

July 2014

## It Adds Up: Ineffective Assistance of Counsel and the Cumulative Deficiency Doctrine

Michael McLaughlin

Follow this and additional works at: <https://readingroom.law.gsu.edu/gsulr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Michael McLaughlin, *It Adds Up: Ineffective Assistance of Counsel and the Cumulative Deficiency Doctrine*, 30 GA. ST. U. L. REV. (2014).  
Available at: <https://readingroom.law.gsu.edu/gsulr/vol30/iss3/5>

This Article is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact [mbutler@gsu.edu](mailto:mbutler@gsu.edu).

# IT ADDS UP: INEFFECTIVE ASSISTANCE OF COUNSEL AND THE CUMULATIVE DEFICIENCY DOCTRINE

Michael C. McLaughlin\*

## TABLE OF CONTENTS

INTRODUCTION .....	859
I. THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.....	864
A. <i>The Right to Assistance of Counsel in Criminal Cases</i> .....	864
B. <i>The Right to Effective Assistance of Counsel in Criminal Cases</i> .....	866
II. THE CIRCUIT SPLIT .....	871
A. <i>Circuits Rejecting the Cumulative Error Doctrine</i> ....	871
B. <i>Circuits Adopting the Cumulative Error Doctrine</i> ....	874
C. <i>The Eleventh Circuit: Calling Attention to the Lack of Supreme Court Guidance</i> .....	876
III. RESOLVING THE SPLIT AND ENSURING UNIFORMITY .....	879
CONCLUSION .....	883

## INTRODUCTION

Benjamin Harris watched as his appointed defense counsel, Murray Anderson, delivered a closing argument in his murder trial.<sup>1</sup> Anderson began to verbally attack his own client, telling members of the jury Harris was a liar and a thief; Anderson continued that Harris had “in’s [sic] and out’s [sic] with several young women,” that “he drank intoxicating liquor a great deal[,]” and he is “a man who doesn’t have

---

\* Thank you to my *Georgia State University Law Review* classmates for contributing to this Note, especially Meg Buice and Andrew Hazen.

1. Harris *ex rel.* Ramseyer v. Wood, 64 F.3d 1432, 1437–38 (9th Cir. 1995). Harris was charged and found guilty of aggravated first-degree murder. *Id.* at 1435. Upon advice of counsel, Harris gave a statement to prosecutors claiming that he shot the victim, but only after his friend, a hired hit man, fired. *Id.* at 1435. Harris and the alleged hit man were tried separately, and the hit man was acquitted. *Id.* at 1434 n.2.

the same moral code as we expect” because he belongs to “a class of men who don’t work and carry guns, regularly.”<sup>2</sup> Likely most damning to his client’s murder charge, Anderson argued to the jury that Harris and his cohorts “kill people.”<sup>3</sup> It is possible that defense counsel—realizing that the jurors felt no sympathy for Mr. Harris—made a strategic decision to dehumanize his client. However, this theory appears less probable considering Anderson had three months to prepare for Harris’s trial, and Anderson only met with Harris for a total of 1 hour and 48 minutes during these months.<sup>4</sup> Anderson had a list of thirty-two persons with knowledge of the murder, but interviewed only three witnesses.<sup>5</sup> Further, Anderson failed to request an investigator to help interview witnesses.<sup>6</sup> Not surprisingly, following his first-degree murder conviction, Harris petitioned for habeas corpus relief based on ineffective assistance of counsel.<sup>7</sup>

In order to succeed on a claim of ineffective assistance of counsel, a defendant must show that his counsel’s representation fell below an “objective standard of reasonableness.”<sup>8</sup> Harris argued the cumulative

2. *Id.* at 1437–38 (alteration in original) (internal quotation marks omitted). The court noted defense counsel’s statements attacked his own client’s veracity and “even his humanity.” *Id.* at 1437.

3. *Id.* at 1438 (internal quotation marks omitted). The Ninth Circuit commented that this closing argument “left the jury little reason to empathize with Harris.” *Id.* It concluded that, “[these arguments] did not support a reasonable defense theory.” *Id.* (quoting Harris *ex rel.* Ramseyer v. Blodgett, 853 F. Supp. 1239, 1267–68 (W.D. Wash. 1994)).

4. *Id.* at 1434–36. It appears Anderson was simply ineffective rather than a victim of ill-planned strategy. *See id.* at 1438. The Ninth Circuit actually addressed the strategic aspect of this closing argument and noted, “these arguments were beyond any discernible trial strategy, and were outrageous.” *Id.* (quoting *Blodgett*, 853 F. Supp. at 1267–68).

5. *Id.* at 1435.

6. *Id.* According to Anderson’s billing statements, he consulted with his client for less than two hours over three months for a first-degree murder case. *Id.* at 1434–35. Police reports listed approximately thirty-two persons with knowledge of the murder, nineteen of which testified at trial, and Anderson interviewed only three witnesses by himself. *Id.* Harris also alleged that Anderson made many other errors during the guilt phase of his trial that the Ninth Circuit did not address as thoroughly. *Id.* at 1438. These deficiencies included, among others: (1) “failure to investigate adequately Harris’s mental and emotional status;” (2) “failure to challenge the admissibility of Harris’s statements” regarding the events of the murder; (3) “failure to conduct proper voir dire;” (4) “failure to object to evidence;” (5) “failure to propose . . . jury instructions;” (6) “failure to raise or preserve meritorious issues in appellate proceedings;” and (7) Anderson’s “decision to call Harris to testify at trial.” *Id.*

7. *Harris ex rel. Ramseyer*, 64 F.3d at 1434. The district court granted Harris’s petition for habeas corpus relief. *Id.* at 1435. The court vacated his first-degree murder conviction and death sentence. *Id.* The State appealed to the Ninth Circuit challenging the lower court’s ruling that many of Anderson’s actions or omissions during the case were deficient. *Id.*

8. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). For a critique of this standard, see Martin C.

impact of Anderson's unreasonable "deficiencies prejudiced his defense" and right to a fair trial.<sup>9</sup> The Ninth Circuit affirmed Harris's habeas relief by adding defense counsel's errors together; in fact, the court specifically noted, "[w]e do not need to decide whether these deficiencies alone meet the prejudice standard."<sup>10</sup> Although this seems logical, especially in the context of this case, Harris, here, received different Sixth Amendment protections than other defendants around the country.<sup>11</sup>

The Sixth Amendment to the United States Constitution protects an individual's fundamental right to a fair trial.<sup>12</sup> The United States Supreme Court has repeatedly emphasized that entitlement to counsel plays a critical role in protecting this fundamental right.<sup>13</sup> In *Strickland*

---

Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413 (1988). Calhoun quotes Judge Bazelon that "in 23 years on the bench . . . a great many—if not most—indigent defendants do not receive the effective assistance of counsel guaranteed them by the 6th Amendment . . ." *Id.* at 416 (quoting David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973)). Judge Bazelon likens current court-appointed protection to "little more than pro forma representation." *Id.*

9. *Harris ex rel. Ramseyer*, 64 F.3d at 1438. Harris alleged defense counsel committed as many as eleven errors during and before his trial. *Id.* at 1435–38. The Ninth Circuit addressed some of the errors individually but focused on the accumulation of errors. *Id.*

10. *Id.* at 1439 (quoting *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992)). "By finding cumulative prejudice, we obviate the need to analyze the individual prejudicial effect of each deficiency." *Id.* The Ninth Circuit continued: "Anderson's performance was deficient in eleven ways, eight of them undisputed. We are compelled to find that they cumulatively prejudiced Harris's defense. The court properly granted habeas relief." *Id.*

11. *See, e.g., Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998) (announcing ineffective assistance of counsel claims must be viewed "individually, rather than collectively"); *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996) (holding that an attorney's acts or omissions "that are not unconstitutional individually cannot be added together to create a constitutional violation"); *Jones v. Stotts*, 59 F.3d 143, 147 (10th Cir. 1995) (explaining "cumulative-error analysis evaluates only [the] effect of matters determined to be error, not [the] cumulative effect of non-errors") (citing *United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990)).

12. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.")

13. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 342 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938); *Powell v. Alabama*, 287 U.S. 45, 67 (1932). In an adversarial judicial system, "access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland*, 466 U.S. at 685 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942)). Because an attorney's role is of vital importance, a person accused of a federal or state crime, with limited exceptions, has the right to have counsel appointed if one cannot be obtained. *Argersinger v. Hamlin*, 407 U.S. 25, 30–31 (1972) (rejecting the contention that prosecutions of petty crimes, which may be tried without a jury, could be tried without a lawyer).

*v. Washington*, the Court announced a two-prong test to evaluate whether a convicted defendant was deprived of his Sixth Amendment right to effective assistance of counsel.<sup>14</sup> In order to succeed on a claim of ineffective assistance of counsel, the defendant must show (1) the “counsel’s performance was deficient” and (2) that the deficient performance prejudiced the defendant as to deprive him of a fair trial.<sup>15</sup> In evaluating counsel’s alleged deficiency, the inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.<sup>16</sup> In evaluating the prejudice prong, courts require that “but-for” counsel’s deficiency, the result of the trial likely would have been different.<sup>17</sup> Unless a defendant affirmatively shows both deficient performance and a resulting prejudice, it cannot be said the defendant’s conviction occurred “from a breakdown in the adversary process that renders the result unreliable.”<sup>18</sup>

Since the Court formed the foundation of ineffective assistance of counsel claims in 1984, a circuit split has emerged on the issue of whether the first prong of the test requires appellate courts to review each of counsel’s errors individually or allows courts to consider counsel’s multiple errors as one whole claim.<sup>19</sup> By permitting courts

14. *Strickland*, 466 U.S. at 687. The Supreme Court had already “recognized that the right to counsel is the right to the effective assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

15. *Strickland*, 466 U.S. at 687. One author explained the current test for constitutionally ineffective assistance of counsel claims as follows: “In the majority of cases, the defendant must prove that specific errors were unreasonable and prejudicial. That is, the errors were not within the broad range of acceptable strategic decisions, and they had a reasonable probability of affecting the outcome of the case.” Jeffrey Levinson, Note, *Don’t Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 157 (2001).

16. *Strickland*, 466 U.S. at 689 (“Judicial scrutiny of counsel’s performance must be highly deferential.”). Courts must not apply hindsight because it “is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Id.*

17. *Id.* at 693–94 (“It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . On the other hand, we believe that a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case. . . . The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”).

18. *Id.* at 687. By meeting each prong, the defendant shows that counsel’s representation fell below an objective standard of reasonableness. *Id.* at 688.

19. *Forrest v. Fla. Dep’t of Corr.*, 342 F. App’x 560, 564–65 (11th Cir. 2009) (acknowledging that the Supreme Court has not directly addressed the applicability of the cumulative error doctrine in the context of an ineffective assistance of counsel claim). The Eleventh Circuit then went on to cast doubt on the

to consider multiple errors as one claim, a defendant may argue counsel committed multiple errors (although each one alone was not egregious enough to warrant a finding of deficient performance) that amounted to a cumulative deficiency below the Sixth Amendment standard.<sup>20</sup> The Fourth, Eighth, and Tenth Circuits have taken a hostile stance toward cumulative deficiency claims, holding that ineffective assistance of counsel claims must be viewed individually rather than collectively.<sup>21</sup> The Second, Seventh, and Ninth Circuits hold the opposite and allow a defendant—like Harris—to prove he suffered ineffective assistance of counsel based on the cumulative effect of errors. These circuit courts ask whether the “multiple deficiencies have the cumulative effect of denying a fair trial to the [habeas corpus] petitioner . . . .”<sup>22</sup>

This Note argues that courts need to allow defendants to prove they suffered ineffective assistance of counsel based on the cumulative effect of counsel’s alleged errors. If the court finds a multitude of errors played a role in denying the defendant his Sixth Amendment right to effective counsel, the court should be able to consider them

---

cumulative deficiency doctrine by interpreting a Supreme Court case on ineffective assistance of counsel claims that was not *Strickland*. See discussion *infra* Part II.C.

20. *Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432, 1435 (9th Cir. 1995). See also sources cited *infra* note 22.

21. *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998) (announcing ineffective assistance of counsel claims “must be reviewed individually, rather than collectively”). This court took the time to cite multiple authorities in announcing this rule. See, e.g., *Arnold v. Evatt*, 113 F.3d 1352, 1364 (4th Cir. 1997) (rejecting a request to review the alleged errors of a trial court cumulatively rather than individually); *Hoots v. Allsbrook*, 785 F.2d 1214, 1219–23 (4th Cir. 1986) (considering ineffective assistance claims individually rather than considering their cumulative impact). Similarly, the Eighth Circuit held that an attorney’s acts or omissions “that are not unconstitutional individually cannot be added together to create a constitutional violation.” *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996). This holding mirrors the Tenth Circuit’s decision in *Jones v. Stotts*, noting that, “cumulative-error analysis evaluates only effect of matters determined to be error, not cumulative effect of non-errors.” 59 F.3d 143, 147 (10th Cir. 1995) (citing *United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990)).

22. *Ewing v. Williams*, 596 F.2d 391, 396 (9th Cir. 1979). A “claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel’s actions.” *Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991). See also *Williams v. Washington*, 59 F.3d 673, 682 (7th Cir. 1995) (defendant may demonstrate that the cumulative effect of counsel’s individual acts or omissions was prejudicial); *Harris ex rel. Ramseyer*, 64 F.3d at 1438 (recognizing that “prejudice may result from the cumulative impact of multiple deficiencies”) (internal quotation marks omitted). The Ninth Circuit totaled counsel’s alleged errors, even before *Strickland*. See, e.g., *Ewing*, 596 F.2d at 396 (“Where no single error or omission of counsel, standing alone, significantly impairs the defense, the district court may nonetheless find unfairness and thus, prejudice emanating from the totality of counsel’s errors and omissions.”).

together rather than the stricter standard of requiring each one alone to prejudice the defendant. By addressing this circuit discrepancy, the Supreme Court will ensure citizens have the same Sixth Amendment rights throughout the country. Part I provides background information of the development and history of ineffective assistance of counsel claims in our nation.<sup>23</sup> Part II analyzes the circuit split regarding the cumulative error doctrine by highlighting some concrete examples of the conflicting approaches.<sup>24</sup> Part III urges the Supreme Court to take up the issue and proposes that the cumulative error doctrine should be available to defendants in the context of ineffective assistance of counsel claims.<sup>25</sup>

## I. THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

### A. *The Right to Assistance of Counsel in Criminal Cases*

The Sixth Amendment guarantees to every defendant in a criminal trial the assistance of counsel.<sup>26</sup> However, this current protection evolved in Sixth Amendment jurisprudence, as it originally only applied in federal courts. In 1942, the Supreme Court held that the Sixth Amendment only mandated the right to counsel in state courts when the circumstances indicated that a deprivation would “constitute a denial of fundamental fairness, shocking to the universal sense of justice.”<sup>27</sup> Even though the Supreme Court noted that the right to the aid of counsel was of a fundamental character encompassed by the Fourteenth Amendment’s Due Process Clause, it declined to extend the Sixth Amendment to the states in every criminal case.<sup>28</sup> During this time period, “[c]ourts typically weighed the competing interests of the defendant and the State to decide whether to provide counsel.”<sup>29</sup> Thus,

---

23. See discussion *infra* Part I.

24. See discussion *infra* Part II.

25. See discussion *infra* Part III.

26. See *supra* note 12.

27. *Betts v. Brady*, 316 U.S. 455, 462 (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

28. *Id.* at 461–62.

29. Jennifer N. Foster, Note, *Lockhart v. Fretwell: Using Hindsight to Evaluate Prejudice in Claims of Ineffective Assistance of Counsel*, 72 N.C. L. REV. 1369, 1377 (1994). This balancing process instructed

a defendant facing robbery charges who could not afford counsel likely would not have one appointed, but a defendant facing more serious charges, like murder or rape, would.<sup>30</sup>

In 1963, the Supreme Court overruled its previous precedent not requiring assistance of counsel in all cases and explicitly decided that “the right to assistance of counsel in criminal cases was obligatory on the states through the [Fourteenth] Amendment . . . .”<sup>31</sup> The Supreme Court announced this rule in *Gideon v. Wainwright*, reasoning that the right to counsel was essential to the right to a fair trial.<sup>32</sup> The Court rejected lower courts’ approach of examining on a case-by-case basis whether fairness dictated the need for counsel appointment and, instead, incorporated a defendant’s Sixth Amendment right to counsel onto the states in all criminal cases.<sup>33</sup> Quoting Justice Sutherland, the Supreme Court explained a defendant’s need for appointed counsel:

The right to be heard would be, in many cases, of little avail if it

---

lower courts to determine on an ad-hoc basis whether “fundamental fairness” warranted appointment. *Betts*, 316 U.S. at 462. This has proved a difficult task for courts. *Foster, supra*, at 1377 (“Although the State had interests in conserving resources, preserving verdicts, and maintaining the integrity of its judicial system, the interests of the defendant were more difficult to ascertain. Courts often measured the defendant’s interest in obtaining counsel by the gravity and complexity of the charge and by the age and education of the defendant. These factors proved difficult for courts to identify at the outset of trial; as a result, appellate courts often inquired into the actual harm or prejudice the defendant suffered as the result of the denial of counsel.”).

30. *Betts*, 316 U.S. at 457. In *Betts*, the defendant was indicted for robbery in Carroll County, Maryland. *Id.* at 456. At his arraignment, he informed the judge he could not afford to employ counsel, and he requested that counsel be appointed for him. *Id.* at 457. “The judge advised him that this could not be done as it was not the practice in Carroll County to appoint counsel for indigent defendants save in prosecutions for murder and rape.” *Id.*

31. Randy J. Sutton, Annotation, *Construction and Application of Sixth Amendment Right to Counsel—Supreme Court Cases*, 33 A.L.R. FED. 2D 1, 3 (2009); *Gideon*, 372 U.S. at 339.

32. *Gideon*, 372 U.S. at 344. Here, the defendant was charged in a Florida state court with breaking and entering a poolroom with intent to commit a misdemeanor, which is a felony offense under Florida law. *Id.* at 336. The defendant appeared at his arraignment without funds to employ a lawyer, and he requested the court to appoint counsel for him. *Id.* at 337. The following colloquy took place:

The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.

The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel.

*Id.*

33. *Id.* at 342–45. The Supreme Court already had extended the Sixth Amendment right to counsel to all felony defendants in federal courts. *Johnson v. Zerbst*, 304 U.S. 458, 467–68 (1938).

did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.<sup>34</sup>

As this Sixth Amendment right to assistance grew, so did the right to *quality* assistance.<sup>35</sup>

#### B. *The Right to Effective Assistance of Counsel in Criminal Cases*

Since the Sixth Amendment right to counsel effectuates the due process right to a fair trial, it is not enough to just have counsel formally appointed or nearby during the trial.<sup>36</sup> As the accused's right to counsel in every criminal trial developed in this country, so did their right to quality assistance; the Sixth Amendment right to counsel

---

34. *Gideon*, 372 U.S. at 344–45 (quoting *Powell v. State of Ala.*, 287 U.S. 45, 68–69 (1932)). For a reflection on Justice Sutherland's legacy on the bench, see Samuel R. Olken, *Justice Sutherland Reconsidered*, 62 VAND. L. REV. 639 (2009). Olken references many of the opinions by Justice Sutherland within the scope of this note:

Sutherland's opinion in *Powell v. Alabama* exemplifies his heightened sensitivity to the problems factions pose in the democratic process. . . . Though relatively narrow in scope, *Powell* is a critical link in the chain of Supreme Court precedent that culminated in the more inclusive incorporation of the Sixth Amendment right to counsel in felony cases recognized in *Gideon v. Wainwright*.

*Id.* at 690.

35. See, e.g., *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Avery v. Alabama*, 308 U.S. 444, 446 (1940); *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

36. *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (“[A] person who happens to be a lawyer . . . present at trial alongside the accused . . . is not enough to satisfy the [Sixth Amendment’s] constitutional command.”); *Avery*, 308 U.S. at 446 (announcing that the right to counsel “cannot be satisfied by mere formal appointment” and could be violated where counsel is denied the opportunity to confer or consult with the accused).

became a constitutional right to “effective counsel.”<sup>37</sup> The Court first suggested that counsel must perform “effectively” in *Powell v. Alabama*, in which the trial court did not appoint defense counsel until just before trial.<sup>38</sup> This day-of appointment of counsel, allowing little time to prepare a defense, “amount[ed] to a denial of effective and substantial” assistance.<sup>39</sup> Cases following the early articulation of the “effective” standard largely consisted of due process claims, where the government interfered in some way with defense counsel and hindered counsel’s ability to be effective.<sup>40</sup> Those cases’ interpretations of “effective assistance” largely focused on courts’ actions in depriving the defendant the right to effective assistance of counsel, rather than the counsel himself depriving the defendant by providing inadequate legal assistance.<sup>41</sup>

In 1970 with *McMann v. Richardson*, the Supreme Court cemented the *Powell* standard that the right to counsel is the “right to effective assistance of counsel” in a context where a defendant claimed he received inadequate legal assistance, as opposed to arguing that the government’s interference rendered his representation ineffective.<sup>42</sup> The Supreme Court, however, failed to provide substantive guidance in evaluating whether the constitutional requirement of effective

---

37. *McMann*, 397 U.S. at 771 n.14. *Strickland* elaborated on the reasoning for such a proposition: “The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce the just results.” 466 U.S. at 685. Therefore, an attorney must be effective in order to ensure that the trial is fair and to uphold the adversarial process. *Id.*

38. *Powell*, 287 U.S. at 53, 71. In *Powell*, the defendants were two black men charged with raping two white women. *Id.* at 49. The trials were held separately, but the outcomes were the same. *Id.* The juries found them guilty and sentenced them to death. *Id.* at 50.

39. *Id.* at 53. The constitutional duty to appoint counsel “is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.” *Id.* at 71.

40. *See, e.g.*, *Brooks v. Tennessee*, 406 U.S. 605, 619 (1972) (requiring that defendant be first witness); *Ferguson v. Georgia*, 365 U.S. 570, 592 (1961) (barring direct examination of defendant except at the discretion of the trial judge).

41. *Strickland*, 466 U.S. at 683 (noting the difference between “actual ineffectiveness” of counsel claims and government interference rendering defense counsel ineffective).

42. *McMann*, 397 U.S. at 763–64. In *McMann*, three defendants each claimed they received ineffective assistance of counsel when their respective counsels encouraged them to accept guilty pleas. *Id.* at 362–64. The Court, citing *Powell v. Alabama*, noted that “[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.” *Id.* at 771 n.14.

assistance had been met; instead it left to the lower courts the task of defining the minimum level of competence the Constitution requires.<sup>43</sup>

Before the proper standards were articulated in *Strickland*, state courts and lower federal courts mostly continued to evaluate ineffective assistance of counsel claims as they had been doing despite *McMann*.<sup>44</sup> The first common test that evolved focused on whether the defendant's deprivation of effective assistance of counsel ultimately resulted in a fundamentally unfair proceeding.<sup>45</sup> This prejudice-based test gradually emerged as the "farce and mockery" standard that controlled in federal courts.<sup>46</sup> Under this standard, "[t]he defendant had to prove that, during the course of the trial, counsel's representation—either through omissions, failure to call witnesses, insufficient preparation, and the like—was so incompetent as to render" the proceedings a farce or mockery.<sup>47</sup> Courts found this standard unworkable because the high burden on the defendant to prove counsel's ineffectiveness converted the trial into a "farce;" because of the vagueness of this standard, courts abandoned the test.<sup>48</sup> The appellate courts did not wait until the Supreme Court expressly

---

43. *Id.* at 771 (arguing that the standard for defense counsel competence "should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts").

44. Although *McMann* cemented the standard, it did not affect the way lower courts evaluated effective assistance of counsel claims because of the lack of guidance provided. For an in-depth discussion on the history of federal courts' interpretations of ineffective assistance of counsel claims, see Richard P. Rhodes, Jr., Note, *Strickland v. Washington: Safeguard of the Capital Defendant's Right to Effective Assistance of Counsel?*, 12 B.C. THIRD WORLD L.J. 121 (1992).

45. Foster, *supra* note 29, at 1377; Rhodes, *supra* note 44, at 127.

46. Rhodes, *supra* note 44, at 127. See, e.g., *Beasley v. United States*, 491 F.2d 687, 694 (6th Cir. 1974) ("In reviewing this Circuit's treatment of 'effective assistance of counsel,' we have found numerous assertions of the 'farce and mockery' standard . . .").

47. Rhodes, *supra* note 44, at 127 ("This standard exemplified the prevailing notion that, except in the most egregious of circumstances, the verdicts of otherwise fair criminal proceedings should never serve a subordinate role to a defendant's ineffective assistance of counsel claim.").

48. By 1970, around the time of the *McMann* decision, the District of Columbia Circuit Court of Appeals expressly invalidated the farce and mockery standard. *Scott v. United States*, 427 F.2d 609, 610 (D.C. Cir. 1970) (citing *Bruce v. United States*, 379 F.2d 113, 116 (D.C. Cir. 1967)). The District of Columbia Circuit Court then instituted the "gross incompetence standard." *Id.* "If the defendant could establish that the gross incompetence of defense counsel precluded the mounting of an effective defense, then a sentence reversal would follow." Rhodes, *supra* note 44, at 128.

rejected the “the farce and mockery test” in 1978 to develop a different standard.<sup>49</sup>

As federal appellate courts began rejecting the farce and mockery test, the circuits developed a variety of approaches to evaluate ineffective claims that involved some sort of “reasonableness” standard.<sup>50</sup> For example, during this time period, the Fifth Circuit utilized “the reasonably competent attorney rule,” which evaluated whether counsel provided “reasonably effective assistance.”<sup>51</sup> The First, Second, and Tenth Circuits similarly required counsel to provide “reasonably competent assistance.”<sup>52</sup> The Sixth Circuit emphasized an ad-hoc approach and asked if the representation was “reasonably effective assistance under the particular facts and circumstances of the case.”<sup>53</sup> Some circuits looked to professional norms in evaluating whether a defendant was deprived of effective assistance of counsel; the Seventh Circuit looked for a “minimum standard of professional representation.”<sup>54</sup> Likewise, the Eighth Circuit required defense counsel to exhibit “customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.”<sup>55</sup> Two years prior to *Strickland*, the Eleventh Circuit defined the right to effective counsel as “the right to counsel reasonably likely to render

---

49. *Marzullo v. Maryland*, 561 F.2d 540, 544 (4th Cir. 1977) (rejecting the farce and mockery test). The Fourth Circuit noted confusion among the lower courts about which standard to apply:

We implicitly departed from the farce and mockery test when, in *Coles v. Peyton*, . . . we imposed specific requirements for counsel’s preparation of his client’s defense. *Coles* has been cited frequently as offering an improved measure for counsel’s performance. Nevertheless, some of our subsequent opinions quoted the [farce and mockery] test, and district courts, justifiably relying on them, have continued to apply it. . . . Since *Coles*, we have usually judged effective representation by determining whether counsel furnished reasonably adequate services instead of inquiring whether the representation was so poor as to make a farce of the trial. Be that as it may, our ambivalence has persisted long enough. We now expressly disavow the farce and mockery of justice test which we approved in *Root v. Cunningham* . . . .

*Id.* at 543 (citations omitted).

50. *Rhodes*, *supra* note 44, at 128.

51. *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960). The Fifth Circuit noted that a defendant is not entitled to an “errorless counsel,” and the counsel will not be “judged ineffective by hindsight.” *Id.*

52. *Trapnell v. United States*, 725 F.2d 149, 153 (2d Cir. 1983); *Dyer v. Crisp*, 613 F.2d 275, 276 (10th Cir. 1980); *United States v. Bosch*, 584 F.2d 1113, 1122 (1st Cir. 1978).

53. *Wilson v. Cowan*, 578 F.2d 166, 166–68 (6th Cir. 1978) (stressing the background facts of the case against which the attorney made his decisions).

54. *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 641 (7th Cir. 1975).

55. *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976).

and rendering reasonably effective assistance.”<sup>56</sup> Most appellate courts called for a showing of harm in addition to the unreasonable errors.<sup>57</sup>

Although appellate courts unanimously utilized some sort of reasonableness test in weighing ineffective assistance claims, the circuit courts applied their own particular standard to define the term, leading to a lack of uniformity.<sup>58</sup> Finally, in *Strickland v. Washington* in 1984, the Supreme Court elaborated on the meaning of the constitutional requirement of effective assistance of counsel and articulated the two-prong deficiency and prejudice test for federal and state courts to *uniformly* apply.<sup>59</sup> As mentioned, the Supreme Court held a defendant meets the deficiency prong by showing his counsel’s performance “fell below an objective standard of reasonableness.”<sup>60</sup> In order to meet the prejudice prong, the defendant must show that the deficient performance likely deprived him of a fair trial.<sup>61</sup> Unfortunately, a deep circuit split has emerged regarding the applicability of the cumulative error doctrine in the context of ineffective assistance of counsel claims. May a defendant total together counsel’s alleged errors to determine that such a performance, when viewed in the aggregate, deprived him of the right to a fair trial?

---

56. *Goodwin v. Balkcom*, 684 F.2d 794, 804 (11th Cir. 1982).

57. *See id.* at 805 (“[R]elief is proper only where a showing of prejudice accompanies the initial and distinct determination of ineffective assistance. This is true even in those cases where counsel’s preparation and investigation have been adjudged woefully inadequate.”). *But cf. Moore v. United States*, 432 F.2d 730, 737 (3d Cir. 1970) (“[T]he ultimate issue is not whether a defendant was prejudiced by his counsel’s act or omission, but whether counsel’s performance was at the level of normal competency. That the client was prejudiced by a failure in performance is of course evidentiary on the issue.”).

58. *See Rhodes*, *supra* note 44, at 128–30.

59. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (“In giving meaning to the requirement [of effective assistance] . . . we must take its purpose—to ensure a fair trial—as the guide.”). Recall, the Supreme Court had already recognized that the right to counsel is “the right to the effective assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

60. *Strickland*, 466 U.S. at 688.

61. *Id.* at 694.

## II. THE CIRCUIT SPLIT

### A. *Circuits Rejecting the Cumulative Error Doctrine*

In 1998, the Fourth Circuit proudly rejected the cumulative error doctrine in *Fisher v. Angelone*.<sup>62</sup> Ensuring no confusion, the Fourth Circuit announced: “To the extent this Court has not specifically stated that ineffective assistance of counsel claims . . . must be reviewed individually, rather than collectively, we do so now.”<sup>63</sup> Previously, the trial court convicted David Fisher of capital murder, determined he was a danger to society, and sentenced him to death.<sup>64</sup> Following his conviction, Fisher petitioned the Fourth Circuit for habeas relief, enumerating five specific errors defense counsel made that deprived him of effective assistance of counsel.<sup>65</sup> Fisher claimed his counsel’s alleged errors were: (1) “failing to challenge the admissibility of [] taped conversations with a government witness”; (2) “failing to develop and present evidence to rebut the aggravating factor of future dangerousness”; (3) “failing to develop and present additional mitigating evidence”; (4) “opening the door to evidence of his parole eligibility status”; and (5) “failing to object when the burden was placed on defendant to prove that he should not be sentenced to death.”<sup>66</sup> Fisher also had a separate enumerated claim that the

---

62. *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998). For an equally proud example of a court accepting the cumulative error doctrine, see *Wisconsin v. Thiel*, 665 N.W.2d 305, 322 (Wis. 2003).

Just as a single mistake in an attorney’s otherwise commendable representation may be so serious as to impugn the integrity of a proceeding, the cumulative effect of several deficient acts or omissions may, in certain instances, also undermine a reviewing court’s confidence in the outcome of a proceeding. Therefore, in determining whether a defendant has been prejudiced as a result of counsel’s deficient performance, we may aggregate the effects of multiple incidents of deficient performance in determining whether the overall impact of the deficiencies satisfied the standard for a new trial under *Strickland*.

*Id.*

63. *Fisher*, 163 F.3d at 852.

64. *Id.* at 838. Fisher killed his friend to cash in on a life insurance policy he had taken out on the friend. *Id.* at 839. Fisher successfully staged the murder scene to look like a hunting accident; however, the life insurance company, reluctant to pay the claim, began an investigation of the circumstances surrounding the death and became suspicious of a cover-up. *Id.* at 840.

65. *Id.* at 843.

66. *Id.*

*combined effect* of these five errors rendered his counsel's assistance ineffective.<sup>67</sup>

After addressing each individual error and determining that each error alone did not prejudice the defendant, the Fourth Circuit denied Fisher's habeas relief.<sup>68</sup> Even though the court dismissed these errors one by one as non-prejudicial, the court engaged in a rather lengthy discussion regarding each error—implying the court may have considered at least some of these errors significant.<sup>69</sup> The court then held that, under *Strickland*, it could not consider the errors collectively to determine whether Fisher was prejudiced.<sup>70</sup> The Fourth Circuit likened the cumulative error doctrine for ineffective assistance of counsel claims to adding the alleged errors of a trial court together.<sup>71</sup> Although in comparing the claims and announcing the rule, the Fourth Circuit failed to explain the rule's reasoning.<sup>72</sup> The court stated that it “has long been the practice of this Court [to individually assess claims]” and “[i]n so holding, we are in agreement with the majority of our sister circuits that have considered the issue.”<sup>73</sup> By rooting its rationale for rejecting the cumulative error doctrine in precedent, citing the Supreme Court as well as the court's own earlier decisions, the

67. *Id.*

68. *Id.* at 852. Moreover, the court conceded that defense counsel failed to articulate objection grounds for evidence that was inadmissible but admitted by the trial judge. *Id.* at 849.

69. *See Fisher*, 163 F.3d at 849–50.

70. *Id.* at 852 (“[I]t would be odd, to say the least, to conclude that those same actions [individual errors], when considered collectively, deprived Fisher of a fair trial.”).

71. *Id.* at 852 (citing *Arnold v. Evatt*, 113 F.3d 1352 (4th Cir. 1997)).

72. *See generally id.* at 851–54 (explaining only that the rule is in agreement with the majority of sister circuits).

73. *Id.* at 852. The Circuit Court then cited the Eighth Circuit, the Tenth Circuit, and the Ninth Circuit as authority for its proposition. *Id.* at 853. However, the Ninth Circuit *does* permit cumulative errors to factor into a prejudice determination. *Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995) (holding for purposes of ineffective assistance of counsel claim, defense may be prejudiced as a result of cumulative impact of multiple deficiencies in defense counsel's performance). The Ninth Circuit totaled counsel's alleged errors, even before *Strickland*. *See, e.g., Ewing v. Williams*, 596 F.2d 391, 396 (9th Cir. 1979). For a different interpretation of *Fisher*, see *United States v. Russell*, 34 F. App'x 927 (4th Cir. 2002). Without ruling on the applicability thereof, the court concluded that *Fisher* did not support the district court's rejection of the cumulative-effect claim where the district court assumed, but did not decide, that the defense attorney's performance was deficient; if his attorney's performance was deficient, “cumulatively, [defendant] could show prejudice.” *Id.* at 928.

court neglected to explain why this rule properly comports with *Strickland*.<sup>74</sup>

While the accuracy of the *Fisher* court's statement that most circuits reject the cumulative error doctrine is questionable—because the court cited circuits that do cumulate counsel's errors for this proposition—the Fourth Circuit *is* in agreement with the Eighth, Tenth, and Sixth Circuits on the issue.<sup>75</sup> The Eighth Circuit has expressly held that an attorney's acts or omissions “that are not unconstitutional individually cannot be added together to create a constitutional violation.”<sup>76</sup> Similarly, the Tenth Circuit has held that “cumulative-error analysis evaluates only [the] effect of matters determined to be error, not [the] cumulative effect of non-errors.”<sup>77</sup> The courts rejecting cumulative error analysis often cite *Strickland* or other precedent in lieu of an explanation.<sup>78</sup> However, in one early Tenth Circuit decision on the cumulative error matter, the court rooted its denial of the doctrine in its fear of “uncontrolled discretion in the appellate courts.”<sup>79</sup> Foreseeing appellate court decisions becoming unpredictable and an influx of appeals from criminal defendants demanding a new trial on the cumulative effect of counsel's errors, the court announced that each alleged error alone must rise to be prejudicial error.<sup>80</sup>

---

74. See *Fisher*, 163 F.3d at 852–53. Other courts' reasoning for rejecting the cumulative error doctrine is also grounded, without explanation, in *Strickland* or earlier precedent. See, e.g., *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996); *Jones v. Stotts*, 59 F.3d 143, 147 (10th Cir. 1995).

75. See, e.g., *Sutton v. Bell*, 645 F.3d 752, 755 (6th Cir. 2011); *Wainwright*, 80 F.3d at 1233; *Jones*, 59 F.3d at 147.

76. *Wainwright*, 80 F.3d at 1233.

77. *Jones*, 59 F.3d at 147 (citing *United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990)).

78. See, e.g., *Wainwright*, 80 F.3d at 1233. In *Wainwright*, the defendant asserted that even if the court rejected each claimed error individually, the cumulative effect deprived him of a fair trial. *Id.* However, the court rejected this proposed analysis in light of *Strickland*. *Id.*

79. *United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990).

There is a substantial body of constitutional, statutory, and common law which defines the various types of error that can lead to reversal of a defendant's criminal conviction. The discretion of an appellate court to reverse a verdict is limited by those legal rules . . . [D]iscretion of a court applying a cumulative-error analysis in the absence of actual error would not be similarly controlled.

*Id.*

80. *Id.*

### B. Circuits Adopting the Cumulative Error Doctrine

In 1984, Frank Rodriguez was convicted of murder in the second degree in a federal district court and “sentenced to an indeterminate term of [twenty] years to life.”<sup>81</sup> Rodriguez petitioned the Second Circuit for habeas relief, enumerating six specific defense counsel errors that deprived him of effective assistance.<sup>82</sup> Rodriguez’s ineffective assistance claims consisted of his counsel’s:

- (1) failing to object to the jury note not being read into the record;
- (2) failing to object to the supplemental jury charge; (3) failing to move for a mistrial based on a juror’s incompetence; (4) failing to investigate whether the prosecution had searched for the photograph identified by [the eyewitness]; (5) failing to investigate possible “favorable” statements made by [another witness] . . . ; and (6) failing to have an investigator photograph the crime scene.<sup>83</sup>

Unlike the defendant in *Fisher*, Rodriguez declined to specifically ask the court to cumulate the errors trial counsel made in his pleadings, but, nonetheless, the court did so on its own.<sup>84</sup> Just as the Fourth Circuit in *Fisher* used *Strickland* to explain why it could not add counsel’s errors together, the Second Circuit used *Strickland* to explain why it should add counsel’s errors together—without even being asked to do so.<sup>85</sup>

The Second Circuit argued that lower courts “should have been given the opportunity to consider all the circumstances and the cumulative effect of all the claims as a whole.”<sup>86</sup> Although the Second

---

81. *Rodriguez v. Hoke*, 928 F.2d 534, 535 (2d Cir. 1991). Rodriguez was arrested and charged with murder based on eyewitness identification. *Id.* The eyewitness “testified that she recognized Rodriguez from the neighborhood.” *Id.* at 536. “Based almost entirely on [this] testimony, the jury returned a verdict of guilty.” *Id.*

82. *Id.* at 538.

83. *Id.*

84. *Id.*

85. *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998); *Rodriguez*, 928 F.2d at 538.

86. *Rodriguez*, 928 F.2d at 538 (quoting *Grady v. LeFevre*, 846 F.2d 862, 865 (2d Cir. 1988)) (internal quotation marks omitted).

Circuit remanded the petition to the district court to be adjudicated on the merits, the circuit court first provided some guidance: “Since Rodriguez’s claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel’s actions, all his allegations of ineffective assistance should be reviewed together.”<sup>87</sup> Interestingly, the Second Circuit cited *Strickland* for adopting the cumulative error doctrine—just as the circuit courts that rejected the doctrine did.<sup>88</sup> The circuit court then elaborated even more favorably on the cumulative error doctrine: “Even if Rodriguez’s claims, evaluated individually, might not amount to a due process violation sufficient to require habeas relief, nevertheless, given the number of questionable circumstances in this case . . . the [] court should be given an opportunity to carefully review all of Rodriguez’s claims together.”<sup>89</sup> The circuit court’s rationale—again similar to those rejecting the doctrine—seems to be rooted in an unexplained precedent.<sup>90</sup>

The Second Circuit’s cumulative approach aligns with the Seventh Circuit.<sup>91</sup> In *Williams v. Washington*, the Seventh Circuit held that a defendant may demonstrate that the cumulative effect of counsel’s individual acts or omissions was prejudicial.<sup>92</sup> These circuits are joined by the Ninth Circuit, which totaled a counsel’s alleged errors in evaluating effective assistance of counsel claims both before and after *Strickland*.<sup>93</sup> The Ninth Circuit still follows the principle it outlined in

---

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* The term “unexplained precedent” is used to describe the implicit reasoning provided by circuit courts for and against the cumulative error doctrine, as both cite *Strickland* and point to the same specific language. Arguably, *Strickland* is simply silent on the exact issue. See generally *Strickland v. Washington*, 466 U.S. 668 (1984).

91. *Williams v. Washington*, 59 F.3d 673, 682 (7th Cir. 1995). Petitioner was convicted of sexual assault on a child and sentenced to twelve years in prison. *Id.* at 675. Petitioner asserted on habeas appeal that she had been denied the effective assistance of counsel at her trial. *Id.*

92. *Id.* at 682. “Counsel’s lack of familiarity with the case, combined with his failure to investigate, provided [defendant] with a trial significantly different than the trial she might have received if represented by a competent attorney.” *Id.* (emphasis added). The Court’s use of the word “combined” demonstrates their adherence to the cumulative deficiency doctrine. The Court then concluded, “[t]here exists, in short, a reasonable probability that the outcome would have been different. We believe that counsel’s various failures have called the fairness of her proceeding into question.” *Id.* (emphasis added).

93. *Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995) (finding for purposes of ineffective assistance of counsel claim, defense may be prejudiced as a result of cumulative impact of multiple deficiencies in defense counsel’s performance). As mentioned *supra* note 73, the Ninth Circuit

*Ewing v. Williams*, six years before *Strickland*: “Where no single error or omission of counsel, standing alone, significantly impairs the defense, the district court may nonetheless find unfairness and thus, prejudice emanating from the totality of counsel’s errors and omissions.”<sup>94</sup> The Ninth Circuit focused on the amount and severity of the alleged errors at issue, and the court reasoned that these combined errors certainly could deprive a defendant of the right to a fair trial—what *Strickland* sought to enforce.<sup>95</sup> If the court finds a “plethora” of grave errors, as a matter of judicial economy, it will engage in the cumulative error analysis, eliminating the need to determine if each error is prejudicial.<sup>96</sup> Such a rule necessarily relies on the facts of each case. The Seventh Circuit’s rationale for supporting the cumulative error doctrine is similar: “Assessments of prejudice are necessarily fact-intensive determinations peculiar to the circumstances of each case.”<sup>97</sup> Therefore, if multiple errors combine to be prejudicial in a certain case, and these errors deprived the defendant of a right to a fair trial, then there is no reason not to consider them together.<sup>98</sup>

### C. *The Eleventh Circuit: Calling Attention to the Lack of Supreme Court Guidance*

Recently, the Eleventh Circuit was faced with deciding the availability of the cumulative error doctrine for a defendant in *Forrest*

---

totalled counsel’s alleged errors, even before *Strickland*. See, e.g., *Ewing v. Williams*, 596 F.2d 391, 396 (9th Cir. 1979).

94. *Ewing*, 596 F.2d at 396. “And even where, as here, several specific errors are found, it is the duty of the Court to make a finding as to prejudice, although this finding may either be ‘cumulative’ or focus on one discrete blunder in itself prejudicial.” *Id.* at 395–96.

95. *Harris ex rel. Ramseyer*, 64 F.3d at 1438.

96. *Id.* In declining to engage in the analysis from an efficiency standpoint, the court did hedge its bet by explaining, “[b]ut by no means do we rule out that some of the deficiencies were individually prejudicial.” *Id.* at 1439.

97. *Williams v. Washington*, 59 F.3d 673, 684 (7th Cir. 1995); *Nealy v. Cabana*, 764 F.2d 1173, 1178–79 (5th Cir. 1985).

98. *Williams*, 59 F.3d at 684 (“Here, counsel’s failure to protect [defendant] from the effect of [a] confession, combined with his failure to prevent the prosecution from using [evidence] to buttress her credibility, produced a trial significantly different than the one that [defendant] should have received. We are convinced that, absent counsel’s errors, there exists a reasonable probability that the factfinder would have had a reasonable doubt concerning [the defendant’s] guilt.”). The language the court uses and the lack of concrete analysis implies a type of “we know it when we see it” use of the cumulative error doctrine.

*v. Florida Department of Corrections*.<sup>99</sup> Matthew Forrest was charged with two counts of aggravated assault with a firearm and sentenced to twenty years imprisonment.<sup>100</sup> After this conviction, Forrest argued he received ineffective assistance of counsel because his counsel failed to call an alibi witness, along with numerous other errors.<sup>101</sup> The other alleged errors included counsel's failure to: (1) depose the alibi witness; (2) file a motion to suppress the ballistics report; (3) examine files presented by the prosecution; (4) call a rebuttal ballistics expert; and (5) ask for a continuance.<sup>102</sup> In addition to each specific enumerated error, Forrest pleaded that, when viewed in the aggregate, these errors amounted to ineffective assistance of counsel.<sup>103</sup>

The Eleventh Circuit began the analysis by stating: "The Supreme Court has not directly addressed the applicability of the cumulative error doctrine in the context of an ineffective assistance of counsel claim."<sup>104</sup> After noting the lack of Supreme Court precedent, and without mention of *Strickland*, the Eleventh Circuit cast doubt on the cumulative error doctrine by quoting another Supreme Court case on the Sixth Amendment.<sup>105</sup> In *United States v. Cronic*, the Supreme Court explained "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt."<sup>106</sup> It appears the Eleventh Circuit focused on the term "specific" because a fair reading could also cut the other way by focusing on the pluralized term "errors." The court equated guilt finding in *Cronic* with the prejudicial prong of *Strickland*.<sup>107</sup> Both Supreme Court cases were decided on the same day.<sup>108</sup>

---

99. *Forrest v. Fla. Dep't of Corr.*, 342 F. App'x 560, 564–65 (11th Cir. 2009).

100. *Id.* at 562. After a dispute over money and personal property, Forrest and a (former) friend got into an altercation in a neighborhood street that ended with Forrest firing a shotgun at the friend. *Id.* at 561.

101. *Id.* at 564 n.6. On the day the alibi witness was supposed to testify, "[d]efense counsel, without explanation, responded, 'Your Honor, the Defense would rest at this time.'" *Id.* at 562.

102. *Id.* at 564 n.6.

103. *Id.* at 564.

104. *Id.*

105. *Forrest*, 342 F. App'x at 564–65 (quoting *United States v. Cronic*, 466 U.S. 648, 659 n.26 (1984)).

106. *Cronic*, 466 U.S. at 659 n.26. *Cronic* held that it is not enough to show that the lawyer was not an experienced criminal lawyer; the defendant must show specific errors. *Id.* at 665.

107. *Forrest*, 342 F. App'x at 564–65.

108. *Cronic*, 466 U.S. 648 (1984); *Strickland v. Washington*, 466 U.S. 668 (1984).

Without strict guidance on how to assess the cumulative error claim, the Eleventh Circuit admitted that *Cronic* was not directly on point and deferred to the Florida State Supreme Court, which had refused to cumulate counsel's errors.<sup>109</sup> The court assumed, without deciding, that the cumulative error doctrine would not be available to a defendant in light of the language in *Cronic*, but the court actually denied Forrest's claims because it believed "the state court's holding [was not] an unreasonable application of clearly established federal law."<sup>110</sup> Supreme Court precedent requires this deference; in *Williams v. Taylor*, the Court held federal habeas corpus relief from a state court conviction was available only when the state court decision was based on an "unreasonable application" of standards "clearly established" by the Supreme Court in *Strickland* and other cases.<sup>111</sup>

Since 2009, the Supreme Court has taken up more cases dealing with ineffective assistance of counsel claims than ever before.<sup>112</sup> The time could just be right for the Supreme Court to resolve the circuit discrepancy on the cumulative error doctrine.<sup>113</sup>

---

109. *Forrest*, 342 F. App'x at 565 ("[Defendant] raised his cumulative error argument before the state court. The state court concluded that none of [defendant's] alleged individual errors amounts to ineffective assistance of counsel. Thus, the state denied [defendant's] claim of cumulative error by relying on the Florida Supreme Court's holding in *Parker v. State*, 904 So.2d 370 (Fla. 2005), which stated that 'where the individual claims of error alleged are . . . without merit, the claim of cumulative error also necessarily fails.'").

110. *Id.*

111. *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J., concurring) (interpreting an amendment to 28 U.S.C. § 2254(d)(1) (Supp. 1996) enacted in the Antiterrorism and Effective Death Penalty Act of 1996).

112. Renee Newman Knake, *The Supreme Court's Increased Attention to the Law of Lawyering: Mere Coincidence or Something More?*, 59 AM. U. L. REV. 1499, 1506 (2010). The Court devoted a remarkable fifteen percent of its already limited time during the 2009 term to cases on the topic including twelve argued cases and five per curiam decisions. *Id.* at 1500, 1502. "The law governing lawyers is a sometimes ignored, but vitally important body of law, essential to the proper function of our justice system and our democratic form of government." *Id.* at 1502.

113. Why the recent focus on the law of lawyering? Knake argues the Supreme Court is considering constitutional implications when agreeing to hear cases involving bad lawyering. *Id.* at 1570 ("[T]he overwhelming majority of the lawyering cases that sparked the Court's interest during the 2009 term involved constitutional challenges."). During the 2009 term, the Court heard ten cases involving ineffective assistance of counsel claims. *Id.* These cases require the Court to "revisit the constitutional rights and safeguards guaranteed to a defendant in a criminal trial." *Id.* If such willingness truly exists, a cumulative error case could be a vehicle for a re-examination of the Sixth Amendment's right to counsel.

### III. RESOLVING THE SPLIT AND ENSURING UNIFORMITY

At the first available opportunity, the Supreme Court should grant a certiorari petition in order to resolve the circuit split over whether the prejudice arising from multiple errors by defense counsel should be cumulated to determine whether counsel rendered ineffective assistance under the *Strickland v. Washington* standard.<sup>114</sup> The Supreme Court should adopt the approach of the Second, Seventh, and Ninth Circuits in favor of allowing a defendant to aggregate defense counsel's alleged errors to meet *Strickland's* prejudice prong.<sup>115</sup> By adopting the cumulative error doctrine in the context of ineffective assistance of counsel claims, the Court will clarify the original text of its *Strickland* precedent and effectuate the founders' intent of the Sixth Amendment.

First, *Strickland* supports the proposition that a convicted defendant's claim of ineffective assistance of counsel should be evaluated by looking at the prejudicial effect of *all* counsel's errors combined. The Supreme Court held in *Strickland* that a defendant meets the deficient performance prong of the test by "showing that counsel made *errors* so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment."<sup>116</sup> By pluralizing "errors" in articulating what constitutes a counsel's deficient performance, the Supreme Court acknowledged a situation where a defense counsel makes repeated missteps that together could deprive a defendant of his constitutional right to effective assistance. Circuit courts denying the defendant of an opportunity to aggregate counsel's alleged errors have disregarded *Strickland's* command to consider all the circumstances of the claim when examining counsel's performance.<sup>117</sup>

Although a federal court could consider each alleged error on an individual basis and still technically perform a totality of the

---

114. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

115. See discussion *supra* Part II.B.

116. *Strickland*, 466 U.S. at 687 (emphasis added).

117. *Id.* at 688 ("In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.").

circumstances inquiry, the Court's repeated use of *errors*, as a plural, suggests a broader intent for the ineffective assistance analysis. The Supreme Court even notes that a defendant making a claim must identify "the *acts* or *omissions* of counsel" that are alleged to have been the result of unreasonable judgment.<sup>118</sup> Once more with its language, the Court is anticipating a claim that arises because of a series of errors—whether they are steps done wrong or multiple steps not done.<sup>119</sup>

This interpretation of allowing multiple errors to factor into the analysis as one claim is harmonized with the Supreme Court's explanation in *Strickland* of how a defendant shows that the deficient performance prejudiced the defense: "[t]his requires showing that counsel's *errors* were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."<sup>120</sup> This language has guided the circuit courts that adopted the cumulative error doctrine.<sup>121</sup> For example, the Ninth Circuit accepted the cumulative error doctrine because *Strickland* requires the focus of the inquiry to be on the fundamental fairness of the trial being challenged.<sup>122</sup> Thus, if a court finds multiple errors combined rendered the proceeding unfair, it obviates the need to analyze the prejudicial effect of each error and still comports with *Strickland*.<sup>123</sup>

The Supreme Court in *Strickland* even framed the prejudice prong in an issue statement for the lower courts: "[W]hether there is a reasonable probability that, absent the *errors*, the factfinder would have had a reasonable doubt respecting guilt."<sup>124</sup> Again, the Court chose to pluralize errors—referring to all the errors together, not each error separately—acknowledging a situation where the severity of multiple missteps rises to the level of a constitutional violation.

Honoring the Supreme Court's language in *Strickland* is essential because of the legitimate impact that the accumulation issue can have

---

118. *Id.* at 690 (emphasis added).

119. *Id.*

120. *See id.* at 687 (emphasis added).

121. *See, e.g., Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432, 1438–39 (9th Cir. 1995).

122. *Id.* (citing *Strickland*, 466 U.S. at 696).

123. *See, e.g., id.* at 1439.

124. *Strickland*, 466 U.S. at 695 (emphasis added).

on a case. As discussed above, the Second Circuit in *Rodriguez v. Hoke* applied the doctrine in evaluating the defendant's six alleged errors of defense counsel.<sup>125</sup> Each claim articulated a certain omission by counsel.<sup>126</sup> Isolating one omission and proving that the outcome of the trial may have been different had it been completed is a daunting task. But when one considers the six alleged errors, which of course must be supported by the record, counsel's performance becomes clearer, and the court gains a more accurate context—reverting back to the goal of simply ensuring a fair trial that is made possible by effective attorneys.

Circuit courts denying the defendant the ability to cumulate counsel's alleged errors because of judicial economy concerns are underestimating the strong safeguards *Strickland* constructed in order for a defendant to present a viable claim. Circuit courts, like the Tenth Circuit, fear an influx of claims from defendants if they adopt the cumulative error doctrine.<sup>127</sup> These circuit courts should be comforted in the strong deference *Strickland* requires in evaluating a claim: "Judicial scrutiny of counsel's performance must be *highly deferential*."<sup>128</sup> Moreover, courts must analyze defense counsel's performance without the wisdom of hindsight.<sup>129</sup> This edict prevents courts from "Monday morning quarterbacking" and reduces the chances a judge would try to substitute his or her own wisdom for that of defense counsel.<sup>130</sup>

---

125. *Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991). Rodriguez's allegations consisted of: (1) failing to object to the jury note not being read into the record; (2) failing to object to the supplemental jury charge; (3) failing to move for a mistrial based on a juror's incompetence; (4) failing to investigate whether the prosecution had searched for the photograph identified by [the eyewitness]; (5) failing to investigate possible "favorable" statements made by [another witness] . . . ; and (6) failing to have an investigator photograph the crime scene.

*Id.*

126. *Id.*

127. See discussion *supra* note 79.

128. *Strickland*, 466 U.S. at 689 (emphasis added). "It is all too tempting for a defendant to second-guess counsel's assistance after conviction . . ." *Id.*

129. *Id.* "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct . . ." *Id.*

130. Empirical data shows the safeguards' success. In the immediate wake of *Strickland*, a 1988 law review survey of the case law on ineffective assistance of counsel claims showed that ineffectiveness claims were sustained in a minuscule 4.3% of cases. Calhoun, *supra* note 8, at 414 n.11, apps. at 458–61.

An argument fearing unpredictability of appellate court decisions on the cumulative claims also lacks merit.<sup>131</sup> Foremost, unpredictability with a circuit split on the cumulative error doctrine is already present. But, *Strickland* sets out rigid enough standards that will confine decisions to limited variation. In addition to the reasonableness standard and deferential treatment to counsel conduct, the biggest safeguard against an influx of ineffective assistance of counsel claims and appellate unpredictability is that the defendant must “affirmatively prove prejudice.”<sup>132</sup> The defendant, already convicted and likely incarcerated, must prove that the errors together would undermine confidence in the trial’s outcome.<sup>133</sup> This high burden ensures only meritorious claims will likely succeed.<sup>134</sup>

Finally, permitting the cumulative error doctrine in ineffective assistance of counsel claims effectuates the intent of the Sixth Amendment. As a result of the circuit split, criminal defendants in different parts of the country are subject to varying levels of Sixth Amendment protection.<sup>135</sup> The Sixth Amendment ensures a defendant will have the assistance of counsel to mount a defense.<sup>136</sup> The provision ensuring the assistance of counsel is mentioned in conjunction with rights our founders wished the accused to “enjoy”: the right to a speedy trial, the right to an impartial jury, the right to be informed of the accusations against them, and the right to confront their accusers.<sup>137</sup> These provisions help protect the accused’s basic right to due process.<sup>138</sup> Allowing ineffective assistance of counsel

---

In six of the twelve federal circuits, no defendant prevailed in a claim of ineffective assistance of counsel. *Id.* app. I.

131. See discussion *supra* Part II.A–B.

132. *Strickland*, 466 U.S. at 693. “The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence.” *Id.* The Court noted the variety of ways errors could come before them and placed the burden on the defendant to show how those errors were unreasonable. *Id.*

133. *Id.* at 694.

134. Most of the cases (43.3%) rejecting the defendant’s claim that he received ineffective assistance of counsel did so on the ground that prejudice had not been shown. Calhoun, *supra* note 8, at 433. Because *Strickland* requires adherence to both prongs of the test, almost half of the cases never even addressed the adequacy of the defense lawyer’s performance. *Id.*

135. See discussion *supra* Part II.

136. U.S. CONST. amend. VI.

137. *Id.*

138. *Strickland*, 466 U.S. at 684–85.

claims based on the cumulative effect of counsel's alleged errors only effectuates these basic due process rights. There is no ascertainable constitutional distinction between several errors that likely affected the outcome of the trial versus one egregious error that likely affected the outcome of the trial. As long as it likely affected the outcome of the trial, courts should be concerned with the legal assistance provided.

Asking courts to consider whether the combination of counsel's alleged errors prejudiced the defendant promotes a totality of the circumstances approach in evaluating our constitutional rights, as opposed to a strictly limited, individual analysis, piecemeal approach. *Strickland*, by instructing courts to consider all of the circumstances, affirms that this is the appropriate constitutional approach.<sup>139</sup>

#### CONCLUSION

Criminal defendants are receiving different Sixth Amendment protections across the country.<sup>140</sup> The Fourth, Eighth, and Tenth Circuits expressly rejected the cumulative error doctrine in the context of ineffective assistance of counsel claims while the Second, Seventh, and Ninth Circuits adopted the doctrine.<sup>141</sup> Despite the lack of uniformity in their opinions, both the circuits rejecting the doctrine and the circuits adopting the doctrine cite *Strickland* as the authority for their positions.<sup>142</sup> The Supreme Court should resolve the discrepancy to bolster their original goal of *Strickland*: uniformly enforcing the accused's fundamental right to a fair trial.<sup>143</sup>

The Supreme Court should adopt the approach of the circuits allowing a defendant to aggregate defense counsel's alleged errors to meet the prejudice prong of *Strickland*.<sup>144</sup> By adopting the cumulative

---

139. *Id.* at 688 (“In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.”).

140. See discussion *supra* Part II.

141. *Id.*

142. *Id.*

143. See generally *Strickland*, 466 U.S. at 689.

144. See, e.g., *Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432, 1438–39 (9th Cir. 1995) (holding that when considering an ineffective assistance of counsel claim, defense may be prejudiced as a result of cumulative impact of multiple deficiencies in defense counsel’s performance).

error doctrine in the context of ineffective assistance of counsel claims, the Supreme Court will clarify the original text of its *Strickland* precedent and effectuate the founders' intent of the Sixth Amendment. "The right to effective counsel is in many ways the most fundamental of all constitutional protections; it is through counsel that all the other rights are asserted and preserved."<sup>145</sup> By failing to resolve the cumulative error circuit split, the Supreme Court has reduced the standard of what it means to provide "effective assistance." And an individual "whose counsel does not provide . . . effective representation may be no better off than the defendant who simply has no lawyer at all."<sup>146</sup>

---

145. Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1479 (1999).

146. *Id.*