

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LINDA CARTY,

Petitioner,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISIONS,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME
IN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

To the Honorable Samuel A. Alito, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Petitioner Linda Carty respectfully requests a 30-day extension of time, to and including June 7, 2018, within which to file a petition for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas in this case, *Ex Parte Carty*, No. WR-61,055-02. The judgment of the Court of Criminal Appeals was entered on February 7, 2018. Unless extended, the time for filing a petition for a writ of certiorari would expire on May 8, 2018. Under this Court's Rule 13.5, this application is being filed at least 10 days before that date.

As explained below, petitioner requests an extension because Supreme Court counsel needs time to further review the record and study the case law before drafting the petition, and he has conflicting deadlines in other matters. Respondent does not oppose this application. No execution date has been set.

This Court has jurisdiction under 28 U.S.C. § 1257(a). The *per curiam* opinion of the Court of Criminal Appeals is attached as Exhibit 1. Judge Walker's concurring opinion is attached as Exhibit 2. Judge Richardson's concurring opinion is attached as Exhibit 3. The opinion of the state district court is attached as Exhibit 4.

1. This is a capital case. It raises the question whether and how courts on collateral review must assess the cumulative effects of constitutional errors that infected a trial. By denying petitioner a cumulative evaluation of the harm arising from multiple constitutional violations, the Court of Criminal Appeals undermined the Due Process Clause's bedrock guarantee of a fair trial. A trial may be rendered fundamentally unfair by the combined effect of two constitutional violations just as surely as by one independently prejudicial violation. The Court of Criminal Appeals' refusal to assess the cumulative harm of constitutional errors departs from the decisions of most circuits, including the Fifth Circuit.

2. In 2002, petitioner was convicted of capital murder by a jury in Harris County District Court and sentenced to death. Exhibit 1, at 1-3. Her conviction

was affirmed on direct appeal. *Id.* at 3 (citing *Carty v. State*, No. AP-74,295 (Tex. Crim. App. Apr. 7, 2004) (not desig. for pub.)).

After state postconviction review, petitioner sought federal habeas relief, raising, as relevant here, a claim of ineffective assistance of counsel. See *Carty v. Thaler*, 583 F.3d 244, 246 (5th Cir. 2009), *cert. denied*, 559 U.S. 1106 (2010). The district court denied relief but granted a Certificate of Appealability. See *ibid.*

The Fifth Circuit reviewed petitioner's ineffective-assistance claim *de novo*, rather than under AEDPA's deferential standards, because the Court of Criminal Appeals had not adjudicated that claim. *Id.* at 253. The court held that petitioner's trial counsel had rendered objectively unreasonable performance. *Id.* at 259. As to prejudice, the court found that the testimony occasioned by counsel's error was "undoubtedly damaging" and "provided motive and context for the crime," which "prosecutors emphasized * * * in their closing remarks." *Id.* at 261. The Fifth Circuit declared it a "close case," but nonetheless concluded that petitioner had narrowly failed to demonstrate prejudice under the *Strickland* standard. *Id.*

3. In 2014, petitioner discovered that the prosecution had suppressed numerous items of exculpatory evidence in violation of *Brady v. Maryland*, 372 U.S. 83 (1963). The Court of Criminal Appeals granted leave to file a successive writ, and the state district court held an evidentiary hearing on the newly discovered violations. Exhibit 1, at 1, 3, 4; Exhibit 4, at 1, 3.

The district court found that “[t]he State was operating under a misunderstanding of *Brady*” at the time of trial. Exhibit 4, at 19. Indeed, the Harris County District Attorney’s Office only turned over impeachment or exculpatory evidence that it independently deemed to be “credible.” *Id.* at 19-20. Thus, the State turned over *no* witness statements to the defense prior to trial, other than Carty’s own statement. *Id.* at 20.

The district court found that the State violated *Brady* by withholding multiple witness statements (including, among others, the statement of an alleged co-conspirator named Chris Robinson). Moreover, the State improperly concealed evidence that the prosecution had a “deal” with one of its key witnesses (Marvin Caston) “that he would not get prison time if Carty received the death penalty.” *Id.* at 21-22. The court held that all of this evidence was “exculpatory or could be used for impeachment purposes.” *Id.* at 21-23. Nonetheless, the district court concluded that the withheld *Brady* evidence would not have altered the jury’s verdict and thus did not meet the materiality standard. *Id.* at 23.

4. On appeal, petitioner challenged the district court’s *Brady* ruling and also urged that the “cumulative impact of the constitutional errors”—the newly discovered *Brady* violations combined with the earlier-adjudicated ineffective assistance of counsel—“violated her state and federal constitutional rights to due process.” Exhibit 1, at 4 (quoting without citation petitioner’s Application for Post Conviction Writ of Habeas Corpus, at 56-58 (filed Sept. 10, 2014)).

An eight-judge Court of Criminal Appeals summarily dismissed petitioner's cumulative-error claim "as an abuse of the writ." Exhibit 1, at 4. The court stated only that it "failed to satisfy" the standard for relief on a successive writ. *Ibid.* (citing Tex. Code Crim. Proc. Art. 11.071, § 5(a)).

The Court of Criminal Appeals also affirmed the district court's denial of relief on the *Brady* claim. Exhibit 1, at 4. The court did not take issue with the district court's findings that the State committed numerous *Brady* violations. It instead cursorily affirmed the district court's conclusion that the misconduct did not materially alter the verdict. *Ibid.* Concurring opinions signed by three judges shed more light on the court's *Brady* reasoning. One concurrence discerned that the *Brady* violations were not material because "defense counsel, with or without the Caston deal, could have cross-examined two witness—Caston and Josie Anderson—about whether or not they had been charged by the State at the time of Applicant's trial, could have explored the existence of motive to testify against Applicant, and could have argued that fact to the jury." Exhibit 2, at 5 (Walker, J., concurring). A second concurrence agreed that the *Brady* violations were not material because of what defense counsel "could have" done even without the withheld evidence. Exhibit 3, at 56-57 (Richardson, J., concurring).

5. In denying petitioner a cumulative evaluation of the harm stemming from constitutionally deficient counsel and rampant *Brady* violations, the Court of Criminal Appeals failed to secure the Due Process Clause's baseline guarantee of a

fundamentally fair trial. The judgment below highlights a division of opinion that has long riven the lower courts. Like the Court of Criminal Appeals, the Eighth Circuit refuses to cumulatively consider constitutional errors on habeas review, as does the Sixth Circuit in non-capital cases. *E.g.*, *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996); *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002). By contrast, most circuits require cumulative-error analysis on habeas review, but “differing approaches to cumulating harmless errors have arisen.” Blume & Seeds, *Reliability Matters: Reassociating Bagley Materiality, Strickland Prejudice, and Cumulative Harmless Error*, 95 J. of Crim. Law & Criminology 1185 n.117 (2005) (collecting cases). Some circuits apply an identical standard to cumulative error on both habeas and direct review. See *ibid.* The Fifth Circuit applies a stricter test to cumulative error on habeas review, but nonetheless holds that constitutional errors that did not individually deprive the defendant of a fair trial may add up to a Due Process violation. *Derden v. McNeel*, 978 F.2d 1453, 1456 & n.5 (5th Cir. 1992) (en banc) (joining the “majority ‘rule’” regarding postconviction cumulative-error analysis and collecting cases).

6. Petitioner has never received any type of cumulative-error analysis, despite suffering multiple, adjudicated constitutional violations. Under the majority circuit-court rule, petitioner was entitled to postconviction cumulative-error review. But she was deprived of this opportunity because the State concealed *Brady* evidence for more than a decade after trial. Thus, while

petitioner raised her ineffective-assistance claim on initial habeas, she could only raise her *Brady* claim through a successive state writ. The relevant courts assessed those claims on the merits and concluded that the respective violations *individually* did not call into question the reliability of the verdict. Petitioner may not be deprived of a postconviction assessment that considers these errors cumulatively simply because the State's misfeasance forced her to raise her constitutional claims in different proceedings years apart.

The Court of Criminal Appeals' failure to conduct a cumulative-error analysis caused real harm to petitioner. This is the textbook case where individual constitutional violations compound one another to raise serious doubts about the verdict's reliability. The Fifth Circuit concluded that counsel's objectively unreasonable performance presented a "close case" as to prejudice. *Carty*, 583 F.3d at 261. Thus, only a small measure of additional harm would dictate a finding that petitioner's trial was unfair and the verdict unreliable. When petitioner discovered the State's suppression of several items of *Brady* evidence many years later, the district court and Court of Criminal Appeals never assessed whether these violations added the sufficient, minimal harm to nudge the "close case" over the line to an unconstitutional one.

Worse, the Court of Criminal Appeals' *Brady*-materiality reasoning vividly illustrates the serious harm that can occur when *Brady* violations are combined with ineffective trial counsel. As noted above, the concurring opinions below

declared the *Brady* violations non-material because trial counsel supposedly “could have” elicited some of the same material through cross-examination or otherwise. See *supra* at 5. But, of course, the court could not say that trial counsel *did* elicit such testimony because counsel did *not* do so; indeed, counsel was constitutionally defective. Thus, the Court of Criminal Appeals’ *Brady* materiality analysis is based upon naked speculation about what a hypothetical trial counsel might have done to mitigate the State’s misconduct. Only a cumulative-error analysis would appreciate that trial counsel’s ineffectiveness meant that he could not have overcome the prosecution’s suppression of evidence through skillful cross-examination. And a cumulative-error analysis would then aggregate this actual *Brady* harm with the *Strickland* prejudice that already rendered this a “close case.” Cases like this demonstrate why scholars have highlighted the toxic mix of *Brady* and *Strickland* violations, see generally Blume & Seeds, *supra*, and why most courts mandate cumulative-error analysis on postconviction review.

The constitutional command is especially forceful in capital cases. No person should be put to death without any court having ever assessed whether constitutional errors collectively robbed her of a fair trial.

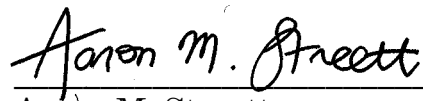
7. Petitioner respectfully requests an extension of time within which to file her petition for a writ of certiorari. Undersigned counsel of record did not substantially participate in earlier stages of this case. Counsel has not yet had a full opportunity to evaluate the complete record in this case, which will allow for an

efficient and clear presentation of the issues to this Court. Counsel, moreover, has been and will continue to be heavily engaged with the press of other matters in this Court and other federal courts, including oral argument on May 2 in the Fifth Circuit in *United States ex rel Jamison v. Del-Jen, Inc.*, No. 17-10409.*

Thus, the requested 30-day extension is necessary to afford counsel time to complete review of the record, study the relevant case law, draft the petition, prepare the appendices, and have those documents printed. The extension will not prejudice respondent. No execution date has been set, and respondent does not oppose the extension.

* These matters also include an *amicus* brief in *Weyerhaeuser Co. v. United States Fish & Wildlife Service*, No. 17-71, due on April 30 in this Court; a brief in opposition in *Dragon Intellectual Property, LLC v. Dish Network LLC*, No. 17-1327, due on May 21 in this Court; a brief in opposition requested by this Court in *Stambler v. Mastercard International, Inc.*, No. 17-1140, due June 1; and a petition for a writ of certiorari to the Second Circuit in *City of Providence v. BATS Global Markets, Inc.*, No. 15-3057 (2d Cir.), due on June 11 in this Court.

Respectfully submitted.

Handwritten signature of Aaron M. Streett in black ink, written in a cursive style.

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