No. 18-50

In the
Supreme Court of the United States

LINDA ANITA CARTY,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF OF TEXAS CRIMINAL JUSTICE EXPERTS AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

KATHERINE DYSON
Counsel of Record
ALEXANDRA I. GLIGA
WHITE & CASE LLP
75 State Street
Boston, Massachusetts 02109
(617) 979-9330
kate.dyson@whitecase.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*

Amici curiae, two former Harris County prosecutors (Linda Geffin and Gene Wu) and one former Texas Court of Criminal Appeals judge (Charles F. Baird) ("*Amici*"), respectfully move under Supreme Court Rule 37.2(b) for leave to file a brief as *amici curiae* in support of Petitioner Linda Carty.[1]

Amici have spent their careers ensuring that the State of Texas complies with its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), *Strickland v. Washington*, 466 U.S. 668 (1984), and their progeny to disclose any potentially exculpatory information, and provide effective assistance of counsel, and otherwise ensuring that trials held in Texas are fundamentally fair.

This case poses issues of constitutional, ethical, and professional importance. *Amici* are concerned that, in this case, state prosecutors did not properly follow their obligations under *Brady v. Maryland*, failing to disclose essential information to Linda Carty's defense team. Moreover, Petitioner's defense was plainly deficient, a point that the Fifth Circuit Court of Appeals recognized.

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[1] Pursuant to Rule 37.6, *Amici* hereby state no counsel for any party authored the brief in whole or in part and no person or entity, other than the *Amici*, their members, or their counsel, made any monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a). Copies of the requisite consent letters have been filed with the Clerk of this Court.

Amici faithfully and diligently fulfilled their *Brady* obligations during their tenures as prosecutors and a judge, as well as ensured that effective assistance of counsel was rendered to defendants. Amici also were involved in Texas criminal justice reform projects and publicly supported reopening of the sentencing hearing for a death row petitioner, a sentence this Court ultimately overturned in *Buck v. Davis*, 137 S.Ct. 759 (2017) because race may have been a factor. In their experience, which accounts for decades of collective trial experience, *Amici* respectfully suggest that in order to assess whether a trial is ultimately fair it must be viewed in its totality.

SUMMARY OF ARGUMENT

For the adversarial system to work equitably, there must be two functioning elements: an ethical prosecution and a vigorous defense. If either party fails in its duty to the defendant or to the system of justice, then there is a clear risk of a miscarriage of justice. When, as in this case, both fail to meet the minimum standards required of them, the risk is exponentially enhanced: the sum of the prejudice is greater than the two parts and should be considered as a whole.

It makes no sense, given our system of law, to ignore this obvious fact. Petitioner's case, set in a county that has sent more people to death row than any other and wrongfully convicted many more, is an ideal case to assess the realistic impact of failing to meet even the minimum standards of justice.

ARGUMENT

I. CUMULATIVE ERROR ANALYSIS ALLOWS COURTS ACCURATELY TO EVALUATE TRIALS

This Court has consistently focused its jurisprudence on the overall fairness of the trial, rather than on the piecemeal impact of a particular snapshot during what may be a lengthy process. See *Cone v. Bell*, 556 U.S. 449, 491 (2009) (noting that a court must view the record as a whole when evaluating a petitioner's *Brady* claims); *Williams v. Taylor*, 529 U.S. 362, 397 (2000) (finding that the Virginia Supreme Court's prejudice determination did not properly consider the totality of the evidence when evaluating the petitioner's ineffective assistance claim); *Kyles v. Whitley*, 514 U.S. 419, 421 (1995) (noting that the question of whether material must be disclosed under *Brady* depends on its cumulative effect on a trial); *Taylor v. Kentucky*, 436 U.S. 478, 487-88, 487 n.15 (1978) (finding that the cumulative effect of a series of errors violated the "due process guarantee of fundamental fairness"); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (holding that two errors combined together denied defendant a fair trial consistent with the guarantees of due process).

Despite this constant, circuits are split as to whether constitutional errors should be examined cumulatively in claims brought in habeas petitions. The vast majority of circuits engage in a cumulative constitutional error review of some kind, albeit in widely varying terms. However, the Fourth, Sixth, and Eighth Circuits, and certain states, have rejected this analysis outright.

A requirement that courts undertake cumulative constitutional error analysis would provide federal appellate consistency. It is also necessary to identify and remedy unjust trial results on habeas review, particularly where individual defendants may have been improperly treated by both the prosecution and the defense.

Absent such a requirement, courts in jurisdictions like Texas engage in an unrealistic, balkanized, collateral review of a trial divorced from the actual experience of litigating said trial. In actuality, different aspects of a trial do not fit into neatly separable boxes for a judge, attorney, or juror to examine individually and rearrange as they see fit. Instead, trials are an integrated process. As attorneys listen to witness testimony, they must be aware of the testimony and evidence already presented, the evidence yet to be elicited, and any statement any witness has made. Attorneys must also be ready to make and justify objections, and to adjust their own line of questioning.

This Court recognized these principles of trial litigation when deciding *Strickland*. There, this Court recognized that an evaluation of an attorney's performance requires a holistic evaluation of the entire trial:

> Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. . . .
>
> Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.

Strickland, 466 U.S. at 693. This Court has taken similarly holistic approaches to answering a range of legal questions – for example, in addition to *Brady* and *Strickland*, courts must employ a totality of the circumstances test when determining whether a confession is voluntary. *Arizona v. Fulminante*, 499 U.S. 279 (1991).

It is rarely the case that one element of an unfair trial is truly divorced from another. However, a non-cumulative approach to trial review forces reviewing courts to focus on only one potentially defective building block at a time. Such an approach ignores the reality of a trial, where, for example, a prosecutor's ethical failings or misdeeds can be counterbalanced by defense counsel's effectiveness, such as a well-timed objection or well-argued motion, or exacerbated by defense counsel's ineffectiveness – i.e., a lawyer who is asleep on the other side.

As the First Circuit has recognized, "a column of errors may sometimes have a logarithmic effect, producing a total impact greater than the arithmetic sum of its constituent parts." *United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993). Reviewing a trial is somewhat like a car assembly line quality check. Multiple workers along the manufacturing line could make small errors – a loosely tightened bolt here, a slightly misinstalled part there – that are not serious on their own, but taken together could seriously affect a car's performance. No quality control manager looks at each employee's performance in isolation to determine whether a car will be safe; he examines the finished product.

Indeed, it makes little sense to ignore the overall picture, particularly when it includes *Brady* violations and ineffective assistance, two fundamental issues that implicate failures of the attorney on each side of a trial. Were the failings of one strongly counterbalanced by the vigor of the other, there might be an argument that the trial was fair; where the prosecution's systematic and unethical failure to respect *Brady* is compounded by defense counsel's systematic and unethical failure to provide a vigorous defense, any such argument falls away.

Refusal to conduct a cumulative error analysis is not an issue that is limited to Harris County – Petitioner's brief reflects how it is manifest across the nation. However, Petitioner's case in Harris Country provides the ideal platform on which to assess the question.

II. HARRIS COUNTY HAS BEEN AN OUTLIER IN THE UNITED STATES BOTH IN TERMS OF THE NUMBER OF PEOPLE EXECUTED, AS WELL AS IN THE NUMBER OF EXONERATIONS

While *Amici* hope for improvement in the future, in the past Harris County has stood apart from the rest of Texas and the rest of the nation in terms of the number of people the county has sought to execute, and the number of people wrongfully convicted. While the problems identified in this case are not unique to this jurisdiction, Harris County provides an ideal platform on which to assess these issues and their detrimental impact because of the frequency with which its courts impose the death penalty and the frequency of wrongful convictions in those same courts. These results derived from a combination of

the policies and practices of the Harris County District Attorney's Office (HCDAO), and the frequently subpar standard of indigent defense in the county. To view the one without the other turns a blind eye to reality.

Since 1976, Harris County has executed 129 people. Texas Department of Criminal Justice, http://www.tdcj.state.tx.us/death_row/dr_county_conviction_executed.html (last visited August 5, 2018). This is more than any other county in the country by an enormous margin. Dallas County, the second most prolific venue, had fewer than half the rate of executions since 1976. *Id.* Harris County alone executed more people than any *state* other than Texas; the highest ranked states, after Texas, executed 113 people (Virginia), 112 (Oklahoma), and 96 (Florida). Death Penalty Information Center, https://deathpenaltyinfo.org/number-executions-state-and-region-1976 (last modified July 18, 2018).

Harris County is not home to more death-eligible people than 49 individual states. Harris County has been profiled in a number of national studies highlighting the problems with the county's criminal justice system, including a nationwide study which examined the reasons for wrongful convictions in the United States. In that study of exonerated individuals, the researchers determined that 70% of murder convictions that resulted in exonerations involved official misconduct. Samuel R. Gross et al., *Race and Wrongful Convictions in the United States*, National Registry of Exonerations, 5 (2017), http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf. The most common types of misconduct in that context were

Brady violations, which occurred in over half of the cases examined. *Id.* at 5-6.

Harris County was also the subject of the Fair Punishment Project's report on the state of the death penalty in the United States. The report demonstrated that the death penalty in the United States is practiced in a small number of counties, and highlighted the effects of overzealous prosecution and ineffective defense in these counties. *Too Broken to Fix: Part 1 An In-Depth Look at America's Outlier Death Penalty Counties*, Fair Punishment Project, 2-5 (2016), http://fairpunishment.org/wp-content/uploads/2016/08/FPP-TooBroken.pdf.

III. THE HARRIS COUNTY DISTRICT ATTORNEY'S OFFICE HAS A HISTORY OF MISAPPLYING *BRADY*, AS REFLECTED IN A NUMBER OF RECENT CASES, INCLUDING PETITIONER'S

Recent decisions and hearings in Texas state courts have underscored serious problems with the HCDAO's office and within Harris County's defense community. Most of the failures examined in these decisions, from both the prosecution and the defense, are on display in Petitioner's case. These failures, from both sides of the courtroom, underscore the need for a cumulative review of Petitioner's trial.

In *Ex Parte Temple*, No. WR-78,545-02, 2016 WL 6903758, at *1-2 (Tex. Crim. App. Nov. 23, 2016) (unpublished), the Court of Criminal Appeals of Texas agreed with Texas trial court Judge Larry Gist's relief recommendations following his granting of a rare hearing on Temple's petition for a Writ of Habeas Corpus. Judge Gist granted the hearing partially in order to determine whether the Harris County

District Attorneys' Office had committed *Brady* violations in Temple's case, and whether these violations warranted relief. *Id.* at *5.

The two-month long evidentiary hearing focused on the activities of the prosecutor assigned to the Temple case, Kelly Siegler. See *id.* at *7. Ms. Siegler is among HCDAO's most well known attorneys. According to her biography, she was at the HCDAO from 1987 till 2008, covering the time of Petitioner's trial, though not as the prosecutor in the Petitioner's case. The Law Offices of Kelly Siegler, www.kellysieglerlaw.com/bio.html (last visited August 5, 2018). Kelly Siegler left her mark on HCDAO over those 21 years. She litigated 20 capital trials and secured a death sentence in 19 of those. *Id.* Some of these trials attained nationwide notoriety.

Ms. Siegler's biography establishes that, as of her retirement, she was intimately involved with deciding who would be hired by the office, supervised "seventy employees including lawyers, investigators, secretaries, fraud examiners and interns," and advised police officers on the law on a "round-the-clock basis." The Law Offices of Kelly Siegler, http://www.kellysieglerlaw.com/accomplishments.html (last visited August 5, 2018). Ms. Siegler trained new attorneys, and was responsible for their Continuing Legal Education (CLE) courses. *Id.*

Ms. Siegler was the primary subject of the evidentiary hearing in *Ex Parte Temple*, 2016 WL 6903758. *Temple* dealt with HCDAO's prosecution of David Temple, who was convicted of the 1999 murder of his wife. *Id.* at *1-2. Mr. Temple maintained his innocence, and has suggested that a neighbor,

identified as "R.J.S.," was likely the actual murderer. *Id.* at *3-4.

Temple's defense attorney requested copies of the investigative reports in the case, partially out of a hope that they would contain evidence linking R.J.S. to the crime, including potentially exonerating statements by witnesses that would have apparently implicated R.J.S. *Id.* at *8. Defense counsel was denied access to these reports because the prosecutor's file was "close[d]" to defense counsel review, in line with HCDAO's policy to close the prosecution's file if defense counsel sought to review it. *Id.* at *8-9.

Defense counsel testified at the habeas hearing that he did not receive the police files (and then, only a partial disclosure) until trial. *Id*. at *9.

In evaluating the HCDAO's decision to not turn over evidence, the court found that Ms. Siegler fundamentally misunderstood *Brady* in a way that vastly overemphasized the District Attorney's role in interpreting evidence. Ms. Siegler believed:

> she did not have an obligation to turn over evidence that was, based on her assessment, "ridiculous." She claimed that, when it came to what constituted *Brady* evidence, *her opinion is what mattered*. The prosecutor stated, when asked, that if information does not amount to anything, the defense is not entitled to it. However, although the prosecutor does have the initial responsibility to assess whether evidence may be favorable to the defense*, the prosecutor is not the final arbiter of what constitutes* Brady *evidence*. A prosecutor who errs on the side of withholding evidence from the defense runs the

> risk of violating *Brady* if the reviewing court ultimately decides that it should have been turned over. The habeas judge found, and we agree, that this prosecutor's misconception regarding her duty under *Brady* was "*of enormous significance*."

Id. at *7-8 (emphasis added).

This misconception was not limited to one case, one employee, or even one doctrine of law. Ms. Siegler was the lead prosecutor in the case of Ronald Prible, who was convicted of killing a close friend and his family. Prible's most recent habeas corpus petition alleges, among many other prosecutorial mistakes or misdeeds, that the prosecutor failed to disclose potentially exculpatory letters from jailhouse informants by incorrectly designating them as attorney work product. Fourth Amended Petition for Writ of Habeas Corpus for Person in State Custody at 68, *Prible v. Thaler*, No. 4:09-1896 (S.D. Tex. Mar. 26, 2018), ECF No. 181. During a deposition relating to undisclosed materials, Ms. Siegler admitted that she did not know what "work product" means:

> Q: Okay. Do you -- do you know what the term 'work product' -- how it's defined under the law?
>
> A: Tell me.
>
> Q: No, I'm asking you if you -- if you know?
>
> A: No, I don't know the criminal definition of it.

Fourth Amended Petition for Writ of Habeas Corpus for Person in State Custody, Ex. 4, Deposition of Kelly Siegler at 148, *Prible*, No. 4:09-01896, ECF No. 181-4.

Highlighting these errors is not meant to disparage one member of the HCDAO – albeit a supervisor and mentor. Ms. Siegler's misunderstanding of *Brady* is not an aberration – it reflects an office-wide practice. The record of Petitioner's case, in which Ms. Siegler was not the prosecutor, reflects the institutional problems at the HCDAO, illustrated above. The habeas trial judge found that the prosecution was operating under a fundamental misunderstanding of *Brady*. As these are a part of the record before the Court, there is no need to recount each violation. However, it is worth highlighting a representative sample from the trial court's *Findings of Fact* of examples of the HCDAO's "misunderstanding" of *Brady*:

> 104. At the time of the Carty trial, the Harris County District Attorney's Office did not believe that impeachment or exculpatory evidence needed to be disclosed if the prosecutor did not find the testimony credible. (IV W.H. at 156, lines 26 (regarding whether to disclose prior inconsistent statements by a witness) ("Q. So, in your mind in that instance there is a judgment call on your part about whether they're telling you the truth? A. In 2002, that was a judgment call. Today it's not even a judgment call. It's automatic notification.")
>
> * * *
>
> 108. Prior to trial, the only statements (written, audio-taped or videotaped) the State provided to defense counsel were the statements of Carty.

> 109. Other than the statements of Carty, the State did not disclose the contents or substance of any statements in its possession prior to the Carty trial.
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> * * *
>
> 121. The State should have known that each of the prior statements of Robinson could be used to impeach him at trial.
>
> 122. The State failed to disclose that Robinson previously provided two consistent statements that conflicted with and were inconsistent with what they represented to Carty's counsel would be his trial testimony (and what was, in fact, his trial testimony).
>
> * * *
>
> 124. Carty's counsel was unaware that Robinson previously provided two consistent statements that conflicted with and were inconsistent with what the State had represented would be his trial testimony (and what was, in fact, his trial testimony)

Ex parte Linda Carty, No. 877592-B, Findings of Fact, Conclusions of Law, Cause (177th Dist. Ct. Sept. 1, 2016) (record citations omitted).

This prosecutorial misconduct was compounded by the inadequacy of defense counsel in Harris County. In Harris County, the quality of court-appointed defense counsel, contemporaneous with Petitioner's trial, was inadequate for Petitioner and other similarly-situated defendants. While vigorous defense counsel might be able to overcome the deficits caused

by a violation of *Brady*; with less effective counsel, a defendant has little chance.

Unfortunately, in Petitioner's case, the mistakes of HCDAO's culture went unchecked. Petitioner was represented by Jerry Guerinot who, for many years, epitomized the woeful state of indigent defense in Harris County.

Mr. Guerinot's deficient performance has already been recognized by the Fifth Circuit Court of Appeals. The Court noted that Mr. Guerinot only began working on Petitioner's case *two weeks* before trial was scheduled to begin. *Carty v. Thaler*, 583 F.3d 244, 244 (5th Cir. 2009). Such was his failure to establish a relationship of trust with his client that he only met her once before trial, and blamed her for not telling him – as the lawyer – how he should prepare and conduct her defense. In a remarkable exchange that is, one must hope, unique in the annals of the law, he claimed that the only way he managed to speak to her was to bribe her with a bar of chocolate. David Rose, *Lethal Counsel*, The Guardian (Dec. 2, 2007), https://www.theguardian.com/observer/magazine/story/0,,2218841,00.html.

It is not surprising that Petitioner was skeptical of his commitment to her case. The Fifth Circuit noted that counsel did not interview a large number of possible witnesses for mitigation, and failed even to contact the British Consulate. *Carty,* 583 F. 3d at 263-265. Mr. Guerinot did not even think to inform Petitioner's husband of his marital privilege against being forced to testify against his wife. *Id*. at 261-262.

These failures were sadly not atypical of Mr. Guerinot's general performance. As noted in the New York Times, "[a] good way to end up on death row in

Texas is to be accused of a capital crime and have Jerry Guerinot represent you." Adam Liptak, *A Lawyer Best Known for Losing Cases,* N. Y. Times (May 17, 2010), https://www.nytimes.com/2010/05/18/us/18bar.html. As of 2010, twenty of his former clients had received the death penalty – a larger number than the entire death row in many states. *Id*.

This is not Mr. Guerinot's only notorious case. In 2017, this Court overturned the sentence of Duane Buck. During the sentencing trial, Mr. Buck's defense team, including Mr. Guerinot, called a psychiatrist to the stand who testified that "Buck was statistically more likely to act violently because he is black." *Buck*, 137 S. Ct. at 767. This Court highlighted this shockingly racist statement, and found that "the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record." *Id.* at 777.

During a seven-month period in 1996, Mr. Guerinot represented four capital clients, all of whom were convicted – an astonishing number for any capital defense attorney. Debra Cassens Weiss, *After 21 of His Clients Received the Death Penalty, Lawyer Won't Take Any More Capital Cases*, ABA Journal (Aug. 15, 2016 11:26 AM), http://www.abajournal.com/news/article/after_21_of_his_clients_received_the_death_penalty_lawyer_wont_take_any_mor/ (last visited Aug. 5, 2018); *see Texas Lawyer Who Never Won a Capital Murder Case Calls It Quits Defending "The Very Worst Clients,"* Dallas News (Aug. 2016), https://www.dallasnews.com/news/crime/2016/08/13/texas-lawyer-never-won-capital-murder-case-calls-quits-defending-worst-clients (reporting that Jim Marcus, co-director of the Capital Punishment Clinic at the

University of Texas, called Mr. Guerinot's practice "unthinkable").

The fact that Mr. Guerinot has finally been removed from capital cases does not solve the problem. This came belatedly for twenty-one people sentenced to death, including Petitioner, and reflects the wider failings in the adversarial process in Harris County at the time of her trial.

As former prosecutors or judges and as officers of the Texas courts, *amici* are appalled at this behavior and the injustice it caused. *Amici* spent their careers promoting and ensuring fundamentally fair trials including advocating effective assistance by any defendant's counsel.

Harris County became notorious nation-wide for its level of indigent defense, including drunk and sleeping lawyers. This level of defense was, at least in part, the result of the widely disparate levels of financing between the State and indigent defense. As noted in one law review article, the District Attorney's office had funds of "$26 million in 1999, compared with $11.6 million for indigent defense." Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 Conn. L. Rev. 85, 91 (2007). Moreover, Harris County did not have a dedicated public defender office until 2010. Until then, and during petitioner's trial, Harris was the "largest court system in the country without a public defender office." Jennifer E. Laurin, *Gideon by the Numbers: The Emergence of Evidence-Based Practice in Indigent Defense*, 12 Ohio St. J. Crim. L. 325, 349 (2015). Instead, counsel were appointed by a judge and only afforded a small maximum daily payment. Matthew J. Fogelman, *Justice Asleep Is Justice Denied: Why*

Dozing Defense Attorneys Demean the Sixth Amendment and Should Be Deemed Per Se Prejudicial, 26 J. Legal Prof. 67, 94-95 (2002).

Again, highlighting these failures is not meant to denigrate any one attorney or office. It is meant to highlight the fact that errors can be, and often are, committed by multiple actors during a trial, and then have a cumulative effect. This is particularly true in Harris County, where institutional problems within HCDAO and the public defender community have threatened defendants' rights to a fair trial for decades.

This Court recently said in *Buck* – a case involving Petitioner's inadequate counsel – "[s]ome toxins can be deadly in small doses." 137 S. Ct. at 777. In the same vein, some concoctions that are toxic but not fatal alone turn lethal together. Here is such a deadly cocktail of Constitutional error.

CONCLUSION

For the reasons stated above, *Amici Curiae* respectfully urges the Court to grant Ms. Carty's petition for a writ of certiorari.

Respectfully submitted,

KATHERINE DYSON
Counsel of Record
ALEXANDRA I. GLIGA
WHITE & CASE LLP
75 State Street
Boston, Massachusetts 02109
(617) 979-9330
kate.dyson@whitecase.com

Counsel for Amici Curiae