No. 18-50

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

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.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958,

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[1] No counsel for a party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and no person other than *amicus curiae* or its counsel made such a monetary contribution. All counsel of record received timely notice of *amicus curiae*'s intent to file this brief, and all parties have filed letters granting consent to the filing.

NACDL has up to 40,000 members nationwide, directly and through its affiliates. Those members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in this Court and other federal and state courts, providing assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a strong interest in this case. The Texas Court of Criminal Appeals denied Linda Carty's habeas corpus application on the theory that the State's suppression of evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), did not prejudice her defense. The court then refused to consider the impact of the *Brady* violations in conjunction with the prejudice from violations of Ms. Carty's right to effective assistance of counsel. Those rulings rested on key misapprehensions about the practical realities of criminal defense and the cumulative impact of multiple errors on the overall fairness of a criminal trial. As a criminal defense bar association with decades of experience, NACDL is uniquely positioned to offer its perspectives on those matters.

STATEMENT

Linda Carty was convicted and sentenced to death for the murder and kidnaping of Joana Rodriguez. The State's evidence rested critically on testimony from two cooperating witnesses who allegedly conspired in the kidnaping, Marvin Caston and Christopher Robinson. After

trial, it emerged that the State had suppressed evidence directly relevant to the credibility of those witnesses.

As the state district court found, "[t]he State was operating under a misunderstanding of *Brady* at the time of the Carty trial." Pet. App. 110a. "[W]hether impeachment evidence constituted *Brady* evidence was * * * resolved with a 'judgment call' based on 'gut instinct,'" and the "District Attorney's Office did not believe that impeachment or exculpatory evidence needed to be disclosed if the prosecutor did not find the testimony credible." *Id.* at 110a-111a.

Consistent with that approach, the State failed to turn over key *Brady* material. First, the State did not disclose a generous promise of leniency it had made to Marvin Caston in return for his testimony. "In meetings with [prosecutors], Caston was promised that he would not get prison time if Carty received the death penalty." Pet. App. 113a. "There is no evidence that the State disclosed to defense counsel the details of a deal with Marvin Caston." *Id.* at 114a.

Second, the State did not disclose prior statements by Christopher Robinson or another conspirator, Gerald Anderson, that conflicted with Robinson's trial testimony. "The State failed to disclose that Robinson had previously provided two consistent statements that conflicted with and were inconsistent with * * * Robinson's trial testimony * * * ." Pet. App. 113a. "The State should have known that each of the prior statements of Robinson could be used to impeach him at trial." *Ibid.* The State similarly withheld a prior statement from Anderson. *Id.* at 114a.

Despite those flagrant *Brady* violations, the Texas Court of Criminal Appeals denied Ms. Carty's habeas

application on the ground that there was no prejudice. With respect to the secret deal with Caston, the court acknowledged that, "[t]o represent to the defense, to the court, and to the jury that there were no deals, and thus no incentive for the witnesses to testify favorably for the State, [wa]s somewhat misleading." Pet. App. 63a-64a (Richardson, J., concurring). The court nonetheless theorized that the defense could have explored the topic through cross-examination *even without* supporting evidence: "[W]ith or without disclosure of the deal with Caston, defense counsel could have cross-examined Caston * * * [and] could have explored and argued to the jury the existence of an incentive to testify favorably for the State." *Id.* at 65a; see also *id.* at 64a ("The existence of an incentive to testify favorably for the State could have been explored and argued by defense counsel."); *id.* at 76a (Walker, J., concurring) ("[D]efense counsel, with or without the Caston deal, could have cross-examined Caston * * * , could have explored the existence of motive to testify against Applicant, and could have argued that fact to the jury.").

As for the prior inconsistent statements, the court found no prejudice because the defense had other means of impeachment. "With regard to the two Robinson statements that were not turned over to the defense, these were mostly consistent with [another] statement he gave that was turned over," and "counsel was able to use [that statement] to impeach Robinson's credibility." Pet. App. 63a (Richardson, J., concurring). Similarly, "impeachment evidence was before the jury even without Gerald Anderson's statement." *Id.* at 64a; see also *id.* at 76a (Walker, J., concurring).

Finally, the court refused even to consider the prejudice from the *Brady* violations together with the preju-

dice from the separate violations of Ms. Carty's right to effective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668 (1984). As the State conceded, Ms. Carty's trial counsel performed in an objectively deficient manner by, among other things, failing to notify Ms. Carty's husband of his right not to testify against her. Pet. App. 145a. The Fifth Circuit previously described that violation, standing alone, as a "close case" for reversal. *Id.* at 148a. In the proceedings below, Ms. Carty "contend[ed] that the 'cumulative impact of the constitutional errors' violated her state and federal constitutional rights." *Id.* at 4a. But the state court refused to conduct any cumulative error analysis. *Ibid.*

SUMMARY OF ARGUMENT

The Texas court's rulings are entirely divorced from real-world criminal trial practice.

I. The Texas court held that the State's suppression of Caston's secret deal with the prosecution was harmless because defense counsel could have conducted an exploratory cross-examination into that topic even absent any supporting evidence. That theory disregards well-accepted principles of trial practice. Settled wisdom instructs defense counsel *not* to ask questions to which they do not already know the answer. Cross-examination is not a discovery device. Exploratory cross-examination can easily backfire, producing responses that bolster rather than undermine the prosecution's case. And it can make defense counsel look inept and unprepared, eroding counsel's credibility with the jury.

The Texas court's ruling also ignores the central role of impeachment in cross-examination. To impeach effectively, counsel must have evidence showing that a witness has misstated the truth. The ability to ask exploratory

questions is no substitute for that evidence—evidence the prosecution unlawfully withheld in this capital case.

The Texas court's ruling on the prior inconsistent statements is similarly flawed. A single prior inconsistent statement may impair a witness's credibility. But the existence of *multiple* prior statements, each consistent with one another and all of them flatly at odds with the witness's trial testimony, can be devastating. Disclosure of one prior statement does not obviate the prejudice from the suppression of others.

II. The Texas court compounded those missteps by refusing to consider the combined prejudice of the *Brady* and *Strickland* violations. Trial outcomes are almost always the result of multiple interwoven causes. That the prejudice from any one violation may be insufficient in isolation does not mean the errors in the aggregate cannot undermine confidence in the outcome. Frequently, moreover, trial errors combine in ways that amplify one another, resulting in prejudice that exceeds the sum of its parts.

The need for cumulative error analysis is particularly acute when the trial errors involve both *Brady* and *Strickland* violations. Those two types of violations are often closely linked: For instance, it can be difficult if not impossible to assess the impact of a *Brady* violation without inquiring into how competent defense counsel would have used the suppressed evidence. The Texas court's refusal even to consider the combined effect of the errors ignores the real-world ways in which multiple defects may conspire to deny the defendant a fair trial.

The questions presented are important and recur in criminal trials nationwide. The Court should grant the petition.

ARGUMENT

I. THE TEXAS COURT'S PREJUDICE RULING ON THE *BRADY* VIOLATIONS DISREGARDS THE REALITIES OF CRIMINAL TRIAL PRACTICE

The Texas court ruled that the State's suppression of Caston's deal with the prosecution was harmless because defense counsel could have explored that topic through cross-examination. It further ruled that the State's suppression of the prior witness statements was harmless because other impeachment evidence was available. Both rulings ignore the realities of criminal trial practice.

A. Sound Criminal Trial Practice Discourages Exploratory Cross-Examination

The Nation's criminal defense bar is practically unanimous: Defense counsel should avoid exploratory questioning at trial. Instead, they should focus on questions to which they already know the answers—answers that will be helpful to their client's case.

"It is a cardinal rule of cross-examination that you should not ask questions to which you do not already know the answers." F. Lee Bailey & Kenneth J. Fishman, *Criminal Trial Techniques* §57:12 (2d ed. 1996). "[C]ross-examination is not the time for the Discovery Channel, nor is it the time to find out * * * what the witness knows." Terence F. MacCarthy, *MacCarthy on Cross-Examination* 78 (2007); see also Larry S. Pozner & Roger J. Dodd, *Cross-Examination: Science and Techniques* §9.21, at 9-19 (2d ed. 2004) ("Trial is not a discovery device. Skillful lawyers do not simply stand up and begin asking questions * * * ."). "It has been said before, and it is worth repeating here: do not ask questions to which you do not know the answers." Steven Lubet & J.C. Lore, *Modern Trial Advocacy: Analysis & Practice* 110 (5th ed. 2015); see also Ronald H. Clark, *et al.*, *Cross-*

Examination Handbook: Persuasion, Strategies, and Techniques 50 (2d ed. 2015) ("[K]now what the answer will be * * * ."); *Ward* v. *Whitley*, 21 F.3d 1355, 1362 (5th Cir. 1994) ("It is a basic rule of cross-examination: Never ask a question for which you do not know the answer.").

The reasons for that approach are obvious. Exploratory questions can easily backfire. "For every reason that you have to think that the answer will be favorable, there are a dozen reasons you haven't thought of, all of which suggest disaster." Lubet & Lore, *supra*, at 110-111. While "[r]easonably hoping to turn up a good answer," counsel could "instead ma[ke] the [opposing party's] case stronger." *Id.* at 111; see also Charles A. Wright, *The Fictional Lawyer*, 40 No. 8 Prac. Law. 65, 70 (1994) ("asking questions to which [counsel] does not know the answer" can "elicit[ ] damaging testimony").

Even where a response is merely unhelpful rather than affirmatively harmful, it may undermine defense counsel's credibility with the jury by making counsel appear to be inept and unprepared. A defense attorney who has "beg[un] an assault" but finds himself unable to complete it runs the risk of "look[ing] ineffective at best and foolishly overbearing at worst." Lubet & Lore, *supra*, at 139. Exploratory questioning may also exhaust the judge's patience, squandering counsel's rapport. See Pozner & Dodd, *supra*, § 10.14, at 10-20 ("[T]he lawyer who * * * is unprepared to impeach * * * often finds herself stopped by a judge.").

At some point, exploratory questioning may even run afoul of ethical constraints. Professional conduct rules generally prohibit lawyers from "allud[ing] to any matter that the lawyer does not reasonably believe is * * * supported by admissible evidence." Am. Bar Ass'n, Model Rule of Prof'l Conduct 3.4(e). Thus, "[c]ounsel is not free

to make up assertions or even to fish for possibly incriminating material. * * * [A]s a predicate to any 'propositional' question, counsel must be aware of specific facts that support the allegation." Lubet & Lore, *supra*, at 134-135; see also Clark, *et al.*, *supra*, at 114 (opining that "the defense cannot allege that a government witness cut a deal in exchange for her testimony when the examiner only suspects it"). Courts have repeatedly enforced those constraints.[2]

B. Impeachment Is Critical to Effective Cross-Examination

The Texas court's decision also misunderstands the central role of impeachment in criminal trials. Even where defense counsel has grounds to believe that a truthful response to a question would be helpful, the witness could deny knowledge, prevaricate, or outright lie. Defense counsel must have the means to impeach the witness by showing through prior statements or other evidence that the response is false. By doing so, the attorney not only sets the record straight but also casts doubt on the witness's credibility generally.

"One of the hallmarks of cross-examination is the act of impeachment." Pozner & Dodd, *supra*, § 16.01, at 16-2. "While much cross-examination consists of demonstrating

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[2] See, *e.g.*, *Michelson* v. *United States*, 335 U.S. 469, 481 (1948) (commending trial court for "guard[ing]" against "groundless question[s] [that] waft an unwarranted innuendo into the jury box"); *United States* v. *Taylor*, 522 F.3d 731, 736 (7th Cir. 2008) ("You are not permitted to cross-examine a witness about a particular topic without a good-faith belief that the answers will be helpful to your case, as distinct from hoping that the question alone will insinuate a helpful answer * * * ."); *United States* v. *Lin*, 101 F.3d 760, 768 (D.C. Cir. 1996) (similar); *United States* v. *Katsougrakis*, 715 F.2d 769, 779 (2d Cir. 1983) (similar).

inaccuracies or rebutting a witness's testimony, impeachment is intended to actually discredit the witness as a reliable source of information." Lubet & Lore, *supra*, at 137. "Successful impeachment renders the witness less worthy of belief, as opposed to merely unobservant, mistaken, or otherwise subject to contradiction." *Ibid.*

Impeachment can advance a defendant's case far beyond the specific point rebutted. "A successful impeachment captures the attention of the jury. As one impeachment follows the other, the jury gives its silent approval for the lawyer to continue to impeach." Pozner & Dodd, *supra*, § 10.14, at 10-20. In addition, "[t]he cross-examiner who appears prepared to immediately impeach is the cross-examiner who will likely later be rewarded when she moves into areas of impeachment that may draw an objection. A judge who has previously observed successful impeachment of this witness is more likely to allow further inquiries into credibility * * * ." *Ibid.* Done properly, impeachment can be a "weapon[ ] of mass destruction." Terence F. MacCarthy, *et al.*, *MacCarthy on Impeachment: How To Find and Use These Weapons of Mass Destruction* (2016).

Effective defense counsel keep impeachment evidence at their fingertips during trial. "Impeachment can succeed only when the source of the impeachment is readily available." Lubet & Lore, *supra*, at 139; see also Pozner & Dodd, *supra*, § 10.13, at 10-18 to 10-20 ("Sourcing a fact should become a matter of habit or routine. * * * It is critical that the facts that can be sourced are sourced."). "When the cross-examiner has sourced a fact and suddenly encounters a full or partial denial of the sourced fact, the end result will always be the opportunity for a successful impeachment of the witness." Pozner & Dodd, *supra*, § 10.15, at 10-20.

Assembling that record of impeachment evidence is a major focus of pretrial investigation. "Counsel should make every effort to gather this information during the pretrial phase, with sources such as witness interviews or depositions." Clark, *et al.*, *supra*, at 118. Experts recommend consciously structuring the investigation around topics that may yield effective impeachment: "There is a simple method of directing an investigation calculated to strengthen * * * cross-examination. Often a lawyer laments, 'If only I had the following fact.' That critical fact might well be obtainable through a properly focused investigation." Pozner & Dodd, *supra*, § 4.13, at 4-13.

The disclosures mandated by *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Giglio* v. *United States*, 405 U.S. 150 (1972), are important sources of impeachment material. Prior statements to the authorities or promises of leniency bear directly on a witness's credibility. But that evidence is often in the exclusive possession of the State. See Richard J. Oparil, *Making the Defendant's Case: How Much Assistance Must the Prosecutor Provide?*, 23 Am. Crim. L. Rev. 447, 450 (1986) ("Disclosure [of *Brady* evidence] may be the only method of insuring that the defendant has the information necessary to conduct an effective cross-examination."). Compliance with *Brady* and *Giglio* thus matters precisely because of the central role of impeachment in criminal trials.

C. The Texas Court's Ruling on the Caston Deal Ignores Sound Trial Practice

The Texas court's ruling on the secret Caston deal cannot be reconciled with the foregoing principles. The Texas courts acknowledged that "Caston was promised that he would not get prison time if Carty received the death penalty" and that there was "no evidence that the State disclosed" that deal. Pet. App. 113a-114a. The

Court of Criminal Appeals nonetheless denied relief because, "with or without disclosure of the deal with Caston, defense counsel could have cross-examined Caston * * * [and] explored * * * the existence of an incentive to testify favorably for the State." *Id.* at 65a (Richardson, J., concurring); see also *id.* at 76a (Walker, J., concurring). That rationale ignores the settled advocacy principles set forth above.

Whether or not defense counsel theoretically *could* have cross-examined Caston about a secret deal with the prosecution, there is no reason that competent counsel *would* have done so. A lawyer adopting that strategy would be violating the "cardinal rule of cross-examination": "[Y]ou should not ask questions to which you do not already know the answers." Bailey & Fishman, *supra*, §57:12. The court thus envisioned precisely the sort of exploratory cross-examination that competent defense counsel avoid.

Indeed, the cross-examination would have been *worse* than exploratory. Because defense lawyers reasonably assume that prosecutors comply with their *Brady* obligations, counsel had every reason to believe there was *no* deal with Caston: If there was, the State would have disclosed it. In those circumstances, cross-examining Caston about promises of leniency would have been worse than a shot in the dark. It would have amounted to asking questions despite *near-certainty* of an unfavorable response. Eliciting such a response would not only bolster rather than undermine the witness's credibility, but also impair the defense's credibility before the jury by seeming to grasp at straws.

The court's reasoning also ignores the central role of impeachment. Even if defense counsel had somehow anticipated the need to inquire about this topic, counsel

would have been powerless to respond if the witness gave testimony that was evasive or false—an all too real possibility. Without evidence in hand to impeach such a response, the defense would have been left supporting the prosecution's case rather than rebutting it. That prospect is one more reason why competent defense counsel would not have pursued this line of inquiry.

The State's refusal to disclose this material was especially harmful given the nature of the evidence. Impeachment based on a witness's motive to testify against the defendant can be uniquely powerful. See MacCarthy, *et al.*, *supra*, at 49 ("We have elevated * * * [motivation] impeachment to a high level of importance, indeed one of the most important * * * ways to impeach."); Pozner & Dodd, *supra*, § 11.20, at 11-17 ("When a witness has a pronounced bias or motive for testifying, it is best to reveal it early in the cross-examination."). Promises of leniency are an undoubted source of bias. See, *e.g.*, *Napue* v. *Illinois*, 360 U.S. 264, 270 (1959) (promise material because jury "might well have concluded that [the witness] had fabricated testimony in order to curry the [prosecution's] favor"). Impeaching for bias can not only undermine the credibility of the witness's entire testimony, but also cripple any forthcoming responses by making the witness "even more nervous concerning his own testimony." Pozner & Dodd, *supra*, § 11.20, at 11-17.

Prejudice from a *Brady* violation should be measured based on strategies that reasonable defense counsel would pursue, not hypothetical approaches that competent lawyers avoid. The decision below upholds a capital conviction based on assumptions about criminal trial practice that are utterly divorced from reality.

D. The Texas Court's Ruling on the Prior Inconsistent Statements Is Similarly Flawed

The ruling on the other *Brady* evidence similarly fails. The Texas courts acknowledged that the State failed to disclose prior statements by Christopher Robinson and Gerald Anderson that conflicted with the testimony that Robinson, a key cooperating witness, gave at trial. Pet. App. 113a. "The State should have known that [the statements] could be used to impeach [Robinson]." *Ibid.* Nonetheless, the Court of Criminal Appeals deemed this violation harmless too, principally because the statements "were mostly consistent with [another] statement [Robinson] gave that was turned over," and "counsel was able to use [that statement] to impeach Robinson's credibility." *Id.* at 63a (Richardson, J., concurring).

Once again, the court ignored the realities of trial practice. A witness's prior statements are paradigmatic impeachment material. "One of the most dramatic aspects of any trial is the confrontation of a witness with his own prior inconsistent statement. This is the moment that cross-examiners live for—the opportunity to show that the witness's current testimony is contradicted by his own earlier words." Lubet & Lore, *supra*, at 144; see also MacCarthy, *et al.*, *supra*, at 1 (impeachment with inconsistent statements "is the most important of the methods of impeachment"). "Impeachments by inconsistent statement will likely be viewed as important events reflecting on the truthfulness and credibility of both the impeached witness and the side that called that witness." Pozner & Dodd, *supra*, § 16.16, at 16-14.

That is even more true where the witness's trial testimony conflicts with *multiple* prior statements. Impeachment by prior inconsistent statements is especially powerful when done repeatedly:

> [I]mpeachment [by prior inconsistent statement], done once, raises some doubts in the minds of jurors. When this technique of impeachment is done repeatedly over the course of a cross-examination it leads to outright juror skepticism. After all, the cross-examiner has demonstrated several times that the witness is sure of a fact, but yet totally at variance with his earlier position on the identical issue. When the cross-examiner continually exposes that the story recited in the direct testimony is full of changes, it undermines the ability of the opponent to argue "certainty" of the witness to the jurors or judge.

Pozner & Dodd, *supra*, § 16.16, at 16-15. Experts thus recognize that "[m]ultiple impeachment is a refined tool. * * * [W]hen deftly executed and well-conceived, the whole of the impeachment can actually turn out to be much greater than the sum of its parts." Lubet & Lore, *supra*, at 141; see also Clark, *et al.*, *supra*, at 147 ("[T]he cumulative effect of a myriad of inconsistencies can reveal that the witness is not credible * * * ."). As a witness's inconsistencies mount, "the sheer volume of self-contradiction may be sufficient to take on a life of its own." Lubet & Lore, *supra*, at 140.

Those principles apply squarely here. Armed solely with the one prior statement the State disclosed, defense counsel had only a limited basis for challenging Robinson's credibility. The jury had no way to know, for example, *which* of the two statements—the prior statement or the trial testimony—was correct. By contrast, if defense counsel could have shown that Robinson had given *multiple* prior statements, each consistent with the others but *in*consistent with his trial testimony, the jury would have had a compelling reason to discount his most

recent version. See Clark, *et al.*, *supra*, at 154 (noting that "impeachment can be enhanced by proof of the truthfulness of one of the statements" such as confirmatory statements). The State's disclosure of one prior statement thus did little to alleviate the prejudice.

E. The Texas Court's Errors Reflect Broader Confusion over How To Analyze Prejudice from *Brady* Violations

The Texas court's missteps are not isolated incidents. The rejection of *Brady* claims based on mistaken assumptions about the realities of trial practice is regrettably common. That broader pattern underscores the need for this Court's review.

The Fourth Circuit, for example, endorsed the same mistaken theory the Texas court relied on here in *United States* v. *Neely*, No. 94-5107, 1996 WL 60329 (4th Cir. Feb. 13, 1996). The defendant in that case claimed the government had violated *Brady* by failing to disclose that a witness was "promised early release from prison and a reduction in fine in exchange for his testimony." *Id.* at *6. The court deemed the error harmless, reasoning that "any promises actually made to [the witness] could have been discovered by defense counsel during cross-examination." *Ibid.*; see also *United States* v. *Iglesias*, 634 F. App'x 971, 975 (5th Cir. 2015) (deeming failure to disclose *Brady* material harmless because defendant "had the opportunity while cross-examining [the witness] to question her" about the topic).

Other courts have found *Brady* violations harmless because defense counsel had some other basis for impeachment. See, *e.g.*, *Heishman* v. *Ayers*, 621 F.3d 1030, 1035 (9th Cir. 2010) (undisclosed material was "similar to and cumulative of [other] impeachment"); *United States* v. *Williams*, No. 08-14531, 2009 WL 4810428, at *2 (11th

Cir. Dec. 15, 2009) (similar). Those decisions mirror the faulty reasoning below with respect to the prior inconsistent statements—that defense counsel armed with one inconsistent statement has nothing to gain by showing that a witness contradicted statements he made on multiple prior occasions.

The *Brady* issues in this case are thus recurring and important. State and federal courts would benefit from clearer guidance over how to assess prejudice from *Brady* violations in light of the realities of criminal trial practice. This case, moreover, is an unusually good vehicle for addressing the issues. The Texas court clearly relied on an "exploratory cross-examination" theory. And the stakes are especially high in this capital case. The unfairness of denying a defendant a fair opportunity to impeach her accusers is gravely aggravated where the defendant's life hangs in the balance.

II. The Texas Court's Refusal To Conduct Cumulative Error Analysis Ignores The Real-World Interactions Among Multiple Errors

The Texas Court of Criminal Appeals compounded its flawed analysis on the *Brady* claims by refusing to conduct cumulative error analysis. Pet. App. 4a. In addition to the *Brady* violations, the State infringed Ms. Carty's right to effective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668 (1984), when her defense lawyer committed serious errors at trial—including by failing to notify her husband of his right not to testify against her. Pet. App. 83a, 144a-145a. The State conceded that counsel's performance was deficient, and the Fifth Circuit previously found that this ineffective assistance alone presented a "close case" on prejudice. *Id.* at 144a-145a, 148a. The Texas court's refusal to consider the combined prejudice of multiple constitutional viola-

tions ignores both common sense and the everyday experience of criminal defense lawyers.

A. Multiple Constitutional Violations May Combine To Render a Trial Fundamentally Unfair

Any criminal defense lawyer understands that the outcome of a trial depends on numerous developments throughout the proceeding. A jury's verdict typically derives not from any one piece of evidence in isolation, but from the record as a whole, with each witness's testimony gauged in light of the witness's credibility and other factors. The law recognizes that multiple causes may contribute to a given event. See, *e.g.*, *Olympic Airways* v. *Husain*, 540 U.S. 644, 653 (2004) (noting that "there are often multiple interrelated factual events that combine to cause any given injury"). The "outcome of a legal proceeding" is no exception: "Like most 'social and behavioral activity,' * * * [it] is 'usually the result of multiple causal influences.'" Ruth A. 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, 490 (2013).

Cumulative error analysis is a straightforward application of that principle. Even "small mistakes" at trial can "combine with each other and with latent defects in the criminal justice system to create disasters." James M. Doyle, *Learning from Error in American Criminal Justice*, 100 J. Crim. L. & Criminology 109, 109 (2010); see also Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 Am. Crim. L. Rev. 1123, 1164-1165 (2005) ("[S]mall dangers of prejudice * * * can compound as a defendant works his way through the process."). The contrary view rests on the "fallacy of composition"—the logical error of "arguing

from a property of parts of a whole to a property of the whole." Robert Audi, *The Cambridge Dictionary of Philosophy* 432 (2d ed. 1999); see also C. Stephen Layman, *The Power of Logic* 143 (3d ed. 2005) (citing as an example the claim that, because "[e]ach of the parts of this airplane is very light[,] * * * the airplane itself is very light"). It is "illogical to contend that because an individual error by counsel was not prejudicial, all of the attorney's errors, when considered collectively, also fail to be prejudicial." Moyer, *supra*, at 493.

Constitutional violations can interact in different ways. Some may be prejudicial from "a purely additive or sum-of-the-parts perspective." *Littlejohn* v. *Royal*, 875 F.3d 548, 570 (10th Cir. 2017); see also *Grant* v. *Trammell*, 727 F.3d 1006, 1026 (10th Cir. 2013) (Gorsuch, J.) ("accumulati[on]" of even "unrelated errors" can "undermine[ ] confidence in the outcome of the trial"). For example, if a State coerces a confession from one witness, pressures another witness to testify falsely, and suppresses impeachment evidence about a third witness, the collective impact may be so substantial as to undermine confidence in the verdict, even if each error alone would not have had that effect. That is true even if the violations had no logical relation to one another beyond some connection to the defendant's guilt or innocence.

Often, however, the violations amplify each other. For example, if prosecutors pressure a witness to testify falsely, and the trial judge then prevents the defense from cross-examining that witness, the combined effect may be a conviction based on false testimony the defense was powerless to rebut. In such circumstances, the violations in the aggregate may be "more potent than the sum of their parts." *Littlejohn*, 875 F.3d at 571; see also *United States* v. *Sepulveda*, 15 F.3d 1161, 1196 (1st Cir.

1993) ("[A] column of errors may sometimes have a logarithmic effect, producing a total impact greater than the arithmetic sum of its constituent parts."); *Cargle* v. *Mullin*, 317 F.3d 1196, 1221 (10th Cir. 2003) ("[T]hese errors had an inherent synergistic effect * * * .").

Whatever form they take, cumulative violations can produce grave harm for defendants. A court seeking to determine whether multiple violations undermine confidence in the verdict—in other words, whether the jury may well have reached a different result in a trial free from constitutional violations—must necessarily consider the cumulative impact of the errors. Any other approach ignores the process by which juries decide cases and the real-world impact of trial errors on that process.

B. Cumulative Error Analysis Is Imperative for *Brady* and *Strickland* Violations

The constitutional violations at issue in this case—*Brady* and *Strickland* errors—make cumulative analysis even more important. This case is thus a strong vehicle for reaffirming the need for cumulative error review.

Brady and *Strickland* violations are especially likely to have mutually reinforcing effects, so that the combined impact is greater than the sum of the parts. A court assessing prejudice from a *Brady* violation focuses on whether "disclosure of * * * suppressed evidence to *competent* counsel" would "ma[k]e a different result reasonably probable." *Kyles* v. *Whitley*, 514 U.S. 419, 441 (1995) (emphasis added); see also *id.* at 445-447 (analyzing what defense counsel could have done with the evidence). That analysis is necessarily intertwined with assumptions about counsel's competence. See Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 Stan. L. Rev. 1133, 1163 n.111 (1982) ("[W]hether the presenta-

tion of some piece of undisclosed evidence * * * ha[s] a chance * * * of affecting the outcome [of a criminal trial] is linked to an assumption that the evidence would have been presented effectively [by counsel].”). Conversely, it can be difficult if not impossible to “reliably measure the impact of defense counsel’s failures without measuring the impact of the prosecution’s failure to provide relevant information.” John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating* Bagley *Materiality,* Strickland *Prejudice, and Cumulative Harmless Error*, 95 J. Crim. L. & Criminology 1153, 1178 (2005).

Even where a State suppresses material impeachment evidence about a witness, competent defense counsel may be able to impeach the witness’s testimony through other means. Conversely, where a State properly discloses impeachment evidence, even inept defense counsel may be able to muddle their way through cross-examination. But where the State both conceals key evidence *and* denies the defendant a lawyer who can competently challenge the prosecution’s case, the impact on the overall fairness of the trial may be far greater than either error alone would imply.

In this case, for example, the Texas court held that suppression of the *Brady* material was harmless because defense counsel could have uncovered the truth through an exploratory cross-examination. For reasons already explained, that theory is flawed—even *competent* defense counsel would not pursue that strategy. But assuming for the sake of argument that the theory makes sense, it plainly assumes the effectiveness of Ms. Carty’s counsel. A lawyer who has already been adjudged to be constitutionally ineffective can hardly be expected to successfully execute a risky cross-examination strategy that most defense counsel would not dare to attempt.

In any event, cumulative error analysis is essential even when the prejudice from the violations is merely additive rather than exponential. Even where "defense counsel's errors and the suppression error * * * are factually unrelated," the "combination" could have "swayed at least one juror" who otherwise would have sided with the defense. Blume & Seeds, *supra*, at 1181-1182.

This case illustrates the point. The ineffective assistance concerning the marital privilege may not have related directly to the *Brady* violations concerning promises of leniency and prior inconsistent statements. But the combined additive effect of the prejudice still could have tipped the outcome of the trial. That prospect is particularly likely given that one of the errors standing alone nearly crossed the threshold of prejudice that would require reversal. See Pet. App. 148a (ineffective assistance presented "close case").

As the petition shows, courts are divided over whether cumulative error review is mandatory on collateral review. Pet. 8-22. That is an important and recurring question that is fundamental to the fairness of criminal trials. It would warrant review in any case. The capital stakes in this case only underscore the need for review. For those reasons and the ones set forth in Ms. Carty's petition, the Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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