South Carolina Law Review

Volume 65
Issue 4 *SURVEY OF SOUTH CAROLINA LAW and FOURTH CIRCUIT SURVEY*

Article 4

Summer 2014

# Rebutting the Strong Presumption of Reliability for Effective Assistance: The Pursuit of Cumulative Analysis for Strickland Claims in South Carolina

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# REBUTTING THE "STRONG PRESUMPTION OF RELIABILITY"[1] FOR EFFECTIVE ASSISTANCE: THE PURSUIT OF CUMULATIVE ANALYSIS FOR *STRICKLAND* CLAIMS IN SOUTH CAROLINA



## I. INTRODUCTION

In his dissent to *Strickland v. Washington*,[2] Justice Thurgood Marshall wrote that "the right to *effective* assistance of counsel is entailed by the right to counsel, and abridgement of the former is equivalent to abridgment of the latter."[3] While Justice Marshall thought that his colleagues did not venture far enough in securing the rights of those being prosecuted by the government,[4] the majority in *Strickland* held that all state criminal defendants across the nation are guaranteed the right to "reasonably effective assistance" under the Sixth Amendment and formulated a standard judging this effectiveness.[5]

The *Strickland* standard is a two-pronged test that reviews whether defense counsel's performance was deficient and, if so, whether that deficiency prejudiced the defendant's right to a fair trial.[6] Thirty years after this landmark decision, however, a number of differing interpretations exist among the state

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1. Strickland v. Washington, 466 U.S. 668, 696 (1984).
2. 466 U.S. 668.
3. *Id.* at 711–12 (Marshall, J., dissenting).
4. *See id.* at 707 (Marshall, J., dissenting) ("For the most part, the majority's efforts are unhelpful. Neither of its two principal holdings seems to me likely to improve the adjudication of Sixth Amendment claims.").
5. *Id.* at 687–88 (citing McMann v. Richardson, 397 U.S. 768, 770, 771 (1970)); *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.").
6. *See Strickland*, 466 U.S. at 687.

and federal courts concerning the *Strickland* standard.[7] Some courts apply the test to each claim of ineffective counsel individually.[8] Other courts question whether an accumulation of multiple nondeficient errors can result in deficient performance or whether multiple deficiencies—each alone failing to cause prejudice under the test—in their totality inhibited the defendant's right to a fair result.[9] Thus, the "lack of uniformity" among the nation's courts on how to properly test claims of ineffective counsel "lead[s] to truly anomalous, inconsistent, and unfair results."[10]

To illustrate the inherent unfairness of multiple *Strickland* standards, a defendant in Virginia—a state that only recognizes an individualized approach to evaluating claims—faces a higher burden of proving ineffective counsel under *Strickland* than would a defendant right across the border in Maryland, a state that adheres to cumulative prejudice analysis.[11] The higher burden for individualized review exists even when the defendants' respective attorneys may have acted in exactly the same manner and committed the same errors at trial.[12] Demonstrating an equivalent tension between state and federal courts concerning the *Strickland* test, a defendant's claims of ineffective counsel in the West Virginia state court system would receive a cumulative analysis, while the same claims in a habeas corpus petition to the United States District Court for the District of West Virginia would only be reviewed individually.[13]

One of the fundamental goals of the American justice system is that "[c]riminal defendants' constitutional rights should not vary by the happenstance of their location."[14] The Sixth Amendment's guarantee of effective assistance of counsel is too important to defendants facing prosecution to have such diverging

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7. *See id.*; Brief of the Nat'l Ass'n of Criminal Def. Lawyers as Amicus Curiae in Support of Petitioner, Marcrum v. Roper, 509 F.3d 489 (8th Cir. 2007) (No. 07-1566), *cert. denied*, 555 U.S. 1068 (2008), at 7.

8. *See, e.g.*, Teleguz v. Warden of Sussex I State Prison, 688 S.E.2d 865, 879 (Va. 2010) ("Having rejected each of petitioner's individual claims, there is no support for the proposition that such actions when considered collectively have deprived petitioner of his constitutional right to effective assistance of counsel." (quoting Lenz v. Warden of Sussex I State Prison, 593 S.E.2d 292, 305 (Va. 2004))) (internal quotation marks omitted).

9. *See, e.g.*, Cirincione v. State, 705 A.2d 96, 113 (Md. Ct. Spec. App. 1998) ("[N]umerous non-deficient errors may cumulatively amount to a deficiency, . . . or numerous non-prejudicial deficiencies may cumulatively cause prejudice." (citing Harris v. Wood, 64 F.3d 1432, 1438–39 (9th Cir. 1995); Bowers v. State, 578 A.2d 734, 744 (Md. 1990))).

10. Brief of the Nat'l Ass'n of Criminal Def. Lawyers, *supra* note 7, at 7.

11. *See id.* at 8; *see also supra* notes 8–9 and accompanying text (showing interpretations of cumulative review by Virginia and Maryland).

12. *See* Brief of the Nat'l Ass'n of Criminal Def. Lawyers, *supra* note 7, at 8.

13. *See id.*; *see also* Fisher v. Angelone, 163 F.3d 835, 852–53 (4th Cir. 1998) (reviewing claims of ineffective assistance of counsel individually); State *ex rel.* Daniel v. Legursky, 465 S.E.2d 416, 424 n.7 (W. Va. 1995) (quoting Williams v. Washington, 59 F.3d 673, 682 (7th Cir. 1995)) (reviewing the cumulative effect of multiple counsel errors).

14. Brief of the Nat'l Ass'n of Criminal Def. Lawyers, *supra* note 7, at 8.

interpretations among various federal and state jurisdictions.[15] Indeed, Justice Marshall's prediction to the majority in *Strickland*—in which he correctly warned that the majority's performance standard was "so malleable that, in practice, it will . . . yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts"[16]—has manifested itself thirty years later.[17] The Supreme Court has yet to review the question of whether courts should assess claims of ineffective counsel individually or cumulatively.[18] Like the Supreme Court, the South Carolina judiciary has yet to decide whether cumulative analysis is appropriate.[19] Nevertheless, until the Supreme Court clarifies this fundamental constitutional question, South Carolina courts should err on the side of the expansive view of the Sixth Amendment's guarantee of assistance of counsel by employing cumulative prejudice analysis for multiple claims of ineffective counsel.

This Note argues that the South Carolina judiciary should adopt cumulative prejudice analysis to ensure fair and consistent reviews of *Strickland* ineffective counsel claims in post-conviction relief (PCR) applications. Part II explains the landmark cases of *Strickland v. Washington*[20] and *United States v. Cronic*.[21] Part III discusses the jurisdictional split among the state and federal courts concerning cumulative analysis. Part IV.A emphasizes that *Strickland*'s language supports a cumulative approach to ineffective counsel claims, and Part IV.B highlights other Supreme Court precedent approving of cumulative analysis. Part V examines the current landscape of cumulative analysis in South Carolina jurisprudence. Finally, Part VI concludes by surveying policy objectives supporting the adoption of cumulative analysis in *Strickland* reviews in South Carolina.

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15. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 343 (1963) ("[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938))) (internal quotation marks omitted).

16. Strickland v. Washington, 466 U.S. 668, 707 (1984) (Marshall, J., dissenting). Justice Marshall also disapproved of the prejudice prong entirely and believed that a criminal defendant sufficiently demonstrates a Sixth Amendment violation simply by proving that counsel's performance was constitutionally deficient. *See id.* at 710–12 (Marshall, J., dissenting) (quoting Chapman v. California, 386 U.S. 18, 23, 23 n.8 (1967)).

17. *See* Brief of the Nat'l Ass'n of Criminal Def. Lawyers, *supra* note 7, at 8.

18. *See, e.g.*, Marcrum v. Luebbers, 509 F.3d 489 (8th Cir. 2007), *cert. denied*, 555 U.S. 1068 (2008) (denying the petition for certiorari).

19. *See, e.g.*, Walker v. State, 397 S.C. 226, 243 n.5, 723 S.E.2d 610, 617 n.5 (Ct. App. 2012) ("[W]hether the cumulation of several errors, 'which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina." (quoting Lorenzen v. State, 376 S.C. 521, 535 n.3, 657 S.E.2d 771, 779 n.3 (2008))) (internal quotation marks omitted). Cumulative analysis for ineffective counsel claims also appears to be an unsettled question in Missouri and North Dakota. *See* Midgyett v. State, 392 S.W.3d 8, 18 (Mo. Ct. App. 2012) (quoting State v. Gray, 887 S.W.2d 369, 390 (Mo. 1994)); Garcia v. State, 678 N.W.2d 568, 578 (N.D. 2004).

20. 466 U.S. 668 (1984).

21. 466 U.S. 648 (1984).

## II. *STRICKLAND* AND *CRONIC*

The U.S. Supreme Court recognized the fundamental importance of the Sixth Amendment right to counsel in state felony prosecutions in *Gideon v. Wainwright*.[22] In *Gideon*, the Court held that the Sixth Amendment right to assistance of counsel for indigent defendants—at the time only guaranteed to indigent defendants in federal courts[23]—was incorporated through the Due Process Clause of the Fourteenth Amendment and, therefore, applicable to indigent defendants in state prosecutions.[24] After a "variety of standards" developed among the state and federal courts regarding the quality of performance by defense counsel in the two decades following *Gideon*,[25] the Court issued two landmark companion opinions on the subject on May 14, 1984.[26]

In *Strickland v. Washington*, the Court confirmed that the Sixth Amendment guarantees defendants the right to "reasonably effective assistance."[27] In *Strickland*, a Florida death row inmate petitioned the Court, claiming his appointed counsel was ineffective in six separate instances after pleading guilty to three capital murder charges and waiving his right to an advisory jury at his capital sentencing hearing against his counsel's advice.[28] The petitioner argued, among other things, that his trial counsel was ineffective during the sentencing hearing because his counsel failed to move for a continuance, failed to request a psychiatric report, and failed to investigate and present character witnesses.[29]

In an attempt to establish a standard for evaluating defense counsel performance for the first time,[30] the *Strickland* Court adopted a two-pronged test that a defendant must satisfy to prove ineffective counsel and, consequently, a violation of the Sixth Amendment right to counsel.[31] First, the defendant must

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22. 372 U.S. 335, 344–45 (1963) (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

23. *See generally* Johnson v. Zerbst, 304 U.S. 458, 468 (1938) (quoting Patton v. United States, 281 U.S. 276, 308 (1930)) (holding that the Sixth Amendment guarantees the right of counsel to indigent federal criminal defendants).

24. *See Gideon*, 372 U.S. at 344–45 (quoting Betts v. Brady, 316 U.S. 455, 473 (1942); *Powell*, 287 U.S. at 68–69). In *Gideon*, the Court overruled *Betts v. Brady*, which held that the Sixth Amendment was not incorporated by the Due Process Clause of the Fourteenth Amendment. *Betts*, 316 U.S. at 468, *rev'd*, *Gideon*, 372 U.S. at 344–45.

25. John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating* Bagley *Materiality,* Strickland *Prejudice, and Cumulative Harmless Error*, 95 J. CRIM. L. & CRIMINOLOGY 1153, 1165 (2005).

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

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

28. *Id.* at 672, 675. The defendant also pleaded guilty to "multiple counts of robbery, kidnapping for ransom, breaking and entering and assault, attempted murder, and conspiracy to commit robbery." *Id.* at 672.

29. *Id.* at 675.

30. *See id.* at 707 (Marshall, J., dissenting) ("The state and lower federal courts have developed standards for distinguishing effective from inadequate assistance. Today, for the first time, this Court attempts to synthesize and clarify those standards.") (footnote omitted).

31. *See id.* at 687.

demonstrate that defense counsel's "performance was deficient."[32] The defendant can establish deficient performance by proving that counsel made "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[33] The Court held that the proper standard for judging counsel's conduct is "simply reasonableness under prevailing professional norms."[34] Second, the defendant must prove the infliction of prejudice due to counsel's deficient performance.[35] To satisfy the prejudice prong, the defendant must prove that counsel's deficiency was so serious that it deprived the defendant of a fair trial or result.[36] Applying the test to the facts of the case, the *Strickland* Court concluded that there was a "double failure" because the petitioner could not show evidence of deficient performance by counsel or any indication that he suffered prejudice.[37]

In *United States v. Cronic*, however, the Court recognized some rare cases in which a court could presume prejudice from several circumstances surrounding inadequate representation.[38] In *Cronic*, the respondent was convicted on mail fraud indictments for his participation, along with two accomplices, in a "check kiting scheme" involving the transfer of millions of dollars.[39] The trial court appointed a young real estate attorney to represent the defendant in that case.[40] Prior to trial, defense counsel was given only twenty-five days for preparation, while federal prosecutors had been investigating and preparing for the case for over four years.[41] The Tenth Circuit reversed the respondent's conviction.[42] Specifically, the circuit court held that the respondent was not required to prove trial counsel error or prejudice because "no such showing is necessary 'when circumstances hamper a given lawyer's preparation of a defendant's case.'"[43]

After granting certiorari, the Supreme Court reversed, ruling that this case was not one of the very few instances in which counsel's performance resulted in per se prejudice, thus rendering unnecessary any further inquiry into prejudice.[44] The Court elaborated on three presumed instances of ineffectiveness, stating that prejudice is first presumed if a defendant is denied assistance at a "critical stage"

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32. *Id.*
33. *Id.*
34. *Id.* at 688. The Court commented that, while no definitive checklist for accepted professional practices exists, standards such as the American Bar Association's Standards for Criminal Justice could perhaps serve as useful guides. *Id.* at 688–89.
35. *Id.* at 687.
36. *Id.*
37. *Id.* at 700.
38. *See* United States v. Cronic, 466 U.S. 648, 658–59 (1984).
39. *Id.* at 649–650.
40. *Id.* at 649.
41. *Id.*
42. *Id.* at 650 (quoting U.S. CONST. amend. VI).
43. *Id.* (quoting United States v. Cronic, 675 F.2d 1126, 1128 (10th Cir. 1982)).
44. *See id.* at 658, 666–67.

of trial.[45] Second, prejudice is presumed if "counsel entirely fails to subject the prosecution's case to a meaningful adversarial testing."[46] In the third instance, per se prejudice results when the "likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."[47] While the respondent's claim of ineffective counsel in *Cronic* did not fall into any of these three scenarios, the Court remanded the case to allow the respondent to point out counsel's specific errors so that the court of appeals could evaluate them under the *Strickland* standard.[48]

## III. INTERPRETATIONS OF *STRICKLAND*

State courts have diverged in their interpretations of the two-pronged *Strickland* test for ineffective counsel claims in the thirty years following the seminal cases discussed above.[49] A small minority of states has explicitly held that courts must apply the *Strickland* test on each claim of ineffective counsel individually.[50] Thus, in these jurisdictions, courts conclude that defense counsel provided constitutionally inadequate assistance only when at least one claim of counsel error satisfies the two-pronged test on its own.[51] Conversely, courts in a majority of states have either recognized or plainly adopted some form of cumulative analysis for reviewing ineffective counsel claims.[52]

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45. *Id.* at 659–60 (citing Davis v. Alaska, 415 U.S. 308 (1974); Powell v. Alabama, 287 U.S. 45 (1932)).

46. *Id.*

47. *Id.* at 659–60.

48. *See id.* at 666–67 & n.41 (citing Strickland v. Washington, 466 U.S. 668, 693–96 (1984)).

49. *Compare* Schofield v. Holsey, 642 S.E.2d 56, 60 n.1 (Ga. 2007) (citing *Strickland*, 466 U.S. at 687) (approving cumulative analysis of multiple deficiencies), *with* Teleguz v. Warden of Sussex I State Prison, 688 S.E.2d 865, 879 (Va. 2010) (quoting Lenz v. Warden of the Sussex I State Prison, 593 S.E.2d 292, 305 (Va. 2004)) (rejecting cumulative analysis).

50. *See* Robertson v. State, 367 S.W.3d 538, 542 (Ark. 2010) (citing Echols v. State, 127 S.W.3d 486, 500 (Ark. 2003); Huddleston v. State, 5 S.W.3d 46, 50 (Ark. 1999)); Diaz v. Comm'r of Corr., 6 A.3d 213, 222–23 (Conn. App. Ct. 2010); Bradley v. State, 33 So. 3d 664, 684 (Fla. 2010) (citing Israel v. State, 985 So. 2d 510, 520 (Fla. 2008)); State v. Draughn, 950 So. 2d 583, 629 (La. 2007) (citing State v. Copeland, 530 So. 2d 526, 544–45 (La. 1988)); Simmons v. State, 869 So. 2d 995, 1005 (Miss. 2004); *Teleguz*, 688 S.E.2d at 879 (quoting *Lenz*, 593 S.E.2d at 305).

51. *See, e.g.*, *Robertson*, 367 S.W.3d at 542 ("Where, as in the case before us, a convicted defendant alleges many instances of ineffective assistance of counsel, at least one error standing alone must meet the standard of *Strickland* for the defendant to be successful.").

52. *See* Brooks v. State, 929 So. 2d 491, 514 (Ala. Crim. App. 2005); State v. Savo, 108 P.3d 903, 916 (Alaska Ct. App. 2005); *In re* Jones, 917 P.2d 1175, 1196 (Cal. 1996); People v. Gandiaga, 70 P.3d 523, 528–29 (Colo. App. 2002); Burns v. State, 76 A.3d 780, 790–91 (Del. 2013) (citing Turner v. State, 5 A.3d 612, 615 (Del. 2010); Michael v. State, 529 A.2d 752, 764 (Del. 1987); State v. Savage, 2002 WL 187510, at *8 (Del. Super. Ct. 2002)); *Schofield*, 642 S.E.2d at 60 n.1 (citing *Strickland*, 446 U.S. at 687); State v. Lovelass, 983 P.2d 233, 244 (Idaho Ct. App. 1999) (citing State v. Hawkins, 958 P.2d 22, 33 (Idaho Ct. App. 1998); State v. Medina, 909 P.2d 637, 647 (Idaho Ct. App. 1996)); People v. Foster, 660 N.E.2d 951, 962 (Ill. 1995); Grinstead v. State, 845 N.E.2d 1027, 1036–37 (Ind. 2006) (citing Smith v. State, 511 N.E.2d 1042, 1046 (Ind. 1987)); State v.

Although some slight variation exists among these state courts, cumulative analysis generally entails the consideration of multiple claims of trial counsel errors through either the deficient performance or prejudice prong of the *Strickland* test.[53] Some courts have concluded that, while specific types of error by counsel may not amount to deficiencies under *Strickland*, the "fundamental lack of formulation and direction in presenting a coherent defense" can establish deficient performance under the first prong.[54] Many courts have questioned whether multiple counsel deficiencies, each failing individually under the prejudice prong of the *Strickland* test, nonetheless violated the defendant's right to a fair trial when viewed in a cumulative manner.[55]

Additionally, the majority of federal circuits employ cumulative analysis in their review of habeas corpus petitions from state court defendants alleging violations of federally protected constitutional rights, such as the Sixth Amendment right to effective counsel.[56] The Fourth Circuit has openly

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Clay, 824 N.W.2d 488, 500 (Iowa 2012); Thompson v. State, 270 P.3d 1089, 1101 (Kan. 2011) (quoting State v. Ellmaker, 221 P.3d 1105, 1121 (Kan. 2009)); Marquez v. Commonwealth, No. 2003-CA-001431-MR, 2005 WL 195188, at *1 (Ky. Ct. App. Jan. 14, 2005); Cirincione v. State, 705 A.2d 96, 112–13 (Md. Ct. Spec. App. 1998) (citing Harris v. Wood, 64 F.3d 1432, 1438–39 (9th Cir. 1995); Bowers v. State, 578 A.2d 734, 744 (Md. 1990)); Commonwealth v. Smith, 924 N.E.2d 270, 280 (Mass. 2010); State v. Achaw, No. CX-01-604, 2001 WL 1646560, at *5, *6 (Minn. Dec. 26, 2001); State v. Hagen, 53 P.3d 885, 896–97 (Mont. 2002); McConnell v. State, 212 P.3d 307, 318 & n.17 (Nev. 2009); State v. Trujillo, 42 P.3d 814, 831 (N.M. 2002) (citing State v. Richardson, 845 P.2d 819, 821 (N.M. Ct. App. 1992)); People v. Brown, 752 N.Y.S.2d 347, 349 (N.Y. App. Div. 2002); State v. Gondor, 860 N.E.2d 77, 90 (Ohio 2006) (citing *Strickland*, 466 U.S. at 695–96; State v. DeMarco, 509 N.E.2d 1256, 1261 (Ohio 1987)); Commonwealth v. Hanible, 30 A.3d 426, 483 (Pa. 2011) (citing Commonwealth v. Johnson, 966 A.2d 523, 532 (Pa. 2009); Commonwealth v. Sattazahn, 952 A.2d 640, 671 (Pa. 2008)); McDowell v. Solem, 447 N.W.2d 646, 651 (S.D. 1989); State v. Zimmerman, 823 S.W.2d 220, 228 (Tenn. Crim. App. 1991); *Ex parte* Aguilar, No. AP-75526, 2007 WL 3208751, at *3 (Tex. Crim. App. Oct. 31, 2007) (quoting *Strickland*, 466 U.S. at 693–96); State v. Lewis, 233 P.3d 891, 899 (Wash. Ct. App. 2010) (citing State v. Hodges, 77 P.3d 375, 378 (Wash. Ct. App. 2003)); State *ex rel.* Daniel v. Legursky, 465 S.E.2d 416, 424 n.7 (W. Va. 1995) (quoting Williams v. Washington, 59 F.3d 673, 682 (7th Cir. 1995)); State v. Thiel, 665 N.W.2d 305, 321–22 (Wis. 2003); Dickeson v. State, 843 P.2d 606, 612 (Wyo. 1992) (citing Gist v. State, 737 P.2d 336, 342 (Wyo. 1987)).

53. *See, e.g.*, *Cirincione*, 705 A.2d at 113 ("[N]umerous non-deficient errors may cumulatively amount to a deficiency, . . . or numerous non-prejudicial deficiencies may cumulatively cause prejudice." (citing Harris v. Wood, 64 F.3d 1432, 1438–39 (9th Cir. 1995); Bowers v. State, 578 A.2d 734, 744 (Md. 1990))).

54. Stouffer v. Reynolds, 168 F.3d 1155, 1162–65 (10th Cir. 1999) (quoting and citing *Strickland*, 466 U.S. at 689, 690; Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir. 1980); United States v. Haddock, 12 F.3d 950, 955 (10th Cir. 1993)).

55. *See, e.g.*, *Savo*, 108 P.3d at 916 ("But the doctrine of cumulative error is really a doctrine of cumulative prejudice. It applies only when real errors have been identified and the remaining question is whether these errors, in combination, were so prejudicial as to undermine the trustworthiness of the underlying judgment (even though each error, taken individually, might not require reversal).").

56. *Compare* Dugas v. Coplan, 428 F.3d 317, 335 (1st Cir. 2005) ("Strickland clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced." (quoting Kubat v. Thieret, 867 F.2d 351, 370 (7th Cir. 1989))) (internal quotation marks omitted), Moore v. Johnson, 194 F.3d 586, 619 (5th Cir. 1999) (finding prejudice based on

disapproved of this analysis.[57] Within the Fourth Circuit, however, state appellate courts in Maryland and West Virginia have subscribed to cumulative analysis in their assessment of *Strickland* claims,[58] while the Virginia Supreme Court has followed the Fourth Circuit's analysis.[59]

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the cumulation of multiple failures by counsel), Stouffer v. Reynolds, 168 F.3d 1155, 1162–65 (10th Cir. 1999) ("[C]umulatively, each failure underscores a fundamental lack of formulation and direction in presenting a coherent defense."), Harris v. Wood, 64 F.3d 1432, 1438–39 (9th Cir. 1995) ("[T]he plethora and gravity of [counsel's] deficiencies rendered the proceeding fundamentally unfair." (citing Mak v. Blodgett, 970 F.2d 614, 622, 624–25 (9th Cir. 1992))), Rodriguez v. Hoke, 928 F.2d 534, 538 (2d Cir. 1991) ("The state courts should have been given the opportunity to consider all the circumstances and the cumulative effect of all the claims as a whole." (quoting Grady v. LeFevre, 846 F.2d 862, 865 (2d Cir. 1988))) (internal quotation marks omitted), McNeil v. Cuyler, 782 F.2d 443, 451 (3d Cir. 1986) ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming support." (quoting Strickland v. Washington, 466 U.S. 668, 696 (1984))) (internal quotation marks omitted), *and* Cooper v. Fitzharris, 586 F.2d 1325, 1333 (9th Cir. 1978)) ("[P]rejudice may result from the cumulative impact of multiple deficiencies"), *with* Seymour v. Walker, 224 F.3d 542, 557 (6th Cir. 2000) ("Because the individual claims of ineffectiveness alleged by [petitioner] are all essentially meritless, [petitioner] cannot show that the cumulative error of her counsel rendered him ineffective."), Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998) (holding that claims of ineffective counsel must be reviewed individually rather than collectively), *and* Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir. 1996) (citing Wharton-El v. Nix, 38 F.3d 372, 375 (8th Cir. 1994); Griffin v. Delo, 33 F.3d 895, 903–04 (8th Cir. 1994); United States v. Stewart, 20 F.3d 911, 917–18 (8th Cir. 1994) ("Errors that are not unconstitutional individually cannot be added together to create a constitutional violation.")). The Eleventh Circuit does not employ a cumulative error analysis, unless the defendant demonstrates that the trial in state court was fundamentally unfair. *See* Pope v. Sec. for the Dep't of Corr., 680 F.3d 1271, 1297 (11th Cir. 2012) (quoting Cargill v. Turpin, 120 F.3d 1366, 1386 (11th Cir. 1997)). For a detailed discussion of cumulative analysis in federal habeas corpus petitions, see generally Ruth A. Moyer, *To Err is Human; To Cumulate, Judicious: The Need for U.S. Supreme Court Guidance on Whether Federal Habeas Courts Reviewing State Convictions May Cumulatively Assess Strickland Errors*, 61 DRAKE L. REV. 447, 466–74 (2013) (citations omitted).

57. *See Fisher*, 163 F.3d at 852 ("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."). *But see* Moyer, *supra* note 56, at 468–69 (citing *Fisher*, 163 F.3d at 852) (highlighting some ambiguity in *Fisher* that suggests the court may adopt "cumulative analysis in order to establish prejudice for ineffectiveness claims").

58. *See Cirincione*, 705 A.2d at 112–13 ("Even when no single aspect of the representation falls below the minimum standards required under the Sixth Amendment, the cumulative effect of counsel's entire performance may still result in a denial of effective assistance."); State *ex rel.* Daniel v. Legursky, 465 S.E.2d 416, 424 n.7 (W. Va. 1995) ("In making the requisite showing of prejudice, a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was substantial enough to meet *Strickland*'s test." (quoting Williams v. Washington, 59 F.3d 673, 682 (7th Cir. 1995))) (internal quotation marks omitted).

59. *See supra* note 8 and accompanying text.

## IV. CUMULATIVE ANALYSIS AND THE UNITED STATES SUPREME COURT

### *A.* Strickland*'s Language Supports a Cumulative Review*

The language of the *Strickland* opinion suggests that the Supreme Court anticipated that appeals would involve multiple claims of deficiency by counsel and that courts should review the resulting prejudice cumulatively.[60] In the deficiency prong of the two-part test, the Court specifically focused on defense counsel's "performance."[61] As Professor Blume and Christopher Seeds argue, the "cumulation [of deficiencies] begins in the first prong."[62] Additionally, the Court elaborated on the overall performance of counsel during representation, holding that a defendant proves deficient performance by showing that "counsel made *errors* so serious" that the defendant was deprived of the constitutionally adequate representation guaranteed by the Sixth Amendment.[63]

A similar choice of words is present in the prejudice prong of the *Strickland* test.[64] The Court noted that the "defendant must show that the deficient *performance* prejudiced the defense."[65] Further, the Court explained that the second prong is satisfied when the defendant proves that "counsel's *errors* were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[66] Lower courts have particularly looked to the use of this language and the plural use of "errors" to find that each individual counsel error should not be reviewed in a vacuum.[67] Indeed, one could only reasonably discern a directive from the Court for a separate, individual review of each claim of deficient performance under *Strickland* if the majority had chosen singular words such as counsel's *error* or *action*.[68]

Along with using the plural form throughout its discussion of the *Strickland* standard, the Court also emphasized that lower courts should remember that the principles laid out in the opinion must not facilitate the judicial construction of

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60. *See* Blume & Seeds, *supra* note 25, at 1169 & n.58 (quoting *Strickland*, 466 U.S. at 690) (citing United States v. Bagley, 473 U.S. 667, 683 (1983)).

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

62. Blume & Seeds, *supra* note 25, at 1169 n.58 (citing *Strickland*, 466 U.S. at 690).

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

64. *See id.*

65. *Id.* (emphasis added).

66. *Id.* (emphasis added).

67. Brief of the Nat'l Ass'n of Criminal Def. Lawyers, *supra* note 7, at 5 (quoting Schofield v. Holsey, 642 S.E.2d 56, 60 n.1 (Ga. 2007); State v. Gondor, 860 N.E.2d 77, 90 (Ohio 2006)) (internal quotation marks omitted); *see also Ex parte* Aguilar, No. AP-75526, 2007 WL 3208751, at *3 (Tex. Crim. App. 2007) ("[*Strickland*'s] discussion of the prejudice prong, however, is replete with the use of the plural tense, referring to counsel's alleged 'errors' and thus indicating a cumulative, not individual, consideration of such errors.").

68. *See generally Strickland*, 466 U.S. at 687 (outlining the two-pronged test using the plural tense).

"mechanical rules."[69] Rather, courts reviewing ineffective counsel claims must "consider the *totality* of the evidence" that was presented to the factfinder.[70] Merely dissecting and distinguishing each individual deficiency, as well as the prejudicial effect of each individual deficiency, contravenes the fundamental focus on considering whether the proceeding as a whole was just and reliable.[71] Indeed, the Court stressed that the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged."[72] Thus, the Court's "rejection of formalistic rules" accompanying individualized reviews signals the Court's acceptance of a cumulative analysis of multiple claims of ineffective assistance.[73]

### *B. Supreme Court Precedent Approves of Cumulative Analysis*

Additionally, other Supreme Court precedent further demonstrates that courts should review ineffective counsel claims cumulatively.[74] As early as 1935, the Court approved of cumulative analysis for certain trial errors—specifically, in the context of reviewing claims of prosecutorial misconduct.[75] In *Berger v. United States*,[76] the Court reversed and remanded for a new trial after holding that a prosecutor's misconduct was not "slight or confined to a single instance," but was, in fact, "pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."[77]

As Blume and Seeds argue, the various suggestions of the Court accepting cumulative prejudice reviews for ineffective counsel claims began with *United States v. Bagley*,[78] which was decided in the Term immediately following the *Strickland* decision.[79] In *Bagley*, the Court adopted the *Strickland* prejudice test for appeals—previously controlled under *Brady v. Maryland*[80]—regarding the

69. Moyer, *supra* note 56, at 484 (quoting *Strickland*, 466 U.S. at 696) (internal quotation marks omitted).

70. *Strickland*, 466 U.S. at 695 (internal quotation marks omitted).

71. *See id.* at 686.

72. *Id.* at 696; *see also* Moyer, *supra* note 56, at 484 (quoting *Strickland*, 466 U.S. at 696) (pointing to the Court's passage to support cumulative error analysis).

73. Moyer, *supra* note 56, at 485.

74. *See* Blume & Seeds, *supra* note 25, at 1171.

75. *See* Brief of the Nat'l Ass'n of Criminal Def. Lawyers, *supra* note 7, at 13 (citing Berger v. United States, 295 U.S. 78 (1935)).

76. 295 U.S. 78.

77. *Id.* at 89.

78. 473 U.S. 667 (1985).

79. *See* Blume & Seeds, *supra* note 25, at 1167, 1169 (quoting and citing *Bagley*, 473 U.S.at 681 & n.12, 682–83; Strickland v. Washington, 466 U.S. 668, 694 (1984); United States v. Valenzuela-Bernal, 458 U.S. 858, 874 (1982)).

80. 373 U.S. 83 (1963).

materiality of evidence suppressed by the prosecution.[81] Mirroring the *Strickland* prejudice prong,[82] the Court held that evidence withheld from the defense by the prosecution is "material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[83]

Ten years later, a majority of the Court mandated a cumulative review of multiple *Bagley* materiality claims.[84] In *Kyles v. Whitley*,[85] the Court ruled that the Fifth Circuit erred in analyzing materiality by focusing individually on separate pieces of suppressed evidence.[86] The Court unequivocally emphasized to lower courts that pieces of suppressed evidence must be "considered collectively, not item-by-item."[87] Accordingly, the majority in *Kyles* reversed the appellant's conviction and held that the "net effect" of suppressed evidence undermined confidence in the reliability of the jury's verdict.[88] Given that *Strickland* and *Bagley* are inextricably linked by their prejudice tests,[89] the Court's position in *Kyles* demonstrates that it would also likely approve of cumulative prejudice analysis in ineffective counsel claims.[90]

The most recent Supreme Court cases on *Strickland* ineffective counsel appeals also indicate the Court's approval of cumulative prejudice analysis.[91] In *Williams v. Taylor*,[92] the Court set aside the death penalty for a defendant

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81. *See Bagley*, 473 U.S. at 682–83; *Brady*, 373 U.S. at 83; *see also* Blume & Seeds, *supra* note 25, at 1161, 1167 (quoting and citing *Bagley*, 473 U.S. at 681 & n.12, 682–83; *Strickland*, 466 U.S. at 694; United States v. Valenzuela-Bernal, 458 U.S. 858, 874 (1982)) (noting that *Brady* "established 'materiality' as an element of the constitutional error for [prosecutorial suppression of evidence], but did not define it.").

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

83. *See Bagley*, 473 U.S. at 682.

84. *See* Blume & Seeds, *supra* note 25, at 1168 (quoting and citing Kyles v. Whitley, 514 U.S. 419, 421–22, 437 (1995)).

85. 514 U.S. 419 (1995).

86. *Id.* at 422 (quoting and citing Burger v. Kemp, 483 U.S. 776, 785 (1987); Kyles v. Whitley, 5 F.3d 806 (1993), *rev'd*, 514 U.S. 419 (1995)).

87. *Id.* at 436 & n.10.

88. *Id.* at 437, 453.

89. *Compare* Strickland v. Washington, 466 U.S. 668, 694 (1984) ("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."), *with Bagley*, 473 U.S. at 682 ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."). Additionally, the *Strickland* Court equated the test for prejudice resulting from ineffective counsel with the test for prejudice resulting from undisclosed evidence, explaining that the "appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution." *Strickland*, 466 U.S. at 694 (citing United States v. Agurs, 427 U.S. 97, 104, 112–13 (1976)).

90. Blume & Seeds, *supra* note 25, at 1169.

91. *Id.* at 1169 (citing *Strickland*, 466 U.S. at 687; *Bagley*, 473 U.S. at 683).

92. 529 U.S. 362 (2000).

convicted of capital murder and robbery.[93] During state habeas corpus proceedings, the trial judge found that the defendant's counsel was ineffective for failing to investigate and present mitigating evidence at the sentencing hearing.[94] This mitigating evidence included the defendant's juvenile commitment for child abuse, testimony that the defendant was borderline mentally retarded and suffered from head injuries, and testimony that the defendant would not pose a threat to society if kept in a structured environment.[95] The trial judge recommended a sentencing rehearing, determining that counsel's failure to present these pieces of mitigating evidence was certainly below the acceptable professional standards under *Strickland*.[96]

After the Virginia Supreme Court denied the recommendation for rehearing,[97] the defendant applied for federal habeas corpus relief;[98] his case was eventually appealed to the U.S. Supreme Court.[99] In its reversal of the defendant's death sentence, the Court looked to the cumulative effect of counsel's failure to present each of multiple pieces of mitigating evidence:

> In our judgment, the state trial judge was correct both in his recognition of the established legal standard for determining counsel's effectiveness, and in his conclusion that the *entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally*, raised a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of *all the available evidence*.[100]

Additionally, *Wiggins v. Smith*[101] also suggests that cumulative analysis is appropriate for ineffective counsel reviews.[102] In *Wiggins*, the Court reversed the defendant's death sentence for first degree murder, robbery, and theft.[103] Similar to the defendant in *Williams*,[104] the defendant in *Wiggins* claimed, in post-conviction relief proceedings, that his counsel was ineffective under *Strickland* for failing to present mitigating evidence at his sentencing hearing.[105]

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93. *See id.* at 368, 399.
94. *Id.* at 370–71.
95. *Id.*
96. *Id.* at 371.
97. *Id.* (citing Williams v. Warden of Mecklenburg Corr. Ctr., 487 S.E.2d 194, 200 (Va. 1997)).
98. *Id.* at 372 (citing 28 U.S.C. § 2254 (2012)).
99. *Id.* at 374 (citing Williams v. Taylor, 526 U.S. 1050 (1999)).
100. *Id.* at 398–99 (emphasis added) (internal quotation marks omitted) (citing Strickland v. Washington, 466 U.S. 668 (1984)).
101. 539 U.S. 510 (2003).
102. *See id.* at 534–38.
103. *Id.* at 515, 519.
104. *Williams*, 529 U.S. at 371.
105. *Wiggins*, 539 U.S. at 516.

The defendant specifically brought up his gravely troubled childhood, during which he suffered physical and sexual abuse from his mother and lived in abusive environments at multiple foster homes.[106]

After a fight in the state and federal appellate courts over whether it was appropriate trial strategy for defense counsel to concentrate on the defendant's acceptance of responsibility for his crime—instead of presenting the mitigating evidence[107]—the Supreme Court granted certiorari.[108] The Court assessed *Strickland* prejudice by weighing the aggravating evidence "against the *totality* of available mitigating evidence."[109] In reversing the defendant's sentence, the Court reasoned that counsel's failure to investigate the mitigating evidence resulted from counsel's inattentiveness.[110] Calling the mitigating evidence "powerful,"[111] the Court concluded that, if "*taken as a whole*," it might have changed the way the jury viewed the defendant in terms of culpability for his crimes.[112] Thus, the relevant language in *Williams* and *Wiggins* "simply clarif[ied] what the Supreme Court's language in *Strickland* already suggest[ed]" regarding the Court's approval of cumulative prejudice analysis in ineffective counsel appeals.[113]

## V. THE CURRENT LANDSCAPE OF CUMULATIVE ANALYSIS IN SOUTH CAROLINA

In South Carolina, the issue of whether cumulative prejudice analysis applies to multiple *Strickland* claims of ineffective counsel in PCR appeals remains an unsettled question.[114] The South Carolina Supreme Court and South Carolina Court of Appeals have both mentioned cumulative prejudice analysis on several occasions, however, and some circuit court judges have—in PCR cases—recognized the analysis in granting relief for ineffective counsel before being reversed by either the South Carolina Court of Appeals or the South Carolina Supreme Court.[115]

Prior to acknowledging the possibility of a cumulative prejudice analysis in *Strickland* ineffective assistance claims, South Carolina appellate courts

106. *Id.* at 516–17.

107. *Id.* at 518–19 (citing MD. CODE ANN., ART. 41, § 4-609(d) (Supp. 1989); Wiggins v. Corcoran, 288 F.3d 629, 639–41 (4th Cir. 2002); Wiggins v. Corcoran, 164 F. Supp. 2d 538, 557–58 (D. Md. 2001); Wiggins v. State, 724 A.2d 1 (Md. 1999)).

108. *Id.* at 519 (citing Wiggins v. Smith, 537 U.S. 1027 (2002)).

109. *Id.* at 534 (emphasis added) (citing Strickland v. Washington 466 U.S. 668, 694 (1984)).

110. *Id.* at 526, 538.

111. *Id.* at 534.

112. *Id.* at 538 (quoting Williams v. Taylor, 539 U.S. 362, 398 (2000)).

113. Blume & Seeds, *supra* note 25, at 1170 (quoting *Wiggins*, 539 U.S. at 538).

114. *See supra* note 19 and accompanying text.

115. *See supra* note 19 and accompanying text; *see also* Lorenzen v. State, 376 S.C. 521, 535, 657 S.E.2d 771, 779 (2008) (holding that the PCR judge incorrectly found prejudice through cumulative effect of multiple alleged counsel errors).

recognized the analysis in reviewing other aspects of trial error.[116] In *State v. Peterson*,[117] for example, the South Carolina Supreme Court reversed the death sentences of two codefendant accomplices convicted of murder, armed robbery, grand larceny of a motor vehicle, and conspiracy under a cumulative analysis of errors the trial judge committed.[118] The codefendants argued that the trial judge erred in giving multiple erroneous instructions to the jury, as well as failing to give several necessary instructions.[119] The supreme court concluded that "[s]ome, if not all" of the defendants' five assignments of trial court error regarding jury instructions had merit and that the "collective impact" of these errors warranted a new trial.[120]

Additionally, the South Carolina Court of Appeals has utilized cumulative analysis with respect to multiple nonprejudicial trial court errors.[121] In *State v. Freeman*,[122] the court of appeals set aside two codefendants' convictions for marijuana offenses due to the trial judge's conduct during cross-examination.[123] Among other assertions of error, the defendants argued that the trial judge committed fourteen different errors during the proceeding, including unnecessary interruptions, inappropriate comments, and limitations on cross-examination of the State's investigating authorities.[124] Although the court found no prejudice from each of these errors individually, it recognized that the "aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to require reversal."[125] The court reasoned that the "combined effect" of the trial judge's otherwise nonprejudicial errors was enough to prejudice the codefendants' case.[126]

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116. *See, e.g.*, State v. Peterson, 287 S.C. 244, 246, 335 S.E.2d 800, 801 (1985) ("The combination of numerous errors committed by the trial court in this death penalty case compels us to reverse and remand for a new trial."), *overruled on other gounds by* State v. Torrence, 305 S.C. 45, 69–70, 406 S.E.2d 315, 328–29 (1991) ("To the extent they require *in favorem vitae* review, the following cases *inter alia*, are hereby overruled."); State v. Freeman, 319 S.C. 110, 123–24, 459 S.E.2d 867, 875 (Ct. App. 1995) ("[T]he aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to justify reversal.").

117. 287 S.C. 244, 335 S.E.2d 800.

118. *Id.* at 245–46, 335 S.E.2d at 801 (citing S.C. CODE ANN. § 16-3-25 (2003)).

119. *Id.* The alleged trial court errors included:

> (1) [F]ailing to give a limiting instruction regarding the use of his prior convictions . . . . (2) giving the jury an erroneous conspiracy charge; (3) giving the jury an erroneous malice charge; (4) failing to instruct the jury to determine each appellant's individual culpability before imposing the death penalty, and (5) failing to instruct the jury to disregard the possibility of parole.

*Id.*

120. *Id.*

121. *See Freeman*, 319 S.C. at 123–24, 459 S.E.2d at 875.

122. 319 S.C 110, 459 S.E.2d 867.

123. *Id.* at 113, 123–24, 459 S.E.2d at 867, 875.

124. *Id.* at 123, 459 S.E.2d at 875.

125. *Id.*

126. *Id.*

The South Carolina Supreme Court first touched upon the possibility of cumulative prejudice analysis for multiple ineffective counsel claims in *Green v. State*.[127] The defendant in *Green* was convicted of armed robbery in a jury trial[128] and claimed three core instances of ineffective trial counsel through PCR: failure to move for a mistrial, failure to object to an *Allen* jury charge,[129] and failure to request that the trial court poll the jury.[130] After disposing of each claim of ineffective assistance of counsel—concluding that trial counsel was not ineffective and that the defendant did not suffer prejudice from any claim[131]—the court affirmed the denial of PCR.[132] In the context of cumulative analysis, the court declared that, even if it were inclined to apply the analysis, "[m]ultiple errors [did] not exist in this case to form any cumulative prejudicial effect."[133]

Although faced with another opportunity to utilize cumulative analysis a year later, the South Carolina Supreme Court took a different path in assessing ineffective assistance of counsel in *Nance v. Frederick*.[134] In *Nance v. Frederick*, the defendant was sentenced to death after a jury convicted him of murder, first degree criminal sexual conduct, first degree burglary, assault and battery with intent to kill, and armed robbery.[135] After the defendant exhausted his direct state appeals and the PCR court denied him relief on numerous claims of ineffective counsel,[136] the supreme court reversed and remanded for a new trial, applying the *Cronic* per se prejudice analysis.[137] Instead of analyzing each claim of ineffective counsel under *Strickland*, the supreme court utilized its 1984 companion and concluded that counsel's performance was so egregious that his "trial presentation, in its entirety, represent[ed] a classic *Cronic* ineffectiveness case . . . because there was a total breakdown in the adversarial process during both the guilt phase and penalty phase of [the defendant's] trial."[138] In its reversal, the court cited six instances of deficient counsel:

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127. 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002).

128. *Id.* at 188, 569 S.E.2d at 320.

129. *See generally* Allen v. United States, 164 U.S. 492, 501–02 (1896) (holding that judges may provide instruction to jurors in the minority that encourages the reconsideration of their vote to avoid hung juries). South Carolina requires *Allen* instructions to be "even-handed, directing both the majority and the minority to consider the other's views." *Green*, 351 S.C. at 194, 569 S.E.2d at 323.

130. *Green*, 319 S.C. at 192–95, 569 S.E.2d at 322–24 (citations omitted).

131. *See id.* at 192–96, 569 S.E.2d at 322–24 (citations omitted).

132. *Id.* at 198, 569 S.E.2d at 325.

133. *Id.*

134. 358 S.C. 480, 490 596 S.E.2d 62, 67 (2004), *vacated and remanded by* Ozmint v. Nance, 543 U.S. 1043, 1043 (2005).

135. *Id.* at 483, 596 S.E.2d at 63.

136. *Id.* (citing State v. Nance, 320 S.C. 501, 466 S.E.2d 349 (1996)).

137. *See id.* at 490, 596 S.E.3d at 67 (quoting United States v. Cronic, 466 U.S. 648, 656–57 (1984)).

138. *Id.* at 488, 596 S.E.2d at 66 (citing *Cronic*, 466 U.S. at 658–59).

> (1) [C]ounsel was taking several prescription medications during the trial which resulted in impaired memory, lack of sleep, and sedation; (2) counsel provided Nance's expert witness with Nance's medical records just a few hours before the trial; (3) during his opening statement counsel informed the jury that he was appointed as a public defender and did not ask for the case; (4) counsel called a correctional officer as a witness who testified regarding Nance's only incident of misbehavior in jail; (5) counsel called Nance's sister to testify without preparing her to testify and eliciting testimony that Nance was an abnormal child who, among other things, killed the family's pets; and (6) counsel referred to Nance during closing arguments as a "sick man" who did "sick things."[139]

Subsequently, the U.S. Supreme Court vacated the judgment and remanded for reconsideration in light of its decision in *Florida v. Nixon*.[140] In *Nixon*, the Court held that *Cronic* prejudice analysis is reserved for rare circumstances in which defense counsel failed to engage in the adversarial process.[141] On remand, the South Carolina Supreme Court reproduced its opinion in *Nance v. Ozmint*,[142] reaffirming its position in the *Nance v. Frederick* case.[143] The court concluded that defense counsel's performance was too "consistently inept" to warrant a *Strickland* prejudice analysis: counsel's "ineffectiveness [was] so pervasive as to render a particularized prejudice inquiry unnecessary."[144] Thus, the South Carolina Supreme Court remained adamant about evaluating effectiveness under *Cronic* when, on remand, it had an open opportunity to apply a cumulative *Strickland* prejudice analysis with regard to defense counsel's errors.[145]

The South Carolina Supreme Court was again presented with an argument in favor of cumulative prejudice analysis for several nondeficient counsel errors in *Simpson v. Moore*.[146] In *Simpson*, the defendant was sentenced to death after he

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139. Lorenzen v. State, 376 S.C. 521, 527 n.2, 657 S.E.2d 775 n.2 (2008) (citing Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006)) (discussing errors made by defense counsel in *Nance v. Ozmint*).

140. *See* Ozmint v. Nance, 543 U.S. 1043, 1043 (2005); Florida v. Nixon, 543 U.S. 175, 190 (2004) (citing *Cronic*, 466 U.S. at 658–59, 662, 666–67) (clarifying the proper use of *Cronic* analysis).

141. *See Nixon*, 543 U.S. at 190 (citing *Cronic*, 466 U.S. at 658–59, 662, 666–67).

142. 367 S.C. 547, 626 S.E.2d 878 (2006).

143. *See id.* at 553–57, 558, 626 S.E.2d at 881–83 (quoting Nance v. Frederick, 358 S.C. at 485–90, 596 S.E.2d at 65–67 (2004)).

144. *Id.* at 558, 626 S.E.2d at 883 (internal quotation marks omitted) (quoting Nance v. Frederick at 490, 596 S.E.2d at 67).

145. *See generally id.* (quoting *Nance*, at 490, 596 S.E.2d at 67) (using *Cronic* per se prejudice analysis to reverse defendant's convictions, instead of evaluating attorney errors under a *Strickland* review).

146. 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) ("The record simply did not contain several errors for the judge to cumulatively assess.").

was convicted for murdering a convenience store clerk during a robbery.[147] Both the defendant and the State appealed after the PCR judge granted relief on sentencing but denied relief on guilt.[148] The defendant raised three different grounds for ineffective assistance: failure to consult a forensic expert, failure to call an expert witness to discredit a child witness's testimony, and failure to object to the State's use of preemptory challenges against prospective female jurors.[149] The supreme court affirmed the PCR court's denial of relief on each claim, holding that the PCR judge did not err by refusing to conduct a cumulative analysis because the "record simply did not contain 'several errors' for the judge to cumulatively assess."[150] Following its reasoning in *Green*, the court remained steadfast in its refusal to address the issue of cumulative analysis in *Strickland* claims until it is presented with a case involving multiple counsel deficiencies.[151]

Two years later, the South Carolina Supreme Court revisited cumulative analysis in *Lorenzen v. State*,[152] in which the PCR judge found cumulative prejudice resulting from multiple nonprejudicial deficiencies.[153] In *Lorenzen*, the defendant was convicted in a jury trial for sexually molesting a young child.[154] The PCR judge granted relief after ruling that the defendant's public defender provided inadequate assistance in violation of the Sixth Amendment.[155] The PCR judge cited five instances of deficient performance chiefly attributable to counsel's inexperience, all of which were exacerbated by the limited resources of the public defender's office.[156] The PCR judge then explicitly endorsed cumulative analysis by ruling that, while none of the young public defender's

147. *Id.* at 594, 627 S.E.2d at 705.

148. *Id.*

149. *Id.* at 594–95, 627 S.E.2d at 705.

150. *Id.* at 604, 627 S.E.2d at 710.

151. *See id.* (citing Green v. State, 351 S.C. 184, 196–97, 569 S.E.2d 318, 324–25 (2002)); *see also Green,* 351 S.C. at 197, 569 S.E.2d at 325 ("[W]e recognize the threshold to asking the cumulative prejudicial question is to first find multiple errors.").

152. 376 S.C. 521, 657 S.E.2d 771 (2008).

153. *See id.*at 527, 657 S.E.2d at 775.

154. *Id.* at 525, 657 S.E.2d at 774. The defendant was convicted of first degree criminal sexual conduct with a minor, second degree criminal sexual conduct with a minor, and performing a lewd act upon a child. *Id.*

155. *Id.* at 526–28, 657 S.E.2d at 774–75 (citing Nance v. Frederick, 358 S.C. 480, 596 S.E.2d 62 (2004)).

156. *Id.* at 526–27, 657 S.E.2d at 774–75. The PCR judge found that defense counsel was deficient by failing to do the following:

> (1) [R]etain or even consult with an expert witness; (2) conduct an investigation to determine whether another individual, particularly the victim's father who was listed on the sexual offender registry, could have been responsible for sexually abusing the victim; (3) have [the defendant] submit to a polygraph examination in order to assist in the defense; (4) obtain the minor victim's records from the sexual abuse counselor, the Department of Juvenile Justice, and the Department of Social Services; and (5) meet with the minor child prior to trial.

*Id.* at 527, 657 S.E.2d at 775.

failures would individually constitute grounds for relief, "the cumulative neglect [was] severe."[157] After the State appealed, the supreme court reversed the PCR judge's order by concluding that defense counsel was not deficient on any of the five allegations of ineffective counsel.[158] Thus, the court held that the PCR judge erred in relying on *Nance v. Frederick* to find that the cumulative prejudicial effect of the purported deficiencies satisfied the *Strickland* standard for ineffective counsel.[159] The court noted, however, that the appropriateness of cumulative prejudice analysis remained an open question in South Carolina because the facts of *Lorenzen* did not provide an opportunity to rule on the issue.[160]

The most recent mention of cumulative analysis—and seemingly the most convincing grounds for its adoption—came from the South Carolina Court of Appeals in *Walker v. State*.[161] In *Walker*, the defendant was convicted in a jury trial of first degree criminal sexual conduct and kidnapping.[162] The PCR judge granted the defendant relief for ineffective counsel on two separate grounds.[163] First, the PCR judge determined that defense counsel's failure to investigate the defendant's girlfriend as an alibi witness was deficient and prejudiced the defendant.[164] Second, the PCR judge cited three additional instances of deficient performance, including counsel's "failure to investigate [the victim's] alcohol use, her failure to move to continue the hearing to await the written results of the forensic testing, [and] her failure to cross-examine the witnesses as to the discrepancy of the conflicting times of the incident."[165] The PCR judge concluded that, when considered along with the failure to investigate the alibi, these errors "cumulatively prejudiced" the defendant—even though these deficiencies were not individually prejudicial.[166]

On the State's appeal, the South Carolina Court of Appeals agreed that the defense counsel's failure to investigate a potential alibi witness was deficient.[167] The court, however, ultimately held that the defendant was not prejudiced by this deficient performance because, upon further review of the PCR hearing, his

157. *Id.* at 527, 657 S.E.2d at 775 (internal quotation marks omitted).

158. *Id.* at 528–35, 657 S.E.2d at 775–79 (citations omitted).

159. *Id.* at 535, 657 S.E.2d at 779 (citing Nance v. Frederick, 358 S.C. 480, 596 S.E.2d 62 (2004)).

160. *Id.* at 535 n.3, 657 S.E.2d at 779 n.3 ("Although we recognize that whether the cumulation of several errors, 'which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina' we do not believe the facts of this case present an opportunity to definitively decide this question.").

161. 397 S.C. 226, 723 S.E.2d 610 (Ct. App. 2012).

162. *Id.* at 231, 723 S.E.2d at 613.

163. *Id.* at 234, 723 S.E.2d at 614.

164. *Id.*

165. *Id.* (internal quotation marks omitted).

166. *Id.* (internal quotation marks omitted).

167. *Id.* at 235, 723 S.E.2d at 615.

girlfriend did not qualify as an alibi witness.[168] With regard to the other three instances of counsel error, the court confirmed that counsel's failure to cross-examine the witnesses as to conflicting evidence on the time of the incident was deficient performance but not prejudicial;[169] the court disposed of the other two errors for lack of deficient performance.[170]

Notably, the court in *Walker* had ample opportunity to apply cumulative prejudice analysis as it faced multiple deficiencies under the first prong of the *Strickland* test[171]—counsel's failure to investigate a potential alibi witness and failure to cross-examine witnesses on conflicting evidence.[172] The court of appeals could have utilized the signal from the South Carolina Supreme Court in both *Green*[173] and *Simpson*[174] to recognize that it was, in fact, considering multiple attorney errors to which it could apply cumulative prejudice analysis.[175] Nevertheless, the court ruled that cumulative analysis was inappropriate in *Walker* because the two deficiencies were "unrelated to each other" and "neither one [made] the other more prejudicial."[176] Cumulative prejudice analysis, however, does not focus on a defined interrelationship between or pattern among deficiencies, but instead considers the overall prejudicial effect when, in the absence of such counsel errors, "the factfinder would have had a reasonable

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168. *Id.* at 237, 723 S.E.2d at 616 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 539, 540 (1995)). The South Carolina Court of Appeals supported its reasoning by referencing the South Carolina Supreme Court's directive that "[t]o qualify as an alibi, a witness's testimony must account for the defendant's whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime." *Id.* at 237, 723 S.E.2d at 616 (citing *Glover*, 318 S.C. at 498, 458 S.E.2d at 540). The purported alibi witness in *Walker* testified that the defendant had stayed over at her house during the weekend of the crime, but because the PCR hearing was five years after the incident, she could not remember whether he was definitely present at the exact time of the crime. *See id.* at 233, 238, 723 S.E.2d at 614, 616. Using *Glover*, the court of appeals ruled that she did not qualify as an alibi because her testimony "leaves open the possibility that [the defendant] is guilty." *Id.* at 238–39, 723 S.E.2d at 617 (citing *Glover*, 318 S.C. at 500–01, 458 S.E.2d at 541).

169. *Id.* at 239, 723 S.E.2d at 617. The conflicting evidence ranged widely, from video surveillance placing the victim at the scene of the abduction at 3:30 P.M. to several reports that she was present at the scene at either 7:00 P.M. or 8:00 P.M. *See id.* at 242, 723 S.E.2d at 619. The court of appeals simply adopted the PCR judge's findings on the lack of prejudicial effect from counsel's failure to cross-examine the victim on these discrepancies without employing any further review. *See id.* at 243, 723 S.E.2d at 619.

170. *Id.* at 243, 723 S.E.2d at 619 (quoting Edwards v. State 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011)). These errors included counsel's failure to request a continuance to await DNA test results and failure to cross-examine the victim on her alcohol abuse. *Id.* at 239–41, 723 S.E.2d at 617–18.

171. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).

172. *See supra* notes 167, 169 and accompanying text.

173. *See* Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002) ("[W]e recognize the threshold to asking the cumulative prejudicial question is to first find multiple errors. Multiple errors do not exist in this case to form any cumulative prejudicial effect.").

174. *See* Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) ("The record simply did not contain 'several errors' for the judge to cumulatively assess.").

175. *See id.* at 604, 627 S.E.2d at 710; *Green*, 351 S.C. at 197, 569 S.E.2d at 325.

176. Walker v. State, 397 S.C. 226, 243, 723 S.E.2d 610, 619 (Ct. App. 2012).

doubt respecting guilt."[177] In *Walker*, the jury arguably could have confronted reasonable doubt during the trial if defense counsel had presented testimony from the defendant's girlfriend as to his whereabouts during the crime, in addition to calling witnesses concerning discrepancies as to the time of the incident.[178]

Most importantly, the *Walker* court's reluctance to employ cumulative prejudice analysis, as well as its use of an individual approach to each counsel error, allows for potentially inconsistent *Strickland* reviews in the form of differing claim definitions.[179] PCR applicants can frame claims of ineffective counsel either generally or specifically.[180] Even so, courts may review these claims of attorney errors under certain categories regardless of how they are pleaded.[181] Thus, inconsistencies occur with an individualized approach to *Strickland* claims because any given categorization of attorney error is almost always "arbitrary."[182] For example, one court may review counsel's general failure to interview several witnesses in one distinct claim definition category, while another may review each specific failure to interview every witness as a separate claim.[183] While each of these courses may be logical, the classifications could have perhaps led to different outcomes concerning the fairness of the proceeding had the court in the latter specific claim scenario declined to apply the cumulative analysis that automatically accompanied the review of the former general claim.[184] Therefore, the varied pleading of defense counsel's errors, as well as the ways in which courts ultimately consider these errors, could potentially have an unfair effect on prejudice analysis for PCR applicants who receive the higher burden accompanying an individualized review.[185]

The claim definition problem is distinctly illustrated by *Walker*, in which the defendant framed one claim of ineffective counsel as the failure to investigate his girlfriend as a potential alibi witness.[186] If the defendant had chosen to plead this claim simply as the failure to investigate and call witnesses, the court may not

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177. *Ex parte* Aguilar, No. AP-75526, 2007 WL 3208751, at *16 (Tex. Crim. App. Oct. 31 2007) (quoting Strickland v. Washington, 466 U.S. 668, 695 (1984)) (internal quotation marks omitted).

178. *See Walker*, 397 S.C. at 233–34, 723 S.E.2d at 614 (noting that the PCR court found that "[t]he jury would have weighed the credibility of the testimony of the [defendant's girlfriend], and it is reasonable to assume that the outcome of the deliberations may have been different had this witness testified in light of the facts of this case") (internal quotation marks omitted).

179. *See id.* at 243, 723 S.E.2d at 619 (quoting Edwards v. State 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011)); Blume & Seeds, *supra* note 25, at 1171–72.

180. Blume & Seeds, *supra* note 25, at 1171–72 & n.71 (quoting Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1121–22 (1999)).

181. *See id.*at 1171–72.

182. *Id.* at 1171.

183. *See id.*

184. *See id.* at 1171–72.

185. *See id.* at 1172.

186. *See* Walker v. State, 397 S.C. 226, 231, 723 S.E.2d 610, 613 (Ct. App. 2012).

have been inclined to analyze the legal definition of, and requirements for, an alibi witness and individually dispose of the claim for lack of prejudice.[187] In fact, this particular error could have been reviewed together with counsel's other "failure to call witnesses" regarding the conflicting times of the incident; in this scenario, the collective prejudicial effect from this category would have been automatically gauged upon review.[188] Indeed, the categorization of these two claims of ineffective counsel as the failure to call witnesses could have effectively given the defendant a cumulative analysis, regardless of whether that was the intention of either the PCR judge or the defendant.[189] Thus, an open recognition of cumulative prejudice analysis would not only be a welcome solution to the claim definition problem, but would also constitute a vital safeguard ensuring that all PCR applicants receive consistent reviews of the prejudicial effect of multiple similar claims of counsel error, regardless of how they plead them.[190]

In early 2014, the South Carolina Supreme Court reversed the South Carolina Court of Appeals in *Walker v. State*,[191] upholding the ruling of the PCR court that the failure to interview the potential alibi witness was deficient and prejudiced the defendant.[192] The supreme court concluded that the court of appeals "read *Glover* too broadly to apply to the alibi testimony . . . and also failed to adhere to the limited standard of review which appellate courts have over findings of the PCR court."[193] Because the supreme court determined that its resolution of the alibi was dispositive, the court did not address the defendant's argument for cumulative prejudicial analysis of the other alleged deficiencies.[194] Thus, the question regarding whether cumulative prejudicial analysis is appropriate for multiple claims of ineffective counsel still remains open in South Carolina.

## VI. THE NEED FOR CUMULATIVE ANALYSIS IN SOUTH CAROLINA

The adoption of cumulative prejudice analysis in *Strickland* reviews by South Carolina courts will level the playing field and produce more consistent

187. *See id.* at 243, 723 S.E.2d at 619 (quoting Edwards v. State 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011)). The PCR court suggested that the defendant's girlfriend did not technically meet the legal definition of an alibi witness at the PCR hearing but found that even though "[her] memory of specific dates is not perfect since it has been approximately five years since the incident, and approximately four years since the trial, her testimony corroborated that of [the defendant]." *Id.* at 233–34, 723 S.E.2d at 614 (internal quotation marks omitted).

188. *See id.* at 242–43, 723 S.E.2d at 618–19 (quoting *Edwards*, 392 S.C. at 459, 710 S.E.2d at 66) (internal quotation marks omitted).

189. *See id.* at 242–43, 723 S.E.2d at 618–19 (quoting *Edwards*, 392 S.C. at 459, 710 S.E.2d at 66).

190. *See supra* notes 184–85 and accompanying text.

191. Op. No. 27368, 2014 WL 1052609, at *1 (S.C. Mar. 19, 2014).

192. *Id.* at *4.

193. *Id.* at *2.

194. *Id.* at *4 n.1.

reviews of ineffective counsel claims for the already overburdened PCR applicants.[195] *Strickland* provides an almost "insurmountable test"[196] for criminal defendants attempting to prove ineffective assistance of counsel.[197] The odds are against challenges for ineffective counsel primarily because of the U.S. Supreme Court's firm directive that "[j]udicial scrutiny of counsel's performance must be highly deferential" to the professional soundness of defense counsel's conduct at trial.[198] Indeed, to prevail under *Strickland*, criminal defendants must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[199]

The strong presumption of effective counsel could not be further from reality when it comes to the representation of indigent defendants at trial.[200] Around the country, and especially in South Carolina, public defenders' offices are grossly underfunded and oversaturated with cases[201] to the critical point that they cannot possibly provide constitutionally adequate representation for all of their indigent clients.[202] Given that appointed counsel will likely make errors in any given case due to the constraints on time and resources,[203] PCR courts should be able to

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195. *See* Blume & Seeds, *supra* note 25, at 1171–72; *see also* S.C. CODE ANN. §§ 17-27-10 through -160 (2014) (providing the statutory framework for South Carolina PCR); John H. Blume & Emily C. Paavola, *A Reintroduction: Survival Skills for Post-Conviction Practice in South Carolina*, 4 CHARLESTON L. REV. 223 (2010) (providing a survey of the many hurdles facing PCR applicants in South Carolina); John H. Blume, *An Introduction to Post-Conviction Remedies, Practice and Procedure in South Carolina*, 45 S.C. L. REV. 235 (1994) (discussing PCR procedure and remedies in South Carolina).

196. Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 414–15 (1988).

197. *Id.*; *see also* Strickland v. Washington 466 U.S. 668, 687 (1984). The *Strickland* test is often criticized by legal commentators as being the "foggy mirror" test, under which "[if] you place a mirror in front of defense counsel during trial and it fogs, counsel is in fact effective." JOSHUA DRESSLER & GEORGE C. THOMAS, III, CRIMINAL PROCEDURE: INVESTIGATING CRIME 1010–11 (4th ed. 2010) (quoting RANDALL COYNE, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS, TEACHER'S MANUAL 148 (1995)) (internal quotation marks omitted). Giving credence to this criticism, a survey of over 37,000 cases that included challenges to convictions for ineffective assistance of counsel shows that lower courts applying *Strickland* have found that almost all defendants (97%) have received constitutionally adequate representation. *See id.* at 1015.

198. *Strickland*, 466 U.S. 668, 689 (1984).

199. *Id.*

200. *See id.* at 708 (Marshall, J., dissenting) ("It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case.").

201. *See* Meg Kinnard, *Cases Flood S.C.'s Public Defender System*, THE STATE, Apr. 18, 2011, at A12.

202. *See* Calhoun, *supra* note 196, at 416–17 ("[T]he problem of inadequate criminal representation is much more pervasive than the *Strickland* Court seemed to realize—or was prepared to admit.").

203. *See id.* at 416 (stating that Judge David L. Bazelon admitted: "[W]hat I have seen in 23 years on the bench leads me to believe that a great many—if not most—indigent defendants do not receive the effective assistance of counsel guaranteed them by the 6th Amendment." (quoting David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973))) (internal

assess the cumulative prejudicial effect of these multiple errors on the applicant's case.

Indigent defendants are similarly burdened at the PCR level: they must fill out PCR applications on their own, and they often have no training on how to properly frame the grounds for ineffective counsel.[204] In fact, under current South Carolina law, indigent defendants do not even receive the assistance of appointed counsel until the PCR application is filed by the defendant and a return is submitted by an attorney in the PCR section of the South Carolina Office of the Attorney General.[205] Thus, under the grounds for relief in section 10 of the PCR application, it is entirely up to the untrained applicant to name the ineffective counsel claims.[206] Even when attorneys are appointed by the court, they too are often inexperienced in PCR matters and conceivably will not be helpful in assisting with the proper framing of ineffective counsel claims.[207] Moreover, applicants and their appointed attorneys will not likely be cognizant of how to group similar claims into categories in an attempt to receive any sort of cumulative prejudice analysis.[208] Again, a formally recognized cumulative prejudice review could be a valuable protective device ensuring that, no matter how untrained applicants or appointed attorneys plead multiple claims of ineffective assistance, the manner of pleading will not produce inconsistent results or have a detrimental effect on the review of prejudice.[209]

Furthermore, consistent prejudice reviews are clearly needed in South Carolina: despite its importance, PCR receives scant attention from scholars and the legal community.[210] Nevertheless, for most criminal defendants challenging convictions that resulted from ineffective assistance of counsel, PCR is the most

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quotation marks omitted). Judge Bazelon served as Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit. Bazelon, *supra*, at 1.

204. *See* S.C. R. CIV. P. 71.1; *see also* Richardson v. State, 377 S.C. 103, 106, 659 S.E.2d 493, 495 (2008) ("Many times, such as in the case at hand, an applicant does not understand the PCR process, including the fact that the allegations that can be raised are limited by law.").

205. *See* S.C. Sup. Ct. Admin. Order No. 2008-10-06-01 (Oct. 6, 2008), *available at* http://www.sccourts.org/courtOrders/displayOrder.cfmVorderNo=2008-10-06-01; *see also* S.C. R. CIV. P. 71.1 ("If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent."); Demetrio L. Sears, *South Carolina Post-Conviction Relief: Practical Considerations and Procedures from a Prisoner's Perspective*, 64 S.C. L. REV. 1169, 1185–86 (2013) ("This appointment, however, is not automatic upon the filing of a PCR action by a prisoner.").

206. S.C. R. CIV. P., Form 5.

207. *See* Blume, *supra* note 195, at 236 & n.3 ("[A]n established post-conviction bar does not exist in South Carolina. Thus, it is usually 'amateur hour' for the inmate, while attorneys who specialize in post-conviction work represent the state.").

208. *See id.* For an examination of the ineffective counsel claim definition and the role of cumulative prejudice review, see *supra* Part V.

209. *See supra* Part V.

210. *See* Blume, *supra* note 195, at 236 (discussing how PCR is often referred to as the "redheaded stepchild of the legal system" (quoting Vance L. Cowden, *Indigent Defense Services for Post-Conviction Relief in South Carolina: Current Problems and Potential Remedies*, 42 S.C. L. REV. 417, 420 (1991))) (internal quotation marks omitted).

important venue for obtaining relief.[211] Additionally, PCR is the last resort for remedies in the state system for most criminal defendants; after pursuing PCR, these defendants must turn to a federal habeas corpus petition.[212] Because the Fourth Circuit does not currently recognize cumulative prejudice review, South Carolina's PCR process is an applicant's last chance to receive this analysis in *Strickland* claims.[213] Thus, South Carolina should join Maryland and West Virginia by becoming the third state in the Fourth Circuit to explicitly give criminal defendants a cumulative prejudice review at the state level.[214]

## VII. CONCLUSION

In assessing multiple *Strickland* claims of ineffective assistance of counsel, courts should consider the cumulative prejudicial effect of multiple attorney deficiencies. A majority of courts around the nation have reached this conclusion.[215] On numerous occasions, the South Carolina judiciary has come close to joining that majority.[216] The wide-ranging suggestions of support for a cumulative review from the U.S. Supreme Court, as well as courts around the country, are further proof of the need for its recognition in South Carolina.[217] Due to the persistent problems occurring in individualized *Strickland* reviews, as well as the issue of differing claim definitions, cumulative prejudice analysis is necessary to provide consistent reviews of multiple claims of ineffective counsel for all PCR applicants. In adopting cumulative review, South Carolina will take a crucial step forward in its PCR process to ensure that all criminal defendants receive a fair review of their fundamental constitutional rights to effective counsel and a just proceeding.

*Benjamin Dudek*

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211. *See* Blume & Paavola, *supra* note 195, at 233 ("In PCR, the focus is usually on alleged errors made by prior counsel and other errors of law or fact that occurred outside the record below. The South Carolina Supreme Court said that 'when asserting the erroneous admission of evidence, a violation of a constitutional right, or other errors in a proceeding, the [PCR] applicant generally must frame the issue as one of ineffective assistance of counsel.'" (footnotes omitted) (quoting Al-Shabaaz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000))). Blume and Paavola believe that the South Carolina Supreme Court's statement is "overbroad and underinclusive" because not all claims for PCR are centered on ineffective counsel claims. *Id.* (citing Cummings v. State, 274 S.C. 26, 27–28, 260 S.E.2d 187 (1979)).

212. *See* Blume, *supra* note 195, at 237 ("[I]n most cases, the state post-conviction process will be the inmate's last chance to raise any additional challenges to his [or her] conviction or sentence.") (footnote omitted). According to the "exhaustion doctrine," defendants must exhaust all state remedies before filing for federal habeas corpus, and petitioners may only argue substantive issues that were previously raised in the state appeals process. *Id.* at 237 n.5 (internal quotation marks omitted).

213. *See supra* note 57 and accompanying text.

214. *See supra* note 58 and accompanying text.

215. *See supra* notes 52 and 56 and accompanying text.

216. *See supra* Part V.

217. *See supra* Parts III–IV.