

What's the Matter with Cumulative Error?: Killing a Federal Claim in Order to Save It

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I. INTRODUCTION

The case of Warren Summerlin, a man convicted of first-degree murder and sentenced to death in Arizona,¹ demonstrates how numerous, fundamental errors—not egregious culpability—can lead to ultimate punishment.² Fortunately, Warren’s death sentence was vacated.³ Unfortunately, and more importantly when considering the integrity of the criminal justice system as a whole, no federal court ever granted Warren’s petitions for the writ of habeas corpus despite the obvious errors that plagued his trial.⁴

Habeas corpus petitions request a federal court to review the legality of a person’s sentence.⁵ On a purely abstract level, if a petitioner can show that her imprisonment violates the United States Constitution or some federal law or treaty, relief should be granted.⁶ Overly simplifying the issue, if habeas relief is granted, the petitioner is released from official custody.⁷

Habeas corpus petitions consist of various discrete claims that allege a petitioner’s rights established by the federal constitution or federal law have been or are being violated by her imprisonment.⁸ One particular claim stands apart because of its inefficacy: cumulative error claims.⁹

Cumulative error claims allege that a petitioner’s due process right to a fundamentally fair trial was violated because of the aggregate effect of

¹ Summerlin v. Stewart, 341 F.3d 1082, 1088–91 (9th Cir. 2003) (en banc), *rev’d sub nom.* Schriro v. Summerlin, 542 U.S. 348 (2004). According to the record, Summerlin sexually assaulted and killed Brenna Bailey, a delinquent account investigator. *Id.* at 1085.

² See Justin F. Marceau, *Exploring the Intersection of Effectiveness & Autonomy in Capital Sentencing*, 42 CAL. W. L. REV. 183, 197–200 (2006).

³ Summerlin, 341 F.3d at 1084, 1121. It should be noted that the Ninth Circuit’s ruling to this end was reversed by the U.S. Supreme Court. See Schriro v. Summerlin, 542 U.S. 348, 358 (2004). However, after several subsequent appeals and other developments, the prosecution ultimately abandoned its pursuit of putting Warren to death. See State v. Summerlin, No. 1 CA-CR 09-0074, 2009 WL 3116831, at *1 (Ariz. Ct. App. Sept. 29, 2009); see also Michael Kiefer, *Arizona Murderer No Longer on Death Row*, ARIZ. REPUBLIC (Dec. 22, 2008), <http://archive.azcentral.com/arizonarepublic/local/articles/2008/12/22/20081222deathpenalty1222.html> [<http://perma.cc/FP9S-UKE8>].

⁴ Summerlin, 341 F.3d at 1084, 1121.

⁵ See CHARLES DOYLE, CONG. RESEARCH SERV., 7-5700, FEDERAL HABEAS CORPUS: A BRIEF LEGAL OVERVIEW 1 (2006); Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 748 (1987).

⁶ See Chemerinsky, *supra* note 5, at 748–49. The situation is much more complicated in light of modern developments in federal habeas law. DOYLE, *supra* note 5, at 5. See generally *infra* Part II.

⁷ See Chemerinsky, *supra* note 5, at 761. Notably, if a petitioner is granted habeas relief for one convicted charge, but not others, she will remain in official custody and will simply have the sentence for the charge upon which relief was granted vacated. See, e.g., Abdur’Rahman v. Bell, 226 F.3d 696, 715 (6th Cir. 2000), *aff’g in part, vacating in part* 999 F. Supp. 1073 (M.D. Tenn. 1998).

⁸ See *infra* Part II.A–B.

⁹ See *infra* Part II.C.

multiple errors.¹⁰ A petitioner raising a cumulative error claim effectively seeks the federal court's review of all the potential or actual errors that transpired during the course of her state criminal proceedings and asks that court to determine if the net effect of all those errors rendered those proceedings fundamentally unfair.¹¹

On their face, cumulative error claims are ideal error-detection mechanisms.¹² Rather than relying on the power of a single violation, cumulative error claims request that a federal court ensure numerous errors *did not* collectively undermine the constitutional legitimacy of a petitioner's state criminal proceedings.¹³ In this way, they are essential tools to capital habeas petitioners attempting to prevent unfair trials from condemning them. However, federal courts never grant habeas relief on cumulative error claims alone, even in the capital context.¹⁴

The marked impotence of cumulative error claims is not a product of universally fair and error-free state criminal procedures; it is the necessary result of vague historical precedent and increasingly restrictive federal law.¹⁵ This dichotomy is all the more troubling in light of evidence that suggests at least some petitioners ought to be granted habeas relief based on the compound effect of the errors in their cases.¹⁶ To illustrate this point, consider the following brief recap of the missteps in Warren Summerlin's state trial.¹⁷

Judge Sidney R. Thomas, who drafted the opinion in *Summerlin*, described the case like this:

It is the raw material from which legal fiction is forged: A vicious murder, an anonymous psychic tip, a romantic encounter that jeopardized a plea agreement, an allegedly incompetent defense, and a death sentence imposed by a purportedly drug-addled judge. But, as Mark Twain observed, "truth is often stranger than fiction because *fiction has to make sense*."¹⁸

First and foremost, Warren suffered from severe mental impairments, which undermined his capacity for self-awareness and self-control.¹⁹ Warren

¹⁰ See 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, 463–66 (2013).

¹¹ See *infra* Part II.C.

¹² See *infra* Part IV.

¹³ See *infra* Part II.C.

¹⁴ See *infra* Part III.

¹⁵ See *infra* Part II.A–C.

¹⁶ See, e.g., *Summerlin v. Stewart*, 341 F.3d 1082, 1085–86, 1088–92 (9th Cir. 2003) (en banc), *rev'd sub nom.* *Schriro v. Summerlin*, 542 U.S. 348 (2004).

¹⁷ *Id.*

¹⁸ *Id.* at 1084 (emphasis added). For another take on Warren's case, see Marceau, *supra* note 2, at 197–200.

¹⁹ *Summerlin*, 341 F.3d at 1085–86. Warren suffered from a combination of intellectual disability and indications of organic brain impairment that caused him to be

had symptoms of psychomotor epilepsy that may have caused him to experience olfactory hallucinations.²⁰ As a result, Warren may have experienced a “temporal lobe seizure” at the time of the killing.²¹ Despite the importance of this evidence, Warren’s trial attorney never presented any psychiatric evidence or called any mental health experts as witnesses.²²

Second, Warren’s original appointed counsel, referred to as “Jane Roe” by the *Summerlin* court,²³ was sleeping with the attorney prosecuting him.²⁴ Despite the obvious conflict of interest this relationship created and Ms. Roe stating she “could no longer ethically represent” Warren, neither she nor the prosecutor felt it was necessary to disclose this issue to Warren.²⁵ Further, neither Ms. Roe nor her office informed the court of this conflict or Ms. Roe’s belief that she was no longer capable of representing Warren.²⁶

Third, Warren’s second appointed counsel,²⁷ a private practitioner named Mr. George Klink, did little to mount a defense for Warren and conducted virtually no mitigation investigation.²⁸ Mr. Klink presented no evidence to support his defense theory at trial nor did he consult any psychiatric experts for trial or for sentencing.²⁹ Mr. Klink did not even meet with Warren before

emotionally and mentally disturbed and prevented him from understanding his own motives underlying his behavior. *Id.*

²⁰ *Id.* at 1085, 1094.

²¹ *Id.* at 1085. An electroencephalogram showed some evidence that Summerlin suffered from this form of epilepsy, but was insufficient to support a diagnosis. *Id.*

²² *Id.* at 1088.

²³ *Id.* at 1085.

²⁴ *Id.* at 1086–87. Initially, Ms. Roe did report her involvement with the prosecutor to her supervisor, but did not take any action to unilaterally withdraw, to inform Warren, or to inform the judge. *Id.* at 1087. Further, while her supervisor felt that “the entire office . . . was compromised,” Summerlin’s original attorney accompanied him to his next hearing. *Id.*

²⁵ *Summerlin*, 341 F.3d at 1087–88.

²⁶ *Id.* at 1087. While Ms. Roe was still representing him, Warren requested new counsel. *Id.* However, the trial judge denied Warren’s request for failure to establish grounds for new counsel. *Id.* Later, the trial judge submitted an affidavit stating that had he known of Ms. Roe’s tryst with the prosecutor, he would have granted Warren’s request. *Id.*

²⁷ As it turned out, Ms. Roe did not represent Warren at trial. *Id.* at 1088. The court determined that due to Warren’s dissatisfaction with Ms. Roe’s representation, “it would be in the best interest of justice” to appoint new counsel. *Id.* Even so, Ms. Roe did not advise Warren of her relationship with the prosecutor. *Id.*

²⁸ *Id.* The record indicates that there was ample evidence to mitigate Warren’s death sentence. *Id.* at 1084. Warren’s father was killed in a shootout. *Id.* Warren’s mother was an alcoholic who “beat him frequently[,] punished him by locking him in a room with ammonia fumes[,]” and forced him to receive electroshock therapy. *Id.* And, as has been mentioned, Warren suffered from mental disabilities. *Id.*

²⁹ *Id.* at 1088–89. The United States Constitution requires death penalty cases to be tried in two phases: a trial phase where the defendant’s guilt is adjudicated, and, if guilt is found, a penalty or mitigation phase to determine if death is the appropriate sentence. See *infra* Part II.A–B.

he was sentenced.³⁰ Further, Mr. Klink allowed Warren to bully him into making overtly poor trial decisions, such as not calling any expert witnesses during mitigation.³¹

Fourth and finally, Judge Philip Marquardt, who presided over Warren's trial, was addicted to marijuana and was actively consuming the drug throughout the proceedings.³² While the impact of Judge Marquardt's drug use on Warren's ultimate conviction and sentence is unclear, the record indicates that Judge Marquardt made unintelligible statements throughout the proceedings and mixed up facts from another case with the facts of Warren's case.³³

As stated above, Warren's death sentence was vacated.³⁴ However, despite raising a cumulative error claim, Warren was never granted habeas relief.³⁵ The trouble is, if Warren—with all of the provocative issues that occurred during his trial—cannot get habeas relief on his cumulative error claim, it seems that no one can.³⁶ History proves this point.³⁷ So, why do cumulative error claims continue to be raised in capital federal habeas petitions?³⁸

This Note makes the case for removing cumulative error claims from the capital federal habeas context.³⁹ Under the current restrictive approach to federal habeas corpus review, cumulative error claims are misplaced. They wrongly suggest that federal courts will conduct a comprehensive review of

³⁰ *Summerlin*, 341 F.3d at 1088.

³¹ *Id.* at 1089.

³² *Id.* at 1089–90.

³³ *Id.* at 1090–91, 1090 n.2. *See generally* State v. Fisher, 686 P.2d 750 (Ariz. 1984). Ultimately, Judge Marquardt stepped down from the bench and was disbarred by the state of Arizona and the United States Supreme Court after an incident in which Judge Marquardt stated he could pin a drug transaction on his daughter's boyfriend came to light. *See Summerlin*, 341 F.3d at 1089–90 n.1; *see also In re* Disbarment of Marquardt, 503 U.S. 902 (1992) (mem.); *In re* Marquardt, 821 P.2d 161 (Ariz. 1991).

³⁴ *Summerlin*, 341 F.3d at 1084, 1121.

³⁵ *Id.* at 1121.

³⁶ To be sure, Warren's appeal to the Ninth Circuit was filed after the effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA). *Id.* at 1092. Thus, the AEDPA governs Warren's "right to appeal." *Id.* However, Warren's initial petition for habeas corpus was filed *before* the AEDPA's effective date, so "pre-AEDPA law governs the petition itself." *Id.* In this way, the federal court in *Summerlin* had more flexibility to grant the writ in that case than courts do in the post-AEDPA world. *See generally infra* Part II. Even so, the errors in Warren's case apparently were not egregious enough to warrant granting the writ. *Summerlin*, 341 F.3d at 1121.

³⁷ *See infra* Part II.C.

³⁸ Obviously, hope is in large part responsible for the continued existence of the claim. When faced with the prospect of death at the hands of a broken, flawed system, a person will grasp at anything even suggesting the remote possibility of salvation. *See* VIKTOR E. FRANKL, *MAN'S SEARCH FOR MEANING* 28 (Wash. Square Press 1985) (1959).

³⁹ The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections 8, 18, 22, 28, and 42 U.S.C.), should have killed off cumulative error claims in this context decades ago. *See infra* Part II.A–C.

each possible instance of unfairness that may have occurred and caused a factually innocent or otherwise undeserving person to be sentenced to death.⁴⁰ This is false.⁴¹ Federal courts conduct only the most perfunctory kinds of review when dealing with cumulative error claims rendering these claims' (putatively) intended purpose—error-detection—unaccomplished.⁴²

The proper forum for comprehensive error review and analysis is state courts, specifically as a mandatory pre-federal habeas procedure.⁴³ This Note suggests that the United States Supreme Court should remove cumulative error claims from capital federal habeas proceedings and enlist the state judiciaries to construct comprehensive error-review protocols in the same way it required the states to develop their own tests for intellectual disability.⁴⁴

Part II outlines the development of modern capital federal habeas jurisprudence and cumulative error claims. Part III surveys the various approaches to cumulative error claims in federal courts conducting habeas review throughout the country. Part IV describes the important role cumulative error claims play in ensuring reliability in capital cases and argues that federal habeas corpus is currently the wrong mechanism for state death row inmates seeking such review. Part V briefly concludes.

II. THE AEDPA, MODERN CAPITAL FEDERAL HABEAS PETITIONS, AND CUMULATIVE ERROR CLAIMS

On April 19, 1995, domestic terrorists, Timothy McVeigh and Terry Nichols, bombed the Alfred P. Murrah Federal Building in Oklahoma City, killing 168 people and injuring around 680 others.⁴⁵ In response to this

⁴⁰The United States Supreme Court's recent habeas corpus jurisprudence has emphatically demonstrated that federal courts reviewing state sentences should *not* be engaging in error detection and correction, but ensuring that the state court's criminal procedures are not "unreasonable." See 28 U.S.C. § 2254(d)(1) (2012); *Harrington v. Richter*, 131 S. Ct. 770, 785 (2011) ("[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." (quoting *Williams v. Taylor*, 529 U.S. 362, 410 (2000))).

⁴¹See *supra* note 40.

⁴²See *infra* Part III.

⁴³See *infra* Part IV.B.

⁴⁴See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that states cannot sentence "mentally retarded" individuals to death). Notably, federal courts have continued to play a supervisory role over state procedures for adjudicating claims of intellectual disability. See *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014) (holding that Florida's procedures for adjudicating intellectual disability claims were too "rigid" and created an unconstitutional risk of executing intellectually disabled persons in violation of the Eighth Amendment).

⁴⁵OKLA. DEP'T OF CIVIL EMERGENCY MGMT., AFTER ACTION REPORT: ALFRED P. MURRAH FEDERAL BUILDING BOMBING 4, 16 (1995), <https://www.ok.gov/OEM/documents/Bombing%20After%20Action%20Report.pdf> [<http://perma.cc/9MD4-6XWQ>]; Elizabeth Chuck, *Twenty Years Later: The People in the Oklahoma City Bombing*, NBC NEWS (Apr.

national tragedy, the United States Congress passed the Antiterrorism and Effective Death penalty Act (AEDPA),⁴⁶ which President Clinton signed into law on April 24, 1996.⁴⁷

Curiously, the AEDPA, which drastically curtailed federal habeas relief, did not originate in the wake of the bombing, but was a part of a package of legislation the so-called “Gingrich Congress” campaigned on in 1994.⁴⁸ As a bill, the AEDPA was first introduced in January 1995 and was designed to cut back federal habeas relief for both non-capital and capital prisoners.⁴⁹ The bombing in Oklahoma City proved to be the necessary catalyst to get Congress to vote on and approve the bill, which originally had nothing to do with terrorism or the death penalty per se.⁵⁰

In the almost two decades since the AEDPA’s passage, federal habeas corpus has been reduced from the “great writ,”⁵¹ as it was once called, to a labyrinthine process where the chance of finding relief is “microscopic.”⁵² Before engaging in a focused discussion of cumulative error claims in federal habeas petitions,⁵³ a general overview of the substantive and procedural impacts of the AEDPA is necessary.

A. The Rigid Rules of Federal Capital Habeas Corpus: The AEDPA and Related Jurisprudence

Historically, state inmates could petition a federal court for a writ of habeas corpus whenever they felt the federal protections in place for criminal defendants were being violated by their incarceration.⁵⁴ Inmates could challenge the legality of their incarceration without any time limits on these

18, 2015), <http://www.nbcnews.com/news/us-news/twenty-years-later-people-oklahoma-city-bombing-n342821> [<http://perma.cc/6HJ6-YRFH>].

⁴⁶ See 141 CONG. REC. 15,095 (1995) (statement of Sen. Dole) (“The most critical element of this bill, and the one that bears most directly on the tragic events in Oklahoma City, is the provision reforming the so-called habeas corpus rules.”).

⁴⁷ William J. Clinton, President, Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996 (Apr. 24, 1996), in 32 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 719, 719 (1996) (“After the tragedy in Oklahoma City, I asked Federal law enforcement agencies to reassess their needs and determine which tools would help them meet the new challenge of domestic terrorism. . . . I am pleased that the Congress included most of the [agencies’] proposals in this legislation.”).

⁴⁸ See James S. Liebman, *An “Effective Death Penalty”? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 412 (2001).

⁴⁹ *Id.*

⁵⁰ See Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 728–29 (2002).

⁵¹ See Chemerinsky, *supra* note 5, at 749 (quoting W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980)).

⁵² NANCY J. KING & JOSEPH L. HOFFMAN, *HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT* 81–84 (2011).

⁵³ See *infra* Parts II.C, III.

⁵⁴ See Liebman, *supra* note 48, at 415.

challenges.⁵⁵ Moreover, *res judicata* did not estop inmates from petitioning a federal court multiple times.⁵⁶ Further, a state court's adjudication on the legality of a state inmate's incarceration—during state collateral or post-conviction proceedings—had no effect on a federal court's adjudication of the same issue.⁵⁷ However, the passage of the AEDPA fundamentally changed the relationship between federal and state courts in the context of collateral reviews of criminal convictions and sentences severely limiting the chances relief will be granted to criminal defendants.⁵⁸

The AEDPA requires federal courts to defer to state court rulings on substantially all issues raised in federal habeas.⁵⁹ So long as a state court's ruling was not "contrary to" or an "unreasonable application of" "clearly established Federal law, as determined by the Supreme Court of the United States," federal courts generally must not disturb the state's ruling on the

⁵⁵ *Id.* For a discussion of the impacts of the AEDPA on the timing of federal habeas petitions, see Anne R. Traum, *Last Best Chance for the Great Writ: Equitable Tolling and Federal Habeas Corpus*, 68 MD. L. REV. 545, 552–54 (2009).

⁵⁶ Liebman, *supra* note 48, at 415. One of the greatest impacts of the AEDPA in the context of capital federal habeas petitioners is the reduction of the availability of so-called "second or successive" habeas petitions. While the AEDPA placed special emphasis on finality of state criminal proceedings and cut back the opportunity for federal habeas petitioners to seek multiple reviews of their claims in federal court, it did so at a cost to petitioners who have claims that are not yet ripe during their initial habeas proceeding. For example, the Eighth Amendment prohibits the execution of persons deemed incompetent to be executed. *Ford v. Wainwright*, 477 U.S. 399, 410 (1986). However, a person can only petition for habeas relief on a *Ford* claim when her execution is "imminent," and so her claim is typically not ripe during her initial federal habeas petition. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998). Thus, the Court had to interpret "second or successive" in the AEDPA as allowing for some claims to be raised in federal court after filing an initial federal habeas petition. *See Panetti v. Quarterman*, 551 U.S. 930, 947 (2007) (holding that the AEDPA restrictions on "second or successive petitions" must not be construed literally such that some claims must be raised in the first instance although they are not yet ripe). For a full discussion of AEDPA's effect on "late-ripening" habeas claims, see generally Kyle P. Reynolds, Comment, "*Second or Successive*" *Habeas Petitions and Late-Ripening Claims after Panetti v. Quarterman*, 74 U. CHI. L. REV. 1475 (2007).

⁵⁷ Liebman, *supra* note 48, at 415.

⁵⁸ Andrew L. Adler, *The Non-Waivability of AEDPA Deference's Applicability*, 67 U. MIAMI L. REV. 767, 770–72 (2013).

⁵⁹ *Id.* at 771. There are some caveats. For example, the AEDPA requires deference on any issue that the state court has adjudicated "on the merits." The meaning of this phrase—"on the merits"—is unclear and gives rise to a variety of litigation during federal habeas proceedings centered on when an issue was in fact adjudicated sufficiently to be deemed "on the merits." *See* John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 CORNELL L. REV. 259, 293 (2006); Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 114 n.100 (2012); *see, e.g.,* *Washington v. Schriver*, 255 F.3d 45, 62–63 (2d Cir. 2001) (Calabresi, J., concurring) (noting the uncertain requirements the AEDPA imposes upon state courts under 28 U.S.C. § 2254(d)(1)).

matter.⁶⁰ This fundamental shift in federal habeas corpus jurisprudence strips the federal courts of the ability to unilaterally correct errors that may occur in a state court proceeding leaving innocent or wrongfully convicted or sentenced people in custody with no remedy.⁶¹

Imposing deference upon the federal courts could be seen as a mechanism for addressing the tension that existed between federal and state courts as a result of the destabilizing effects of *de novo* habeas review.⁶² Further, deference to state court decisions promoted finality of criminal convictions and sentences, a key issue for the AEDPA's promoters—especially in the capital context.⁶³ For example, Republican Congressman William McCollum of Florida lambasted pre-AEDPA federal habeas corpus as an avenue for delaying justice for heinous killers:

[C]onvicted murderers on death row regularly make a mockery of the criminal justice system by using every trick in the book to delay imposition of their sentences. In many cases where the people's elected representatives have passed capital punishment laws, executions never occur because of endless appeals and lawsuits. People are sick and tired of the legal maneuvers of violent criminals. They want accountability.

H.R. 729 [the Effective Death Penalty Act of 1995] stands for the clear and simple proposition that there must be finality and accountability.⁶⁴

The AEDPA's strict deference requirements cut deeply against any possibility of legal gamesmanship during federal habeas corpus proceedings, which addressed issues of undue delay and trickery through litigation.⁶⁵ However, the AEDPA did not only amend the relationship between federal and state courts; the AEDPA rewrote the procedures a state inmate must adhere to in order to even have a federal court hear a petition for habeas corpus.⁶⁶

⁶⁰ See 28 U.S.C. § 2254(d)(1) (2012); see, e.g., *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (“[S]tate proceedings are the central process, not just a preliminary step for a later federal habeas proceeding.”).

⁶¹ See Marceau, *supra* note 59, at 108–16; Larry W. Yackle, *The Figure in the Carpet*, 79 TEX. L. REV. 1731, 1754 (2000).

⁶² See DOYLE, *supra* note 5, at 1.

⁶³ See, e.g., 141 CONG. REC. 4,111 (1995) (statement of Rep. Cox); *id.* at 15,062 (statement of Sen. Hatch).

⁶⁴ *Id.* at 4,086 (statement of Rep. McCollum).

⁶⁵ See Stevenson, *supra* note 50, at 729.

⁶⁶ See DOYLE, *supra* note 5, at 17–18. For a step-by-step discussion of the elements necessary to comport with the AEDPA's procedural guidelines, see COLUMBIA HUMAN RIGHTS LAW REVIEW, A JAILHOUSE LAWYER'S MANUAL 221–23 (9th ed. 2011) [hereinafter JAILHOUSE LAWYER], <http://www3.law.columbia.edu/hrlr/ejlm.php> [<http://perma.cc/DK58-U7CC>].

First and foremost, the AEDPA created a one-year statute of limitations for filing federal habeas corpus petitions.⁶⁷ Prior to the AEDPA's enactment, federal habeas corpus petitions could be filed at any time so long as the petitioner was in government custody.⁶⁸ More than simply imposing a time constraint on federal habeas corpus petitions, the AEDPA's statute of limitations applies differently depending upon the status of the petitioner.⁶⁹

On its face, the AEDPA requires all federal habeas corpus petitions to be filed within one year of a state conviction becoming finalized.⁷⁰ However, several important exceptions exist.⁷¹ The one-year window to file a petition for habeas corpus in federal court starts running upon the completion of direct state review procedures, but the period is tolled during state collateral review.⁷² Further, the beginning of the one year filing window may also be delayed under other circumstances.⁷³ Nonetheless, the AEDPA's harsh statute of limitations requirement often precludes an inmate from even seeking habeas relief regardless of the merits of her underlying claims because she (or her counsel) is not aware of the precise filing deadline.⁷⁴ In the world of the AEDPA, a missed deadline is generally fatal to an inmate's opportunity for federal review.⁷⁵

In addition to its exacting and complex statute of limitations, the AEDPA also requires all federal claims to be exhausted in state court before they can

⁶⁷ See 28 U.S.C. §§ 2244(d)(1), 2255(f) (2012).

⁶⁸ *United States v. Smith*, 331 U.S. 469, 475 (1947) (“[H]abeas corpus provides a remedy . . . without limit of time.”).

⁶⁹ See DOYLE, *supra* note 5, at 15–16.

⁷⁰ 28 U.S.C. §§ 2244(d), 2255(f).

⁷¹ See DOYLE, *supra* note 5, at 15–16.

⁷² See 28 U.S.C. § 2244(d). However, the underlying state appeal must itself be timely according to state law. See *Evans v. Chavis*, 546 U.S. 189, 191 (2006). In fact, the state appeal must be “properly filed” such that its delivery to the court or office in which it must be lodged is successful in order to toll the statute of limitations (although the substance of the appeal may be barred by other procedures). *Artuz v. Bennett*, 531 U.S. 4, 8 (2000).

⁷³ See generally 28 U.S.C. § 2244(d)(1). These scenarios include: the date of removal of a government impediment preventing the prisoner from filing for habeas relief, the date of Supreme Court recognition of the underlying federal right and of the right's retroactive application, or the date of uncovering previously undiscoverable evidence upon which the habeas claim is predicated. *Id.* § 2244(d)(1)(A)–(D). However, when the Supreme Court recognizes the right in one case, but recognizes the right's retroactivity in another, later case, the statute of limitations begins to run from the date of the decision recognizing the right. *Dodd v. United States*, 545 U.S. 353, 357–58 (2005).

⁷⁴ See Lieberman, *supra* note 48, at 417. For a full discussion of the impact of the AEDPA's statute of limitations, see Ken Armstrong, *Death By Deadline, Part One*, THE MARSHALL PROJECT (Nov. 15, 2014), <https://www.themarshallproject.org/2014/11/15/death-by-deadline-part-one> [<https://perma.cc/5U78-DMC4>].

⁷⁵ There has been some pushback against the hard and fast statute of limitations the AEDPA prescribes. Scholars have argued and the United States Supreme Court has suggested that the AEDPA allows for “equitable tolling” in order to deal with the seeming impropriety with shuttering the federal courts from potentially meritorious claims. See Traum, *supra* note 55, at 547.

be reviewed in federal habeas proceedings.⁷⁶ The AEDPA does create an exception to its state exhaustion requirement but, in order to qualify for the exception, a petitioner must demonstrate “an absence of available State corrective process [or] circumstances . . . that render such process ineffective to protect the rights of the [petitioner].”⁷⁷ Nonetheless, the AEDPA’s strict exhaustion requirement can cause a petition that contains both exhausted and non-exhausted claims—a “mixed” petition—to be dismissed on the merits.⁷⁸ More troubling still, the AEDPA’s exhaustion requirement in addition to its statute of limitations creates the untenable situation where many inmates who wish to file federal habeas corpus petitions are unable to do so because, without the assistance of legal counsel, they fail to properly file state collateral appeals to exhaust their claims.⁷⁹

Dismissals of mixed petitions are particularly troubling under the AEDPA because the law generally prohibits second or successive petitions.⁸⁰ Before the AEDPA, a petitioner could bring a second or successive habeas petition if she could establish “cause and prejudice” or a miscarriage of justice such that the second petition ought to be reviewed.⁸¹ However, the AEDPA instructs federal courts to dismiss a claim presented in a second or successive habeas petition that was previously presented.⁸² The AEDPA does allow some wiggle room for new claims in second or successive petitions, but not much.⁸³

To make matters worse for federal habeas petitioners, recent Supreme Court jurisprudence has deliberately strengthened the AEDPA’s already biting restrictions such that a federal court can rarely grant evidentiary hearings let

⁷⁶ 28 U.S.C. § 2254(b)(1)(A) (2012).

⁷⁷ *Id.* § 2254(b)(1)(B)(i)–(ii).

⁷⁸ *Id.* § 2254(b)(2).

⁷⁹ See Liebman, *supra* note 48, at 417–18. Remarkably, even though exhausting state claims in state court is a prerequisite for federal habeas review, indigent inmates are not constitutionally required to have effective counsel during these state collateral reviews, which can cause these inmates to procedurally default on potentially meritorious claims due to the negligence or incompetence of their post-conviction counsel. See *Maples v. Thomas*, 132 S. Ct. 912, 922 (2012) (“[W]hen a petitioner’s postconviction attorney misses a filing deadline, the petitioner is bound by the oversight . . .”); *Coleman v. Thompson*, 501 U.S. 722, 755–56 (1991).

⁸⁰ 28 U.S.C. § 2244(b)(1); *Tyler v. Cain*, 533 U.S. 656, 661 (2001); see *supra* note 79.

⁸¹ See *McCleskey v. Zant*, 499 U.S. 467, 492–97 (1991). For a thorough discussion of pre-AEDPA second or successive habeas petition jurisprudence, see DOYLE, *supra* note 5, at 14–15.

⁸² See 28 U.S.C. § 2244(b)(1).

⁸³ *Id.* § 2244(b)(2)(A)–(B). The AEDPA allows a petitioner to raise a new claim in a second or successive petition so long as it relies on a newly announced constitutional interpretation that is made retroactively applicable, or it is predicated upon newly discovered evidence not previously available through due diligence. Additionally, the Court held that *Ford* incompetency claims may be brought when they are ripe and do not have to be brought during an initial federal habeas petition. See *supra* note 56.

alone outright relief barring extreme circumstances.⁸⁴ Consequently, a petitioner's chances of getting habeas relief in federal court have dropped measurably post-AEDPA.⁸⁵

B. Federal Capital Habeas Corpus Mechanics: Discrete Constitutional Claims

For state inmates sentenced to death, federal habeas corpus is the last opportunity for judicial review of their convictions and sentences.⁸⁶ Aside from the AEDPA's procedural requirements, federal habeas jurisprudence requires inmates to raise discrete constitutional claims in the substance of their petitions.⁸⁷

When an inmate petitions a federal court for a writ of habeas corpus, that inmate must claim that her incarceration violates the United States Constitution or one of the laws of the United States.⁸⁸ However, because federal statutes do not govern state criminal procedures, a state inmate must show that her incarceration violates the United States Constitution.⁸⁹ This last wrinkle is especially important when examining the situation of death row inmates, because substantially all death row inmates are state prisoners.⁹⁰

While federal habeas law permits a state death row inmate to raise a claim that any of her constitutional rights were violated, in practice, the claims raised

⁸⁴ See *Cullen v. Pinholster*, 131 S. Ct. 1388, 1400 (2011) (holding that new facts developed during federal habeas proceedings have no bearing on federal habeas review under 28 U.S.C. § 2254(d)(1)); *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (holding that only "extreme malfunctions in the state criminal justice systems" require federal intervention (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment))).

⁸⁵ See Marceau, *supra* note 59, at 100–05. Professor Marceau evaluated a variety of studies examining the rates of success for both non-capital and capital federal habeas petitioners. His review does not place a precise figure on the decrease rate of success; however, his work suggests that the empirical evidence available demonstrates the trend is pointing towards reduced grants of habeas relief. *Id.* at 103–04. The difficulty with determining a clear "rate of success" is due in part to what "success" means. See *id.* at 99–100 n.46 (noting that a win—or a grant of habeas relief—for one petitioner may be a loss for petitioners generally).

⁸⁶ See Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 457–58 (2007). The AEDPA's exhaustion requirement in conjunction with its strict restrictions on second or successive habeas petitions establish federal habeas as the last, albeit most unhelpful, opportunity for a death row inmate to receive relief from the judiciary. See also DOYLE, *supra* note 5, at 13–15.

⁸⁷ JAILHOUSE LAWYER, *supra* note 66, at 224–37.

⁸⁸ See 28 U.S.C. § 2254(a).

⁸⁹ See JAILHOUSE LAWYER, *supra* note 66, at 225 n.19.

⁹⁰ See Criminal Justice Project of the NAACP Legal Def. & Educ. Fund, Inc., *Summary of State Lists of Prisoners on Death Row*, DEATH ROW U.S.A., Fall 2014, at 34–35. (stating that there are 63 federal death row inmates out of a total of 3,041 total death row inmates in the United States).

by death row inmates fall into two general categories.⁹¹ The first general category pertains to claims of counsel error;⁹² the second pertains to claims of constitutional error during the penalty phase of the trial.⁹³ While counsel errors are governed by general constitutional jurisprudence, penalty phase errors during capital trials have received special treatment by the Supreme Court and are governed by their own distinct case law.⁹⁴

The most common constitutional claims raised by state death row inmates are claims of counsel error, implicating either the inmate's right to due process under the Fourteenth Amendment⁹⁵ or her right to counsel under the Sixth Amendment.⁹⁶ Counsel errors come in a variety of forms.⁹⁷ However, generally, they concern either the death row inmate's own counsel failing to take certain actions or insufficiently addressing certain claims,⁹⁸ or the prosecution withholding evidence that would exculpate the inmate.⁹⁹ Federal jurisprudence has created a two-pronged structure for these claims where an inmate must show not only the existence of a deficiency or error by counsel, but also that there is a reasonable probability that the error affected the outcome of the proceeding.¹⁰⁰ The problem with this tiered approach to

⁹¹ See *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (judgment of the court, and opinion of Stewart, Powell, & Stevens, JJ.) (holding that capital trials should occur in two steps assessing a defendant's guilt before determining whether the death penalty is the appropriate sentence).

⁹² *Strickland v. Washington*, 466 U.S. 668, 686–87 (1984).

⁹³ See *infra* note 94.

⁹⁴ See *Penry v. Johnson (Penry II)*, 532 U.S. 782, 786 (2001); *Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 307 (1989); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). These cases create specific penalty-phase constitutional claims. Because of the uniqueness of the death penalty, the Supreme Court has been careful to construct specific safeguards for the penalty phase whereas it has allowed general criminal procedure jurisprudence to guide the culpability phase. See, e.g., *Gregg*, 428 U.S. at 188 (recognizing that “penalty of death is different in kind from any other punishment” and emphasizing its “uniqueness”); *Furman v. Georgia*, 408 U.S. 238, 286, 289 (1972) (Brennan, J., concurring) (stating that “[d]eath is a unique punishment”, and “[d]eath . . . is in a class by itself”); *id.* at 306 (Stewart, J., concurring) (“[P]enalty of death differs from all other forms of criminal punishment, not in degree but in kind.”).

⁹⁵ See *Brady v. Maryland*, 373 U.S. 83, 86 (1963) (holding that the suppression of exculpatory evidence by the prosecution violates a state criminal defendant's right to due process under the Fourteenth Amendment).

⁹⁶ See *Strickland*, 466 U.S. at 686–87 (holding that the Sixth Amendment's guarantee of counsel in criminal proceedings requires effective counsel).

⁹⁷ See John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating Bagley Materiality, Strickland Prejudice, and Cumulative Harmless Error*, 95 J. CRIM. L. & CRIMINOLOGY 1153, 1157–58 n.9 (2005).

⁹⁸ See *Wiggins v. Smith*, 539 U.S. 510, 514–16, 519–23 (2003).

⁹⁹ See *Kyles v. Whitley*, 514 U.S. 419, 421–25 (1995).

¹⁰⁰ See Blume & Seeds, *supra* note 97, at 1166–68; see also *United States v. Bagley*, 473 U.S. 667, 681–82 (1985) (requiring that undisclosed evidence be “material” where material is defined in terms of *Strickland* prejudice in order to raise a *Brady* claim);

counsel error claims is that it creates a legal fiction that deliberately requires courts to ignore errors so long as those errors are not sufficiently material.¹⁰¹ That is, a legitimate counsel deficiency may have occurred, but, if the error did not have a significant enough impact on the outcome of the proceedings, the court will dismiss the claim as if no error had occurred at all.¹⁰²

Arguably, the most important constitutional claims for the purposes of state death row inmates filing federal habeas petitions are penalty phase constitutional claims because these claims attack the legitimacy of the proceedings that condemned the inmate to die, not the general proceedings that found the inmate guilty of a crime.¹⁰³ The jurisprudential history of the penalty phase of capital trials suggests extreme caution should be exercised in imposing the death penalty.¹⁰⁴ As a result, state death row inmates routinely raise two claims in their federal habeas corpus petitions that suggest relief should be granted because of errors in the penalty phase of their trials: *Lockett*¹⁰⁵ error claims and *Penry*¹⁰⁶ error claims.

Strickland, 466 U.S. at 687 (establishing that a defendant must show both deficient performance and prejudice).

¹⁰¹ See Blume & Seeds, *supra* note 97, at 1183–84.

¹⁰² *Id.* (“[C]ourts rely dogmatically on the tiered structure of *Brady* and *Strickland* errors (no constitutional error arises unless both performance defect and prejudice are shown) to dispose of claims, calculating that nothing (1/2 of *Strickland*) + nothing (3/4 of *Brady*) = nothing.”).

¹⁰³ See *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) (noting that the death penalty is “profoundly different from all other penalties”). This category of claims also encompasses virtually all of the Eighth Amendment jurisprudence concerning the death penalty. The special significance surrounding death penalty cases and death row inmates is, of course, the sentences involved in these cases. Thus, both the general question of whether death is ever an appropriate sentence and the specific questions concerning specific methods of execution fall into this category. See, e.g., *Baze v. Rees*, 553 U.S. 35, 41–44, 47–50 (2008) (discussing the historical development of different methods of execution and the Court’s repeated decisions to uphold those methods because “capital punishment is constitutional . . . [and so i]t necessarily follows that there must be a means of carrying it out”). The contemporary problem of reconciling the death penalty with the Eighth Amendment is captured succinctly by the dichotomy between so-called “absolute proportionality” and “comparative proportionality.” That is, courts must determine whether to examine the seriousness of the crime compared with the severity of the punishment or punishment practices in one jurisdiction in light of the punishment practices in another jurisdiction. See Susan Raeker-Jordan, *Kennedy, Kennedy, and the Eighth Amendment: “Still in Search of a Unifying Principle”?*, 73 U. PITT. L. REV. 107, 111 (2011).

¹⁰⁴ See *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (requiring a jury to find the aggravating factors outweigh the mitigating factors in order to qualify a defendant for the death penalty); *id.* at 614 (Breyer, J., concurring in the judgment) (arguing that a jury, not a judge, should make the ultimate decision to sentence a defendant to death); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (holding that the capital sentencer must not be precluded from considering any mitigating evidence that may suggest a penalty less than death is sufficient).

¹⁰⁵ *Lockett*, 438 U.S. at 604 (holding that a capital defendant must be able to present any mitigating evidence during the penalty phase of a capital trial).

Lockett and *Penry* establish a capital defendant's right, under the Eighth and Fourteenth Amendments, to present any and all evidence that could persuade a jury that a sentence less than death is sufficient and that the jury should be able to consider and give effect to that evidence.¹⁰⁷ Under *Lockett*, a capital defendant must be able to present any relevant mitigating evidence during the penalty phase.¹⁰⁸ If a court precludes any such evidence, then a *Lockett* error has occurred.¹⁰⁹ Under the *Penry* series of cases, the jury instructions at the end of the penalty phase must allow the jury to express a "'reasoned moral response' to [mitigation] evidence in rendering its sentencing decision."¹¹⁰ Basically, the court cannot limit the jury's consideration of the mitigation evidence presented to it.¹¹¹

While these distinct claims provide a variety of avenues for a death row inmate to seek relief in federal court, they do not ensure the reliability or justifiability of these inmates' convictions or sentences.¹¹² In raising either a counsel error claim or a penalty phase error claim, current habeas law deliberately prevents relief for errors so long as those errors are not substantial enough¹¹³ or the lower court did not unreasonably or incorrectly rule on them.¹¹⁴ As a result, these discrete claims do not on their own make the states' imposition of the death penalty upon those convicted and sentenced to death any more reliable or any less risky.¹¹⁵ Enter cumulative error claims.

C. Cumulative Error Claims

In the federal habeas context, a cumulative error claim asks a federal court to grant relief because "two or more individually harmless errors" in the state

¹⁰⁶ *Penry v. Johnson (Penry II)*, 532 U.S. 782, 804 (2001); *Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 328 (1989). Taken together these two cases stand for the rule that the jury instructions at the end of the penalty phase must allow the jury to give meaningful effect to the mitigation evidence presented. See Ryan C. Thomas, Comment, *Not-So-Harmless Error: A Higher Standard for Mitigation Errors on Capital Habeas Review*, 89 WASH. L. REV. 515, 532 (2014).

¹⁰⁷ See Thomas, *supra* note 106, at 522.

¹⁰⁸ *Lockett*, 438 U.S. at 604; see Thomas, *supra* note 106, at 527 ("Lockett is to mitigation as *Miranda* is to post-arrest silence." (footnote omitted)).

¹⁰⁹ See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 120 n.1 (1982).

¹¹⁰ *Penry I*, 492 U.S. at 328. For a full discussion of the effects of expansive mitigation evidence on juries, see generally Michael E. Antonio, *Stress and the Capital Jury: How Male and Female Jurors React to Serving on a Murder Trial*, 29 JUST. SYS. J. 396 (2008).

¹¹¹ See, e.g., *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263–64 (2007) (holding that a jury must be allowed to consider a defendant's culpability in light of his personal history before undertaking the "grave task of imposing a death sentence").

¹¹² See Blume & Seeds, *supra* note 97, at 1183–84. See generally Moyer, *supra* note 10, at 454–63.

¹¹³ See Blume & Seeds, *supra* note 97, at 1166–68.

¹¹⁴ See 28 U.S.C. § 2254(d)(1)(2) (2012); *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000); Liebman, *supra* note 48, at 418–21.

¹¹⁵ See Liebman, *supra* note 48, at 423–27.

proceeding cumulatively deprived the petitioner of her right to a fair trial.¹¹⁶ Conceptually, cumulative error claims serve as a check on the reliability of state convictions and sentences because they allow an inmate to receive judicial review of claims that by themselves could be summarily dismissed.¹¹⁷ In this way, cumulative error claims seem to serve as residual, catchall claims that allow federal courts to double check their work and reaffirm that when they dismiss a habeas petition they have not missed any glaring errors in the state proceeding.¹¹⁸ However, cumulative error claims rarely, if ever, lead to habeas relief.¹¹⁹ Moreover, since the AEDPA requires an unreasonable or contrary application of clearly established federal law, as determined by the United States Supreme Court under section 2254(d),¹²⁰ it seems as though habeas relief cannot be granted on a cumulative error claim at all because the Supreme Court has not explicitly said so.¹²¹

Nonetheless, cumulative error claims are routinely raised in federal habeas corpus petitions by state death row inmates because of the possibility that given the right set of facts and circumstances, relief could be had.¹²² The allure of cumulative error claims is driven by the underdeveloped Supreme Court jurisprudence undergirding the claim and the claim's ambiguous origin—two characteristics that foster creative lawyering and breed (false) hope for petitioners.

Depending on whom you ask,¹²³ cumulative error claims originated with *Taylor v. Kentucky* or *Chambers v. Mississippi*.¹²⁴ Either way, the doctrine—

¹¹⁶ See Moyer, *supra* note 10, at 463 (quoting *Wilson v. Sirmons*, 536 F.3d 1064, 1122 (10th Cir. 2008)); see, e.g., *Wilson*, 536 F.3d at 1122 (quoting *Duckett v. Mullin*, 306 F.3d 982, 992 (10th Cir. 2002)).

¹¹⁷ See Fahy v. Horn, 516 F.3d 169, 205 (3d Cir. 2008) (“Individual errors that do not entitle a petitioner to relief may do so when combined . . .”).

¹¹⁸ See Pursell v. Horn, 187 F. Supp. 2d 260, 374 (W.D. Pa. 2002) (“[T]he reliability of a state criminal trial can be substantially undermined by a series of events, none of which individually amounts to a constitutional violation . . .”).

¹¹⁹ See, e.g., *Wooten v. Kirkland*, 540 F.3d 1019, 1025–26 (9th Cir. 2008); *United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990) (en banc).

¹²⁰ See *supra* Part II.A.

¹²¹ See *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002).

¹²² See, e.g., *Keith v. Mitchell*, 455 F.3d 662, 679 (6th Cir. 2006).

¹²³ Compare Moyer, *supra* note 10, at 464, with *Blume & Seeds*, *supra* note 97, at 1185.

¹²⁴ See *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978) (stating that “the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness”); *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973) (“We need not decide, however, whether this error alone would occasion reversal since *Chambers*’ claimed denial of due process rests on the ultimate impact of that error when view in conjunction with the trial court’s refusal to permit him to call other witnesses.” (emphasis added)). While the Court in *Chambers* does not explicitly use the word “cumulative,” it does describe how the net effect of multiple errors can deprive a criminal defendant of due process. See *id.* Moreover, while *Taylor* was decided five years

however confused and underdeveloped in application—is clear enough to understand conceptually: multiple errors occurring within the same state proceeding may not individually deprive a defendant of her constitutional right to due process, but may do so cumulatively.¹²⁵

Despite the doctrinal difficulties with the claim, cumulative error claims persist to protect the fundamental fairness of state criminal proceedings guaranteed by the Fourteenth Amendment.¹²⁶ In the capital context, fairness and reliability take on a heightened significance because of the gravitas of what is at stake.¹²⁷ Perhaps, that heightened concern contributes to the claim's continued existence.

III. CUMULATIVE ERROR CLAIMS ACROSS THE FEDERAL CIRCUITS: AN UPHILL BATTLE FOR APPELLANTS¹²⁸

The fuzzy origin of cumulative error claims along with the Supreme Court's refusal to elaborate on them has led to wide disparities among the federal circuits as to how to handle these claims in habeas proceedings.¹²⁹ While all federal circuits address cumulative error claims on direct appeal, the circuits are split as to whether or not they should review cumulative error claims in habeas petitions.¹³⁰ Further, even among circuits that agree on whether they should review cumulative error claims in habeas petitions, they

after *Chambers*, the Court expressly describes the aggregate impact of multiple harmless errors as “cumulative” in that case. *Taylor*, 436 U.S. at 487 n.15.

¹²⁵ See Moyer, *supra* note 10, at 463.

¹²⁶ See *Taylor*, 436 U.S. at 487 n.15.

¹²⁷ John Paul Stevens, Assoc. Justice, Supreme Court of the United States, Address to the American Bar Association (Aug. 6, 2005), http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-06-05 [<http://perma.cc/2T4E-VS9X>] (“[W]ith the benefit of DNA evidence, we have learned that a substantial number of death sentences have been imposed erroneously. That evidence is profoundly significant - not only because of its relevance to the debate about the wisdom of continuing to administer capital punishment, but also because it indicates that there must be serious flaws in our administration of criminal justice.”).

¹²⁸ See *Knight v. Spencer*, 447 F.3d 6, 18 (1st Cir. 2006) (“We add, without deciding, that even were the argument of cumulative effect properly before us, it would be an uphill battle for appellant.”).

¹²⁹ See Blume & Seeds, *supra* note 97, at 1185 n.117.

¹³⁰ See *id.* The rationale for the distinction between reviewing these claims on direct review as opposed to reviewing them on collateral review during habeas proceedings has been unsatisfactory. See Rachel A. Van Cleave, *When Is an Error Not an “Error”? Habeas Corpus and Cumulative Error Analysis*, 46 BAYLOR L. REV. 59, 63 (1994). Federal appellate courts readily accept these claims during direct review, but waffle at them during collateral review proceedings without much discussion as to the constitutional distinction. Finality, procedural default, and a lack of clearly established federal law may justify the exclusion of these claims from federal habeas review, but the United States Supreme Court has remained silent as the circuits have struggled to find a unified approach to handling them.

approach the claims with their own tests and analysis standards.¹³¹ To get a sense for the current state of the doctrine, consider the following brief survey of the different circuit standards.

A. *The Majority*

All but three federal circuits allow cumulative error claims in federal habeas corpus petitions without exception.¹³² However, each of these circuits has established its own standard to evaluate these claims.¹³³ Consequently, despite their similarity in allowing cumulative error claims in federal habeas, these circuits vary greatly in how they handle these claims.

These circuits share the same general purpose in allowing cumulative error claims in federal habeas: to ensure the fundamental fairness of the petitioner's state trial proceedings.¹³⁴ These circuits derive this rationale for allowing cumulative error claims in federal habeas corpus petitions from the Fourteenth Amendment's due process guarantee for state judicial proceedings.¹³⁵

The different tests used in each of these circuits demonstrates a high degree of irregularity in examining cumulative error claims in federal habeas. At the most fundamental level, each circuit court uses a test that requires two

¹³¹ Van Cleave, *supra* note 130, at 61–62 (“While the vast majority of habeas petitions alleging cumulative error fail, only a few cases analyze in any detail precisely what ‘cumulative error analysis’ entails, and even fewer define the types of ‘errors’ which courts should consider for purposes of cumulative error analysis.”). Van Cleave argues that the Court's silence concerning the scope of cumulative error doctrine is more fundamental than the procedures used to analyze these claims. She articulates for three distinct cumulative error “situations”—aggregating multiple clear constitutional errors, aggregated multiple clear errors of state law, and aggregating multiple errors none of which amount to violations of either the Constitution or state law. *Id.* at 60–61. To be sure, errors of state law are not grounds for habeas relief. *Swarthout v. Cooke*, 131 S. Ct. 859, 861 (2011) (per curiam) (citing *Estelle v. McGuire*, 502 U.S. 62, 67 (1991)). Nonetheless, the Court's nebulous description of cumulative error claims as remedies to flaws in “fundamental fairness” has not precisely described the true meaning of what errors should be used in determining whether cumulative error tips the scale towards granting habeas relief. *See Moyer, supra* note 10, at 463.

¹³² *See* Blume & Seeds, *supra* note 97, at 1185 n.117. These circuits include the First, Second, Third, Fifth, Seventh, Ninth, Tenth and Eleventh Circuits. *Id.*

¹³³ *See* Ballard v. McNeil, 785 F. Supp. 2d 1299, 1336 n.22 (N.D. Fla. 2011). In *Ballard*, the court examines in detail the general split among the circuits as to how to handle claims of cumulative error and outlines the fractures among the disparate camps on opposite sides of that split. *Id.*

¹³⁴ *See* Blume & Seeds, *supra* note 97, at 1184–86.

¹³⁵ *See, e.g.,* Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007). Notably, at least two of these circuits cite to Supreme Court cases as the “clearly established” precedent necessary to address these claims under the AEDPA. *See id.* (citing *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973)); *Darks v. Mullin*, 327 F.3d 1001, 1018 (10th Cir. 2003) (citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993)).

elements: a “cumulative error” element and a “fairness” element.¹³⁶ In the abstract, these elements require a petitioner to show that multiple errors rendered her state trial unfair. However, the many permutations of the “cumulative error” element undermine any uniformity across these circuits.¹³⁷

To satisfy the “cumulative error” element, the First Circuit requires petitioners to show that their trial was “*so riddled with error* that [the trial] lacked the appearance of fairness and impartiality necessary to satisfy due process.”¹³⁸ This standard, like others below, is highly subjective. The First Circuit does not describe what “so riddled with error” means nor does it elaborate further on the element.¹³⁹

The Second Circuit requires petitioners to show that multiple errors “cast *such doubt* on the fairness of the proceedings that a new trial is warranted, even if no single error requires reversal.”¹⁴⁰ Again, the Second Circuit does not expressly define or thoroughly describe what “such doubt” is or what that phrase means.¹⁴¹

The Third Circuit’s requirements for cumulative error in federal habeas petitions are less colorful, but no less opaque. They require petitioners to show, plainly, that the cumulative effect of the alleged errors deprives the petitioner of due process.¹⁴² This standard does not require a subjective evaluation of the cumulative claim by the courts like the others; however, it is still unhelpful to petitioners who must attempt to show a due process violation without any specific guidance.

Like the Third Circuit, the Ninth Circuit uses a plainly-worded albeit frustratingly unspecific standard for cumulative error claims. It maintains that a petitioner must show that the cumulative effect of multiple errors either

¹³⁶ See, e.g., *United States v. Blasco*, 702 F.2d 1315, 1329 (11th Cir. 1983) (“We must consider the cumulative effect of [the alleged errors] and determine whether, viewing the trial as a whole, appellants received a fair trial as is their due under our Constitution.” (citing *United States v. Labarbera*, 581 F.2d 107 (5th Cir. 1978))). The two-part structure of cumulative error claims mirrors the two-part structure in *Brady* or *Strickland* claims in many ways. See *supra* Part II.B.

¹³⁷ As will be shown, what constitutes an error that can be cumulated for purposes of determining fundamental fairness is greatly contested. This element has been in flux as a result of the Supreme Court’s silence on cumulative error claims. See *Van Cleave*, *supra* note 130, at 60–63.

¹³⁸ *Mello v. DiPaulo*, 295 F.3d 137, 151 (1st Cir. 2002) (emphasis added).

¹³⁹ Subsequent cases in the First Circuit have simply referred to *Mello* when analyzing cumulative error claims without any development or further explanation. See, e.g., *Crouse v. Dickhaut*, C.A. No. 07-12004-MLW, 2013 WL 1054845, at *15 (D. Mass. Mar. 13, 2013).

¹⁴⁰ *United States v. Rahman*, 189 F.3d 88, 145 (2d Cir. 1999) (emphasis added).

¹⁴¹ See *id.*

¹⁴² See *Marshall v. Hendricks*, 307 F.3d 36, 94 n.44 (3d Cir. 2002) (“Moreover unified consideration of the claims in the petition well satisfies the interests of justice because the cumulative effect of the alleged errors may violate due process, requiring the grant of the writ, whereas any one alleged error considered alone may be deemed harmless.” (quoting *United States ex rel. Sullivan v. Cuyler*, 631 F.2d 14, 17 (3d Cir. 1980))).

“prejudiced” the petitioner,¹⁴³ or deprived the petitioner of her due process right to a fair trial.¹⁴⁴ It does not state whether the “prejudice” required is the same as the “prejudice” required for an ineffective assistance of counsel claim although it suggests something to this effect.¹⁴⁵ The consequence of defining prejudice in this way is the restriction of the claim to only those petitioners making arguments about their counsel’s performance.¹⁴⁶

The Seventh Circuit incorporates the Tenth Circuit’s cumulative error test into its own standard.¹⁴⁷ The Tenth Circuit’s approach to cumulative error claims in federal habeas stands alone from the previously described tests because it only allows “actual errors” to be cumulated as opposed to merely “adverse” events.¹⁴⁸ While the Tenth Circuit includes both the familiar “cumulative error” and “fairness” elements in its test, its requirement that only “actual errors” be cumulated severely limits what petitioners can raise in their cumulative error claims.¹⁴⁹

In *United States v. Rivera*, the Tenth Circuit en banc held that adverse impacts on a trial outcome that cannot be connected to an underlying error or can only be connected to a “non-error” should not be cumulated in order to grant relief.¹⁵⁰ The *Rivera* court reasoned that allowing an appellate court to cumulate all adverse effects even those not produced by “actual errors” would vest “nearly uncontrolled discretion in the appellate courts.”¹⁵¹ However, the *Rivera* court defined “actual error” as a “type[] of error that can lead to reversal of a defendant’s criminal conviction.”¹⁵² Consequently, the Tenth Circuit seems to suggest that a petitioner can only be successful on a cumulative error claim if she can show that her trial was affected by multiple errors that could independently provide her with relief.¹⁵³ In other words, a successful cumulative error claim may be superfluous considering that in order for a cumulative error claim to be successful there may have to be at least two other claims that would also be successful.

The Seventh Circuit’s incorporation of the Tenth Circuit’s cumulative error analysis suggests “actual errors” are not “reversible errors.” The Seventh

¹⁴³ *Ceja v. Stewart*, 97 F.3d 1246, 1254 (9th Cir. 1996).

¹⁴⁴ *Karis v. Calderon*, 283 F.3d 1117, 1132 (9th Cir. 2002).

¹⁴⁵ See *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992) (defining “prejudice” as “unfairness . . . from the totality of counsel’s errors and omissions” (quoting *United States v. Tucker*, 716 F.2d 576, 595 (9th Cir. 1983))).

¹⁴⁶ See *id.* at 619–22.

¹⁴⁷ See *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000). Consequently, examining the Tenth Circuit standard illuminates the rule across both circuits.

¹⁴⁸ See *United States v. Rivera*, 900 F.2d 1462, 1470–71 (10th Cir. 1990) (en banc).

¹⁴⁹ See *id.* at 1469–71.

¹⁵⁰ *Id.* at 1471.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ As one Ninth Circuit court put it: “Because no individual errors underlying [the petitioner’s] convictions [had] been demonstrated, no cumulative error exists.” *United States v. Franklin*, 321 F.3d 1231, 1241 n.4 (9th Cir. 2003).

Circuit maintains that an “actual error” is a “constitutional error” and, for cumulative error purposes, errors that are cumulated must be “individually harmless.”¹⁵⁴ However, the distinction between a so-called “constitutional error” that is harmless and an “adverse” event that is not an error is unclear. As a result, in the Seventh, and Tenth Circuits, petitioners often raise their cumulative error claims without attempting to satisfy this distinction.¹⁵⁵ Most of the time, a petitioner will raise any and all perceived errors that occurred during her state criminal proceedings in her cumulative error claim hoping the net effect will lead to relief.¹⁵⁶

The Eleventh Circuit flips the common approach on its head. Rather than first examining the “cumulative error” element and then moving onto an evaluation of the fundamental fairness of the state proceeding, the Eleventh Circuit uses the “fairness” element as a gate-keeping device.¹⁵⁷ It requires petitioners to show that their trial was unfair before it will examine cumulative error claims.¹⁵⁸ Moreover, the Eleventh Circuit refers to the Fifth and Sixth Circuit’s jurisprudence on cumulative error to define the claim.¹⁵⁹ This may mean the Eleventh Circuit is likely to reverse course and join the dissenting circuits that effectively do not allow cumulative error claims in federal habeas.¹⁶⁰

The Fifth Circuit has, arguably, the most extensive cumulative error jurisprudence in the federal habeas context.¹⁶¹ The launching point for the Fifth Circuit’s approach to cumulative error in federal habeas is *Derden v. McNeel*.¹⁶²

Derden involved a petitioner, Mr. George Guy Derden, who was convicted of burglary in Mississippi and sentenced to seven years in prison.¹⁶³ After exhausting his state remedies, Derden petitioned for federal habeas relief on the grounds that the prosecutor acted improperly during trial, improperly

¹⁵⁴ See *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000).

¹⁵⁵ See, e.g., *Stouffer v. Trammell*, 738 F.3d 1205, 1229 (10th Cir. 2013) (holding that none of the petitioner’s alleged errors rendered his trial unfair either independently or cumulatively).

¹⁵⁶ See, e.g., *id.*

¹⁵⁷ See, e.g., *Allen v. Sec’y., Fla. Dep’t of Corr.*, 611 F.3d 740, 765 (11th Cir. 2010), *aff’g* *Allen v. McNeil*, No. 03-10077-CIV, 2009 WL 856017 (S.D. Fla. Mar. 31, 2009).

¹⁵⁸ See *Cargill v. Turpin*, 120 F.3d 1366, 1386–87 (11th Cir. 1997).

¹⁵⁹ See *id.*

¹⁶⁰ See *infra* Part III.B.

¹⁶¹ See *Van Cleave*, *supra* note 130, at 72–80; see also *Blume & Seeds*, *supra* note 97, at 1185 n.117.

¹⁶² *Derden v. McNeel*, 978 F.2d 1453, 1454 (5th Cir. 1992) (en banc).

¹⁶³ *Derden v. McNeel*, 938 F.2d 605, 609 (5th Cir. 1991), *on reh’g* 978 F.2d 1453 (1992). While *Derden* did not involve a capital sentence, it is the touchstone of cumulative error jurisprudence in the Fifth Circuit. See, e.g., *United States v. Bernard*, 762 F.3d 467, 482 (5th Cir. 2014); *Livingston v. Johnson*, 107 F.3d 297, 309 (5th Cir. 1997). Consequently, it is relevant to the analysis of cumulative error claims in federal habeas petitions inclusive of both capital and non-capital cases.

questioned jurors during voir dire, and the trial judge's inappropriate demeanor had unfairly prejudiced him.¹⁶⁴

Initially, the Fifth Circuit panel accepted that cumulative error was a basis for habeas corpus relief because the cumulative effects of multiple errors may have deprived Derden of a fair trial.¹⁶⁵ The panel stated that, in reviewing cumulative error claims, "[t]here is no set formula and each case must be independently examined."¹⁶⁶ The panel described the review process for cumulative error claims as a determination of "whether the trial *taken as a whole* is fundamentally unfair."¹⁶⁷ This idyllic approach to cumulative error did not last long as the Fifth Circuit voted to consider Derden's case en banc and subsequently reversed.¹⁶⁸

The en banc Fifth Circuit described entertaining cumulative error claims in federal habeas corpus petitions as "a difficult theoretical proposition."¹⁶⁹ Facially, the en banc court recognized that the cumulative effect of multiple errors may deprive a petitioner of her due process right to a fair trial.¹⁷⁰ However, the standard it articulated for determining if cumulative errors required habeas relief effectively precludes a meaningful handling of the claim.

Much like the Tenth Circuit's distinction between "actual errors" and "adverse" events, the Fifth Circuit constructed a four-prong test in *Derden* that restricts what claims a federal court can cumulate in federal habeas proceedings.¹⁷¹ First, errors alleged in a cumulative error claim must refer only to errors committed in the state trial court that have not been cured by that court.¹⁷² Second, the errors must not be procedurally barred.¹⁷³ Third, the errors must be "constitutional"—that is they must have "so infused the trial with unfairness as to deny due process of law."¹⁷⁴ Fourth, the errors must make it more likely than not that the verdict is "suspect."¹⁷⁵

While this test appears to allow petitioners to raise cumulative error claims in their federal habeas corpus petitions, it effectively has eliminated consideration of the claims unless the underlying errors could independently give rise to relief. This is primarily a function of the "constitutionality" element of the test.

¹⁶⁴ *Derden*, 938 F.2d at 610–18.

¹⁶⁵ *Id.* at 618.

¹⁶⁶ *Id.* at 609.

¹⁶⁷ *Id.* (emphasis added).

¹⁶⁸ *Derden*, 978 F.2d at 1456 (en banc).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1456–59.

¹⁷¹ *Id.* at 1458.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Derden*, 978 F.2d at 1458 (quoting *Lisenba v. California*, 314 U.S. 219, 228 (1941)).

¹⁷⁵ *Id.*

The Fifth Circuit's constitutionality element is similar to the Tenth Circuit's actual error-adverse event test, but it is more restrictive. Where the Tenth Circuit at least suggests that actual errors do not have to require relief independently, the Fifth Circuit requires that constitutional errors necessitate relief on their own.¹⁷⁶ Thus, if a petitioner cannot get relief on any one of her claims, she cannot get relief via cumulative error.¹⁷⁷

In practice, the differences among these circuits' approaches to cumulative error claims in federal habeas petitions are largely irrelevant considering a petitioner's rate of success is virtually zero, regardless of jurisdiction.¹⁷⁸ In most cases, the federal court examining the claim will handle the claim succinctly in a pro forma manner.¹⁷⁹ First, the court will note the petitioner has raised the claim.¹⁸⁰ Then, the court will state the relevant circuit standard for the claim.¹⁸¹ Next, the court will conclude that the petitioner has not met that standard.¹⁸² In some cases, the court will further state that even if the petitioner had met the standard the court could not grant relief on the claim because the lower court¹⁸³ did not act unreasonably in dismissing the claim.¹⁸⁴ This last point drives home the fact that the AEDPA has largely rendered cumulative error claims meaningless exercises only nominally concerned with fairness because there is no guiding Supreme Court precedent directly on point.¹⁸⁵

¹⁷⁶ *Id.*; see also Van Cleave, *supra* note 130, at 81–82.

¹⁷⁷ *United States v. Bernard*, 762 F.3d 467, 482 (5th Cir. 2014).

¹⁷⁸ See Moyer, *supra* note 10, at 463 (“Importantly, however, the accumulation of *non-errors* generally fails to rise to the level of a due process violation.”); Van Cleave, *supra* note 130, at 61 (“[T]he vast majority of habeas petitions alleging cumulative error fail . . .”). Over the past six months, I have tracked every federal habeas case raising a cumulative error claim and none have led to relief being granted on that claim alone.

¹⁷⁹ Van Cleave, *supra* note 130, at 61.

¹⁸⁰ See *Nickelberry v. Soto*, No. 2:14-cv-01168-JKS, 2015 WL 502935, at *29 (E.D. Cal. Feb. 5, 2015). It is worth noting that the court in *Nickelberry* refers to *Chambers* and *Brecht* for support of its cumulative error doctrine despite the fact that those cases did not establish clear Supreme Court precedent in regards to cumulative error claims in the federal habeas context. See *infra* note 185 and accompanying text.

¹⁸¹ See *Nickelberry*, 2015 WL 502935, at *29.

¹⁸² *Id.*

¹⁸³ In some cases, the “lower court” will be the federal district court; in others, it will be the state court. See *supra* Part II.A–B.

¹⁸⁴ See *Mello v. DiPaulo*, 295 F.3d 137, 151–52 (1st Cir. 2002).

¹⁸⁵ A federal court may only grant habeas relief upon a claim adjudicated on the merits in state court if the state court's decision was contrary to or involved an unreasonable application of “clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1) (2012) (emphasis added); see also *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). In other words, without clear Supreme Court precedent, federal courts may not grant habeas relief. See *infra* Part IV.B.2. However, the Ninth and the Tenth Circuits maintain that there is clear Supreme Court precedent for addressing cumulative error claims in federal habeas. See *supra* note 135. Yet, both of these circuits' references to clearly established federal law suffers from the same flaw: they constructively establish *post facto* the Supreme Court precedent required by the AEDPA.

For example, take *Cunningham v. Merrill*.¹⁸⁶ In that case, the federal magistrate judge recommended dismissing the petitioner's cumulative error claim because it was not raised in state court and so it was not properly exhausted.¹⁸⁷ Further, the magistrate stated any claim the petitioner raised could only lead to relief if he could show that state court unreasonably or incorrectly applied federal law.¹⁸⁸ Thus, even if the petitioner had exhausted her cumulative error claim, she could not receive habeas relief because she could not show that the lower court acted unreasonably or incorrectly.¹⁸⁹

This last conclusion drives home a common theme among the circuits that allow cumulative error claims in federal habeas: it is a useless, yet complex claim. Petitioners do not get relief from it. Courts do not do much with it (other than create nonspecific standards about fairness). The situation does not improve in the circuits that have functionally eschewed cumulative error from federal habeas petitions.

B. *The Dissent*

The Fourth, Sixth, and Eighth Circuits either explicitly or effectively do not allow cumulative error claims to be raised in federal habeas corpus petitions.¹⁹⁰ While agreeing that cumulative error claims ought to be precluded

The Ninth Circuit cites to *Chambers* for the required precedent, but the Court in *Chambers* states directly “[i]n reaching this judgment, we establish no new principles of constitutional law.” *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). To overcome this hurdle, the Ninth Circuit blends *Chambers* with *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), which expressly does not adopt the due process violation the Ninth Circuit cites it for, in order to establish the necessary precedent. See *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007). The Tenth Circuit maintains that “[c]umulative error analysis is an extension of harmless error” and cites to *Brecht* for Supreme Court support. *Darks v. Mullin*, 327 F.3d 1001, 1018 (10th Cir. 2003). However, this “extension” misconstrues *Brecht*'s holding to serve the Tenth Circuit's end goals. *Brecht* itself only outlines the distinction between the harmless beyond a reasonable doubt error standard established in *Chapman v. California*, 386 U.S. 18, 24 (1967), and the substantial and injurious harmless error standard articulated in *Kotteakos v. United States*, 328 U.S. 750, 752 (1946), and holds that the latter standard applies during collateral review. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). For a full discussion of the Court's evolving harmless error jurisprudence, see Thomas, *supra* note 106, at 532–38.

¹⁸⁶*Cunningham v. Merrill*, No. Civ. 02-158-B-S, 2003 WL 1712511, at *4 (D. Me. Apr. 1, 2003).

¹⁸⁷*Id.* at *7.

¹⁸⁸*Id.* at *2–3. Without the Supreme Court providing an express mandate governing cumulative error claims, it seems improbable that a petitioner can show that a lower court acted unreasonably or incorrectly in deciding these claims.

¹⁸⁹See *infra* Part IV.B.2.

¹⁹⁰See *Ballard v. McNeil*, 785 F.Supp.2d 1299, 1336 n.22 (N.D. Fla. 2011) (describing how the Fourth, Sixth, and Eighth Circuits do not allow cumulative error in federal habeas petitions).

from federal habeas petitions, each of these circuits discards the claim using its own logic and rationale.

1. *The Fourth and Eighth Circuits*

The simplest approach is captured by the Eighth Circuit's treatment of cumulative error claims in federal habeas, which expressly prohibits these claims in this context.¹⁹¹ While this rule is straightforward enough, the Eighth Circuit provides scant reasoning as to why cumulative error claims are not appropriate for federal collateral review.¹⁹² The Circuit's leading case on cumulative error claims in federal habeas, *Wainwright v. Lockhart*, states simply: "Errors that are not unconstitutional individually cannot be added together to create a constitutional violation."¹⁹³

The Fourth Circuit incorporates the Eighth Circuit's cumulative error jurisprudence through its leading case on those claims in the federal habeas context: *Fisher v. Angelone*.¹⁹⁴ In *Fisher*, the Fourth Circuit held both claims of counsel error and claims of trial court error must be reviewed "individually, rather than collectively."¹⁹⁵ The *Fisher* court cited directly to the Eighth Circuit's *Wainwright* decision to demonstrate its accord with sister circuits on the issue of cumulative error in habeas petitions.¹⁹⁶

¹⁹¹ *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996) (holding that errors that are not unconstitutional individually cannot be added together to create a constitutional violation).

¹⁹² See Van Cleave, *supra* note 130, at 71–72.

¹⁹³ *Wainwright*, 80 F.3d at 1233.

¹⁹⁴ *Fisher v. Angelone*, 163 F.3d 835, 852–53 (4th Cir. 1998). There is some confusion over the Fourth Circuit's stance on cumulative error in federal habeas corpus petitions. As noted previously, all federal appellate courts entertain cumulative error claims on direct appeal. See *supra* note 130 and accompanying text; see also Moyer, *supra* note 10, at 464. The Fourth Circuit is no exception. See *United States v. Ollivierre*, 378 F.3d 412, 422–23 n.8 (4th Cir. 2004), *vacated on other grounds*, 543 U.S. 1112 (2005). However, according to John H. Blume and his co-author Christopher Seeds, the Fourth Circuit "appl[ies] cumulative error analysis, without explicit distinction from the direct-appeal context, in the review of habeas corpus petitions." Blume & Seeds, *supra* note 97, at 1185 n.117. This conclusion is incorrect, yet the mistake is understandable. The Fourth Circuit has not maintained clear separation between its direct appeal cumulative error doctrine and its collateral review cumulative error doctrine. In *United States v. Hicks*, the Fourth Circuit applied *Fisher*—its habeas cumulative error touchstone—to dismiss a claim of cumulative error on direct appeal. 307 Fed. App'x 758, 763–64 (4th Cir. 2009) (citing *Fisher*, 163 F.3d at 852 n.9). While in *United States v. Lighty*, the Fourth Circuit did not mention *Fisher* and stuck with a more traditional cumulative error standard in reviewing such a claim on direct appeal. 616 F.3d 321, 371 (4th Cir. 2010). These mixed messages both contribute to widespread misunderstandings of the Fourth Circuit's stance on cumulative error and demonstrate the need for clarity from the Supreme Court.

¹⁹⁵ *Fisher*, 163 F.3d at 852.

¹⁹⁶ *Id.* at 852–53. To be sure, the *Fisher* court does not expressly draw the distinction between cumulative error claims in the habeas context and cumulative error claims on direct appeal. See *id.* Nonetheless, given the context in which *Fisher* itself was decided in

The Fourth Circuit's adoption of the Eighth Circuit's approach to cumulative error claims in the federal habeas context demonstrates the jurisprudential mess that these claims have made among the circuits.¹⁹⁷ The lack of Supreme Court guidance as to how cumulative error claims should be dealt with in federal habeas proceedings has caused misunderstandings by scholars and courts.¹⁹⁸ It has also led to numerous suggestions to "expand" cumulative error despite the incomprehensible and irreconcilable doctrine available.¹⁹⁹ In the face of all this confusion and conceptual innovation, the Sixth Circuit has constructed a sobering and sound approach to cumulative error in federal habeas proceedings.

2. *The Sixth Circuit*

By all outward appearances, the Sixth Circuit is just like the Eighth Circuit and imposes a blanket ban on cumulative error claims in federal habeas corpus petitions.²⁰⁰ However, the clarity of this seemingly straightforward judicial prohibition is incongruent with the fact that virtually all habeas petitions in the Sixth Circuit include cumulative error claims.²⁰¹ So, what gives?

This dilemma stems from the Sixth Circuit's gnawing ambivalence about the claim's existence. On the one hand, the Sixth Circuit's defining case law states flatly that the Supreme Court has never expressly allowed cumulative error claims in federal habeas corpus petitions and so these claims are not cognizable in habeas.²⁰² On the other hand, the Sixth Circuit continues to

conjunction to its deliberate use of *Wainwright*, it seems that the decision can only apply in the habeas context. However, problems persist with this interpretation. Marceau, *supra* note 59, at 90. Moreover, it does not seem that the *Fisher* court understood the significance of the context of its decision as it cites haphazardly to both direct appeal decisions and habeas decisions. *Fisher*, 163 F.3d at 852–53. Compare *Arnold v. Evatt*, 113 F.3d 1352, 1356 (4th Cir. 1997) (habeas proceeding), with *United States v. Stewart*, 20 F.3d 911, 912 (8th Cir. 1994) (direct appeal). Perhaps part of the problem is that *Fisher* was decided in December 1998 and the AEDPA was only two years old at that point. Scholars have noted that the AEDPA seemed less "bite" than "hype" in those early years. See Blume, *supra* note 59, at 261.

¹⁹⁷ See *supra* notes 194, 196 and accompanying text.

¹⁹⁸ See *supra* note 194 and accompanying text.

¹⁹⁹ See *infra* Part IV.

²⁰⁰ See, e.g., *Anderson v. Berghuis*, No. 1:10-cv-349, 2015 WL 566619, at *18 (W.D. Mich. Feb. 11, 2015) ("The Sixth Circuit repeatedly has stated that cumulative error claims are not cognizable on habeas review."). Notably, this strong statement has only ever been cited in non-capital habeas review. See *infra* note 203.

²⁰¹ See *Anderson*, 2015 WL 566619, at *18; *Brenson v. Warden*, No. 2:11-CV-1146, 2015 WL 422827, at *36 (S.D. Ohio Feb. 2, 2015); *Brown v. Lafler*, No. 05-72843, 2014 WL 3752441, at *16 (E.D. Mich. July 30, 2014). Time and time again, federal habeas petitioners in the Sixth Circuit raise cumulative error claims despite the Circuit's excision of the claim from the set of cognizable claims. See *Scott v. Elo*, 302 F.3d 598, 607 (6th Cir. 2002).

²⁰² See *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002).

dismiss these claims by describing their lack of merit.²⁰³ Thus, there is a lingering tension in the Sixth Circuit's cumulative error jurisprudence: either these claims cannot be brought in federal habeas petitions full-stop; or they can be brought, but they will only lead to relief if they are sufficiently meritorious.²⁰⁴

The only element of the Sixth Circuit's cumulative error jurisprudence that is fairly stable is that the claim cannot be raised in federal habeas by non-capital petitioners.²⁰⁵ Taking the stability of this proposition as a given, the Sixth Circuit's approach to capital petitioners raising these claims is less clear.

In *Keith v. Mitchell*, the Sixth Circuit panel dismissed a capital petitioner's cumulative error claim because it was procedurally defaulted; however, the panel did not end its analysis there.²⁰⁶ It went on to restate that the Supreme Court has not held that habeas petitioners can raise cumulative error claims *and also* that the petitioner's claim here did not warrant relief.²⁰⁷

In other words, the *Keith* panel left open the possibility that were a petitioner to have a non-defaulted cumulative error claim that did warrant relief, it could grant that relief.²⁰⁸ Thus, it is possible for capital (and maybe noncapital²⁰⁹) petitioners to successfully raise cumulative error claims in the Sixth Circuit despite all of its suggestions to the contrary.

²⁰³ See *Scott*, 302 F.3d at 607 (“In any event, we do not find that any errors, even when cumulated, denied [the petitioner] a fair trial.”); *Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir. 2000). In more recent cases, the federal district courts in the Sixth Circuit have denied cumulative error claims without discussing their lack of merit by noting that these claims are simply not cognizable in federal habeas. See *supra* notes 200–01. However, all of these cases involved non-capital habeas petitioners. Thus, the Sixth Circuit's stance on capital petitioners raising cumulative error claims in federal habeas is not clear from these decisions.

²⁰⁴ Recent cases demonstrate the Sixth Circuit has adopted the former approach over the latter, but the Circuit's appellate courts have not addressed the issue head-on since 2006. See *Bradley v. Birkett*, 192 Fed. App'x 468, 480 (6th Cir. 2006).

²⁰⁵ See *Davis v. Burt*, 100 F.App'x 340, 351 (6th Cir. 2004). *Davis* was not recommended for publication. Thus, its precedential value is uncertain. See 6th Cir. R. 32.1(a). The only other Sixth Circuit case addressing the issue of cumulative error claims raised by non-capital petitioners in habeas was also not recommended for publication. See *Eskridge v. Konteh*, 88 Fed. App'x 831, 836 (6th Cir. 2004).

²⁰⁶ *Keith v. Mitchell*, 455 F.3d 662, 679 (6th Cir. 2006).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Considering there have been no published cases directly precluding non-capital petitioners from raising cumulative error claims, it seems certain noncapital petitioners will continue to raise these claims and may find success with the right set of facts. See *supra* notes 200–01.

IV. CUMULATIVE ERROR, CAPITAL CASES, AND FEDERAL HABEAS: RIGHT IDEA, WRONG FORUM

The doctrine of cumulative error in the federal habeas context is at an impasse. A number of the circuits allow petitioners to raise cumulative error claims during these collateral proceedings,²¹⁰ yet another group of circuits prohibits them.²¹¹ More importantly, however, no circuit has granted relief to a petitioner solely on a claim of cumulative error.²¹² Further still, given that the AEDPA necessarily precludes a federal court from granting relief on cumulative error claims since the Supreme Court has not clearly permitted or articulated the claim,²¹³ the claim's obsolescence becomes apparent.

In the capital context, cumulative error review is a great idea: taking one final, full look at what transpired in the state proceeding before taking irreversible action against a citizen is simply good practice. The conceptual attractiveness of cumulative error claims has fostered wild and varied suggestions from the legal academe.²¹⁴ However, idealism has limited applicability in the rough world of modern federal habeas corpus.²¹⁵

A. Academic Attempts to Salvage Cumulative Error

The continued existence of cumulative error claims in federal habeas petitions post-AEDPA has led to the proliferation of academic theorizing as to how the claim, at least structurally, can be used to promote justice and fairness in criminal proceedings.²¹⁶ Scholars argue for the claim's usefulness in promoting global reliability for all criminal cases.²¹⁷ However, few of these academic endeavors truly reconcile the idea of cumulative claims in federal habeas with the reality of the AEDPA's strictures.²¹⁸ The workable academic suggestions that do exist use cumulative error as a structural remedy to an already extant habeas claim—ineffective assistance of counsel.²¹⁹ However, cumulative error claims, on their own, cannot be vindicated in the federal habeas context.

²¹⁰ See *supra* Part III.A.

²¹¹ See *supra* Part III.B.

²¹² See *supra* note 178 and accompanying text.

²¹³ See 28 U.S.C. § 2254(d) (2012).

²¹⁴ See, e.g., Blume & Seeds, *supra* note 97, at 1191–93; Moyer, *supra* note 10, at 483–502.

²¹⁵ See Marceau, *supra* note 59, at 90 (“The era of exhaustive, de novo federal habeas review has passed, at least for the time being, and so too must the focus of federal review be redirected.”).

²¹⁶ See generally Blume & Seeds, *supra* note 97, at 1191; Van Cleave, *supra* note 130, at 89–90. Van Cleave's article was written pre-AEDPA, but its reasoning has been cited numerous times subsequently and will be discussed in a post-AEDPA context hereinafter.

²¹⁷ See Blume & Seeds, *supra* note 97, at 1188.

²¹⁸ See *supra* Part II.A–B.

²¹⁹ See Moyer, *supra* note 10, at 483.

1. *Cumulative Error Theory One: A Federal Habeas Claim to Ensure Reliability*

Because death is different in kind than all other penalties, the need for reliability in capital cases is arguably greater than it is for lesser sentences.²²⁰ Scholars point to reliability as the *raison d'être* for cumulative error claims to be reviewed in federal habeas petitions.²²¹ Nonetheless, this line of reasoning misunderstands the current role of federal courts during federal habeas review, which is to evaluate and review the procedural mechanisms employed by the state judiciaries in criminal proceedings.²²²

Professor Rachel Van Cleave argues that the errors alleged in all properly exhausted claims, excluding Fourth Amendment claims,²²³ ought to be examined in federal habeas.²²⁴ Van Cleave asserts that federal courts should “examine the entire record and even consider ‘prejudicial circumstances’ to determine” whether the alleged errors deprived a petitioner of a fair trial in state court.²²⁵ Further, she defines “error” broadly as “any violation of an objective legal rule.”²²⁶

To be sure, Van Cleave made these assertions before the AEDPA was enacted.²²⁷ However, her rationale and perspective have not been entirely abandoned.²²⁸

²²⁰ *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

²²¹ Blume & Seeds, *supra* note 97, at 1157 (“Our position thus relies on a link between verdicts’ reliability as a core aspiration and global scope of review as its measure. Seeking the former, one must employ the latter.”).

²²² See Justin F. Marceau, *Don’t Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications*, 62 HASTINGS L.J. 1, 64–65 (2010). Federal courts reviewing habeas petitions by state inmates have become less concerned with the substantive result of the state procedures than they are with the path taken to get to that result. *Id.*

²²³ See *Stone v. Powell*, 428 U.S. 465, 486–87 (1976). For a full discussion of *Stone* and its impact on due process challenges in federal habeas, see generally Peter McCormack, Comment, *Habeas Corpus and Due Process: Stone v. Powell Restricted*, 17 HOUS. L. REV. 923 (1980).

²²⁴ Van Cleave, *supra* note 130, at 89–90.

²²⁵ *Id.* at 90.

²²⁶ *Id.* (quoting *United States v. Rivera*, 900 F.2d 1462, 1470 n.7 (10th Cir. 1990) (en banc)). Van Cleave describes this definition as “broad.” *Id.* This description is inapt. See Moyer, *supra* note 10, at 453 n.29. More often than not, alleged errors do not violate any clear legal rule, but demonstrate some intrinsic unfairness such as an attorney allowing his client to bully him into making poor decisions or an attorney failing to investigate certain evidentiary leads. See, e.g., *Summerlin v. Stewart*, 341 F.3d 1082, 1088–99 (9th Cir. 2003) (en banc), *rev’d sub nom.* *Schriro v. Summerlin*, 542 U.S. 348 (2004).

²²⁷ See *infra* note 228.

²²⁸ There has been direct criticism of relying on pre-AEDPA scholarship in regards to cumulative error in federal habeas corpus proceedings. See Moyer, *supra* note 10, at 480 (“[P]re-AEDPA case law and scholarship arguing that federal habeas courts should apply the cumulative-error analysis when reviewing state court determinations fail to be

For their contribution to the development of cumulative error doctrine in federal habeas corpus, Professor John H. Blume and Christopher Seeds argue that the claim should be used to weed out any errors that undermine the reliability of a criminal sentence.²²⁹ Like Van Cleave, Blume and Seeds apply several procedural limitations on what errors can be cumulated.²³⁰ To preserve finality interests, they state that procedurally defaulted claims of error cannot be cumulated.²³¹ Further, they require that the strictest standard of review of all the potential errors alleged ought to be used to evaluate the entire cumulative error assessment.²³²

The relationship between Van Cleave's approach to cumulative error and Blume and Seeds's approach is in their proposed scope of review.²³³ They each argue for cumulative error review that includes every possible error that is procedurally permitted.²³⁴ In this way, the wide scope of review they argue for places a great burden on federal courts, a burden the AEDPA most certainly precludes.²³⁵

The fatal flaws inherent in these theories stem from their dependence upon the idea that federal courts review state criminal proceedings to ensure reliability, especially in the capital context.²³⁶ Reliability is important, but finality is more important in the post-AEDPA federal habeas world.²³⁷

instructive.”). Nonetheless, the carryover exists. *See* Blume & Seeds, *supra* note 97, at 1185–86 n.117 (citing Van Cleave, *supra* note 130, at 62).

²²⁹ Blume & Seeds, *supra* note 97, at 1191.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 1192. It appears that this would mean that if one of the errors required a petitioner to only show the existence of the error, but another error required the petitioner to show it was outcome-determinative, the outcome-determinative standard would apply to the whole cumulative assessment. *Id.* at 1192–93 n.132. However, Blume and Seeds state clearly the standard would be whether the cumulative errors “present a *reasonable probability of a different outcome*.” *Id.* at 1192. Deciphering these mixed messages is not relevant to the analysis of their approach for the purposes of this Note.

²³³ *See* Blume & Seeds, *supra* note 97, at 1191; Van Cleave, *supra* note 130, at 90.

²³⁴ *Compare* Blume & Seeds, *supra* note 97, at 1191, *with* Van Cleave, *supra* note 130, at 90. Blume and Seeds go so far as to say both record-based and non-record-based errors ought to be considered. *See* Blume & Seeds, *supra* note 97, at 1191.

²³⁵ For one, the Supreme Court has rejected Blume and Seeds's contention that non-record-based errors ought to be reviewed in federal habeas. *See* Cullen v. Pinholster, 131 S. Ct. 1388, 1400 (2011) (noting that new evidence that was not part of the original state court record has “no bearing” on federal review of the state court's decision). Further, the claims that are cognizable in federal habeas are entirely dependent upon the Supreme Court's stating so. *See supra* note 185. Thus, the scope of reviewable errors is much more narrow than asserted by Blume and Seeds as well as Van Cleave.

²³⁶ *See* Blume & Seeds, *supra* note 97, at 1192–93 (“This approach . . . furthers the Court's constitutional value of choice, ‘reliability,’ . . .”).

²³⁷ *See supra* Part II.A–B.

2. *Cumulative Error Theory Two: A Structural Model for Other Habeas Claims*

Since the enactment of the AEDPA, scholars have argued for the adoption of cumulative error not as a claim in and of itself, but as a structural archetype to be incorporated in another common federal habeas claim: ineffective assistance of counsel or *Strickland* claims.²³⁸ There is much to be said in support of this argument both from precedent and from its intuitive logic.²³⁹ Nonetheless, cumulating attorney errors for purposes of evaluating *Strickland* claims has only an analogous relationship to cumulative error claims as stand-alone global reliability assessments.²⁴⁰ Thus, the vein of scholarship stands apart from the more general understanding of cumulative error claims on their own.

In *Kyles v. Whitley*, the Supreme Court incorporated the structure of cumulative error claims into its *Brady* error doctrine.²⁴¹ The Court held that “suppressed evidence [must be] considered collectively, not item by item.”²⁴² The Court reasoned that consideration of the net effect of unconstitutionally suppressed evidence would have a measurable effect on a jury’s verdict in comparison to the jury considering each piece of suppressed evidence in isolation.²⁴³

Following *Kyles*, it seemed as though the Supreme Court would inevitably hold that attorney errors must be viewed together when courts review *Strickland* ineffective assistance of counsel claims.²⁴⁴ However, despite many suggestions that a clear decision to this effect was imminent, no such decision has been made.²⁴⁵

Consequently, numerous scholars have argued that attorney errors must be cumulated in evaluating *Strickland* claims.²⁴⁶ As noted, this conclusion seems

²³⁸ See, e.g., Moyer, *supra* note 10, at 483.

²³⁹ See Blume & Seeds, *supra* note 97, at 1180–83.

²⁴⁰ That is, wholesale review of the entire set of potential errors that may have undermined a criminal conviction or sentence is a separate inquiry entirely from whether or not multiple attorney errors ought to be considered together or separately.

²⁴¹ *Kyles v. Whitley*, 514 U.S. 419, 421 (1995).

²⁴² *Id.* at 436.

²⁴³ *Id.* at 437. This holding was reinforced by *Banks v. Dretke*, 540 U.S. 668, 698 (2004).

²⁴⁴ See Blume & Seeds, *supra* note 97, at 1169.

²⁴⁵ See *United States v. Bagley*, 473 U.S. 667, 683 (1985) (citing *Strickland* as support for the considering the cumulative effect of the undisclosed evidence); see also *Wiggins v. Smith*, 539 U.S. 510, 536 (2003) (noting that ineffective assistance of error claims require a court to “evaluate the totality of the evidence—‘both that adduced at trial, and the evidence adduced in the habeas proceeding[s]’” (alteration in original) (quoting *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000))).

²⁴⁶ See Blume & Seeds, *supra* note 97, at 1171 (“This point ought not be controversial: errors in defense counsel’s performance should be cumulated in the *Strickland* prejudice prong.”); Moyer, *supra* note 10, at 483 (“The Supreme Court should resolve the current

constitutionally correct. Further, given the Court's recent ineffective assistance jurisprudence, it seems that it would be open to expressly holding as such soon.²⁴⁷ Still, such a decision would have little, if any, effect on cumulative error claims as viable habeas claims on their own.

3. *Cumulative Error Theory Three: Shifting the Burden to the State*

One last proposition has struck close to the heart of the tension between cumulative error claims and state death sentences: the Supreme Court should readopt the higher harmless error review standard articulated in *Chapman v. California*²⁴⁸ for state death row inmates arguing mitigation error in federal habeas.²⁴⁹ This argument uses the “death is different” rationale to reconfigure cumulative error so that it provides meaningful review for inmates condemned to die.²⁵⁰

Despite the superficial appeal of this argument, it is only half-baked. First, if the Supreme Court were to adopt the “harmless beyond a reasonable doubt”²⁵¹ standard for mitigation errors, which would place the burden on the prosecution to prove that the errors that occurred were in fact without effect, it would be implicitly leaving death row inmates raising culpability phase claims without an avenue for relief. In this way, heightening the harmless error standard for mitigation errors would not only be too narrow—it would be harmfully exclusive.

Second, scholars supporting this jurisprudential move in order to ensure the reliability of capital sentences would have to ignore the severe deference the AEDPA requires federal courts to give to state courts.²⁵² Ryan C. Thomas, the main proponent of this argument, contends that the limited applicability of

circuit split concerning the cumulation of *Strickland* errors and hold that courts may cumulate an attorney's errors in order to determine if *Strickland* prejudice exists.”); Michael C. McLaughlin, Note, *It Adds Up: Ineffective Assistance of Counsel and the Cumulative Deficiency Doctrine*, 30 GA. ST. U. L. REV. 859, 879 (2014) (“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.”); Eric O'Brien, Note, *Jennings v. Stephens and Judicial Efficiency in Habeas Appeals*, 10 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 21, 35 (2015) (“The Court should rule . . . that ineffective assistance of counsel is a single claim with a deficient performance prong and a cumulative prejudice prong . . .”).

²⁴⁷ See generally *Trevino v. Thaler*, 133 S. Ct. 1911 (2013); *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

²⁴⁸ *Chapman v. California*, 386 U.S. 18, 24 (1967).

²⁴⁹ See Thomas, *supra* note 106, at 516.

²⁵⁰ See *id.* at 552; see also *California v. Ramos*, 463 U.S. 992, 998–99 (1983) (“The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.”).

²⁵¹ *Chapman*, 386 U.S. at 24.

²⁵² See *supra* Part II.A–B.

this review inoculates it from the AEDPA's focus on finality and deference.²⁵³ However, limited applicability only addresses finality and does not impact the AEDPA's stringent deference requirements. Sure, only a subset of a subset of federal habeas cases will be impacted by this rule (death row inmates *with* mitigation error claims); however, even for that limited group, the federal court will have to defer to the state court's ruling on the matter.²⁵⁴ In this way, federal courts will not be truly applying the *Chapman* standard to mitigation errors for death row inmates—state courts will.²⁵⁵ The federal courts will only be there to reaffirm that the state courts did not act unreasonably.²⁵⁶

If the AEDPA could be ignored or worked around, perhaps this argument would have greater appeal. However, given the new rules of federal habeas, this approach effectively only reframes the analysis for the state courts and does little, if anything, to provide relief in federal court.

4. *The Future of Cumulative Error in Federal Habeas*

Federal habeas review of cumulative error claims, in the abstract, is ideal for ensuring the reliability of state criminal convictions and sentences.²⁵⁷ In addition, it is beyond dispute that consideration of multiple errors of the same kind separately, as opposed to considering them collectively unfairly diminishes their cumulative significance.²⁵⁸

However, the unsteady and unguided development of cumulative error claims in federal habeas has precluded a unified doctrine.²⁵⁹ Further, even with doctrinal discrepancies across the circuits, the trend is clear: cumulative error claims do not lead to habeas relief on their own.²⁶⁰

Still, cumulative error can serve a valuable, necessary purpose in the context of capital cases where reliability takes on heightened significance.²⁶¹ The problem is, given the AEDPA and its Supreme Court progeny,²⁶² cumulative error as an independent federal habeas claim is ineffective.²⁶³ Consequently, it ought to be removed from federal habeas jurisprudence and reintroduced as a mandatory state collateral review procedure.

²⁵³ Thomas, *supra* note 106, at 551–54.

²⁵⁴ 28 U.S.C. § 2254(d) (2012).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *See supra* Part II.C.

²⁵⁸ *See infra* Part IV.B; *see also* Kyles v. Whitley, 514 U.S. 419, 436 n.10 (1995).

²⁵⁹ *Compare supra* Part III.A, *with supra* Part III.B.

²⁶⁰ *See supra* Part III.

²⁶¹ *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370–71 (1995).

²⁶² *See supra* Part II.A–B.

²⁶³ *See supra* note 178 and accompanying text.

B. *Necessary Trouble: Reimagining Cumulative Error as a State Procedure*

So long as state and federal legislatures continue to support capital punishment, those inmates sentenced to death will continue to seek avenues for relief.²⁶⁴ While some condemned prisoners will have received fair procedures, others will not have.²⁶⁵ In order to ensure that no person is executed as a result of fundamentally unfair procedures, some systematic reliability check or error-review mechanism needs to be in place.²⁶⁶

Cumulative error claims in federal habeas corpus petitions have been an ineffective, but important, symbolic stopgap.²⁶⁷ Although these claims have never led to relief on their own, their existence suggests that courts are aware that reviewing what occurred below *in the aggregate* is important to maintain fundamentally fair procedures.²⁶⁸ However, given that cumulative error claims are so futile in federal habeas petitions, their actual capacity to review and check the fairness of the criminal procedures leading to a death sentence is *de minimis*.²⁶⁹

1. *Selecting the Proper Channel for Change: The Legislature or the Court?*

Fortunately, a simple reconfiguration of cumulative error can save it from its current hapless state, which will, in turn, ensure that it can truly function as a reliability check for capital sentences. Rather than using cumulative error as a claim in federal habeas petitions, cumulative error ought to be reimagined as a mandatory state procedure wherein potential errors that may have undermined the fundamental fairness of the capital trial are examined at the state-level first.

This transformation of cumulative error can be undertaken in one of two ways. The first option is federal legislation. Congress could enact legislation that incentivizes adopting these additional procedures. A good starting place would be using the accelerated the AEDPA “opt-in” mechanism.²⁷⁰ Congress

²⁶⁴ See FRANKL, *supra* note 38, at 28.

²⁶⁵ See, e.g., *Summerlin v. Stewart*, 341 F.3d 1082, 1088–92 (9th Cir. 2003) (en banc), *rev’d sub nom. Schriro v. Summerlin*, 542 U.S. 348 (2004).

²⁶⁶ See, e.g., *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978); *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973).

²⁶⁷ See *supra* Parts II.C, III.

²⁶⁸ See *supra* Part III.

²⁶⁹ See, e.g., *Summerlin*, 341 F.3d at 1091–92.

²⁷⁰ See DOYLE, *supra* note 5, at 8–11. The AEDPA permits states that provide mechanisms for appointing and compensating counsel for indigent death row inmates during their state collateral appeals to take advantage of streamlined and expedited federal habeas procedures. 28 U.S.C. § 2261(b)–(c) (2012). As it stands, only three states have attempted to “opt-in” and none have succeeded. See Jennifer Ponder, *The Attorney General’s Power of Certification Regarding State Mechanisms to Opt-in to Streamlined*

could amend the AEDPA's opt-in procedures to allow states that adopt cumulative error review procedures easier paths to opting-in.²⁷¹ However, this approach is less than ideal.

Ignoring the practical difficulties of passing substantial legislation, congressional incentives are inherently less effective than federal mandates.²⁷² Further, Congress cannot pass a federal mandate requiring additional state criminal procedures in the same way it can create mandates in other arenas.²⁷³ Thus, at best, Congress can suggest states act in a certain way; however, that suggestion will likely go unheeded.²⁷⁴

The second option is a Supreme Court decision. The United States Supreme Court could grant certiorari to a federal habeas corpus appeal involving a state death row inmate raising a cumulative error claim, definitively remove the claim from federal habeas corpus petitions, and require state courts or legislature to develop cumulative error review protocols.

In so doing, the Court would remedy two of the major problems with the cumulative error doctrine in its current state. First, the Court's direct decision on the issue of cumulative error claims in federal habeas corpus petitions raised by state death row inmates would establish the clear precedent the AEDPA requires in order to have federal courts determine if state courts acted reasonably.²⁷⁵ This would, in effect, eliminate the wide disparity amongst the circuits on the issue of cumulative error while also giving necessary guidance on the claim itself.²⁷⁶ Second, if the Court decided this issue in the way described above (removing cumulative error from federal habeas corpus and reconfiguring it as a state procedure), the claim would be able to serve its intended function—error-detection and review.²⁷⁷

While it is easy to critique any proposed solution that involves the Supreme Court both granting certiorari and deciding a case in a specified manner, this particular solution stands apart for three reasons. First, the

Habeas Corpus Procedure, 6 AM. U. CRIM. L. BRIEF 38, 41 (2010), <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1046&context=clb> [<http://perma.cc/CF3M-5BUJ>].

²⁷¹ The USA PATRIOT Improvement and Reauthorization Act of 2005 made opting in easier by eliminating some of the counsel requirements under 28 U.S.C. § 2265(b) and shifting the approval process from a judicial determination to a determination made by the Attorney General. See DOYLE, *supra* note 5, at 11; Ponder, *supra* note 270, at 41. Congress would simply have further amend 28 U.S.C. § 2265(b).

²⁷² See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604 (2012) (opinion of Roberts, C.J.).

²⁷³ See United States v. Morrison, 529 U.S. 598, 617–18 (2000); United States v. Lopez, 514 U.S. 549, 564 (1995). For a general discussion of the limits of Congress's power in the arena of state criminal law, see Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355, 385–91 (2012).

²⁷⁴ See *supra* note 270 and accompanying text.

²⁷⁵ See 28 U.S.C. § 2254(d); see also *supra* Parts II.C, III.

²⁷⁶ See, e.g., Keith v. Mitchell, 455 F.3d 662, 679 (6th Cir. 2006).

²⁷⁷ See Taylor v. Kentucky, 436 U.S. 478, 487 n.15 (1978); Chambers v. Mississippi, 410 U.S. 284, 298 (1973).

problem it addresses can only effectively be addressed by a Supreme Court decision given the AEDPA restrictions.²⁷⁸ Second, the proposed solution is neither radical nor impracticable; it is necessary and designed to make the criminal justice system as a whole more workable than it is currently. Third, the proposed solution involves a reduction in federal court traffic while giving more responsibility and deference to state criminal procedures just as the AEDPA intended.²⁷⁹

2. *State Cumulative Error Review as the Essential Pre-Federal Habeas Procedure for State Death Row Inmates*

A Supreme Court decision addressing cumulative error claims in the federal habeas context head-on would go a long way to shoring up the claims' legitimacy and efficacy.²⁸⁰ But, it is not enough that the Supreme Court take up the claim and elaborate on it. To save the claim, the Supreme Court must transform it from an ad hoc federal habeas claim²⁸¹ to a state pre-federal habeas procedure.

For state death row inmates, ensuring that each potential or actual error is given due consideration before their sentences are executed is of paramount importance.²⁸² For federal courts under the AEDPA, deference to state courts and finality are the ball game.²⁸³ Reconciling these two important perspectives can be achieved by refashioning cumulative error as a state procedure.

In the current federal habeas climate, even robust claims such as *Brady* claims can appear meek and ineffectual in federal courts given the AEDPA's ever-constricting procedural hurdles.²⁸⁴ Given this reality, it is no grand surprise that an extemporized, last-ditch claim like a cumulative error claim has no traction in federal court.²⁸⁵ Yet, cumulative error claims remain attractive both for petitioners and for federal judiciaries, at least at the outset,²⁸⁶ because they point out the poignant reality that criminal justice is a singularly human endeavor bound to contain all manner of mistakes, missteps,

²⁷⁸ See *supra* Part II.A–B.

²⁷⁹ See *supra* Part II.A–B.

²⁸⁰ See, e.g., *Keith*, 455 F.3d at 679.

²⁸¹ See *supra* Parts II.C, III.

²⁸² See *supra* note 127 and accompanying text.

²⁸³ See *Marceau*, *supra* note 59, at 110–13.

²⁸⁴ See *id.* at 113 (“The Ninth Circuit concluded that there was little doubt ‘[the petitioner’s] *Brady* rights were violated’ but nonetheless held that, because federal review is constrained by § 2254(d), the petitioner was not ‘entitled to habeas relief.’” (quoting *Valdovinos v. McGrath*, 423 F. App’x 720, 722–23 (9th Cir. 2011))).

²⁸⁵ See *supra* Part III.

²⁸⁶ See *supra* Part III.A (noting that a number of circuits at least allow petitioners to raise cumulative error claims).

and miscues.²⁸⁷ Introducing cumulative error into state post-conviction procedures allows courts (albeit state courts) to take advantage of the attractive qualities of the claim—robust error-detection and increased reliability of the entire criminal justice system—without running afoul of the AEDPA. In fact, this reimagining of cumulative error would fall precisely in line with the AEDPA's guiding principles: finality and deference to the states.²⁸⁸

After determining that cumulative error claims must be addressed by the states, the next logistical issue is determining at what stage of the criminal process should these claims be reviewed.²⁸⁹ Requiring this review to be conducted on direct appellate review has two key advantages: direct review is mandatory and indigent criminal defendants must be afforded constitutionally effective counsel.²⁹⁰ However, direct appeal suffers from a limited scope of review as appellants usually can only raise claims based upon the record before the trial court.²⁹¹

The other state-court option is post-conviction proceedings also referred to as state habeas or initial collateral review.²⁹² This avenue has its own set of advantages and drawbacks. On the plus side of the ledger, state post-conviction allows criminal defendants to raise claims based on an expanded record not limited to the record before the trial court.²⁹³ This expansive look at what transpired is especially useful for cumulative error claims, which depend upon *all* the errors that may or may not have occurred, not a subset of those errors.²⁹⁴ However, the downside of requiring cumulative error to be raised in state post-conviction proceedings is dispositive here: in state post-conviction, there is no constitutional right to counsel.²⁹⁵ Given that a state death row inmate behind bars is, to put it lightly, ill-positioned to conduct a serious fact-

²⁸⁷ James M. Doyle, *Learning from Error in the Criminal Justice System: Sentinel Event Reviews*, in MENDING JUSTICE: SENTINEL EVENT REVIEWS 3, 4 (Nat'l Inst. of Justice ed., Sept. 2014), <https://ncjrs.gov/pdffiles1/nij/247141.pdf> [<https://perma.cc/Z4UA-TM7G>].

²⁸⁸ See *supra* Part II.A–B.

²⁸⁹ The claim could, arguably, be raised and addressed on direct appeal where criminal defendants still have a constitutional right to counsel. See *Martinez v. Ryan*, 132 S. Ct. 1309, 1317–18 (2012). However, post-conviction would be better suited for cumulative error's totality-of-the-circumstances, aggregate type review because the scope of review would not be limited to the trial record. *Id.*

²⁹⁰ See *Douglas v. California*, 372 U.S. 353, 357–58 (1963).

²⁹¹ See, e.g., *Martinez*, 132 S. Ct. at 1317–18.

²⁹² See *id.* at 1316–17.

²⁹³ *Id.* at 1317–18. For this reason, many states funnel ineffective assistance of counsel claims into initial collateral review proceedings. *Id.* at 1318. This deliberate channeling by state legislatures fostered the litigation in *Martinez* and *Trevino*. See *supra* note 245 and accompanying text.

²⁹⁴ See *supra* Part II.C.

²⁹⁵ See *Martinez*, 132 S. Ct. at 1315.

intensive investigation *pro se*,²⁹⁶ the costs of having cumulative error raised in state post-conviction outweigh the benefits.

Having considered the two traditional avenues for state appellate review, it seems neither is suitable for cumulative error review. While this is unfortunate, it is sensible: on direct review, death row inmates have counsel, but a limited source of evidence; on collateral review, they theoretically have unlimited evidence, but no counsel.²⁹⁷ Neither of these kinds of review fit cumulative error claims well because cumulative error claims require a court to conduct comprehensive review as opposed to claim-by-claim evaluations—a totalizing kind of review that requires both evidence outside the trial record *and* effective counsel.²⁹⁸

Unlike these traditional kinds of state appellate review, cumulative error claims charge a reviewing court with the task of ensuring that in light of the mistakes that have occurred, the entire criminal process and the ultimate result are fundamentally fair.²⁹⁹ Cumulative error is not concerned with a single problem or a single claim; it is a question of the net effect of multiple errors, and whether, in the aggregate, those errors cast doubt upon the legitimacy of the process or the outcome.³⁰⁰ In this way, cumulative error should be constructed as a state *procedure* not a state *claim*. That is, cumulative error ought to be a mandatory mechanism or protocol that states develop and use to self-evaluate.

Ideally, cumulative error will be a state procedure that is defined not by what appeal or process it comes after, but by what appeal it comes before: federal habeas corpus. In this posture, states will have the opportunity to conduct a comprehensive review that may (but probably will not) eliminate a number of federal habeas petitions. This posture is ideal because it is undeveloped. Currently, there is no constitutional guidance as to whether pre-federal habeas review requires counsel or not, or whether such review is limited to trial record or not. Importantly, however, this posture gives structural and substantive deference to the states because they will have the opportunity to screen cases before they become federal habeas cases.³⁰¹

In order to ensure that the state procedures leading to a death sentence are fundamentally fair, a thorough review of all the available evidence should be undertaken.³⁰² But, this review must stand apart from the current state

²⁹⁶ *Id.* at 1317 (“While confined to prison, the prisoner is in no position to develop the evidentiary basis for [his or her claims] . . .”).

²⁹⁷ *See id.*

²⁹⁸ *See supra* Part II.B.

²⁹⁹ *See supra* Parts II.C, III.

³⁰⁰ *See supra* Parts II.C, III.

³⁰¹ *See supra* Part II.B.

³⁰² Many scholars, in arguing for the proper judicial approach to cumulative error claims, attempt to shoehorn the claim into the narrowly prescribed limits of federal review by eliminating procedurally impermissible claims and applying varying standards of review. *See supra* Part IV.A. However, the purpose of cumulative error claims is to

appellate processes where adversaries are not predisposed to admit fault or error.³⁰³ Further, judges ought not be the sole arbiters of whether the underlying criminal proceedings were fundamentally fair.³⁰⁴

James Doyle, a Visiting Fellow at the National Institute of Justice from 2012 to 2014, argues that the United States criminal justice systems lack procedures to account for “unintended tragic outcomes, to learn lessons from . . . errors, and to use these lessons to reduce future risks.”³⁰⁵ Doyle contends that unlike other “high-risk enterprises” America’s criminal justice systems fail to provide “sentinel event reviews,” which are comprehensive reviews of potential structural weaknesses that indicate significant, unexpected negative outcomes.³⁰⁶ Doyle notes that in other fields like medicine and aviation these reviews are focused on reducing future risk *not* assigning blame.³⁰⁷ In this way, sentinel event reviews are untaken “with all system stakeholders working together in a nonblaming review.”³⁰⁸

Doyle’s sentinel event review model ought to be the framework by which cumulative error as a pre-federal habeas state procedure is shaped. This model acknowledges that errors that lead to wrongful convictions or improper

examine all possible sources of error and determine if, in light of those missteps, errors, or blatant wrongdoings, a criminal conviction ought to be sustained or a specific punishment ought to be imposed. *See Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978) (stating that “the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness”). Due process and fundamental fairness are not “technical conception[s] with a fixed content unrelated to time, place and circumstances.” *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). It is inherently context-dependent and requires an examination of the particular facts and circumstances of a given case. *See Lassiter v. Dep’t of Social Servs. of Durham Cty.*, 452 U.S. 18, 32 (1981).

³⁰³ *See* Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1319 (1978) (“[A]dversarial investigation . . . enables counsel to play the games of deception, concealment, and manipulation that defeat the purposes discovery was intended to serve.”). It should be noted that while Brazil focuses on civil litigation and we often conceptualize the death penalty as a purely criminal topic, post-conviction procedures as well as federal habeas are, by definition, civil *not* criminal procedures. *See Fay v. Noia*, 372 U.S. 391, 423–24 (1963), *overruled on other grounds by Coleman v. Thompson*, 501 U.S. 722, 750 (1991). For a different take on the problems with the adversarial process and ensuring fundamental fairness, see Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 644–47 (2002).

³⁰⁴ *See Sawyer v. Whitley*, 505 U.S. 333, 355–56 (1992) (Blackmun, J., concurring in the judgment) (criticizing the Court’s “actual innocence” doctrine for requiring federal courts “unnaturally, to ‘function in much the same capacity as the state trier of fact’; that is, to ‘make a rough decision on the question of guilt or innocence’” (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 471 n.7 (1986) (Brennan, J., dissenting))).

³⁰⁵ *See* Doyle, *supra* note 287, at 3.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 9.

sentences are products of organizational accidents *not* individual errors.³⁰⁹ As Doyle notes:

No single error can cause an organizational accident independently; the errors of many individuals (“active errors”) converge and interact *with system weaknesses* (“latent conditions”), increasing the likelihood that individual errors will do harm. The practitioners and organizations involved in [wrongful convictions or improper sentences] do not *choose* to make errors. These events involved normal people, doing normal work, in normal organizations, and they suffer . . . “normal accidents.” Like the Challenger launch decision, the outcomes reflect “mistake[s] embedded in the banality of organizational life.”³¹⁰

In this way, this pre-federal habeas procedure should allow the states to ferret out mistakes and errors that should not have contributed to what could be a permanent, preventable harm: the execution of a human being.

Consequently, in keeping with Doyle’s sentinel event review model, this pre-federal habeas state procedure should involve all of the key stakeholders in the criminal justice system: prosecutors, defense counselors, judges, victim advocates, and the like.³¹¹ The goal of this process should be to prevent preventable tragedies, not to point fingers.³¹² Thus, involving all of the stakeholders, perhaps excluding those parties directly involved in the litigation below to preserve objectivity and ward off any potential conflicts of interest, will allow cumulative error’s true purpose to be achievable and effective.

Of course, this approach is idyllic. It is also challenging. It requires a lot of effort from the states who have elected to keep and use capital punishment. But, the safeguards it affords are necessary.

Death is different in kind from every other punishment.³¹³ Consequently, different—even costly—protective measures are absolutely necessary to ensure this ultimate punishment is imposed fairly.

V. CONCLUSION

The AEDPA has refocused federal courts to ensure that states are the ultimate substantive arbiters of their own criminal processes.³¹⁴ It has forced

³⁰⁹ *Id.* at 4.

³¹⁰ *Id.* (third alteration in original) (first emphasis added) (footnotes omitted) (first quoting CHARLES PERROW, *NORMAL ACCIDENTS: LIVING WITH HIGH RISK TECHNOLOGIES* (1984); and then quoting DIANE VAUGHAN, *THE CHALLENGER LAUNCH DECISION: RISKY TECHNOLOGY, CULTURE, AND DEVIANCE AT NASA* (1996)).

³¹¹ Doyle, *supra* note 287, at 4–5 (“In an organizational accident, the correct answer to the question, ‘Who is responsible?’ is almost invariably, ‘Everyone involved, to one degree or another,’ if not for making a mistake, then by failing to catch someone else’s.”).

³¹² *Id.* at 9.

³¹³ *See supra* note 220.

³¹⁴ *See supra* Part II.A–B.

federal courts to punt the brunt of the constitutional review process to state courts leaving the former only to check on the procedures of the latter.³¹⁵

In the ten years since the AEDPA was enacted, scholars have debated whether its restrictions would be more hype than bite.³¹⁶ However, recent Supreme Court jurisprudence coupled with the AEDPA's application throughout the federal circuits has shown its restrictions to be anything but nominal.³¹⁷ In this constricting context, federal courts have been forced to defer to troubling state court rulings even when they wished to rule otherwise.³¹⁸

The turmoil following the AEDPA's passage and subsequent application has, surprisingly, left cumulative error as a federal habeas claim largely intact.³¹⁹ Although the claim is entirely symbolic, it continues to be raised time and time again.³²⁰ The inefficacy of cumulative error claims is not a consequence of perfect state procedures,³²¹ but a necessary result of incomplete doctrine in an inhospitable environment.

Cumulative error claims no longer belong in federal habeas corpus.³²² Ideally, they will be reconfigured as a pre-federal habeas state *procedure* involving multiple stakeholders in the criminal justice system as a whole specifically for cases wherein a person has been sentenced to death.³²³ Short of this, the Supreme Court should do *something* with cumulative error lest it wallow away in the muck and confusion of the federal circuits, dying a slow death.³²⁴

³¹⁵ See Marceau, *supra* note 59, at 198–99.

³¹⁶ See *id.* at 95–97.

³¹⁷ See *supra* Part II.B.

³¹⁸ See *Valdovinos v. McGrath*, 423 F. App'x 720, 722–23 (9th Cir. 2011).

³¹⁹ See *supra* Part III.

³²⁰ See *supra* Part III.

³²¹ See, e.g., *Summerlin v. Stewart*, 341 F.3d 1082, 1088–92 (9th Cir. 2003) (en banc), *rev'd sub nom.* *Schriro v. Summerlin*, 542 U.S. 348 (2004).

³²² See *supra* Part IV.B.

³²³ See *supra* Part IV.B.

³²⁴ See *supra* Part III.