No. 18-_____

In the Supreme Court of the United States

AURIEL DEVON FRETT,

Petitioner,

v.

PEOPLE OF THE VIRGIN ISLANDS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the Virgin Islands

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the instruction to not consider the specific length of sentence a testifying co-defendant faced absent cooperation violates a defendant's sixth amendment right to cross-examination and to due process?

2. Was the rejection of the cumulative error doctrine in the Virgin Islands contrary to *Chambers v. Mississippi*, 410 U.S. 284 (1973) and its progeny, and the failure to find error in incomplete jury charges grounds warranting summary reversal?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Auriel Devon Frett, respectfully prays that a Writ of Certiorari issue to review the February 22, 2017 judgment and decision of the Supreme Court of the Virgin Islands. That decision affirmed the convictions following a jury trial.

OPINIONS BELOW

The February 22, 2017 opinion of the Supreme Court of the Virgin Islands is found at 66 V.I. 399 (V.I. 2017).

JURISDICTION

The Supreme Court of Virgin Islands filed its opinion on February 22, 2017. (App.1a). A Petition for Certiorari was filed and granted with the Third Circuit Court of Appeals pursuant to 48 U.S.C. § 1613 on August 10, 2017. (App.39a). On August 24, 2018, the Third Circuit Court of Appeals dismissed the Petition. (App.37a-38a). This petition for a writ of certiorari is filed within ninety days of the dismissal. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

- **U.S. Const. amend. VI**

  In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him.

- **U.S. Const. amend. XIV, § 1**

  No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In the Superior Court of the Virgin Islands, Petitioner Auriel Devon Frett was charged in a Second Amended Information with first-degree Murder contrary to 14 V.I.C. § 921; Assault for robbery contrary to 14 V.I.C. § 295(a)(2), and Kidnapping for robbery contrary to 14 V.I.C. § 1052(a). (App.1a-2a; 40a-42a). The People contended that Petitioner and co-defendant John Southwell ("Southwell") murdered Gabriel Lerner, who was a law clerk to a then-judge in the Virgin Islands Superior Court. *People v. Frett*, 58 V.I. 492, 493 (V.I. 2013).

Southwell cooperated with the People and pled guilty to a reduced charge of second-degree murder

and second-degree robbery. (App.2a). Southwell's plea agreement was admitted into evidence, detailing these terms. (App.43a-46a). That evidence explains that Southwell is being prosecuted "identical to the charges" brought against the Petitioner including Murder in the First Degree. (App.43a). The agreement shows that a conviction for the lesser Murder in the Second Degree carries a minimum of five years incarceration with no maximum sentence. (App.44a). However, because Southwell cooperated he avoided the "no maximum" (*i.e.*, life imprisonment) and received a reduced sentence of merely twenty-years on the murder and ten-years on the robbery to run concurrently. (App.44a).

No testimony placed Petitioner at the murder other than Southwell's testimony. (App.2a-3a) (detailing Southwell's testimony). The timing and day of the murder was provided by Southwell. The People admitted in summation that without Southwell the People may never have known what happened that day.

As to Southwell's testimony itself, one part of the Third Circuit Court of Appeals' "great care and caution [jury] charge" was provided. That instruction states:

> In considering these witness' testimony, you should bear in mind that a witness who has entered into a plea agreement has an interest in this case different from an ordinary witness's. A witness who realizes he may be able to obtain his own freedom, or receive a lighter sentence by giving testimony favorable to the prosecution, has motive to testify falsely. Therefore, you must examine his tes-

> timony with caution and weigh it with great care.

Third Circuit Court of Appeals Criminal Jury Instruction 4.19.

A second aspect of the same instruction was not provided. That aspect regards a distinct issue. Specifically, a jury cannot consider a co-defendant's guilty plea as substantive evidence of the defendant's guilty; that the co-defendant's guilty plea is only offered to assess the co-defendant's credibility; and that the jury may only consider the plea for those specific purposes. *Id.* The trial court failed to provide a limiting instruction that Southwell's plea was not substantive evidence nor as to how the jury could or could not use the plea. (App.23a).

In summation, the People argued that no presumption of innocence existed, stating that "it is not that this defendant is innocent. That is not it. He's guilty. Guilty on each of those counts. There's no inference of innocence here today. None whatsoever." (App.6a). The prosecutor reiterated that "There's no presumption here whatsoever of innocence." (App.6a). No objection was made nor was the prosecutor admonished by the judge. A later instruction presented: "[if] the accused be proven guilty, say so. If proven not guilty, say so." (App.4a). Proper instructions covering the presumption of innocence were provided buried in the final jury charge. (App.11a-12a).

Conversely, in summation, Petitioner wished to give content to his entire defense and to emphasize animating principle of the "great care and caution" charge—that Southwell had great incentive to lie by highlighting the term of incarceration Southwell faced

as compared his plea's terms. (App.28a). *Sua sponte*, the trial court "objected" and instructed the jury that "any term of incarceration, if any, is within the sole province of the [c]ourt. Do not consider that when making your determination." (App.27a-28a). Meaning, the judge instructed the jury to not consider the bargained for benefit of the co-defendant's guilty plea to assess his credibility. Yet, this was Petitioner's entire defense theory.

Despite this, the judge permitted the People to argue this exact issue denied to Petitioner—that Southwell did not have incentive to lie and was thus credible because his plea bargain was not such a "great deal." (App.4a)

On appeal to the Virgin Islands Supreme Court, Petitioner argued that the failure to provide a limiting instruction as to Southwell's guilty plea coupled with the judge's *sua sponte* instruction not to consider Southwell's plea to assess his credibility denied him a fair trial. He argued that the cumulative nature of all errors violated this Court's Cumulative Error Doctrine. (App.20a).

First, the V.I. Supreme Court held that the trial court "did not commit any error[]" when it failed to instruct on the plea's limited use. (App.24a). However, the court simultaneously acknowledged that the omitted instruction is designed to protect "significant interests" and that the plea "can jeopardize fundamental fairness." (App.24a).

Second, the Virgin Islands Supreme Court found error in the trial court's *sua sponte* restriction of defense counsel's summation and instruction to the jury. (App. 28a). Petitioner had a right to argue that the incarcer-

ation Southwell faced prior to cooperation in order to give full force to the ensuing "great care and caution" charge. This argument was "mendaciously warranted." (App.28a). Still, the Virgin Islands Supreme Court denied prejudice despite the fact that this *sua sponte* instruction contradicted with the later jury charge to consider Southwell's plea with great care and caution. (App.29a-30a).

Further, the Virgin Islands Supreme Court simply ignored judicial bias evinced by a double standard. The trial judge denied defense the opportunity to argue Southwell was not credible due to his plea's explicit terms, but permitted the People to argue that Southwell was credible due to the plea's explicit terms.

Third, the Virgin Islands Supreme Court found an additional error in the attack on the presumption of innocence. (App.6a). The lower court found this "patently incongruous with the fundamental legal principle that Frett was presumptively innocent[.]" The presumption is "a basic component of a fair trial[]" *Estelle v. Williams*, 425 U.S. 501, 503 (1976), but refused to reverse.

Petitioner argued that the prejudice must be assessed cumulatively. (App.20a). The People briefed that this doctrine is not afforded to defendants in the Virgin Islands, allegedly having been rejected by the territorial courts. In the end, the V.I. Supreme Court crafted an opinion where it rejected this doctrine by preemptively isolating one error in order to incorrectly assert that only one error occurred, despite explicitly finding two. (App.20a).

The conviction was affirmed and Petitioner now continues his sentence imposed including life imprison-

ment without the possibility of parole. (App.40a). Petitioner filed a Petition for Certiorari that was granted by the Third Circuit Court of Appeals on August 10, 2017. (App.39a). However, upon reversing a prior decision *en banc*, the Third Circuit dismissed the Petition by Order dated August 24, 2018. (App.37a-38a).

REASONS FOR GRANTING THE WRIT

The Virgin Island Supreme Court's decision was based on an improper proposition regarding the rights of a defendant to challenge the veracity of lynchpin testimony against him; to have complete jury instructions presented; to have an unbiased judge treat the litigants equally; and to afford the full range of Constitutional protections to the litigants in the Virgin Islands. The decision warrants this Court's review for several reasons:

1. Petitioner's defense was to attack the co-defendant's credibility by highlighting the extent of the plea he received in exchange for his testimony. The trial permitted this defense including during cross-examination. However, in summation, the judge *sua sponte* abolished Petitioner's defense. The judge instructed the jury to not consider the plea terms when assessing the co-defendant's credibility. Curiously, the judge permitted the prosecution to argue the exact point denied to the Petitioner. The lower courts are in conflict as to whether a defendant has the right to question and/or argue the explicit terms of cooperating co-defendant's plea agreements. The Virgin Islands Supreme Court found error, but denied reversal. This

Court has noted that whether rooted in the Fourteenth Amendment's Due Process Clause, *Chambers v. Mississippi*, 410 U.S. 284 (1973), or the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23 (1967); *Davis v. Alaska*, 415 U.S. 308 (1974), "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 583, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984). The restriction here either violated Confrontation and/or Fourteenth Amendment rights by denying the defense theory after the close of evidence.

2. This Court should instruct that the Cumulative Error Doctrine protects defendants in the Virgin Islands. While the doctrine has various iterations, the exact contours of this doctrine are not challenged here. What is at issue is that despite multiple errors, no consideration of the Due Process implications was conducted. The Virgin Islands Supreme Court has declined to recognize these protections. *Simmonds v. People*, 59 V.I. 480, n.16 (V.I. 2013) (noting court has not adopted the cumulative error doctrine, stating "Even if we were to adopt the cumulative error doctrine . . . "); *Joseph v. People*, 60 V.I. 338, n.11 (V.I. 2013) ("Even if this Court were inclined to adopt the cumulative error doctrine—which we have not yet done . . . "). This Court should summarily reverse as it is not for the lower court to "adopt" this Court's case law, but rather the lower court is bound by this Court's decisions.

3. Should this Court remand with instructions that Due Process reaches the Virgin Islands, the Court

should ensure that the analysis is complete. The Virgin Islands Supreme Court's decision that it was not error to omit a jury charge limiting the use of the co-defendant's guilty plea was, in fact, a serious error. On remand, the Virgin Islands Supreme Court must use this error, along with the two others, to determine whether Petitioner's right to a fair trial was denied.

Below, the Petition addresses each of these three reasons in turn.

I. THE VIRGIN ISLANDS SUPREME COURT DECISION BELOW VIOLATED PETITIONER'S RIGHT TO CONFRONT THE WITNESS, DEEPENING A CONFLICT IN THE LOWER COURTS, AND DENYING PETITIONER A FAIR TRIAL BY ELIMINATING THE DEFENSE DURING SUMMATION

In *United States v. Larson*, the Ninth Circuit held that Sixth Amendment rights were violated when a judge denied the defendant the opportunity to explore the life sentence the witness faced absent cooperation. 495 F.3d 1094, 1107 (9th Cir. 2007) (en banc). The Ninth Circuit noted that the potential sentence and length of sentence cast doubt on the believability of the witness. *Id.* at 1104.

In *Arizona v. Morales*, a trial court prohibited cross-examination of witness as to the penalties the witness faced absent cooperation. 587 P.2d 236, 239 (Ariz. 1978). This was error because the defendant had the right to cross-examine the State's major witness as to what he expected to receive in exchange for his testimony. *Ibid.*

In *United States v. Chandler*, the Third Circuit found restriction on cross-examination to be error.

326 F.3d 210, 222 (3d Cir. 2003). A limitation as to details was insufficient for the jury to "appreciate the strength of [the witness's] incentive to provide testimony that was satisfactory to the prosecution. *Ibid*.

In *Wilson v. Delaware*, the trial court admitted a co-defendant's plea into evidence but with the sentence recommendation redacted. 950 A.2d 634, 639 (Del. 2008). The court held that "[h]ad the jury been told of the extent of the benefit [the witness] received, it might have developed a different impression of [the witness'] credibility." *Ibid.* Specific discussion was required.

Conversely, for example, the Eighth Circuit, in *United States v. Wright*, held an alternative, amorphous phrase "decades" was sufficient to substitute for articulation of the extent of penalties faced absent cooperation. 866 F.3d 899, 908-909 (8th Cir. 2017).

Similar to the Eighth Circuit, the Eleventh Circuit held in *United States v. Rushin* that the "precise number" of years a witness faced absent cooperation adds little value when permitted to question about the "severe penalty" faced prior to cooperation. 844 F.3d 933, 940 (11th Cir. 2016).

This conflict exists in the state courts as well. *Compare*, *South Carolina v. Gracely*, 731 S.E.2d 880, 886 (S.C. 2012) (holding defendant has right to question as to extent of bias and specific terms at issue); *Manley v. Georgia*, 698 S.E.2d 301, 306 (Ga. 2010) (concluding specific disparity between penalties might have provided witness with bias or motivation to assist the State) *with Nebraska v. Patton*, 845 N.W.2d 572, 577 (Neb. 2014) (finding permissible limitation on cross-examination as to specific penalties faced); *Minnesota v. Young*, 774 N.W.2d 539, 553 (Minn. 2009) (concluding

jury had sufficient information to assess credibility because jury knew witness faced "considerably less jail time in exchange for their testimony.").

This Court has held that a defendant has a Sixth Amendment right to question a witness regarding information that might provide a jury a "significantly different impression of [the witness's] credibility." *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986). "The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Exposing a witness's motivation to testify is a "proper and important function of the constitutionality protected right of cross-examination." *Id.* at 316-317.

Additionally, this Court has noted that no less than three (3) Constitutional rights may be affected when it comes to a defendant's right to present a "complete defense." *Crane*, 476 U.S. at 690 (citing Fourteenth Amendment protections under *Chambers*, 410 U.S. 284, Sixth Amendment Compulsory Process protections under *Washington*, 388 U.S. at 23, and Sixth Amendment Confrontation protections under *Davis*, 415 U.S. 308). Those procedural rights include an opportunity to be heard. *In re Oliver*, 333 U.S. 257, 273 (1948); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). "That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Crane*, 476 U.S. at 690. Without a valid justification, the exclusion of exculpatory evidence "deprives a defendant of the basic right to

have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Id.* at 690-91 (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984) and *Washington*, 388 U.S. at 23).

Here, Petitioner acknowledges that counsel was permitted to cross-examine without limitation but that does not mean his rights were not violated. The constitutional violation is two-fold.

First, while Petitioner was unrestricted in technical cross-examination, all was for naught when the judge, *sua sponte*, instructed the jury to disregard the co-defendant's term of incarceration, and in turn, that line of examination. The denial of the right to confrontation is linked to an instruction not to consider the confrontation that occurred at trial. This violated Petitioner's Sixth Amendment rights, adding to the split of authority on this issue.

Second, when the judge instructed the jury to not consider the specifics of the co-defendant's plea, not only was confrontation nullified, *see*, *Van Arsdall*, 475 U.S. at 680 (stating defendant has a right to question a witness regarding information that might provide a jury a "significantly different impression of [the witness's] credibility); *Davis*, 415 U.S. at 316-17 (stating partiality of a witness is "always relevant" to exploration and a "proper and important function of the constitutionality protected right of cross-examination."), but, worse, Petitioner's defense theory was struck from the jury's consideration after the close of evidence.

Petitioner had a right to present a "complete defense." *Crane*, 476 U.S. at 690. This right is animated by no less than three Constitutional guarantees. *Chambers*, 410 U.S. 284; *Washington*, 388 U.S. at 23, *Davis*,

415 U.S. 308. Yet, this is unfortunate case of "empty" rights because of the judge's actions. *Crane*, 476 U.S. at 690. This instruction was an exclusion from consideration of a valid defense, "depriv[ing] a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Id.* at 690-91 (quoting *Cronic*, 466 U.S. at 656 and *Washington*, 388 U.S. at 23). This inquiry not only implicates this Question Presented but also the issues address below.

The opinion below is wrong. Yes, the lower court found the instruction to be error but denied prejudice. Meaning, the lower court acknowledged that the jury received incorrect instructions, yet, the court refused to recognize that the prejudice that flowed was significant. Either viewed as a specific violation of the right to confrontation or as a broader violation of Due Process and his right to a fair trial, the decision below is worthy of this Court's consideration and reversal.

II. THE VIRGIN ISLAND SUPREME COURT'S REJECTION OF THE CUMULATIVE ERROR DOCTRINE AND FAILURE TO FIND ERROR IN INCOMPLETE JURY INSTRUCTIONS REQUIRES SUMMARY REVERSAL WITH INSTRUCTIONS THAT DUE PROCESS PROTECTIONS ARE AFFORDED TO VIRGIN ISLANDS CRIMINAL DEFENDANTS

The lower court found two errors: the prosecutor's attack on the presumption of innocence and the restriction/instruction during summation. But still, the Virgin Islands Supreme Court erred in rejecting the Cumulative Error Doctrine and failing to find an incomplete jury charge was a separate error. These constitutional concerns are worthy of summary reversal for several reasons.

First, Petitioner argued that prejudice must be assessed cumulatively. However, the Virgin Islands Supreme Court only examined the Cumulative Error Doctrine after the solitary error of negating Petitioner's presumption of innocence was found. The Virgin Islands Supreme Court crafted an opinion where it rejected the doctrine by preemptively isolating one error in order to incorrectly assert that only one error occurred. The multiple errors, the lack of independent evidence of guilt, and the constitutional rights implicated require Due Process protection.

This Court has held that individual errors, insufficient to reverse, may, when accumulated, necessitate reversal. Individual errors which do not alone create constitutional error can, when combined, have a cumulative effect which rises to the constitutional error. *Kyles v. Whitley*, 514 U.S. 419 (1995); *Taylor v. Kentucky*, 436 U.S. 478, 488 (1978); *Chambers v. Mississippi*, 410 U.S. 284, 290 (1973).

Courts of Appeals have applied this doctrine in various iterations. *See*, *e.g.*, *Fahy v. Horn*, 516 F.3d 169, 205 (3d Cir. 2008) ("Individual errors that do not entitle a petitioner to relief may do so when combined . . . "); *United States v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001); *State v. Williams*, 81 F.3d 1434, 1443-44 (7th Cir. 1996); *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996); *Cargle v. Mullin*, 317 F.3d 1196, 1206 (10th Cir. 2003); *United States v. Munoz*, 150 F.3d 401, 418 (5th Cir. 1998); *United States v. Sepulveda*, 15 F.3d 1161, 1195 (1st Cir. 1993).

The defendant must establish at least two errors. Next, considered together, against the record, the errors so infected the jury's deliberation that they denied

the defendant a fundamentally fair trial. *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000); *United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990) (en banc) (citing *United States v. Rivera*, 417 F.2d 893, 894 (9th Cir. 1969)).

Despite being bound by this Court's jurisprudence, the lower court refused to "adopt" the doctrine. Indeed, the lower court has been steadfast in rejecting the doctrine, repeatedly declining to provide litigants its protections. *Simmonds v. People*, 59 V.I. 480, n.16 (V.I. 2013) (noting Virgin Islands Supreme Court has not adopted the cumulative error doctrine); *Joseph v. People*, 60 V.I. 338, n.11 (V.I. 2013) (same).

Summary reversal is appropriate where "the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument would be a waste of time." Eugene Gressman et al., *Supreme Court Practice* 344 (9th ed. 2007); *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (per curiam) (Marshall, J., dissenting) (explaining that summary reversal is appropriate when "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error").

There is no doubt that the Virgin Islands Supreme Court is bound by this Court's precedent. (App.26a) (citing 48 U.S.C. § 1561 for application of the Fifth and Sixth Amendments as well as the Due Process Clause of Fourteenth Amendment to the Virgin Islands). Still, Due Process finds no refuge in the Virgin Islands. The territory's main prosecuting agency explicitly briefed that this doctrine has not been "adopted" within its borders while its highest court

has refused to entertain this right. Lower courts must follow this Court's decisions.

Second, the Virgin Islands Supreme Court's failure to find error in the omission of a limiting instruction about the use of co-defendant's guilty plea was independent and serious error. Lower courts emphasize that juries must be instructed that a co-defendant's guilty plea: 1) must be viewed cautiously and with care, reviewing the bargained for benefit of the plea in order to assess the co-defendant's credibility and 2) is not substantive evidence of guilt for the defendant. *See e.g.*, *United States v. King*, 505 F.2d 602, 607 (5th Cir. 1974) (affirming on plain-error review but cautioning instruction is required where co-defendant's plea is used for a permissible purpose); *Allen v. State*, 878 A.2d 447, 451 (Del. 2005) (although prosecutor may introduce co-defendant's plea agreement into evidence for limited purpose, reversible error where trial court failed to give a cautionary instruction as to that limited purpose); *Pinckney v. State*, 510 S.E.2d 923, 924 (Ga. 1999) (guilty plea of joint offender admissible only where joint offender is present at trial and subject to cross-examination or where admitted with instruction that it not be used as evidence of defendant's guilt); *State v. Stefanelli*, 396 A.2d 1105, 1113 (N.J. 1979) (affirming on harmless error review but stating that potential for misuse of information regarding co-defendant's guilty plea is "manifest" and that court should give jury cautionary instruction, even *sua sponte*).

Jury instructions are required across the Courts of Appeals. *See* First Circuit Court of Appeals Criminal Jury Instruction 2.08 (instructing to view testimony

with "particular caution" and that plea is not substantive evidence); Fifth Circuit Court of Appeals Criminal Jury Instruction 1.15 (same); Sixth Circuit Court of Appeals Criminal Jury Instruction 7.08 (same); Seventh Circuit Court of Appeals Criminal Jury Instruction 3.13 (same); Eighth Circuit Court of Appeals Criminal Jury Instruction 4.04 and 4.05A (same); Ninth Circuit Court of Appeals Criminal Jury Instruction 4.9 (same); Tenth Circuit Court of Appeals Criminal Jury Instruction 1.14 (same); Eleventh Circuit Court of Appeals Criminal Jury Instruction 1.2 (same).

The Third Circuit Court of Appeals, in *Government of Virgin Islands v. Mujahid*, held that trial courts "must instruct the jury regarding the limited purpose for which the evidence may be used." 990 F.2d 111, 116 (3d Cir. 1993). A generalized instruction is inadequate. *United States v. Newman*, 490 F.2d 139, 144 (3d Cir. 1974); *United States v. Gullo*, 502 F.2d 759, 762, n.4 (3d Cir. 1974). Failure to provide an instruction as to evidentiary use of the co-defendant's guilty plea was serious error. *Mujahid*, 990 F.2d at 116, 118. Because no instruction was provided "prejudice increased" and the "jury probably felt free to use [the co-defendant's] plea as substantive evidence of defendant's guilt." *Id.* at 117.

In the Tenth Circuit, "[a] codefendant's guilty plea may not be used as substantive evidence of a defendant's guilt." *United States v. Baez*, 703 F.2d 453, 455 (10th Cir. 1983). This rule is rooted in fundamental fairness and due process. *United States v. Pedraza*, 27 F.3d 1515, 1525 (10th Cir. 1994). A limiting instruction is mandatory to ensure jurors do not use the plea

as substantive evidence. *United States v. Whitney*, 229 F.3d 1296, 1304 (10th Cir. 2000).

Equally so, the Ninth Circuit recognizes that a co-defendant's guilty plea may not be used as substantive evidence but may, with a proper instruction, be used to assess the credibility of the witness. *United States v. Halbert*, 640 F.2d 1000, 1004 (9th Cir. 1981). With such a permissible purpose, the trial court is still obliged to deliver "adequate cautionary instructions that make it clear to lay people that evidence of a witness' own guilty plea can be only to assess credibility. *Id.* at 1006; *see also*, *id.* at 1007 (stating jury "should be told in unequivocal language that the plea may not be considered as evidence of a defendant's guilty.").

Here, the V.I. Supreme Court ran afoul of the near universality of this jury charge. It held that the trial court "did not commit any error" in omitting the instruction about the limited use and purpose of Southwell's guilty plea. (App. 23); *but see*, *Mujahid*, 990 F.2d at 116. Because the court failed to find error, it failed to address prejudice.

The egregiousness of this action is epitomized by the court's later adoption of this very charge. Having denied any error in Petitioner's case, and thus, denied any prejudice to Petitioner's trial, the court continued that the omitted charge protects "significant interests" and can "jeopardize the fundamental fairness of a criminal trial." (App.24a). Because of these dangers, the court held that trial courts must specifically instruct the jury that a co-defendant's plea is not proof of defendant's guilt and must be disregarded. (App. 25a). Unfortunately, Petitioner received no benefit, indeed not even an acknowledgement from the lower

court, that his trial and his rights were affected by the omission of this charge.

Petitioner submits that there is a difference from not finding error and not reversing for plain error. Those are separate questions that are intertwined. The lower court conflated the two. While the case law and jury instructions split among whether omission of an instruction is plain error alone, there is a consensus that the omission itself is an error unto itself.

The judge's actions directly impacted Petitioner's Sixth and Fourteenth Amendment rights. However, just as *Chambers* found a right to present a "complete defense" in the Due Process Clause of the Fourteenth Amendment so too did *Chambers* find a due process protection in the Cumulative Error Doctrine. *Chambers*, 410 U.S. 284.

Should this Court summarily reverse and remand with instructions to assess cumulative error, the Court should note that its jurisprudence already found error in "depriv[ing] a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing,'" *Crane*, 476 U.S. at 690-91, and that such deprivation is exactly what occurred below.

Cumulative error requires an assessment of all errors and the prejudice that flowed. For the reasons stated above, this a proper vehicle for summary reversal with instructions to apply the Cumulative Error Doctrine. However, those protections are diminished by the lower court's refusal to find the omitted jury charge was error as well or acknowledging the judge's *sua sponte* instruction was seriously prejudicial to Petitioner's "basic right" to present a "complete defense."

To be clear, Petitioner does not ask this Court to weigh the prejudice. That is more properly reserved for the Virgin Islands Supreme Court on remand. But, if the Due Process protections of this Court's Cumulative Error Doctrine are to have any value, the Virgin Islands Supreme Court must completely assess all errors, including the omitted jury instruction as one (of several) errors in this case.

If this Court does not grant review of the first Question Presented, this Court should summarily reverse the decision below to consider the cumulative effect of the errors on Petitioner's right to a fair trial.

CONCLUSION

For the reasons set forth above, the Court should grant certiorari to review the Virgin Island Supreme Court's decision or, in the alternative, summarily reverse with instructions that the Due Process protections of the cumulative error doctrine are applicable to all defendants in the territory.

Respectfully submitted,

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