No. 19-7391

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOHN WALTERS, *Petitioner-Appellant*,

v.

MICHAEL MARTIN, WARDEN, HUTTONSVILLE CORRECTIONAL CENTER, *Respondent-Appellee*.

On Appeal from the United States District Court, for the
Northern District of West Virginia
Case No. 3:17-cv-96-FPS (Hon. Frederick P. Stamp, Jr.)

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL) AS AMICUS CURIAE IN SUPPORT OF PETITIONER-APPELLANT

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

As called for under Federal Rule of Appellate Procedure 26.1, amicus curiae hereby certifies that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 including affiliate members. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files amicus curiae briefs in the federal and state courts of appeals and in the United States Supreme Court.

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2), (4).

This case presents a question of great importance to NACDL, and the clients its attorneys represent, because the vast majority of criminal prosecutions end in guilty pleas. NACDL has a strong interest in protecting the fairness of plea bargains through ensuring the effective assistance of counsel at this critical stage and therefore files this brief in support of appellant.

INTRODUCTION AND SUMMARY OF ARGUMENT

Whether analyzed as a constructive denial of counsel claim under *United States v. Cronic*, 466 U.S. 648 (1984), or as an ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984) and *Missouri v. Frye*, 566 U.S. 134 (2012), the repeated failings of Mr. Walters' appointed counsel here violated his Sixth Amendment right to counsel by undermining the fundamental fairness of the plea bargaining process—a critical phase of criminal proceedings—and Mr. Walters is therefore entitled to habeas relief.

It should go without saying that the duties of appointed counsel start, but do not end, upon appointment. Yet here, as the dissenting Justice of the West Virginia Supreme Court recognized, Mr. Walters would "probably would have been better off acting pro se," JA 462-463, than with the representation he received in name only from his appointed counsel. If formally pro se—rather than de facto pro se—at least he would have timely received a favorable plea offer that lapsed months before he even learned of it.

As Mr. Walters argued below, his counsel's pervasive failure to communicate resulted not only in the loss of a favorable early plea offer but also no assistance with an attempt to reduce his bond, requiring him to reach out pro se to the court, a failure to share discovery, and a complete breakdown of trust between Mr. Walters and his counsel. Mr. Walters' counsel's abject failure to communicate with him during the critical plea negotiations stage—whether viewed as a constructive denial of counsel or as deficient performance—prejudicially undermined the fairness of the proceedings below and deprived Mr. Walters' of his Sixth Amendment right to counsel.

Although the line between *Cronic* and *Strickland* claims can sometimes be murky, whichever test is used here, Mr. Walters is entitled to habeas relief. As to *Cronic*, Mr. Walters preserved before both the state and federal habeas courts his claim that he was constructively denied counsel. Whether considered de novo (because the state courts failed to address his *Cronic* claim on the merits) or under AEDPA's deferential lens, the facts here show how his counsel's pervasive failure to communicate during a critical phase of the proceedings so deprived Mr. Walters of his right to counsel that prejudice should be presumed. A *Cronic* analysis makes sense especially here because one would be hard-pressed to apply *Strickland's* error-specific deference to tactical decisions when counsel made none.

If not presumed under *Cronic*, prejudice is nonetheless manifest when the full extent of counsel's alleged failings is considered. Counsel's utter and pervasive failure to communicate—viewed as one overarching error—resulted not only in the failure to timely relay the favorable March plea that was the sole focus of the proceedings below, but *also* destroyed trust between attorney and client, leaving Mr. Walters in the dark for months about the gravity of the charges against him and angry with and wary of an antagonistic counsel that he had repeatedly tried to contact without success. Applying the *Frye* test to all these facts—and not just the failure to relay the plea in a vacuum—there is a reasonable probability both that Mr. Walters would have accepted the plea, if timely explained by an attorney he trusted that carefully unpacked the charges he was up against; and that this very early pre-indictment plea, offered before any circuit court had even been assigned, would have been entered. The state court's conclusions otherwise ignore these facts and are an unreasonable application of clearly established law.

If viewed as a series of errors, rather than one overarching error, the prejudicial effect of these intertwined and reinforcing demonstrable failings by counsel should nonetheless be examined cumulatively. Nothing in this Court's precedent says otherwise. *Strickland* makes plain that the prejudice analysis is cumulative, both by referring repeatedly to multiple errors prejudicing a single outcome, and by modeling the prejudice standard on the materiality standard for

prosecutorial misconduct, which indisputably demands a cumulative analysis. The majority of circuits agree that the prejudice analysis is cumulative, especially where, as here, at least one clear defect in performance is not in dispute.

Whatever the prejudice analysis, on this record, habeas relief is warranted.

ARGUMENT

A claim involving a pervasive failure to communicate implicates the "fine line between *Strickland* and *Cronic*," but a *Cronic* analysis should apply where, as here, there is "an objectively reasonable (as opposed to subjective) belief that the attorney-client relationship was not salvageable." *Commonwealth v. Brooks*, 839 A.2d 245, 255 (Penn. 2003) (Castille, J., concurring). It is critical that courts carefully disaggregate the different types of ineffective assistance claims and "apply[] the right test in the right case." *See* Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 Stan. L. Rev. 1581, 1581 (2020) (hereinafter Primus, *Disaggregating IAC Doctrine*).

The state court failed to apply the right test here, and NACDL agrees with Mr. Walters that the most appropriate framework for his ineffective assistance claim is to view it as a pervasive failure to communicate during a critical stage, resulting in a constructive denial of counsel where prejudice should be presumed. But prejudice can be demonstrated under *Strickland* as well—whether the pervasive failure to communicate is viewed as a single deficiency; prejudice is evaluated in light of the

cumulative effect of repeated neglect, as the Sixth Amendment requires; or the failure to convey the March plea offer is considered alone.

In short, this is a case where a reasonable application of any conceivably applicable test leads to the same result: Mr. Walters' "counsel's conduct [and lack thereof] 'so undermined the proper functioning of the adversarial process' that the proceedings below 'cannot be relied on as having produced a just result." *United States v. Carthorne*, 878 F.3d 458, 465 (4th Cir. 2017) (quoting *Strickland*, 466 U.S. at 686).

I. Walters' Counsel's Utter Failure To Communicate Constructively Denied Him Counsel So Prejudice Should be Presumed.

The right to assistance of counsel is "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938). The Constitution thus "requires that 'counsel act[] in the role of an advocate,'" *Carthorne*, 878 F.3d at 465 (4th Cir. 2017) (quoting *Cronic*, 466 U.S. at 656), and the "Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." *Avery v. Alabama*, 308 U.S. 444, 446 (1940). Thus, when counsel is "totally absent … during a critical stage of the proceeding," *Cronic*, 466 U.S. at 659 n. 25, a defendant does not need to "point[] to specific errors by trial counsel," and prejudice may be presumed, *id*. at 666.

Total absence of counsel is exactly what Mr. Walters experienced. As the dissenting justice on the West Virginia Supreme Court observed, Mr. Walters would have been better off proceeding pro se. JA 462-463. In fact, for seven months he effectively did proceed pro se—with all the burden of advocating for himself in letters to the court and none of the benefit of direct communication with the prosecutor's office. As Mr. Walters argued before the state court, he "should not even have the burden to prove [prejudice] because he effectively had no counsel[,]" and the attorney-client relationship was "practically non-existent." JA 420. The state court's failure to address this claim requires habeas relief to be granted on *de novo* review,[2] but Mr. Walters prevails even under AEDPA deference.

Mr. Stanley was formally appointed but did not advocate, advise, or even communicate. From January to April 2012, Mr. Stanley's only communication was a brief phone conversation where he provided Mr. Walters with no information about his case. JA 265. And it went downhill from there; by his own admission, Mr. Stanley probably did not open Mr. Walters' case file at any point from March to July. JA 407. He did not respond to Mr. Walters' attempts to contact him about assistance with a bond reduction, requiring Mr. Walters to reach out to the court pro

[2] Because the state court analyzed only Walters' *Strickland* claim, and not his *Cronic* claim, that court has made no determination on the merits, and AEDPA deference does not apply. *See Appel v. Horn*, 250 F.3d 203, 210-211 (3d Cir. 2001); Opening Br. at 12.

se on that issue (unsuccessfully) as well as to seek assistance in obtaining new counsel in light of repeated (unsuccessful) attempts to communication with Mr. Stanley. JA 269; JA 178; JA 457. And Mr. Stanley failed to convey a pre-indictment plea offer until months after it expired. JA 457-58. Seven months of radio silence—while the file sat on the shelf and Mr. Stanley ignored the prosecutor's favorable plea offer—was a complete abdication of his duties as counsel.

This utter neglect equates to "total[] absen[ce]," *Cronic*, 466 U.S. at 659, n.25. *See* Opening Br. at 2-6. In *Childress v. Johnson*, 103 F.3d 1221, 1231 (5th Cir. 1997), the Fifth Circuit found counsel was constructively denied under *Cronic* when counsel offered no advice at his plea hearings and conducted no investigation to assist the defendant. *Id.* at 1231. A fortiori, counsel was constructively denied here where there was no substantive communication at all. At least in *Childress* the defendant communicated with counsel and was timely informed about the plea before it expired.

When "no effort to consult with the client [is] made," and the court "acquiesces in this constructive denial of counsel by ignoring the defendant's repeated requests for assistance, *Cronic* governs." *Mitchell v. Mason*, 325 F.3d 732, 744 (6th Cir. 2003). A state court ruling otherwise is "both contrary to and an unreasonable application of Supreme Court precedent." *Id*. In *Mitchell*, the Sixth Circuit held that the state court's rejection of a habeas petitioner's ineffective

assistance claim was an unreasonable application of clearly established law when, before trial, counsel spent only "six minutes spanning three separate meetings in the bullpen" with the defendant and had been suspended from practice for a month immediately before trial. *Id.* at 741. This failure to consult with the client "constituted a complete denial of counsel at a critical stage of the proceedings," *id.*, and accordingly, the state court "should have applied *Cronic*, rather than *Strickland*, to his claim," *id.* at 748.

So, too, here. Like Mr. Mitchell, Mr. Waters alleged a specific type of inadequate performance, but "also alleged that his counsel was utterly absent during [a] seven-month period" due to the failure to consult. *Id.* at 748. As in *Mitchell*, it is nonsensical to apply *Strickland* to a pervasive failure to communicate, because "there are no conceivable tactical or strategic reasons for defense counsel to fail to consult with a client." *Id.* at 747. And, as in *Mitchell*, "the trial court repeatedly ignored [Mr. Walters'] entreaties for counsel who would properly prepare a defense." *Id.* at 742. Under the "stark facts in this appeal," Walters "should not have to point to any specific event of prejudice." *Urquhart v. State*, 203 A.3d 719, 732 (Del. 2019) (en banc) (holding counsel had been constructively denied where the defendant's attorney did not meet with him or discuss his case until the morning of the first day of trial). Because this is not a case where "counsel's performance was

inadequate," but one where "the inadequacy rose to a *complete* denial of representation," *Cronic* governs. *Id*. at 730.

Mr. Walters' constructive denial of counsel occurred, moreover, at a critical stage of the proceedings. The seminal case distinguishing between *Cronic* and *Strickland* claims, *Bell v. Cone*, 535 U.S. 685 (2002), teaches that such "critical stages" are not limited to formal appearances. *Id*. at 696 & n.3. Plea negotiations are one such stage, as confirmed in *Frye*, where the Court recognized "[t]he reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." 566 U.S. at 143; *accord Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance to counsel).

Because ours "is for the most part a system of pleas, not a system of trials," *Lafler v. Cooper*, 566 U.S. 156, 157 (2012), to deny effective assistance at the plea offer and negotiations stage is tantamount to denying effective assistance altogether. As of 2016, more than 97% of criminal cases were resolved by guilty plea. NACDL, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF

EXTINCTION AND HOW TO SAVE IT 14 (2018), https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct.

Mr. Stanley's utter neglect of Mr. Walters during this critical plea bargaining stage thus infected the entire proceeding, jeopardizing its fairness. Mr. Walters should therefore not be required to demonstrate specific prejudice. *See Primus*, *Disaggregating IAC Doctrine,* at 1603 & nn. 116-117; *see also Cronic*, 466 U.S. at 659. "*Cronic* presumes prejudice based on the absence of counsel when such absence threatens the overall fairness" of a proceeding. *Burdine v. Johnson*, 262 F.3d 336, 347 (5th Cir. 2001).

To be sure, *Cronic* applies only to a narrow subset of ineffective assistance claims—a defendant's unhappiness with *how* his counsel performs will not suffice. But the floodgates will not be flung open by recognizing that a seven-month near-total failure to respond to phone calls and letters, while critical events are taking place in the case—a refusal to provide *any* assistance—is effectively the same as having no counsel at all.

Because Mr. Walters, during a critical stage of the proceedings "did not have the aid of counsel in any real sense," *Powell v. Alabama*, 287 U.S. 45, 57 (1932), his Sixth Amendment right to counsel has been denied. It is objectively reasonable to hold, as one member of the West Virginia Supreme Court did, that Mr. Walters would have been better off with no counsel at all. To hold otherwise "would simply

be to ignore actualities" *Powell*, 287 U.S. at 58. The totality of Mr. Walters' allegations establishes his *Cronic* claim that he "effectively had no counsel[,]" JA 420, at a critical stage of proceeding.

II. Alternatively, Mr. Walters Established Prejudice Under *Strickland* and *Frye* Resulting From His Counsel's Pervasive Neglect.

Mr. Walters is entitled to habeas relief even if Mr. Stanley's seven-month abdication of his role as counsel is evaluated as deficient performance rather than the absence of performance. In the context of a foregone plea offer, *Strickland* asks whether, had counsel not been deficient, there is a reasonable probability "that the plea offer would have been presented to the court[,] … that the court would have accepted its terms, and that the conviction, or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler*, 566 U.S. at 164. A reasonable application of this clearly established test proves prejudice here.

Applying this plea-context-specific prejudice test, *Strickland's* general admonition stands—courts must "determine whether, in light of *all* the circumstances, the identified acts or omissions were outside the range of professionally competent assistance." *Strickland*, 466 U.S. at 690 (1984) (emphasis added). This holistic inquiry focuses on "whether counsel provided the assistance necessary to ensure the fundamental fairness of the proceeding whose result is being

challenged." *Resnover v. Pearson*, 965 F.2d 1453, 1460 (7th Cir. 1992) (citing *Strickland*, 466 U.S. at 696).

Here, there is a demonstrable "probability sufficient to undermine confidence in the outcome," *Strickland*, 466 U.S. at 694, that a plea would have been accepted and entered but for Mr. Stanley's deficient performance—whether the deficiency is assessed as one overarching failure to communicate, or as series of separate, but mutually reinforcing and compounding, failures. If this Court is reluctant to weigh evidence already in the record, but not considered by the district court in the first instance, at the very least remand is required for the district court to do so, and if necessary, hold an evidentiary hearing.

A. There Is a Reasonable Probability that the Favorable March Plea Offer Would Have Been Accepted and Entered If Counsel Had Communicated with Mr. Walters.

NACDL agrees with Mr. Walters that even if Mr. Stanley's failure to convey the March plea offer is considered in a vacuum, Mr. Walters has demonstrated prejudice. *See* Opening Br. at 40-43. NACDL writes separately to emphasize, however, that the prejudice resulting from the failure to convey the plea offer cannot be considered in a vacuum and must be evaluated within the context of an overarching deficiency in communication.

"Plea discussions are sensitive and for counsel to be effective in a case like this, counsel must build trust between attorney and client through pretrial contact, a

review of the strengths and weaknesses of the State's case, and a frank discussion about the defendant's chances of an acquittal after trial." *Urquhart*, 203 A.3d at 734; *see also Brooks*, 839 A.2d at 249 (recognizing the critical importance of in-person meetings to "develop a fundamental base of communication" between attorney and client). When there is no communication, there is no trust and no basis for a defendant to make an informed decision about even a timely-conveyed plea offer.

The state court's clear error, and unreasonable application of clearly established law, was thus to substitute an unduly narrow assessment of the prejudicial impact of Mr. Stanley's failure to timely relay the favorable March plea offer for the required assessment of prejudice from "all the circumstances," *Strickland*, 466 U.S. at 690, including the totality of Mr. Stanley's failings. The foregone plea offer was but one example of Mr. Stanley's overarching failure to communicate. As Mr. Walters sets forth, Opening Br. at 8-11, Mr. Stanley's failure to build any type of client-attorney relationship over the seven months he held his appointment but did next to nothing resulted in a total breakdown in trust by late July, when he and Mr. Walters finally had their first substantive meeting. No discovery had been relayed, Mr. Stanley did not respond to Mr. Walters' pleas to assist him with a bond reduction, and apart from a brief and uninformative phone call, Mr. Walters had heard nothing from Mr. Stanley, and learned nothing about the seriousness of the charges against him, for seven months. And Mr. Walters' anger

and distrust only grew upon being treated rudely by his counsel when he finally did deign to meet with him, and upon learning of a plea offer that expired months before he was told about it. JA 404. Mr. Stanley's failure to even attempt to build any attorney-client relationship, much less provide the advice and information necessary for Mr. Walters to evaluate a plea offer, must be weighed in the analysis of whether Mr. Walters was prejudiced by Mr. Stanley's failure to timely disclose that offer.

Once the complete picture of Mr. Stanley's failure to communicate is considered, as *Strickland* demands, the supports for any no-prejudice finding under *Frye* crumble. In assessing prejudice, the West Virginia courts doubted that Mr. Walters would ever have accepted the March plea, given his various pro se requests for more lenient treatment. JA 461. But in reaching this conclusion the court failed to take into account the critical importance of attorney counseling (or the lack thereof), and unfairly faulted Mr. Walters for not understanding the seriousness of the charges against him when his counsel had not explained anything to him, nor provided him the discovery that would have enabled him to better assess the strength of the state's case. Viewed properly, not only did Mr. Stanley's refusal to engage with Mr. Walters' case mean that the plea window was missed, but it also destroyed his client's trust, and left his client uninformed about the severity of his offense and the charges against him (charges that only got harsher over time because of Mr. Stanley's ineffective performance). If Mr. Walters had had a counsel who timely and

adequately conveyed the plea offer, there would not have been a seven-month period of no contact, there would be a basis for a trusting relationship between attorney and client, and Mr. Walters would not have been in the dark about his options. The end result is a reasonable probability that he would have accepted the offer had he received assistance that was not constitutionally deficient—as demonstrated by his acceptance of a much worse offer, after he obtained new counsel.

It is also reasonably probable that the state would have retained the plea, the second prong of the *Lafler/Frye* prejudice test. The offer was made very early, pre-indictment, and would have resulted in significant savings of resources if accepted, making a plea withdrawal highly unlikely. Prosecutors' charges and initial plea offers typically contain higher charges which are then bargained down to induce guilty pleas and avoid trial. *See* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 Columbia L. Rev. 1303, 1310-1313 (2018). But here, the initial March plea offer involved lesser charges; the subsequent indictment added counts, and Mr. Walters lost an exceptional opportunity for a favorable plea all because his counsel failed to even try to keep him informed.

Finally, to the extent the lower court factored in, with hindsight, the ultimate heavy sentencing hand of the circuit court eventually assigned Mr. Walters' case in positing that it was unlikely the court would have accepted the more favorable sentence offered by the March plea, this too was an objectively unreasonable

application of clearly established law. The prejudice analysis "should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency." *Strickland*, 466 U.S. at 695. And the March plea offer would have constrained the sentencing court's discretion in any event. *See* Opening Br. at 46.

Because guilty pleas waive the constitutional right to trial, they "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). A criminal defendant's ability to make a choice to accept or reject a plea offer with "sufficient awareness of the relevant circumstances and likely consequences," in turn, depends upon communication with counsel. By failing to consider Mr. Walters' requests for leniency and reaction to the March plea offer (when he finally learned of it) in the context of the full extent of Mr. Stanley's failure to communicate with his client, the state court unreasonably applied *Strickland*'s prejudice test. A reasonable analysis would not assume that Mr. Walters had the requisite knowledge to knowingly and intelligently decide whether to accept the plea offer in the absence of substantive communication with counsel. Counsel's critical assistance in brokering knowing, intelligent, and voluntary pleas is essential but impossible when proper information is not timely conveyed and what little communication there is occurs only after a complete breakdown of trust.

B. If Mr. Stanley's Deficient Performance Is Instead Viewed as a Series of Separate Errors, *Strickland* Compels a Cumulative Consideration of Prejudice.

The bare failure to convey the plea offer cannot reasonably be separated from the context of Mr. Stanley's overarching failure to communicate with Mr. Walters during the period before the July meeting. But even if each time Mr. Stanley hung up on Mr. Walters, declined to accept a letter, or failed to respond to critical communications about bond, discovery, and plea options is considered a discrete and separate error, prejudice must be determined based on the cumulative effect of those errors. The "decision to grant relief on ineffective assistance grounds is a function of the prejudice flowing from *all* of counsel's deficient performance—as *Strickland* directs it to be." *Cargle v. Mullin*, 317 F.3d 1196, 1212 (10th Cir. 2003) (emphasis added). Thus "it is appropriate to consider the cumulative impact of [counsel's] errors in assessing prejudice." *Turner v. Duncan*, 158 F.3d 449, 457 (9th Cir. 1998).

Strickland "repeatedly" states the "prejudice inquiry in aggregate terms of reasonable probability of counsel's errors affect[ing] outcome of proceeding." *Cargle*, 317 F.3d at 1212. *E.g.*, *Strickland*, 466 U.S. at 693 ("Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they had an adverse effect on the defense."); *id.* at 694 ("[B]ut for counsel's unprofessional errors, the result of the proceeding would have been different.").

Because "the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution," *id.* at 694, it is little surprise that the prejudice analysis is cumulative. "[W]hile courts of necessity examine undisclosed evidence item-by-item, their materiality determinations must evaluate the cumulative effect of all suppressed evidence to determine whether a *Brady* violation has occurred." *United States v. Ellis*, 121 F.3d 908, 916 (4th Cir. 1997). This "cumulative effect" of undisclosed evidence is evaluated "for purposes of materiality separately and at the end of the discussion." *Kyles v. Whitley*, 514 U.S. 419, 436 n.10 (1995).

Strickland errors, like *Brady* errors are thus "governed in the first instance by substantive standards which already incorporate an assessment of prejudice with respect to the trial process as a whole." *Cargle*, 317 F.3d at 1207. So "to deny cumulative-error consideration of claims unless they have first satisfied their individual substantive standards for actionable prejudice would render the cumulative error inquiry meaningless since it would be predicated only upon individual error already requiring reversal." *Id.* (internal quotation marks and citation omitted).

The majority of circuits to have weighed in on the issue agree that "'*Strickland* clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced.'" *Dugas v. Coplan*, 428 F.3d 317,

335 (1st Cir. 2005) (quoting *Kubat v. Thieret*, 867 F.2d 351, 370 (7th Cir. 1989)); *see also Richards v. Quarterman*, 566 F.3d 553, 571-72 (5th Cir. 2009) ("considering the cumulative effect of [counsel's] inadequate performance" to find *Strickland* prejudice to affirm a grant of habeas relief); *Lindstadt v. Keane*, 239 F.3d 191, 194, 199 (2d Cir. 2001) (counting four errors made by counsel "fall[ing] outside the wide range of professionally competent assistance," but declining to "decide whether one or another or less than all of these four errors would suffice, because *Strickland* directs us to look at the 'totality of the evidence before the judge or jury,' keeping in mind that 'some errors have a pervasive impact, …'" (some alterations omitted) (citing *Strickland*, 466 U.S. at 695-696); *Harris v. Wood,* 64 F.3d 1432, 1438-1439 (9th Cir. 1995) ("By finding cumulative prejudice, we obviate the need to analyze the individual prejudicial effect of each deficiency."); *Cargle*, 317 F.3d at 1207, 1212.

A cumulative prejudice analysis makes particular sense with interwoven errors, as here, where it is impossible to disentangle the prejudicial effects of Mr. Stanley's various missteps, and the only reasonable way to characterize the errors separately is to recognize that they are nonetheless intertwined and reinforcing. Mr. Walters' difficulties in understanding the ramifications of the March plea offer when he was finally told about it, for example, cannot be understood apart from his frustration of months of having his attempts at communication rebuffed. *Cf. Cargle*,

317 F.3d at 1217 ("[A]ny effort by the State to deflect responsibility for prosecutorial misconduct or to discount the resultant prejudice by blaming defense counsel for not objecting to/curing the errors would support petitioner's case for relief in connection with his associated allegations of ineffective assistance.")

Because Mr. Stanley's deficiencies are not scattershot tactical errors occurring at all different phases of the proceedings, and because it is undisputed that at least one of the failures—the failure to timely relay the March plea offer—is constitutionally deficient performance, this Circuit's decades-old precedent, *Fisher v. Angelone*, 163 F.3d 835 (4th Cir. 1998), does not control.[3]

Fisher declined to assess prejudice based on cumulative errors where there was no single error of constitutional magnitude. *See United States v. Russell*, 34 F. App'x 927, 927-28 (4th Cir. 2002) (declining to apply *Fisher* when the lower court had not yet separately analyzed the alleged errors). Moreover, the five errors evaluated in *Fisher* were distinct and spread out over the guilt and sentencing phases of a capital case including: 1) failure to challenge admissibility of taped conversations; 2) failure to develop and present evidence to rebut future

[3] If the Court were to read *Fisher* as holding that—even when there is constitutionally deficient performance manifest in a series of reinforcing, related errors, with one indisputable error of constitutional magnitude—prejudice cannot be evaluated cumulatively, then NACDL agrees with Mr. Walters that *Fisher* is wrongly decided under *Strickland* and against the weight of authority in other courts of appeals.

dangerousness; 3) failure to develop and present mitigating evidence; 4) opening the door to evidence of parole eligibility status; and 5) failure to object to erroneous burden of proof instruction. 163 F.3d at 848. Only *after* concluding that none of counsel's actions could even "be considered constitutional error," *id.* at 852, did the court rule that the errors' prejudicial effect "must be reviewed individually, rather than collectively," *id.* at 853.

The handful of cases cited by *Fisher* to support its holding, *id.*, show—at most—that if *no* alleged error by counsel rises to the level of objectively unreasonable, a cumulative analysis is not appropriate.[4] Like *Fisher*, therefore, those cases do not control here, where the failure to timely relay the March plea is indisputably an error of constitutional magnitude.

One other factor distinguishes *Fisher* here. Not only does this case have one plain constitutional failing (where *Fisher* had none), but Mr. Stanley's additional

[4] *Jones v. Stotts*, 59 F.3d 143, 147 (10th Cir. 1995), rejected the cumulative evaluation of non-errors. And *United States v. Gutierrez*, 995 F.2d 169 (9th Cir. 1993), was not even an ineffective assistance of counsel case, but rather held that there can be no cumulative error from the admission of evidence where the defendant "failed to identify a single error in the admission of evidence." *Id.* at 173. *Wainwright v. Lockhart,* 80 F.3d 1226, 1233 (8th Cir. 1996), rejected a cumulative approach but in a case where the defendant sought to aggregate the effect of a single instance of deficient performance by his counsel with wholly unrelated trial errors. And the Ninth and Tenth Circuits cases cited in *Fisher* are no longer (if they ever were) circuit precedent on the *Strickland* cumulative prejudice issue. *E.g. Turner v. Duncan*, 158 F.3d 449, 457 (9th Cir. 1998) (considering cumulative prejudice, relying on a 1995 Ninth Circuit case ignored by *Fisher*); *Cargle*, 317 F.3d at 1212.

missteps are not separate tactical errors scattered throughout various phases of the proceeding, as in *Fisher*. Instead, the compounding errors here are interwoven and reinforcing failures. One cannot assess the prejudice of the clear error of the lapsed plea offer apart from the utter breakdown in trust caused by Mr. Stanley's other failings. It is thus impossible to answer whether Mr. Walters would have accepted the March plea if timely offered by competent counsel that he trusted without considering the effect that his warranted distrust of his admittedly deficient counsel had on his evaluation of the plea offer when it was (belatedly) revealed. At that point, his counsel had not only missed the plea deadline, but also repeatedly ignored his requests for help (including with bond reduction); had rebuffed various efforts at communication; never shared discovery; and was openly antagonistic. Given that context—lacking any trusted or informed advice about his options—Mr. Walters' reluctance to provide an immediate unequivocal answer to Mr. Stanley's demand that he accept the offer before Mr. Stanley would even deign to ask for it to be reopened is understandable. JA 458.

Considered through the proper legal lens, the record developed in the state court amply establishes Mr. Walters' entitlement to habeas relief. If the Court concludes, however, that the narrow focus of prior courts on the failure to convey the plea offer left the record insufficiently developed, the Court should remand the prejudice inquiry for the district court to apply the correct legal rule—considering

the full extent of counsel's alleged deficiencies, whether as one overarching failure to communicate or as a series of compounding errors—with the possibility of an evidentiary hearing if necessary. *See, e.g., Dugas*, 428 F.3d at 342 ("'Habeas doctrine is flexible enough … to condition a grant of the writ on the outcome of further inquiry' into the nature of the evidence.") (quoting *Ellsworth v. Warden*, 333 F.3d 1, 6 (1st Cir. 2003) (en banc)). Where, as here, the claim was diligently pursued but "neither the state court nor the district court fully addressed the prejudice prong of this claim," if this Court is unable to rule on the existing record, a remand is warranted. *Chilton v. True*, 327 F. App'x 383, 387 (4th Cir. 2009)*; see also Wolfe v. Johnson*, 565 F.3d 140, 167-168 (4th Cir. 2009) (discussing diligence requirement for entitlement to an evidentiary hearing under 28 U.S.C. § 2254(e)(2) as set forth in *Williams (Michael) v. Taylor*, 529 U.S. 420, 431(2000)); *Stouffer v. Reynolds*, 168 F.3d 1155, 1164 (10th Cir. 1999) (recognizing that "further evidentiary exploration" was required to assess the cumulative impact of *Strickland* errors).

CONCLUSION

For the foregoing reasons, the District Court's judgment should be reversed, and habeas relief should be granted.

Date: September 21, 2020

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CERTIFICATE OF COMPLIANCE

Counsel for Amicus Curiae NACDL certifies:

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and Fourth Circuit Rule 32(b). This brief contains 5,864 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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I hereby certify I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system on September 21, 2020. In accord with the Court's Updated Public Advisory Regarding Operating Procedures in Response to COVID-19 of May 11, 2020, no paper copies have been filed with the Court. All participants in the case are registered CM/ECF users and so will be served by the CM/ECF system, which constitutes service pursuant to Federal Rule of Appellate Procedure 25(c)(2) and Fourth Circuit Rule 25(a)(4).

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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