7-1-2005

Reliability Matters: Reassociating Bagley Materality, Strickland Prejudice, and Cumulative Harmless Error

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0091-4169/05/9504-1153
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY

Vol. 95, No. 04
Printed in U.S.A.

RELIABILITY MATTERS: REASSOCIATING *BAGLEY* MATERIALITY, *STRICKLAND* PREJUDICE, AND CUMULATIVE HARMLESS ERROR

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INTRODUCTION

> Certain errors . . . are like apples, while others . . . are like oranges. Both share the same shape (they are errors), but they have decidedly different textures, colors, and tastes, making it extremely difficult to judge their combined effect on the jury.[1]

> Categories are made, not found . . . . [O]ur categories do not derive from the shape of the world but create it.[2]

Most commonly invoked after conviction and direct appeal, when a defendant may claim that his lawyer was ineffective or that the government failed to disclose exculpatory information, the *Brady*[3] doctrine, which governs the prosecutor's duty to disclose favorable evidence to the defense, and the *Strickland*[4] doctrine, which monitors defense counsel's duty to represent the client effectively, have developed into the principal safeguards of fair trials, fundamental to the protection of defendants' constitutional rights and arguably defendants' strongest insurance of a reliable verdict.[5] But the doctrines do not sufficiently protect these core values.

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[1] Pursell v. Horn, 187 F. Supp. 2d 260, 377 n.55 (W.D. Pa. 2002).

[2] ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 27 (2000).

[3] Brady v. Maryland, 373 U.S. 83 (1963); *see* United States v. Bagley, 473 U.S. 667 (1985).

[4] Strickland v. Washington, 466 U.S. 668 (1984).

[5] Between 1975 and 1993, appellate courts found reversible error in 68% of the capital cases they reviewed, with 81% resulting in different outcomes upon relitigation at the trial level. *See* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART I: ERROR RATES IN CAPITAL CASES, 1973-1995, at 5 (2000), *available at* http://ccjr.policy.net/cjedfund/jpreport/

The doctrines, despite their common due process heritage and symbiotic development, are generally divided when assessing prejudice. Even in cases where the defendant alleges both that the prosecution withheld evidence and that his counsel was incompetent, courts assess the impact of each party's conduct on the verdict independently. Our objectives here are two-fold. Our more modest objective is to argue that courts should consider the impact of *Brady* violations and *Strickland* violations together when evaluating whether a guilty verdict or death sentence is reliable. Without considering their simultaneous impact on jurors, the reliability of a verdict cannot fairly be measured. A divide-and-conquer approach is inconsistent with reliability, the touchstone of both doctrines. This is important because the *Brady* and *Strickland* doctrines, besides being the most commonly raised types of post-conviction error, govern the core functions of the main players in the adversarial system. Few courts, and no commentators, however, have directly tackled this issue.

Our second objective is more ambitious. If *Strickland* and *Brady* errors should be considered jointly when assessing prejudice, then why shouldn't the impact of all errors that potentially affect the reliability of a verdict be taken into account? By this, we mean errors that affect the information the jury considers and errors that affect the manner in which the jury considers the information it receives: denials of expert assistance,[6] denials of the right to confront one's accuser,[7] and prosecutorial misconduct that skews the factual presentation, to name a few. Such a global reliability inquiry is the alleged goal of cumulative harmless error doctrine, a branch of due process analysis addressing claims for relief based on multiple errors that do not warrant relief in isolation. But while cumulative harmless error analysis could provide a vehicle for overarching inquiry, the doctrine is inconsistently and rarely applied. Fears that fundamental fairness determinations could swamp other rules of criminal procedure, or displace state interests in finality in favor of omnipresent federal review, motivate courts to narrow the cumulative-error calculus. For example, many courts exclude suppression of evidence or mistakes by defense counsel, categorizing them as non-errors if they fail to satisfy the *Strickland* or *Brady* prejudice requirements. A verdict's reliability cannot sensibly be measured by assessing deficiencies of counsel, prosecutorial misconduct,

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finrep.pdf. Together, errors of ineffective representation by defense counsel and prosecutorial suppression of evidence accounted for 55% of those reversals. *See generally* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT, at app. C-4 (2002), *available at* http://ccjr.policy.net/cjedfund/dpstudey/appendixliebman2.pdf.

[6] *See* Ake v. Oklahoma, 470 U.S. 68 (1985).

[7] *See* Lee v. Illinois, 476 U.S. 530 (1986).

and any other errors affecting reliability in isolation from one another. Such a procrustean, divide-and-conquer approach sacrifices reliability. It preserves verdicts, but guarantees that many of them will be unreliable. In sum, reliability cannot be assessed piecemeal.

Part I begins by tracing the history of the *Strickland* and *Brady* doctrines. We focus on three defining moments. The first is the United States Supreme Court's decision in the well-known case of *Powell v. Alabama*, which established a criminal defendant's right to counsel as a fundamental right protected by the Due Process Clause of the Fourteenth Amendment, the same legal precept the Court relied on in prior cases where the prosecution withheld or presented false evidence. The second is the initial development of prejudice standards to govern failures of defense counsel and prosecutorial suppression, highlighted by *Brady v. Maryland*, which put forth the materiality requirement for suppression errors, and *Gideon v. Wainwright*, in which the Supreme Court (while delivering the Sixth Amendment right to counsel to the states) adhered to the due-process roots of the right it recognized in *Powell*. The third and culminating moment is the Supreme Court's creation during its 1984-85 term of the mirror-image prejudice standards for ineffective assistance of counsel and suppression claims in *Strickland* and in *United States v. Bagley*, respectively. This history shows that laws governing the right to counsel and suppression of evidence have long shared the same core value, reliability of outcomes, and have long applied a broadly inclusive measure of error, totality-of-the-circumstances review, to effectuate it. The historical discussion ends with a look at recent precedent, which emphasizes that totality-of-the-circumstances review as applied in *Strickland* and *Bagley* is a cumulative consideration. Together, the doctrines' history and character anchor our argument.

Beginning with Part II we address three problems that we see as dividing reliability determinations. The first, failure to cumulate defense counsel errors in *Strickland* prejudice analysis, is really a non-problem. The Court's recent decisions applying *Strickland* show that with respect to ineffective assistance of counsel claims defense counsel's conduct "taken as a whole" must be considered in assessing prejudice.[8] Still, we think it is significant to point out this trend that divides reliability determinations in some courts. In the process, we see flawed reasoning that will reemerge later when we discuss cumulative harmless error doctrine.

We next consider the relationship between the *Brady* and *Strickland* doctrines, in Part III. Our call is for integrating *Strickland* prejudice and

[8] Wiggins v. Smith, 539 U.S. 510, 538 (2003); *see* Williams v. Taylor, 529 U.S. 362, 398-99 (2000).

Bagley materiality. To some what we call for may seem obvious: a totality of the circumstances test, which both *Strickland* and *Bagley* are, surely takes into account everything that the jury should have heard if the system had worked properly. Considering suppression missteps in the *Strickland* prejudice prong, and evaluating defense counsel's errors in assessing *Bagley* materiality is, therefore, already written in the law. But others may see a difficulty: how can a due process violation (*Brady/Bagley*) combine with a Sixth Amendment violation (*Strickland*) to invalidate a conviction? What would such a hybrid be called? Integrating the prejudice arising from suppression and ineffective-assistance is inherent in the *Bagley* and *Strickland* standards. Both are totality of the circumstances standards derived from due process; the *Bagley* and *Strickland* standards reflect the same core constitutional value, reliability. That the doctrines presently reside under different constitutional amendments with traditionally different focuses, we argue, is ultimately of little concern. Considering suppressed evidence within the contour of *Strickland* prejudice, or defense-counsel failures in the context of *Bagley* materiality, is only being true to the function of each, to guarantee reliable verdicts.

Part IV expands the argument for cumulation beyond ineffective assistance of counsel and prosecutorial suppression. Embarking upon our second objective, we consider the obstacles to unified reliability determination posed by cumulative harmless error analysis. We advocate including all errors at the trial that impact verdict reliability in the scope of cumulative error analysis. The same reason for integrating *Strickland* and *Brady* prejudice—that reliability cannot be measured piecemeal—supports unifying the prejudice associated with other errors that threaten reliability. We propose an approach that need not conflict with justified limits on collateral review.

Courts frequently assess reliability in pieces, considering the impact of a portion of errors, rather than assessing how the panoply of trial errors affect the reliability of a verdict overall. Our call here is for a rule of integration requiring courts to consider the unified impact on the verdict of all errors affecting reliability.

I. BACKGROUND: THE HISTORY AND CHARACTER OF *BAGLEY* AND *STRICKLAND*

In general terms, this article concerns what errors can and ought to be considered together in determining reliability. A necessary starting point, then, is identifying what errors affect the reliability of a verdict. This is a question that, starting on a blank slate, would merit exploration with respect to every conceivable error. But we are not on a blank slate. We draw on

hundreds of years of precedent, in which errors have already been defined. Among the current mechanisms in the law for gauging the reliability of verdicts, three are prominent: the *Brady* doctrine, which governs prosecutorial suppression; the *Strickland* doctrine, which governs performance of defense counsel; and cumulative harmless error analysis, which accumulates errors, alone harmless, to assess whether their collective effect undermines the fairness of the proceedings. Rather than set off on a free-form journey to define reliability-impacting errors, therefore, we examine the state of reliability assessment, focusing on the success or failure of these doctrines.

It is our position that reliability has meaning only when assessed globally. If divided, considered error by error, one cannot measure it. If one focused on the reliability-impact of each individual error, one would, in essence, fail to see the forest for the trees. A forest may remain a forest if it misses one or two trees, but if it misses enough trees its essential character is hopelessly distorted. So it is with reliable verdicts. Some errors may not sabotage the reliability of a verdict in and of themselves, but it cannot fairly be said that a verdict's reliability is intact without assessing the impact of all the errors together.

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. A verdict cannot be partly reliable. Later, we advance the argument that it should be of no moment whether a verdict is not reliable as a result of counsel's deficient performance, the prosecutor's withholding of favorable information, a combination of the two, or a combination of even more errors that affect reliability; if errors alike impact the reliability of the verdict, it makes sense to consider them collectively. The history of the *Brady* and *Strickland* doctrines establishes this. As the *Brady* and *Strickland* history shows commonalities between doctrines, it also reveals something about reliability as it pertains to verdicts: that reliability is by nature a global consideration.

A. THE HISTORICAL DEVELOPMENT OF *BAGLEY* AND *STRICKLAND*[9]

[9] There are many types of prosecutorial misconduct violations, just as there are many types of denial of the right to counsel and, among those, many types of ineffective assistance of counsel. We concentrate on ineffective assistance of counsel due to defense counsel's failures and prosecutorial misconduct in the form of suppression of evidence. Ineffectiveness claims in which the *Strickland* rule applies are distinct from the narrower categories of right-to-counsel cases in which circumstances render the trial "presumptively unreliable" and prejudice is presumed: denial of counsel, state interference with the right to counsel, and counsel bound by a conflict of interest. *See* United States v. Cronic, 466 U.S. 648, 658-59, 659 n.26 (1984) ("There are . . . circumstances that are so likely to prejudice

It is not easy to sum up seventy years of precedent, particularly the development of law as fluctuating and diverse as that of ineffective assistance of counsel. What we endeavor to do in the following pages, however, is to show that throughout all of the changes—the shifts between the Fourteenth and Sixth Amendments, shifts between various articulations of a standard—the scope of the factual review in determining effectiveness

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the accused that the cost of litigating their effect in a particular case is unjustified . . . . Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the [trial]."); *see also Strickland*, 466 U.S. at 692 ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.").

Regarding denial of counsel, see Bell v. Cone, 635 U.S. 685, 697-98 (2002) (declining to extend presumption to capital case where defense counsel failed to investigate and present mitigating evidence and waived sentencing-phase closing argument); Roe v. Flores-Ortega, 528 U.S. 470, 484 (2000) (same where counsel failed to file notice of appeal); Smith v. Robbins, 528 U.S. 259, 288-89 (2000) (same where appellate counsel failed to file merits brief). Regarding state interference, see Geders v. United States, 425 U.S. 80, 91-92 (1976) (defense counsel not permitted to confer with client during overnight mid-trial recess); Herring v. New York, 422 U.S. 853, 865 (1975) (state statute barred summation by defense counsel). Regarding conflict of interest, compare Mickens v. Taylor, 535 U.S. 162, 166 (2002) (reiterating that defendant must show counsel's conflict "actually affected the adequacy of his representation"), and Cuyler v. Sullivan, 446 U.S. 335, 348-49 (1980) (same), with Holloway v. Arkansas, 435 U.S. 475, 488-89 (1978) (reversal automatic where court requires joint representation over defendant's objection). *See generally, e.g.*, Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 440-55 (1996) (discussing different types of cases where courts have not required showing of prejudice before finding ineffective assistance of counsel).

On the distinction between various types of prosecutorial misconduct violations, see Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process Than the Bottom Line*, 88 COLUM. L. REV. 1298, 1299, 1304 (1988) ("The approach employed depends on the type of misconduct involved . . . . [O]ne uses such analysis to define the due process violation itself [*e.g.*, *Brady*], while the other relies on more traditional concepts of fairness to define due process violations and restricts its use of outcome-determinative analysis as a harmless error test to determine whether a given due process violation requires reversal of the defendant's conviction [*e.g.*, inappropriate summation]."). Fisher recognizes that suppression and false presentation of evidence violations, *see, e.g.*, Napue v. Illinois, 360 U.S. 264 (1959), have a built-in prejudice element whereas other prosecutorial misconduct errors, *see, e.g.*, *Darden v. Wainwright*, 477 U.S. 168, 178-83 (1986) (alleged improper comments made by a prosecutor during closing argument), do not. Fisher, *supra*, at 1304.

Other types of prosecutorial misconduct violations include the knowing presentation of false evidence, *see Napue*, 360 U.S. at 272; Mooney v. Holohan, 294 U.S. 103, 110 (1935); and summation misconduct, *see Darden*, 477 U.S. at 181 ("[A] relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'") (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). As we discuss in section II.A., the due process violation for suppression of evidence developed from the doctrine regulating the knowing presentation of false evidence.

of counsel has always taken into account the totality of the circumstances. The same is true with respect to the prosecutorial misconduct jurisprudence dealing with suppression of evidence. The core constitutional value at stake in both, moreover, is and has always been the reliability of the underlying verdict. We focus on three areas: the doctrines' due process roots, first standards of prejudice for both doctrines, and then the creation of the *Strickland* prejudice and *Bagley* materiality standards.

1. Due Process Roots

In the 1930's, the Supreme Court decided a pair of cases that provide the first solid foundations of the modern rules guaranteeing the right to the meaningful assistance of counsel and prohibiting prosecutorial misconduct through withholding evidence. It resolved both under the Due Process Clause of the Fourteenth Amendment.

The first was the well-known case of *Powell v. Alabama*, which arose after three black teenagers were sentenced to death for the rape of two white women in a small Alabama town.[10] The defendants, from out of state and illiterate, faced a single-day trial before an all-white jury.[11] Without asking the defendants if they had a lawyer or means to employ one, the trial court purported to appoint the entire local bar to represent the defendants; but no one working on the defendants' behalf investigated and no attorney in defense showed at trial.[12] The Court's opinion resonated with the need for a minimum level of effectiveness by counsel, holding that the trial court's failure to make an effective appointment of counsel denied the defendants due process.[13] Due process requires notice and hearing, the Court concluded; and a hearing "has always included the right to the aid of counsel when desired and provided by the party asserting the right."[14] What ultimately carried the day in *Powell* was not just the trial court's failure to

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[10] *See generally* DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1969); JAMES GOODMAN, STORIES OF SCOTTSBORO (1994).

[11] Powell v. Alabama, 287 U.S. 45, 52 (1932).

[12] *Id.* at 52, 58.

[13] *Id.* at 65.

[14] *Id.* at 68. In reaching this conclusion, the Court reviewed its prior findings of right-to-counsel violations rooted in the due process clause. *See id.* at 69-70 (citing Kelley v. Oregon, 273 U.S. 589, 591 (1927); Cooke v. United States, 267 U.S. 517, 537 (1925); Frank v. Magnum, 237 U.S. 309, 344 (1915); Felts v. Murphy, 201 U.S. 123, 129 (1906); *Ex parte* Hidekuni, 219 F. 610, 611 (S.D. Cal. 1915); *Ex parte* Riggins, 134 F. 404, 418 (N.D. Ala. 1904)). The Court also cited a number of state cases standing for the proposition that the right to counsel is fundamental in character and therefore essential to due process of law (*Powell*, 287 U.S. at 70), and noted that twelve of the original thirteen colonies recognized the right for anyone accused of a felony. *Id.* at 59-70.

appoint counsel who would actually represent the defendants, or even the fact that the trial took place three weeks after the defendants' arrest. Rather, the court considered the racist mob gathered outside the courthouse and the defendants' ignorance and utter helplessness. Taken together, these factors made it very likely that the jury's verdict was unreliable and resulted in a denial of due process.[15]

Three years after *Powell*, the Court decided *Mooney v. Holohan*,[16] which initiated a line of due-process cases focusing on "the special role played by the American prosecutor in the search for truth in criminal trials."[17] *Mooney* found the trial fundamentally unfair because the prosecution deliberately suppressed evidence favorable to the defendant and then presented perjured testimony. Like *Powell*, it found the fundamental fairness requirement in the Due Process Clause. Like *Powell*, the *Mooney* Court also addressed the impact of the prosecutor's actions on the ultimate integrity of the verdict in light of the totality of the circumstances.[18]

2. *First Development of Prejudice Standards*

Powell and *Mooney*, not surprisingly, encouraged other defendants to challenge their convictions, and in many cases their death sentences, on the ground that they had been denied due process. As courts confronted these cases, most determined that not all false-evidence or right-to-counsel violations warranted a new trial. Thus a variety of prejudice standards emerged. Through these varied articulations, and even as the right to

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[15] *See Powell*, 287 U.S. at 71 ("In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process. . . . But passing that, and assuming their inability, even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.").

[16] 294 U.S. 103, 112 (1935).

[17] Strickler v. Greene, 527 U.S. 263, 281 (1999).

[18] *Mooney*, 294 U.S. at 112. As the Court later explained, "the principle in *Mooney v. Holohan* is not punishment of society for the misdeeds of a prosecutor but avoidance of an unfair trial to the accused." Brady v. Maryland, 373 U.S. 83, 87 (1963); *see also* Pyle v. Kansas, 317 U.S. 213, 215-16 (1942); Napue v. Illinois, 360 U.S. 264, 269 (1959) (holding prosecutor's conscious failure to correct false testimony violated due process).

counsel was increasingly enforced under the Sixth Amendment, the due-process nature of the prejudice inquiry remained.

This is relatively straightforward with respect to the law governing false evidence and suppression. After *Mooney*, the Supreme Court announced that the knowing presentation of false evidence violated due process if there was a "reasonable likelihood [that the false testimony] affected the judgment of the jury."[19] Then in *Brady v. Maryland*, the Court analogized the knowing *presentation* of false evidence to the prosecution's duty to *disclose* evidence favorable to the accused: *Brady* focused on a withheld statement exculpating the defendant, which defense counsel discovered only after Brady had been convicted and sentenced to death.[20] The Court held that "suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[21] *Brady* established "materiality" as an element of the constitutional error, but did not define it.[22] Throughout the late sixties and early seventies, lower courts adopted varied definitions of the term.[23]

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[19] *Napue*, 360 U.S. at 271-72; *see also* Alcorta v. Texas, 355 U.S. 28, 31-32 (1957) (remanding for retrial where prosecutor withheld information regarding a witness and encouraged misleading testimony which was "seriously prejudicial" to the defendant).

[20] 373 U.S. at 84. For a discussion of developments in caselaw leading up to the Supreme Court's decision in *Brady*, see Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136, 136-45 (1964).

[21] *Brady*, 373 U.S. at 87.

[22] *See Strickler*, 527 U.S. at 298 (Souter, J., concurring in part and dissenting in part); United States v. Bagley, 473 U.S. 667, 703 n.5 (1985) (Marshall, J., dissenting). *See generally* Victor Bass, Comment, Brady v. Maryland *and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112, 125-31 (1973) (criticizing *Brady* because it "provides no clear standard to which the prosecutor can conform," and suggests that "[t]he word 'material,' as used in the *Brady* holding, should be taken to mean simply 'relevant'"). Questions arose, for example, as to whether the *Brady* materiality was synonymous with the *Chapman* harmless error standard, or more or less demanding; questions also arose as to whether the prosecution had a duty to turn over information it considered favorable without prompting or with only a general request from the defense. *See, e.g.*, *id.* at 136; Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1172-98 (1960); Note, *supra* note 20; *see also* Giles v. Maryland, 386 U.S. 66, 101 (1967) (Fortas, J., concurring).

[23] Most acknowledged that *Brady* derived from the *Napue* line, *see, e.g.*, Giglio v. United States, 405 U.S. 150 (1972); Giles v. Maryland, 386 U.S. 66 (1967), which has a "reasonable likelihood" standard, and described materiality in terms of its likely effect on the verdict, using phrases such as "reasonable possibility," "reasonably likely," "significant chance," or simply, "might." *See* Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1146 n.46 (1982) (collecting cases).

The development of a prejudice standard for right-to-counsel violations was more circuitous due to unresolved question about the Sixth Amendment's applicability to the states.[24] In *Gideon v. Wainwright*, the Supreme Court extended the Sixth Amendment guarantee to counsel in criminal prosecutions to state defendants.[25] In doing so, the majority recognized the fundamental character of the right to counsel, and saw *Powell* as "ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgement are equally protected against state invasion by the Fourteenth Amendment."[26]

As the due process, fundamental nature of the right to counsel endured, so did totality of the circumstances review. The District of Columbia Circuit Court of Appeals coined the due process "farce and mockery" standard that every federal circuit adopted at some point over the next thirty

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[24] *See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964) (overruling in part Adamson v. California, 332 U.S. 46 (1947)). *Compare id.* at 59-68 (Frankfurter, J., concurring), *with id.* at 68-92 (Black, J., dissenting). *See also* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1950) (supporting Justice Frankfurter's view); John Raeburn Green, *The Bill of Rights, the Fourteenth Amendment and the Supreme Court*, 46 MICH. L. REV. 869 (1948) (supporting Justice Black's view). *See generally* Yale Kamisar, *The Right to Counsel, and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1 (1963).

[25] 372 U.S. 335, 338-39 (1963). Six years after *Powell*, the Court held that the Sixth Amendment guaranteed counsel in all federal criminal prosecutions. Johnson v. Zerbst, 304 U.S. 458 (1938). But four years later in *Betts v. Brady*, it rejected an invitation to impose the same requirement on the States. 316 U.S. 455 (1942); *accord* Bute v. Illinois, 333 U.S. 640 (1948); Foster v. Illinois, 332 U.S. 134 (1947); *cf. Bute*, 333 U.S. at 674 ("[I]f these charges had been capital charges, the court would have been required, both by the state statute and the decisions of this Court interpreting the Fourteenth Amendment, to take some such steps [appointing counsel]."). *Betts* said *Powell*'s holding was limited to its facts and that the right to counsel was not so fundamental as to require a bright-line rule of appointment. 316 U.S. at 465, 471. According to *Betts*, the Fourteenth Amendment required only that states provide counsel on a case-by-case basis, where denial of counsel would be a "denial of fundamental fairness and shocking to a universal sense of justice." *Id.* at 462. *Compare id.*, *with* McNeal v. Culver, 365 U.S. 109 (1961) (finding denial of due process), Townsend v. Burke, 334 U.S. 736, 739 (1948), White v. Ragen, 324 U.S. 760 (1945), *and* Williams v. Kaiser, 323 U.S. 471 (1945). *See generally* Francis A. Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213, 225-30 (1959) (discussing Supreme Court application of *Betts* rule). *Betts* left federal defendants, availed of the Sixth Amendment right to counsel, with more protection than state defendants, who could call only upon the due process right to counsel defined in *Powell*.

[26] *Gideon*, 372 U.S. at 341. The majority overruled the Court's previous decision in *Betts v. Brady* because *Betts* "departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested." *Id.* at 345; *see also id.* at 352 (Harlan, J., concurring).

years.[27] The inquiry was grounded, as *Powell*, in the fundamental fairness concerns of the due process clause and focused on "the proceedings as a whole," not merely the isolated "mistakes of counsel."[28]

After *Gideon*, a shift toward the Sixth Amendment began, as notions of effectiveness of counsel and a more robust adversarial process increasingly came to the fore.[29] At the time the Supreme Court issued what

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[27] Citing both right-to-counsel and false-evidence cases in support, the D.C. Circuit held that attorney conduct did not violate due process unless the impact was so "extreme" that under the "circumstances surrounding the trial" it "shocked the conscience of the court and made the proceedings a farce and mockery of justice." Diggs v. Welch, 148 F.2d 667, 669-70 (D.C. Cir. 1945) (citing Johnson v. Zerbst, 304 U.S. 458 (1938); Brown v. Mississippi, 297 U.S. 278 (1936); Mooney v. Holohan, 294 U.S. 103 (1935); Powell v. Alabama, 287 U.S. 45 (1932); Moore v. Dempsey, 261 U.S. 86 (1923)); *see* Kirchmeier, *supra* note 9, at 431 n.31.

[28] *Diggs*, 148 F.2d at 670. As one commentator describes: "[A]s a practical matter the only remedy for inadequate representation has been to vacate otherwise valid convictions. As a result, the courts have been more concerned with the fairness of the proceedings taken as a whole than with the obligations of counsel. The mockery-of-justice standard simply reflects the view that the policy of finality in criminal cases so outweighs the consequences of inferior defense work that only the most serious errors and omissions by counsel deprive the defendant of a fair trial." Harvey E. Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927, 929 (1973); *see, e.g.*, Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1966); Scott v. United States, 334 F.2d 72, 72 (6th Cir. 1964); Frand v. United States, 301 F.2d 102, 103 (10th Cir. 1962); United States *ex rel.* Darcy v. Handy, 203 F.2d 407, 427 (3d Cir. 1959); Newsome v. Smyth, 261 F.2d 452, 454 (4th Cir. 1958); Anderson v. Bannan, 250 F.2d 654, 655 (6th Cir. 1958); Taylor v. United States, 283 F.2d 409, 414 (9th Cir. 1956); United States v. Wight, 176 F.2d 376 (2d Cir. 1949); United States *ex rel.* Feeley v. Ragen, 166 F.2d 976, 980-981 (7th Cir. 1948); Jones v. Huff, 152 F.2d 14 (D.C. Cir. 1945); *Diggs*, 148 F.2d 667.

[29] During this time, courts abandoned the farce and mockery standard. *See, e.g.*, Trapnell v. United States, 725 F.2d 149, 154-55 (2d Cir. 1983). The court that created it, the District of Columbia Circuit Court of Appeals, replaced it with a standard of "gross incompetence." Scott v. United States, 427 F.2d 609, 610 (D.C. Cir. 1970). The Fifth Circuit, which later decided *Strickland*, shifted to a requirement of "counsel reasonably likely to render and rendering reasonably effective assistance." Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970) (per curiam) (quoting MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960)); *see* Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974) (recreating the farce-mockery standard in the frame of *MacKenna*, 280 F.2d 592: "The two tests [farce-mockery and reasonably effective assistance] can be reconciled. The governing standard is reasonably effective assistance. One method of determining whether counsel has rendered reasonably effective assistance is to ask whether the proceedings were a farce or mockery. The farce-mockery test is but one criterion for determining if an accused has received the constitutionally required minimum representation . . . . One may receive ineffective assistance of counsel even though the proceedings have not been a farce or mockery."); *see, e.g.*, Kirchmeier, *supra* note 9, at 432:

> An impetus for this change in competency standards [from the farce and mockery standard to reasonably competent assistance] was the Supreme Court's decisions in several cases, including *Gideon*, which shifted the focus in right to counsel cases from the "fair trial" Due Process

many view as its first statement on "effectiveness" in *McMann v. Richardson* (stating in dicta that "it has long been recognized that the right to counsel is the right to effective counsel"),[30] courts long receptive to the notion increasingly applied the principle by standards that demanded "reasonable" rather than "farcical" representation.[31] Still, questions remained regarding how to articulate the standard of performance, whether there should be a prejudice requirement for inadequate assistance of counsel claims,[32] and if so, what the standard should be.[33] But as the courts applied

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standard of the Fifth Amendment to the Sixth Amendment right to counsel and the application of that right to the states through the Due Process Clause of the Fourteenth Amendment.

See also Bines, *supra* note 28, at 929 (arguing that the absence of another remedy "le[ft] a criminal defendant without an enforceable right to effective representation"); Bruce Andrew Green, Note, *A Functional Analysis of the Effective Assistance of Counsel*, 80 COLUM. L. REV. 1053 (1980) (suggesting the farce and strict standard may never have developed, had *Betts* extended the Sixth Amendment to the States, and thus initiated a shift in focus from fairness to specific performance); Joel Jay Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1078 (1973).

[30] 397 U.S. 759, 771 n.14 (1970) (citing Reece v. Georgia, 350 U.S. 85, 90 (1955); Glasser v. United States, 315 U.S. 60, 69-70 (1942); Avery v. Alabama, 308 U.S. 444, 446 (1940)).

[31] *See, e.g.*, Trapnell v. United States, 725 F.2d 149, 153 (2d Cir. 1983) ("reasonably competent assistance"); Goodwin v. Balkcom, 684 F.2d 794, 804 (11th Cir. 1982) ("reasonably likely to render and rendering reasonably effective assistance"); Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir. 1980) ("reasonably competent defense attorney"); United States v. Bosch, 584 F.2d 1113, 1122 (1st Cir. 1978) ("reasonably competent assistance"); Wilson v. Cowan, 578 F.2d 166 (6th Cir. 1978) ("reasonably effective assistance"); Cooper v. Fitzharris, 586 F.2d 1325, 1328 (9th Cir. 1978) ("reasonably competent and effective representation"); United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976) ("reasonably competent attorney"); United States *ex rel.* Williams v. Twomey, 510 F.2d 634 (7th Cir. 1975) ("minimum standard of professional representation"); *Herring*, 491 F.2d 125, 128 (5th Cir. 1974); Moore v. United States, 432 F.2d 730, 736, 737 (3d Cir. 1970) ("customary skill and knowledge," "normal competency"); Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968) (listing various duties necessary to achieve effective assistance). *See generally* Richard P. Rhodes, Strickland v. Washington*: Safeguard of the Capital Defendant's Right to Effective Assistance of Counsel?*, 12 B.C. THIRD WORLD L.J. 121, 130-35 (1992).

[32] At least one court said there should be no prejudice requirement. *See* Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974). Some courts applied a "harmless error" test, placing the burden on the state to establish lack of prejudice. *See, e.g.*, Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977); *Coles*, 389 F.2d at 224, 226; McQueen v. Swenson, 498 F.2d 207, 218-20 (8th Cir. 1974); *see* Bines, *supra* note 28, at 960-61 (discussing use of *Chapman* standard for determining prejudice from ineffective-assistance-of-counsel violations). Others placed the burden of demonstrating prejudice on the defendant. *See, e.g.*, United States v. Wood, 628 F.2d 554, 559 (D.C. Cir. 1980) (en banc). The Supreme Court showed signed of favoring a prejudice showing. In *United States v. Morrison*, 449 U.S. 361 (1981), the Court held that regardless of whether a defendant's Sixth Amendment right to counsel was violated when federal agents interviewed the defendant prior to trial without counsel's knowledge or consent, the proper remedy was not dismissal of the indictment unless prejudice was shown. The Court noted that "[t]he premise of our prior cases is that

the right to *effective* counsel, as it was increasingly called, the due process roots of the right remained visible in the various standards: courts applying a prejudice requirement applied a totality of the circumstances review and cumulated counsel's mistakes.[34]

3. *Creation of the* Strickland *and* Bagley *Standards*

By the late seventies and early eighties, a variety of standards regulated the performance of prosecution and defense counsel. During the 1984 and 1985 terms, the Supreme Court weighed in. It began in *Strickland v. Washington* by acknowledging the principles of equality and fairness underlying the adversary system,[35] and by emphasizing the relationship between the right to counsel and the due process right to a fair trial: "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause . . . ."[36] "The benchmark for judging any claim of ineffectiveness," the Court reasoned, "must be whether counsel's conduct so undermined the proper functioning of the adversarial system that the trial cannot be relied on as having produced a just result."[37]

The two-prong test the *Strickland* Court set forth requires both deficient performance by counsel and a showing of prejudice.[38] Rejecting

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the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense. Absent such impact on the criminal proceeding, however, there is no basis for imposing a remedy in that proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial." *Id.* at 365.

[33] *See generally* Washington v. Strickland, 673 F.2d 879, 896-900 (5th Cir. 1982) (canvassing positions of all circuit courts of appeals).

[34] *See, e.g.*, *Trapnell*, 725 F.2d 149; United States v. Decoster, 624 F.2d 196 (D.C. Cir. 1979); *Cooper*, 586 F.2d at 1333; United States v. Taylor, 562 F.2d 1345 (2d Cir. 1977); United States v. Pinkney, 543 F.2d 908, 916 (D.C. Cir. 1976); *McQueen*, 498 F.2d at 218-220; *Scott*, 427 F.2d at 610; United States v. Hammonds, 425 F.2d 597, 600-02 (D.C. Cir. 1970); Bruce v. United States, 379 F.2d 113, 116-17 (D.C. Cir. 1967); People v. Pope, 590 P.2d 859, 865-66 (Cal. 1979); Commonwealth v. Saferian, 315 N.E.2d 878, 883 (Mass. 1974).

[35] 466 U.S. 668, 685 (1984) ("The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled.") (quotation omitted).

[36] *Id.* at 696; *see id.* at 684 ("The Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.").

[37] *Id.* at 686.

[38] The deficient-performance prong of the *Strickland* test asks whether defense counsel's performance fell below "an objective standard of reasonableness." *Id.* at 688. The

harmless-error and newly-discovered-evidence prejudice standards,[39] the Court looked to one of its recent prosecutorial misconduct cases, *United States v. Agurs*.[40] The Court announced that a defendant has incurred

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objective-reasonableness standard is measured by "prevailing norms of practice," such as the American Bar Association Standards for Criminal Justice. *Id.* In applying the objective-reasonableness standard, there is a strong presumption that counsel's performance was reasonable. *Id.*

[39] The Supreme Court was confronted with two very different approaches to assessing claims of ineffective assistance of counsel. In *Washington v. Strickland*, a panel of the then-Fifth Circuit held that the proper standard for assessing the impact of defense counsel's poor performance was whether "but for . . . counsel's ineffectiveness [defendant's] trial, but not necessarily its outcome, would have been altered in a way helpful to him." 673 F.2d 879, 902 (5th Cir. 1982). Upon that showing, the burden would shift to the state to show the error was harmless. *Id.* (citing Chapman v. California, 386 U.S. 18 (1967)).

The en banc court adopted a different standard. Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982). Looking to a Supreme Court case holding that prejudice was required for reversal where the state deported a defense witness, *United States v. Valenzuela-Bernal*, 458 U.S. 858, 866-67 (1982) (interpreting compulsory process clause), the court noted that "virtually any new piece of favorable evidence produced by a petitioner at a habeas hearing may be 'helpful to him.'" *Strickland*, 693 F.2d at 1262. The court was also concerned that the government should not bear responsibility for errors it had no part in and that any burden of proof placed on the state would skew procedural default requirements on collateral review. *Id.* at 1261 ("[W]here ineffectiveness is predicated upon the failure of counsel to raise certain objections, application of the *Chapman* rule would relieve petitioner of the requirement that he show prejudice before he can raise those objections on collateral review."). It therefore applied the prejudice standard needed to avoid procedural default in habeas corpus—that a defendant must "show that ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense." *Id.* at 1262 (adopting the interpretation of Wainwright v. Sykes, 433 U.S. 72, 87 (1977) ("cause and prejudice" requirement)); *see also* United States v. Frady, 456 U.S. 152, 170 (1982)).

[40] 427 U.S. 97 (1976). In *Agurs*, the Supreme Court carved the *Brady* doctrine into three separate categories, each governed by a different standard of materiality: the first, characterized by the knowing presentation of false testimony, was governed by the standard enunciated in *Napue*; the second involved situations where the defendant specifically requested information from the prosecution, which it failed to produce; and the third was a situation, as in *Agurs*, where counsel made a general request for favorable information, or no request at all, and the prosecution failed to disclose exculpatory information. *Id.* at 103-07. The court concluded that in general request situations, "if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." *Id.* at 112. The false testimony standard, appropriate for the first scenario and apparently for the second, could not apply to Agurs' situation, the Court anticipated, because it would require an open file policy by every prosecutor. *Id.* at 109. For the same reason, the Court held, customary harmless error standards should not apply. *Id.* at 111-12 (citing Kotteakos v. United States, 328 U.S. 750, 764 (1946)); *see* Chapman v. California, 386 U.S. 18, 24 (1967) (requiring prosecution to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"). On the other hand, the Court recognized that the strict outcome-determinative test used in newly-discovered-evidence cases was too strict, with it "there would be no special significance to the prosecutor's obligation to serve the cause of justice." *Agurs*, 427 U.S. at 111.

prejudice warranting a new trial when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[41] "In making this determination," the Court emphasized, "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."[42]

The next term, in *United States v. Bagley*, the Court redefined *Brady* materiality in terms of *Strickland* prejudice.[43] Noting that prior precedent had not defined a standard for the specific-request situation,[44] the Court looked instead to other contexts in which the fact-finder was *deprived of information*: ineffective assistance of counsel[45] and deportation of defense witnesses.[46] Adopting the prejudice standards from those cases, the Court held that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." "A 'reasonable probability,'" it reiterated, "is a probability sufficient to undermine confidence in the outcome."[47]

By adopting a standard identical to *Strickland*, the Court signaled recognition of the need for balance between the rules governing the conduct of the prosecution and defense counsel.[48] And its opinion emphasized the significance of the adversaries' relationship:

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[41] *Strickland*, 466 U.S. at 694. The Court also relied on the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, *Valenzuela-Bernal*, 458 U.S. at 872-74, which mirrors the *Agurs* test.

[42] *Strickland*, 466 U.S. at 695-96.

[43] 473 U.S. 667 (1985). *Bagley* also held that impeachment evidence is like any other exculpatory evidence for *Brady* purposes. *Id.* at 676-77 (recalling Giglio v. United States, 405 U.S. 150, 154 (1972) (false evidence case in which witness lied when asked whether he had been promised anything in return for assisting government)).

[44] *Bagley*, 473 U.S. at 681 & n.12. The Ninth Circuit had applied a false-evidence prejudice standard in determining that the prosecution's failure to divulge impeachment evidence that defense counsel specifically was reversible error. Bagley v. Lumpkin, 719 F.2d 1462, 1464 (9th Cir. 1983) (finding suppression of impeachment evidence was especially egregious "because it threatens the defendant's right to confront adverse witnesses").

[45] *Strickland*, 466 U.S. at 694.

[46] United States v. Valenzuela-Bernal, 458 U.S. 858, 874 (1982).

[47] *Bagley*, 473 U.S. at 682.

[48] *Id.* at 682-83. Following *Agurs*, one commentator noted that to preserve equality and truthfulness in the adversary system, courts would have to compensate for what she perceived to be a lax duty on prosecutors by holding defense counsel to higher standards of performance. "By easing the *Brady* standard," she said, "courts have increased the importance of providing effective assistance of counsel to the accused." Babcock, *supra* note 23, at 1163. Anticipating *Strickland*, she added that "[w]hen the Court finally fully treats effective assistance, it must do so in light of . . . *Agurs*." *Id.* at 1165. Given *Agurs*, she continued, "a weak ineffective assistance requirement means that no one is systematically

> [U]nder the *Strickland* formulation the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.[49]

A *Brady* violation alone, the Court acknowledged, could eviscerate defense counsel's ability to adequately prepare and present a case.[50] Defense counsel performance was thus integral to the materiality determination.

B. THE "COLLECTIVE" CHARACTER OF *STRICKLAND* PREJUDICE AND *BAGLEY* MATERIALITY

In *Kyles v. Whitley*, a majority of the Supreme Court held that a federal court erroneously isolated suppressed pieces of evidence in analyzing materiality.[51] For *Bagley* materiality, the Court explained, "suppressed evidence [must be] considered collectively, not item-by-item."[52] Considering the "net effect"[53] of the suppressed evidence in *Kyles*, the Court was "not . . . confident that the jury's verdict would have been the same."[54]

> [C]onfidence that the verdict would have been unaffected cannot survive when suppressed evidence would have [1] entitled a jury to find that the eyewitnesses were not consistent in describing the killer, [2] that two out of the four eyewitnesses testifying were unreliable, [3] that the most damning physical evidence was subject to suspicion, [4] that the investigation that produced it was insufficiently probing, and [5] that the principal police witness was insufficiently informed or candid.[55]

Kyles thus put to rest any notion that the significance of evidentiary items withheld from the defense and the jury could be assessed in isolation.[56]

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responsible for assuring that the factfinder hears evidence favorable to an accused." *Id.* at 1167. The Court found the standard adopted in *Bagley* sufficiently flexible to account for that. *See Bagley*, 473 U.S. at 682.

[49] *Bagley*, 473 U.S. at 682-83.

[50] *Id.* at 668.

[51] 514 U.S. 419, 421 (1995).

[52] *Id.* at 437 n.10.

[53] *Id.* at 437.

[54] *Id.* at 454 n.22.

[55] *Id.* at 453.

[56] The Supreme Court's most recent interpretation of the *Brady* doctrine, *Banks v. Dretke*, 540 U.S. 668 (2004), in which the Court considers considering the collective materiality of suppressed evidence, reinforces *Kyles*.

Following *Kyles*, it seems a given that the prejudice arising from individual errors of defense counsel must also be considered together. And the Supreme Court's most recent ineffective assistance of counsel decisions reinforce, as the Court suggested in *Bagley,*[57] that cumulating deficiencies is the appropriate and intended practice under *Strickland.*[58] In both *Williams v. Taylor*[59] and *Wiggins v. Smith,*[60] the Court reversed based on multiple failures of defense counsel during the penalty phase of a capital trial. In *Williams*, the Court held that the trial judge was correct to conclude that "the entire postconviction records, viewed as a whole and cumulative of mitigation evidence presented originally, raised 'a reasonable probability that the result of the sentencing proceeding would have been different.'"[61] The appellate court below, in contrast, had failed to consider all ways the trial would have been different but for counsel's mistakes and thereby failed to properly apply *Strickland.*[62]

In *Wiggins*, the Court quoted *Williams* to explain that it "evaluate[s] the totality of the evidence—'both that adduced at trial *and the evidence adduced in habeas proceeding[s].*'"[63] Then it asks: Would a competent, reasonable attorney have introduced the evidence in admissible form? Would defense counsel have changed their strategy and presentation based on this discovery, for instance to prioritize it?[64] Only after answering these questions, the Court said, should a court consider whether a jury confronted with that presentation would have returned a different verdict or sentence.[65] "In assessing prejudice," the Court added, acknowledging the penalty-phase context, "we reweigh the evidence in aggravation against the totality of

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[57] In *United States v. Bagley,* the Court invoked *Strickland* as support for evaluating the cumulative effect the prosecution's failure to disclose had on the defense. 473 U.S. 667, 683 (1983).

[58] Indeed, *Strickland*'s language indicates that cumulation begins in the first prong—that deficient performance is itself an "overall" error: *Strickland* says the reviewing court must "assess counsel's *overall performance*" to determine whether "identified *acts* and *omissions* rise to the level of deficient performance." Strickland v. Washington, 466 U.S. 668, 688 (1984) (emphasis added); *cf.* Mark Peake, Hoots v. Allsbrook*: The Fourth Circuit's Application of the* Strickland *Test for Determining Ineffective Assistance of Counsel Claims*, 44 WASH. & LEE L. REV. 598, 611 (1987) (citing *Strickland,* 466 U.S. at 694-96) (noting that the Court "repeatedly used the plural form of the word 'error,'" in addition to the fact that Court's decision emphasized the totality of the circumstances).

[59] 529 U.S. 362 (2000).

[60] 539 U.S. 510 (2003).

[61] 529 U.S. at 398-99.

[62] *Id.* at 371, 394.

[63] 539 U.S. at 536 (quoting *Williams,* 529 U.S. at 397-98).

[64] *Id.* at 535.

[65] *Id.* at 534-36.

available mitigating evidence . . . ."[66] That evidence is "taken as a whole."[67] *Wiggins* and *Williams* thus simply clarify what the Supreme Court's language in *Strickland* already suggests.

The upshot of the preceding history is this: first, the *Brady* and *Strickland* doctrines have a common goal—securing reliable verdicts; second, the doctrines affect that goal by a common means—totality of the circumstances review; third, there is an inherent logic in the use of totality of the circumstances review as a measure of reliability.

Given this, when one looks at the way reliability is currently assessed in many courts—at the myopic way, for instance, that the *Bagley* materiality and *Strickland* prejudice standards are applied—it seems plain that something is fundamentally wrong. As we will discuss in more detail below, the issue of the verdict's reliability is often divided many times. Defense counsel's various deficiencies may be viewed individually when assessing prejudice. Prejudice in the ineffective assistance of counsel context is almost always separated from the materiality inquiry arising from a prosecutor's withholding of favorable information. And no court currently examines all constitutional errors when gauging the reliability of a verdict in a particular case. In many cases, defendants are informed that the verdict is reliable, even though a series of mishaps or errors occurred; errors which, from a common-sense perspective, call in question the integrity of the jury's verdict. In short, courts have improperly beset the road to global reliability with obstacles. In the following pages we consider how these obstacles have undercut reliability determinations.[68] We study three situations in particular, pressure points in the current state of the law, where there is resistance to cumulating reliability-impacting errors: first, the cumulation of defense counsel errors within *Strickland* prejudice (Part II); second, the integration of *Strickland* and *Bagley* errors within the *Strickland* and *Bagley* prejudice prongs (Part III); and finally, the integration of the impact of all reliability-impacting errors (Part IV).

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[66] *Id.* at 534.

[67] *Id.* at 538.

[68] Throughout the discussion we focus primarily on courts conducting collateral or post-conviction review, i.e. review after trial, direct appeal as of right, and the initial request for certiorari to the Supreme Court. We do so because in most jurisdictions a defendant cannot challenge counsel's performance or the prosecutor's failure to disclose favorable information until the case reaches collateral review. This is so for good reason: except in extraordinary circumstances, both types of claims require additional factual development that extends beyond the trial transcript.

II. CUMULATING COUNSEL'S ERRORS IN THE *STRICKLAND* FRAMEWORK

This point ought not be controversial: errors in defense counsel's performance should be cumulated in the *Strickland* prejudice prong. Recent Supreme Court precedent has said this with clarity, yet some courts do not do it. The approach to *Strickland* prejudice in the hypothetical mirrors the Fifth Circuit's adjudication of a recent case, *Banks v. Cockrell*, in which the defendant identified four shortcomings of defense counsel at the penalty phase: (1) counsel failed to obtain a social history of Banks; (2) counsel failed to prepare witnesses, including Banks's parents, to testify; (3) counsel failed to present the expert testimony of a psychologist concerning Banks's family background and future dangerousness; and (4) counsel failed to interview one of the state's penalty-phase witnesses.[69] The court regrouped the allegations according to what it considered "related." It analyzed the failure to investigate social history and to retain a psychologist (1 and 3) as one failure. It identified the failure to prepare Banks's parents and other witnesses (2) as another. And it considered defense counsel's failure to interview a state's witness (4) as a third. The court then assessed the prejudice from each category in isolation. It did not consider how the deficiencies "taken as a whole" would have affected the jury's verdict.[70]

There are two things to note about the court's approach. First, the court's decision is arbitrary. Arbitrary because while there is nothing illogical about its groupings, there are other, different groupings that are just as logical and may have produced a different result. For instance, the failure to interview and prepare the state's witness (4) could have logically been linked with the failure to prepare other witnesses (2). And the failure to conduct a social history investigation (1) is just as much a prerequisite to preparing witnesses (who must first be identified) (2 and 4) as it is to retaining a psychologist (3). By drawing these relations, which are as evident as the court's own, all deficiencies could have been grouped together and the prejudice determination would, in effect, have cumulated the errors.

As the case shows, if the focus was on each alleged deficiency in isolation, a finding of prejudice could become largely dependent on claim definition and semantics, and thereby fail to measure the overall reliability of the trial.[71] For instance, consider a failure by defense counsel to

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[69] Banks v. Cockrell, No. 1-40058, 2002 WL 31016679, at *34-35 (5th Cir. Aug. 20, 2002).

[70] *Id.* at *36.

[71] On the multiplicity of claim definitions in pleading ineffective assistance of counsel claims, see, for example, Anne M. Voigts, Note, *Narrowing the Eye of the Needle:*

investigate and present multiple mitigating aspects of a defendant's background in a capital sentencing proceeding. Is this a single error or many?[72] How a defendant pleads and how courts interpret various performance deficiencies could have a determinative effect on the prejudice inquiry—if the deficiencies are not cumulated. This demonstrates the inherent logic in cumulating errors for prejudice, a global reliability inquiry.

The second thing to note is that there is more here than a court's errant taste in categorizing claims. Recent Supreme Court precedent holds that defense counsel errors should be cumulated in the *Strickland* prejudice prong. In so failing to cumulate, the Fifth Circuit is not alone. The Eighth Circuit interestingly refuses to cumulate *because of Strickland.* While most courts interpret *Strickland* to advocate cumulation, the Eighth Circuit cites *Strickland* as its basis for considering the prejudice of each deficiency separately.[73] This is particularly odd because before *Strickland,* when the Circuit applied a Sixth-Amendment-based standard very similar to *Strickland's* reasonable-probability prong, it considered counsel's deficiencies together.[74]

The Fourth Circuit's approach has also been curiously incorrect. In *Fisher v. Angelone,* the defendant, arguing that "the cumulative effect of his

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Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel, 99 COLUM. L. REV. 1103, 1121-22 (1999):

> In practical terms, those violations have taken many forms, and the subject matter of ineffective assistance claims has varied greatly. Broadly speaking, one can raise a claim of ineffective assistance of counsel both generally and specifically. General claims include allegations that the lawyer failed to prepare adequately, lacked experience, or neglected to file a claim or discovery motion. Specific claims, by comparison, include the failure to investigate an issue, to object to the admissibility or sufficiency of the evidence, to call witnesses, or to cross-examine those called by the prosecution. The former are substantiated by reference to the record as a whole; the latter by reference to a specific event or issue.

[72] *See* Williams v. Taylor, 529 U.S. 362, 395-97 (2000) (finding that counsel's failures as a whole undermined the reliability of the verdict).

[73] *See, e.g.*, United States v. Stewart, 20 F.3d 911, 917-18 (8th Cir. 1994); Girtman v. Lockhart, 942 F.2d 468, 475 (8th Cir. 1991); *see also* Ryan v. Clarke, 281 F. Supp. 2d 1008, 1079 (D. Neb. 2003) (applying the *Stewart/Girtman* reasoning post-*Wiggins*).

[74] *See* Harris v. Housewright, 697 F.2d 202 (8th Cir. 1982) (applying cumulative review); *see also* Johnson v. United States, 506 F.2d 640, 645 (8th Cir. 1974) ("[E]ven when combined with Johnson's other assertions [of deficient performance by counsel], [it] falls far short of meeting the ineffective assistance of counsel standard, however it might be phrased."). In *Girtman,* 942 F.2d at 475, the Eighth Circuit stated that it had overruled *Harris* in *Fink v. Lockhart,* 823 F.2d 204, 205-06 (8th Cir. 1987). *See Stewart,* 20 F.3d at 917-18 (following *Girtman*). In both *Stewart* and *Girtman,* the defendant invoked *Harris* as a basis for cumulating prejudice and the Eighth Circuit responded that *Strickland* changed the law. *See* Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir. 1996). The court's decision in *Fink,* however, did not explicitly discuss cumulative review of defense counsel errors. *See* 823 F.2d at 205-06.

trial counsel's individual actions deprived him of a fair trial," asked the court to consider the prejudicial effect of each performance deficiency together in assessing the *Strickland* prejudice.[75] The court refused. It assessed the prejudice attendant to each deficient performance individually, then declared, "Having just determined that none of counsel's actions could be considered constitutional error . . . it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial."[76] In treating the defendant's request for "cumulation" as a request for a cumulative harmless error analysis, the court never gave the defendant a proper opportunity to establish constitutional error before declaring there was none.[77]

This disposition echoes impediments on overall reliability determination imposed in cumulative harmless error analysis.[78] It is an

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[75] 163 F.3d 835, 852 (4th Cir. 1998). No Fourth Circuit cases have cited *Fisher* or followed (or criticized) its reasoning since the Supreme Court's decision in *Wiggins* (June 26, 2003). This leaves the door open for the Fourth Circuit courts to change their approach in the future.

[76] *Id.* (citation omitted).

[77] The Fourth Circuit and district courts within the circuit present similar reasoning in a number of cases. *See, e.g.*, United States v. Russell, No. 01-7804, 2002 WL 1011530 (4th Cir. May 20, 2002); Rocheville v. Moore, No. 98-23, 1999 WL 140668, at *6 n.6 (4th Cir. Mar. 16, 1999); Roberts v. Curran, No. Civ.A. AMD 96-478, 2002 WL 32330995 (D. Md. Aug. 21, 2002); Cole v. Saunders, No. Civ.A. 7:01CV00395, 2002 WL 32074707 (W.D. Va. 2002); Hansford v. Angelone, 244 F. Supp. 2d 606 (E.D. Va. 2002); Leary v. Garraghty, 155 F. Supp. 2d 568 (E.D. Va. 2001); Prince v. United States, 2001 WL 34085230 (D.S.C. Dec. 05, 2001). For a discussion of one such case, see Mark Peake, Hoots v. Allsbrook*:* *The Fourth Circuit's Application of the* Strickland *Test for Determining Ineffective Assistance of Counsel Claims*, 44 WASH. & LEE L. REV. 598, 606 n.61 (1987), which canvassed other decisions by the Fourth Circuit and district courts within the Fourth Circuit that fail to cumulate prejudice under *Strickland*. *See also* Hoots v. Allsbrook, 785 F.2d 1213, 1223 (4th Cir. 1986) (Ervin, J., dissenting) (criticizing court for failing to cumulate counsel's performance errors in assessing prejudice under *Strickland*).

[78] In mistakenly distinguishing cases relied on by the defendant as ones in which the defendant established both prongs of *Strickland* before considering cumulation, the court noted that "legitimate cumulative-error analysis evaluates only the effect of matters actually determined to be constitutional error, not the cumulative effect of all of counsel's actions deemed to deficient." *Fisher*, 163 F.3d at 852 n.9. This mirrors cumulative harmless error analysis, which we will discuss in Section IV. It bears mention here that the Fourth Circuit's statement that its holding was "in agreement with the majority of our sister circuits that have considered the issue," *id.* at 852, is incorrect. The Eighth, Ninth, and Tenth Circuits were on its side, the court said, while the Second and Seventh Circuits were opposed. The Ninth Circuit's approach to *Strickland* prejudice, both before and after *Fisher*, is to cumulate prejudice. *See* Silva v. Woodford, 279 F.3d 825, 834 (9th Cir. 2002); Turner v. Duncan, 158 F.3d 449, 457 (9th Cir. 1998); Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992). It refuses to cumulate only when instances of deficient performance *together* fail *Strickland*'s second prong. *See* United States v. Gutierrez, 995 F.2d 169, 173 (9th Cir. 1993). The Tenth Circuit not only cumulates prejudice within the second prong of *Strickland* before determining

instructive precursor to the discussions—of integrating *Strickland* prejudice with *Bagley* materiality, and of integrating all reliability-impacting errors for prejudice analysis—that follow.

III. WHY *BAGLEY* MATERIALITY AND *STRICKLAND* PREJUDICE SHOULD BE READ TOGETHER

Having dispensed with doubt about cumulating defense counsel errors in *Strickland*, we address a second problem. Given the history and character of the doctrines, one must ask: if *Bagley* materiality and *Strickland* prejudice ask the same fundamental question, shouldn't prosecutorial suppressions and defense counsel failures—the opening-prong violations of *Bagley* and *Strickland*—be aggregated when determining the reliability of a verdict? Specifically, shouldn't all defense counsel deficiencies be considered as part of the totality of the circumstances when determining *Bagley* materiality; shouldn't all suppressed items of evidence come into play when defense counsel's presentation to the jury is "taken as a whole"?

The short answer to these questions is yes. To begin, this integration simply makes sense. The Supreme Court could have embraced other core values, such as the integrity of the proceedings, but it did not. Reliability of the verdict, fundamentally a due process notion, is the chosen constitutional concern of both *Bagley* and *Strickland.* Since suppressions and failings of defense counsel alike impact the reliability of the verdict, logic says to consider their collective impact in ascertaining if a verdict is reliable. Put somewhat differently: if the core constitutional value is the reliability of the verdict, then it should be of no moment whether the verdict is not reliable as a result of counsel's deficient performance, the prosecutor's withholding of favorable information, or a combination of the two.[79]

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whether there is constitutional error, *see* Humphreys v. Gibson, 261 F.3d 1016, 1021 (10th Cir. 2001); United States v. Rivera, 837 F.2d 906 (10th Cir. 1988), but it also allows mere first-prong violations—discrete instances of deficient performance—in its cumulative error/harmless error review. *See* Stouffer v. Reynolds, 168 F.3d 1155, 1163 (10th Cir. 1999). The opinion did not mention the Fifth Circuit.

[79] To be precise, prejudice and materiality should be considered cumulatively, in our view, only if the defendant is able to make the initial showing for both categories of error. In other words, the defendant would first have to satisfy *Strickland* prong one (counsel acted unreasonably), and *Brady* prongs one and two (there was a withholding of favorable information). If the defendant can make such a showing, a reviewing court would then ask whether as a result of both trial counsel's inadequate performance and the prosecution's withholding of favorable information is there a reasonable probability that the outcome would have been different.

A. *STRICKLAND* PREJUDICE

In Part I, we took the time to develop the history of the *Strickland* prejudice and *Bagley* materiality standards because we believe that the due process nature of both have always envisioned a scope of review that endorses integrating defense counsel's failures with prosecution suppression errors (and others, as we'll discuss in Part IV) in assessing prejudice. With regard to *Strickland*, we look back to *Powell*, in which the Supreme Court said deprivation of the right to counsel violates the Due Process Clause of the Fourteenth Amendment.[80] It decided this based on the totality of the circumstances in the case.[81] It was not just the trial court's failure to appoint counsel or the rush to trial. It was also the racist environment and the defendants' helplessness. Together, all these things made it very likely that the jury never knew the truth. The characteristics germane in *Powell*, fundamental right and concern with totality of the circumstances, have defined the right to counsel ever since.[82] *Gideon* reaffirmed *Powell*'s statement that the right to counsel was fundamental, even as it defined a new relationship between the Sixth and Fourteenth Amendments.[83] *Powell* said a fundamental right could coexist in multiple Amendments. The *Gideon* majority recognized that a fundamental right could also travel from one Amendment through another. The Fourteenth Amendment could thus be a source of the right to counsel, and also a medium "incorporating" the Sixth Amendment. These roles are not mutually exclusive. *Gideon* did not overrule *Powell*; far from it. The facts of *Gideon* only called for the Fourteenth Amendment to serve the role of medium: because the Court applied a bright-line rule of appointment, it had

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[80] Powell v. California, 287 U.S. 45, 65-69 (1932).

[81] *See supra* Part I.A.1.

[82] One might argue that had the Sixth Amendment applied to the States in 1932, it would have been the basis for reversal in *Powell* and that the Court utilized the Due Process Clause of the Fourteenth Amendment to extend the Bill of Rights to state defendants who were not, at that time, granted its protection. There are certainly multiple reasons for the Court's use of the due process based totality-of-the-circumstances review in *Powell*, some of which are definitely historical. But subsequent decisions of the Court show that, even had the Sixth Amendment then applied to the States, the defendants in *Powell* would have no less been denied due process of law. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 327 (1937) ("The [*Powell*] decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing."), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784, 794 (1969). Thus, at the end of the day, the *Powell* Court reached the correct result using the correct methodology.

[83] Gideon v. Wainwright, 372 U.S. 335, 341-42 (1963).

no need to engage in totality-of-the-circumstances review. After *Gideon*, the totality of the circumstances in a case could lead to a right to counsel violation; or the Fourteenth Amendment could deliver, for example, the rule of absolute appointment created in *Johnson v. Zerbst*.[84]

As lower courts developed standards for effective assistance following *Gideon*, they increasingly viewed the Sixth Amendment through the Fourteenth.[85] Yet effectiveness-of-counsel tests (in circumstances where prejudice is not presumed), unlike *Johnson v. Zerbst*'s appointment rule, called (in both federal and state court proceedings) for the Fourteenth Amendment to play the source role—for courts to look at the totality of the circumstances to see if "reasonably competent" counsel would have made a difference. So in the effectiveness context, the Fourteenth Amendment took on both characteristics, source and medium. This is at the core of the Supreme Court's decision in *Strickland*.

Strickland is, principally, a case about fundamental fairness.[86] The Court could have applied, as in *Gideon*, a bright-line rule regarding deficient performance. But it did not. It embraced a distinctly due process fixation, the prejudice prong, to serve a distinctly due process function, insuring a fair and reliable result.[87] Many argued that no true Sixth Amendment violation would have a built-in prejudice requirement. Perhaps, but an ineffective assistance of counsel violation, though commonly referred to as a Sixth Amendment violation, may likewise violate the due process clauses of the Fifth and Fourteenth Amendments.[88]

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[84] 304 U.S. 458 (1938).

[85] *See supra* notes 24, 39.

[86] Strickland v. Washington, 466 U.S. 668, 685-86 (1984).

[87] *Id.* Justice Marshall, dissenting in *Strickland*, felt that the majority did not go far enough in giving voice to the right to counsel's due process roots. Justice Marshall urged that a showing of deficient performance, in itself, violates due process and warrants a new trial: "A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process. . . . I would thus hold that a showing that the performance of a defendant's lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby." *Id.* at 711-12 (Marshall, J., dissenting).

[88] For instance, one might argue that had the Sixth Amendment then applied to the states, it would have been the basis for reversal in *Powell*, and that the Court utilized the Due Process Clause of the Fourteenth Amendment to extend the Bill of Rights to state defendants who were not, at that time, granted its protection. This argument would derive from *Gideon*, 372 U.S. at 341-45 (interpreting *Powell*). But even had the Sixth Amendment applied, the defendants would have no less been denied due process of law. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 327 (1937) ("The [*Powell*] decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of

The prejudice requirement is, therefore, more than a "vestige" of due process.[89] *Strickland*'s totality-of-the-circumstances focus refers back to *Powell*—to Fourteenth Amendment roots of the right that remain just as legitimate today.

That leads to this point: if *Strickland*'s totality-of-the-circumstances focus in the prejudice prong refers back to *Powell*, then it is from *Powell* that we should define the scope of circumstances considered for *Strickland* prejudice.

Powell took into account numerous factors about the trial: not just defense counsel's failure to perform, but circumstances ranging from the racist mob to the defendants' lack of education. Applying the same scope to *Strickland* to ask if counsel's failures undermined confidence in the verdict, we need to do more than take into account the ways in which counsel performed unreasonably—that is the deficiency prong. We also need to know whether it mattered. To properly calibrate the effect of these errors on the outcome, we must also account for the characteristics of the defendants, the circumstances of the trial, the evidence presented (and excluded), the instructions provided to the jury at trial and, at least potentially, a myriad of other factors. For example, do the defendants have mental impairments that would have supported a challenge to the voluntariness of a confession that counsel failed to uncover? Were bigoted threats involved that defense counsel knew about but failed to bring to the court's attention? Was there a witness to the crime that defense counsel failed to interview whose testimony would have exculpated the defendants, which we now know about only through belated disclosure? Was there impeachment information that would have discredited an important witness? All of these—including the last two, which incorporate the *Brady* doctrine's first prongs—are relevant to the totality of the circumstances as *Powell* understood them. They are just as relevant to *Strickland* prejudice. And, most importantly, they are crucial to an accurate reliability assessment.

The Court's recent interpretation of *Strickland* in *Wiggins v. Smith*,[90] which involved multiple failures of defense counsel related to the penalty phase, is consistent with this interpretation. Explaining that available evidence should be "taken as a whole," *Wiggins* noted that "[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of

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counsel was essential to the substance of a hearing."), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784, 794 (1969).

[89] *Cf.* Green, *supra* note 29, at 1060 (arguing that the prejudice requirement is a "vestige of due process").

[90] 539 U.S. 510 (2003).

available mitigating evidence."[91] The Court measured "available mitigating evidence" at the time of appellate review, looking at all evidence that reasonably competent counsel could have presented in light of the post-conviction proceedings.[92] This included the "mitigating evidence counsel failed to discover and present in th[e] [trial] case."[93] *Wiggins*'s promise to weigh the "totality of available mitigating evidence," read in light of *Powell*, might also include any mitigating evidence withheld by the prosecution that reasonably competent counsel would have used.[94]

B. *BAGLEY* MATERIALITY

In the opening part of this section, we referred to the common-sense appeal of cumulating suppression errors within the *Strickland* prejudice determination. From a perspective that seeks truth, as the adversarial process does, this makes sense. No fact-finder can reliably measure the impact of defense counsel's failures without measuring the impact of the prosecution's failure to provide relevant information. The totality-of-circumstances measure of fundamental fairness applied in *Powell* is equally inherent and indispensable to *Brady* due process violations. Similar to *Strickland* prejudice, *Bagley* materiality takes into account not only the prosecution's indiscretions but also the rest of the trial, including defense counsel's performance. The Supreme Court stressed in *Bagley* that the materiality inquiry concerns not only what the jury heard, but also how defense counsel's preparation and strategy would have been altered. If, for example, defense counsel's superior performance renders suppression a moot point, then there will be no reversal.[95] Materiality thus depends on an evaluation of defense counsel's deficient performance.

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[91] *Id.* at 534, 538.

[92] *Id.* at 534.

[93] *Id.*

[94] For a discussion of the impact of *Wiggins v. Smith* on ineffective assistance of counsel doctrine, see Lyn Entzeroth, *Federal Habeas Review of Death Sentences, Where Are We Now?: A Review of* Wiggins v. Smith *and* Miller-El v. Cockrell, 39 TULSA L. REV. 49 (2003); Robin M. Maher, *'The Guiding Hand of Counsel' and the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 1091 (2003).

[95] For example, suppose the prosecution possesses an inconsistent statement of one of its witnesses, yet neglects to provide it to defense counsel. If in cross-examining the witness defense counsel then, through superior performance or serendipity, unearths the inconsistency, it no longer matters so far as reliability of verdict is concerned that the prosecution suppressed the inconsistent statement. Defense counsel has found the information, and provided it to the jury, on its own.

The interplay is most acute when the breakdowns on both sides concern the same information or witness.[96] In that event, the materiality inquiry fully includes *Strickland*. Consider a situation in which defense counsel was allegedly ineffective for failing to interview a witness whose statement the prosecution suppressed and who should have been interviewed despite the suppression. The *Strickland* query asks what reasonably competent counsel would have achieved by interviewing and presenting the witness's testimony; the materiality inquiry is what reasonably competent counsel would have done with the witness's statements. Both ask what competent counsel would have done with information the witness provided.

This interplay was at work in *Kyles v. Whitley*, in which the government suppressed statements by several witnesses (two of which were eyewitnesses) that defense counsel also failed to interview.[97] Kyles challenged the suppression of those statements and also alleged that defense counsel was ineffective for failing to interview the witnesses and for failing to call one witness to testify.[98] Each of the alleged deficiencies thus related to witnesses whose statements were suppressed.

A majority of the Fifth Circuit considered the materiality of each of the suppressed statements of information separately.[99] It also reviewed, independently, the impact of each of the claimed deficiencies in defense counsel's performance.[100] The court held that none of the parties' mistakes unhinged the reliability of the trial.[101] Yet the impact of defense counsel's failure to interview the witnesses was strikingly evident only once the suppressed statements were disclosed: not only did the statements impeach the witnesses, but they also directly supported the defense's theory—that one of the witnesses was the murderer and was framing Kyles.

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[96] For instance, when a court recognizes how significant a failure to interview a witness was based on the disclosure of previously suppressed witness testimony or statements, it accounts for *Bagley* suppression in the *Strickland* prejudice determination. When a court recognizes that a piece of suppressed evidence would have significantly altered the defense strategy, it accounts for defense counsel's performance in the *Bagley* materiality determination. *See* discussion of *Kyles*, *supra* Part I.B.2.

[97] 5 F.3d 806, 811-17 (5th Cir. 1993), *rev'd*, 514 U.S. 419 (1995).

[98] *Id.* at 811, 818.

[99] *Id.* at 811-17; *see also* Kyles v. Whitley, 514 U.S. 419, 441 (1995) ("The result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley* . . . ."). *But see id.* at 459 (Scalia, J., dissenting) ("[I]t is clear beyond cavil that the court assessed the cumulative effect of the *Brady* evidence in the context of the whole record.").

[100] *Kyles*, 5 F.3d at 818-20.

[101] *Id.* at 811-20.

The dissenting Fifth Circuit judge focused on this interplay between the statements and counsel's failures. "[C]hiefly concern[ed with] how a reasonably effective trial counsel would have used the *Brady* evidence had it been properly disclosed by the State,"[102] Judge King recognized that there was really but a single question before the court:

> I believe that the only appropriate way to analyze Kyles' case is to consider his ineffectiveness and *Brady* claims in conjunction. After all, the "materiality" prong of his *Brady* claim in a significant way directly relates to the "prejudice" prong of his ineffectiveness claim, and vice versa. Furthermore, . . . the inquiry for both claims is identical: assuming, counter-factually, that Wallace had in fact been called as a defense witness and that trial counsel had been privy to all of the aforementioned *Brady* evidence, it must be asked whether there is a "reasonable probability" that the result of the guilt/innocence phase or punishment phase would have been different.[103]

After separately assessing the opening prongs of *Strickland* and *Brady*,[104] Judge King restated the query in terms of both tests:

> [W]hether there is a "reasonable probability" that, but for the two constitutional errors working in conjunction, Kyles' jury, considering all the relevant evidence, would not have unanimously found either that there was sufficient evidence to prove beyond a reasonable doubt that Kyles was guilty or that Kyles should receive a death sentence.[105]

"The heart of the inquiry here," she emphasized, "is whether the constitutional infirmities rendered the proceeding *unreliable*."[106]

When the *Kyles* case reached the Supreme Court, the Court identified the same symbiosis as Judge King's dissent. Although the Court granted certiorari on the *Brady* issue alone, and therefore did not adjudicate ineffective assistance of counsel, it addressed the same deficiencies in defense counsel's performance that Kyles raised below (failure to interview three witnesses and failure to call one as a witness) because what competent counsel would have done with the suppressed information was integral to materiality. With the information in the statements of the two eyewitnesses, the Court noted, reasonably competent counsel would have destroyed the value of those witnesses on cross-examination.[107] With the information in

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[102] *Id.* at 832 (King, J., dissenting).

[103] *Id.* at 831 (King, J., dissenting); *see also id.* at 827 ("[B]ecause the critical issue of 'materiality' in this court's *Brady* analysis is governed by a standard identical to that governing the 'prejudice' prong of the two-prong ineffectiveness analysis required by *Strickland*, I will address the *Brady* 'materiality' and *Strickland* 'prejudice' issues together after separately analyzing the first prongs of the *Strickland* and *Brady* standards.").

[104] *See id.* at 827 (King, J., dissenting).

[105] *Id.* at 832 (King, J., dissenting).

[106] *Id.* (King, J., dissenting).

[107] Kyles v. Whitley, 514 U.S. at 419, 442-45 (1995).

the other witness's (Wallace's) statements, competent counsel could have "attack[ed] not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well."[108] Finally, reasonably competent counsel could have called Wallace as an adverse witness without concern.[109] The Court did not *explicitly* fuse *Brady* and *Strickland.* But the Court's approach to materiality was very similar to that taken in the dissenting Fifth Circuit opinion. And the Court reached the same conclusion: disclosed to "competent counsel," the information the witnesses provided "would have made a different result reasonably probable."[110]

In a case like *Kyles*, however, where defense counsel's failures relate to witnesses whose statements are suppressed, the materiality and *Strickland* prejudice inquiries are, as the dissenting Fifth Circuit Judge observed, identical.[111] But in any case, the scope of circumstances relevant to the materiality inquiry matches that of *Strickland* prejudice, and thus includes defense counsel's errors. Consider, for instance, the following hypothetical case: A defendant is convicted of capital murder and sentenced to death for shooting and killing a bystander during a convenience-store robbery, in which the defendant was one of several participants. Following the conviction and sentence, further investigation reveals that defense counsel failed to interview witnesses that would have provided information and would have been willing to testify about adverse circumstances in the defendant's childhood home. Suppose post-conviction investigation also reveals that the prosecution possessed a statement by a witness who said the defendant was coerced into participating in the robbery, and that this statement—which mitigates against a death sentence, although it may have done little to help the defendant avoid a conviction—was never provided to defense counsel. In sum, with respect to sentencing, the post-conviction investigation has established *Strickland*'s first prong as well as the suppression and materiality requirements of *Brady*.

Unlike *Kyles*, however, defense counsel's errors and the suppression error in this hypothetical case are factually unrelated. Yet both parties'

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[108] *Id.* at 445.

[109] *Id.*

[110] *Id.* at 441.

[111] Such equivalence between *Strickland* prejudice and *Bagley* materiality is not limited to situations in which defense counsel fails to interview a witness with respect to which the state has suppressed *Brady* material. The inquiries are the same whenever the errors, as in *Kyles*, are factually related. Say, for example, in a case of a gun going off during a struggle, where the State suppresses its ballistics expert's report finding the gun had a hair trigger and defense counsel meanwhile fails to make a funding motion for a ballistics expert, thus preventing impeachment of the State expert.

errors deprived the jury of information relevant to deciding whether to impose the death penalty—information that the jury, in the process of making its sentencing decision, would have considered simultaneously. As such, the jurors need not have been persuaded by any piece of evidence alone: knowing that the defendant was coerced into participating in the robbery, in combination with knowing about the adversity the defendant faced growing up, in combination with whatever other mitigating factors were presented at the original sentencing trial, may have swayed at least one juror to vote for a life sentence. Given this context, if a court believes that multiple errors undermine confidence in a verdict, should it uphold the verdict as reliable simply because it believes that each of the errors in isolation did not sabotage the verdict's integrity? No, demanding that any one of the pieces of missing information had to, in and of itself, change a juror's mind defies reason—particularly in jurisdictions where jurors exercise discretion to impose a life sentence for any reason or no reason at all; in effect, such a demand pretends that the errors responsible for depriving the jury of information occurred in different cases. And beyond defying reason, this misguided approach would ignore the due process, totality-of-the-circumstances roots of the *Brady* and *Strickland* doctrines that we featured in Part I.

Consequently, an appellate court reviewing the reliability of the jury's sentencing decision in a case like the hypothetical should look at the impact of defense counsel's errors and the impact of the prosecution's suppression error *in combination*—it should consider all the ways in which the cases presented by both parties would have been different, *in their entirety*, but for the parties' errors—then assess whether the sentencing decision would have been different.[112] Whether a case involves interlocking defense-counsel and prosecution errors, like *Kyles*, or factually distinct errors, as in

[112] A recent example of this in an actual case is *Banks v. Dretke*, 540 U.S. 668 (2004). In *Banks*, a majority of the Supreme Court, in determining *Brady* materiality, took into account facts that were omitted from trial as a result of defense counsel's failure. The majority thus considered, alongside damaging trial testimony showing that Banks threatened and pistol-whipped his brother-in-law, the fact—which defense counsel failed to uncover—that the brother-in-law, not Banks, instigated the fight. *Id.* at 699 n.17. Neither of these facts carried great weight in the majority's finding of materiality, *see id.* at 698-703, but the point stressed here is that they were considered cumulatively. Justice Thomas, joined by Justice Scalia in dissent in *Banks*, did not take issue with cumulating prosecutorial suppression and defense counsel failures for determining *Brady* materiality. Finding materiality a "very close question," *id.* at 706 (Thomas, J., dissenting), Justice Thomas concluded that "even if it is appropriate to mix-and-match the prejudice analysis of the *Brady* claim and the claim under *Strickland* (rather than to evaluate them independently, as distinct potential constitutional violations), Banks' response was vastly disproportional to his brother-in-law's actions." *Id.* at 708.

the hypothetical, the same rule should apply: cumulate the prejudice from the errors, then determine the reliability of the verdict.[113] In either event, Judge King's dissent in *Kyles* exemplifies how to measure the combined impact of *Brady* and *Strickland* errors: fuse the materiality and prejudice questions and answer both simultaneously. If there is a reasonable probability that, but for both parties' missteps, the outcome would have been different, violations of both *Brady* and *Strickland* result.

C. WHY COURTS DON'T CUMULATE: A NOTE ON CATEGORIES

If at this point of the discussion, the necessity of integrating materiality and prejudice seems obvious, one may well wonder why courts do not already do it. Much of the reason is that the Supreme Court has never firmly embraced the idea of cumulative error, to which we turn in Part IV, and thus there is no clear doctrinal "hook." Perhaps consequentially, attorneys have not aggressively pursued cumulating *Bagley* materiality, *Strickland* prejudice, and other reliability-impacting errors as a litigation strategy. Along the same lines, courts accustomed to considering the errors separately have not set out to change their practice. Courts continue to perceive the division between prosecutorial-suppression errors and ineffective-assistance-of-counsel errors—the former a Fifth or Fourteenth Amendment due process violation and the latter now viewed predominantly under the Sixth Amendment—as rendering the errors apples and oranges, effectively incomparable in terms of their effect on the trial. Or courts rely

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[113] *See, e.g.*, Gonzales v. McKune, 247 F.3d 1066, 1078 (10th Cir. 2001), *vacated in part*, 279 F.3d 922, 924-25 (10th Cir. 2002) (en banc). After finding that defense counsel's failure to object to a confession letter fell below an objective standard of reasonable performance and that the State's failure to disclose a negative semen test deprived the defendant of favorable evidence, the court fused the prejudice inquiry, finding "both [*Strickland* and *Brady*] tests were established to preserve the integrity of the trial process and they adopt similar standards to reach this goal." *Id.* The court concluded that there was "no basis in law for affirming a trial outcome that would likely have changed in light of a combination of *Strickland* and *Brady* errors." *Id.* Yet another example is the Florida Supreme Court's decision in *State v. Gunsby*:

> The second prong of *Strickland* poses the more difficult question of whether counsel's deficient performance, standing alone, deprived Gunsby of a fair trial. Nevertheless, when we consider the cumulative effect of the testimony presented at the [ineffective-assistance-of-counsel] hearing and the admitted *Brady* violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome.

670 So. 2d 920, 924 (Fla. 1996) (cross-referencing Cherry v. State, 659 So. 2d 1069 (Fla. 1995), which held that the cumulative effect of defense-counsel deficiencies was prejudicial). The opinion suggests that the Florida Supreme Court viewed combining as a unique due process violation. What we stress here is that the combined prejudice from the prosecution and defense counsel performance in fact violated both.

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.

Such formalistic approaches adhere to categorizations of *Brady* and *Strickland* errors. As Amsterdam and Bruner describe in their book *Minding the Law*, all "things may take the shape of rules and principles, rights and obligations, freedoms and commitments, values and goals," and even legal doctrines such as *Brady*, *Strickland*, or harmless error inevitably carry with them some preconceived notions about their character. Things come tinged by labels and predefinition. In a general sense, things come categorized according to a value system "grounded in what our culture designates as mattering." In the law, rules, principles, and doctrines are the product of reasoning that itself depends "upon notions about the nature of things generally, what they are and how they are related." In short, we categorize things to serve a purpose. As Amsterdam and Bruner describe, categories are themselves "meaning making," they "serve particular functions." Over time, categories become "entrenched" as habit and often they cover up truths.[114] These formalistic approaches adhere to certain categorizations of *Brady* and *Strickland* errors (as errors that are not constitutional errors unless prejudice is found, as due process violations vs. Sixth Amendment violations) in a manner that is inconsistent with the doctrines' roots and purpose, divides reliability determinations, and thus undercuts the core aspiration—one might say, the truth—of both doctrines, to ensure reliable verdicts.

Formalistic application also sabotages cumulative harmless error analysis, a due process doctrine that could accomplish the global reliability check we seek.

IV. EXPANDING THE SCOPE OF THE CUMULATIVE ANALYSIS

If the Circuit Court dissent in *Kyles* provides a model of how to measure the combined impact of *Brady* and *Strickland* errors, it also begs

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[114] Amsterdam's and Bruner's conception of categories as ever-changing in response to the wants and needs of society finds common voice in philosophical conceptions of power (from Nietzsche to Foucault to Derrida and so on) and in critical legal and social theory. *See, e.g.*, Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 200 (1987) (recognizing that "the commonplace legal discourses often produce such seriously distorted representations of social life that their categories regularly filter out complexity, variety, irrationality, unpredictability, disorder . . . [and] exclude or repress alternative visions of social life."); *see also* J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L. J. 743, 763 (1987) (discussing the "privileging of particular legal ideas").

the question, why stop there? Other errors affect the reliability of the verdict, so shouldn't the prejudice catalyzed by those errors be considered along with *Bagley* and *Strickland*? Otherwise, aren't we left at a similar place, with reliability divided, lacking a universal account of what happened at the trial from the jurors' perspective? Why shouldn't courts, then, consider all errors that affect the jury's consideration of the facts in tandem?

At first glance, an apparent mechanism for this already exists: the due-process doctrine known as cumulative harmless error. But in practice, cumulative harmless error analysis does not fare well in achieving a comprehensive determination of a verdict's reliability.

The reasons for this begin with the lack of strong doctrinal underpinning. When one sets out to investigate the origins of cumulative harmless error, there is not a lot to find. The Supreme Court first mentioned the concept in a footnote to *Taylor v. Kentucky*, accepting the idea that several errors that do not individually amount to reversible error may cumulatively deny a defendant the right to a fair trial.[115] But apart from this widely recognized genesis, there is no cumulative harmless error "doctrine" per se.[116]

Consequently, differing approaches to cumulating harmless errors have arisen.[117] They rely on a combination of *Taylor* and other Supreme

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[115] 436 U.S. 478, 487 n.15 (1978) (concluding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness").

[116] *See, e.g.*, Lorraine v. Coyle, 291 F.3d 416, 447 (6th Cir. 2002) ("The Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief."), *amended on other grounds by* 307 F.3d 459 (6th Cir. 2002).

[117] All of the federal circuits consider the effect of cumulative errors on direct review. *See* United States v. Ollivierre, 378 F.3d 412 (4th Cir. 2004), *vacated on other grounds*, 125 S. Ct. 1064 (2005); United States v. Trujillo, 376 F.3d 593 (6th Cir. 2004); Marshall v. Hendricks, 307 F.3d 36 (3d Cir. 2002); United States v. Rahman, 189 F.3d 88 (2d Cir. 1999); United States v. Munoz, 150 F.3d 401, 418 (5th Cir. 1998); United States v. Rogers, 89 F.3d 1326, 1338 (7th Cir. 1996); United States v. Adams, 74 F.3d 1093, 1100 (11th Cir. 1996); Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995); United States v. Sepulveda, 15 F.3d 1161 (1st Cir. 1993); United States v. Johnson, 968 F.2d 768, 771 (8th Cir. 1992); United States v. Rivera, 900 F.2d 1462 (10th Cir. 1990); United States v. Jones, 482 F.2d 747 (D.C. Cir. 1973). Except for the Fifth, Sixth, and Eighth Circuits, the federal courts of appeals apply cumulative error analysis, without explicit distinction from the direct-appeal context, in the review of habeas corpus petitions. *See* Miller v. Mullin, 354 F.3d 1288 (10th Cir. 2004); Mello v. DiPaulo, 295 F.3d 137 (1st Cir. 2002); Karis v. Calderon, 283 F.3d 1117 (9th Cir. 2002); Marshall v. Hendricks, 307 F.3d 36 (3d Cir. 2002); Alvarez v. Boyd, 225 F.3d 820 (7th Cir. 2000); United States v. Rahman, 189 F.3d 88 (2d Cir. 1999); Fisher v. Angelone, 163 F.3d 835 (4th Cir. 1998); Davis v. Zant, 36 F.3d 1538 (11th Cir. 1994). While the Fifth Circuit does consider cumulative error claims in habeas corpus petitions, it has limited the type of errors that may be considered. *See* Derden v. McNeel, 978 F.2d 1453 (5th Cir. 1992) (en banc); *see also infra* note 120-23 and accompanying text; Rachel A. Van

Court authority establishing the right to due process.[118] Yet the approaches differ with respect to the errors included, the standard of review, and the rules of procedure and preservation that govern the scope of review:

> [G]eneral agreement masks the subtle and protracted problems that arise whenever a court undertakes a cumulative error analysis. Which errors should be included in the cumulative mix? And what standard, other than "I know it when I see it," governs the due process inquiry in cumulative error cases? Most courts deny relief on claims of cumulative error with little or no discussion and, thus, avoid these questions altogether. Yet, the questions remain.[119]

Stated another way, certain courts limit the review more than others.

The significance of these limitations extends beyond their diversity, which itself may promote arbitrary application of due process. According to *Taylor*, the purpose of the cumulative harmless error inquiry is to insure a fundamentally fair and reliable verdict. Reliability is the core value. As such, cumulative harmless error analysis, like any inquiry into the reliability of a verdict (*Bagley* materiality or *Strickland* prejudice, for instance), demands a global scope of review. The more inclusive cumulative harmless error analysis is, the more effective it will be in measuring verdict reliability. A less worthy consideration of a verdict's reliability results if the analysis is segregated—if reliability-impacting errors are considered individually or partially.

From this perspective, any limitation on the errors a court considers threatens to jeopardize the analysis because it divides the reliability inquiry. Consider, for instance, limits the Fifth Circuit imposes. The court accepts an error for cumulative harmless error analysis only if it is "of constitutional dimension," unaccompanied by a curative instruction, and properly preserved and not procedurally defaulted.[120] In applying the

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Cleave, *When is an Error Not an "Error"? Habeas Corpus and Cumulative Error Analysis*, 46 BAYLOR L. REV. 59, 62 (1993). The Sixth Circuit has held that cumulative error is not a basis for granting habeas relief in non-capital cases. *See* Davis v. Burt, 100 F. App'x 340, 351 (6th Cir. 2004); *Lorraine*, 291 F.3d at 447. The Eighth Circuit Court of Appeals has rejected the cumulative error analysis in the context of habeas corpus. Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir. 1996); Lee v. Lockhart, 754 F.2d 277 (8th Cir. 1985). *See generally* Van Cleave, *supra*, at 63.

[118] *See, e.g.*, Darks v. Mullin, 327 F.3d 1001, 1018 (10th Cir. 2003). The court determined that cumulative harmless error analysis "is an extension of harmless error, and conducts the same inquiry as for individual error, focusing on the underlying fairness of the trial. The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." *Id.* (quotations and citations omitted); *see also* United States v. Rivera, 900 F.2d 1462, 1469 (10th Cir. 1990) (en banc).

[119] Pursell v. Horn, 187 F. Supp. 2d 260, 374 (W.D. Pa. 2002).

[120] Derden v. McNeel, 938 F.2d 605, 621 (5th Cir. 1991).

"constitutional dimension" requirement, the court views mere instances of deficient performance by counsel or prosecutorial suppression, absent prejudice, as "adverse events" not available for cumulative error review.[121] Similarly, if a trial error that impacts reliability is followed by a curative instruction, the court will not include it, because "if the trial court cured a putative error, the petitioner is complaining only of an adverse event rather than actual error."[122] And if prior counsel previously failed to challenge any errors impacting the evidence the jury heard or did not hear, that claim is waived.[123] Each of these requirements has the effect of circumscribing removing reliability-impacting errors from inclusion in the cumulative review.

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[121] *Id.* The Fifth Circuit's reversal of the District Court in the recent case of *Banks* exemplifies the court's approach. Banks v. Cockrell, No. 01-40058 (5th Cir. Aug. 20, 2002) (per curiam) (unpublished table decision), *available at* http://www.ca5.uscourts.gov/opinions/unpub/01/01-40058.0.wpd.pdf. Banks claimed ineffective assistance of counsel and a *Brady* violation based on one witness's undisclosed paid-informant status in his third state petition. *See id.* at 8. Recommending relief as to the death sentence, the District Court, adopting the magistrate's opinion, integrated *Strickland* and *Brady* violations. Banks v. Johnson, No. 5:96-CV-353, slip op. at 5-6 (E.D. Tex. Aug. 18, 2000) (unpublished) (concurring with *Banks v. Johnson*, No. 5:96-CV-353 (E.D. Tex. May 11, 2000) (unpublished magistrate decision)). For prejudice on each claim, the District Court looked at the impact of the withholding of the informant status *together with* counsel's mistakes. *See Banks*, No. 01-40058, slip op. at 34-35. It fused the *Brady* and *Strickland* violations: in the *Brady* context, materiality factored in defense counsel's mistakes; in the *Strickland* context, prejudice included the State's failure to disclose. In light of *Powell* and due process precedent, the court properly looked at the totality of the circumstances and found a reasonable probability that the outcome would have been different.

Nevertheless, the Fifth Circuit held that the district court improperly invoked cumulative error doctrine. It viewed the fusion ("each holding included the other as the basis of materiality or prejudice") of "unrelated" *Brady* and *Strickland* claims as a cumulative error exercise. *Id.* at 45-46; *see id.* at 44 ("[T]he magistrate judge seems to have grounded her recommendations with respect to both claims on cumulative error."). As a novel claim, it needed to be exhausted in state court before raised in federal habeas. Because Banks had relied only on *Brady* and *Strickland* claims in his prior federal and state petitions, the court dismissed the claim. *Id.* at 46-47.

Furthermore, the Court held, there was no basis for cumulation because there were no actual violations of all prongs of *Brady* or *Strickland*. "For there to be cumulative error", the court reflected, "there must first be error." *Id.* at 47. Another recent example is *Hooks v. Dretke*, 93 F. App'x 665 (5th Cir. 2004), in which the court refused to cumulate deficient-performance-of-counsel errors with *Ake* errors because counsel's failings didn't amount to constitutional (prejudicial) error under *Strickland*.

[122] *Derden*, 938 F.2d at 621.

[123] For a critique of the Fifth Circuit's test for evaluating due process violations based on cumulative error, see Van Cleave, *supra* note 117, at 72-88; Jack Kenneth Dahlberg, Jr., *Analysis of Cumulative Error in the Harmless Error Doctrine: A Case Study*, 12 TEX. TECH L. REV. 561 (1981).

So why the limitations? The answer is that in defining the scope of cumulative harmless error analysis, courts are focusing less on verdict reliability than on two other, also legitimate, concerns—first, that fundamental fairness determinations could overrun other rules of criminal procedure and, second, that the same could displace state interests in finality in favor of federal review:

> "Cumulative error" is an infinitely expandable concept that, allowed to run amok, could easily swallow the jurisprudence construing the specific guarantees of the Bill of Rights and determining minimum standards of procedural due process. . . . The legal certainty afforded by rules drawn from the specific Bill of Rights provisions related to criminal law could then yield to the subjectivity of fundamental fairness determinations. . . . Equally important, granting habeas relief from state convictions for aggregated non-constitutional errors may too easily conflict with established limits on the scope of federal habeas relief. The result would thwart recent decisions that emphasize due regard of the finality of state court judgments.[124]

The question is: can these legitimate reasons for limiting collateral litigation reconcile with the need to assess verdict reliability globally, not piecemeal?

A. RECONCILING LIMITS ON COLLATERAL LITIGATION WITH GLOBAL RELIABILITY ASSESSMENT

Let's start with a point of clarification: Both finality of state verdicts and protection of other criminal procedure jurisprudence are, in some circumstances, legitimate reasons for limiting subsequent review. But that does not mean that any limitation placed on cumulative harmless error analysis in their name is valid. To reconcile these interests with the core value of reliability one must distinguish points of unavoidable conflict from matters that can be resolved; then accept the former and dismiss the latter.

The only point of truly unavoidable conflict is the enforcement of preservation and procedural default doctrines to protect finality interests. Federal courts' approach to such unpreserved or "waived" claims has been to exclude them from cumulative harmless error review. Not because they are not relevant or part of the relevant circumstances of the trial, but because the defendant/petitioner may, under some circumstances, forfeit the right to have that aspect of the proceeding considered by his own actions—for instance, by failing to raise the claim in state court. But the fact that an error impacting reliability wasn't raised on direct appeal or state collateral appeal does not dissolve its reliability-impacting character: although interests in finality weigh against its tardy adjudication, its real-world

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[124] *Pursell*, 187 F. Supp. 2d at 374 (quoting Derden v. McNeel, 978 F.2d 1453, 1457-58 (5th Cir. 1992)).

impact on the reliability of the verdict remains. So to respect the interest in finality, the reliability impact of some errors may not be considered. The rationale is that the petitioner has forsaken the claim through his own lack of diligence.

There are, on the other hand, current limitations that do not serve a legitimate purpose. Take for example, the Fifth Circuit's application of its "constitutional dimension" requirement, which purportedly exists to prevent cumulative harmless error analysis from intruding on other doctrines of criminal law. By the court's terms, it will join *Brady* and *Strickland* errors with other errors in cumulative harmless error analysis, *but only if* prejudice or materiality are found. It thus excludes failed instances of deficient performance by defense counsel or prosecutorial suppression—which may affect reliability, albeit at a level less than a "reasonable probability that the outcome would have been different" from cumulative harmless error review. But cumulative harmless error analysis, occurring as it does after individual claims of error have failed, serves to review failed errors. Far from protecting the integrity of *Brady* doctrine or *Strickland* doctrine, the court's tautology serves only to obstruct the purpose of the cumulative harmless error analysis, which is to review the aggregate impact of all individually harmless errors on the reliability of the verdict.[125]

In limiting cumulative harmless error review, a court need not dispense with errors, such as deficient performance by defense counsel or suppression by the prosecution, that have failed to meet the applicable substantive prejudice standard simply because those doctrines incorporate prejudice in the definition of the error. Types of error denied for insufficient prejudice that incorporate their own prejudice components should be included in the cumulative analysis. As one court has noted:

> [P]articular types of error . . . are governed in the first instance by substantive standards which already incorporate an assessment of prejudice with respect to the trial process as a whole . . . . These substantive prejudice components essentially duplicate the function of harmless-error review. Thus, such claims should be included in the cumulative-error calculus if they have been individually denied for insufficient prejudice. Indeed, to deny cumulative-error consideration of claims unless they have first satisfied their individual substantive standards for actionable prejudice would

[125] The same is true of the Fifth Circuit's decision to exclude trial errors followed by a curative instruction. While a curative instruction may render a record-based error harmless, it does not absolve the "event" of its reliability-impacting character. The effect of a curative instruction is to make an error fall short of the applicable harmless-error prejudice standard. Although the Fifth Circuit dubs this an "adverse event," it is in fact a failed claim of error which should be part of cumulative harmless error analysis.

> render the cumulative error inquiry meaningless, since it would be predicated only upon individual error already requiring reversal.[126]

While the Fifth Circuit focuses on the unique built-in prejudice component of the *Strickland* and *Bagley* standards to the point of overlooking the purpose of cumulative harmless error review (to review failed errors), the Tenth Circuit's analysis is problematic for another reason: it reviews constitutional errors by a standard more lenient than that applicable to some underlying substantive claims. Specifically, the court measures errors of constitutional dimension, including failed *Bagley* and *Strickland* claims, for cumulative harmless error by the harmless-beyond-a-reasonable-doubt standard of *Chapman*.[127] Whether or not there is a marked difference in practice between the application of the *Chapman* standard (or the *Brecht* standard) and the "reasonable probability that the outcome would have been different" standard,[128] this discrepancy, at the very least, presents a potential point of disagreement over the proper standard. Potential disagreement could be resolved by applying a standard of review that equates with the strictest of the applicable substantive standards.

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[126] Cargle v. Mullin, 317 F.3d 1196, 1207 (10th Cir. 2003) (citations omitted). The Tenth Circuit recently made the same point in another recent case:

> As we have noted, Mr. Darks argued on direct appeal that the accumulation of error denied him his constitutional rights to due process and a fair trial. The OCCA rejected this argument, holding that "if individual assertions of error are rejected, then the proposition when considered collectively will not yield a different result." The OCCA's rationale, however, "taken on its face, would render the cumulative error inquiry meaningless, since it indicates that cumulative error may be predicated only upon individual error already requiring reversal."

Darks v. Mullin, 327 F.3d 1001, 1017-18 (10th Cir. 2003). As the Supreme Court explained in *Kyles v. Whitley*, "once a reviewing court applying *Bagley* has found constitutional error there is no need for harmless-error review." 514 U.S. 419, 435 (1995); *see* United States v. Agurs, 427 U.S. 97, 112 (1976). Given that *Strickland* bears the same construction and is the source of the *Bagley* standard, the same principle applies.

[127] *See* United States v. Rivera, 900 F.2d 1462, 1469-70 (10th Cir. 1990) (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).

[128] *See* United States v. Dominguez Benitez, 124 S. Ct. 2333, 2342 (2004) (Scalia, J., concurring) (describing the *Chapman*, *Brecht*, *Agurs*, and *Strickland* standards as "ineffable gradations of probability . . . beyond the ability of the judicial mind (or any mind) to grasp"); *see also Kyles*, 514 U.S. at 434 ("[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . . *Bagley*'s touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

Reconciling interests in reliability with competing interests in doctrinal coherence, therefore, must involve: (1) eliminating false limitations on the review, such as the Fifth Circuit's exclusion of opening-prong *Brady* and *Strickland* errors, to include a broad scope of harmless errors; (2) applying a standard of review and burden of proof that equates with the strictest of the substantive standards applicable to the included claims; and (3) enforcing of preservation and procedural default doctrines to protect finality interests

B. A PROPOSED APPROACH

In general, a cumulative harmless error analysis, to effectuate the core value of promoting reliable verdicts, should include any and all errors that affect reliability—whether record-based errors (evidentiary rulings, instructional errors, *Ake* errors) or non-record-based errors (such as *Strickland* and *Brady* errors). And it should assess the prejudice coming from those errors in the context of the circumstances of the trial. Finality interests may limit the claims of error available for review. But rules such as the Fifth Circuit applies to exclude opening-prong *Strickland* or *Brady* violations need not. So long as the analysis applies a strict standard of review and reviews only constitutional errors previously assessed according to the applicable prejudice standard, cumulative harmless error can be globally inclusive, and uniform across jurisdictions, without consuming other constitutional law rights such as the *Brady* and *Strickland* doctrines and the associated standards of review in the process.

In the pool of qualifying errors, we would include constitutional errors found harmless under *Chapman* and *Brecht*, or their functional equivalents. We would include *Strickland* prong one and *Brady* prong one and two errors because they are the functional equivalents of constitutional violations and they raise integrity concerns where defense counsel or district attorney violate their most basic obligations. And we would include defaulted constitutional claims where "cause"[129] is shown (but not prejudice) because it is an error of constitutional dimension and the showing of cause, which essentially excuses the default by establishing there was some impediment to the defendant's ability to properly preserve the issue, overcomes the state interest in finality. But if no cause is shown, the interests in finality win out, and claim should be excluded from the cumulative error review. Together, these form a coherent set of issues

[129] *See* Murray v. Carrier, 477 U.S. 478 (1986); Wainwright v. Sykes, 433 U.S. 72 (1977).

relevant to a cumulative harmless error analysis that attempts to promote reliability but respects finality.[130]

The analysis itself would proceed as follows. First, a court would begin by looking at all claims of constitutional error and determining whether any of those individual errors warrants a new trial (or sentencing proceeding in a capital case). In doing so, the court would utilize the current prejudice standard relevant to that claim, i.e., a reasonable probability the result would have been different but for the error for ineffective assistance of counsel claims and/or *Brady* claims; the *Chapman* standard for non-structural constitutional errors at trial; the *Brecht* standard for claims reviewed in federal habeas corpus. Assuming no discrete error (or errors) mandated a new trial, the court would then conduct, if requested by the defendant, cumulative error review.[131] Our proposed standard, commensurate with the strictest of the included claims, would require the *defendant* to show that the errors, cumulatively, present a *reasonable probability of a different outcome.*[132] This approach has a solid doctrinal

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[130] Countless combinations could result. *See Cargle*, 317 F.3d at 1207 (providing as examples: prosecutorial misconduct and improper limitation on defense cross-examination, improper denial of mid-trial acquittal motion and evidentiary error, *Brady* error and prosecutorial misconduct, prosecutorial misconduct and evidentiary errors).

[131] To be cognizable for review in federal habeas corpus, the cumulative error claim would need to be exhausted in state court. *Compare id.* at 1206 (petitioner exhausted cumulative error claim including deficient performance of counsel, prosecutorial misconduct, and admission of victim impact testimony, by asserting it on direct appeal in state post-conviction proceedings), *with* Gonzales v. McKune, 279 F.3d 922, 925 (10th Cir. 2002) (rejecting request to cumulate *Brady* materiality and *Strickland* prejudice because defendant had not exhausted the issue in state court). Federal courts may only consider claims from state-court cases if those claims were properly raised in the state court. Known as the independent-and-adequate-state ground doctrine, this requires federal courts to defer to a State's clear application of a state trial or appellate procedural rule. A defendant's failure to properly raise a claim in state court, for instance by failing to object contemporaneously at trial or raise the claim in state appeals, accordingly, renders the claim unpreserved, i.e., a procedural default. *See* John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679 (1990); Anne M. Voight, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1111-13 (1999). *See generally* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 1133-1240 (4th ed. Supp. 2003); John H. Blume & David P. Voisin, *An Introduction to Federal Habeas Corpus Practice and Procedure*, 47 S.C. L. REV. 271, 286-90 (1996). Regarding enforcement of exhaustion and procedural default rules, see, for example, Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part One)*, 29 U. RICH. L. REV. 1327 (1995).

[132] The standard of review currently applied to cumulative harmless error analysis varies by jurisdiction. The Tenth Circuit applies two different standards of review, depending on whether the cumulated errors are constitutional or non-constitutional in nature. If the cumulated errors are non-constitutional in nature, substantial rights are affected and there is

basis, linked to the basic due process roots of *Strickland* and *Brady*, and it furthers the Court's constitutional value of choice, "reliability," by including a broad range of errors. At the same time, to respect finality interests, it is also narrower than some applications. It is narrowed by the recognition that you can't throw in the kitchen sink. Rather, an error must be constitutional error (previously deemed harmless), defaulted constitutional error for which the petitioner can show "cause," or the functional equivalent of constitutional error where the prejudice/harmless error standard is built into the violation. The proposed approach expands the scope of what is relevant in making the reliability determination and it provides a sensible and defensible understanding of the limits of cumulative harmless error review.[133]

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reversible error if the cumulated errors have a substantial influence on the outcome of the trial or leave one in grave doubt as to whether they had such an effect. *Rivera*, 900 F.2d at 1469-70 (quoting Kotteakos v. United States, 328 U.S. 750, 765 (1946)). If the cumulated errors are constitutional in nature, then "the harmless-beyond-a-reasonable-doubt standard announced in *Chapman*" is used in determining whether the defendant's substantial rights were affected. *Id.* (quoting Chapman v. California, 386 U.S. 18, 24 (1967)); *see also Cargle*, 317 F.3d at 1206-07. Other circuits' formulation of the standard of review echoes either the *Rivera* language of substantial influence on the outcome of the trial or the *United States v. Taylor* language of "fundamental fairness" of the trial. The First Circuit Court of Appeals asks whether a defendant's substantial rights were affected. United States v. Meserve, 271 F.3d 314 (1st Cir. 2001). According to the Third Circuit, a new trial is required on a cumulative error basis only when the "errors, when combined, so infected the jury's deliberations that they had a substantial influence on the outcome of the trial." United States v. Copple, 24 F.3d 535, 547 n.17 (3d Cir. 1994). The Fourth Circuit also asks whether the defendant's "substantial rights were affected." United States v. Martinez, 277 F.3d 517, 532 (4th Cir. 2002). The Fifth Circuit asks if the errors had a substantial influence on the outcome of the trial. United States v. Munoz, 150 F.3d 401, 418 (5th Cir. 1998). The Sixth Circuit asks whether "the combined effect" of individually harmless errors "was so prejudicial as to strike at the fundamental fairness of the trial." United States v. Parker, 997 F.2d 219, 222 (6th Cir. 1993); United States v. Trujillo, 376 F.3d 593 (6th Cir. 2004). The Seventh Circuit asks whether "the multiple errors so infected the jury's deliberation that they denied the petitioner a fundamentally fair trial." Alvarez v. Boyd, 225 F.3d 820, 824 (7th Cir. 2000) (reviewing a state conviction, but making no distinction between direct or habeas review). The Eighth Circuit asks whether the cumulative errors "prejudicially affected the defendant's substantial rights so as to deprive him of a fair trial." United States v. Wadlington, 233 F.3d 1067, 1077 (8th Cir. 2000). While the Ninth Circuit does not appear to have articulated a clear standard, its focus appears to be whether the errors so prejudiced the defendant as to affect the jury's deliberation. *See* United States v. Berry, 627 F.2d 193, 201 (9th Cir. 1980). The Eleventh Circuit language echoes that of the Tenth Circuit as laid out in *Rivera*. United States v. Adams, 74 F.3d 1093, 1100 (11th Cir. 1996) (asking whether "the substantial right of the defendants were . . . affected by th[e] errors"). We found no D.C. Circuit cases setting a standard for the application of a cumulative error analysis on direct review.

[133] There may be, in cases where *Brady* or *Strickland* claims are raised, another way to achieve an overall assessment of a verdict's reliability: consider all reliability-impacting

V. CONCLUSION

In this article, we have called attention to the fact that assessments of verdicts' reliability are being done piecemeal and, specifically, that the scope of review of *Strickland* prejudice, *Bagley* materiality, and cumulative harmless error analysis is not being applied as broadly as it should. Some courts recognize this. But many courts focus on what, given the history and character of the doctrines, we see as false distinctions. As Amsterdam and Bruner describe, categorization is an act of meaning-making that serves a particular function; categories become embedded over time and often cover up truths. The first truth we seek to reveal here is that the *Strickland* and *Brady* doctrines are principally reliability measures. The categorizations these errors have picked up over the years have not changed that nature and ought not obscure it. The second is that cumulative harmless error analysis, like *Strickland* prejudice and *Bagley* materiality, can only meaningfully function as a global inquiry.

For instance, in the wake of debate over incorporation of the Bill of Rights, the right to counsel became categorized as a Sixth Amendment violation. This gave state defendants greater access to counsel than they would have achieved at the time under the Fourteenth Amendment. But it did not dissolve the due process roots of the right to counsel. In the application of cumulative harmless error doctrine, *Brady* and *Strickland* violations have been categorized as multi-prong tests that do not amount to error unless the defense proves prejudice. This purports to serve interests in finality and preservation of constitutional law. But it obscures the universal reliability determination that cumulative harmless error analysis, *Brady*, and *Strickland* alike seek to achieve. Categorizations come and go. They are never final. As planes of vision alter, characterizations are always subject to adjustment. In this article, we have attempted to step back, to see that the current categorizations and apples-and-oranges comparison they promote obstruct the doctrines' unity of purpose—insuring a truly reliable verdict, and to envision new ways of assessing verdict reliability globally, by measuring the collective effect of reliability-impacting errors.

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errors within the *Strickland* prejudice and *Brady* materiality prongs. *Strickland* prejudice and *Bagley* materiality are not cumulative error analyses. But they are totality of the circumstances reviews. One can argue that to fully measure the fundamental fairness of a trial and the reliability of a verdict, considering the effect of multiple issues that affect reliability, be they error or merely events, is necessary and a proper interpretation of the scope of totality of the circumstances review under *Strickland* and *Bagley* as it has descended from the fundamental fairness measure applied in *Powell*: assessing counsel's performance in light of the totality of the circumstances means doing so in light of all trial errors that affect the evidence presented to the jury and the jury's consideration of that evidence.