

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

DAMION CRUZ-BENAVENTE, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

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

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**QUESTION PRESENTED FOR REVIEW**

To determine whether a criminal trial was unfair because of cumulative errors, does a court review whether the aggregate errors—both preserved and forfeited—had a substantial influence on the verdict?

No. \_\_\_\_\_

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Petitioner Damion Cruz-Benavente asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on August 21, 2023.

**PARTIES TO THE PROCEEDING**

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

**RELATED PROCEEDINGS**

All proceedings directly related to the case are as follows:

- *United States v. Cruz-Benavente*, No. 4:21-CR-157-DC (W.D. Tex. Jan. 31, 2022) (judgment)

- *United States v. Cruz-Benavente*, No. 22-50078 (5th Cir. July 20 & Aug. 22, 2023) (unpublished opinion and order denying petition for panel rehearing)

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**DECISION BELOW**

A copy of the unpublished opinion of the court of appeals, *United States v. Cruz-Benavente*, No. 22-50078 (5th Cir. July 20, 2023) (per curiam), is attached to this petition as Appendix A.

A copy of the order denying the petition for panel rehearing, *United States v. Cruz-Benavente*, No. 22-50078 (5th Cir. Aug. 22, 2023), is attached to this petition as Appendix B.

**JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES**

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 20, 2023. Pet. App. A. Cruz timely filed a petition for panel rehearing, which the Fifth Circuit denied on August 22, 2023. Pet. App. B. This petition is filed within 90 days after denial of rehearing. *See* Sup. Ct. R. 13.1, 13.3. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL PROVISIONS INVOLVED**

The Fifth Amendment to the U.S. Constitution provides, in pertinent part: “No person shall be ... deprived of life, liberty, or property, without due process of law ....”

The Sixth Amendment to the U.S. Constitution provides, in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury ....”

## STATEMENT

In March 2021, a federal grand jury indicted Cruz for committing three sexual abuse offenses in Big Bend National Park between 2015 and 2016 against D.A. Cruz proceeded to trial. In his opening statement, Cruz conceded that he fathered a child, S.A., with D.A. and was guilty of one of three counts he faced—having sex with a minor. But he argued that the evidence would not support conviction on the two aggravated sexual abuse charges because he did not use force or threats to cause D.A. to engage in sexual acts.

Cruz’s guilt of the aggravated counts turned on whether the jury believed D.A. when she testified that Cruz used force and threats. D.A. first accused Cruz of using force and threats in 2019 after child protective services discovered that D.A. and Cruz were S.A.’s parents. With CPS’s involvement, D.A. was afraid of losing custody of her son and did not want Cruz to have rights over him. Cruz argued that this motivated D.A. to lie about the force and threats. Cruz also argued her story lacked corroboration as no wit-

nesses testified about the nonsexual violent acts D.A. claimed occurred, friends and family who lived with or near D.A. and Cruz during 2015 and 2016 had no suspicion of the alleged forced or threatened sexual acts, and D.A. alleged force and threats years after the fact and only when she had a motive to lie.

The Government countered that D.A.’s consistency—telling family and investigators about the force and threats from 2019 on—corroborated her story. Over objection,<sup>1</sup> the Government introduced D.A.’s out-of-court statements through two witnesses that described her account of sexual acts prompted by force and threats. Over another objection,<sup>2</sup> the Government played 33 minutes of an audio-recorded interview between D.A. and a National Park Services investigator. Through that recording, the jury heard detailed accounts of forced sexual acts in Big Bend that D.A. did not describe in her live testimony. And the jury heard the investigator praising D.A.’s courage and consistency while criticizing

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<sup>1</sup> Cruz objected to the admission of D.A.’s out-of-court statements as hearsay but did not specify that D.A.’s statements were post-motive and therefore not admissible under Federal Rule of Evidence 801(d)(1)(B)(i) as prior consistent statements. *See Tome v. United States*, 513 U.S. 150, 167 (1995). Thus, Cruz’s argument regarding the independent error of admitting D.A.’s out-of-court statements was subject to plain error review. Pet. App. A5.

<sup>2</sup> Cruz objected to the admission of the recording on many grounds but not that D.A.’s statements were post-motive.

Cruz’s inconsistency. In closing, the Government repeated that D.A.’s consistency is her corroboration. Three days after the trial began, the jury convicted Cruz of all three counts.

The district court sentenced Cruz to life sentences on the two aggravated sexual abuse counts and to 180 months’ imprisonment on the sexual abuse of a minor count, all to run concurrently.

On appeal, Cruz challenged the two aggravated sexual abuse convictions, seeking reversal based on the application of the cumulative error doctrine.<sup>3</sup>

The Fifth Circuit held that the admission of D.A.’s prior out-of-court statements about the sexual acts by force and threat was error because the statements were all made after 2019, when D.A.’s motive to fabricate her story arose. Pet. App. A7; *see Tome*, 513 U.S. at 160. Those inadmissible statements were introduced through Government witnesses who had interviewed D.A.: a detective, a family advocate, and the National Park Service investigator’s recorded interview with D.A. Yet, the Fifth Circuit found no *plain* error because the statements “were cumulative—they mirrored D.A.’s detailed in-court testimony under oath.” Pet. App. A8.

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<sup>3</sup> Cruz also sought reversal based on three evidentiary errors independently.

Cruz also argued it was error to allow the investigator's bolstering statements in the recorded interview because they were inadmissible hearsay and lay opinion. The Fifth Circuit found no error because those statements were offered to provide context for D.A.'s (inadmissible) statements, not for the truth of the matter asserted.<sup>4</sup> Pet. App. A8–9.

Cruz raised additional errors: (1) admission of irrelevant testimony by D.A.'s grandmother about the grandmother's personal history of sexual abuse, (2) admission of the detective's impermissible opinion testimony that "a lot of the time" allegations of abuse are raised years after the abuse, and (3) the exclusion of relevant evidence tending to negate D.A.'s claims of fear. The court did not resolve whether those were errors. Pet. App. A11–12. Instead, the court noted that "Cruz's most compelling argument for error is the admission of D.A.'s statements for rehabilitation." Pet. App. A12. The court continued that, "considering Cruz's admissions of having sexual contact with D.A. and other evidence presented at trial, we decline to exercise the extraordinary doctrine of cumulative error here." Pet. App. A12.

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<sup>4</sup> The court of appeals held that the district court did not erroneously limit cross-examination of D.A.

Cruz filed a petition for panel rehearing. He argued that the court’s application of the cumulative error doctrine was flawed because it did not aggregate the errors to determine whether, together, they were harmless. Cruz argued that the synergistic errors struck at the heart of Cruz’s defense—whether D.A. fabricated her claim that Cruz had forced and threatened her to have sex with him years earlier. The court of appeals denied the petition. Pet. App. B.

### **REASONS FOR GRANTING THE WRIT**

**The Fifth Circuit failed to apply this Court’s *Kotteakos* harmless error review of non-constitutional cumulative errors, conflicting with other circuits’ correct approach.**

This Court has “repeatedly recognized that the cumulative effect of a trial court’s errors, even if they are harmless when considered singly, may amount to a violation of due process requiring reversal of a conviction.” *United States v. Al-Moayad*, 545 F.3d 139, 178 (2d Cir. 2008); *see, e.g., Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978) (“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”); *Chambers v. Mississippi*, 410 U.S. 284, 302–03 (1973) (“under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial”).

As circuit courts have explained, the “cumulative error doctrine ‘provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial, which calls for reversal.’” *United States v. Baker*, 432 F.3d 1189, 1223 (11th Cir. 2005) (quoting *United States v. Munoz*, 150 F.3d 401, 418 (5th Cir. 1998)); *see also Al-Moayad*, 545 F.3d at 178; *United States v. Necoechea*, 986 F.2d 1273, 1282–83 (9th Cir. 1993). But this Court has not yet explained precisely how to undertake this cumulative error review when the errors being reviewed are both preserved and forfeited.

For cumulative error review of non-constitutional errors, most circuits correctly apply the standard this Court announced in *Kotteakos v. United States*, 328 U.S. 750, 764 (1946). *Baker*, 432 F.3d at 1223; *see United States v. Meserve*, 271 F.3d 314, 329, 332 (1st Cir. 2001); *United States v. Zhong*, 26 F.4th 536, 558 (2d Cir. 2022); *United States v. Greenspan*, 923 F.3d 138, 154 (3d Cir. 2019); *Barber v. City of Chicago*, 725 F.3d 702, 715 (7th Cir. 2013); *United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990).

Under that standard, a “non-constitutional error is harmless ‘if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that

the judgment was not substantially swayed by the error.” *Baker*, 432 F.3d at 1223 (quoting *Kotteakos*, 328 U.S. at 764). The inquiry is not just whether there was sufficient evidence to support the result without the error. *Id.* It is “whether the error itself had substantial influence.” *Kotteakos*, 328 U.S. at 764. If there was a substantial influence, “or if one is left in grave doubt, the conviction cannot stand.” *Id.* at 765. The same standard applies whether the errors were preserved or forfeited. *Baker*, 432 F.3d at 1224. The focus is on “the underlying fairness of the trial.” *United States v. Wood*, 207 F.3d 1222, 1238 (10th Cir. 2000) (cleaned up).

That standard is strikingly different from the one the Fifth Circuit used to affirm Cruz’s conviction. The court made no indication that it reviewed the errors collectively to determine whether those combined errors substantially influenced the jury’s verdicts on aggravated sexual abuse by force and threats. *See Pet. App. A11–12.* Instead, after noting that reversal under the cumulative error doctrine is “rare,” the Fifth Circuit relied on Cruz’s admissions of sexual contact with D.A. and other evidence presented at trial to “decline to exercise the extraordinary doctrine of cumulative error[.]” *Pet. App. A11–12.*

But the only admissible evidence that established the challenged force and threat elements of Cruz’s convictions was D.A.’s

trial testimony, making her credibility a key issue. And the prosecution used a mountain of *inadmissible* evidence—statements D.A. made after her motive to fabricate the story arose—to corroborate her testimony. The prosecutor referred to those statements repeatedly in opening and closing, introduced them through the testimony of two witnesses, and played a 33-minute audio recording of D.A.’s interview with the investigating officer.

With such a heavy focus on D.A.’s inadmissible statements, combined with the other evidentiary errors all bolstering D.A. and discrediting Cruz, the errors substantially influenced the jury’s finding of force and threats.<sup>5</sup> *See Kotteakos*, 328 U.S. at 764. “[O]ne cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.” *Id.*

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<sup>5</sup> In similar cases, courts have found the erroneously admitted evidence harmful. *See, e.g., United States v. Bercier*, 506 F.3d 625, 633 (8th Cir. 2007) (holding the introduction of the victim’s hearsay statements harmful because the Government’s case—that the sexual acts were non-consensual—“turned entirely on the credibility of [the victim]” and introduction of the prior statements through a medical expert “tipped the scales unfairly”); *United States v. Tome*, 61 F.3d 1446, 1455 (10th Cir. 1995) (finding harm on remand, after this Court held that the victim’s post-motive statements were inadmissible).

Had the Fifth Circuit used the correct standard, it would have reversed the challenged convictions. This Court should grant certiorari to clarify that the *Kotteakos* harmless error standard applies to non-constitutional errors aggregated for cumulative error review, regardless of whether they were preserved or forfeited.

## CONCLUSION

FOR THESE REASONS, Cruz asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

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