While we agree that we must consider all the evidence before the factfinder, we do not agree that this requires a cumulative-error analysis. . . . [T]his court has consistently refused to recognize the doctrine of cumulative error in allegations of ineffective assistance of counsel."[216] Some states have also expressed uncertainty about its applicability.[217]

In short, as far as state prosecutions are concerned, interpretations of federal constitutional standards by lower federal courts are essentially of no moment. The responsibility to articulate federal constitutional standards binding in state prosecutions rests squarely on the Supreme Court.[218] Absent a clear Supreme Court directive, state courts are under no obligation to apply *Strickland* cumulation even if its federal circuit or district court does so. If *Strickland* cumulation is to have any consistent meaning in state prosecutions—as a means to (1) properly effectuate a defendant's Sixth Amendment right to counsel and (2) correctly provide state courts with the first opportunity to determine whether this right has been satisfied—then it is imperative that the Supreme Court determine whether *Strickland* errors may be properly cumulated.[219]

B. *Cumulation of Counsel's Errors Is Not Clearly Established Supreme Court Law*

As both the Sixth and Eighth Circuits correctly concluded, the cumulative-error doctrine as a means to establish *Strickland* prejudice is

2010) (noting that the Supreme Court has declined to recognize a claim for ineffective assistance of counsel based on the cumulative effect of multiple attorney errors).

216. Echols v. State, 127 S.W.3d 486, 500 (Ark. 2003) (citations omitted).

217. *See, e.g.*, McNabb v. State, 991 So. 2d 313, 332 (Ala. Crim. App. 2007) (quoting Brooks v. State, 929 So. 2d 491, 514 (Ala. Crim. App. 2005)).

218. *See* Ursula Bentele, *The Not So Great Writ: Trapped in the Narrow Holdings of Supreme Court Precedents*, 14 LEWIS & CLARK L. REV. 741, 743–44 (2010) (observing an "increasing focus on whether the Supreme Court itself had, at the time the state court ruled on the case, announced the pertinent federal law with sufficient specificity"); Padraic Foran, Note, *Unreasonably Wrong: The Supreme Court's Supremacy, the AEDPA Standard, and* Carey v. Musladin, 81 S. CAL. L. REV. 571, 590 (2008) (footnote omitted) (suggesting that "the AEDPA served primarily to reinforce the hierarchy of Article III courts, and therein to reemphasize the Supreme Court's supremacy").

219. Certainly, a Supreme Court decision endorsing *Strickland* cumulation not raised within the § 2254 context would provide this necessary guidance to state courts. Yet, because § 2254 constitutes a unique intersection of state criminal practice and federal constitutional norms, the circuit split concerning *Strickland* cumulation on § 2254 review provides a compelling lens for Supreme Court review of the issue.

not "clearly established Federal law, as determined by the Supreme Court of the United States."[220] Therefore, the majority of lower federal courts have erroneously applied the cumulative-error doctrine to *Strickland* claims during § 2254 review of state convictions.

When Congress amended the AEDPA in 1996, it limited the "area of relevant law to that determined by the Supreme Court of the United States."[221] Consequently, pre-AEDPA case law and scholarship arguing that federal habeas courts should apply the cumulative-error analysis when reviewing state court determinations fail to be instructive.[222]

In *Middleton v. Roper*, the Eighth Circuit properly rejected the contention that *Strickland* and its progeny mandated cumulative-error analysis for ineffectiveness claims.[223] The Sixth Circuit has likewise explained, "post-AEDPA, not even constitutional errors that would not individually support habeas relief can be cumulated to support habeas relief."[224] Instead, the Sixth Circuit properly observed that "[t]he Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief. Thus, it cannot be said that the judgment of [a state court rejecting cumulative error] is contrary . . . to any . . . Supreme Court decision so as to warrant relief under the AEDPA."[225]

As the Supreme Court has instructed, the "rule set forth in *Strickland* qualifies as clearly established Federal law, as determined by the Supreme Court of the United States."[226] Recognition of the right to effective counsel does not break "new ground or impose[] a new obligation on the States."[227] The Supreme Court has explained that the "*Strickland* standard is a general one, so the range of reasonable applications is substantial."[228] In

220. 28 U.S.C. § 2254(d)(1) (2006).

221. Williams v. Taylor, 529 U.S. 362, 381 (2000) (quoting 28 U.S.C. § 2254(d)(1) (1994)) (internal quotation marks omitted).

222. *See, e.g.*, Van Cleave, *supra* note 29, at 89–97.

223. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006).

224. Moore v. Parker, 425 F.3d 250, 256 (6th Cir. 2005) (citations omitted).

225. Lorraine v. Coyle, 291 F.3d 416, 447 (6th Cir. 2002); *see also Moore*, 425 F.3d at 256 ("Because . . . no Supreme Court precedent obligat[es] the state court to consider the alleged trial errors cumulatively, we cannot grant relief on this ground." (footnote omitted)); Baze v. Parker, 371 F.3d 310, 330 (6th Cir. 2004) (noting that the Supreme Court has not held that "errors can be considered in the aggregate").

226. *Williams*, 529 U.S. at 391 (internal quotation marks omitted).

227. *Id.* (quoting Teague v. Lane, 489 U.S. 288, 301 (1989)) (internal quotation marks omitted).

228. Harrington v. Richter, 131 S. Ct. 770, 788 (2011); Premo v. Moore, 131 S.

order to consider whether a state court's application of a rule was unreasonable, federal habeas courts must consider the rule's specificity.[229] "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations."[230] As with all § 2254 cases, "[i]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by" the Supreme Court.[231]

No Supreme Court decision has yet announced a specific legal rule that an attorney's errors should be cumulated for purposes of the *Strickland* prejudice analysis. A cumulative-error analysis for *Strickland* claims constitutes a specific rule, not a general one.[232] Therefore, this proposition does not constitute clearly established federal law as required under § 2254.

Moreover, the Supreme Court has repeatedly admonished that "[f]ederal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. *The question is whether there is any reasonable argument that counsel satisfied* Strickland*'s deferential standard*."[233] In its 2011 *Harrington v. Richter* decision, for example, the Supreme Court elaborated:

> The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard. Were that the inquiry, the analysis would be no different

Ct. 733, 740 (2011) (citing Knowles v. Mirzayance, 129 S. Ct. 1411, 1420 (2009)). As one observer has aptly noted, "Criminal cases rarely present completely identical factual situations, and for that reason, courts rarely find a precedential case directly on point. This is particularly true [in the *Strickland* context], which boils down to reasonable attorney performance, a case-by-case question, and prejudice, also a case-by-case question." Zimpleman, *supra* note 81, at 455 (footnote omitted).

229. *Harrington*, 131 S. Ct. at 786.

230. *Id.* (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)) (internal quotation marks omitted).

231. *Id.* (quoting Knowles v. Mirzayance, 129 S. Ct. 1411, 1413–14 (2009)) (internal quotation marks omitted).

232. *Id.*

233. *Id.* at 788 (emphasis added); *Premo*, 131 S. Ct. at 740. The Supreme Court has observed, "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult" because both the *Strickland* and § 2254(d) standards are "highly deferential, and when the two apply in tandem, review is doubly so." *Id.* (citations omitted) (internal quotation marks omitted).

> than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), an *unreasonable* application of federal law is different from an *incorrect* application of federal law.[234]

The Supreme Court has not yet held that an attorney's errors should be cumulated to determine if *Strickland* prejudice exists. Therefore, when a state court fails to cumulatively assess an attorney's errors, a federal habeas court cannot deem this failure unreasonable.

The current circuit split demonstrates the salient lack of guidance from the Supreme Court.[235] Although some federal courts have cited the Court's 1973 decision in *Chambers v. Mississippi*[236] as evidence that the Court has approved of cumulation,[237] *Chambers* does not render the cumulation of an attorney's errors as "clearly established Federal law." *Chambers* concerned trial court errors, not counsel errors.[238] Also, *Chambers* did not clearly instruct that errors occurring in a state prosecution may be cumulatively assessed by a federal habeas court.[239] Therefore, while *Chambers* undeniably supports the wisdom of cumulative-error analysis, it does not render cumulative analysis of *Strickland* errors clearly established federal law.

In short, a federal habeas court may not deem a state court's application of *Strickland* unreasonable because the state court declined to cumulatively analyze counsel's errors. The specific legal rule permitting the cumulative analysis of an attorney's errors has not yet been clearly established by the Supreme Court.[240]

234. *Harrington*, 131 S. Ct. at 785 (quoting Williams v. Taylor, 529 U.S. 362, 410 (2000)) (internal quotation marks omitted); *see also* Zimpleman, *supra* note 81, at 455 (noting that *Strickland* and the AEDPA together establish a "doubly deferential" standard of review).

235. Carey v. Musladin, 549 U.S. 70, 76 (2006).

236. Chambers v. Mississippi, 410 U.S. 284 (1973).

237. *See, e.g.*, Parle v. Runnels, 505 F.3d 922, 927–28 (9th Cir. 2007).

238. *Chambers*, 410 U.S. at 285–90.

239. *See id.* at 294–303.

240. Harrington v. Richter, 131 S. Ct. 770, 786 (2011); see *supra* Part II.A for an overview of § 2254 review.

IV. THE SUPREME COURT SHOULD RESOLVE THE CIRCUIT SPLIT AND HOLD THAT COURTS MAY CUMULATE AN ATTORNEY'S ERRORS FOR THE *STRICKLAND* PREJUDICE ANALYSIS

The Supreme Court should resolve the current circuit split concerning the cumulation of *Strickland* errors and hold that courts may cumulate an attorney's errors in order to determine if *Strickland* prejudice exists. Such a holding by the Court is consistent with its past *Strickland* prejudice jurisprudence. Furthermore, cumulation of an attorney's errors recognizes that the criminal justice system is comprised of human actions and institutions. As many scholars have observed, overly linear or piecemeal causal analysis is not helpful in assessing the cause and effect of human actions and institutions. Instead, the cumulative-error analysis properly recognizes that an effect, such as an unfair trial, may be the result of multiple causes, such as errors by an attorney. Moreover, rejection of the cumulative-error analysis constitutes a fallacy of composition; this view erroneously asserts that because each individual error by counsel was not prejudicial, all of the errors, when considered collectively, also fail to be prejudicial.

A. *Cumulative-Error Analysis Is Consistent with the Supreme Court's* Strickland *Jurisprudence*

The application of the cumulative-error doctrine to *Strickland* prejudice does not presently constitute "clearly established Federal law" for purposes of § 2254(d).[241] Yet, the doctrine is consistent with past Supreme Court ineffectiveness of counsel jurisprudence.[242] To that extent, the Supreme Court may readily resolve the current circuit split by holding that an attorney's errors may be cumulated in order to determine *Strickland* prejudice.

A clear directive by the Supreme Court will ensure that state courts reviewing ineffective assistance of counsel claims will cumulatively assess counsel's errors when determining if the defendant has demonstrated outcome-determinative prejudice. Even more critically, however, an unambiguous statement about cumulation from the Court will enable federal habeas courts to hold that a state court's prejudice determination was an unreasonable application of clearly established federal law when

241. *Harrington*, 131 S. Ct. at 786.
242. *See id.*

the state court fails to cumulatively assess counsel's errors.[243]

As one scholar aptly summarized, "It is clear from the repeated reference to the plural 'errors' in [the *Strickland*] opinion that the Court contemplated cumulative consideration of counsel's performance, as well as individual errors."[244] Nevertheless, "*Strickland*'s language is sufficiently vague, such that lower courts have been inconsistent in their understanding of its appreciation for the cumulation of counsel's errors."[245]

The language and reasoning within *Strickland* and its progeny strongly suggest the propriety of cumulative-error analysis. *Strickland* instructed that

> in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated *do not establish mechanical rules*. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.[246]

In its 2011 *Harrington* decision, the Supreme Court similarly noted, "[W]hile in some instances 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,' it is difficult to establish ineffective assistance when counsel's *overall* performance indicates active and capable advocacy."[247] Therefore, the Supreme Court implicitly recognized the value and propriety of assessing an attorney's entire performance throughout a proceeding, including the effect of nonprejudicial errors.

Likewise, the Supreme Court observed in its 1986 *Kimmelman v. Morrison* decision that "[t]he essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect."[248] The *Kimmelman* Court's choice of language

243. *See* Renico v. Lett, 130 S. Ct. 1855, 1875 (2010).

244. Sullivan, *supra* note 110, at 358 (citing Strickland v. Washington, 466 U.S. 668, 678–79, 682, 693–96 (1984)).

245. *Id.* ("[T]here is significant split among jurisdictions on the application of cumulative error analysis to ineffective assistance claims"); *see supra* Part III (noting that cumulation of *Strickland* errors does not constitute clearly established Supreme Court jurisprudence).

246. *Strickland*, 466 U.S. at 696 (emphasis added).

247. *Harrington*, 131 S. Ct. at 791 (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)) (emphasis added).

248. Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) (citations omitted).

suggests a holistic approach to evaluating *Strickland* prejudice, namely, one that assesses all of counsel's errors.

As the Supreme Court noted in *Strickland*,

> [i]n giving meaning to the [constitutional] requirement [of effective assistance], . . . we must take its purpose—to ensure a fair trial—as the guide. The benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.[249]

In order to effectuate the meaning of *Strickland* prejudice properly, reviewing courts should be permitted to cumulatively assess an attorney's errors. Cumulative-error assessment as part of the *Strickland* prejudice analysis comports with the Court's direct rejection of formalistic rules for assessing *Strickland* prejudice.

In short, courts will more effectively attain the Sixth Amendment's "goal of ensuring a fair and reliable trial by considering the cumulative effect of all of counsel's unprofessional errors in deciding ineffective assistance of counsel claims."[250] Nothing within *Strickland* or its progeny indicates that cumulation is inconsistent with *Strickland*; therefore, the Supreme Court will have little analytical difficulty in holding that courts may cumulate an attorney's errors as part of the *Strickland* prejudice analysis.

B. *Multi-Factor Causation and the Criminal Justice System*

A cumulative analysis of an attorney's errors comports with the inherently variable and normative process of determining whether an attorney's erroneous decisions or omissions affected the outcome of a proceeding. As *Strickland* aptly explained:

> Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an

249. *Strickland*, 466 U.S. at 686.

250. Mark Peake, Note, Hoots v. Allsbrook: *The Fourth Circuit's Application of the* Strickland *Test for Determining Ineffective Assistance of Counsel Claims*, 44 WASH. & LEE L. REV. 598, 612 (1987) (footnote omitted).

> art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.[251]

Thus, *Strickland* implicitly noted the cause-and-effect nature of an attorney's errors and *Strickland* prejudice. Furthermore, *Strickland* indirectly acknowledged that viewing an attorney's error in a vacuum frustrates a meaningful determination of whether outcome determinative prejudice has occurred.

1. *Causation*

The notion that certain errors by counsel are sufficient to create *Strickland* prejudice is one of cause (i.e. error) and effect (i.e. outcome-determinative prejudice). Arguably, the *Strickland* prejudice analysis constitutes the reverse of most cause-and-effect analyses. In many circumstances, observers know the effect and must attempt to determine whether potential causes created the effect. By contrast, within the context of *Strickland* prejudice, courts must consider potential causes identified by a petitioner and determine whether such causes created a potential effect.[252] Nevertheless, the considerations underlying the first type of analysis are equally relevant to the considerations underlying the second type of analysis.[253]

Multiple or cumulative causation, can include situations in which "[s]pecific effect E was produced by specific causes A and B, both of which were present, and each of which separately contributed to E."[254] It may also

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251. *Strickland*, 466 U.S. at 693.

252. *See id.* at 700 (concluding that the deficiencies in counsel's assistance did not cause a breakdown in the adversary process rendering the justice of a sentence unreliable).

253. The concept of cause-and-effect analysis is wholly consistent with the concept of *Strickland*. In the legal system,

> factors cited as causes can be and often are acts of omission. If one then asks how something which did not happen can cause something to happen, this is because the interest is in assigning responsibility, or in thinking how something could have been otherwise, or it is in both.

EMMET, *supra* note 25, at 60 (footnote omitted). *Strickland* prejudice inquires whether a reasonable probability exists that but for an attorney's act or omission, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

254. PAUL HUMPHREYS, THE CHANCES OF EXPLANATION: CAUSAL

include situations in which, for example, the "specific effect E was produced by the interaction of specific factors A and B, both of which were present."[255] Causes and effects are similarly multiple, "and this makes them more difficult to diagnose."[256] The "notion of a cause is neither a single nor a simple one."[257] Although causes may be viewed as "selected factors,"

> the factor selected may vary as to how it relates to others in different contexts and in some contexts it may not be the relevant one to consider. Moreover, to concentrate on linear chains of cause and effect will lead to ignoring the multiple contributing factors on the causal side, and the multiple repercussions on the effect side.[258]

As one observer has explained:

> The world is a complex and messy place. If it were not, if it consisted solely of medium-sized atoms that were causally independent of one another, say, we should not need science to discover its structure. . . . At least as early as Galileo, scientific investigation was found to proceed most efficiently when investigating artificial phenomena produced in the clean and austere conditions of the laboratory, when only a single causal influence was at work.[259]

Many observers have noted that cause-and-effect analyses concerning human behavior and institutions necessitate a consideration of multiple causal factors.[260] As one philosopher has explained, "Besides looking for causes in the functionings, and breakdowns of functioning, in mechanical systems and in organisms, we can look for them in the happenings of social life."[261] Neither "organisms nor mechanisms," societies are "networks of human activities within a physical environment, some of which are channeled into institutional forms, some of which are sporadic and individual."[262] Human activities are

> a natural field for the view of a cause as a happening or a property which makes *more likely* some other happening or some other

EXPLANATION IN THE SOCIAL, MEDICAL, AND PHYSICAL SCIENCES 8 (1989).

255. *Id.*
256. EMMET, *supra* note 25, at 69.
257. *Id.* at 73.
258. *Id.* at 67 (footnote omitted).
259. HUMPHREYS, *supra* note 254, at 7 (footnote omitted).
260. *See, e.g.*, EMMET, *supra* note 25, at 70.
261. *Id.*
262. *Id.*

> property in the same thing or in something else. A likelihood, can be increased by various factors, so that no one of them need be a unique cause . . . .[263]

To that extent, "grand over-all single causes" used to explain human actions are particularly unsatisfactory.[264] Much of "social and behavioral activity" is "usually the result of multiple causal influences."[265] Also, social activities frequently "have feedbacks; what is an effect at one stage of an on-going process can have a causal influence on a supervening stage, either to correct it, or (in the case of negative feedback) to reinforce it."[266] As one scholar has asserted, to "stress multiple causation is not only to put [forth] a philosophical position; to neglect it can have dangerous practical effects in social contexts."[267]

2. *Criminal Justice System: Human Actions and Institutions*

These considerations are particularly relevant to the criminal justice system, inherently comprised of human actions and institutions and thus possessing the potential for error.[268] As one scholar has noted,

> One of the most distinctive features of the criminal justice process is that it is operationalized predominantly through people: witnesses, detectives, prosecutors, suspects, defense attorneys, forensic examiners, judges, and jurors. These actors turn the wheels of the system through their mental operations: perceptions, memories,

263. *Id.*

264. *Id.* at 64; *see also* Talcott Parsons, *Cause and Effect in Sociology*, *in* CAUSE AND EFFECT 55 (David Lerner ed., 1965) ("One must have a conceptual scheme that makes allowance for these normative and symbolic factors and mechanisms before one can build a scientific analysis of human behavior.").

265. HUMPHREYS, *supra* note 254, at 7 n.5.

266. EMMET, *supra* note 25, at 71.

267. *Id.* at 66–67. Thus, the use of "single, isolated chains of cause and effect, instead of allowing for multiple causes in the sense of networks of interrelated factors, or for the possibility of different routes leading up to the same end result" are not helpful. *Id.* at 73.

268. Dist. Att'ys Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 74–75 (2009); Kansas v. Marsh, 548 U.S. 163, 199 (2006) (Scalia, J., concurring) ("Like other human institutions, courts and juries are not perfect."); Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 14 (1964) (noting the possibility of human error within the criminal justice system). The essential objective of a criminal trial is to determine "which human events constitute crimes and who perpetrated them." Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 144 (2011).

> recognitions, assessments, inferences, judgments, and decisions—all tied in with emotions, affective states, motivations, role perceptions, and institutional commitments.[269]

Both the deliberative processes of juries and judges possess the capacity to result in human error.[270] Thus, "as long as the ascertainment of factual truth will remain a human endeavor, the accuracy of criminal verdicts will inevitably be constrained by the imperfect human cognition that makes them possible."[271]

Given the inherent difficulties of assessing human conduct according to inexorable legal rule, courts routinely apply a totality of the circumstances or multi-causal approach to resolve issues about how, as a matter of law, "one ought to characterize particular events."[272] Unsurprisingly, a "common kind of causation in the legal process involves joint causation situations where one input variable by itself is not likely to cause a substantial change in the output variable but instead requires a second input variable to interact with it."[273] To illustrate, courts analyze the totality of the circumstances when determining whether a confession was voluntary or involuntary. "In answering such questions, one starts with some conception of what constitutes voluntariness and involuntariness and then asks whether the particular situation shares more of the voluntary elements or the involuntary elements. . . . The reasoning is thus primarily analogical."[274]

Within the Sixth Amendment counsel context, *Strickland* presents "two context-dependent questions" in which "[f]acts matter quite a bit."[275] The determination of *Strickland* prejudice is a "necessarily fact-intensive determination[] peculiar to the circumstances of each case."[276] Thus, as with other fact-intensive legal determinations, the analysis of whether an attorney's errors establish prejudice necessitates a consideration of all of

269. Simon, *supra* note 268, at 145.

270. Graham v. Florida, 130 S. Ct. 2011, 2055 (2010) (Thomas, J., dissenting); *see also* Simon, *supra* note 268, at 145.

271. Simon, *supra* note 268, at 223.

272. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987).

273. STUART S. NAGEL, CAUSATION, PREDICTION, AND LEGAL ANALYSIS 9 (1986).

274. Aleinikoff, *supra* note 272, at 945.

275. Zimpleman, *supra* note 81, at 427.

276. Williams v. Washington, 59 F.3d 673, 684 (7th Cir. 1995) (citing Nealy v. Cabana, 764 F.2d 1173, 1179 (5th Cir. 1985)).

the attorney's errors.

To that extent, rejection of cumulative-error analysis inaptly concentrates "on linear chains of cause and effect."[277] Like most "social and behavioral activity," the outcome of a legal proceeding is "usually the result of multiple causal influences."[278] An attorney's error during a proceeding can have a causal influence on a later stage of the proceeding, "either to correct it, or (in the case of negative feedback) to reinforce it."[279] Consistent with multi-factor causation, the cumulative-error doctrine explains that "a column of errors may sometimes have a logarithmic effect, producing a total impact greater than the arithmetic sum of its constituent parts."[280] In short, errors in the criminal justice system "can be seen as 'organizational accidents' in which small mistakes (no one of which would suffice to cause the event) combine with each other and with latent defects in the criminal justice system" to produce reversible errors.[281]

To illustrate, in a defendant's trial for the armed robbery of a convenience store, the defense attorney neglected to subpoena the store's cashier who would have "testified that she could not identify [the defendant] as the robber and that she chose another person from the police lineup."[282] Furthermore, on direct examination of the defendant, his attorney asked him "a question that ultimately led the court to allow cross-examination on two of [the defendant's] previous armed robbery convictions."[283] Moreover, the defendant's co-conspirators, who pled guilty before the defendant's trial, testified against him and asserted that they had received threats regarding their participation as prosecution witnesses.[284] Yet, the defendant's attorney did not request a limiting instruction on the testimony regarding the threats.[285] Additionally, the defendant's attorney did not object to the prosecution's misleading claims that one of the codefendants had no incentive to testify; in fact, the codefendant had sought a shorter sentence in exchange for his testimony.[286] Also, the

277. EMMET, *supra* note 25, at 67.
278. HUMPHREYS, *supra* note 254, at 7 n.5.
279. EMMET, *supra* note 25, at 71.
280. United States v. Sepulveda, 15 F.3d 1161, 1196 (1st Cir. 1993).
281. James M. Doyle, *Learning from Error in American Criminal Justice*, 100 J. CRIM. L. & CRIMINOLOGY 109, 109 (2010).
282. Goodman v. Bertrand, 467 F.3d 1022, 1023–24 (7th Cir. 2006).
283. *Id.* at 1024 (footnote omitted).
284. *Id.* at 1025.
285. *Id.*
286. *Id.*

defendant's attorney failed to object to the prosecutor's inaccurate argument that a codefendant "could not have been charged or convicted without his voluntary confession."[287] The defendant was ultimately convicted.[288]

In such a situation, "the cumulative effect of trial counsel's errors sufficiently undermines . . . confidence in the outcome of the proceeding."[289] Instead of "evaluating each error in isolation . . . , the pattern of counsel's deficiencies must be considered in their totality."[290] Although each of the attorney's "errors considered in isolation may not have been prejudicial to [the defendant], viewed in their totality, they create[d] a clear pattern of ineffective assistance."[291] Thus, when viewed within the context of the evidence before the jury, a "reasonable probability [existed] that the outcome would have been different absent counsel's deficient conduct."[292]

Similarly, in order to demonstrate *Strickland* prejudice from an appellate counsel's constitutionally deficient errors, a defendant must show a reasonable probability exists that the outcome of his appeal would have been different but for the deficient performance.[293] As a hypothetical example, imagine an appellate counsel fails to raise on appeal a series of cognizable claims that had been adequately preserved at trial.[294] These claims include (1) the trial court's admission of a hearsay statement when the declarant was unavailable and the defendant had no opportunity to cross-examine him; (2) the trial court's failure to grant a mistrial based on the prosecutor's unprovoked references to the defendant's failure to testify; and (3) the trial court's decision barring the defendant from cross-examining a key prosecution witness about his perjury conviction. It makes little sense to assess each of these failures in isolation; instead, a reviewing court should cumulatively assess the appellate counsel's errors in order to determine if the attorney's deficient performance prejudiced the defendant.

287. *Id.*
288. *Id.*
289. *Id.* at 1030.
290. *Id.* (citing Washington v. Smith, 219 F.3d 620, 634–35 (7th Cir. 2000)).
291. *Id.*
292. *Id.*
293. Ferrell v. Hall, 640 F.3d 1199, 1236 (11th Cir. 2011) (citations omitted).
294. *See supra* text accompanying notes 35–42 (discussing limitations on issues that may be raised on appeal).

A formalistic approach does not help determine whether, for example, a defense attorney's error impacted the manner in which twelve humans determined another human's guilt.[295] Similarly, it is difficult to assess in an isolated manner the effect of an appellate counsel's errors on the ultimate determination granting or denying relief that an appellate court, comprised of several human judges, makes. The practice of law, including appellate advocacy and trial advocacy, is "an art, not a science, and many questions that attorneys must decide are questions of judgment and degree."[296] The cumulative-error doctrine comports with these realities of causation, human actions, and the criminal justice system.

C. *Fallacy of Composition*

Rejecting cumulative-error analysis for assessing *Strickland* prejudice constitutes a "fallacy of composition."[297] The fallacy of composition constitutes "the inference that some property of the parts must be a property of the whole or that a property of the members of a set must be a property of the set."[298] The fallacy of composition is illustrated in the following argument: "Each player in this orchestra is a virtuoso. Therefore this is an exceptionally fine orchestra."[299] In order to "argue correctly from properties of the members of a set to properties of the set taken as a whole,

295. As one scholar has explained, the social sciences explore human actions that are "free in the sense that they are not subject to explanation and prediction on the basis of strict causal laws; what empirical science is capable of investigating successfully cannot be free in that sense; hence the social studies cannot be empirical sciences." MICHAEL A. SIMON, UNDERSTANDING HUMAN ACTION: SOCIAL EXPLANATION AND THE VISION OF SOCIAL SCIENCE 2 (1982); *see also* WILLIAM J. RAY, METHODS TOWARD A SCIENCE OF BEHAVIOR AND EXPERIENCE 15 (8th ed. 2006) (noting that because the "subject matter of psychology focuses in part on humans, psychology is faced with a greater challenge" than is science).

296. Simmons v. Lockhart, 915 F.2d 372, 375 (8th Cir. 1990); Edward D. Ohlbaum, *Jacob's Voice, Esau's Hands: Evidence-Speak for Trial Lawyers*, 31 STETSON L. REV. 7, 34 (2001) (repeating the art–science distinction, but pointing out that "art, too, requires technique and disciplined application").

297. Brief of the National Association of Criminal Defense Lawyers, *supra* note 9, at 3, 14–18. A fallacy is "a type of argument that may seem to be correct but which proves, upon examination, not to be so." IRVING M. COPI, INTRODUCTION TO LOGIC 72–73 (4th ed. 1972).

298. HENRY C. BYERLY, A PRIMER OF LOGIC 60 (1973); *see also* JOHN W. BLYTH, A MODERN INTRODUCTION TO LOGIC 52 (1957) (noting "an equivocation involving a shift from a distributive to a collective use of a term is called a *fallacy of composition*").

299. BLYTH, *supra* note 298, at 52 (internal quotation marks omitted).

we need to know the mechanism of composition."[300]

Within the *Strickland* context, "[a]lthough 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."[301] As the fallacy of composition illustrates, it is illogical to contend that because an individual error by counsel was not prejudicial, all of the attorney's errors, when considered collectively, also fail to be prejudicial.

V. ESTABLISHING A FRAMEWORK FOR CUMULATING AN ATTORNEY'S ERRORS FOR *STRICKLAND* PREJUDICE ANALYSIS

Because "[a]n ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial," courts must apply *Strickland* with "scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve."[302] Therefore, a Supreme Court decision concerning the cumulation of an attorney's errors must provide a framework that includes meaningful limits on the scope of cumulative-error analysis.

A. *Actual Errors by Counsel*

As a critical preliminary matter, "jurisdictions recognizing cumulative error analysis . . . require that the cumulation relates to actual deficiencies that could be termed 'errors' on the part of counsel, rather than claims of deficient performance not amounting to errors."[303] Any solution to the *Strickland*-cumulation problem should retain this well-established requirement of actual constitutional errors.[304]

300. BYERLY, *supra* note 298, at 60–61.

301. Brief of the National Association of Criminal Defense Lawyers, *supra* note 9, at 3, 14–17.

302. Harrington v. Richter, 131 S. Ct. 770, 788 (2011) (citing Strickland v. Washington, 466 U.S. 668, 689–90 (1984)).

303. Sullivan, *supra* note 110, at 358; *see also* United States v. Rivera, 900 F.2d 1462, 1470–71 (10th Cir. 1990).

304. *But see* Van Cleave, *supra* note 29, at 90–91 (endorsing a broad definition of error that includes "any violation of an objective legal rule" and asserting that courts should "evaluate the relevance of individually non-constitutional errors" (quoting *Rivera*, 900 F.2d at 1470 n.7) (internal quotation marks omitted)).

B. *Cumulative Error Must Be Assessed Separately as to Each Proceeding*

Some circuits, in reviewing a state conviction under § 2254, combine allegations of ineffectiveness from all proceedings.[305] As the Ninth Circuit asserted in *Sanders*, courts should "examine all aspects of the counsel's performance at different stages, from pretrial proceedings through trial and sentencing."[306] *Sanders* elaborated, "Separate errors by counsel at trial and at sentencing should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance."[307] The Tenth Circuit has similarly approved combining trial counsel's errors that occurred in the guilt proceeding and the sentencing proceeding for purposes of cumulative-error analysis when the "prejudicial effect of the [trial] influenced the . . . determination of sentence."[308]

Yet, consistent with *Strickland*, counsel's errors must be analyzed within each proceeding. For example, it makes little sense to combine the errors of trial counsel with those of appellate counsel. In *Strickland*, the Supreme Court instructed:

> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence . . . , the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.[309]

As a general rule, the prejudice analysis as to an attorney's error during sentencing is distinct from the prejudice analysis of an attorney's error during the guilt phase or from an appellate attorney's error. Therefore, the errors from each proceeding should be assessed cumulatively and *independently* of the other proceedings.

At the same time, however, a counsel's error in one proceeding may

305. *See, e.g.*, Sanders v. Ryder, 342 F.3d 991, 1000 (9th Cir. 2003).
306. *Id.* (citing United States v. Leonti, 326 F.3d 1111, 1116–17 (9th Cir. 2003)).
307. *Id.* at 1001 (citations omitted).
308. Cargle v. Mullin, 317 F.3d 1196, 1208 (10th Cir. 2003).
309. Strickland v. Washington, 466 U.S. 668, 695 (1984).

adversely affect the outcome of a subsequent proceeding. To illustrate, counsel may erroneously fail to seek the exclusion of inadmissible evidence at the defendant's trial; and at the defendant's later sentencing hearing, this same evidence is used to enhance the defendant's sentence. When a defendant sufficiently demonstrates the transcendent nature of the error, this error may be cumulated with the counsel's errors occurring in another proceeding.[310]

C. *Refusing to Mix "Apples and Oranges"*:[311] Strickland *Errors Must Be Cumulated Independently of Other Errors*

Both the Third and Tenth Circuits have instructed that when a petitioner alleges multiple instances of ineffectiveness, as well as other trial errors, *all* of the errors should be considered collectively.[312] As the Tenth Circuit explained in *Cargle*, "[O]ur cases reflect application of cumulative-error review to legally diverse claims."[313] To that extent, the Third and Tenth Circuits cumulate all errors, including those of the counsel and the trial court.

As a more general matter, the federal circuit courts are divided as to whether clearly established Supreme Court precedent permits federal habeas courts to cumulate errors on § 2254 review.[314] Given the reasoning of courts such as the Third and Tenth Circuits, this broader circuit split has become intertwined with the circuit split as to whether an attorney's errors may be cumulated in order to establish *Strickland* prejudice.[315] Regardless of the correct answer to this general circuit split, *Strickland* errors must be cumulatively assessed as part of the prejudice analysis.[316] Furthermore,

310. *Cf.* Lafler v. Cooper, 132 S. Ct. 1376, 1386 (2012).

311. Pursell v. Horn, 187 F. Supp. 2d 260, 377 n.55 (W.D. Penn. 2002) ("Certain errors . . . are like apples, while others . . . are like oranges.").

312. *See, e.g.*, Breakiron v. Horn, 642 F.3d 126, 132 n.5 (3d Cir. 2011); Cargle v. Mullin, 317 F.3d 1196, 1206–07 (10th Cir. 2003) ("A cumulative-error analysis aggregates *all errors* . . . ." (emphasis added) (quoting United States v. Toles, 297 F.3d 959, 972 (10th Cir. 2002)) (internal quotation marks omitted)).

313. *Cargle*, 317 F.3d at 1207.

314. Morris v. Sec'y, Dep't of Corr., 677 F.3d 1117, 1132 n.3 (11th Cir. 2012); see *supra* Part II.D for a discussion of this circuit split concerning general cumulation on § 2254 review.

315. No court has yet addressed whether *Strickland* errors must be assessed independently of other errors. Additionally, this Article does not resolve the general cumulation circuit split.

316. See *supra* Part IV for an explanation of why *Strickland* errors should be cumulated.

Strickland errors must be cumulated independently from other, non-*Strickland* errors for the following critical reasons.

1. *Cumulation of* Strickland *Errors with Non-*Strickland *Errors Is Contrary to § 2254(d)(1) and State Appellate Review Structure*

The cumulation of *Strickland* errors with non-*Strickland* errors is contrary to the § 2254(d)(1) standard for federal habeas review of state convictions. Therefore, *Strickland* errors should be cumulatively assessed independently of other errors. Many non-*Strickland* errors are raised during the state direct appeal process, and these direct appeal errors often include allegations of trial court error that were preserved on the record.[317] By contrast, in most states, ineffective assistance of counsel claims are generally raised through state collateral proceedings, not direct appeal.[318]

It is not necessary for a § 2254 petitioner "to present his federal claims to state courts *both* on direct appeal and in a [postconviction collateral] proceeding."[319] In order to exhaust his claim sufficiently so as to obtain future § 2254 review, "[a] state prisoner is not required to seek [state] collateral relief on facts and issues already decided on direct review."[320] As the Sixth Circuit has explained, "a petitioner who properly and fairly presents a claim on direct appeal to the state's intermediate appellate court and highest court, but who fails to file a later collateral motion" on the same issue, has sufficiently exhausted state remedies.[321]

Therefore, as a practical matter, a state court will rarely have the opportunity to cumulate *Strickland* errors with non-*Strickland* errors unitarily. Quite simply, no state court decision on the merits that cumulates *Strickland* errors with non-*Strickland* errors will exist for the federal habeas

317. STRAZZELLA, *supra* note 37, at 254.

318. LAFAVE ET AL., *supra* note 37, at 1315; Place, *supra* note 106, at 312–13.

319. Showers v. Beard, 586 F. Supp. 2d 310, 317 (M.D. Pa. 2008) (citing Swanger v. Zimmerman, 750 F.2d 291, 295 (3rd Cir. 1984)).

320. Jelinek v. Costello, 247 F. Supp. 2d 212, 263 (E.D.N.Y. 2003) (citing Brown v. Allen, 344 U.S. 443, 447 (1953)). Specifically, "exhaustion does not require repeated assertions if a federal claim is actually considered at least once on the merits by the highest state court." Greene v. Lambert, 288 F.3d 1081, 1086 (9th Cir. 2002) (citing Castille v. Peoples, 489 U.S. 346, 350 (1989)). As the Third Circuit has similarly explained, "It is well-settled that a claim raised in state court at trial and on direct appeal satisfies the exhaustion requirement and that a habeas corpus petitioner need not also raise the claim in a collateral attack before proceeding in federal court." *Swanger*, 750 F.2d at 295 (citations omitted).

321. Clinkscale v. Carter, 375 F.3d 430, 438 (6th Cir. 2004).

court to review.[322] Federal habeas courts are confined to reviewing whether a state court decision, on the merits, is contrary to Supreme Court precedent.[323] Therefore, absent a correctional measure to the structure of the AEDPA or to the manner in which federal constitutional claims are litigated in state court, this difficulty precludes the cumulation of *Strickland* errors with non-*Strickland* errors on § 2254 review.

2. Strickland *Prejudice Is Different from the Standard Applied for Other Errors*

Strickland prejudice fundamentally differs from the standard used to assess harm for other, non-*Strickland* errors.[324] *Strickland* claims do not implicate the same standard for reversible error as do many non-*Strickland* claims.[325] Claims properly raised during state direct appellate review are often subject to a harmless-error analysis on § 2254 review, which requires the "State to prove that the defendant was not prejudiced by the error."[326] Under the standard that the Supreme Court announced in *Brecht v. Abrahamson*, an error is not harmless if it had a "substantial and injurious effect or influence" on the outcome of the proceeding.[327] The error "may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect that it had on the trial]."[328] A court's function with regard to federal habeas claims is to determine if the state court applied this harmless-error review in an objectively unreasonable manner.[329]

322. *See* 28 U.S.C. § 2254(d)(1) (2006).

323. *See supra* notes 43–55 and accompanying text.

324. *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 623 (1993); Kimmelman v. Morrison, 477 U.S. 365, 382 (1986).

325. *See* Collins v. Beard, No. 10-5950, 2012 WL 3135625, at *20 (E.D. Pa. Feb. 29, 2012) (noting the distinction between the *Strickland* and *Brecht* standards). *But see* Albrecht v. Horn, 485 F.3d 103, 139 (3d Cir. 2006) (terming the standards essentially the same).

326. *Kimmelman*, 477 U.S. at 382 n.7; *see also* O'Neal v. McAninch, 513 U.S. 432, 438 (1995); Chapman v. California, 386 U.S. 18, 24 (1967).

327. *Brecht*, 507 U.S. at 623 (quoting Kotteakos v. Unites States, 328 U.S. 750, 756 (1946)) (internal quotation marks omitted); *see also* Fry v. Pliler, 551 U.S. 112, 116 (2007) (noting that federal courts assess prejudicial impact of a state court's constitutional error under the *Brecht* standard of "substantial and injurious effect," regardless of whether or not state courts recognized the error or reviewed the error under a more generous standard).

328. *Brecht*, 507 U.S. at 629 (alterations in original) (quoting Arizona v. Fulminante, 499 U.S. 279, 307–08 (1991)) (internal quotation marks omitted).

329. Mitchell v. Esparza, 540 U.S. 12, 17–18 (2003); *Brecht*, 507 U.S. at 638.

The *Brecht* standard, which "spoke only to 'trial type' errors," is inapplicable to at least two situations: *Brady* claims and *Strickland* claims.[330] As the Supreme Court has explained, no "harmlessness analysis is required once a court determines that a petitioner has established a due process violation under *Brady* or a denial of the effective assistance of counsel."[331] To that extent, "[t]he *Strickland* prejudice analysis is complete in itself; there is no place for an additional harmless-error review."[332] Thus, "[w]hen a petitioner must show prejudice [under *Strickland*] . . . , it is unnecessary to show prejudice a second time through the lens of *Brecht*."[333]

Critically, the government bears the burden of demonstrating harmless error under the *Brecht* substantial and injurious standard.[334] By contrast, for ineffective assistance of counsel claims, the defendant bears the burden of demonstrating "that there exists a reasonable probability that, absent his attorney's incompetence, he would not have been convicted."[335]

3. *The Problem with Diminishing the Significance of* Strickland *Errors When No Non-*Strickland *Errors Are Present*

Even when the appropriate error standard is the same as *Strickland*'s outcome-prejudice standard, non-*Strickland* errors should not be cumulated with *Strickland* errors. To do so would inaptly marginalize the individual significance of *Strickland* errors. Furthermore, the cumulation of *Strickland* errors with non-*Strickland* errors potentially disregards the

330. LAFAVE ET AL., *supra* note 37, at 1374–75; *see also, e.g.*, Barrientes v. Johnson, 221 F.3d 741, 756 (5th Cir. 2000) (noting that harmless-error analysis is unnecessary for *Brady* and *Strickland* claims alike, as these claims rely upon the more demanding standard of reasonable probability).

331. Kyles v. Whitley, 514 U.S. 419, 435 (1995) ("[O]nce a reviewing court . . . has found constitutional error there is no need for further harmless-error review."); *see also* LAFAVE ET AL., *supra* note 37, at 1374–75.

332. Jackson v. Calderon, 211 F.3d 1148, 1154 n.2 (9th Cir. 2000) (citing Baylor v. Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996)).

333. Rodriguez v. Montgomery, 594 F.3d 548, 551 (7th Cir. 2010) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

334. O'Neal v. McAninch, 513 U.S. 432, 438 (1995); *see also, e.g.*, 2 HERTZ & LIEBMAN, *supra* note 73, 1686–87, 1689 (noting that the Supreme Court has instructed that government bears burden of persuasion with harmless-error analysis); LAFAVE ET AL., *supra* note 37, at 1374 (noting *O'Neal* "rejected the government's contention that [a § 2254] petitioner bore 'the burden of establishing' that constitutional error was 'prejudicial' under" *Brecht*).

335. Kimmelman v. Morrison, 477 U.S. 365, 382 n.7 (1986).

specific values that *Strickland* seeks to safeguard.[336]

To illustrate, when evaluating whether the evidence that the prosecution suppressed in violation of *Brady* was material, courts apply the same outcome-determinative standard used to establish *Strickland* prejudice.[337] On this basis, some observers have contended that *Strickland* claims can be cumulatively reviewed with *Brady* claims.[338]

Yet, if this approach were adopted, courts may be reluctant to find *Strickland* prejudice when no *Brady* error has occurred. Cumulating *Strickland* errors with *Brady* errors may create the undesirable result of discouraging otherwise proper conclusions of *Strickland* prejudice when a defendant alleges only *Strickland* errors. Additionally, cumulating *Strickland* errors with non-*Strickland* errors potentially overlooks the distinct values that *Strickland* and *Brady* protect. Consequently, to ensure the independent force and validity of *Strickland* claims and other types of claims, *Strickland* errors must be cumulated independently from non-*Strickland* errors.

D. *The Relevance of the Rest of the Record and the Strength of the Prosecution's Evidence*

The Supreme Court in *Kimmelman v. Morrison* stated, "While we have recognized that the 'premise of our adversary system of criminal justice . . . that partisan advocacy . . . will best promote the ultimate objective that the guilty be convicted and the innocent go free,' . . . we have never intimated that the right to counsel is conditioned upon actual innocence."[339]

Nonetheless, given the outcome-determinative nature of the *Strickland* prejudice assessment, the strength of the prosecution's evidence nonetheless remains relevant. In *Allen v. Woodford*, for example, the Ninth Circuit persuasively reasoned that even when an attorney's particular errors were "considered cumulatively, . . . these errors [we]re not

336. *See Strickland*, 466 U.S. at 684–85 (stressing the importance of effective counsel to protect a defendant's right to a fair trial).

337. Kyles v. Whitley, 514 U.S. 419, 435 (1995); United States v. Bagley, 473 U.S. 667, 682–84 (1985) (citing *Strickland*, 466 U.S. at 694).

338. *See, e.g.*, Blume & Seeds, *supra* note 15, at 1174.

339. *Kimmelman*, 477 U.S. at 379–80 (quoting Evitts v. Lucey, 469 U.S. 387, 394 (1985)) (internal quotation marks omitted) (declining to hold that the guarantee of constitutionally effective counsel "belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt" (footnote omitted)).

sufficiently prejudicial to overcome the overwhelming evidence, derived from numerous sources, of [the defendant's] guilt, or the uniquely aggravating circumstances surrounding [the defendant's] crimes."[340] Likewise, in *Gardner v. Galetka*, the Tenth Circuit cumulatively assessed an attorney's errors as part of the *Strickland* prejudice analysis.[341] Yet, *Gardner* concluded that "even if any of the claims of ineffective assistance during the guilt phase have merit, the strong evidence of [the defendant's] intent to shoot [the victim] would have still convinced the jury of his guilt . . . . Thus, reversal [wa]s not warranted on the cumulative effect of counsel's errors."[342]

Therefore, once a reviewing court cumulatively assesses all of counsel's errors, it should view these cumulatively assessed errors against the backdrop of the entire trial record, including the state's evidence and any trial court errors. This proposed approach is distinct from the practice of cumulating all non-*Strickland* errors and *Strickland* errors.[343] Instead, it maintains the critical and unique nature of the *Strickland* prejudice inquiry.

Viewing counsel's cumulated errors against the rest of the trial record is consistent with *Strickland*'s articulation of the prejudice standard. As *Strickland* instructed, "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. . . . Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."[344] Furthermore, *Strickland* explained that when assessing prejudice, a court "must consider the totality of the evidence before the judge or jury."[345] As *Strickland* elaborated:

> Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the

340. Allen v. Woodford, 395 F.3d 979, 1019 (9th Cir. 2005).

341. Gardner v. Galetka, 568 F.3d 862, 877 (10th Cir. 2009).

342. *Id.*; *see also* Albrecht v. Horn, 485 F.3d 103, 139 (3d Cir. 2006) (concluding that a verdict was not unreliable when defendant had a motive, he continued to abuse the victim, there was physical evidence against him, and he made numerous serious threats to a variety of people).

343. *See supra* Part V.C (explaining why *Strickland* errors should not be cumulatively assessed with non-*Strickland* errors).

344. Strickland v. Washington, 466 U.S. 668, 691–92 (1984).

345. *Id.* at 695.

> inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, 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.[346]

Although *Strickland* articulated these limitations within the context of trial counsel's ineffectiveness, they are equally applicable to assessments of an appellate counsel's ineffectiveness.

E. *Procedurally Defaulted Ineffectiveness Claims That Satisfy a Causal Standard May Be Cumulatively Assessed*

It is fundamental that state courts have the opportunity to assess errors before a federal habeas court does so. Under the procedural-default doctrine, a convict may not obtain § 2254 relief unless the convict has "properly presented his or her claims through one complete round of the State's established appellate review process."[347] Yet, a state convict may obtain § 2254 review of a procedurally defaulted claim "by showing cause for the default and prejudice."[348] As the U.S. Supreme Court explained in *Martinez v. Ryan*, a federal habeas court may review an ineffective assistance of trial counsel claim that procedurally defaulted, so long as the petitioner establishes sufficient cause for the default.[349] Consequently, as part of the *Strickland* cumulation analysis, a federal habeas court should be permitted to consider procedurally defaulted claims of ineffectiveness that satisfy the cause requirement.

F. *Adequately Preserving a Cumulative-Error Claim*

Many circuit courts that cumulate *Strickland* errors caution that a § 2254 petitioner who "argues that the cumulative effect of his trial

346. *Id.* at 695–96.

347. Woodford v. Ngo, 548 U.S. 81, 92–93 (2006) (quoting O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999)) (internal quotation marks omitted); see *supra* notes 67–73 and accompanying text for a discussion of the procedural-default doctrine.

348. Martinez v. Ryan, 132 S. Ct. 1309, 1316 (2012) (citing Coleman v. Thompson, 501 U.S. 722, 750 (1991)).

349. *Id.* at 1315; see *supra* notes 67–73 and accompanying text for a brief definition of the procedural-default doctrine.

attorney's purported errors resulted in . . . constitutionally deficient representation" must exhaust this cumulative-error claim.[350] Yet, contrary to this view, a § 2254 petitioner should not be obligated to raise an individual cumulation claim in state court. Instead, cumulation should be deemed implicit within the *Strickland* prejudice analysis.[351] As the Ninth Circuit has suggested, separate errors by counsel are "not separate claims, but rather different aspects of a *single claim* of ineffective assistance of counsel."[352]

A Supreme Court decision holding that an attorney's errors may be cumulated to establish *Strickland* prejudice would obviate the need for a petitioner to raise a separate cumulation claim. The Court's analysis in such a decision should clearly conceptualize cumulation as an inextricable component of the *Strickland* prejudice analysis. Therefore, no need exists for a state convict to assert a separate cumulation claim in state court in order to preserve it adequately for later federal habeas review.

VI. CONCLUSION

Multiple causal factors—rather than a single causal factor—frequently explain why a given result or effect occurs within the context of human actions or institutions.[353] Likewise, a criminal proceeding, with its inherent potential for error, can often be a "complex and messy place."[354] Thus, unfair prejudice in a criminal proceeding can conceivably be the cumulative result of multiple errors by any of the various human participants in the criminal justice system.

As the Supreme Court has repeatedly instructed, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[355] Concomitantly, however, a combination of several nonprejudicial errors by counsel may collectively create *Strickland* prejudice.

350. Knight v. Spencer, 447 F.3d 6, 18 (1st Cir. 2006); *see also* Bunton v. Atherton, 613 F.3d 973, 990 (10th Cir. 2010); Wooten v. Kirkland, 540 F.3d 1019, 1026 (9th Cir. 2008).

351. *See Strickland*, 466 U.S. at 687.

352. Sanders v. Ryder, 342 F.3d 991, 1001 (9th Cir. 2003) (emphasis added).

353. HUMPHREYS, *supra* note 254, at 7.

354. *See id.*

355. *Strickland*, 466 U.S. at 691–92 (citing United States v. Morrison, 449 U.S. 361, 364–65 (1981)).

The Supreme Court has not yet held that an attorney's errors may be cumulated for purposes of the *Strickland* prejudice analysis. Thus, cumulation within the *Strickland* prejudice analysis does not presently constitute clearly established law. Without a Supreme Court decision that renders *Strickland* cumulation clearly established law, federal habeas courts are barred from concluding that a state court's failure to cumulatively assess counsel's errors was unreasonable.

The Supreme Court should hold that an attorney's errors may be cumulated for purposes of the *Strickland* prejudice analysis. A clear directive from the Court will resolve the current circuit split concerning the propriety of *Strickland* cumulation when a federal court is reviewing a state conviction pursuant to § 2254 review. The Court's affirmation of the cumulative-error doctrine as an integral part of the *Strickland* prejudice analysis comports with its well-established ineffective assistance of counsel jurisprudence. Moreover, this affirmation recognizes what logic and common sense dictate—that a combination of several nonprejudicial errors by counsel may satisfy the *Strickland* prejudice standard. Perhaps most fundamentally, the cumulation of an attorney's errors ultimately recognizes the human fallibility of not only the criminal justice system but also defense counsel's crucial role in that system.