No. 18-50

In the Supreme Court of the United States

LINDA CARTY, PETITIONER
v.
THE STATE OF TEXAS
(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF IN OPPOSITION

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant
Attorney General

KYLE D. HAWKINS
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
kyle.hawkins@oag.texas.gov
(512) 936-1700

QUESTIONS PRESENTED

1. Does the Court have jurisdiction to review the judgment of the Texas Court of Criminal Appeals rejecting a claim of cumulative error under the Due Process Clause when one of the two claims underlying the cumulative-error claim was untimely and therefore denied by the state court on procedural grounds?

2. Did the Texas Court of Criminal Appeals err in finding that undisclosed evidence, which was not exculpatory but which might have been used to further impeach prosecution witnesses, was not material because it would not have called into question overwhelming evidence that was not subject to impeachment?

TABLE OF CONTENTS

Page

Questions Presented I
Table of Authorities III
Jurisdiction 1
Statement 2
Reasons to Deny the Petition 9
I. The Texas Court of Criminal Appeals Rejected Petitioner's Cumulative-Error Claim on an Adequate and Independent State Ground. 9
II. Even If A Procedural Bar Did Not Foreclose Review, The Question Presented Would Not Warrant Review Because Texas Recognizes Cumulative-error Claims 18
III. Petitioner's *Brady* Claim Does Not Merit This Court's Attention 23
Conclusion 26

TABLE OF AUTHORITIES

Page(s)

Cases:

Brady v. Maryland,
373 U.S. 83 (1963) 7
Cargle v. Mullin,
317 F.3d 1196 (10th Cir. 2003) 21
Carty v. Quarterman,
345 F. App'x 897 (5th Cir. 2009) (per curiam) .. 5, 6, 14

Cases—Continued:

Carty v. Quarterman,
No. 06-614, 2008 WL 8097280
(S.D. Tex. Dec. 16, 2008) 5
Carty v. Quarterman,
No. 06-614, 2008 WL 8104283
(S.D. Tex. Sept. 30, 2008) 4, 5, 13
Carty v. Thaler,
559 U.S. 1106 (2010) 6
Chamberlain v. State,
998 S.W.2d 230 (Tex. Crim. App. 1999) 4, 19, 20
Coleman v. Thompson,
501 U.S. 722 (1991) 1, 14, 15
Cone v. Bell,
556 U.S. 449 (2009) 10
Cupp v. Naughten,
414 U.S. 141 (1973) 16
Derden v. McNeel,
978 F.2d at 1454 .... 16, 19
Estrada v. State,
313 S.W.3d 274 (Tex. Crim. App. 2010) 19
Ex parte Acker,
Nos. WR-56841-01, -03, 2006 WL 3308712
(Tex. Crim. App. Nov. 15, 2006) (per curiam) 11
Ex parte Carty,
No. 61,055-01 (Tex. Crim. App. Mar. 2, 2005)
(unpublished) 4
Ex parte Esparza,
Nos. WR-66111-01, -02, 2007 WL 602812
(Tex. Crim. App. Feb. 28, 2007) (per curiam) 11

Cases—Continued:

Ex parte Golden,
991 S.W.2d 859 (Tex. Crim. App. 1999)....................12
Ex parte Hall,
No. WR-70,834-01, 2009 WL 1617087
(Tex. Crim. App. June 10, 2009) (per curiam)........11
Ex parte Medina,
No. WR-41,274-05, 2017 WL 690960
(Tex. Crim. App. Jan. 25, 2017) (per curiam).........23
Ex parte Medina,
Nos. WR-41,274-02, -04, 2009 WL 2960466
(Tex. Crim. App. Sept. 16, 2009)
(per curiam) 23
Ex parte Ramirez,
Nos. WR-71,401-01, -02, 2015 WL 6282336
(Tex. Crim. App. Oct. 14, 2015) (per curiam) 11
Ex parte Sales,
No. WR-78,131-02, 2018 WL 852323
(Tex. Crim. App. Feb. 14, 2018) (per curiam) .. 22, 23
Ex parte Smith,
977 S.W.2d 610 (Tex. Crim. App. 1998)....................12
Ex parte Welborn,
785 S.W.2d 391 (Tex. Crim. App. 1990)......................4
Gamboa v. State,
296 S.W.3d 574 (Tex. Crim. App. 2009)....................19
Giglio v. United States,
405 U.S. 150 (1972) 6
Grant v. Trammell,
727 F.3d 1006 (10th Cir. 2013) 19, 20-21

Cases—Continued:

Harmon v. State,
No. 09-16-00304-CR, 2018 WL 4609029 (Tex. App.—Beaumont Sept. 26, 2018, no pet. h.) 19
Kyles v. Whitley,
514 U.S. 419 (1995) 24
Lambrix v. Singletary,
520 U.S. 518 (1997) 15
Linney v. State,
413 S.W.3d 766 (Tex. Crim. App. 2013) 18, 20
Napue v. Illinois,
360 U.S. 264 (1959) 6
Salazu v. State,
No. 12-16-00036-CR, 2016 WL 4538617 (Tex. App.—Tyler Aug. 31, 2016, no pet.) 19
Stahl v. State,
749 S.W.2d 826 (Tex. Crim. App. 1988) 18
Strickland v. Washington,
466 U.S. 668 (1984) 5
United States v. Bell,
367 F.3d 452 (5th Cir. 2004) 19
United States v. Sepulveda,
15 F.3d 1161 (1st Cir. 1993) 20
Walker v. Martin,
562 U.S. 307 (2011) 13
Williams v. Drake,
146 F.3d 44 (1st Cir. 1998) 20
Ylst v. Nunnemaker,
501 U.S. 797 (1991) 12

Constitutional Provisions and Statutes:

Tex. Const. art. I, § 19 16
28 U.S.C.
§ 1257 1
§ 2254 15
§ 2254(b)(2)...15
§ 2254(b)(3)...13
Tex. Code Crim. Proc. art. 11.071,
§ 4(a) 10, 11
§ 4(b) 10, 11
§ 4(e) 11
§ 5(a) 11

Miscellaneous:

Brief of Respondent-Appellee, *Carty v. Quarterman*, No. 08-70049 (5th Cir. July 7, 2009)...14
Respondent-Appellee's Opposition to Request for Certificate of Appealability, *Carty v. Quarterman*, No. 08-70049 (5th Cir. July 7, 2009)...14
17B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4266 (3d ed. 2009)..14

In the Supreme Court of the United States

No. 18-50

LINDA CARTY, PETITIONER
v.
THE STATE OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF IN OPPOSITION

The Solicitor General of Texas, on behalf of the State of Texas, respectfully files this response in opposition to Petitioner Linda Carty's petition for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257, but this Court lacks jurisdiction to consider either of the questions presented to the extent they rely on Petitioner's claim of cumulative error because the judgment below dismissing the cumulative-error claim is supported by an adequate and independent state ground. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

STATEMENT

1. Petitioner's crime is detailed in the opinions below. Pet. App. 2a-10a, 72a-95a. In May 2001, Petitioner set out to abduct the infant son of Joana Rodriguez, a neighbor she suspected of having an affair with Jose Corona, her alleged common-law husband. With help from her colleagues in the drug trade, Petitioner orchestrated an armed invasion of Rodriguez's apartment, during which mother and child were kidnapped. Petitioner then killed Rodriguez by suffocating her with a plastic bag and claimed the dead woman's baby as her own.

Following a jury trial in a Texas court, Petitioner was convicted of capital murder on February 19, 2001. Pet. App. 81a. The jury ultimately answered Texas's three "special issues" in favor of capital punishment and, on February 21, 2002, Petitioner was sentenced to death. Pet. App. 81a. The Texas Court of Criminal Appeals affirmed the conviction and sentence on direct appeal. Pet. App. 3a.

2. Petitioner timely applied for state habeas relief on August 6, 2003, raising thirty claims. SHCR 2-159.[1] On February 2, 2004, months after the deadline to amend the habeas application had expired, the British government filed a motion in the state court requesting a 180-day extension in which "any amendment or supplement filed in that time should be accepted without the application" of the statutory deadline. SHCR 222. The state

---

[1] The abbreviation "SHCR" refers to the clerk's record in the initial state habeas proceeding; the abbreviation "SHCR-02" refers to the clerk's record in the subsequent state habeas proceeding.

court denied the motion "for want of jurisdiction." SHCR 222. The British government then arranged for Baker Botts L.L.P., to represent Petitioner. SHCR 650. Petitioner repeatedly attempted to raise new claims, SHCR 282-382, 403-472, 485-697, but the state court never authorized any amendments to her habeas application. Pet. App. 119a.

On November 1, 2004, the same day that the parties' proposed findings of fact and conclusions of law were due, Petitioner filed a document entitled "Additional Further Response to Respondent's Original Answer," SHCR 485-590, which purported to raise six new claims and more than two dozen subclaims, including 13 allegations of ineffective assistance. *See* SHCR 486-490 (table of contents). Among those 13 allegations of ineffective assistance of trial counsel, Petitioner asserted that trial counsel was constitutionally ineffective for failing to advise her alleged common-law husband, Jose Corona, of his privilege not to testify against her (the spousal-immunity IATC claim).[2] The final claim in the Additional Further Response alleged that Petitioner's rights to due process and fair trial were denied by "the cumulative effect of the Court, prosecution, and/or trial counsel's errors." SHCR 587. As presented in the Additional Further Response, Petitioner's cumulative-error claim focused on the combined effect of trial counsel's deficient

[2] Petitioner also claimed that the prosecution violated her constitutional rights by failing to advise Corona of his privilege not to testify against her. Pet. App. 227a.

acts.[3] She argued, "Even if 'no one instance in the present case standing alone is sufficient proof of ineffective assistance of counsel, counsel's performance taken as a whole does compel such a holding.'" SHCR 587-88 (quoting *Ex parte Welborn*, 785 S.W.2d 391, 396 (Tex. Crim. App. 1990)); *see also id.* at 587 (citing *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999)).

The trial court held a hearing on Petitioner's state habeas application on November 30, 2004. The trial court adopted the State's proposed findings and recommended that the Court of Criminal Appeals deny relief. SHCR 771-797. The Texas Court of Criminal Appeals adopted the trial court's recommendation and denied relief. *Ex parte Carty*, No. 61,055-01 (Tex. Crim. App. Mar. 2, 2005) (unpublished).

3. Petitioner filed a timely federal habeas petition and moved for an evidentiary hearing. Pet. App. 131a. In September 2008, the United States District Court for the Southern District of Texas denied habeas relief and a hearing. *Carty v. Quarterman*, No. 06-614, 2008 WL 8104283 (S.D. Tex. Sept. 30, 2008). The district court held that new claims raised for the first time in the Additional Further Response were unexhausted and procedurally barred. *Id.* at *29 ("Petitioner simply did not place her claims before the state courts in a habeas application, an amended application, or by any other traditional means that would comply with Texas procedure."). The district

[3] Petitioner made only a general allegation regarding errors by the court and the prosecution: "Moreover, the cumulative effect of the Court, prosecution, and/or trial counsel's errors as described herein mandate a reversal." SHCR 589.

court nevertheless reviewed Petitioner's unexhausted and procedurally defaulted claims "[i]n the interests of justice." *Id.* at *31. The district court rejected her spousal-immunity IATC claim, concluding that Petitioner failed to prove prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), because her alleged common-law husband's testimony "only corroborated other information already fully before the jury" and was not necessary to her conviction or sentence. *Id.* at *56. The court also considered and rejected Petitioner's claim that she was prejudiced by the cumulative effect of counsel's alleged ineffective acts. *Id.* at 79. The district court rejected Petitioner's broader cumulative-error claim, holding that "the whole of errors in her trial" did not "aggregate into a due process violation" because they did not "infect[] her trial with fundamental unfairness." *Id.* at *80. The district court later granted a certificate of appealability on two claims—"(1) trial counsel should have informed her boyfriend/husband of possible spousal immunity and (2) trial counsel should have presented more mitigating evidence at the punishment phase"—and on the question of whether Petitioner exhausted her claims in state court. *Carty v. Quarterman*, No. 06-614, 2008 WL 8097280, at *1-2 (S.D. Tex. Dec. 16, 2008).

Petitioner then moved the United States Court of Appeals for the Fifth Circuit to expand the certificate of appealability to eighteen additional issues, including her claim of "cumulative error by the trial court, prosecutor, and trial counsel." *Carty v. Quarterman*, 345 F. App'x 897, 909 (5th Cir. 2009) (per curiam). The Fifth Circuit denied Petitioner's motion, declining to issue a COA on her cumulative-error claim because "jurists of reason

could not debate that the summation of otherwise non-prejudicial errors did not cause a suspect verdict or [a]ffect the fundamental fairness of the result." *Id.*

The Fifth Circuit determined that the Director waived the exhaustion defense, Pet. App. 141a, and considered the merits of Petitioner's unexhausted claims. Applying de novo review, *see* Pet. App. 133a, the Fifth Circuit affirmed the district court's judgment denying relief on Petitioner's spousal-immunity IATC claim, holding that trial counsel's failure to interview Petitioner's alleged common-law husband was objectively unreasonable but that it did not prejudice her defense. Pet. App. 144a-145a. Despite characterizing the question of prejudice as "a close case," Pet. App. 148a, the Fifth Circuit soundly rejected Petitioner's claim, holding that "Corona's testimony provided nuance to the case but did not alter the entire evidentiary picture. The evidence of Carty's guilt was overwhelming, even absent Corona's testimony, and his testimony, in most regards, only corroborated other sources. Corona's testimony was not necessary to prove, let alone relevant to, any of the elements of capital murder." Pet. App. 150a.

This Court denied Petitioner's petition for a writ of certiorari. *See Carty v. Thaler*, 559 U.S. 1106 (2010).

4. Petitioner filed a subsequent state habeas application in the state trial court on September 10, 2014. Pet. App. 169a-243a. The subsequent application raised six claims: (A) that the State presented false and misleading testimony at trial in violation of her right to due process under *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959), Pet. App. 190a;

(B) that the State presented false and misleading testimony in violation of her right to due process and due course of law under the Texas Constitution, Pet. App. 206a; (C) that the State failed to disclose impeachment and exculpatory evidence in violation of her right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963), Pet. App. 209a; (D) that the cumulative effect of constitutional errors, including the errors alleged in her Additional Further Response, violated her right to due process, Pet. App. 220a; (E) that the cumulative effect of constitutional errors, including the errors alleged in her Additional Further Response, violated her rights under the Texas Constitution, Pet. App. 222a; and (F) that her conviction and death sentence violated the Eighth and Fourteenth Amendments because she is actually innocent, Pet. App. 228a.

The trial court transmitted Petitioner's subsequent state habeas application to the Court of Criminal Appeals pursuant to Texas Code of Criminal Procedure article 11.071, section 5(b). After reviewing Petitioner's subsequent application, the Court of Criminal Appeals found that Grounds A, B, and C satisfied the requirements for consideration of a subsequent application and remanded to the trial court for consideration of those claims. Pet. App. 162a.

On remand, the trial court ordered an evidentiary hearing on Grounds A, B, and C of the subsequent application. Pet. App. 84a. The evidentiary hearing began on June 27, 2016, and ended on July 5, 2016. Pet. App. 85a. The trial court heard testimony from 13 witnesses, ad-

mitted 72 exhibits, and took judicial notice of the transcripts of Petitioner's trial and other relevant proceedings. Pet. App. 85a.

On September 1, 2016, the trial court entered findings of fact and conclusions of law and recommended that Petitioner's claims be denied. Pet. App. 80a-117a. The trial court concluded that Petitioner failed to prove that the State presented false testimony at trial. Pet. App. 115a. Based on the evidence, including testimony at the evidentiary hearing, the court found that co-conspirators Chris Robinson and Marvin Caston did not give false testimony at Petitioner's trial, nor were they coerced by the prosecution to do so. Specifically, the court found that their testimony was consistent with that of other witnesses who had not attempted to recant their trial testimony, Pet. App. 103a-106a, and in Robinson's case, that his testimony was consistent with statements he provided to police shortly after the crime, Pet. App. 95a, 103a. The trial court also rejected Petitioner's *Brady* claim. Although it found that the State violated *Brady* by failing to disclose statements that could have been used to impeach prosecution witnesses, Pet. App. 113a-114a, it concluded, "[i]n considering the *Brady* violations cumulatively, . . . in light of the entire body of evidence presented, including the trial testimony," that the withheld statements were not material, Pet. App. 116a.

The Court of Criminal Appeals denied Petitioner's subsequent state habeas application. Based on the trial court's findings and conclusions and its own review of the record, the court denied relief on Claims A, B, and C. Pet. App. 4a. And based on its finding that Petitioner "failed to satisfy the requirements of Article 11.071, § 5(a)," the

court "dismiss[ed] Claims D, E, and F as an abuse of the writ without reviewing the merits of those claims." Pet. App. 4a. Judge Richardson filed a concurring opinion, joined by Judges Hervey and Walker, in which he agreed with the court's decision to "dismiss[] three of Carty's habeas claims as procedurally barred [and] den[y] the remaining three habeas claims on the merits." Pet. App. 5a. With respect to the *Brady* claim, he noted that the undisclosed evidence was not material, whether considered individually or cumulatively. Pet. App. 65a. Although the undisclosed statements would have allowed defense counsel to further impeach the prosecution's witnesses, "it would not have changed the outcome" because "the withheld witness statements were not exculpatory," and "[t]here was overwhelming evidence of guilt admitted at trial that was not subject to impeachment." Pet. App. 65a. In a separate concurrence, Pet. App. 71a, Judge Hervey focused on the question of materiality under *Brady* and emphasized the need to examine undisclosed evidence cumulatively, Pet. App. 73a-75a, 79a.

REASONS TO DENY THE PETITION

I. The Texas Court Of Criminal Appeals Rejected Petitioner's Cumulative-Error Claim On An Adequate And Independent State Ground.

Review of Petitioner's cumulative-error claim is barred by an adequate and independent state ground. As presented in this Court, Petitioner's cumulative-error claim rests on two underlying claims: (1) the spousal-immunity IATC claim, which she first attempted to raise in the Additional Further Response to her initial state ha-

beas application; and (2) *Brady* claims raised in her subsequent state habeas application. But in reviewing Petitioner's initial state habeas application, the state court did not consider the ineffective-assistance claim—or any of the claims raised in the Additional Further Response—because it was untimely. And in rejecting Petitioner's subsequent state habeas application, the Court of Criminal Appeals determined that the cumulative-error claim was procedurally barred—as it undoubtedly was, since one of the two underlying claims was never properly presented in state court. That procedural bar is an adequate and independent state ground that deprives this Court of jurisdiction to review Petitioner's cumulative-error claim.

"It is well established that federal courts will not review questions of federal law presented in a habeas petition when the state court's decision rests upon a state-law ground that is independent of the federal question and adequate to support the judgment." *Cone v. Bell*, 556 U.S. 449, 465 (2009) (internal quotation marks omitted). The Texas capital habeas statute expressly prohibits untimely amendment of claims. Article 11.071 of the Texas Code of Criminal Procedure provides that state habeas applications in death penalty cases must be filed by "the 180th day after the date the convicting court appoints counsel . . . or . . . the 45th day after the date the state's original brief is filed on direct appeal with the court of criminal appeals, whichever date is later." Tex. Code Crim. Proc. art. 11.071, § 4(a). The statute allows only a single 90-day extension of the filing period upon a showing of good cause. *Id.* § 4(b). Failure to file a timely application "constitutes a waiver of all grounds for relief."

Id. § 4(e). And Texas law prohibits supplementation or amendment of claims outside this time period unless the applicant demonstrates either cause or actual innocence. *Id.* § 5(a). The Texas Court of Criminal Appeals has consistently applied this statutory scheme to disallow the insertion of new habeas claims outside the statutory time period. *See, e.g.*, *Ex parte Ramirez*, Nos. WR-71,401-01, -02, 2015 WL 6282336, at *1 (Tex. Crim. App. Oct. 14, 2015) (per curiam); *Ex parte Hall*, No. WR-70,834-01, 2009 WL 1617087, at *2 (Tex. Crim. App. June 10, 2009) (per curiam); *Ex parte Esparza*, Nos. WR-66111-01, -02, 2007 WL 602812, at *1 (Tex. Crim. App. Feb. 28, 2007) (per curiam); *Ex parte Acker*, Nos. WR-56841-01, -03, 2006 WL 3308712, at *1 (Tex. Crim. App. Nov. 15, 2006) (per curiam).

The 45-day period for filing Petitioner's state habeas application began March 31, 2003, when the State filed its brief on direct appeal, and was extended 90 days to August 13, 2003. *See* Tex. Code Crim. Proc. art. 11.071, §§ 4(a)-(b). With seven days remaining in the filing period, Petitioner applied for habeas relief on August 6, 2003, raising thirty claims supported by seventeen exhibits. SHCR 2-159.

Petitioner then attempted several untimely amendments of her habeas application, all of which were rejected by the Texas court. On February 2, 2004—173 days after time to amend the application had expired—the British government filed a "Motion to Suspend Proceedings, and Application for a Reasonable Time for Consular Assistance to Supplement Post-Conviction Writ for Habeas Corpus." SHCR 183-222. The motion recognized that the time had expired for Petitioner to

raise new claims but asked the court to grant a 180-day extension in which "any amendment or supplement filed in that time should be accepted without the application of Art. 11.071 5(f)." SHCR 222. The District Attorney "took the position that it did not believe that there was jurisdiction to suspend proceedings." SHCR 209. The Texas court agreed and denied the motion "for want of jurisdiction." SHCR 222; *see Ex parte Golden*, 991 S.W.2d 859, 861 (Tex. Crim. App. 1999) (holding that Article 11.071 "explicitly limits" court's subject matter jurisdiction over subsequent applications in death penalty cases); *Ex parte Smith*, 977 S.W.2d 610, 611 (Tex. Crim. App. 1998) (noting that Article 11.071 provides "the *exclusive* procedures for the exercise of this Court's original habeas corpus jurisdiction in death penalty cases").

Over the next fifteen months, Petitioner continued her attempt to raise new claims despite Article 11.071's time limitations, SHCR 382, 403-472, 485-697, and despite the Texas court's jurisdictional holding, SHCR 222. But the state court never authorized any amendments, presumably for want of jurisdiction. *See Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991) (holding that when one reasoned state-court decision rejects a federal claim, subsequent unexplained rejections of the same claim are considered to rest on the same ground as did the reasoned state judgment).

Petitioner's spousal-immunity IATC claim—presented in this Court as one of two claims underlying her cumulative-error claim—was one of many untimely claims that Petitioner attempted to raise in her Additional Further Response. Petitioner also raised that claim in her federal habeas petition. *See* Pet. App. 143a.

The federal district court recognized that the spousal-immunity IATC claim was untimely and therefore procedurally defaulted. *See Carty*, 2008 WL 8104283, at *26, *29. Petitioner unsuccessfully urged the federal courts to excuse her procedural default because, she claimed, the District Attorney had agreed to waive Article 11.071's timeliness requirement and the state habeas court had blessed the agreement. Pet. App. 136a. The federal district court found otherwise, holding that "[n]othing in the record . . . suggests that the parties and state habeas court agreed to suspend Tex. Code Crim. Proc. [Ann.] art. 11.071 § 5's limitation on tardy amendments." Pet. App. 136a. Noting that "Carty does not and cannot argue that her Additional Further Response was timely," the Fifth Circuit affirmed the district court's finding that there was no "agreement in fact to permit late-filed claims in the Additional Further Response." Pet. App. 136a. And it correctly held that "dismissal for an abuse of the writ in the form of a tardy application is an adequate and independent state-law bar to federal review." Pet. App. 135a; *see Walker v. Martin*, 562 U.S. 307, 310 (2011).

That the Fifth Circuit considered (and rejected) Petitioner's spousal-immunity IATC claim despite the procedural default does not cure the jurisdictional defect in her petition. The Fifth Circuit addressed the merits after finding that the Director waived any affirmative defense under AEDPA based on Petitioner's failure to exhaust. Pet. App. 139a (citing 28 U.S.C. 2254(b)(3)), 141a. This was an oversight because the Director also relied on the

separate affirmative defense of procedural default.[4] Waiver of exhaustion alone did not justify review of the merits because Petitioner's procedural default posed an independent bar to federal review. *Coleman*, 501 U.S. at 729-32; *see also* 17B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4266 (3d ed. 2009) ("It may be that a state prisoner will exhaust his state remedies without obtaining any decision on the merits of his federal constitutional claim because he has failed to comply with state procedural rules on how the claim must be raised."). The Fifth Circuit did not find a waiver of procedural default.[5] In fact, in its earlier order denying Petitioner's motion to expand the certificate of appealability, the Fifth Circuit held that "jurists of reason could not debate that the state did not waive its procedural default defense" and that she could not show "cause and actual prejudice" or a "fundamental miscarriage of justice." *Carty*, 345 F. App'x at 910-11.

---

[4] *See* Respondent-Appellee's Opposition to Request for Certificate of Appealability 24-26, *Carty v. Quarterman*, No. 08-70049 (5th Cir. July 7, 2009); Brief of Respondent-Appellee 39 n.13, *Carty v. Quarterman*, No. 08-70049 (5th Cir. July 7, 2009) ("The Court should also find the unexhausted claims procedurally defaulted as argued in the Director's Opposition to COA.").

[5] Although it recognized that procedural default and exhaustion are "distinct concepts," the Fifth Circuit appears to have misunderstood the district court's ruling on procedural default to be "entirely dependent" on its failure-to-exhaust ruling. *See* Pet. App. 139a-141a. In any case, the Fifth Circuit's oversight does not change the fact that Petitioner's ineffective-assistance claim was untimely, and Petitioner's statement that the claim was not procedurally defaulted (Pet. 19) is incorrect.

In any event, the procedural default caused by Petitioner's untimely filing of her spousal-immunity IATC claim has different consequences in her direct appeal than on federal habeas review. The procedural default did not foreclose federal habeas review because the adequate-and-independent-state-ground doctrine "is not technically jurisdictional" in federal habeas cases brought by state prisoners under 28 U.S.C. § 2254, *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997), and Congress has authorized federal courts to deny federal habeas petitions on the merits even if the claims are unexhausted, 28 U.S.C. § 2254(b)(2). But on direct review, an adequate and independent state ground creates a jurisdictional bar. *Coleman*, 501 U.S. at 729 ("In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional.").

In her subsequent state habeas application, Petitioner again raised her spousal-immunity IATC claim as one of several bases for the claim that the cumulative effect of constitutional errors deprived her of due process (Claim D). *See* Pet. App. 220a-222a. While the cumulative-error claim in her subsequent application focused primarily on her claims that the State presented false testimony and failed to disclose *Brady* materials,[6] Pet. App. 221a, she argued that the state court should also

---

[6] Petitioner's claim that the State presented false testimony, based on *Giglio* and *Napue*, was presented as Ground A of her subsequent state habeas application. Pet. App. 190a. Her claim that the State suppressed favorable material evidence in violation of *Brady* was presented as Ground C of her subsequent state habeas application. Pet. App. 209a.

consider "the ineffective assistance and other claims brought previously." Pet. App. 222a. Petitioner acknowledged, however, "that her original claims raised, including those in her Additional Further Response, are typically not considered for purposes of cumulative error under the Federal *Derden* standard." Pet. App. 221a-222a. That was an effective admission of procedural default. In *Derden v. McNeel*, the Fifth Circuit held 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 . . . ; (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.'" 978 F.2d 1453, 1454 (5th Cir. 1992) (en banc) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)) (emphasis added).

Petitioner further signaled the procedural default of her spousal-immunity IATC claim (and other claims in the Additional Further Response) by urging the state court to consider a distinct cumulative-error claim under the Texas Constitution's due-course-of-law clause.[7] Pet. App. 222a. Among other reasons, Petitioner argued that Texas law might allow her procedurally defaulted claims to be considered as part of her state-law cumulative error claim. Pet. App. 223a ("Lastly, and crucially, Texas

[7] Tex. Const. art. I, § 19 ("No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.").

courts have never addressed whether procedurally defaulted errors can be considered in analyzing whether cumulative error occurred.").

The Court of Criminal Appeals correctly concluded that Petitioner's claim of cumulative error under the Due Process Clause (Claim D) was procedurally defaulted. The per curiam opinion concluded, with respect to Claims D, E, and F, that Petitioner "failed to satisfy the requirements of Article 11.071, § 5a," and dismissed them "as an abuse of the writ without reviewing the merits of those claims." Pet. App. 4a. Judge Richardson's concurring opinion confirmed that in dismissing Claims D, E, and F, the court "dismisse[d] three of Carty's habeas claims as procedurally barred." Pet. App. 5a. That determination is consistent with settled law and with prior decisions in this case, and it creates a jurisdictional bar to review of Petitioner's cumulative-error claim in this Court.

Even if it did not create a jurisdictional defect, Petitioner's procedural default makes this case a poor vehicle to consider whether the Due Process Clause requires the cumulation of error in *Brady* and *Strickland* claims. Petitioner never properly presented her spousal-immunity IATC claim in state court, so there is no separate constitutional error to cumulate with Petitioner's *Brady* claim. Thus, granting review and instructing the lower court to consider the cumulative prejudice from Petitioner's *Brady* and spousal-immunity IATC claims could not change the result in Petitioner's case.

II. Even If A Procedural Bar Did Not Foreclose Review, The Question Presented Would Not Warrant Review Because Texas Recognizes Cumulative-error Claims.

Petitioner asks this Court to grant her petition for a writ of certiorari because (she now alleges) Texas law does not recognize claims of cumulative error. But in the Court of Criminal Appeals, Petitioner admitted that "Texas Courts have long reiterated that 'a number of errors may be found harmful in their cumulative effect,' even if each error, considered separately, would be harmless." Pet. App. 223a (quoting *Linney v. State*, 413 S.W.3d 766, 767 (Tex. Crim. App. 2013) (Cochran, J., concurring)). That fact undermines the central premise of Petitioner's argument in this Court, and it provides a sufficient basis to deny her petition for a writ of certiorari. It also underscores why this case is a poor vehicle to resolve both questions presented.

As Petitioner acknowledged below but now denies, Texas courts have consistently looked to the cumulative effect of multiple errors to determine prejudice. In *Stahl v. State*, 749 S.W.2d 826, 832 (Tex. Crim. App. 1988), for example, the Court of Criminal Appeals held that the cumulative effect of a witness's outburst and the prosecutor's improper argument inviting the jury to consider that outburst entitled the applicant to relief on appeal. Although each error may have been harmless in isolation, the court "[could not] say that the cumulative effect of these errors was harmless beyond a reasonable doubt." *Id.* The Court of Criminal Appeals has consist-

ently reaffirmed the general proposition underlying cumulative-error claims—"that a number of errors may be found harmful in their cumulative effect," *Chamberlain*, 998 S.W.2d at 238. *See Estrada v. State*, 313 S.W.3d 274, 311 (Tex. Crim. App. 2010) (recognizing cumulative error doctrine, citing *United States v. Bell*, 367 F.3d 452, 471 (5th Cir. 2004)); *Gamboa v. State*, 296 S.W.3d 574, 585 (Tex. Crim. App. 2009) (noting that "it is possible for a number of errors to cumulatively rise to the point where they become harmful").

Petitioner is correct that the Fifth Circuit endorsed cumulative-error claims in *Derden v. McNeel*, 978 F.2d at 1454. Petitioner fails to note, however, that Texas courts have cited Fifth Circuit cases, including *Derden*, as authority for the cumulative-error doctrine, recognizing "that the combined effect of multiple errors can, in the aggregate, constitute reversible error, even though each individual error, analyzed separately, was harmless." *Harmon v. State*, No. 09-16-00304-CR, 2018 WL 4609029, at *7 (Tex. App.—Beaumont Sept. 26, 2018, no pet. h.); *see also Salazu v. State*, No. 12-16-00036-CR, 2016 WL 4538617, at *3 (Tex. App.—Tyler Aug. 31, 2016, no pet.) ("The cumulative error doctrine provides relief only when constitutional errors so 'fatally infect the trial' that they violated the trial's 'fundamental fairness.'" (quoting *Bell*, 367 F.3d at 471 (in turn quoting *Derden*, 978 F.2d at 1457)).

Petitioner also highlights opinions from the Tenth Circuit, including an opinion by then-Judge Gorsuch, recognizing that habeas petitioners may bring cumulative-error claims. *See* Pet. 3, 13 (citing, inter alia, *Grant v. Trammell*, 727 F.3d 1006, 1026 (10th Cir. 2013)). But

Petitioner fails to mention that the Court of Criminal Appeals has relied on the same authorities to explain its application of the cumulative-error doctrine. In *Linney*, Judge Cochran concurred in the denial of review but wrote separately to clarify the requirements of cumulative-error claims. She offered the following summary:

> We have long recognized that "a number of errors may be found harmful in their cumulative effect," even if each error, considered separately, would be harmless. However, cumulative error is an independent ground for relief, separate from the underlying instances of error. A string of harmless errors does not arithmetically create reversible, cumulative error. Instead, we look for "multiple errors [that] synergistically achieve 'the critical mass necessary to cast a shadow upon the integrity of the verdict.'"[8]

413 S.W.3d at 767 (Cochran, J., concurring) (footnotes omitted).[9] Judge Cochran quoted the Tenth Circuit for two propositions: that "[t]he task is undoubtedly more subtle than simply counting up the number of errors discovered," *id.* at 767 n.12 (quoting *Grant*, 727 F.3d at

---

[8] The first quoted passage comes from *Chamberlain*, 998 S.W.2d at 238; the second comes from *Williams v. Drake*, 146 F.3d 44, 49 (1st Cir. 1998) (quoting *United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993)).

[9] Petitioner quoted the same passage, in part, in her subsequent state habeas application. Pet. App. 223a ("Texas courts have long reiterated that 'a number of errors may be found harmful in their cumulative effect,' even if each error, considered separately, would be harmless." (quoting *Linney*, 413 S.W.3d at 767 (Cochran, J., concurring))).

1025-26); and that cumulative-error claims require more than "isolated, insular errors scattered randomly throughout the proceedings," *id.* (quoting *Cargle v. Mullin*, 317 F.3d 1196, 1221 (10th Cir. 2003)).[10]

Without acknowledging that the Court of Criminal Appeals has recognized cumulative-error claims—or that she acknowledged that fact in her subsequent state habeas application—Petitioner now attempts to argue that the Court of Criminal Appeals conclusively rejected the cumulative-error doctrine when it denied relief on her subsequent application. Petitioner argues, in short, that the Court of Criminal Appeals' failure to grant relief on *her* cumulative-error claim can only mean that the court "did not believe such analysis to be constitutionally required." Pet. 21. That argument is baseless. The Court

---

[10] Even if her spousal-immunity IATC claim had been properly presented, Petitioner's cumulative-error claim would have fallen far short of the standard articulated in *Linney*. At no point has Petitioner attempted to explain how the *Brady* violation and the spousal-immunity IATC claim interacted to violate her right to due process. Indeed, her subsequent state habeas application did not even specify which of "the ineffective assistance and other claims brought previously" should be considered to determine cumulative error. Pet. App. 221a-222a. Similarly, in her Applicant's Brief on Legal Standards Applicable to Her Claims, SHCR-02 1748-70, Petitioner provided only a cursory discussion of her cumulative-error claim, specifically arguing that the court should consider "all of the *Brady* and false testimony errors" cumulatively, but referring only generally to "the matters in her original writ" without identifying the spousal-immunity IATC claim, let alone articulating how it operated together with another claim or claims to violate due process. SHCR-02 1768-69.

of Criminal Appeals dismissed Petitioner's cumulative-error claim without considering the merits because it was procedurally barred. Pet. App. 4a, 5a. Petitioner's creative reinterpretation of that dismissal as a "refus[al] on substantive grounds to evaluate a properly presented cumulative-error claim on collateral review," Pet. 20, is twice wrong—the Court of Criminal Appeals refused to consider her cumulative-error claim on *procedural* grounds precisely because it was *not* properly presented. Petitioner's argument also contradicts the presentation of her cumulative-error claim before the Court of Criminal Appeals, where she acknowledged not only that Texas courts recognized cumulative-error claims, Pet. App. 223a, but also that her spousal-immunity IATC claim (among many others) was procedurally defaulted and therefore not cognizable as part of a cumulative-error claim under the Due Process Clause, Pet. App. 221a-222a.

The Texas Court of Criminal Appeals did not categorically reject cumulative-error claims in the decision below, nor has it done so in other recent cases. Petitioner cites *Ex parte Sales*, No. WR-78,131-02, 2018 WL 852323, at *2 (Tex. Crim. App. Feb. 14, 2018) (per curiam), as evidence of the Court of Criminal Appeals' supposed "recent practice of refusing to conduct cumulative-error analyses on habeas review," Pet. 21, but nowhere in the opinion did the Court of Criminal Appeals suggest that cumulative-error claims are not cognizable. The Court of Criminal Appeals merely concluded that the petitioner failed to overcome the procedural bar with re-

spect to seven of eight claims in his subsequent application, including a cumulative-error claim based on alleged *Brady* and *Strickland* violations. *Sales*, 2018 WL 852323, at *2 (remanding the sole claim that alleged "sufficient specific facts which, if true, establish that the factual basis of the claim was [previously] unavailable"). And *Ex parte Medina*, No. WR-41,274-05, 2017 WL 690960 (Tex. Crim. App. Jan. 25, 2017) (per curiam), appears to contradict Petitioner's argument. There, the Court of Criminal Appeals refused to revisit claims that had already been rejected on the merits, including a claim that "the cumulative effect of the ineffective assistance of counsel and the State's *Brady* violations undermined all confidence in the verdict." *Id.* at *3-4 (Newell, J., concurring) (citing *Ex parte Medina*, Nos. WR-41,274-02, -04, 2009 WL 2960466 (Tex. Crim. App. Sept. 16, 2009) (per curiam)). The Court of Criminal Appeals' continued recognition of cumulative-error claims belies Petitioner's suggestion that the court suddenly—and silently—abandoned a doctrine it has recognized for decades.

III. Petitioner's *Brady* Claim Does Not Merit This Court's Attention.

Because Texas courts recognize cumulative-error claims, and because there is no *Strickland* claim presented, this case provides no occasion to address the cumulation of prejudice from *Brady* and *Strickland* claims. The petition therefore reduces to a request for error correction on Petitioner's *Brady* claim. Petitioner's run-of-the-mill *Brady* claim does not warrant review in any

event, but the judgment below is correct, and it demonstrates Texas courts' consideration of cumulative error.

The Court of Criminal Appeals' judgment on Petitioner's *Brady* claim reflects a straightforward determination that the undisclosed evidence was not material. The Court of Criminal Appeals correctly determined that "the withheld witness statements were not exculpatory," and that they would not have affected the "overwhelming evidence of guilt admitted at trial that was not subject to impeachment." Pet. App. 65a. To take one example, the undisclosed evidence did not call into question Chris Robinson's testimony that Petitioner committed capital murder, which was "consistent with and corroborated by other witnesses," Pet. App. 103a-104a.

Instead of engaging the state court's central conclusion or the supporting evidence, Petitioner focuses on the ancillary question whether defense counsel could have cross-examined Marvin Caston about a supposed "deal" with the prosecution without the undisclosed statements. Pet. 28-29. That misses the point. No matter how much the undisclosed material might have allowed Petitioner to impeach prosecution witnesses, it would not have cast doubt on the overwhelming evidence of her guilt, which has been recognized by every court to consider her claims.

Even if there were reason to question the outcome below, the Court of Criminal Appeals' judgment raises no question about the existence of cumulative-error claims. Consistent with its longstanding practice and with this Court's decision in *Kyles v. Whitley*, 514 U.S. 419 (1995), the court below considered the cumulative

prejudice resulting from every piece of evidence that the State failed to disclose. The trial court entered the following conclusion of law:

> In considering the *Brady* violations cumulatively, in consideration of the evidence, in light of the entire body of evidence presented, including the trial testimony, the Court finds there is no reasonable likelihood it could have affected judgments returned by the jury and does not meet the *Brady* materiality standard.

Pet. App. 116a. The Court of Criminal Appeals relied on that conclusion and its own review of the record to deny relief on Petitioner's *Brady* claim. Both concurring opinions recognized *Kyles v. Whitley*'s holding that the materiality of suppressed evidence must be determined collectively. Pet. App. 61a-62a, 72a-75a. To the extent Petitioner's claims required the state court to evaluate prejudice cumulatively, it did so. There is no question of cumulative error for this Court to address, nor is there any reason to instruct Texas courts to continue to follow this Court's precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant
Attorney General

KYLE D. HAWKINS
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
kyle.hawkins@oag.texas.gov
(512) 936-1700

OCTOBER 2018