

No. _____

IN THE
Supreme Court of the United States

FERMIN GUERRERO,

Petitioner,

v.

MARTIN BITER,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Fermin Guerrero was convicted of the first-degree murder of Jose Ortiz and sentenced to fifty-years-to-life in prison, based on an informant's testimony that Guerrero had supposedly confessed to the crime. But contrary to the informant's testimony, eyewitnesses testified Guerrero was not the shooter and had a different face shape, body type, and complexion. Guerrero also had an alibi for the time period—earlier on the day of the crime—when the shooter was seen driving through the victim's neighborhood. The prosecutor argued the eyewitnesses had recently fabricated their exculpatory testimony under pressure from Guerrero's supposed gang associates, but a photographic lineup proved they had not done so. Guerrero's trial counsel, however, inexplicably failed to present the photographic lineup to the jury to rehabilitate the eyewitnesses' testimony that Guerrero was not the shooter.

After trial, the state admitted that Guerrero's prosecutor had failed to disclose to Guerrero's defense that law enforcement had paid the informant between \$6,000 and \$10,000 for his assistance and testimony in Guerrero's case. The jury never heard that information. The questions presented are:

1. Does the Constitution require a court on habeas review to assess cumulatively the prejudice caused by multiple constitutional errors at a criminal trial?
2. Did Fermin Guerrero suffer material prejudice from his prosecutor's undisputed failure to disclose to Guerrero's defense that the prosecution's key witness had been paid between \$6,000 and \$10,000 for assisting law enforcement in Guerrero's case?
3. Did Guerrero's trial counsel provide constitutionally ineffective assistance by failing to present evidence—contained in his own trial file—that would have rehabilitated the defense's key exculpatory witness and rebutted the prosecution's attack on her credibility?
4. Does the combined prejudice from the prosecution's withholding of evidence and trial counsel's ineffective assistance warrant relief from Guerrero's conviction under the Fourteenth Amendment?

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**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Fermin Guerrero (“Guerrero” or “Petitioner”) petitions for a Writ of Certiorari to review the final order of the United States Court of Appeals for the Ninth Circuit in this case denying his appeal, and affirming the judgment of the United States district court denying him habeas corpus relief.

ORDERS AND OPINIONS BELOW

The district court adopted the Report and Recommendation of the magistrate judge, denied Guerrero’s petition for writ of habeas corpus, and granted Guerrero’s request for a Certificate of Appealability (“COA”) on his claim under *Brady v. Maryland*, 373 U.S. 83 (1963). (Petitioner’s Appendix (“Pet. App.”) 6-8.)

Guerrero appealed from the district court’s denial of his *Brady* claim, and also requested that the COA be expanded to include an uncertified claim for ineffective assistance of trial counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The Ninth Circuit denied his *Brady* claim in an unpublished memorandum decision on February 25, 2019, without addressing his *Strickland* claim. (Pet. App. 1-5; *Guerrero v. Biter*, 2019 WL 925845 (9th Cir., Feb. 25, 2019).)

JURISDICTION

The district court had jurisdiction over Guerrero's federal habeas corpus petition under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit entered judgment on February 25, 2019. (Pet. App. 1-5.) This Court has jurisdiction under 28 U.S.C. § 1254(1). *See Miller-El v. Cockrell*, 537 U.S. 322, 329-31 (2003).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment

The Sixth Amendment to the United States Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Fourteenth Amendment

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. § 2254(d)

28 U.S.C. § 2254(d) provides, in relevant part, "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

PRELIMINARY STATEMENT

Fermin Guerrero was convicted of first-degree murder and sentenced to 50 years to life in prison, after a rushed and perfunctory trial preceded by the most minimal possible investigation. The only eyewitnesses to the crime testified that Guerrero was not the shooter. The state's star witness, Jimmy Richardson, was a convicted felon and informant who claimed he had heard Guerrero confess. Yet Richardson admitted he had read about the crime in a newspaper before his testimony, and evidence showed he was involved in selling the murder weapon himself, suggesting he was involved in the crime. Unbeknownst to Guerrero's trial counsel or jury, Richardson received thousands of dollars in secret payments from law enforcement for helping secure Guerrero's conviction.

Guerrero's trial counsel did almost nothing to counter the state's presentation. He never spoke with Richardson, and he failed to present evidence in his own case file that would have corroborated the eyewitnesses' testimony that Guerrero was not the shooter. This evidence showed that one of the exculpatory eyewitnesses had rejected Guerrero's picture in a photo array months earlier, and had selected a photograph consistent with her trial testimony that the shooter was someone else. But the jury never heard that information because trial counsel failed to present it; and that error allowed the prosecution to falsely discredit the eyewitnesses' exculpatory testimony by claiming it had been recently fabricated.

The courts that have reviewed these claims ruled (either silently or explicitly) that those constitutional violations individually did not prejudice Guerrero

sufficiently to warrant relief. However, no court has properly assessed their cumulative impact on Guerrero's right to a fair trial. Here, the cumulative impact was devastating: the *Brady* violation improperly bolstered the State's case, and the *Strickland* error unconscionably weakened the theory of defense. Cumulative-error review is essential—in this case, and in every habeas case—to secure the due-process right to a fundamentally fair trial and reliable verdict. This case presents an opportunity to resolve a deep split among lower courts as to whether cumulative-error claims are indeed cognizable on habeas review.

STATEMENT OF THE CASE

On July 14, 2002, shortly after 10:00 p.m., Jose Ortiz was shot and killed in Paramount, California by a man driving a Camaro. The State's case was built on two pillars: bolstering the credibility of star witness Jimmy Richardson, who claimed that Guerrero confessed to the Ortiz murder and later sold the murder weapon (which was found and matched to ballistics at the scene) to a mutual acquaintance; and discrediting the testimony of two eyewitnesses, Catalina and Lawrence Avalos, who testified at trial that Guerrero was not the shooter.

- A. **Jimmy Richardson agreed to assist law enforcement, and subsequently implicated Guerrero, prior to being sentenced on felony drug and counterfeiting charges**

Jimmy Richardson was Guerrero's co-worker at the time of the homicide.

(4.RT.670-71.) Richardson first came to law enforcement's attention in October of 2002, three months after Ortiz's murder, when he was arrested by the United States Secret Service ("USSS") and the Department of Alcohol, Tobacco and

Firearms (“ATF”), and charged with state law offenses involving counterfeit money and possession of methamphetamine. (4.RT.673-75.)¹ Richardson pled guilty to two felonies and—later—received a suspended sentence based upon his agreement to cooperate with law enforcement “to get cases on other people dealing with guns and drugs.” (4.RT.674-76]. Richardson was required “to get three gun buys and two counterfeit money buys” as part of the deal with law enforcement. (4.RT.674-76, 727, 753-54.)

An investigator testified at trial that Richardson pled guilty to his state law offenses and was sentenced in November 2002, before he began assisting law enforcement in Guerrero’s case. (5.RT.1064.) But that was untrue. Court documents show Richardson’s sentencing was actually continued several times after November 2002, and did not occur until March 2003—after he had been helping police investigate Guerrero for several months. (Appx.118-28.) Indeed, it was in November 2002—while in custody awaiting sentencing, and long after Guerrero’s supposed confession—that Richardson first told federal authorities that he had heard Guerrero admit to Ortiz’s murder. (4.RT.676, 712-14.)

On December 23, 2002, federal authorities conveyed Richardson’s information to Los Angeles County Sheriff’s Department (“LASD”) investigators handling the Ortiz murder investigation. (5.RT.1063-64.) Richardson thereafter

¹ “RT” and “CT” refer to, respectively, the Reporter’s Transcript and Clerk’s Transcript of Guerrero’s Trial.

cooperated with a “multi-agency gang task force,” including the LASD, FBI, federal Secret Service, and ATF, to investigate Guerrero’s alleged role in the Ortiz shooting. (4.RT.712-14, 740-41, 750-51.) Richardson assisted the task force by conducting two covertly tape-recorded conversations with Guerrero to elicit incriminating information from him about the Ortiz murder. (4.RT.702-03, 5.RT.1064-65.) In one recording, Guerrero made an ambiguous statement that the prosecution claimed incriminated him in Ortiz’s shooting. (1.CT.166.)

At trial, Richardson testified that Guerrero confessed to Ortiz’s murder while Guerrero and Richardson carpooled to work in Guerrero’s then-burgundy-colored Camaro. (4.RT.670-77.) Guerrero showed Richardson a nine-millimeter Baretta handgun and told Richardson that he used that weapon to commit the murder. (4.RT.685.)

About a week or two later, Richardson testified, he was again carpooling with Guerrero when Guerrero handed him a copy of a newspaper article dated July 22, 2002, which described Ortiz’s murder. (4.RT.696-99.) The article was consistent with Guerrero’s description of the shooting. (4.RT.700.) Richardson testified that Guerrero continued to drive the Camaro for about two weeks after the murder, then repainted the car from burgundy to gray and had some body work done because it was “hot” after being used in the shooting. (4.RT.681, 684, 725-26.)

Richardson testified that he told federal agents that Guerrero sold the murder weapon to Raul Macias, a co-worker of Richardson and Guerrero.² (4.RT.714, 721.) However, Richardson had actually told federal agents that Guerrero sold the gun to “Gabriel,” who was Macias’s cousin. Richardson claimed at trial that he knew Macias by the name “Gabriel,” even though he worked with Gabriel and Macias and knew both of them. (4.RT.721-24, 731, 758.)

When questioned about any benefits that he received from law enforcement, Richardson testified that his suspended sentence meant he could “go to the penitentiary” if he “g[ot] in trouble again for any reason,” (4.RT.676), and that “unless there was action taken on the information that [he] gave, that [he] wouldn’t get the benefit of [his] bargain, which was a suspended prison sentence.” (4.RT.727.) He did not testify about receiving any financial benefit for his assistance on the Guerrero prosecution.

On March 12, 2003, six days after police arrested Guerrero, Richardson was finally sentenced on the guilty plea he had entered back in November 2002, when he first began assisting in Guerrero’s case. (Appx.124, 128.) He received no prison

² Federal agents and LASD deputies executed a raid on the Macias home in March 2003 and seized the murder weapon. At that time, Macias provided an audiotaped statement claiming that Guerrero sold him the gun. However, at trial Macias recanted his earlier statement and testified that Richardson had sold him the gun, with Guerrero and at least one other person present. Macias testified in great detail about what transpired during the raid, and explained that the only reason he implicated Guerrero is because he feared for his family’s safety, and because law enforcement agents threatened him with homicide charges if he incriminated Richardson instead of Guerrero. (5.RT.911-37, 943-45.)

time, and 36 months' probation. (Appx.128.) However, the court's order stated that Richardson "is not required to report to probation nor is he required to pay costs or fines/fees." (*Id.*)

Guerrero's jury was never informed that Richardson was sentenced in March 2003, *after* informing on Guerrero. Instead, the lead detective incorrectly testified that Richardson had already been sentenced in November 2002, *before* he ever began assisting in Guerrero's case. (5.RT.1064.) Rather than correcting that false testimony, the prosecutor affirmatively argued it to the jury in closing, claiming Richardson "was [already] sentenced in November [2002]," and thus had nothing more to gain by the time he informed on Guerrero starting in December 2002.

(6.RT.1272.)

B. Eyewitness testimony identified someone other than Guerrero as the shooter

Catalina Avalos and her son, Lawrence Avalos, were in their front yard and saw the shooting, as well as the car driven by the perpetrator. (3.RT.424, 431-41; 4.RT.605, 614-28.) Catalina and Lawrence both testified that Guerrero was not the shooter. Catalina described the shooter as taller, thinner, older-looking, and darker-completed than Guerrero (3.RT.453-60, 489, 498-99), with a narrow face (3.RT.460), and testified that Guerrero "does not look like the person I saw that night." (3.RT.446.) She testified that Guerrero "doesn't even look like the coloring" of the shooter (3.RT.461), that she would not pick Guerrero's photograph out of a lineup if presented with one (3.RT.461), and that she had felt uncomfortable when

she saw Guerrero sitting at the defendant's table at the preliminary hearing because she knew he was not the shooter. (3.RT.447-50, 498-500.)

Consistent with her trial testimony, five months before Guerrero's preliminary hearing Catalina had rejected Guerrero's photograph in a photographic lineup and circled a photograph of a thinner, darker-completed person as resembling the shooter. (3.RT.483-84 (testifying generally that she had been shown a photographic lineup, but not about its contents or her identification); Appx.130-31 (Photo Lineup).) Guerrero's photograph—which appears heavier, broader-faced, and lighter-completed—was in the bottom left corner of the lineup, but Catalina did not select it. (*Id.*) This lineup was contained in the discovery provided to Guerrero's trial counsel. (Appx.149-50, ¶¶ 6-7.) Although Catalina briefly mentioned during her testimony that she had viewed a photographic lineup (3.RT.457-58, 483-84), trial counsel never introduced the lineup at trial. The jury therefore never saw the lineup, never learned that it contained Guerrero's photograph or that Catalina had rejected Guerrero's photograph, and never learned which photograph she chose.

Lawrence, the other eyewitness, also testified that Guerrero was not the shooter. (4.RT.641, 653, 659.) Like Catalina, Lawrence described the shooter as tall and "skinny," that his body type was different than Guerrero's, and that he looked older than Guerrero. (4.RT.630-35, 641-42, 650-51.) Lawrence saw the shooter's car, a Camaro, drive down the street twice on the day of Ortiz's murder, at

about 1:00 p.m. and 4:00 p.m.; he also saw the shooter drive by again the next day.³ (4.RT.638-39, 647-48.)

At trial, evidence was presented that in July 2002 Guerrero drove a dark gray Camaro with no graphics or designs on it, with metallic maroon paint underneath the top coat. (5.RT.1097, Appx.153-62.)⁴ However, the testimony of both eyewitnesses described the shooter's Camaro as not resembling Guerrero's. Catalina testified that the shooter's car was dark green with colored graphic lines over the passenger side wheel well. (3.RT.436, 454.) Lawrence testified at trial that the shooter's car was green, black, or blue, but not burgundy or gray.

(4.RT.625, 648.)

The prosecution sought to discredit the Avaloses' testimony by arguing that they fabricated their exculpatory trial testimony because of pressure from Eastside Paramount ("ESP"), a gang with which both Guerrero and Catalina's ex-husband were formerly affiliated, and in whose territory Ortiz (a member of a rival gang) had been killed. (3.RT.424-25.) Catalina testified that she was "not afraid that anybody is going to come to my house or anything like that" because of her testimony in

³ Guerrero presented three witnesses who provided him with an alibi for the afternoon on the day of the shooting. Guerrero's then-girlfriend, Kathy Lainez, testified that she was with Guerrero during the time Lawrence saw the shooter driving in the neighborhood. (5.RT.1004-05.) Lainez's father and aunt corroborated her testimony. (5.RT.1101; 6.RT.1206-07.)

⁴ A police investigator examined the layers of paint on Guerrero's car and determined that it had never been green. (5.RT.1097.)

Guerrero's case, and no gang members had pressured her about her testimony, though some neighborhood residents had spoken with her son Lawrence. (3.RT.426, 449, 492-94, 497.) Lawrence similarly testified that he would not feel like he was "snitching" if he were to testify against an ESP gang member, and that he did not know that Guerrero was a member of ESP, except that he might have been told that once by the prosecutor. (4.RT.612-13.) Inexplicably, trial counsel failed to present the photo lineup as evidence to demonstrate that Catalina had identified someone other than Guerrero long before the prosecutor accused her of fabricating her exculpatory trial testimony.

C. The prosecution failed to disclose that Richardson received thousands of dollars from law enforcement in exchange for implicating and testifying against Guerrero

In 2015, twelve years after Guerrero's trial, Richardson was interviewed by Guerrero's post-conviction counsel. During that interview Richardson disclosed, for the first time, that law enforcement had paid him between \$6,000 and \$10,000 for the information he provided implicating Guerrero in the Ortiz shooting:

In 2002, I gave information about Guerrero and the shooting in Paramount to several law enforcement agencies, including the FBI, [USSS], [ATF], and the Los Angeles County Sheriff's Department. In exchange for this information, agents of the several agencies gave me between \$6,000 and \$10,000.

(Appx. 146-47, ¶ 5.) Richardson further stated that he made at least two calls to Macias as part of his cooperation with law enforcement on Guerrero's case, and "made both calls at the urging of agents of the Los Angeles County Sheriff's

Department, as well as the FBI, ATF, and/or Secret Service.” (Appx.147, ¶ 6.)

Consistent with Macias’s testimony, Richardson stated that he made the second call to Macias just a couple of days before law enforcement searched Macias’s home for the murder weapon. (*Id.*, ¶ 8.)

No one affiliated with Guerrero’s defense ever interviewed Richardson before Guerrero’s trial. (Appx.148, ¶9.) Richardson states that had he been interviewed, he would have told Guerrero’s counsel about the payments from law enforcement. (*Id.*) He would have testified about the payments had he been asked. (*Id.*)

During post-conviction proceedings, the California Attorney General’s Office informed Guerrero’s post-conviction counsel that ATF paid Richardson “\$3,750 for relocation and incidental fees in relation to the Guerrero case.” (Appx.97, ¶7; Appx.103.) However, no information was provided about whether Richardson was paid by any of the other agencies he was working with on the case, or the amount of any such payments.

The payments were never disclosed to Guerrero’s trial counsel. Trial counsel’s file contains no information about any payments to Richardson from any law enforcement agency. (Appx.96, ¶¶ 2-3.) In 2016, Guerrero’s post-conviction counsel asked the Attorney General’s office, Los Angeles County District Attorney’s Office, and ATF for permission to view the District Attorney’s file and ATF file on Richardson, but those requests were refused. (Appx.97-99, ¶¶ 8-19; Appx.105-113.) Guerrero asked the California Supreme Court (“CSC”) to order discovery of

Richardson's law enforcement files, but the CSC summarily denied his *Brady* claim without permitting discovery or issuing an order to show cause. (Appx.78.)

REASONS FOR GRANTING THE WRIT

A forest may remain a forest if it misses one or two trees, but if it misses enough trees its essential character is hopelessly distorted. So it is with reliable verdicts. Some errors may not sabotage the reliability of a verdict in and of themselves, but it cannot fairly be said that a verdict's reliability is intact without assessing the impact of all the errors together.

Blume & Seeds, *Reliability Matters: Reassociating Bagley Materiality, Strickland Prejudice, and Cumulative Harmless Error*, 95 J. Crim. L. & Criminology 1153, 1154, 1157 (2005).

- A. This Court's cases addressing cumulative analysis recognize that a constitutionally defective trial can arise from a single error or from a series of less prejudicial errors that collectively violate constitutional mandates

The Constitution guarantees a fair trial through the Due Process Clauses of the Fifth and Fourteenth Amendments, which establish the right to a reliable verdict based on "a fair opportunity to defend against the State's accusations."

Chambers v. Mississippi, 410 U.S. 284, 294 (1973). In addition to this fundamental, due-process right, there are additional constitutional protections that safeguard the right to a fair trial and a reliable verdict. As relevant here, the Due Process Clause requires the prosecution to produce any evidence favorable to the accused for use by the defense, and the Sixth Amendment entitles a defendant to the effective assistance of counsel. *Brady*, 373 U.S. at 86-88; *Strickland*, 466 U.S. 684-87.

This Court has had several opportunities to address how to assess prejudice under the Due Process Clause when there are multiple errors in the same proceeding. In the earliest of these cases, *Powell v. Alabama*, three black men were charged with raping two white women in a small Alabama town. *Powell v. Alabama*, 287 U.S. 45, 52 (1932). The trial court purported to appoint the entire local bar to represent the defendants, but no attorney investigated the case, and no attorney in defense showed at trial. *Id.* at 52, 58. This Court found that the trial court's failure to make an effective appointment of counsel for three black teenagers accused of raping two white women denied the defendants due process, because due process requires notice and a hearing with the aid of counsel. *Id.* at 65. However, what ultimately carried the day in *Powell* was not just the trial court's failure to appoint counsel who would actually appear and represent the defendants, although that was paramount; rather, the court considered a number of factors cumulatively, including: the defendants' youth, ignorance, isolation, and helplessness; the presence of a racist mob outside of the courthouse during the trial; and the fact that the trial took place three weeks after the defendants' arrest. Taken together, these factors made it probable that the jury's verdict was unreliable and resulted in a denial of due process. *Id.* at 71.

Three years later, this Court decided *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), which focused on "the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*, 527 US. 263, 281 (1999). *Mooney* was the first in a line of due-process cases seeking to regulate the impact of

a prosecutor's actions on the ultimate integrity of a criminal verdict. *Mooney*, 294 U.S. at 112; *see also Brady*, 373 U.S. at 87 (“[T]he principle in *Mooney v. Holohan* is not punishment of society for the misdeeds of a prosecutor but avoidance of an unfair trial to the accused.”). Like *Powell*, the *Mooney* Court relied upon multiple errors committed by the prosecution—namely, suppression of favorable evidence and the presentation of perjured testimony—to find that the defendant's due-process right to a fundamentally fair proceeding was violated.

Subsequently, in *Kyles v. Whitley*, 514 U.S. 419 (1995), the Court formalized the importance of cumulative analysis on collateral review of *Brady* claims, holding that “the state's obligation under [*Brady*] to disclose evidence favorable to the defense[] turns on the cumulative effect of all such evidence suppressed by the government.” *Kyles*, 514 U.S. at 421. The Court reversed the holding of the Fifth Circuit, which addressed the errors as “a series of independent materiality evaluations, rather than the cumulative evaluation required” by the Constitution. *Id.* at 441 (citing *United States v. Bagley*, 473 U.S. 667 (1985)).

The importance of cumulating trial-court errors to protect due-process rights was addressed by this Court in *Taylor v. Kentucky*, 436 U.S. 478 (1978) and *Chambers v. Mississippi*, 410 U.S. 284. In *Chambers*, the Court declined to address whether individual errors would merit reversal, and instead cumulated their prejudicial impact: “We conclude that the exclusion of this critical evidence, coupled with the State's refusal to permit [the defendant] to cross-examine a key witness, denied him a trial in accord with traditional and fundamental standards of due

process.” 410 U.S. at 302-03. Similarly, in *Taylor*, the Court confronted a case with multiple trial court errors, including “skeletal instructions,” “possible harmful inferences” due to improper references to the indictment, and “repeated suggestions that petitioner’s status as a defendant tended to establish his guilt.” 436 U.S. at 487-88. The Court aggregated these errors in its prejudice analysis, concluding that “the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness in the absence of an instruction as to the presumption of innocence.” *Id.* at 487 n.15.

Finally, this Court’s ineffective-assistance-of-counsel decisions reinforce that cumulating all of trial counsel’s deficiencies and looking at the totality of the proceedings is the appropriate practice under *Strickland*.⁵ See, e.g., *Williams v. Taylor*, 529 U.S. 362 (2000) and *Wiggins v. Smith*, 539 U.S. 510 (2003). In *Williams*, the Court held that the trial court correctly looked to “the entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally,” when it granted sentencing relief under *Strickland*. 529 U.S. at 398-99. Similarly, in *Wiggins*, the Court (relying on *Williams*), evaluated “the

⁵ While *Strickland* claims arise out of the Sixth Amendment’s guarantee of a right to counsel, that right “exists, and is needed, in order to protect the fundamental right to a fair trial” guaranteed by the Due Process Clause. *Strickland*, 466 U.S. at 684. *Strickland* claims, like due-process claims, prioritize fundamental fairness and reliability, as “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial system that the trial cannot be relied on as having produced a just result.” *Id.* at 686; see also Blume & Seeds, *supra*, at 1165-67.

totality of the evidence—“both that adduced at trial and the evidence adduced in habeas proceedings” to assess prejudice. 539 U.S. at 535-36.

Thus, while this Court has never squarely addressed whether different types of constitutional violations should be aggregated on collateral review, the line of cases discussed above demonstrate that there is no principled basis for cumulating multiple *Brady* violations on habeas review (as in *Kyles*), multiple trial errors on direct appeal (as in *Chambers* and *Taylor*), or multiple deficiencies and the totality of the proceedings under *Strickland*, yet *not* cumulate the harmful effects of disparate constitutional violations on collateral review. This is especially true when the constitutional errors are based on *Brady* and *Strickland*, as the test for *Brady* materiality and *Strickland* prejudice are closely related. *See Strickland*, 466 U.S. at 694 (explaining that “the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution”).

B. There is an deep split in the courts over whether the Constitution requires a cumulative assessment of multiple constitutional errors on habeas review

Despite this Court’s guidance in the cases discussed above—and despite the common-sense principle that a constitutionally defective trial can result from a single, prejudicial error or from a series of less prejudicial errors that collectively render a trial fundamentally unfair—“circuits are split as to whether or not they should review cumulative error claims in habeas petitions.” Semerad, *What’s the Matter with Cumulative Error?: Killing A Federal Claim in Order to Save It*, 76

Ohio St. L.J. 965, 981 (2015). Federal appellate courts are divided over whether the “clearly established law” requirement under the Antiterrorism and Effective Death Penalty Act (AEDPA) requires cumulating the effect of constitutional errors. *See* 28 U.S.C. Sec. 2254(d)(1). Numerous courts and scholars have acknowledged the longstanding conflict. *See Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117, 1132 n.3 (11th Cir. 2012) (recognizing the split on whether cumulative-error claims are cognizable in light of AEDPA); *Alvarez v. Boyd*, 225 F.3d 820, 824 & n.1 (7th Cir. 2000) (noting the split on whether “the cumulative effect of trial errors” provides a basis for relief on federal habeas); *Derden v. McNeel*, 978 F.2d 1453, 1456 (5th Cir. 1992) (en banc) (recognizing the split on whether “federal habeas relief may issue if a defendant was denied fourteenth amendment due process by the cumulative effect of errors committed in a state trial, which together deny fundamental fairness”); *State v. Clay*, 824 N.W.2d 488, 504 (Iowa 2012) (Mansfield, J., concurring specially) (acknowledging that whether “cumulative prejudice [should] be considered” under *Strickland* is a “question [that] has divided other courts”); *McConnell v. State*, 212 P.3d 307, 318 n.17 (Nev. 2009) (same); *Garcia v. State*, 678 N.W.2d 568, 578 (N.D. 2004) (same); Moyer, *To Err Is Human; to Cumulate, Judicious: The Need for U.S. Supreme Court Guidance on Whether Federal Habeas Courts Reviewing State Convictions May Cumulatively Assess Strickland Errors*, 61 Drake L. Rev. 447, 465 (2013) (“[A] . . . circuit split exists concerning whether courts hearing claims under § 2254, may cumulate errors—both *Strickland* and non-*Strickland*—in order to grant federal habeas relief.”); Blume & Seeds, *supra*, at 1185 n.117 (2005) (noting

the circuit split on whether to cumulate the prejudicial effects of errors on habeas review). This case provides an avenue for the Court to answer this crucial and recurring constitutional question.

1. The majority of lower courts cumulate the prejudicial effects of separate constitutional violations on habeas review

The First, Third, Fifth, Seventh, Ninth, and Tenth Circuits permit cumulative error analysis in habeas, finding that this Court's case law "clearly establishes" the need for a cumulative-error assessment on collateral review. *See, e.g., Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007) ("[T]he Supreme Court has clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal."). As then-Judge Gorsuch wrote for the Tenth Circuit, "prejudice can be accumulated" on habeas review, meaning "that all a defendant needs to show is a strong likelihood that the several errors in his case, when considered additively, prejudiced him." *Grant v. Trammell*, 727 F.3d 1006, 1026 (10th Cir. 2013) (emphasis omitted). Then-Judge Gorsuch rooted cumulative-error analysis in the Due Process clause, explaining that the "cumulative-error doctrine" "will suffice to permit relief . . . only when the constitutional errors committed in the state court trial so fatally infected the trial that they violated the trial's fundamental fairness." *Matthews v. Workman*, 577 F.3d 1175, 1195 n.10 (10th Cir. 2009) (internal quotation marks omitted).

Like then-Judge Gorsuch's holding in *Matthews*, each of the circuits that cumulate disparate habeas claims grounds its analysis on the fundamental fairness and reliability guarantees of the Due Process Clause. *See, e.g., Parle*, 505 F.3d at 927 ("[W]here the combined effect of individually harmless errors renders a criminal defense 'far less persuasive than it might [otherwise] have been,' the resulting conviction violates due process.") (quoting *Chambers*, 410 U.S. at 294, 302-303)); *Alvarez*, 225 F.3d at 824 ("The cumulative effect analysis requires a petitioner to establish two elements: (1) at least two errors were committed in the course of the trial; (2) considered together, along with the entire record, the multiple errors so infected the jury's deliberation that they denied the petitioner a fundamentally fair trial."); *Albrecht v. Horn*, 485 F.3d 103, 139 (3d Cir. 2007) (cumulating the prejudicial effects of *Strickland* and *Brady* violations on habeas review); *Mello v. DiPaulo*, 295 F.3d 137, 151-52 (1st Cir. 2002) (combining a *Strickland* claim and a claim that his confession should have been suppressed); *Derden*, 978 F.2d at 1454 (allowing cumulative error review only for undefaulted, constitutional errors (*i.e.*, the errors "so infected the entire trial that the resulting conviction violates due process") (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973))).

A majority of state courts, including California, also permit cumulative-error claims on collateral review. *See In re Avena*, 12 Cal. 4th 694, 772 n.32 (Cal. 1996) ("The concept of finding prejudice in cumulative effect, of course, is not new. Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial."); *State v. Radke*, 821

N.W.2d 316, 330 (Minn. 2012) (“An appellant will be entitled to a new trial if the errors, considered cumulatively, had the effect of denying him a fair trial.”); *Starling v. State*, 130 A.3d 316, 336 (Del. 2015) (combining *Strickland* and *Brady* claims as part of a fundamental fairness review, as the “touchstone” of both those claims is “the fairness of the trial”); *Commonwealth v. Lesko*, 15 A.3d 345, 417 (Pa. 2011) (“the measure of *Brady* materiality and *Strickland* prejudice are the same”); *Adamcik v. State*, 408 P.3d 474, 487 (Idaho 2017) (“Under the cumulative error doctrine, an accumulation of irregularities, each of which might be harmless in itself, may in the aggregate reveal the absence of a fair trial in contravention of the defendant’s right to due process.” (internal quotation marks omitted)); *Hurst v. State*, 18 So. 3d 975, 1015 (Fla. 2009) (“Where multiple errors are found, even if deemed harmless individually, the cumulative effect of such errors may deny to defendant the fair and impartial trial that is the inalienable right of all litigants.” (internal quotation marks omitted)); *Cramer v. State*, 153 P.3d 782, 787 (Utah 2006) (“Under the cumulative error doctrine, a conviction must be overturned if the effect of several errors, even if harmless individually, undermines the court’s confidence that the defendant was given a fair trial.”); *People v. Jackson*, 793 N.E.2d 1, 23 (Ill. 2001) (“This court has recognized that individual errors may have the cumulative effect of denying a defendant a fair hearing”); *State v. Marshall*, 690 A.2d 1, 90 (N.J. 1997) (assessing the cumulative effect of “numerous, assorted claims of error”); *Vernon Kills On Top v. State*, 928 P.2d 182, 187 (Mont. 1996)

(“Cumulative error can serve as a basis for reversal, even when individual errors alone would not serve as a sufficient basis for reversal.”).

2. A minority of lower courts refuse to conduct a cumulative-error analysis on habeas review

Only three circuit courts of appeal—the Fourth, Sixth, and Eighth Circuits—do not conduct cumulative-error analysis on habeas review. The Sixth Circuit has determined that “because the Supreme Court has not spoken on this issue,” there is no clearly established law which makes cumulative-error claims cognizable on habeas review. *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006). Similarly, the Eighth Circuit has held (both pre- and post-AEDPA) that “a habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test.” *Middleton v. Roper*, 455 F.3d 838, 851 (8th Cir. 2006) (quoting *Hall v. Luebbers*, 296 F.3d 685, 692 (8th Cir. 2002)).⁶ And the Fourth Circuit likewise refuses to conduct a cumulative analysis of claims, including individual *Strickland* claims. *Fisher v. Angelone*, 163 F.3d 835 (4th Cir. 1998).

A minority of state courts, including Arkansas, New Mexico, and Georgia, squarely reject cumulative-error analysis on collateral review. *See Lacy v. State*, 545 S.W.3d 746, 752 (Ark. 2018) (“This court does not recognize cumulative error in

⁶ The Eighth Circuit even refuses to cumulate counsel’s separate errors for purposes of assessing prejudice on a *Strickland* claim. *See Shelton v. Mapes*, 821 F.3d 941, 951 (8th Cir. 2016).

allegations of ineffective assistance of counsel."); *State v. Lattin*, 428 P.2d 23, 27 (N.M. 1967) (rejecting the argument that a "combination of errors, deprivation of constitutional rights[,] and defects in law and procedure amounted to a denial of due process" because there was no individually "prejudicial error"); *Schofield v. Holsey*, 642 S.E.2d 56, 60 (Ga. 2007) (permitting aggregation of trial counsel's errors on *Strickland* claims, but otherwise rejecting cumulative-error analysis).

C. The Due Process Clause requires analysis of the cumulative harm arising from disparate, non-defaulted constitutional errors

This Court's case law on cumulative-error analysis, based on the Due Process Clause's guarantee of a fundamentally fair trial and a reliable verdict, requires that cumulative-error claims based on the aggregation of disparate errors be heard on collateral review. As discussed *supra*, this approach is the established rule on direct review, when assessing *Brady* claims, and generally in the context of *Strickland* claims. The result should be no different when instead of a series of *Brady* violations, a defendant suffers a *Brady* violation coupled with some other type of constitutional deprivation, such as a *Strickland* violation. It matters not that these claims arise in habeas, because these types of constitutional violations can often only be raised on collateral review. Therefore, when a court refuses to assess cumulative prejudicial effects on habeas, it forecloses the only opportunity to determine whether their "cumulative effect . . . violated the due process guarantee of fundamental fairness." *Taylor*, 436 U.S. at 488. The analysis of cumulative harm is even more straightforward when, as here, the petitioner raises *Brady* and

Strickland claims, as the prejudice standards for those constitutional claims are nearly identical. *See Strickland*, 466 U.S. at 694. The lower courts in this case erred in not following the example set by the majority of courts that recognize that constitutional harm can and often does result from the cumulative impact of multiple errors, even if those errors individually fail to meet the required prejudice threshold. “A verdict’s reliability cannot sensibly be measured by assessing deficiencies of counsel, prosecutorial misconduct, and any other errors affecting reliability in isolation from one another. Such a procrustean, divide-and-conquer approach . . . preserves verdicts, but guarantees that many of them will be unreliable.” Blume & Seeds, *supra*, at 1154-55.

D. The acknowledged *Brady* violation prejudiced Guerrero both in isolation and cumulatively with the *Strickland* violation

The Ninth Circuit erred in finding that the *Brady* violation in this case was not material. Compounding that error, it ignored Guerrero’s request to expand the COA to include his *Strickland* claim and his cumulative-error claim. This omission is contrary to Ninth Circuit precedent and the position of the majority of federal and state courts on this issue. *See Parle*, 505 F.3d at 928 (holding that cumulative-error claims may be considered on habeas and relief may be granted on such claims “even where each error considered individually would not require reversal.”). Given the state of the law in California and the Ninth Circuit, the summary denial by the CSC was similarly flawed. *See id.*; *see also Avena*, 12 Cal. 4th at 772 n.32.

The lower courts' failure to conduct a cumulative-error analysis is sufficient reason for this Court to grant review, resolve an intractable split in the circuit courts, and vacate the decision below. At minimum, the Ninth Circuit should be directed to abide by its own precedent and perform a cumulative-error assessment, taking into account the *Strickland* claim that the court ignored below. However, as demonstrated below, the lower courts also erred in denying Guerrero's substantive *Brady* and *Strickland* claims.

1. The prosecutor's failure to disclose payments to the State's star witness violated Guerrero's due process rights under *Brady*

Guerrero's state and federal petitions alleged a *prima facie* case that the prosecution violated Guerrero's due process rights by failing to disclose its payments to Jimmy Richardson, the State's star witness. To obtain relief on this claim, Guerrero is required to show that (1) "[t]he evidence at issue [is] favorable to [Guerrero], either because it is exculpatory, or because it is impeaching;" (2) "that the evidence [was] suppressed by the State, either willfully or inadvertently;" and (3) "prejudice . . . ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

Withheld evidence is material (*i.e.*, prejudicial) under *Brady* if a reasonable probability exists that, had it been disclosed, at least one juror would have found a reasonable doubt as to the defendant's guilt. *Bagley*, 473 U.S. at 681; *Buck v. Davis*, 137 S. Ct. 759, 776 (2017) (the *Brady/Strickland* prejudice standard requires a reasonable probability that "at least one juror would have harbored a reasonable

doubt.”). The California Supreme Court unreasonably and summarily denied this claim.

As the district court correctly determined, the state court could not reasonably have found the undisclosed payments not favorable, because they gave the prosecution’s key witness a financial motive to assist the State’s case. (Appx.32.) Such evidence is favorable “beyond genuine debate,” *Banks v. Dretke*, 520 U.S. 668, 691 (2004), and no fair-minded jurist could conclude otherwise. *Harrington*, 562 U.S. at 101. Similarly, the state court could not have reasonably determined that the payments were not suppressed. As the district court found, it was “undisputed that this evidence was never closed to the defense,” (Appx.32.) and trial counsel’s file contains no hint of any payments to Richardson. (Appx.149-50.) Thus, the key question is whether the state court could have reasonably found the payments to Richardson were not material. The answer to that question is no.

First, the payments would have impeached Richardson’s testimony: the cornerstone of the State’s case. The Supreme Court clearly established the materiality of such evidence in *Banks*, holding a witness’s paid informant status was material because his testimony was “the centerpiece of [the] prosecution’s penalty phase case.” *Banks*, 540 U.S. at 701. Without Richardson, the prosecution had no evidence placing Guerrero at the scene of the crime, no evidence of an alleged confession, and no clear evidence implicating Guerrero as the seller of the murder weapon. The jury must have placed great weight on Richardson’s testimony, because the other evidence presented at trial pointed so strongly to

innocence, or at the very least reasonable doubt. The only eyewitnesses to the shooting, Catalina and Lawrence Avalos, testified that the shooter was taller, darker, and thinner than Guerrero, and that Guerrero's car did not resemble the shooter's car. (3.RT.436, 454.) Three witnesses testified that Guerrero had an alibi for the two times that Lawrence saw the shooter drive through the neighborhood prior to the shooting. (4.RT.638-39, 647-48.) And Raul Macias repudiated his earlier statement that Guerrero sold him the murder weapon, instead testifying at trial that law enforcement coerced him into implicating Guerrero and that it was Richardson who sold him the weapon. (5.RT.922-23, 937-38.)

Richardson was so critical to the State's case that the trial court deemed his credibility "the most fundamental thing in this trial." (1.RT.11.) Thus, had the jury disbelieved Richardson's testimony that Guerrero confessed, it would have had little or no evidence on which to convict Guerrero beyond a reasonable doubt. Similarly, evidence that law enforcement paid Richardson thousands of dollars to elicit incriminating evidence against Guerrero would have lent credibility to Macias's testimony that law enforcement was protecting Richardson, and made it believable that the same agents had pressured Macias not to implicate their paid informant on tape.

Such impeachment of the State's credibility is material under clearly-established federal law. In *Kyles v. Whitley*, the Supreme Court held that a key informant's inconsistent statements were material because the statements, and law enforcement's failure to suspect the informant in light of them, "could have been

used to cap an attack on the integrity of the investigation.” 514 U.S. at 449.

Similarly, here, the State’s credibility as an investigator and presenter of evidence would have been undermined by its use of payments to obtain information about Guerrero—who was not even a suspect before Richardson implicated him—from a known felon who was possibly involved in the crime.

Moreover, Richardson was not significantly impeached at trial, as Guerrero’s jury never heard any evidence suggesting Richardson was benefitting in any way—let alone financially—from assisting law enforcement specifically in Guerrero’s murder case. The only impeachment Guerrero’s jury heard about Richardson was that he had received a lenient sentence after pleading guilty to two felonies, in exchange for assisting police in cases *other than* Guerrero’s murder prosecution—specifically, cases involving “gun buys” and “counterfeit money buys.”⁷ (4.RT.675; *see also* 4.RT.754 (Richardson’s plea deal related to “information in the area of weapons and counterfeit currency.”)) This Court has clearly held that a key witness’s paid informant status in the case at hand is material under *Brady*, when—as here—the jury heard evidence that the witness had acted as an informant in other cases. *See Banks*, 540 U.S. at 688-89, 700-01 (witness’s paid informant status was material and not cumulative, even though the jury was aware that the

⁷ The district court itself recognized that this impeachment pertained to cases other than Guerrero’s, stating that Richardson “testified that he . . . received a suspended sentence in exchange for cooperating with law enforcement *on other cases*” and “g[iving] law enforcement information *about other crimes*.” (Appx.36) (emphasis added).

same witness had previously acted as a police informant in other cases). The impeachment testimony Guerrero's jury heard offered, at most, an "opportunit[y] for chipping away on cross-examination," but nothing close to "the assault that was warranted" on Richardson's credibility. *Kyles*, 514 U.S. at 443 & n.14.

And just as in *Banks*, what little impeachment was introduced against Richardson was itself undermined: the prosecutor elicited false testimony from a law enforcement witness (5.RT.1064) (and later falsely argued to the jury (6.RT.1272)) that Richardson's sentencing benefit could not have influenced him in Guerrero's case because Richardson had supposedly "already been sentenced" on his drug and counterfeiting charges by the time he began cooperating with police in the Ortiz murder investigation in December 2002. (*Id.*) (emphasis added). Though that argument was untrue—Richardson was in fact not sentenced until March 2003 (Appx.128)—it succeeded in erasing any residual impeaching effect that Richardson's plea deal might have had on his credibility, leaving Guerrero's jury with no reason to disbelieve him. The prosecutor emphasized this fiction in closing, arguing that the timing of Richardson's sentencing meant he was "not going to get . . . any kind of sweetheart deals" for informing on Guerrero. (6.RT.1272.) Yet information that Richardson received thousands of dollars in payment, and that he was not sentenced until after he helped law enforcement on the Guerrero case, would have countered the prosecution's reliance on, and bolstering of, Richardson's testimony in closing argument. *Compare Banks*, 540 U.S. at 701 (informant's testimony was material where it "was the centerpiece of [the] prosecution's penalty-

phase case") and *Kyles*, 514 U.S. at 444-45 (withheld inconsistent statement was material where the prosecutor argued for the credibility of eyewitnesses' testimony in closing); *with Strickler*, 527 U.S. at 289 (impeaching evidence was not material where, *inter alia*, it "was not relied upon by the prosecution at all during its closing argument at the penalty phase.")

The harm from the *Brady* violation, then, is the difference between powerful, virtually unimpeached testimony by a key witness and testimony that would have been weakened, if not completely undermined, by counsel's use of the *Brady* evidence. Because Richardson was the State's single most important witness, provided the only evidence that Guerrero confessed, was not significantly impeached at trial, and was the centerpiece of the prosecution's closing argument, no fair-minded jurist could conclude that Guerrero failed to raise at least a *prima facie* case that the withheld payments to Richardson were material. The state court cannot have found—absent an evidentiary hearing, and purporting to credit Guerrero's allegations as true—that these payments were immaterial without contravening, and unreasonably applying, the clearly-established law set forth in *Banks*, *Kyles*, *Strickler*, *Bagley*, and *Brady* itself. *See* 28 U.S.C. § 2254(d)(1).

The state court ruling was also factually unreasonable under 28 U.S.C. § 2254(d)(2). In order to have dismissed Guerrero's claims without affording him an evidentiary hearing, it must have resolved factual disputes—including the amount Richardson was actually paid and whether he was a paid informant in other cases—in the State's favor. Doing so without an evidentiary hearing constituted an

unreasonable determination of the facts. The state court's summary denial of relief—and conclusion that Guerrero did not state a *prima facie* case under *Brady*—is therefore unreasonable under 28 U.S.C. § 2254(d), and Guerrero is entitled to relief, or at least an evidentiary hearing, in federal court.

2. Trial counsel unreasonably and prejudicially failed to provide the jury with evidence that substantiated the exculpatory eyewitness testimony and supported Guerrero's theory of defense

Trial counsel refused to speak with Guerrero's post-conviction counsel or provide a declaration regarding his handling of Guerrero's trial. (Appx.151-52, ¶¶ 12-23.) But the record shows he made several important errors. He was appointed to Guerrero's case just four weeks before trial began. (1.CT.144 (7/1/03 appointment); 2.RT.1 (8/5/03 start of trial)). The only witnesses he contacted were the Avaloses, to confirm statements they had previously made to prior counsel's investigator. (Appx.150, ¶ 9.) He never interviewed other witnesses, identified in police reports, who could have corroborated the Avaloses' testimony that Guerrero was not the shooter: Federico Hernandez told police he was at home at the time of the shooting and heard the gunshots, and that, at about 3:00 p.m. on the day of the murder, he saw a car matching the Avaloses' description of the shooter's car drive past the crime scene several times. (Appx.95.) Hernandez was interviewed by Guerrero's postconviction counsel in October 2016, and stated that when he saw the shooter's car that afternoon there was only one person inside. (Appx.95, ¶ 2.) Richard Adams, another neighborhood resident, told police that moments after the shooting he heard someone yell "green Camaro." (Appx.138-39.)

Hernandez's and Adams's testimony would have corroborated the Avaloses' testimony that the shooter's car was green, and had driven by earlier in the day when Guerrero was elsewhere with his girlfriend. Yet trial counsel never interviewed them, or directed his investigator to do so. (Appx.150, ¶ 9; Appx.95, ¶ 4.) Moreover, as discussed *supra*, trial counsel's file also contained the exculpatory January 14, 2003 photographic lineup in which Catalina had rejected Guerrero's photograph (Appx.149-50, ¶¶ 6-7), but trial counsel did not attempt to introduce it into evidence.

3. The *Brady* violations cumulatively prejudiced petitioner when combined with the harm from the *Strickland* violation

Where "the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."

Wearry v. Cain, 136 S. Ct. 1002, 1006 (2016). The combined effect of the undisclosed payments to Richardson and trial counsel's failure to investigate or present exculpatory evidence is sufficient to create a reasonable doubt and devastate the reliability of Guerrero's trial.

This case exemplifies the compounding effect that multiple constitutional errors can inflict on a trial. Here, there was no dispute that a *Brady* violation occurred—the only open question was whether that violation had a material effect on Guerrero's conviction. Similarly, trial counsel's failure to use evidence in his possession to rehabilitate the testimony of the only eyewitnesses to the crime—eyewitnesses who otherwise *exculpated* his client—was an egregious failure that

seriously harmed Guerrero's defense. Thus, every aspect of the State's case was distorted against Guerrero. The prosecution's suppression of Richardson's payments falsely bolstered his credibility, which the prosecutor took pains to emphasize during his closing remarks; while trial counsel's failure to corroborate the Avaloses' credibility falsely discredited them. But for the constitutional violations, Guerrero's jury would have learned that Richardson, rather than being the disinterested witness the prosecutor claimed, had a direct financial stake in Guerrero's conviction. It would have learned that Catalina Avalos, rather than changing her story, had consistently rejected Guerrero as resembling the shooter, even from the time she first described the shooter to police in January 2003. With the State's key witness falsely bolstered, and exculpatory witnesses falsely discredited, Guerrero cannot be said to have obtained a fair trial.

Evaluating these constitutional claims in isolation leads to an improperly narrow assessment of prejudice and obfuscates the unreliability of Guerrero's trial. Cumulative-error analysis allows courts to take account of the reality of criminal trials and how constitutional violations can compound one another. As this Court and numerous lower courts and commentators have noted, *Brady* and *Strickland* claims are particularly synergistic. *Bagley*, 473 U.S. at 688 (redefining *Brady* materiality in terms of *Strickland* prejudice); *Cargle*, 317 F.3d at 1221 (emphasizing the "synergistic effect" of *Strickland* and *Brady* errors); Blume & Seeds, *supra*, at 1154 ("[C]ourts should consider the impact of *Brady* violations and *Strickland* violations together. . ."). In a case such as this, where the prosecution's *Brady*

violation made the State's star witness more credible, and defense counsel's *Strickland* error made the defense star witness less credible, it is imperative for courts to consider the interplay of those errors and the impact they collectively had on Guerrero's due-process right to a fundamentally fair trial. When considered cumulatively, there is no question that the constitutional harms at the heart of this case "undermined confidence in the verdict." *Wearry*, 136 S. Ct. at 1006.

CONCLUSION

For the foregoing reasons, Guerrero respectfully requests that this Court grant his Petition for Writ of Certiorari to resolve the circuit split regarding whether the cumulative impact of multiple types of errors forms a basis for habeas corpus relief under the Fourteenth Amendment.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: May 21, 2019
By: 
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