

No. 18-____

IN THE
Supreme Court of the United States

LINDA CARTY,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE**QUESTIONS PRESENTED**

Petitioner was convicted of capital murder and sentenced to death in a trial that suffered from multiple constitutional errors. Nearly a decade ago, the Fifth Circuit held on petitioner’s federal habeas petition that her trial counsel performed “objectively unreasonably” and denied relief only after deeming it a “close case” whether counsel’s error altered the verdict. In the decisions below, Texas state courts authorized petitioner to file a successive writ and found that the State intentionally suppressed numerous items of *Brady* evidence, including evidence that a key witness had struck a “deal” with the prosecution in exchange for inculpatory testimony. The Court of Criminal Appeals nonetheless denied relief after finding that the withheld evidence would not have altered the verdict, in part because an *effective* counsel could have mitigated the *Brady* harm through cross-examination. The court refused to consider the cumulative prejudice caused by the *Brady* violations when combined with the already “close case” on prejudice presented by the ineffective-assistance claim. Federal appellate courts and state high courts are divided over whether the Constitution requires courts on collateral review to assess cumulatively the prejudicial effect of non-defaulted constitutional errors.

The questions presented are:

1. Whether the Constitution requires a court on habeas review in a capital case to assess cumulatively the prejudice caused by multiple constitutional errors at a criminal trial?

2. Whether the State's intentional suppression of evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), prejudiced petitioner by itself or in combination with the objectively unreasonable performance of her trial counsel?

PARTIES TO THE PROCEEDINGS BELOW

Linda Carty was the applicant in the state district court and Court of Criminal Appeals.

The State of Texas was the respondent in the state district court and Court of Criminal Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Linda Carty respectfully petitions for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas.

OPINIONS BELOW

The Court of Criminal Appeals' opinion denying habeas relief (App., *infra*, 1a-79a) is reported at 543 S.W.3d 149. The court's earlier opinion remanding the case to the state district court for consideration of certain claims (App., *infra*, 161a-168a) is unreported. The state district court's findings of fact and conclusions of law (App., *infra*, 80a-117a) are unreported.

STATEMENT OF JURISDICTION

The judgment of the Court of Criminal Appeals was filed on February 7, 2018. On April 27, Justice Alito extended the time to file a petition for certiorari until June

7, 2018. On May 24, 2018, Justice Alito further extended the time to file a petition for certiorari until July 9, 2018. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. XIV, §1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

PRELIMINARY STATEMENT

Petitioner Linda Carty faces execution following a trial that courts later determined suffered from multiple constitutional shortcomings. Her trial counsel was judged objectively unreasonable by the Fifth Circuit, and years later, a Texas state court found that the State had intentionally suppressed numerous items of *Brady* evidence. The respective courts ruled that those constitutional violations *individually* did not sufficiently prejudice Carty to warrant relief. But no court has assessed

their *cumulative* effect on Carty’s right to a fair trial.

The cumulative effect was devastating. The Fifth Circuit deemed Carty’s ineffective-assistance claim—by itself—a “close case” on prejudice. Yet the Court of Criminal Appeals below refused to assess whether the addition of the *Brady* violations pushed the cumulative prejudice across the constitutional line. What is more, evaluating the *Brady* claim in isolation, the court below discerned no prejudice only by speculating that the same trial counsel the Fifth Circuit found ineffective could have discovered some of the *Brady* evidence through effective cross-examination. This case vividly illustrates the danger of refusing to assess constitutional errors cumulatively.

Federal courts of appeals and state high courts have long been divided over whether, on collateral review, the Constitution requires a cumulative assessment of the harm caused by separate constitutional violations. Most courts—including the Tenth Circuit in opinions by then-Judge Gorsuch—have aggregated the effects of constitutional errors, while a minority of courts decline to do so. The split is especially concerning for ineffective-assistance and *Brady* violations, which typically come to light only on habeas review. Scholars and appellate judges have repeatedly noted this conflict and implored the Court to intervene.

Cumulative-error review is essential to secure the due-process right to a fundamentally fair trial. This Court’s decisions have added together the harm from trial errors on direct appeal and from individual *Brady* violations on collateral review to determine whether a defendant demonstrated cumulative prejudice. Logic dictates that this analysis would apply across species of constitutional errors on collateral review. As then-Judge Gorsuch observed, errors that individually would not warrant relief

on collateral review may nonetheless have an aggregate effect that destroys the reliability of the verdict.

This case presents an opportunity to resolve the conflict among lower courts without the AEDPA overlay that could frustrate review. A clear holding requiring cumulative-error analysis would decide the disputed constitutional question *and* dissolve the entrenched AEDPA split over whether this Court's decisions do indeed "clearly establish" the necessity of cumulative-error assessment on habeas review.

At the very least, if the Constitution does not require an assessment of cumulative harm in *all* collateral-review cases, then surely it does in *capital* cases. This Court's precedents establish numerous procedural safeguards before a person may be sentenced to death and executed. The principles embodied in those cases compel the conclusion that *some court* must evaluate the cumulative effect of constitutional errors before a death sentence is carried out. This is no mere technicality. The alternative is executing a person with little assurance that she received a fundamentally fair trial.

STATEMENT

I. BACKGROUND

A. Petitioner's trial and conviction

In 2002, the State tried petitioner for capital murder in Harris County District Court. App., *infra*, 3a. The State's theory of the case was that petitioner "recruited a group of men to break into [the victim]'s apartment to commit robbery and kidnap [the victim]." *Id.* at 2a. The co-conspirators included Christopher Robinson, Gerald Anderson, Carliss Williams, and Marvin Caston. *Ibid.* Only two of these four allegedly key players, Robinson and Caston, testified at petitioner's trial. *Id.* at 11a-13a, 16a. They provided the State with key testimony that

painted petitioner not only as a participant in the crime, but as its ringleader. See *id.* at 11a-13a. Based on this and other evidence, including critical testimony from petitioner's common-law husband, the jury found petitioner guilty of capital murder and sentenced her to death. *Id.* at 3a. Her conviction was affirmed on direct appeal. See *ibid.* (citing *Carty v. State*, No. AP-74,295, 2004 WL 3093229 (Tex. Crim. App. Apr. 7, 2004) (unpublished)).

B. Petitioner's federal habeas petition

After state habeas review, petitioner sought federal habeas relief, raising, as relevant here, a claim of ineffective assistance of counsel. See *id.* at 118a-160a. The district court denied relief but granted a Certificate of Appealability on certain claims. *Id.* at 131a.

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 132a-133a. The court held that petitioner's trial counsel had "performed objectively unreasonably" by failing to "notify [petitioner's common-law husband] of his right to assert his marital privilege not to testify against [petitioner]." *Id.* at 144a-145a. 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 149a. The Fifth Circuit declared the prejudice question a "close case," but concluded that petitioner had narrowly failed to demonstrate prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* at 148a.

II. PROCEEDINGS BELOW

A. Proceedings in state district court on petitioner's successive state habeas petition

Despite years of denials by the State, in 2014 petitioner discovered that the prosecution had willfully suppressed numerous items of evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Petitioner filed a successive application for a writ of habeas corpus in the Court of Criminal Appeals that raised the new *Brady* claims and a claim based upon the cumulative prejudicial effect of the *Brady* violations combined with the previous ineffective-assistance claim. App., *infra*, 169a-243a. The Court of Criminal Appeals permitted the successive application on the *Brady* claim and remanded to the state district court for consideration. *Id.* at 161a-162a. The Court of Criminal Appeals took no action on the cumulative-error claim. *Ibid.*

After an evidentiary hearing, the district court found that “[t]he State was operating under a misunderstanding of *Brady*” at the time of trial. *Id.* at 110a. Specifically, the Harris County District Attorney’s Office only turned over exculpatory or impeachment evidence that it independently deemed to be “credible.” *Id.* at 111a. The district court found that the State violated *Brady* by withholding multiple witness statements (including, among others, some from Robinson). *Id.* at 110a-115a. Moreover, the State improperly concealed evidence that the prosecution had a “deal” with Caston “that he would not get prison time if Carty received the death penalty.” *Id.* at 113a-114a. The court held that all this evidence was “exculpatory or could be used for impeachment purposes.” *Id.* at 115a. Nonetheless, the district court concluded without explanation that the evidence withheld through “*Brady* violations” would not have altered the jury’s verdict and thus did not meet *Brady*’s materiality

standard. *Id.* at 116a.

B. The Court of Criminal Appeals' decision

The Court of Criminal Appeals agreed with the district court and denied petitioner's application. *Id.* at 4a. On petitioner's *Brady* claim, 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 affect 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 in part because "defense counsel, with or without the Caston deal, could have cross-examined * * * Caston * * * about * * * the existence of motive to testify against [petitioner]." *Id.* at 76a (Walker, J., concurring). A second concurrence agreed. *Id.* at 65a (Richardson, J., concurring) ("[D]efense counsel could have cross-examined Caston * * * [regarding] the existence of an incentive to testify favorably for the State.").

The court summarily rejected petitioner's cumulative-error argument that the additional harm from the *Brady* violations nudged what was already "a close case" on the ineffective-assistance claim over the line for constitutional prejudice. The court did not dispute that petitioner raised the cumulative-error claim at the earliest possible juncture. The court dismissed petitioner's cumulative-error claim "as an abuse of the writ" and offered no further explanation for its refusal to conduct a cumulative-error analysis. *Id.* at 4a (citing Tex. Code Crim. Proc. art. 11.071, § 5(a)). As explained below, this dismissal is considered a ruling on the constitutional merits and thus is not an adequate and independent state ground that

bars this Court’s review.¹

REASONS FOR GRANTING THE PETITION

I. COURTS ARE INTRACTABLY DIVIDED OVER WHETHER THE CONSTITUTION MANDATES ASSESSING THE CUMULATIVE PREJUDICIAL EFFECTS OF MULTIPLE CONSTITUTIONAL VIOLATIONS ON HABEAS REVIEW

A. This Court has cumulated the prejudicial effects of separate errors in determining whether a defendant received the fundamentally fair trial guaranteed by the Due Process Clause

1. “The Constitution guarantees a fair trial through the Due Process Clauses * * * .” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006) (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984)). The due-process, fair-trial right “is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

In addition to this backstop, due-process right, individual constitutional protections safeguard the right to a fair trial. As relevant here, the Sixth Amendment entitles a defendant to the effective assistance of counsel, while the Due Process Clause requires the prosecution to produce any evidence favorable to the accused for use by the defense. *Strickland*, 466 U.S. 684-687; *Brady*, 373 U.S. at 86-88.

If a defendant establishes a *Strickland* or *Brady* violation, she must next establish that the violation had the requisite effect on the trial to warrant relief. For an ineffective-assistance-of-counsel claim, this Court asks whether there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Harrington v. Richter*,

¹ See *infra* Part I.B.3 for further discussion.

562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 694). Similarly, for the withholding of evidence in violation of *Brady*, the Court assesses whether “‘there is a reasonable probability’ that the result of the trial would have been different if the suppressed documents had been disclosed to the defense.” *Strickler v. Greene*, 527 U.S. 263, 289 (1999) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). This Court has noted the close resemblance between the test for *Strickland* prejudice and *Brady* materiality. *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”).

A slightly different prejudice test applies on federal habeas review of constitutional errors. In that setting, a petitioner must establish that the error “resulted in actual prejudice,” meaning that it “had substantial and injurious effect or influence in determining the jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal quotation marks omitted). But “there is no need for [this] further harmless-error review” if *Brady* or *Strickland* errors are at issue because the habeas prejudice standard is less stringent than that for either *Brady* or *Strickland* errors. See *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

2. This Court has had two opportunities to address how to assess prejudice under the Due Process Clause when there are multiple errors in the same proceeding. See *Taylor v. Kentucky*, 436 U.S. 478 (1978); *Chambers*, 410 U.S. 284. Both times, the Court added together the prejudicial impact from each of the errors to determine whether their “cumulative effect * * * violated the due process guarantee of fundamental fairness.” *Taylor*, 436 U.S. at 488; see also *Chambers*, 410 U.S. at 302-303.

In *Chambers*, the trial court committed two errors.

First, it “denied [the defendant] an opportunity to subject [a key witness]’s damning repudiation and alibi to cross-examination.” 410 U.S. at 295. Second, it “refus[ed] to permit him to call [certain] other witnesses.” *Id.* at 298. The Court declined to assess “whether [each] error alone would occasion reversal.” *Ibid.* It instead cumulated their prejudicial effects to find a denial of due process: “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.” *Id.* at 302-303.

Similarly, in *Taylor*, the Court confronted a case with “skeletal instructions, * * * possible harmful inferences from * * * references to the indictment, and * * * repeated suggestions that petitioner’s status as a defendant tended to establish his guilt.” 436 U.S. at 487-488. Rather than assess each error individually, the Court aggregated them in its constitutional analysis. The Court “conclu[ded] 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.

Relatedly, the Court has endorsed cumulative analysis on collateral review in the context of *Brady* claims in *Kyles*, 514 U.S. 419. It held that “[o]n habeas review, we follow the established rule 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. Because the “[t]he result reached by the Fifth Circuit majority [was] compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by [*United States v. Bagley*, 473 U.S. 667 (1985)],” the Court reversed. *Id.* at 441.

Taken together, this Court’s cases subscribe to the common-sense principle that a constitutionally defective trial can arise from a single, prejudicial error or from a series of less prejudicial errors that collectively cause the trial to fail the Due Process test of fundamental fairness. To be sure, this Court has never squarely addressed the aggregation of different species of constitutional violations on collateral review. But no principled basis exists for cumulating trial errors on direct appeal (as in *Chambers* and *Taylor*) or multiple *Brady* violations on habeas review (as in *Kyles*), while refusing to aggregate the harmful effect of various constitutional violations on collateral review. Such an outcome would eviscerate the Due Process Clause’s bedrock fair-trial guarantee.

B. The courts are divided over whether the Constitution requires courts to consider cumulatively the effect of multiple constitutional violations on collateral review

Despite this Court’s guidance, “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). State courts on collateral review and federal cases before the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) directly address whether the Constitution requires habeas courts to assess the cumulative harm of constitutional violations. In post-AEDPA cases, federal appellate courts have divided over whether this Court’s “clearly established” law requires cumulating the effect of constitutional errors. See 28 U.S.C. § 2254(d)(1). This case presents a badly needed opportunity for the Court to directly answer this important constitutional question, in one stroke dissolving the AEDPA split and instructing state courts that the Constitution requires

cumulative-error analysis on collateral review.

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 * * * provide[s] a basis for relief in a § 2254 motion”); *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, *Reliability Matters: Reassociating Bagley Materiality, Strickland Prejudice, and Cumulative Harmless Error*, 95 J. Crim. L. & Criminology 1153, 1185 n.117 (2005) (noting the circuit split on whether to cumulate the prejudicial effects of errors on habeas review). The Court should now answer the call to resolve this important and recurring question.

1. *Most lower courts cumulate the prejudicial effects of separate constitutional violations on collateral review*

a. The First, Third, Fifth, Seventh, Ninth, and Tenth Circuits cumulate the prejudice from multiple constitutional errors on habeas review. Indeed, these courts hold that this Court's case law "clearly establishes" the need for a cumulative-error assessment. 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."). These courts' holdings thus directly conflict with the decision below.

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, fair-trial guarantee, 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).

The Tenth Circuit granted relief on this ground in *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003). There, much as here, ineffective assistance of counsel, prosecutorial misconduct, and improper victim-impact evidence combined to prejudice the defendant. Judge Ebel's opinion for the court "conclude[d] that the death sentences

imposed in this case were substantially influenced by cumulative error and, therefore, cannot stand.” *Id.* at 1224-1225.

The Third Circuit similarly cumulated the prejudicial effects of *Strickland* and *Brady* violations on habeas review in *Albrecht v. Horn*, 485 F.3d 103 (3d Cir. 2007). It first concluded that neither of those constitutional violations resulted in prejudice when considered separately. See *id.* at 126-129 (*Strickland*); *id.* at 132-133 (*Brady*). But it then “recognize[d] that errors that individually do not warrant habeas relief may do so when combined.” *Id.* at 139. Accordingly, it conducted a cumulative-error analysis that “aggregate[d] all the errors that individually have been found to be harmless, and therefore not reversible, and * * * analyze[d] whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless.” *Ibid.* (quoting *Darks v. Mullin*, 327 F.3d 1001, 1018 (10th Cir. 2003)).

The First Circuit entertained a cumulative-error argument in *Mello v. DiPaulo*, 295 F.3d 137 (1st Cir. 2002), where it conducted an “analysis of [the defendant’s] ineffective assistance of counsel claims and his argument that his confession should have been suppressed.” *Id.* at 151-152. The state habeas court there had performed its own cumulative-error analysis and found no cumulative prejudice. *Id.* at 151. The First Circuit ultimately concluded that “the [state court]’s rejection of his cumulative error argument” on the merits “was [neither] contrary to, [n]or involved an unreasonable application of, clearly established Federal law.” *Id.* at 151-152 (quoting 28 U.S.C. § 2254(d)(1)). Thus, both the state and federal court recognized that a cumulative-harm assessment was appropriate on collateral review.

The Seventh and Ninth Circuits also interpret Due

Process to require a cumulative-error analysis on habeas review. See *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.”).

Finally, in an opinion by Judge Edith Jones, the en banc Fifth Circuit held that cumulative-error review is available on federal habeas to correct due-process violations caused by the aggregate effect of defaulted, constitutional errors. *Derden*, 978 F.2d at 1454 (“[W]e now hold that federal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where (1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors ‘so infected the entire trial that the resulting conviction violates due process.’” (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). That court has continued to apply *Derden* in post-AEDPA cases. See *Turner v. Quarterman*, 481 F.3d 292, 301 (5th Cir. 2007).

b. A majority of state courts likewise conduct cumulative-error analysis on collateral review. The Supreme Court of Delaware has held that “[w]here there are multiple material errors in a trial, the Court must weigh their cumulative effect and determine if, combined, they are prejudicial to substantial rights [so] as to jeopardize the fairness and integrity of the trial process.” *Starling*

v. *State*, 130 A.3d 316, 336 (Del. 2015) (internal quotation marks omitted). Recognizing that the “touchstone” of both *Strickland* and *Brady* is “the fairness of the trial,” the court went on to hold that “[c]ounsel’s ineffective performance under *Strickland* * * * combined with the State’s *Brady* violation” “resulted in an unfair trial.” *Ibid.*

Similarly, the Supreme Court of Pennsylvania “not[ed] * * * that the measure of *Brady* materiality and *Strickland* prejudice are the same” and performed an analysis “cumulating the ineffectiveness/remorse claim and the *Brady* claims.” *Commonwealth v. Lesko*, 15 A.3d 345, 417 (Pa. 2011).

Florida, Idaho, Illinois, Minnesota, Montana, New Jersey, and Utah also cumulate the prejudicial effects of separate errors on habeas review. See *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)); *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.”); *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 assess the cumulative prejudice from multiple constitutional violations*

a. The Fourth, Sixth, and Eighth Circuits do not conduct cumulative-error analysis on habeas review. The Sixth Circuit has reasoned that “because the Supreme Court has not spoken on this issue,” “cumulative error claims are not cognizable on habeas” under the “clearly established” AEDPA standard. *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006). Under this approach, “not even constitutional errors that would not individually support habeas relief can be cumulated to support habeas relief.” *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005).

Similarly, the Eighth Circuit has “repeatedly * * * recognized ‘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)). Indeed, the Eighth Circuit’s approach is so entrenched that it refuses even 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) (“Habeas relief will not be granted based on the cumulative effect of attorney errors.”). Notably, the Eighth Circuit’s post-AEDPA precedent is consistent with its pre-AEDPA precedent interpreting the Constitution directly. See

Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir. 1996) (“Errors that are not unconstitutional individually cannot be added together to create a constitutional violation.”).

The Fourth Circuit joined this side of the split in *Fisher v. Angelone*, 163 F.3d 835 (4th Cir. 1998), where it refused to perform any analysis of whether individually harmless errors combined to deprive the defendant of a fundamentally fair trial. See *id.* at 852 (“[I]neffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively * * * .”). Like the Eighth Circuit, the Fourth Circuit reached that result even without applying the deferential AEDPA standard of review. See *id.* at 838 n.3.

b. A minority of state courts sides with these three circuits. Arkansas squarely rejects 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 allegations of ineffective assistance of counsel.”). New Mexico takes the same approach. See *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”). Lastly, while Georgia accepts that “the combined effects of trial counsel’s errors should be considered together as one issue” on a *Strickland* claim, it “does not [otherwise] recognize the cumulative error rule.” *Schofield v. Holsey*, 642 S.E.2d 56, 60 (Ga. 2007) (internal quotation marks omitted).

3. *The Court of Criminal Appeals joined the minority view in the decision below*

The judgment below—along with other recent Court of Criminal Appeals’ decisions—places Texas on the mi-

nority side of this split.

a. After petitioner discovered the prosecution's long-concealed *Brady* violations, she asserted that claim in her successive state habeas petition and simultaneously argued that the "cumulative impact of the constitutional errors in [her] proceedings violated [her] right to due process under the United States Constitution." App., *infra*, 220a. She then detailed the cumulative prejudicial effects of the *Brady* violations and the "close case" *Strickland* violations, contending that together they abridged her right to a fair trial. See *id.* at 219a-228a.

Petitioner could not have raised either her ineffective-assistance claim or her *Brady* claim on direct review. And neither claim was procedurally defaulted; the Fifth Circuit and the Court of Criminal Appeals addressed the respective claims on their merits. See *id.* at 4a, 141a-159a. The Texas courts have not disputed that petitioner raised her *Brady* claim and associated cumulative-error claim at the earliest possible opportunity, as reflected by the Court of Criminal Appeals' authorizing her to file a successive writ on the *Brady* claim. *Id.* at 161a-162a. In short, petitioner timely presented her cumulative-error claim in the correct venue through the only available procedural vehicle.

b. The Court of Criminal Appeals did not take issue with the district court's conclusion that "the State withheld or failed to disclose witnesses' statements and information that were exculpatory or could be used for impeachment purposes in violation of [*Brady*]." *Id.* at 115a. Nor did it question (or even acknowledge) the Fifth Circuit's earlier holding that petitioner's "trial counsel performed objectively unreasonably," causing a "close case" on *Strickland*'s prejudice prong. *Id.* at 144a-145a, 148a. And the Court of Criminal Appeals noted petitioner's "conten[tion] that the 'cumulative impact of the constitu-

tional errors' violated her * * * federal constitutional right[] to due process." *Id.* at 4a. But then, without engaging in any analysis, it declared that petitioner's cumulative-error claim "failed to satisfy the requirements of Article 11.071, § 5(a)" and "dismiss[ed] [it] as an abuse of the writ without reviewing the merits of th[at] claim[]." *Ibid.*

c. Despite this terse language, the only possible conclusion is that the Court of Criminal Appeals refused on substantive grounds to evaluate a properly presented cumulative-error claim on collateral review—just as a minority of state and federal appellate courts do. As relevant here, Article 11.071, § 5(a) prohibits a court from considering the merits of a successive writ application unless "the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." Tex. Code Crim. Proc. art. 11.071, § 5(a)(1). However, the Court of Criminal Appeals has "grafted an additional requirement on" this provision. *Williams v. Thaler*, 602 F.3d 291, 306 (5th Cir. 2010). It has "interpreted [that provision] to mean that, to satisfy Art. 11.071, § 5(a), 1) the factual or legal basis for an applicant's current claims must have been unavailable as to all of his previous applications; and 2) the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence." *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). Accordingly, when the Court of Criminal Appeals dismisses a claim for "abuse of the writ," as it did here, additional analysis is needed to determine whether it acted under the first, procedural prong of the *Campbell* test or under the second, merits prong of that test. See *Ruiz v. Quarterman*, 504 F.3d 523, 527 (5th Cir. 2007) ("The boilerplate dismissal by the [Court of Criminal Appeals] of an application for abuse of the writ is * * * unclear whether the [Court of Criminal

Appeals] decision was based on the first element, a state-law question, or on the second element, a question of federal constitutional law.”).

The Fifth Circuit recently outlined how to determine whether an “abuse of the writ” dismissal under Article 11.071, § 5(a) constitutes a decision on the merits (the second prong) or a decision based on an adequate and independent state ground (the first prong). In *In re Davila*, the court confronted an identical dismissal “as an abuse of the writ without reviewing the merits of the claims raised.” 888 F.3d 179, 187 (5th Cir. 2018). It then carefully analyzed the Court of Criminal Appeals’ sparse opinion to determine whether that dismissal was under the first or second prong of the *Campbell* test, ultimately concluding that it was under the second prong and thus did not present an adequate and independent state procedural ground. See *id.* at 187-189.

Here, there is no question that the “factual or legal basis for the new [cumulative error] claim was unavailable as to previous applications,” for the court would not have permitted petitioner’s *Brady* claim otherwise. Accordingly, the court below must have concluded that “the specific facts alleged [do not] rise to a constitutional violation.” And because it did so without conducting any cumulative-error analysis, the only reasonable conclusion is that the court did not believe such analysis to be constitutionally required. That conclusion is consistent with the Court of Criminal Appeals’ recent practice of refusing to conduct cumulative-error analyses on habeas review. See *Ex parte Sales*, No. WR-78,131-02, 2018 WL 852323, at *2 (Tex. Crim. App. Feb. 14, 2018) (per curiam) (unpublished) (rejecting an argument that “cumulative effect of the ineffective assistance of counsel and the *Brady* violations undermines confidence in the verdict” because it “fail[s] to meet the requirements of [Article 11.071, § 5].”); *Ex Parte Medina*, No. WR-41,274-05,

2017 WL 690960, at *3 (Tex. Crim. App. Jan. 25, 2017) (per curiam) (unpublished) (noting that the court had rejected an argument that “[t]he cumulative effect of the ineffective assistance of counsel and the State’s *Brady* violations undermined all confidence in the verdict”).

d. As the Fifth Circuit noted, “courts are not required ‘to check our common sense at the door when we read an opinion of the [Court of Criminal Appeals] with an eye toward ascertaining its decisional basis.’” *Davila*, 888 F.3d at 188. This Court likewise “assume[s] that there are no [adequate and independent state] grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.” *Michigan v. Long*, 463 U.S. 1032, 1042 (1983). It is far from “clear” that the decision below relied on a state-law ground that is both adequate and independent of the properly presented federal constitutional question. See *Rwiz*, 504 F.3d at 527-528 (holding that “boilerplate” abuse-of-the-writ dismissal fell short of the “clarity insisted upon by *Michigan v. Long*”). And, as discussed above, it “fairly appears that the state court rested its decision primarily on” its view of the constitutional validity of cumulative-error claims. Therefore, nothing prevents this Court from reviewing the decision below and definitively resolving the split over cumulative-error claims on collateral review.

II. THE COMPLETE DENIAL OF CUMULATIVE-ERROR REVIEW IN CAPITAL CASES IS CONSTITUTIONALLY OFFENSIVE ON MULTIPLE LEVELS

The Court of Criminal Appeals’ refusal to cumulate the prejudicial effects of petitioner’s two separate constitutional claims would violate the Due Process Clause had she been charged with a lesser offense. It is particularly

egregious in a capital case.

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

The Due Process Clause’s guarantee of a fundamentally fair trial requires a cumulative-error analysis on habeas review, at least for non-defaulted constitutional violations that could not have been raised on direct appeal. “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers*, 410 U.S. at 294. In protecting that right on direct review, this Court has added together the separate prejudicial impacts from multiple errors to assess whether their “cumulative effect * * * violated the due process guarantee of fundamental fairness.” *Taylor*, 436 U.S. at 488; see also *Chambers*, 410 U.S. at 302-303 (analyzing whether the cumulative impact of multiple errors “denied [the defendant] a trial in accord with traditional and fundamental standards of due process”). On collateral review, the Court has required that each instance of suppressing *Brady* evidence should be added together when assessing materiality. See *Kyles*, 514 U.S. at 421 (*Brady* claim “turns on the cumulative effect of all such evidence suppressed by the government”).

Those two related strands of case law yield the result that courts on habeas review must cumulate the individual prejudicial effects of multiple types of constitutional violations. That is the established rule on direct review, and the Court has also required what are essentially multiple *Brady* violations to be aggregated in *Kyles*. The result should be no different when instead of a series of *Brady* violations, a defendant suffers a *Brady* violation and some other type of constitutional deprivation, such as petitioner’s *Strickland* violation. The habeas context

changes nothing, for, as in petitioner’s case, these types of constitutional violations often can be raised only on collateral review. Accordingly, refusing to assess their cumulative prejudicial effects on habeas review forecloses the only opportunity for a court to undertake the critical analysis whether their “cumulative effect * * * violated the due process guarantee of fundamental fairness.” *Taylor*, 436 U.S. at 488.

Common sense explains why this view represents the majority position in lower courts. Constitutional harm is no less real because it stems from cumulative violations that individually fall just short of the prejudice threshold instead of from a single violation that barely squeaks across the line. As then-Judge Gorsuch persuasively opined, “otherwise harmless [constitutional] errors” must be “aggregated” to ensure that cumulatively they did not “so fatally infect[] the trial that they violated the trial’s fundamental fairness.” *Matthews*, 577 F.3d at 1195 n.10.

The cumulative-harm analysis is even more straightforward when, as here, a defendant raises *Strickland* and *Brady* claims. Those constitutional protections feature nearly identical prejudice thresholds. See *Strickland*, 466 U.S. at 694. In such cases, the courts of appeals have simply inquired whether the combined effect of the violations “undermined the reliability of the verdict.” *Albrecht*, 485 F.3d at 139; *Cargle*, 317 F.3d at 1224-1225. (“conclud[ing] that the death sentences imposed in this case were substantially influenced by cumulative error and, therefore, cannot stand”). The Court of Criminal Appeals erred by not following their example.

B. The “heightened scrutiny” required in capital cases reinforces the need for a cumulative assessment of harm

Capital cases intensify the necessity for cumulative-error review. “When a defendant’s life is at stake, the

Court has been particularly sensitive to insure that every safeguard is observed.” *Gregg v. Georgia*, 428 U.S. 153, 187 (1976); see also *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (“In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases.”) (Burger, C.J., concurring in judgment). The Court has often required “procedures that safeguard against the arbitrary and capricious imposition of death sentences.” *Roberts v. Louisiana*, 428 U.S. 325, 334 (1976).

These procedural protections ensure that only the guilty—indeed, only the worst of the worst—are executed. See, e.g., *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993) (“[In] capital case[s], * * * we have held that the Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case.”); *Beck v. Alabama*, 447 U.S. 625, 643 (1980) (striking down procedures that “introduce a level of uncertainty and unreliability * * * that cannot be tolerated in a capital case”). When, as here, a capital trial is infected by *Brady* and *Strickland* error, the heightened procedural scrutiny this Court has demanded permits no escape from cumulative-error review.

To be sure, none of these cases so hold directly, but the principles they embody dictate that, at least in capital cases, some court must evaluate the cumulative effect of non-defaulted constitutional errors. An assessment of whether multiple constitutional violations combined to “den[y] [a capital defendant] a trial in accord with traditional and fundamental standards of due process,” *Chambers*, 410 U.S. at 302-303, surely qualifies as a basic “procedure[] that safeguard[s] against the arbitrary and capricious imposition of death sentences,” *Roberts*, 428 U.S. at 334. The “greater degree of accuracy and fact-finding” required for capital cases, *Gilmore*, 508 U.S. at 342, confirms the need for such an analysis. And when

the constitutional violations are of a kind that can be pursued only on habeas review, such as the *Strickland* and *Brady* violations that occurred here, cumulative-harm analysis must occur at that juncture. To execute a death sentence without the assurance that the accused received a fundamentally fair trial would “permit this unique penalty to be . . . wantonly and . . . freakishly imposed.” *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990).

While the Due Process Clause requires cumulative-error review before the State may deprive a person’s “liberty,” its command is even more resounding when “life” is on the line.

III. THE ACKNOWLEDGED *BRADY* VIOLATIONS PREJUDICED PETITIONER BOTH IN ISOLATION AND CUMULATIVELY WITH THE *STRICKLAND* VIOLATION

The Court of Criminal Appeals’ refusal to entertain a cumulative-error claim affords ample reason for this Court to grant plenary review, resolve an important split of authority, and vacate the decision below. At minimum, the Court of Criminal Appeals should be directed to perform a cumulative-harm assessment, taking into account the “close case” of *Strickland* prejudice that the court steadfastly ignored below. The Court of Criminal Appeals further erred in holding non-material the numerous *Brady* violations identified by the state district court. Even if the *Brady* violations were insufficiently prejudicial to alone warrant relief, this egregious prosecutorial misconduct surely provided the small amount of marginal harm necessary to establish cumulative prejudice when considered in conjunction with the near-miss *Strickland* violation.

A. The *Brady* violations were prejudicial even considered in isolation

1. The State’s theory of the case was that petitioner “recruited a group of men to break into Rodriguez’s

apartment to commit robbery and kidnap Rodriguez.” App., *infra*, 2a. The co-conspirators included Christopher Robinson, Gerald Anderson, Carliss Williams, and Marvin Caston. *Ibid.* Only two of these four allegedly key players, Robinson and Caston, testified in petitioner’s trial. *Id.* at 11a-13a, 16a. They provided the State with key testimony that painted petitioner as not only a participant in the crime, but as its ringleader. See *id.* at 11a-13a.

Long after Robinson and Caston’s testimony had secured petitioner’s conviction and death sentence, petitioner learned that “the State withheld or failed to disclose witnesses’ statements and information that were exculpatory or could be used for impeachment purposes” against these two witnesses. *Id.* at 115a (state district court’s findings and conclusions).² Incredibly, the State failed to disclose that “Caston was promised that he would not get prison time if Carty received the death penalty.” *Id.* at 113a. Nor did it disclose “that Robinson had previously provided two consistent statements that conflicted with and were inconsistent with * * * Robinson’s trial testimony.” *Ibid.* The State withheld various other witness statements as well. See *id.* at 112a-115a. This gross prosecutorial misconduct arose because the largest death-penalty jurisdiction in the country—Harris County, Texas—“was operating under a misunderstanding of *Brady* at the time.” *Id.* at 110a.

The Court of Criminal Appeals did not question the systemic unlawfulness of the State’s conduct. Instead, it denied relief because it found that “there is no reasonable likelihood [the *Brady* violations] could have affected judgments returned by the jury.” *Id.* at 116a; see also *id.* at 66a (Richardson, J., concurring) (“I agree that the cu-

² The decision below was explicitly “[b]ased upon the trial court’s findings and conclusions.” App., *infra*, 4a.

mulative effect of all the withheld *Brady* evidence was not material. There is not a reasonable probability that, had the undisclosed evidence been disclosed to the defense, the result of the proceeding would have been different.”); *id.* at 79a (Walker, J., concurring) (similar).

The court defended its ruling that the State’s withholding of *Brady* evidence was not prejudicial in part by arguing that petitioner’s counsel could have gone on a blind fishing expedition through cross-examination despite having no inkling about the secret Caston deal. See *id.* at 65a (Richardson, J., concurring) (“[D]efense counsel could have cross-examined Caston * * * [regarding] the existence of an incentive to testify favorably for the State.”); *id.* at 76a (Walker, J., concurring) (“[D]efense counsel, with or without the Caston deal, could have cross-examined Caston * * * about whether or not [he] had been charged by the State at the time of [petitioner’s] trial[and] could have explored the existence of motive to testify against [petitioner].”). The court also declared that petitioner’s counsel’s ability to “further impeach Robinson by exposing inconsistencies in his statements” would not have made a difference, despite his status as one the State’s key witnesses. *Id.* at 76a (Walker, J., concurring); see *id.* at 65a (Richardson, J., concurring) (same).

2. The Court of Criminal Appeals’ reasoning cannot withstand scrutiny and, if followed broadly, would make *Brady* materiality an insurmountable hurdle. A court can *always* hypothesize that defense counsel *could have* cross-examined witnesses regarding topics that may overlap with suppressed *Brady* evidence. But that is a poor substitute for having the *Brady* material itself.

Indeed, if counsel had known of Caston’s deal with the State, he could have conducted a powerful cross-examination to impeach Caston’s motivation for testify-

ing. If Caston then lied about the deal, counsel could have produced evidence of the agreement and irreparably destroyed Caston’s credibility. None of this was possible when the State withheld evidence of the deal. While counsel could perhaps have asked broadly whether Caston had an “incentive to testify favorably for the State,” *id.* at 65a (Richardson, J., concurring)—although counsel in fact did not—he would have been taking the proverbial shot in the dark. Caston could easily deny any such incentive, and counsel would have no means to impeach that testimony. Cf. *Banks v. Dretke*, 540 U.S. 668, 694 (2004) (noting that when state suppressed paid-informant status of key witness, he “responded untruthfully” when asked at trial about dealings with police).

The harm from the *Brady* violation, then, is the difference between powerful, 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. The Court of Criminal Appeals non-materiality finding betrays a fundamental misunderstanding of criminal trials. It is also directly at odds with this Court’s precedents finding prejudice from similar *Brady* violations. See *Wearry v. Cain*, 136 S. Ct. 1002, 1004, 1007 (2016) (failure to disclose that police promised key witness to put in a good word with prosecutors if he “told the truth” satisfied materiality standard); *Banks*, 540 U.S. at 701-703 (failure to disclose that key witness was paid police informant who feared criminal prosecution if he did not help the prosecution satisfied materiality standard). This Court has long recognized that “a witness’ attempt to obtain a deal before testifying was material because the jury ‘might well have concluded that [the witness] had fabricated testimony in order to curry the [prosecution’s] favor.’” *Wearry*, 136 S. Ct. at 1007 (quoting *Napue v. Illinois*, 360 U.S. 264, 270 (1959)). This error independently warrants certiorari and reversal.

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

1. At a minimum, the State's *Brady* violations caused sufficient, additional harm to push what the Fifth Circuit established to be a "close case" on *Strickland* prejudice across the line to a constitutional violation. After all, where "the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Wearry*, 136 S. Ct. at 1006.

What is more, this case exemplifies the compounding effect that multiple constitutional errors can inflict on a trial. Recall the Fifth Circuit held that petitioner's trial counsel had "performed objectively unreasonably" by failing to "notify [petitioner's common-law husband] of his right to assert his marital privilege not to testify against [petitioner]." App., *infra*, 143a-145a. The testimony allowed by counsel's error was "undoubtedly damaging" and "provided motive and context for the crime," which "prosecutors emphasized * * * in their closing remarks." *Id.* at 149a. The *Strickland* violation thus allowed one of the State's key witnesses to present critical testimony that otherwise would have been wholly absent.

The *Brady* violations deprived petitioner of a full opportunity to impeach the credibility of *two more* key witnesses. All told, constitutional shortcomings empowered the testimony of three star witnesses. The cumulative constitutional harm at the heart of this case "undermined confidence in the verdict." *Wearry*, 136 S. Ct. at 1006 (stating prejudice standard)

2. The Court of Criminal Appeals' *Brady*-materiality analysis inadvertently highlighted the force-multiplier effect of the cumulative violations here. The opinions below concluded that the suppression of Caston's deal with

the State was immaterial because “*defense counsel could have cross-examined* Caston * * * [regarding] the existence of an incentive to testify favorably for the State.” *Id.* at 65a (Richardson, J., concurring) (emphasis added); *id.* at 76a (Walker, J., concurring) (same). But because the court refused to examine petitioner’s cumulative-error claim, it ignored that the same “defense counsel” had been adjudged constitutionally deficient with respect to a different key witness. Thus, not only did defense counsel *not* cross-examine Caston regarding the deal, he was not the sort of prescient counsel who ever *would have* asked about a deal that was concealed from him. Cf. Olsen, *Changes in Harris County’s Death Penalty Machine*, 55 Hous. L. Rev. 933, 946 (2018) (recounting a “commonly-circulated courthouse joke” that petitioner’s trial counsel “lost so many death penalty cases * * * he should have his own wing of death row to house [his] former clients”). The court’s finding of no materiality based on a hypothetical cross-examination that counsel could have conducted is thus not only speculative, it is contrary to the reality observed by the Fifth Circuit.

Evaluating each constitutional claim in isolation spawns such myopic assessments of prejudice. Cumulative-error analysis, by contrast, allows courts to take account of the real-world ways in which constitutional violations can compound one another. A court considering petitioner’s *Strickland* and *Brady* claims together could not have glossed over the suppressed evidence’s materiality by projecting what *effective* counsel *might have* done. It is therefore hardly surprising that both courts and scholars have noted the dangerously synergistic relationship between *Strickland* and *Brady* errors. See *Cargle*, 317 F.3d at 1221 (emphasizing the “synergistic effect” of *Strickland* and *Brady* errors); *Starling*, 130 A.3d at 336 (*Strickland* and *Brady* violations “combined” to “undermine[] our confidence in the verdict”); Blume & Seeds,

supra, at 1154 (“[C]ourts should consider the impact of *Brady* violations and *Strickland* violations together * * * .”) In this context, perhaps even more than others, cumulative-error review is essential to protecting the due-process right to a fundamentally fair trial.

IV. THE ISSUE IS IMPORTANT AND WELL-SUITED FOR PLENARY REVIEW HERE

A. The entrenched split on this fundamental, recurring issue cries out for resolution

The importance of this issue is self-evident. The question whether a person should be executed without any court’s having assessed the combined effect of acknowledged constitutional errors goes to the heart of the Due Process Clause. The issue frequently arises in many non-capital cases as well. Whether a person enjoys basic constitutional protections should not depend on the whims of geography. And now the Nation’s second-largest state—and largest death-penalty state—has refused to assess errors cumulatively. The uneven availability of cumulative-error review throughout the country is uniquely unacceptable in capital cases. And given the persistent nature of the split, this unjust anomaly will continue unless this Court intervenes.

B. This case presents a rare opportunity for the Court to directly address the constitutional question unhindered by AEDPA

Because this case arises on state habeas, it offers an opportunity to definitively resolve constitutional questions regarding cumulative-error review without the distorting effects of AEDPA. When this Court reviews a federal habeas case, it must apply AEDPA’s standard of review, which asks whether the state court’s adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Fed-

eral law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). AEDPA thus superimposes a level of abstraction on the underlying constitutional issue that may prevent the Court from resolving it directly. See, e.g., *Sexton v. Beaudreaux*, No. 17-1106, 2018 WL 3148261, at *3 n.3 (U.S. June 28, 2018) (per curiam) (“Because our decision merely applies 28 U.S.C. § 2254(d)(1), it takes no position on the underlying merits and does not decide any other issue.”). Thus, if this court were to review a federal habeas case, it may not need to decide whether the Constitution requires cumulative-error assessment on collateral review. Such an AEDPA-focused decision might resolve the AEDPA split in the courts of appeals over what this Court’s previous decisions clearly establish as to cumulative-error analysis, but a negative AEDPA answer on cumulative error might give little guidance to state courts as to what *the Constitution* requires on collateral review.

This case avoids those complications because it arises on state habeas review. The constraints of AEDPA do not apply. See, e.g., *Foster v. Chatman*, 136 S. Ct. 1737 (2016) (reviewing constitutional issues in state habeas case directly). This Court would be free to decide the constitutional issue instead of limiting its analysis to whether *Chambers*, *Taylor*, and *Kyles* “clearly established” the right to cumulative-error review in habeas proceedings. An answer to the undiluted constitutional question would perforce resolve the AEDPA split *and* give guidance to state courts as to when they must undertake cumulative-error analysis on collateral review. For that reason, this case provides the Court with an ideal vehicle to resolve the longstanding split on this important issue.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted.

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