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When Is An Error Not An "Error"? Habeas Corpus and Cumulative Error analysis

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WHEN IS AN ERROR NOT AN "ERROR"? HABEAS CORPUS AND CUMULATIVE ERROR ANALYSIS*

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TABLE OF CONTENTS

I. INTRODUCTION 59
II. WHY CUMULATE? 63
A. *Cumulative Error Considered on Direct Review* 64
B. *No* Stone-*Bar to Cumulate Errors on Habeas* 65
C. *The Unpersuasive Eighth Circuit* 70
III. CUMULATIVE ERROR AND FUNDAMENTAL FAIRNESS 72
A. *The Fifth Circuit "Beauty Contest"* 72
1. The Panel Majority 75
2. The *En Banc* Court 79
B. *Two Standards for Fundamental Fairness?* 80
IV. WHEN IS AN ERROR NOT AN ERROR? 85
A. *"Actual Error" or "Adverse Event"?* 85
B. *Failure to Object* 86
C. *State Law Errors* 88
V. A PROPOSED ANALYSIS OF CUMULATIVE ERROR 89

I. INTRODUCTION

Federal courts entertain petitions by state prisoners for habeas corpus relief "only on the ground that [the prisoner] is in custody in violation of the Constitution or laws or treaties of the United States."[1] Federal courts substantively and procedurally limit the types of complaints which they will entertain.[2] First, federal courts will not hear claims that evidence obtained in violation of the Fourth Amendment was admitted at the petitioner's trial as long as the petitioner had a

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[1] 28 U.S.C. § 2254 (a) (1988); 28 U.S.C. § 2241 (c)(3) (1988). For an excellent discussion of the history of the writ of habeas corpus, *see generally*, William F. Duker, *A Constitutional History of Habeas Corpus* (1980).

[2] The list of limitations in the text is not exhaustive. *See* Teague v. Lane, 489 U.S. 288 (1989) (a "new rule" will not be applied to a habeas corpus petition); McClesky v. Zant, 449 U.S. 467 (1991) (failure to raise a claim in first habeas corpus petition will bar subsequent petition absent a showing of "cause and prejudice").

"full and fair" opportunity to litigate the claim in state court.[3] Second, federal courts will not grant habeas relief where the prisoner complains of a violation of state law unless the violation amounts to a constitutional deprivation.[4] Third, a constitutional violation may not mandate issuance of the writ where a federal court determines that the error was harmless.[5] Additionally, the petitioner must not have defaulted her claims by, for example, failing to object to the alleged error at trial, or otherwise failing to follow state procedural rules.[6] Finally, a petitioner must exhaust all of his claims in state court before he may petition for federal habeas corpus relief.[7]

Typically, courts grant habeas relief based on a single, non-harmless constitutional violation. But what about the cumulative effect of several errors? Should not a court grant habeas relief where a petitioner alleges several "constitutional errors" each of which is "harmless" but which, in the aggregate, denied the petitioner of a fair trial? Or may the petitioner allege several errors of state law, none of which individually amounts to a constitutional violation, but again, had a cumulative effect on the fairness of the trial? What should federal courts do? The United States Supreme Court has not considered the use of cumulative error analysis in habeas corpus petitions and recently denied certiorari in a case which squarely presented these issues.[8]

The issue regarding the parameters of "cumulative error analysis" raises several difficult questions. First is the situation where a habeas corpus petitioner alleges several "constitutional errors," meaning specific errors which clearly violate specific constitutional standards. In this situation, federal courts employ a type of cumulative error analysis by evaluating the overall prejudice that the defendant suffered as a result of these "constitutional errors." While a court might find that a single constitutional error was harmless in a particular case, cumulative error analysis requires a court to determine whether several "constitutional errors," otherwise individually harmless, were collectively harmful. This is a "cumulation of harmlessness," which entails more of a quantitative analysis of the petitioner's trial.

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[3]Stone v. Powell, 428 U.S. 465, 486 (1976).

[4]Estelle v. McGuire, 112 S. Ct. 475 (1991).

[5]Chapman v. California, 386 U.S. 18 (1967).

[6]Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977).

[7]28 U.S.C. § 2254(b) (1988); Rose v. Lundy, 455 U.S. 509 (1982) (requiring federal courts to dismiss habeas petitions presenting any unexhausted claims).

[8]Derden v. McNeel, 978 F.2d 1453 (5th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 2928 (1993). For a discussion of cumulative error in civil cases, see Jack Kenneth Dahlberg, Jr., *Analysis of Cumulative Error in the Harmless Error Doctrine: A Case Study*, 12 TEX. TECH. L. REV. 561 (1981).

The next situation is where a habeas corpus petitioner argues errors of state law.[9] As previously indicated, claimed errors of state law are not cognizable in federal habeas corpus review. However, at some point, numerous errors of state law may operate together to deprive a petitioner of a fair trial under the Due Process Clause of the Fourteenth Amendment. Such a qualitative analysis raises questions as to the definition of a fair trial.

The final situation consists of a grey area between the situations described above. This scenario involves errors which are not state law errors, but neither are they bad enough to amount to federal constitutional errors; for example, errors which fail to meet a specific standard like "cause and prejudice." Again, such errors individually are not of constitutional dimension and thus are generally not cognizable in habeas corpus review. However, as with state law errors, at some point these types of "errors" might also aggregate to deprive one of a fair trial. This article addresses the second and third of these situations, which otherwise might fall through the cracks, precluding habeas corpus review.

A majority of federal courts entertain habeas corpus petitions requesting relief based on the "cumulative effect" of several errors, each of which, when considered alone, would not warrant habeas relief, but when taken together indicate that the petitioner has suffered a due process violation. Nonetheless, the Eighth Circuit Court of Appeals has determined that "each habeas claim must stand or fall on its own"[10] and therefore does not consider the cumulative effect of several errors on the trial. However, the Eighth Circuit does not offer a persuasive reason for this conclusion.[11]

While the vast majority of habeas petitions alleging cumulative error fail, only a few cases analyze in any detail precisely what "cumulative error analysis" entails, and even fewer define the types of "errors" which courts should consider for purposes of cumulative error analysis. Generally, when evaluating cumulative error claims, courts determine that the petitioner has not alleged any "constitutional errors" and deny relief. This approach often excludes or ignores alleged errors which individually do not reach constitutional dimensions. By excluding non-constitutional errors from the cumulative error analysis, federal courts employ a different analysis for due process violations in habeas petitions than they use in direct appeals, or in federal

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[9] A very narrow definition of state law is intended here, limited to violations of state constitutions and state statutes.

[10] Scott v. Jones, 915 F.2d 1188, 1191 (8th Cir. 1990).

[11] *See infra* Section II. C.

criminal cases.[12] In federal criminal cases, courts may reverse a conviction in one of three ways: based on a single constitutional error;[13] based on the cumulative effect of more than one constitutional but harmless error;[14] and based on the aggregate effect of several non-constitutional errors.[15] There is no persuasive reason for federal courts to employ a different standard when reviewing the fundamental fairness of a trial in habeas corpus review.

Recently, the Fifth Circuit Court of Appeals agreed to consider cumulative error claims in habeas corpus petitions, but at the same time severely limited the types of "errors" which federal courts could consider for purposes of cumulative error.[16] One such limitation is that the Fifth Circuit will not consider a violation of state law, for purposes of cumulative error analysis, unless that violation amounts to a constitutional deprivation of due process. Therefore, before the court will consider a violation of state law for purposes of cumulative error analysis, that violation must first pass the threshold of amounting to a due process violation. However, this is the same standard which errors considered individually must meet. This common standard is whether the petitioner's trial was fundamentally unfair such that "there is a reasonable probability that the verdict might have been different had the trial been properly conducted."[17] If such an error reaches this threshold, cumulative error analysis would not be necessary since the writ would be issued based on the single state law violation which deprived the petitioner of a fundamentally fair trial. This prong of the

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[12] In this article the term "direct appeal" refers to appeals taken from a state's court of last resort to the United States Supreme Court. The term "federal criminal cases" refers to cases appealed from federal district courts to federal courts of appeal and/or the United States Supreme Court. "Habeas corpus" refers to the "federal remedy available to a state prisoner who challenges the fact or duration of confinement and seeks as relief her immediate or speedier release." *Project; Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1991-1992*, 81 GEO. L.J. 853, 1562 (1993). "Collateral attack" is another way to refer to habeas corpus petitions challenging the constitutionality of the state conviction.

[13] *See* Derden v. McNeel, 938 F.2d 605, 610 (5th Cir. 1991) (panel opinion) and cases cited therein. *See also*, Lesko v. Lehman, 925 F.2d 1527 (3d Cir. 1991).

[14] *See* United States v. Rivera, 900 F.2d 1462 (10th Cir. 1990) (en banc) (allowing the cumulation of constitutional and non-constitutional errors in review of federal criminal cases).

[15] *Id.*

[16] Derden v. McNeel, 978 F.2d 1453 (5th Cir. 1992) (en banc). Arguably, the Fifth Circuit recognized cumulative error analysis in habeas corpus review in Mullen v. Blackburn, 808 F.2d 1143 (5th Cir. 1987). However, in *Mullen*, the court did not devote much discussion to cumulative error analysis, but it denied the petition on the grounds that the petitioner had failed to allege any errors at all stating, "[t]wenty times zero equals zero." *Id.* at 1147.

[17] Kirkpatrick v. Blackburn, 777 F.2d 272, 279 (5th Cir. 1985), *cert. denied*, 476 U.S. 1178 (1986); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991), *rev'd*, 978 F.2d 1453 (5th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 2928 (1993).

Fifth Circuit's analysis amounts to allowing courts to consider only the cumulative effect of constitutional, but individually harmless errors, and is different from the analysis used in the review of federal criminal cases. Rather than dismiss errors which individually are not "constitutional errors," federal courts should more closely examine what constitutes an "error" and then proceed to evaluate the cumulative effect of the errors.

This article first addresses the question of whether courts should consider cumulative error analysis in habeas corpus cases, or whether the Eighth Circuit Court of Appeals is correct that each error must stand on its own. After concluding that cumulative error analysis should be a cognizable issue in habeas corpus petitions, the question of whether courts should employ a different standard for habeas petitions alleging cumulative error is addressed. Emphasis is placed on the Fifth Circuit case, *Derden v. McNeel*,[18] and that court's rationale for imposing limitations on habeas corpus petitions alleging cumulative error. The Fifth Circuit's four-prong test for evaluating petitions alleging a due process violation based on the cumulative effect of "errors" is critiqued. Finally, this article proposes a standard for cumulative error analysis that more carefully defines "error" and suggests that habeas corpus counsel point to specific legal standards violated by the alleged error. This standard requires that federal courts consider a broader range of "errors" as well as the relationship among the errors, in order to evaluate whether a trial was fundamentally unfair.

II. WHY CUMULATE?

There are at least three reasons why an allegation that aggregated errors deprived the petitioner of a fair trial is a cognizable claim in habeas corpus petitions. First, federal courts already consider the cumulative effect of errors on direct review. Second, there is no reason to exclude cumulative error analysis from the scope of habeas corpus review since such a claim is premised upon the Due Process Clause of the Fourteenth Amendment and falls outside the scope of *Stone v. Powell*, which excluded Fourth Amendment claims from habeas corpus review. Finally, the only circuit which refuses to cumulate errors alleged in habeas petitions has provided little analysis as to why courts should not cumulate errors.

[18] 978 F.2d 1453 (5th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 2928 (1993).

A. *Cumulative Error Considered on Direct Review*

In *Taylor v. Kentucky*,[19] the Supreme Court accepted the notion that several errors, none of which individually rise to constitutional dimensions, may have the cumulative effect of denying a defendant a fair trial. *Taylor* involved a direct appeal from a state court conviction of robbery which had been affirmed by the Kentucky Court of Appeals.[20] The Supreme Court reversed based on the following: 1) the trial judge rejected the defendant's presumption of innocence instruction; 2) the prosecutor was allowed to read the indictment to the jury in the absence of an instruction to the jury that the indictment did not constitute evidence; 3) the prosecutor improperly made comments linking the defendant to every defendant previously sentenced to prison;[21] and 4) the instructions which were given by the judge were "skeletal, placing little emphasis on the [state's burden] to prove the case beyond a reasonable doubt and none at all on the jury's duty to judge [the defendant] only on the basis of the testimony heard at trial."[22]

The Court acknowledged that the phrase "presumption of innocence . . . may not be constitutionally mandated,"[23] but in *Taylor*, such an instruction was essential to a fair trial due to the other circumstances listed above. Significantly, the Court did not expressly find that the failure to instruct on the presumption of innocence constituted reversible error. Rather, the Court examined the absence of this instruction along with the effect of other alleged errors. As to the prosecutor's comments, the Court stated that "standing alone, [such comments] would [not] rise to the level of reversible error. . . . They are relevant to the need for carefully framed instructions designed to assure that the accused be judged only on the evidence."[24] In fact, the Court even hedged on concluding that some of the prosecutor's comments were improper, stating, "the *combination* of the skeletal instructions, the *possible* harmful inferences from the references to the indictment, and the repeated suggestions that [defendant's] status as a defendant tended to establish his guilt created a genuine danger that

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[19] 436 U.S. 478 (1978).

[20] The Supreme Court of Kentucky denied discretionary review. *Id.* at 483.

[21] Specifically, the prosecutor stated that the defendant "like every other defendant who's ever been tried who's in the penitentiary or in the reformatory today has the presumption of innocence until proved guilty beyond a reasonable doubt." *Id.* at 486. The Court found that this statement "could be viewed as an invitation to the jury to consider petitioner's status as a defendant as evidence tending to prove his guilt." *Id.* at 487.

[22] *Id.* at 486.

[23] *Id.* at 485.

[24] *Id.* at 487, n.14.

the jury would convict . . . [defendant] on the basis of those extraneous considerations."[25]

The Court did not decide whether the trial court committed reversible error by refusing to instruct the jury that the indictment was not evidence. Furthermore, the Court declined to hold that the judge's instruction defining guilt "beyond a reasonable doubt" as "a substantial doubt, a real doubt," constituted reversible error. Instead, the Court stated that "the *cumulative effect* of the potentially damaging circumstances of this case violated the *due process guarantee of fundamental fairness* in the absence of an instruction as to the presumption of innocence."[26]

Taylor demonstrates that in the absence of any individually reversible errors, the Supreme Court has considered the cumulative effect of several errors with respect to a claim alleging that the defendant was denied a fair trial. In *Taylor*, the Court did not assess each error to determine whether it was individually harmless. As to at least one error, the Court did not expressly find that an alleged error actually constituted "error." Nor did the Court concern itself only with errors which individually were of constitutional dimension. Rather, the Court evaluated the circumstances surrounding the defendant's trial to determine that the state had denied the defendant fundamental fairness as guaranteed by the Due Process Clause of the Fourteenth Amendment. Again, this is a claim that the petitioner was denied a *fair trial* by a state court, and except for the procedural posture of the case, is no different from a federal habeas corpus petition challenging the fairness of the trial. Certainly, if federal courts will hear direct appeals alleging a denial of fundamental fairness based on a cumulation of several errors, they must also entertain such claims asserted in habeas corpus petitions.

B. *No* Stone-*Bar to Cumulate Errors on Habeas*

As discussed above, federal courts have applied cumulative error analysis in federal criminal cases to determine whether the aggregate effect of errors at trial was so prejudicial as to require a reversal.[27] Under cumulative error, a petitioner essentially alleges that she was deprived of fundamental fairness due to accumulated errors at trial

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[25] *Id.* at 487-88 (emphasis added).

[26] *Id.* n.15 (emphasis added).

[27] United States v. Rivera, 900 F.2d 1462 (10th Cir. 1990) (en banc) (denied reversal of conviction based on the cumulative effect of otherwise harmless errors); United States v. Wallace, 848 F.2d 1464 (9th Cir. 1988); United States v. Birdsell, 775 F.2d 645, 654 (5th Cir. 1985), *cert. denied*, 476 U.S. 1119 (1986).

which individually are not constitutional violations. In effect, the petitioner claims a Fourteenth Amendment due process deprivation. While the Supreme Court has eliminated habeas corpus review of Fourth Amendment violations in *Stone v. Powell*,[28] a due process claim based on the cumulative effect of errors falls outside the parameters of *Stone*, which the Court has subsequently limited to Fourth Amendment exclusionary rule violations.

The petitioners in *Stone* sought habeas corpus relief on the basis that illegally obtained evidence had been introduced at their state trials. The Supreme Court addressed:

> whether a federal court should consider, in ruling on a petition for habeas corpus relief filed by a state prisoner, a claim that evidence obtained by an unconstitutional search or seizure was introduced at his trial, when he has previously been afforded an opportunity for full and fair litigation of his claim in the state courts.[29]

The Court balanced the justifications for enforcing the Fourth Amendment via the exclusionary rule on collateral attack against intrusion on the values of finality and federalism when federal courts grant habeas relief to state prisoners. For several reasons, the Court concluded that federal courts were not to entertain claims of exclusionary rule violations on collateral attack.[30]

First, the Court stated that the exclusionary rule, applied to the states in *Mapp v. Ohio*,[31] is not "a personal constitutional right,"[32] but rather serves to deter future Fourth Amendment violations and thus should only be applied where "'its remedial objectives are thought most efficaciously served.'"[33] The Court found that collateral considerations of Fourth Amendment violations would only "add marginally to an awareness of the values protected by the Fourth Amendment,"[34] given the likelihood that a habeas claim could occur years after the alleged violation.

Second, the Court emphasized that allegations that illegally obtained evidence was admitted at trial rarely involved questions that the conviction was unreliable. In fact, the Court stated that "the physical evidence sought to be excluded is typically reliable and often the most

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[28] 428 U.S. 465 (1976).

[29] *Id.* at 469.

[30] For a discussion of this balancing, see Peter McCormack, Comment, *Habeas Corpus and Due Process: Stone v. Powell Restricted*, 17 HOUS. L. REV. 923, 928-30 (1980).

[31] 367 U.S. 643 (1961).

[32] *Stone*, 428 U.S. at 486.

[33] *Id.* at 486-87 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

[34] *Id.* at 493.

probative information bearing on the guilt or innocence of the defendant."[35]

The Court further stated that habeas corpus petitions "for purposes other than to assure that no *innocent* person suffers an unconstitutional loss of liberty results in serious intrusions on values important to our system of government."[36] This suggests that the Court's reasoning could apply to exclude from habeas review other claims that are not relevant to a petitioner's guilt or innocence.[37] The broad justifications which the Court relied on to limit habeas corpus review disturbed several commentators who feared that the court was preparing to exclude other claims from habeas review, especially if the claims did not bear directly on the guilt or innocence of the petitioner.[38]

The Court has been restrained in extending the application of *Stone.* For example, in *Kimmelman v. Morrison,*[39] the Court refused to extend *Stone* to preclude habeas corpus review of a Sixth Amendment claim of ineffective assistance of counsel based on the trial attorney's failure to seek exclusion of allegedly illegally obtained evidence. Over defense counsel's objection, the trial court permitted the prosecutor to introduce the evidence ruling that defense counsel should have made a pre-trial suppression motion. Upon the Supreme Court's consideration of the habeas petition, the state argued that the Court should not allow the petitioner to circumvent the *Stone*-bar by stating his claim as one of ineffective assistance of counsel, rather than the admission of illegally obtained evidence. However, the Court reasoned that the Sixth Amendment right to effective counsel is a "fundamental right . . . [and] assures the fairness, and thus the legitimacy, of our adversary process."[40] In contrast, the exclusionary rule is simply a judicially created remedy to safeguard Fourth Amendment rights. Thus, when an asserted right goes to the fairness and reliability of a conviction, *Stone* will not apply to bar federal habeas corpus review.

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[35] *Id.* at 490.

[36] *Id.* at 491 (emphasis added). For a discussion of the "costs" of federal habeas corpus review, see Sandra Day O'Connor, *Habeas Corpus and Judicial Federalism: Some Thoughts on Finality, Comity and Error Correction,* PUB. INTEREST L. REV. ANN. 3 (1992).

[37] *See* Robert Weisberg, *A Great Writ While it Lasted,* 81 J. CRIM. L. & CRIMINOLOGY 9, 13 n.28 (1990).

[38] Robert M. Cover and T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court,* 86 YALE L.J. 1035, 1086-95 (1977); Neil McFeeley, *Habeas Corpus and Due Process: From Warren to Burger,* 28 BAYLOR L. REV. 533, 553 (1976). *See also,* Erwin Chemerinsky, *Thinking About Habeas Corpus,* 37 CASE W. RES. L. REV. 748, 786 (1987). *But see,* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. CHI. L. REV. 142 (1970).

[39] 477 U.S. 365 (1986).

[40] *Id.* at 375.

Kimmelman substantially limited *Stone* by emphasizing the importance of the right to effective assistance of counsel. However, this result, along with other cases considering a *Stone*-bar, implies a hierarchy of constitutional rights based upon the relationship of a particular right to the guilt or innocence of the petitioner.[41] Nonetheless, while *Stone* seemed to hint at requiring the petitioner to make a colorable claim of innocence, in *Kimmelman*, the court relied more generally on the significance of effective counsel to the fairness, and thus reliability of a criminal trial.

In *Jackson v. Virginia*,[42] the Court refused to apply *Stone* to habeas petitions alleging that the conviction had been obtained on insufficient evidence. In *Jackson*, the petitioner, while admitting that he committed homicide, claimed that the evidence regarding premeditation was insufficient to support a first degree murder conviction. The state argued that *Stone* bars federal habeas corpus review once a defendant has received a full and fair hearing in the state courts regarding a sufficiency of the evidence claim. The Court rejected this argument, reasoning that pursuant to *In re Winship*,[43] due process under the Fourteenth Amendment requires that state prosecutions be supported upon proof of each element beyond a reasonable doubt, and that this issue is "central to the basic question of guilt or innocence."[44] As in *Kimmelman*, the Court appeared to rely, not on whether the petitioner can claim actual innocence, but rather whether the right she asserts is one which bears directly on the reliability of the conviction, and thus on the issue of her guilt or innocence.

As to an issue not relating to guilt or innocence, the Supreme Court refused to extend the *Stone*-bar to habeas petitions alleging constitutional violations implicating the integrity of the judiciary in *Rose v. Mitchell*.[45] In *Rose*, the petitioner alleged that the grand-jury foreman had been selected in a discriminatory manner, violating the Equal Protection Clause of the Fourteenth Amendment. The Court distinguished the *Stone* justification that state courts are equally capable of adjudicating Fourth Amendment claims. In *Rose*, the Court stated that where a petitioner alleges that the "state judiciary itself engages in discrimination in violation of the Fourteenth Amendment, there is a

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[41] *See*, Kevin J. O'Brien, Comment, *Federal Habeas Review of Ineffective Assistance Claims: A Conflict Between Strickland and Stone?*, 53 U. CHI. L. REV. 183 (1986).

[42] 443 U.S. 307 (1979).

[43] 397 U.S. 358 (1970).

[44] *Jackson*, 443 U.S. at 323.

[45] 443 U.S. 545 (1979). *See also*, William F. Duker, *Rose v. Mitchell and Justice Lewis Powell: The Role of Federal Courts and Federal Habeas*, 23 HOW. L.J. 279 (1980).

need to preserve independent federal habeas review . . . ."[46] The Court also stressed the integrity of the judicial system as a concern substantially greater in the context of grand jury discrimination cases than in the context of violations of the exclusionary rule. "The claim that the court has discriminated on the basis of race . . . brings the integrity of the judicial system into direct question."[47] Thus, even where a particular right has little, if any, relevance to the guilt or innocence of the habeas petitioner, federal courts will entertain such allegations on habeas corpus review if the right bears on the integrity of the judicial system.

Most recently, in *Withrow v. Williams*,[48] the Court refused to extend *Stone* to claims that a statement obtained in violation of *Miranda v. Arizona*[49] was introduced at trial. The Court reasoned that, unlike the exclusion of illegally obtained physical evidence mandated by *Mapp*, *Miranda* "safeguards a 'fundamental *trial* right.'"[50] Furthermore, in *Stone*, the Court relied in part on the inherent reliability of the illegally seized evidence as a reason for foreclosing habeas review if the petitioner had a full and fair opportunity to litigate the Fourth Amendment claim in state court. In contrast, the Court in *Withrow* stated that the right protected by *Miranda* did not "serve some value necessarily divorced from the correct ascertainment of guilt,"[51] but rather many statements obtained in violation of *Miranda* may be *unreliable*. As in *Kimmelman* and *Jackson*, the Court emphasized the importance of the right asserted by the petitioner and how that right has the potential to diminish the reliability of the conviction, thus necessitating independent federal habeas review.[52]

Regardless of whether *Stone* was correctly decided, given subsequent limitations on the application of *Stone*, it is not a bar to habeas corpus relief based on the allegation that the petitioner was denied a fair trial due to the aggregate effect of several errors, each of which is either harmless, or individually fails to amount to a "constitutional error."

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[46] *Id.* at 563.

[47] *Id.*

[48] 113 S. Ct. 1745 (1993).

[49] 384 U.S. 436 (1966).

[50] *Withrow*, 113 S. Ct. at 1753 (quoting United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (emphasis added)).

[51] *Id.*

[52] In another recent case, *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1720 (1993), the Court cited to *Stone* in applying a different standard for determining the harmlessness of constitutional errors in habeas corpus petitions than the standard used on direct review. However, *Stone* is relevant to the question of whether federal courts may exclude certain types of claims from habeas corpus review. The issue of whether federal courts should entertain a particular claim in habeas petitions is different from the question of what standards federal courts should apply when reviewing a habeas claim rather than a claim on direct review.

Again, this type of allegation is premised on the Due Process Clause of the Fourteenth Amendment. It therefore involves the integrity of the state judiciary, similar to the issues involved in *Rose*, especially where the petitioner claims that the trial judge's conduct contributed to the unfairness of his trial. As in *Rose*, where the state judge is accused of impairing the fairness of a defendant's trial, a defendant should have a federal forum. Similar to the Sixth Amendment right to effective assistance of counsel and the Fourteenth Amendment Due Process rights asserted in *Kimmelman* and *Jackson*, a Fourteenth Amendment Due Process right to a fair trial is a fundamental, trial, and personal right, since it alleges that the petitioner has been denied fundamental fairness.[53] Furthermore, where alleged errors are relevant to the credibility of the witnesses,[54] as in *Derden v. McNeel*,[55] such a claim can bear directly on the reliability of the verdict and thus relate to the guilt or innocence of the habeas petitioner. Thus, *Stone* does not exclude allegations of cumulative error resulting in a deprivation of due process from habeas corpus review.

C. *The Unpersuasive Eighth Circuit*

The Eighth Circuit is the only federal jurisdiction which refuses to cumulate Due Process errors alleged by a habeas petitioner. However, this circuit has never provided detailed reasoning for refusing to consider the aggregate effect of alleged errors. Instead, the Eighth Circuit has used sweeping language in its first case considering the question which subsequent opinions have routinely quoted.

In *Lee v. Lockhart*,[56] the petitioner argued that evidence obtained in violation of the Fourth Amendment had been admitted at his trial. The court, citing *Stone v. Powell*, held that such an error is not a cognizable issue since the petitioner received a full and fair opportunity to litigate his Fourth Amendment claim. The petitioner attempted to avoid the *Stone*-bar by arguing that this was not the only alleged error. In this context, when the petitioner alleged an error which federal courts are not to consider at all, the court stated that "[e]ach claim of a constitutional deprivation asserted in a petition for federal habeas

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[53] In *Strickland v. Washington*, 466 U.S. 669, 698 (1984), the Court describes an ineffective assistance of counsel claim as an "attack on the fundamental fairness" of the trial. The Court then states that "fundamental fairness is the central concern of the writ of habeas corpus." *Id.*

[54] *See* United States v. Wallace, 848 F.2d 1464 (9th Cir. 1988), *aff'd*, 902 F.2d 1578 (1990).

[55] 978 F.2d 1453 (5th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 2928 (1993).

[56] 754 F.2d 277 (8th Cir. 1985).

corpus must stand on its own, or, as here, fall on its own, and Lee's Fourth Amendment claim must fall under *Stone*."[57]

This was the extent of the court's analysis. In fairness to the court, the petitioner in *Lee* did not allege that several errors cumulatively deprived him of a fair trial; rather, he argued that the court should consider the Fourth Amendment violation because this was not his sole claim of error.

In subsequent Eighth Circuit cases, the court has routinely quoted the above language from *Lee* and refused to consider the cumulative effect of otherwise cognizable habeas corpus claims on the petitioner's trial.[58] Certainly, where federal courts will not hear particular claims at all, the petitioner may not avoid such rules by arguing that there are other errors. Similarly, where a petitioner has failed to exhaust all of his claims in the state courts, he may not avoid the exhaustion requirement by arguing that he has also alleged claims which he has exhausted. This would defeat the purpose of the exhaustion requirement.[59] However, unlike Fourth Amendment claims and non-exhausted claims, federal courts will entertain petitions alleging errors which deprived the petitioner of a fair trial. Such claims come under a due process analysis and have yet to be excluded by the Supreme Court from habeas corpus jurisdiction. Thus, the Eighth Circuit's refusal to consider the aggregate effect of alleged errors is unsupported and unpersuasive.

Furthermore, while the Eighth Circuit will not consider errors which individually are not of constitutional dimension in habeas corpus claims, the court *will* consider the cumulative effect of counsel's errors for purposes of a Sixth Amendment violation alleged in a habeas corpus petition.[60] In *Harris v. Housewright*,[61] the petitioner sought habeas corpus relief, claiming that he did not receive effective assistance of counsel at his state trial and pointed to several "errors" made by his appointed counsel. The Eighth Circuit stated that "[n]o single error made by the petitioner's appointed counsel is of constitutional dimension. Yet, when viewed *cumulatively*, the multiple errors . . . demonstrate that counsel's total performance was below the level

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[57] *Id.* at 279.

[58] Scott v. Jones, 915 F.2d 1188, 1191 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1626; Byrd v. Armentrout, 880 F.2d 1, 11 (8th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990); Cooley v. Lockhart, 839 F.2d 431, 432 (8th Cir. 1988); Wedemann v. Solem, 826 F.2d 766, 767 (8th Cir. 1987); Hobbs v. Lockhart, 791 F.2d 125, 127-28 (8th Cir. 1986).

[59] Rose v. Lundy, 455 U.S. 509 (1982).

[60] Harris v. Housewright, 697 F.2d 202, 206 (8th Cir. 1982).

[61] 697 F.2d 202 (8th Cir. 1982).

of professional skill."[62] The court expressly rejected the State's argument that the court should evaluate each mistake individually, stating, "[w]e cannot . . . view the individual mistakes committed by the petitioner's attorneys in isolation. The record, viewed as a whole, establishes that the defense counsel's [sic] overall performance and the *cumulative effect* of their multiple errors denied Harris effective assistance."[63]

There is no reason to refuse to cumulate errors for purposes of a Fourteenth Amendment due process claim, but to permit the accumulation of errors for purposes of a Sixth Amendment ineffective assistance of counsel claim. Furthermore, the Eighth Circuit does not explain the reason for this inconsistency. If several errors by counsel, each of which individually do not amount to a Sixth Amendment violation, but cumulatively may have deprived a person of effective assistance of counsel, then several trial errors cumulatively may have deprived a person of Fourteenth Amendment Due Process. There is no reason to distinguish between these two fundamental *trial* rights.

III. CUMULATIVE ERROR AND FUNDAMENTAL FAIRNESS

As discussed earlier, most federal courts devote little analysis to the appropriate parameters of a cumulative error claim. In federal criminal cases where a defendant has alleged cumulative error, federal courts examine whether the errors rendered the trial fundamentally unfair. A trial is fundamentally unfair if "there is a reasonable probability that the verdict might have been different had the trial been properly conducted."[64] Except for the Eighth and Fifth Circuits, no federal courts make an explicit distinction between cumulative error alleged in direct appeals and cumulative error in habeas corpus petitions. While the Eighth Circuit's discussion of the distinction is cursory, in *Derden v. McNeel*,[65] the Fifth Circuit recently provided explanations for analyzing cumulative error in habeas petitions differently.

A. *The Fifth Circuit "Beauty Contest"*[66]

Mr. George Guy Derden was convicted of burglary in the Circuit Court of Clay County, Mississippi and was sentenced to seven years in

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[62] *Id.* at 206 (emphasis added).

[63] *Id.* at 212 (emphasis added).

[64] Kirkpatrick v. Blackburn, 777 F.2d 272, 278-79 (5th Cir. 1985), *cert. denied*, 476 U.S. 1178 (1986).

[65] 978 F.2d 1453 (5th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 2928 (1993).

[66] *Derden*, 978 F.2d at 1463 (Garza, J., dissenting).

prison.[67] The burglary for which he was convicted occurred February 10, 1983; however, Mr. Derden was not indicted until October, 1985, and his trial began on April 14, 1986. At trial, the State presented the testimony of three individuals who admitted involvement in the burglary: Willie Sherrod, Jay Posey, and Tommy Turner.[68] They testified that the burglary had been planned by Ricky Forrestor, who was not charged and did not testify at trial.[69] These three testified that they accompanied Mr. Derden, and his girlfriend, Pam Smith, in his van on the drive from West Point, Mississippi to Wade's Grocery in Pheba and participated in the burglary which was interrupted by an approaching car. They estimated that the burglary had occurred between 12:00 a.m. and 1:00 a.m. The witnesses who had chased off the burglars testified that they had called the deputy sheriff to report the incident at 1:00 a.m.[70] However, the police log which the state failed to produce showed that the call had not been made until 2:05 a.m.[71]

The three burglars testified that upon being chased off, Turner, Smith, and Derden drove away, leaving Sherrod and Posey stranded.[72] Sherrod and Posey then obtained a ride back to West Point from two farmers who testified that they arrived in West Point by 2:00 a.m. and returned to Pheba by 2:30 a.m. Turner testified that Mr. Derden drove himself, Turner, and Smith to Houston, Mississippi, taking back roads, stopping for gas and to fix a defective tail light, before returning to West Point. Sheriff McNeel had Turner duplicate the route and estimated that it took Derden, Turner, and Smith three hours and fourteen minutes to drive from the scene of the burglary to Houston and back to West Point.[73] However, the testimony of the state's witnesses established that the burglary had occurred at 12:30 a.m., and Sherrod and Posey testified that when they returned to West Point at 2:00 a.m., Turner and Derden were already there.[74]

Mr. Derden maintained that he did not participate in the burglary. He testified that on the day of the burglary, Sherrod, an employee at Derden's carpet store, asked to swap cars with Derden.[75] The two later met at the Apollo Club and traded cars. Derden testified that he

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[67] Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991) (panel opinion) (citing 522 So. 2d 752 (Miss. 1988)).

[68] *Id.* at 607.

[69] *Id.* at 608.

[70] *Id.*

[71] *Id.* at 617.

[72] *Id.* at 608.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 608-09.

and Smith then drove to Houston to measure homes for carpet installation, asking a police officer in Houston for directions and stopping for gas. While Derden produced the receipt for the gas, he could not remember the location of the homes he had measured for carpet. Smith testified that she had been present when Sherrod asked to borrow Derden's van and when the two swapped cars.[76] She also stated that she had gone with Derden to Houston to measure homes for carpet. Two other witnesses testified that they were also present and heard Sherrod ask to borrow the van on the night of the burglary.[77]

The jury convicted Derden of burglary and the judge sentenced him to seven years in prison. Sherrod, Posey, and Forrestor were not indicted for burglary, and Turner received a five-year suspended sentence with five-years probation.[78]

Mr. Derden appealed his conviction to the Mississippi Supreme Court which determined that Mr. Derden alleged only one error worthy of discussion, that the prosecutor improperly sought commitments from the jurors during voir dire that they would view the testimony of the co-conspirators as they would any other witness.[79] Mr. Derden's counsel had objected to the prosecutor's repeated question, but the judge overruled these objections.[80] The Mississippi Supreme Court acknowledged that the prosecutor's questions violated state law. However, the Mississippi Supreme Court determined that the trial court cured the error by instructing the jury at the end of the trial that they were to "regard this testimony [of the co-conspirators] with great suspicion and to consider it with caution."[81] The court then summarily dismissed Mr. Derden's other allegations of error, stating, "[t]he other assignments of error have been studied and are without merit and unworthy of discussion."[82]

Mr. Derden then petitioned for habeas corpus relief in federal court, alleging the same errors he had alleged in his direct appeal to the state supreme court. The magistrate determined that no individual error alleged by Mr. Derden entitled him to habeas corpus relief, but that "the trial judge's demeanor *coupled with* the prosecutor's overzealous actions combined to produce a prejudicial atmosphere

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[76] *Id.* at 609.

[77] *Id.*

[78] *Id.*

[79] Derden v. State, 522 So. 2d 752, 753-54 (Miss. 1988).

[80] *Id.*

[81] *Id.* at 754.

[82] *Id.* at 755.

throughout petitioner's trial,"[83] thus entitling Mr. Derden to habeas corpus relief.

The district court determined that while the Fifth Circuit has "indicated a willingness to consider the cumulative prejudice resulting from trial errors in direct appeals, . . . it has also indicated that cumulative error is not a proper basis upon which to grant habeas corpus relief."[84] Relying on *Mullen v. Blackburn*,[85] the district court concluded that the Fifth Circuit did not recognize cumulative error analysis in habeas petitions.

1. The Panel Majority

The Fifth Circuit panel opinion accepted the doctrine of cumulative error as a basis for habeas corpus relief for the purpose of determining whether the petitioner was denied a fair trial.[86] The court acknowledged that while the Fifth Circuit had not expressly recognized cumulative error in habeas petitions, the Fifth Circuit had considered cumulative error allegations in direct appeal cases, and the majority of sister circuits permit such allegations in habeas petitions.[87] The court emphasized that cumulative error analysis involves a "Fourteenth Amendment Due Process inquiry," and therefore they were not creating new law, but merely "applying that which was secured to the accused over two hundred years ago."[88] Explaining the application of cumulative error analysis, the court stated that "[t]here is no set formula and each case must be independently examined."[89] The reviewing court must determine "whether the trial taken as a whole is fundamentally unfair."[90] While this does not mean that a petitioner is entitled to a perfect trial,[91] if "there is a reasonable probability that

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[83] Magistrate's Report and Recommendation, 31 (emphasis added).

[84] District Court Memorandum Opinion, 2-3 (citations omitted). Alternatively, the district court found that Mr. Derden's petition was not "one where the aggregate of the errors produced a trial that was so fundamentally unfair that petitioner was denied due process of law." *Id.* at 4.

[85] 808 F.2d 1143, 1147 (5th Cir. 1987) (the court found that the petitioner had failed to allege any error at all, stating, "[t]wenty times zero equals zero.").

[86] Derden v. McNeel, 938 F.2d 605, 609-10 (panel opinion), (5th Cir. 1991), *cert. denied*, 112 S. Ct. 3028 (1992).

[87] *Id.* at 610.

[88] *Id.* at 610.

[89] *Id.* at 609.

[90] *Id.*

[91] *See* Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) ("the Constitution entitles a criminal defendant to a fair trial, not a perfect one.").

the verdict might have been different had the trial been properly conducted," then the trial lacked fundamental fairness.[92]

Applying this standard for fundamental fairness, the panel agreed with the magistrate that due to the cumulative effect of the judge's conduct during trial,[93] the prosecutor's improper questions,[94] and the weakness of the evidence against Mr. Derden, he suffered a due process violation entitling him to habeas corpus relief.[95] Similar to the Supreme Court's holding in *Taylor*,[96] the panel majority found that when considered individually, the above three "errors" did not require habeas corpus relief. However, their cumulative effect rendered Mr. Derden's trial fundamentally unfair.[97]

The panel found that the prosecutor's repeated attempts during voir dire to secure the jury's agreement to view the testimony of the co-conspirators as they would that of any other witness contributed to a denial of due process.[98] The prosecutor was allowed to ask the jurors *seven* times whether they would believe the testimony of the admitted burglars. While each question was slightly different, the following is representative:

> . . . as I understand it, you are all telling me that you will weigh [the co-conspirator's] testimony as you would anybody else's. If anybody says that they cannot do that, that they could not weigh their testimony as they would anybody else's would you please indicate it now by raising your hand?[99]

The Mississippi Supreme Court found this questioning incorrectly stated the law that jurors must view the uncorroborated testimony of an accomplice "with great caution and suspicion."[100] Despite the fact that defense counsel objected four times to this questioning, the judge did not sustain the objection, nor did he instruct the jury as to the correct state of the law when defense counsel objected. Instead, the judge stated, "[a]ll right, the record will reflect your objection.

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[92] *Derden*, 938 F.2d at 609-10 (quoting Kirkpatrick v. Blackburn, 777 F.2d 272, 278-79 (5th Cir. 1985), *cert. denied*, 476 U.S. 1178 (1986)).

[93] *Id.* at 611-15.

[94] *Id.* at 615-17.

[95] *Id.* at 618.

[96] *See supra*, Section IIA.

[97] *Derden*, 938 F.2d at 618.

[98] *Id.* at 615-17.

[99] *Id.* at 615-16. The prosecutor also asked the following questions: "would . . . anybody simply disregard the testimony of [the co-conspirator's] simply because of a plea bargain arrangement with them?" "Do any of you feel that such testimony from such witnesses is inherently untruthful?" *Id.*

[100] *Id.* at 616 (panel opinion).

You may proceed. . . . The Court will instruct them on that, Counselor, at the proper time."[101] At the end of the trial, the judge instructed the jury that they were "to regard this testimony [of the co-conspirator] with great suspicion and caution."[102] While the Mississippi Supreme Court found that this cured the error, the Fifth Circuit disagreed stating that "[t]his miniscule instruction at the end of the trial could not possibly have overcome the damage that was done at voir dire."[103]

The prosecutor also improperly elicited evidence of other crimes allegedly committed by Mr. Derden, from co-conspirator Sherrod.[104] Defense counsel cross-examined Sherrod on his motive for testifying against Derden. Sherrod admitted that he faced charges for prior criminal activity which the prosecutor had agreed to drop. On redirect, the prosecutor began to question Sherrod further on these other crimes. Defense counsel objected, stating that he believed the prosecutor was about to ask an improper question.[105] The judge overruled the objection and the prosecutor asked Sherrod, "[i]n all of these robberies . . . who was involved with you?"[106] Sherrod responded, "George Derden." Upon defense counsel's second objection the judge stated, "[a]ll right the objection is now sustained, and the jury will be admonished to disregard that remark." Although the judge immediately instructed the jury to disregard the statement, the panel found that the prosecutor "blatantly disregarded the law of Mississippi and introduced evidence of another crime separate from that charged in the indictment."[107] The panel stated that this conduct alone would not require habeas corpus relief but it "contributed significantly to [Mr. Derden's] deprivation of due process."[108]

The panel also quoted several portions of the trial transcript which demonstrated that conduct by the judge "tended to lead the jury to believe that Derden and his counsel were not to be believed."[109] During defense counsel's opening statement, the judge sustained several

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[101] *Id.* at 615-16.

[102] *Id.* at 616 n.3.

[103] *Id.* at 616. As to the need for immediate curative instructions, see United States v. Dansker, 537 F.2d 40, 63 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

[104] *Derden*, 938 F.2d at 616-17.

[105] Specifically, defense counsel stated, "[y]our Honor . . . I object to this and I'd like to make a record on it probably outside the presence of the jury. It's improper [re]direct; it's grossly improper as [the prosecutor] knows and I'd like to make a record on this because I think I know what he's fixing to try to do." *Derden*, 938 F.2d at 616.

[106] *Id.*

[107] *Id.* at 617.

[108] *Id.*

[109] *Id.* at 611.

of the prosecutor's objections on the basis that defense counsel was arguing his case.[110] However, the record indicates that defense counsel was attempting to walk the jury through the complicated and contradictory state's evidence to show that Mr. Derden could not possibly have been involved in the burglary.[111] The judge also chastised defense counsel in the absence of an objection.[112]

The trial judge also reprimanded Mr. Derden on several occasions. Mr. Derden testified that he had filled the van with gas the same day Sherrod asked to borrow it. Turner had testified that upon returning to West Point after the burglary, he and Mr. Derden had stopped for gas. Defense counsel asked whether, assuming Turner was telling the truth, the van would have needed gas. Mr. Derden responded, "[t]hat van could have gone to Memphis, Tennessee without needing any gas."[113] Defense counsel then attempted to introduce into evidence Derden's receipt showing that Derden had filled the van with gas. The judge interrupted with the following: "Let me caution the witness. Mr. Derden, I don't care if it [the van] had gone to Memphis or Chicago and the jury don't [sic] care either; just answer his question, do you understand?"[114]

The Fifth Circuit panel found that this testimony was crucial. "Derden wanted to discredit Turner's testimony that the van used in the burglary had gassed up in Houston," concluding that "[t]his is important because the trial judge's comment seemed to indicate he did not care whether the van would have needed any gas in Houston."[115] When defense counsel attempted to enter into evidence business records showing where he had installed carpet the following day, the prosecutor objected that they were not relevant. The judge stated, "[c]ounsel, he's testified where he was. Now I don't know what you're trying to do with the records. . . . I am not going to let these records in. He can testify where he was and what he did."[116]

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[110] *Id.*

[111] *Id.*

[112] The following is one such occasion. When attempting to recross Sherrod on whether he had an opportunity to talk to the other co-conspirators, the judge stated "[c]ounsel, what difference does it make if he had an opportunity to talk every day if he didn't talk. Cross examine him on the times he did talk to them." The judge also demonstrated that he was not paying attention when during defense counsel's closing argument, the prosecutor made an objection to which the judge responded, "I just wasn't paying any attention; I don't know what was said, Counsel, but you may proceed." *Id.* at 612.

[113] *Id.*

[114] *Id.*

[115] *Id.* at 613.

[116] *Id.*

On cross-examination of Mr. Derden, the prosecution indicated that there was nothing on the gas receipt to indicate when it had been made, and Mr. Derden responded, "[w]ell, I've been in jail, ladies and gentlemen, since January twenty, eighty-[sic]eighty-five . . . ."[117] The judge interrupted, "[j]ust a minute. Face the lawyer and answer the lawyer's questions, and you do not address the jury, you understand? I'm not going to caution you about this again."[118] The panel stated "[s]uch a remark was inexcusable and could leave no other impression with the jury [than] that Derden was guilty."[119]

While the panel concluded that the judge's comments considered individually did not deny Mr. Derden a fair trial, when considered together, they "substantially contributed to [Mr. Derden's] deprivation of due process."[120]

The final contributing factors were the prosecutor's suppression of a police radio log, and the weak and contradictory evidence given by the co-conspirators.[121] The radio log indicated that the witnesses who chased off the burglars called the police at 2:05 a.m. This could have been used to impeach these witnesses since they had testified that they called at 1:00 a.m. It could have also impeached the testimony of the three co-conspirators by discrediting their account of what occurred and when on the night of the burglary. As to the contradictory testimony of the three admitted burglars, the panel found that while this alone was not a due process violation, it "bolsters our conclusion that a violation of the Due Process Clause occurred."[122]

As the Supreme Court determined in *Taylor*, the panel found that none of the errors individually required relief. Nor did the panel assess whether each error was harmless. Rather, the court examined the circumstances of the trial and concluded that the errors added up to a "glaring violation of due process."[123]

2. The *En Banc* Court

The Fifth Circuit then considered the case *en banc* and reversed the panel opinion.[124] Writing for the *en banc* court, Judge Edith Jones

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[117] *Id.* at 614.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 615.

[121] *Id.* at 617-18.

[122] *Id.* at 617.

[123] *Id.* at 618.

[124] *Derden v. McNeel*, 978 F.2d 1453 (5th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 2928 (1993). It is interesting to note that the panel had denied the state's request for a rehearing and for a rehearing *en banc*. Fifth Circuit Local Rule 35 allows an active judge on the court to request the Chief Judge to poll the court for an *en banc* hearing. Since Judge

prefaced the opinion by noting that the idea that federal courts entertain a habeas corpus petition alleging "a series of events none of which individually violated a defendant's constitutional rights seems a difficult theoretical proposition. . . ."[125] While the court joined the majority of circuit courts in recognizing habeas corpus allegations that the cumulative effect of trial errors may deprive one of a fair trial, the court established a four-prong test limiting the types of errors which the court will consider. First, a cumulative error allegation "must refer only to *errors* committed in the state trial court. . . . If an action of the trial court cured a putative error, the petitioner is complaining only of an adverse event rather than actual error."[126] Second, alleged errors must not be procedurally barred.[127] Third, the court will not consider errors of state law unless the errors rise to "constitutional dimension."[128] Finally, federal courts "must review the record as a whole to determine whether the errors more likely than not caused a suspect verdict."[129] This new test so limits the errors which the Fifth Circuit will consider in the aggregate that it undermines the Fourteenth Amendment right to due process and the fundamental right to a fair trial.

B. *Two Standards for Fundamental Fairness?*

The Fifth Circuit's *en banc* opinion imposes three limitations that are not part of cumulative error analysis in federal criminal cases or in direct appeal cases. This raises the question of whether federal courts should employ a different due process analysis for habeas corpus petitions than that used in cases on direct appeal. Previously, this comment examined whether cumulative error analysis is a cognizable claim in habeas corpus petitions. Once federal courts recognize cumulative error analysis, the next question is whether courts should apply a different analysis depending upon whether the claim is raised in a direct appeal or in a habeas corpus petition.

Jones wrote the dissent to the panel opinion and the opinion of the court *en banc*, it appears that she also requested that the entire court be polled on the issue of whether to hear the case *en banc*. Furthermore, given Judge Reynaldo Garza's comment that "[t]his case has turned into a beauty contest between me and Judge Jones," indicates that there was probably a great deal of letter writing among the judges about this case. *Id.* at 1463 (Garza, J., dissenting).

[125] *Id.* at 1456.

[126] *Id.* at 1458.

[127] *Id.*

[128] *Id.*

[129] *Id.*

The Fifth Circuit justified the more limited standard for cumulative error on habeas corpus review for several reasons. First, "[t]he standard for reversal on direct appeal of a criminal conviction, . . . , should logically be more flexible than that available on collateral review."[130] Judge Jones, however, failed to explain why this is "logically" so. Rather, the court pointed to Supreme Court opinions stating that the Due Process Clause has limited application, and that "the category of infractions that violate 'fundamental fairness' [has been defined] very narrowly."[131] Therefore, courts must exercise caution in holding that an error which does not amount to a constitutional error "by itself might suddenly, when aggregated with other non-constitutional errors, become worthy of habeas relief."[132]

The Supreme Court has stated that fundamental fairness is a very narrow concept and has described denials of due process as "the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."[133] However, the Court has not imposed a different standard for fundamental fairness for habeas corpus cases. In fact, the Court has never developed different standards for other constitutional rights when a habeas petitioner has alleged a violation. For example, whether alleged on direct appeal, or on habeas corpus, the standard for a Sixth Amendment ineffective assistance of counsel claim is the same.[134] Very few cases, whether on direct appeal or habeas corpus review, demonstrate a deprivation of fundamental fairness. This fact alone does not provide the logic for a narrower standard for such a claim alleged by a habeas corpus petitioner.

The Fifth Circuit states that federal court consideration of a cumulation of non-constitutional errors as a basis for habeas corpus relief "may too easily conflict with established limits on the scope of federal habeas relief."[135] The court cites three United States Supreme Court

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[130] *Id.* at 1457.

[131] *Id.* (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)).

[132] *Id.*

[133] Lisenba v. California, 314 U.S. 219, 236 (1941).

[134] One must first show that counsel's performance was deficient and second that this deficient performance was so prejudicial that the result of the trial is unreliable. Strickland v. Washington, 466 U.S. 668, 687 (1984). *Strickland* is a habeas corpus case, however the Court applied the same standard in *United States v. Cronic*, 466 U.S. 648 (1984), which the Court heard on direct appeal.

[135] *Derden*, 978 F.2d at 1458.

decisions in order to justify its limitations on habeas corpus cumulative error analysis.[136] However, the three cases cited do not involve the use of a different *constitutional* standard for habeas corpus petitions. Rather, these cases state various *procedural* limitations on habeas corpus relief.

In *Coleman v. Thompson*,[137] the Supreme Court held that federal habeas review is presumptively barred if it "fairly appears" that the state court's dismissal was based "primarily" on a state procedural rule.[138] Certainly, Mr. Derden should not be able to circumvent the *Coleman* limitation by arguing cumulative error if one or more of his claims were procedurally barred by a state rule. However, this limitation is not relevant in *Derden*, where the Mississippi Supreme Court summarily dismissed all but one of his allegations without providing any statement that his other claims were barred by state law. Furthermore, the state did not argue that Mr. Derden's claims were procedurally barred.[139]

The *Derden* court also cited *McCleskey v. Zant*,[140] which applied a broader definition of abuse of the writ of habeas corpus. Pursuant to *McClesky*, when a petitioner has failed to raise a particular claim in her first habeas corpus petition, she will be barred from raising the claim in subsequent petitions, unless she is able to show cause for failing to raise the claim in the initial petition and actual prejudice to her case if the court refuses to grant relief.[141] Since Mr. Derden has filed only one habeas corpus petition, the court cannot accuse him of abusing "the Great Writ."

Finally, the court cited *Teague v. Lane*,[142] which set out the standard for determining whether a "new rule" will be applied to cases on collateral review. *Derden* does not involve the issue of a "new rule." Furthermore, while *Teague* states a different standard for the application of new rules on habeas corpus than cases on direct review, retroactivity, addressed in *Teague*, is not a *constitutional* doctrine, unless of

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[136] *Id.*

[137] 111 S. Ct. 2546 (1991).

[138] *Id.* at 2554. In Ylst v. Nunnemaker, 111 S.Ct. 2590 (1991), the Supreme Court further loosened this standard by holding that if a lower state court based its dismissal on state procedural grounds, federal courts could infer that appellate state courts relied on similar grounds.

[139] The en banc opinion concedes that "[n]either the state courts nor Mississippi's brief has relied on procedural bar." *Derden*, 978 F.2d at 1459 n.8.

[140] 111 S. Ct. 1454 (1991).

[141] *Id.* at 1470.

[142] 489 U.S. 288 (1989). For a critique of *Teague*, see Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797 (1992).

course the issue is the application of an ex post facto law.[143] Due process and fundamental fairness *are* constitutional doctrines. Courts should use the same standards whether the claim is a federal criminal case, direct appeal, or a habeas corpus petition.

These three cases relied upon by the Fifth Circuit do not directly support the conclusion that a different standard of fundamental fairness applies when such an allegation is raised in a habeas corpus petition rather than on direct review. However, these cases do support the Supreme Court's emphasis on the need for finality of state court judgments. Certainly, the Supreme Court has emphasized the importance of finality of state court judgments, as well as notions of federalism. Any habeas corpus petition will raise concerns of finality and federalism.[144] While the Fifth Circuit is probably correct in stating that federal courts must exercise caution when evaluating a claim that a trial was fundamentally unfair, they must also exercise caution when deferring to these practical concerns as a basis for altering a constitutional standard.

A recent example of these concerns "running amok"[145] is *Brecht v. Abrahamson.*[146] In *Brecht,* the petitioner claimed that the state had referred to Brecht's post-*Miranda* silence in violation of due process under *Doyle v. Ohio.*[147] The issue was whether the state had to meet the standard of harmlessness set forth in *Chapman v. California*[148] for constitutional errors, or whether the harmlessness standard for non-constitutional errors in *Kotteakos v. United States*[149] applied. The Supreme Court reaffirmed that the *Doyle* rule, rooted in fundamental fairness and due process concerns, is constitutionally based, and not simply a "prophylactic rule."[150] Nonetheless, the Court held that where a constitutional error is alleged by a *habeas corpus* petitioner, the *Chapman* "harmless beyond a reasonable doubt" standard does not apply.[151] Instead federal courts are to apply the less stringent standard of *Kotteakos.*[152]

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[143] U.S. Const. art. I, § 9, cl. 3.

[144] *See* Jackson v. Virginia, 443 U.S. 307, 322 (1979).

[145] Judge Jones speaks of the danger that cumulative error analysis may easily "run amok" and "swallow the jurisprudence construing specific guarantees of the Bill of Rights." *Derden,* 978 F.2d at 1457.

[146] 113 S. Ct. 1710 (1993).

[147] 426 U.S. 610 (1976).

[148] 386 U.S. 18, 24 (1967) (reversal not required where constitutional error was harmless beyond a reasonable doubt).

[149] 328 U.S. 750 (1946).

[150] *Brecht,* 113 S. Ct. at 1717.

[151] *Id.* at 1721-22.

[152] *Id.* at 1722.

Under *Kotteakos*, a court may find a non-constitutional error harmless if it "did not influence the jury, or had but very slight effect. . . ."[153] Justice Stevens' concurrence maintains that the burden is still on the prosecution to demonstrate harmlessness.[154] However, Justice White reads the majority opinion as placing the burden on habeas corpus petitioners to show that the error "resulted in '*actual* prejudice.'"[155] The Court justified this distinction based on precedent noting that "collateral review is different from direct review. . . ."[156] The plurality opinion also emphasized frequently used reasons for distinguishing between collateral review and direct review — finality of convictions, comity and federalism.[157] Justice O'Connor, in dissent stated that these concerns "are inevitable *whenever* [habeas] relief is awarded,"[158] and she cautioned that "decisions concerning the Great Writ 'warrant restraint' . . . for [the Court] ought not to take lightly alteration of the 'fundamental safeguard against unlawful custody.'"[159]

The dissenting opinions in *Brecht* seem to accord the *Chapman* harmless error standard constitutional status and emphasize the need for the more stringent standard to assure the protection of federal constitutional rights.[160] In contrast, the majority fails to explain the nature of the *Chapman* standard; whether it is simply a "prophylactic" rule to protect constitutional rights, or whether it is constitutionally based. Instead, the majority relies primarily on notions of comity, finality and federalism to conclude that "it scarcely seems logical to require federal courts to engage in the identical approach to harmless error review that *Chapman* requires state courts to engage in on direct review."[161]

Given the broad language of *Brecht* and the majority's exclusive reliance on "equitable principles," it would appear consistent for the Court to apply a different standard for cumulative error allegations when the claim is raised on direct appeal to a federal court than when it is presented by a habeas corpus petitioner. However, cumulative error is also distinguishable. While it may not be clear whether the

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[153] *Kotteakos*, 328 U.S. at 764.

[154] *Brecht*, 113 S. Ct. at 1723 (Stevens, J., concurring).

[155] *Id.* at 1727 (emphasis added) (quoting the majority at 1722).

[156] *Id.* at 1719.

[157] *Id.* at 1720.

[158] *Id.* at 1732 (O'Connor, J., dissenting).

[159] *Id.* at 1728 (O'Connor, J., dissenting) (quoting Withrow v. Williams, 113 S. Ct. 1745, 1756-58 (1993) (O'Connor, J., concurring in part and dissenting in part).

[160] *Id.* at 1726 (White, J., dissenting). *See also id.* at 1729 (O'Connor, J., dissenting).

[161] *Id.* at 1721.

Chapman harmless error standard is constitutionally mandated, certainly an allegation that one has been deprived of a fair trial is a constitutional claim. Cumulative error analysis usually centers on the fairness of the trial, and thus constitutes a claim that the petitioner has been denied due process under the Fourteenth Amendment. While such claims are rarely successful, they are nonetheless *constitutionally* based. Certainly, federal courts should not undertake cumulative error analysis on habeas corpus in a manner which would enable a petitioner to circumvent other limitations on habeas review.[162] However, the Fifth Circuit's four-prong test is too restrictive because it eliminates errors which, although individually are "non-constitutional," may nonetheless have contributed to a fundamentally unfair trial.

IV. When Is an Error Not an Error?

The *Derden* majority correctly notes that federal court review of whether a petitioner has been denied a fair trial can become an "infinitely expandable concept,"[163] requiring courts to carefully define cumulative error; however, the Fifth Circuit unduly restricts the "errors" a court may accumulate.

A. *"Actual Error" or "Adverse Event"?*

The court found that any claim of cumulative error must allege actual errors and not merely unfavorable or adverse events which are not erroneous.[164] However, the Fifth Circuit's statement that conduct by the trial court which has cured the error exempts the error from the cumulative error analysis is unsupportable. First, a "curative" instruction by the court does not automatically cure an error. Instead, a court examines the instruction to determine whether the error is harmless. An error has still occurred; a curative instruction may simply make the error harmless. In review of federal criminal cases, most federal courts consider all harmless errors cumulatively whether constitutional or non-constitutional.[165] Yet under *Derden*, in habeas corpus petitions, a curative instruction will downgrade the error to an adverse event and the court will exclude it from cumulative error analysis.

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[162] *See supra* Section II. C. (*The Unpersuasive Eighth Circuit*).

[163] *Derden*, 978 F.2d at 1457.

[164] *See supra*, Section III. A. 2 (*The En Banc Court*).

[165] *See* United States v. Rivera, 900 F.2d 1462 (10th Cir. 1990) (en banc).

The Tenth Circuit in *United States v. Rivera*,[166] emphasized that "cumulative-error analysis aggregates only *actual* errors."[167] The court stated that "[i]ndividual rulings frequently will have an adverse effect on a party, but unless that party can demonstrate that the ruling was an error, reversal would not be warranted."[168] The court defined error "generically to refer to *any* violation of an objective legal rule, . . . [and] there must be violation of a constitutional, statutory, or common law, or a violation of an administrative regulation or an established rule of court."[169] While not addressing the issue presented in *Derden* regarding the effect of a curative instruction, the *Rivera* court would appear to allow consideration of such an error for purposes of cumulative error, and also consider the curative instruction in determining whether a defendant has been deprived of a fair trial. While *Rivera* was a federal criminal case, there is no reason to define error differently based on the procedural posture of a case.

Under this prong, the *en banc* court in *Derden* eliminated the two instances of prosecutorial misconduct from cumulative error analysis. The court appeared to acknowledge that "the prosecutor admittedly overstepped his bounds under Mississippi law when in *voir dire* he tried to commit the jury to evaluate the co-conspirators' testimony like any other."[170] However, based on the instruction given at the end of the trial, as well as the Mississippi Supreme Court's conclusion that the instruction removed the need to reverse Mr. Derden's conviction, the Fifth Circuit excluded this error from its cumulative error analysis.[171] Also excluded was the prosecutor's elicitation of testimony from co-conspirator Sherrod that Derden had been an accomplice in other robberies. Again, the court agreed that this constituted error, but due to the prompt instruction by the trial judge, excluded this error from its analysis of an aggregation of errors.[172]

B. *Failure to Object*

When a defendant on direct review alleges an error to which she did not object at trial, federal courts require her to show "plain error,"

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[166] *Id.*

[167] *Id.* at 1470 (emphasis added).

[168] *Id.* at 1470-71.

[169] *Id.* at 1470 n.7 (emphasis added).

[170] *Derden*, 978 F.2d at 1460.

[171] *Id.*

[172] This conclusion was bolstered by the court's third prong, regarding errors of state law. The court concluded that neither error reached constitutional dimensions, thus could not be considered for purposes of cumulative error for this reason as well.

as defined by the Federal Rules of Criminal Procedure.[173] However, in habeas corpus petitions, where the petitioner has failed to object to an error at trial, the petitioner must show cause for failing to preserve the error and prejudice resulting from the alleged error.[174] When the habeas petitioner alleges cumulative error, the Fifth Circuit imposes the requirement that "a defendant [have] objected to errors to demonstrate that they were believed at the time of trial to have had an adverse effect on the defense,"[175] before the court will consider the error in its cumulative error analysis. In federal cases on direct review, when an individual alleges cumulative error but has failed to preserve a claim by objecting at trial, courts apply the "plain error" rule.[176] A different standard is not used simply because the appellant argues cumulative error. Likewise, where a habeas petitioner alleges cumulative error but has failed to preserve trial errors, courts should only exclude such errors from cumulative error review if the petitioner fails to meet the cause and prejudice standard. While this limited standard is difficult to meet, it at least provides a habeas corpus petitioner with an opportunity to have the error reviewed by a federal court. Instead, under *Derden*, failure to object to an error at trial will result in exclusion of the error for purposes of cumulative error review apparently even if the petitioner is able to show cause and prejudice.

This prong eliminated Mr. Derden's allegations that comments by the trial judge contributed to his deprivation of due process. While the en banc court characterized some of the trial judge's comments as "ambiguous or imprudent,"[177] "understandable,"[178] and "regrettable,"[179] the court did not confront the question of whether either individually, or together they constituted "error" — the violation of an objective legal rule. Furthermore, without ever stating whether the judge's comments amounted to error, the court concluded that "[o]n balance, the court ruled evenhandedly on both sides' objections."[180] This really is not the point. The issue is whether the judge acted improperly. Examining the record as a whole before considering whether the comments were improper puts the cart before the horse.

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[173] United States v. Canales, 744 F.2d 413 (5th Cir. 1984); FED. R. CRIM. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

[174] Wainwright v. Sykes, 433 U.S. 72, 88 (1977). *See also* Francis v. Henderson, 425 U.S. 536 (1976); Davis v. United States, 411 U.S. 233 (1973).

[175] *Derden*, 978 F.2d at 1458.

[176] United States v. Frady, 456 U.S. 152 (1982).

[177] *Derden*, 978 F.2d at 1459.

[178] *Id.*

[179] *Id.*

[180] *Id.* at 1460.

As discussed in the next section, federal courts should first determine whether the alleged errors violated an objective legal rule. Upon determining which allegations constitute errors, courts must then evaluate the trial as a whole. The court in *Derden* appears to justify its conclusion that the judge's comments were not error based on its own evaluation of the entire record. The other flaw in the *Derden* court's analysis is that the court considered whether the trial judge's conduct alone violated due process. This is similar to the court's treatment of errors of state law.

C. *State Law Errors*

As to the third limitation on cumulative error analysis the Fifth Circuit will not consider an alleged error of state law unless it rises to "constitutional dimension."[181] Generally, errors of state law are not cognizable in habeas corpus unless they "so infused the trial with unfairness as to deny due process of law."[182] This is the same Fourteenth Amendment due process analysis used for evaluating the *cumulative* effect of trial errors. This restricts cumulative error analysis to errors which are individually of constitutional dimensions. However, an error of state law is "constitutional" only if it amounts to a due process violation. When a habeas corpus petitioner claims that the cumulative effect of errors denied her fundamental fairness, she alleges a due process violation. Again, while no single error of state law may entitle her to relief, several errors may have denied her a fair trial, and courts should consider this possibility.

In *Derden*, this prong eliminated the prosecutorial errors of state law described earlier, concluding that "these violations of state law were not of a constitutional dimension."[183] Instead, the court should have considered whether the cumulative effect of the errors of state law amounted to a due process violation.

Regardless of the merits of Mr. Derden's habeas corpus petition, the Fifth Circuit has needlessly restricted the scope of cumulative error analysis. This type of allegation is rarely successful, and as Judge

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[181] *Id.* at 1458.

[182] Lisenba v. California, 314 U.S. 219, 228 (1941). *See also* Estelle v. McGuire, 112 S. Ct. 475 (1991); Marshall v. Lonberger, 459 U.S. 422 (1983).

[183] *Derden*, 978 F.2d at 1460. As to the police log discussed earlier, the en banc court simply disagreed with the panel that the evidence was either material or exculpatory, stating that "[t]he police might have acted on their report slowly." *Id.*

Higginbotham commented, the en banc majority took "a club to a pup and by doing so [told] the world that it is a wolf."[184]

V. A Proposed Analysis of Cumulative Error

The Fifth Circuit acknowledged that "formulating a complete definition of unconstitutional cumulative error is not feasible. . . ."[185] In *Derden*, rather than establishing an approach explaining the types of errors to evaluate in a cumulative error allegation, the court elected to "*eliminate* certain types of complaints that should generally *not* be considered in cumulative error review."[186] As discussed earlier, the Fifth Circuit's limitations on cumulative error analysis unnecessarily exclude the possibility that several individually non-constitutional errors might operate in the aggregate to deprive a defendant of a fair trial. In *Taylor v. Kentucky*,[187] the Supreme Court did not find that the defendant suffered *one* constitutional error. Rather, the Court held that several non-constitutional errors cumulatively deprived the defendant of a fair trial.[188] Courts should afford a similar review to habeas corpus petitioners. The approach proposed within attempts to achieve a balance between the due process rights of habeas corpus petitioners and the Supreme Court's concerns for finality, comity, and federalism. It would eliminate only two types of claimed errors from cumulative error analysis. First, courts should not consider non-exhausted claims. For example, if a petitioner alleges that the state court violated her right to confront the witnesses against her, but she failed to exhaust this claim in state court, she may not, in a federal habeas petition allege such a claim as part of a cumulative error allegation. Second, federal courts should not consider Fourth Amendment claims for purposes of cumulative error when the petitioner had a full and fair opportunity to litigate the claim in state court. Cumulative error analysis should not include these claims because they are both barred from habeas corpus review. If a petitioner presents exhausted and non-exhausted claims, a federal court must dismiss the petition and require the petitioner to present all non-exhausted claims to the state courts. Of course, the petitioner may decide to proceed with the habeas corpus petition as to the exhausted claims. If

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[184] *Id.* at 1462 (Higginbotham, J., concurring) (cumulative error analysis is "quite narrow—as evidenced by the majority's inability to locate more than two instances from our thousands of habeas cases in which a state petitioner has succeeded with the argument.").

[185] *Id.* at 1458.

[186] *Id.* (emphasis added).

[187] 436 U.S. 478 (1978).

[188] *Id.* at 487-88.

the petitioner makes this choice, he may not avoid the total exhaustion rule by attempting to raise the non-exhausted claims in the form of a cumulative error allegation.

There is an exception to the *Stone*-bar. Unlike exceptions to other limitations on habeas corpus review, the exception to *Stone* does not permit an examination of the Fourth Amendment claim per se. Rather, it allows a federal court to examine the adequacy of the state procedure for evaluating such a claim. Where a petitioner is unable to show that she was denied a full and fair opportunity to litigate her Fourth Amendment claim in state court, courts should not allow her to present the merits of the claim as part of a cumulative error allegation. Aside from these two limitations, federal courts should consider any alleged error as part of cumulative error review. The following discussion describes the analytical steps which courts could employ in order to produce opinions which evaluate cumulative error claims in a more principled manner.

A federal court should examine each alleged error and determine whether it in fact constitutes an error, under either constitutional or non-constitutional standards. In determining whether an error has occurred, courts should employ a broad definition of error to include "any violation of an objective legal rule."[189] At this point in the analysis, courts should not simply conclude that an error, if error at all, was not of constitutional magnitude. The premise of cumulative error analysis is that *several* errors can operate in the aggregate to deny the petitioner a fair trial. Without confronting the question of whether the alleged error is actually an error, courts cannot evaluate a cumulative error allegation.

If an alleged error was an error, courts should then evaluate whether the individual error amounts to a constitutional error. Of course, if only one particular error amounted to a constitutional error, federal courts already evaluate the error to determine whether it was harmless. In evaluating the error for harmlessness, federal courts examine the entire record and even consider "prejudicial circumstances" to determine whether the error was harmless. This step merely restates established law.

If there are several constitutional errors, each of which individually was harmless, courts should then consider the cumulative effect of such errors. In *United States v. Rivera*,[190] the Tenth Circuit described cumulative error as "an extension of the harmless-error rule, which is

[189] United States v. Rivera, 900 F.2d 1462, 1470 n.7 (10th Cir. 1990) (en banc).

[190] 900 F.2d 1462 (10th Cir. 1990).

used to determine whether an individual error requires reversal."[191] The court stated that "[a] cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, . . . and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless."[192] As with the evaluation of a single error's harmlessness, when judging the cumulative effect of several constitutional, but individually harmless errors, courts should examine the entire record as a whole.

Courts must then evaluate the relevance of individually non-constitutional errors. Of course, the general rule is that habeas corpus review is available to remedy only constitutional defects. However, as discussed, a constitutional deprivation may result from several errors, each of which individually did not impair the defendant's constitutional protections, but when considered in the aggregate denied the defendant a fair trial. This step seeks to pay deference to the limitations on habeas corpus review, but allow for consideration of such a situation. Most importantly, cumulative error analysis should include errors of state law that individually are not of constitutional dimensions. In *Derden*, the Fifth Circuit discounted two clear violations of state law by the prosecutor because individually, each error did not amount to a constitutional deprivation.[193] My analysis would include these errors in a cumulative error analysis.

I suggest that federal courts evaluate and characterize non-constitutional errors into two categories: "actual errors" and "prejudicial circumstances." By categorizing non-constitutional errors in this way, courts will better understand the significance of these errors and be better prepared to evaluate the petitioner's trial for fundamental fairness.

Courts should separate non-constitutional errors into "actual errors" and "prejudicial circumstances." Actual errors would include any "defect, irregularity and variance"[194] to which the petitioner objected at trial, and did not otherwise default, even if the alleged errors constitute violations of state law. Furthermore, when the petitioner objected at trial, and the trial judge sustained the objection, or instructed the jury in an effort to "cure" the error, courts should still consider this an "actual error" and consider the curative instruction in

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[191] *Id.* at 1469.

[192] *Id.* at 1470.

[193] *See supra* Section IV. C. (*State Law Errors*).

[194] FED. R. CRIM. P. 52(a); 28 U.S.C. § 2111.

their evaluation of the entire trial. In *United States v. Berry*,[195] the Ninth Circuit determined that for purposes of cumulative error analysis, the court would consider "errors and instances of misconduct which we earlier held were adequately cured by the court's instruction. We recognize that a trace of prejudice may remain even after a proper instruction is given. If we find a residue of prejudice, we will take it into account."[196] Similarly, in *Derden*, the court should have included the violations committed by the prosecutor despite the fact that the judge properly instructed the jury. A curative instruction as to Mr. Derden's alleged involvement in other robberies was given promptly. However, this evidence was extremely prejudicial, especially in a case where Mr. Derden's credibility was crucial since the only evidence tying him to the burglary was the testimony of the admitted burglars. While the trial judge eventually instructed the jury as to the correct law regarding the testimony of co-conspirators, this instruction came at the end of the trial, while the error occurred at the beginning.[197] Again, the court should have considered the facts surrounding the error and the putative curative instruction, rather than simply excluding the error from cumulative error analysis.

In addition, when the petitioner failed to object at trial or otherwise defaulted, courts should still consider an allegation as "actual error," rather than a "prejudicial circumstance," if the petitioner is able to show "cause and prejudice" pursuant to *Wainwright v. Sykes*.[198] Again, when a claim of error is not part of a cumulative error argument, federal courts will consider non-preserved errors if the petitioner can meet the "cause and prejudice" standard.[199] Courts should not abandon this standard simply because the petitioner seeks habeas corpus relief based on the cumulative effect of errors. In *Derden*, the Fifth Circuit stated that "none of the judge's comments is even an obvious abuse of discretion."[200] It is not clear whether the court intended to imply the "cause and prejudice" standard and simply concluded that Mr. Derden failed to meet this with respect to the judge's remarks.

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[195] 627 F.2d 193 (9th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

[196] *Id.* at 201. The court ultimately held that there was no "cumulative prejudice" and affirmed the conviction.

[197] *See supra* discussion in Section III. A. 1. (*The Panel Majority*).

[198] 433 U.S. 72 (1977). Certainly, where the allegation is procedurally barred, habeas corpus petitioners should consider framing their complaint as one of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 669 (1984). *See* Peter W. Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work to do*, 31 STAN. L. REV. 1, 5 n.25 (1978).

[199] *See supra* Section IV. B. (*Failure to Object*).

[200] *Derden v. McNeel*, 978 F.2d 1453, 1460 (5th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 2928 (1993).

Nor is it clear that an abuse of discretion standard applies to statements by a judge which the defendant claims could have led the "jury to believe that Derden and his counsel were not to be believed."[201] The court should have more closely examined whether the judge's comments either separately or together were improper, then analyzed whether Mr. Derden was able to show "cause and prejudice," as to those comments which were error, since he did not object to them at trial.

"Prejudicial circumstances" consist of those events to which the petitioner failed to object, and cannot meet the "cause and prejudice" standard, but otherwise constituted errors. Courts should consider such circumstances not as part of the aggregation of error, but rather as part of their evaluation of the overall fairness of the petitioner's trial. Certainly, courts should not consider events which do not pass the above threshold standard of constituting an error at all as either an "actual error" or a "prejudicial circumstance." However, if Mr. Derden demonstrated that some of the judge's comments were error, but he was unable to show "cause and prejudice," under my analysis, the Fifth Circuit would have considered the comments "prejudicial circumstances" and evaluated the "actual errors" in light of the "prejudicial circumstances" to determine whether Mr. Derden was denied a fair trial.

Once a court has determined the nature of the alleged errors, the final step is to examine the record as a whole to determine whether the petitioner was deprived of a fair trial. In conducting such an evaluation, courts should devote particular attention to the relatedness of the errors. The best way to explain this concept is to examine some examples.

In *Walker v. Engle*,[202] the Sixth Circuit Court of Appeals granted habeas corpus relief on the basis that several errors operated cumulatively to deprive Walker of a fair trial. Walker had been charged with felony murder. Two men who had been convicted of involvement in the crime testified that Walker was the triggerman who killed a police officer. Walker's alibi was that he was confined in the Cuyahoga County Jail on the day of the robbery and killing. The state's response was to introduce evidence showing that the officers who ran the jail were "so corrupt and/or ineffective that Walker could have gotten out of jail before [the robbery] and then returned."[203]

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[201] *Derden*, 938 F.2d at 611 (panel opinion).

[202] 703 F.2d 959 (6th Cir.), *cert. denied*, 464 U.S. 951, 464 U.S. 962 (1983).

[203] *Id.* at 961-62.

On habeas, the Sixth Circuit considered the cumulative effect of primarily evidentiary errors on the fairness of the petitioner's trial. Acknowledging that errors of state law regarding the admissibility of evidence are generally not cognizable in federal habeas corpus review, the court determined that Walker's "trial was inflamed by marginally relevant and irrelevant evidence that was highly prejudicial . . . [which] allow[ed] the trial to focus more on the claimed corruption of the Sheriff's Department than on the issue of Walker's guilt or innocence."[204]

Specifically, witnesses were allowed to testify as to the Warden's criminal convictions which occurred long after the robbery and murder for which Walker was charged.[205] An examiner for the State Auditor was allowed to testify as to inaccuracies and shortages in the jail's commissary account funds.[206] Aggravating this error, the prosecutor argued in closing that the records were introduced "[t]o show you that all the thieves and the bad people weren't on the inside of the jail; that if you lie and steal [sic] what says you won't let a prisoner out for a weekend or a few days."[207] The state was allowed to put a witness on the stand who refused to swear in, and then through other witnesses was permitted to "suggest to the jury that [the unsworn witness'] testimony would have been helpful to the prosecution had he testified."[208] All of these errors related to the issue of the corruption and ineffectiveness of the jail's personnel, an issue which had little to no relevance to Walker's guilt or innocence. In considering cumulative error allegations, federal courts should be especially sensitive to situations where several errors are related to a particular problem, such as distracting the jury from the issue of guilt or innocence.

Another example of the importance of examining the relationship among several errors is *Cooper v. Sowders*.[209] As in *Walker*, the errors alleged by Cooper were violations of state law, and the Sixth Circuit acknowledged that federal courts are not to consider an error of state law unless that error amounts to a denial of due process. Nonetheless, the court examined the cumulative effect of such errors, even though each error, individually, did not result in a deprivation of due process.

In *Cooper*, the petitioner sought habeas corpus relief from a state conviction of murder. The first alleged error was that a police officer was allowed to testify that during his investigation of the murder he

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[204] *Id.* at 968.
[205] *Id.* at 963.
[206] *Id.* at 963-64.
[207] *Id.* at 964.
[208] *Id.*
[209] 837 F.2d 284 (6th Cir. 1988).

"found no evidence that would link any of those other suspects to this crime. . . . The only evidence we found that would link anybody to this crime would be Mr. Cooper."[210] The court found that this testimony constituted error because it "suggest[ed] to the jury the guilt of the accused and the innocence of other suspects,"[211] thus invading the province of the jury. The court also found error with the trial judge's comments that the police officer was an "expert."[212] Firstly, there was no proof as to the officer's qualifications as an expert,[213] and secondly, there was nothing specialized about the officer's opinion, to even require that he be an expert.[214] The third error found was with the police informant's testimony who was permitted to testify that he had provided information in the past, which had led to arrests and convictions.[215] The court found that this testimony bolstering the informant's credibility was not relevant and was prejudicial.[216] Each of these errors related to the credibility of the state's witnesses, which in turn impinged on the credibility of the defendant. The issue of credibility is especially relevant when the evidence against the defendant is not overwhelming and when, as in *Cooper*, the case against the defendant is a "close" one.[217]

United States v. Wallace,[218] although a federal criminal case, is another example of how a court should consider the cumulative effect of errors on the defendant's credibility. In *Wallace*, the defendant was convicted of conspiracy and of possession with intent to distribute heroin.[219] The government witness who provided the crucial testimony linking Wallace to the distribution of heroin was provided by an admitted co-conspirator, Sterling.[220] Wallace alleged that the government did not provide her with Sterling's written notes which Sterling testified that she had referred to while testifying before the grand jury.[221] The Ninth Circuit found that the government's failure to produce these notes was error, but remanded to the district court to determine whether the error was harmless.[222]

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[210] *Id.* at 287.

[211] *Id.* (quoting Cooper v. Kentucky, No. 84-SC-494-MR, slip op. at 2 (Liesbon, J., dissenting)).

[212] *Id.* at 287-88.

[213] *Id.* at 288.

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] 848 F.2d 1464 (9th Cir. 1988), *aff'd*, 902 F.2d 1580 (1990).

[219] *Id.* at 1466.

[220] *Id.* at 1467.

[221] *Id.* at 1470-72.

[222] *Id.* at 1471.

The court also found that the district court improperly allowed the government to impeach Wallace with a heroin conviction which was over ten years old.[223] The court further found that the prosecutor engaged in improper vouching during the direct examination of Sterling and during closing arguments.[224] The court noted that the defense did not object at trial, but concluded that the district court must review the entire record to determine whether the improper vouching amounted to "plain error."[225] Finally, the court found that although Wallace was given *Miranda* warnings upon her arrest, the district court erred in holding that she had waived her rights, and that her subsequent statements should not have been admitted at trial.[226]

The court remanded the case stating:

> [a]lthough each of the above errors, looked at separately, may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial to [Wallace] that reversal is required. . . . Our court is particularly sensitive to allegations of prejudice where, as here, the convictions are based on the largely uncorroborated testimony of a single accomplice or co-conspirator.[227]

The court further emphasized that due to the "credibility contest between the defendants and the co-conspirator witness, we are particularly troubled by the possible cumulative effect of those errors which go to the *credibility* of the witnesses."[228]

In a footnote, the court explained the relevance of the prosecutorial vouching, to which the defendant failed to object, stating, "[a]lthough the [prosecutorial] vouching was unobjected to at trial and may not alone amount to plain error, it is, in any event, relevant to the central issue of Sterling's credibility. Considered with the conduct that was error, the vouching may have contributed to prejudice to [Wallace]."[229] Thus the Ninth Circuit will consider errors which otherwise are precluded from direct appeal review under a cumulative error analysis. Under my proposed analysis for cases, if the improper vouching did not meeting the "cause and prejudice" standard, a court

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[223] *Id.* at 1472-73.

[224] *Id.* at 1473-74.

[225] *Id.* at 1474.

[226] *Id.* at 1475.

[227] *Id.* at 1475 (citations omitted).

[228] *Id.* at 1476.

[229] *Id.* n.21. *See also* United States v. Berry, 627 F.2d 193, 201 n.7 (9th Cir. 1980) ("We do not decide whether several errors may constitute 'plain error' in the aggregate or whether, once we decline to review an error, we may no longer consider it for any purpose.").

would consider it a prejudicial circumstance in its evaluating the trial as a whole.

In *Derden*, credibility was the crucial issue. The only evidence presented by the state which linked Mr. Derden to the burglary was the testimony of the three admitted burglars. Much of their testimony was not only uncorroborated, but was often contradicted by the co-conspirators and other state witnesses. Thus, the court should have evaluated the errors in terms of their effect on the credibility of the witnesses.

Nearly every error alleged by Mr. Derden concerned the credibility of the state's witnesses, as well as the credibility of Mr. Derden himself. The prosecutor's erroneous *voir dire* questioning improperly bolstered the credibility of the admitted burglars who testified against Derden. The erroneous admission at trial of Mr. Derden's alleged prior criminal conduct directly impinged upon Mr. Derden's credibility. The trial judge's hostile comments toward Mr. Derden and his counsel could have led the jury to disbelieve Mr. Derden and his attorney.

Certainly, different judges will evaluate differently claims that one has been deprived of a fair trial, and so it seems was the case for Mr. Derden. The proposed analysis does not solve this "know it when I see it problem." However, by forcing reviewing judges to more candidly confront the question of what constitutes an "error," and to evaluate the relationship among the errors, the proposal may result in opinions which move away from free-floating notions of fairness, without unnecessarily restricting the due process clause for habeas corpus petitioners.