No. 18-50

IN THE
Supreme Court of the United States

LINDA CARTY,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

The State does not dispute the deep and intractable split on whether the Constitution requires a cumulative assessment of prejudice from multiple constitutional errors on collateral review. Nor does it question the importance of that issue, which plagues both state and federal courts. The State instead makes two misguided arguments to dissuade the Court from resolving this pressing issue.

First, the State argues that the Court of Criminal Appeals' (CCA) holding rests on an adequate and independent state ground because the ineffective-assistance component of the cumulative-error claim was allegedly procedurally defaulted a decade ago. But nothing in the opinion below suggests as much, the State did not raise the argument in its briefing below, and the last court to review the ineffective-assistance claim—the Fifth Circuit—squarely

held that it was *not* procedurally barred and reviewed the claim on the merits—finding that it presented a "close case" on prejudice. The State's once-rejected procedural-default argument is a flimsy attempt to evade review.

Second, the State insists that the CCA *does* cumulate errors on collateral review, but it cites only cases that cumulate errors on *direct* review—something that all courts do. All collateral-review decisions—like the one below—show that the CCA firmly refuses to consider cumulative-error claims. The cumulative-error split is squarely presented here.

On the *Brady* question, the State does not dispute that it suppressed evidence and concealed that fact for 12 years. It does not dispute the grave methodological errors in the CCA's *Brady* analysis that were outlined by petitioner and *amicus* National Association of Criminal Defense Lawyers (NACDL). Instead, the State asserts that "overwhelming evidence of guilt" forecloses certiorari. But this Court frequently reviews *Brady* questions where lower courts found prejudice lacking—and often reverses where the State concealed evidence of a witness's deal with the prosecution. A capital defendant deserves fundamental procedural protections—including a proper *Brady* and cumulative-error analysis—before being ordered to suffer the ultimate punishment.

I. THE COURT OF CRIMINAL APPEALS REJECTED THE CUMULATIVE-ERROR ARGUMENT ON CONSTITUTIONAL GROUNDS

Cobbling together snippets from various opinions and briefs that span almost a decade, the State speculates that the CCA based its rejection of petitioner's cumulative-error argument on an alleged failure to timely raise her ineffective-assistance claim years ago. But the State obscures the Fifth Circuit's crystalline holding that nothing barred petitioner's ineffective-assistance claim on col-

lateral review. It ignores the well-developed law that governs how to interpret Texas abuse-of-the-writ rulings—which demonstrates that the CCA reached the constitutional issue. And it overlooks this Court's longstanding practice to "assume that there are no such [adequate and independent state] grounds" when presented with ambiguous state-court rulings. See *Michigan* v. *Long*, 463 U.S. 1032, 1042 (1983). The State's unfounded conjecture that the CCA relied *sub silentio* on a previously rejected procedural-default defense does not prevent review of this important question.

A. This Court's adequate-and-independent-state-ground analysis "primar[il]y focus[es]" on "the face of the opinion." *Id.* at 1041 & n.8; see also *Florida* v. *Powell*, 559 U.S. 50, 57-58 (2010). That focus reflects *Long*'s rule that this Court possesses jurisdiction unless an adequate and independent state ground is "clear from the face of the opinion." 463 U.S. at 1041.

The petition carefully follows this Court's face-of-the-opinion approach. Pet. 20-22. Petitioner identified the relevant language in the CCA's opinion and then interpreted it in light of that court's "behavior in other * * * cases." *Caldwell* v. *Mississippi*, 472 U.S. 320, 328 (1985). That analysis revealed two possible meanings of the CCA's terse "abuse of the writ" holding: Petitioner had failed to show either that "1) the factual or legal basis for an applicant's current claims [was] unavailable as to all of his previous applications; [or that] 2) the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence." *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). The State does not engage with this analysis, nor does it dispute that petitioner's cumulative-error claim was previously unavailable, as the *Brady* claim was based on newly discovered evidence and new state-court findings. Pet. 21. There-

fore, the only reasonable reading of the opinion is that it rejected the cumulative-error argument on constitutional grounds. See *In re Davila*, 888 F.3d 179, 187-189 (5th Cir. 2018) (applying *Campbell* analysis and holding that abuse-of-the-writ dismissal using identical language rested on constitutional grounds).[1]

Contemporaneous sources beyond the face of the opinion confirm this result. Petitioner's briefing below squarely asserted that the "cumulative impact of the constitutional errors in [her] proceedings violated [her] right to due process under the United States Constitution." Pet. App. 220a. The State's briefing, by contrast, did not reference the procedural-default ground it now invokes. The opinion, supplemented by the relevant briefing, should end the inquiry.

B. The State's argument does not improve even as it strays far afield from the opinion below. The State posits that the CCA silently rested its abuse-of-the-writ holding on a procedural-default argument that the State last briefed nearly a decade ago—and that was squarely rejected by the Fifth Circuit.

Beyond violating this Court's face-of-the-opinion mandate, the State's creative theory fails for at least two reasons. First, if the CCA had rejected the cumulative-error claim because the ineffective-assistance component was not timely asserted, it would have used the same language it employed in the cases cited by the State. See BIO 11; *Ex Parte Ramirez*, WR-71,401-01, 2015 WL 6282336, at *1 (Tex. Crim. App. Oct. 14, 2015) (per curi-

[1] The State cites language from one of the concurrences stating that the judgment below "dismisse[d] three of Carty's habeas claims as procedurally barred." Pet. App. 5a. But that merely repeats the court's holding that Carty "failed to satisfy the requirements of Article 11.071, § 5(a)." *Id.* at 4a. It sheds no light on *which* species of abuse-of-the-writ dismissal the court entered.

am) (unpublished) ("[T]his document was filed in the trial court after the deadline provided for the filing of an initial application for habeas corpus * * * ."); *Ex parte Hall*, WR-70,834-01, 2009 WL 1617087, at *2 (Tex. Crim. App. June 10, 2009) (per curiam) (unpublished) ("[T]he statutory time for filing has passed."); *Ex parte Esparza*, WR-66,111-01, 2007 WL 602812, at *1 (Tex. Crim. App. Feb. 28, 2007) (per curiam) (unpublished) ("Both documents were filed after the deadline provided for the filing of an initial application for writ of habeas corpus."); *Ex parte Acker*, WR-56,841-01, 2006 WL 3308712, at *1 (Tex. Crim. App. Nov. 15, 2006) (per curiam) (unpublished) ("[T]his application was filed after the deadline provided for an initial application for habeas corpus * * * ."). The absence of similar language below confirms that the CCA rejected the cumulative-error claim on substantive grounds.[2]

Second, the State labors mightily to obscure the Fifth Circuit's resolution of petitioner's ineffective-assistance claim. The reality is simple and self-evident: The Fifth Circuit plainly saw no procedural bar to addressing the claim. It extensively analyzed the untimeliness argument that the State recycles here, Pet. App. 129a-141a, explaining that "as the parties have framed it, the exhaustion requirement" includes a timeliness component, *id.* at 134a-136a. It ultimately concluded that the State had waived its exhaustion defense by conceding in federal district court that petitioner's ineffective-assistance claim was properly exhausted. *Id.* at 140a-141a. Consequently,

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[2] The State asserts that a state court previously accepted its untimeliness argument. BIO 10-12 (citing *Ylst* v. *Nunnemaker*, 501 U.S. 797 (1991)). That is simply not so. As the Fifth Circuit recounted, "the state did not object" to petitioner's claims in her Additional Further Response "and the state habeas court did not mention any delinquency in the filings of those claims." Pet. App. 130a. "Neither state court" said anything about those claims at all. *Ibid.*

the Fifth Circuit addressed that claim on the merits, agreed that petitioner's counsel was ineffective, and denied relief only after finding a "close case" on prejudice. *Id.* at 141a-151a. Given that clear holding, there is no reason to think that the CCA looked past that decision and relied on a nearly decade-old, previously rejected procedural-default argument that the State didn't even bother to brief below.[3]

The State invites the Court to parse its federal-habeas briefing from almost a decade ago, relitigating its rejected assertion that its exhaustion waiver did not affect what it now claims was a "separate" procedural-default defense based on untimeliness. BIO 14. No amount of parsing, however, credits the State's claim.[4]

More importantly, it is beside the point. The question is not whether the CCA could have relied on an adequate

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[3] The Fifth Circuit's separate opinion denying an expanded certificate of appealability does not advance the State's argument. There, the Fifth Circuit recognized that because the "district court's underlying procedural default ruling was entirely dependent on its failure-to-exhaust ruling[] * * * , Carty's success on her appeal of the exhaustion issue would by definition remove the procedural default bar to federal review." *Carty* v. *Quarterman*, 345 F. App'x 897, 910 (5th Cir. 2009).

[4] The State claims that "[w]aiver of exhaustion alone did not justify review of the merits because Petitioner's procedural default posed an independent bar to federal review." BIO 14. But the State's cited authorities concern the unusual scenario—not presented here—of a petitioner attempting to use his procedural default as a basis for demonstrating exhaustion. See *Coleman* v. *Thompson*, 501 U.S. 722, 732 (1991) ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him."); 17B Wright, et al., Federal Practice and Procedure § 4266 (3d ed. 2009) (similar). Neither casts doubt on the Fifth Circuit's conclusion that the State's concession as to proper exhaustion included its intertwined untimeliness argument.

and independent state ground, but whether it in fact did so. The face of the opinion, interpreted in light of abuse-of-the-writ caselaw, the parties' briefing below, and the court's practice of expressly noting timeliness grounds, demonstrates that the court rejected the cumulative-error claim on constitutional grounds. The State's fanciful contrary theory does not alter that reality.[5]

In any event, this Court has stressed that it is "important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Powell*, 559 U.S. at 56 (quoting *Minnesota* v. *Nat'l Tea Co.*, 309 U.S. 551, 557 (1940)). Here, the State seeks to execute petitioner without affording her a cumulative-harm review, when just one of the multiple errors constituted a "close case" on prejudice. It cannot be contested that the opinion below lacks the required "'plain statement' that a decision rests upon adequate and independent state grounds." *Long*, 463 U.S. at 1042. That plain-statement rule is especially critical in a capital case, where petitioner's strong cumulative-error claim has not yet been reviewed by *any court*.

II. THE COURT OF CRIMINAL APPEALS REJECTS CUMULATIVE-ERROR CLAIMS ON COLLATERAL REVIEW

Conceding that federal and state courts are divided over whether to entertain cumulative-error claims on habeas review, the State asserts that the CCA *permits* such

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[5] The State cites vague language in petitioner's briefing below referring to *all* of petitioner's previous claims of error to suggest that she "effective[ly] admi[tted]" her ineffective-assistance claim had been procedurally defaulted. BIO 16. It is simply implausible to infer from this broad statement that petitioner conceded her ineffective-assistance claim was procedurally defaulted when the Fifth Circuit squarely held that it was not and addressed it on the merits.

claims. But it cannot dispute that the CCA has never analyzed a cumulative-error claim on the merits on collateral review—despite being presented with such claims in this and other cases.

The State instead cites a handful of cumulative-error cases arising on *direct* review without deigning to acknowledge that key distinction. BIO 18-21. After this Court required cumulative-error analysis on direct review in *Taylor* v. *Kentucky*, 436 U.S. 478 (1978), and *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), the CCA had little choice but to cumulate constitutional errors on direct review. Indeed, *all courts* allow cumulative-error claims on direct review. The split among the circuits and state high courts is over whether that rule extends to *collateral* review.[6]

Nor do cases in which the CCA summarily rejected cumulative-error claims on collateral review somehow demonstrate that the court actually recognizes such claims. BIO 22-23. If those opinions had explained that multiple errors did not cumulatively prejudice the petitioner, the State would be correct to draw that inference. But the opinions say no such thing; they dismiss cumulative-error claims without any reasoning.[7] Likewise here, the court's abrupt rejection of a cumulative-error claim—

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[6] The State tries to manufacture a concession out of petitioner's citing the CCA's direct-review cases below. BIO 18. Petitioner tried, but failed, to convince the CCA to extend its direct-review holdings to collateral review.

[7] The State asserts that *Ex Parte Medina*, WR-41,274-05, 2017 WL 690960 (Tex. Crim. App. Jan. 25, 2017) (per curiam) (unpublished), references a previous habeas ruling that rejected a cumulative-error claim "on the merits." BIO 23. But both rulings simply describe the claim as having been "denied"—a statement consistent with a holding that such a claim is not constitutionally cognizable. *Id.* at *1; *Ex parte Medina*, WR-41,274-02, 2009 WL 2960466, at *1 (Tex. Crim. App. Sept. 16, 2009) (per curiam) (unpublished).

even though one of the errors presented a "close case" in isolation—confirms that the CCA holds cumulative-error claims are categorically unavailable on collateral review. While the CCA's pronouncements on collateral review of cumulative-error claims are terse, they are best understood as joining the minority view and refusing to cumulate error on collateral review.

The *amicus* brief of Texas Criminal Justice Experts confirms this common-sense understanding. The Experts, who include a former CCA judge, acknowledge the split of state and federal authority over whether cumulative-error claims are appropriately considered on habeas review. Experts Br. 3. They lament that "courts in jurisdictions like Texas engage in an unrealistic, balkanized collateral review of a trial," rather than assessing constitutional harm in a cumulative fashion. *Id.* at 4. And they join petitioner in urging the Court to resolve this critical issue. *Id.* at 6.

What is more, the State's previous litigation positions strongly belie its certiorari-stage assertion that cumulative-error claims are cognizable on habeas. The State recently urged the Fifth Circuit to hold on collateral review that "the cumulative error doctrine" "lacks 'clearly established' Supreme Court precedent." Br. of Respondent-Appellee at 47, *Nickleson* v. *Stephens*, No. 13-41313 (5th Cir.). And, even on direct appeal, the State has told the CCA that "[a]n allegation that the cumulative effect of two or more purported errors denies a defendant a fair trial is not a proper issue and thus presents nothing for review." State's Appellate Brief at *26, *Sorto* v. *State*, No. AP-74,836, 2005 WL 5981247 (Tex. Crim. App.). These previous arguments undermine the State's current contention that the CCA recognizes cumulative-error claims on collateral review—despite repeatedly rejecting such claims without analysis. This Court should not allow the highest criminal court in the Nation's death-penalty

capital to employ cursory dismissals to avoid review on important issues of federal law.

III. THE *BRADY* ISSUE INDEPENDENTLY MERITS REVIEW

The State does not dispute it committed *Brady* violations and concealed evidence for 12 years despite insistent requests by petitioner. Under a cumulative-error analysis, the *Brady* harms would provide the added prejudice necessary to push the "close case" on the *Strickland* violation across the constitutional goal line—especially given that the *Brady* materiality analysis turns on how "competent" counsel would have used the suppressed evidence. *Kyles* v. *Whitley*, 514 U.S. 419, 441, (1995).

But even apart from cumulative error, the *Brady* issue would independently warrant this Court's review. Petitioner and *amici* demonstrated the serious errors in the CCA's *Brady* analysis. The court improperly speculated that the *Brady* violations did not prejudice petitioner because her counsel could have cross-examined prosecution witnesses about the withheld "deal" and prior inconsistent statements—despite lacking any knowledge of them. As petitioner and *amicus* NACDL explained, this conjecture ignores both the realities of trial and the cardinal rules of cross-examination. Pet. 26-29; NADCL Br. 11-16. Unfortunately, other courts of appeals have committed the same error. NADCL Br. 16-17 (citing *Heishman* v. *Ayers*, 621 F.3d 1030, 1035 (9th Cir. 2010); *United States* v. *Williams*, No. 08-14531, 2009 WL 4810428, at *2 (11th Cir. Dec. 15, 2009)).

Tellingly, the State does *not* defend the court's approach to assessing materiality. It is thus undisputed that the CCA employed an improper *Brady*-materiality methodology. This Court has often granted review to correct important misunderstandings of *Brady*, and it

should do so again here. See *Wearry* v. *Cain*, 136 S. Ct. 1002 (2016); *Smith* v. *Cain*, 565 U.S. 73 (2012); *Youngblood* v. *West Virginia*, 547 U.S. 867 (2006). Granting review and correcting the CCA's erroneous analysis would provide valuable guidance to the lower courts on a substantial, recurring issue.

Ignoring the CCA's legal error, the State views the allegedly "overwhelming evidence of guilt" as insulating the petition from review. BIO 24. But the State overlooks the governing materiality standard. Petitioner "need not show that [s]he 'more likely than not' would have been acquitted had the new evidence been admitted." *Wearry*, 136 S. Ct. at 1006 (quoting *Smith*, 565 U.S. at 75). Rather, she must demonstrate only a "reasonable probability" that the result would have been different to "'undermine confidence' in the verdict." *Ibid.* (quoting *Smith*, 565 U.S. at 76).

As detailed by petitioner and *amici*, the withheld evidence of secret deals and prior inconsistent statements would have allowed petitioner to powerfully impeach the testimony of the only two members of the alleged conspiracy's inner circle who testified at trial. Pet. 26-29; NADCL Br. 11-16. Notwithstanding allegedly inculpatory evidence, devastating impeachment of two of the State's star witnesses "is sufficient to 'undermine confidence' in the verdict." *Wearry*, 136 S. Ct. at 1006 (quoting *Smith*, 565 U.S. at 76). This Court has recognized as much by repeatedly granting and reversing no-materiality findings where the prosecution improperly withheld evidence of its deals with key witnesses. See *id.* at 1004, 1007; *Banks* v. *Dretke*, 540 U.S. 668, 701-703 (2004). The Court should do so again here.

Respectfully submitted.

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