No. _____ 09-900 JAN 25 2010

In the Supreme Court of the United States

LINDA ANITA CARTY,

Petitioner,

v.

RICK THALER, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

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

Capital Case

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE QUESTIONS PRESENTED FOR REVIEW

In *Bell v. Kelly*, 128 S. Ct. 2108 (2008), this Court granted *certiorari* to address the correct method for giving effect to evidence properly considered for the first time in federal habeas corpus proceedings within the framework of the Antiterrorism and Effective Death Penalty Act, which affords some deference to state court decisions reasonably made on the evidence before the state court. The parties in *Bell* noted a lower court split over whether to accord de novo review or apply AEDPA's deferential provisions. This case squarely presents, *inter alia*, the issue this Court sought to address in *Bell*:

1. Did the Fifth Circuit err when, confronted with the *Bell* conundrum, it adopted the novel approach of carving Carty's claim of ineffective assistance into subclaims, applying different standards of review to the fragments of her claim and denying them seriatim without ever considering de novo the totality of her claim for relief?

2. Did the Fifth Circuit err in applying *Strickland v. Washington*, 466 U.S. 668 (1984)—which requires evaluating the totality of the postconviction record when—(A) it assessed sentencing prejudice without considering the impact of trial counsel's culpability phase error, in conflict with three courts of appeals, and (B) it refused to cumulate all the categories of mitigating evidence?

3. Should the Fifth Circuit's decision simply be reversed and remanded for further consideration in light of *Porter v. McCollum*, 130 S. Ct. 447 (2009) (per curiam), in which this Court implicitly held that courts must

cumulate all punishment phase errors when assessing sentencing prejudice?

4. Did the Fifth Circuit's conviction prejudice assessment violate *Strickland* where the Fifth Circuit improperly relied on *Lockhart v. Fretwell*, 506 U.S. 364 (1993), and thereby imposed a higher standard than *Strickland* requires?

5. Does the Fifth Circuit's unusual practice—followed in Carty's case—of carving a unitary claim of ineffective assistance of counsel into multiple distinct subclaims, and then deciding whether each such truncated subclaim justifies issuance of a Certificate of Appealability, violate 28 U.S.C. § 2253, which makes a COA available to a petitioner who makes a "substantial showing of the denial of a constitutional right," and *Strickland*, which requires assessing the cumulative impact of counsel's errors?

LIST OF PARTIES TO THE PROCEEDING (SUP. CT. R. 14.1(b)) AND CORPORATE DISCLOSURE STATEMENT (SUP. CT. R. 29.6)

The caption of this case contains the names of all parties to this proceeding, *i.e.*, Linda Anita Carty (Petitioner) and Rick Thaler, Director of the Texas Department of Criminal Justice, Correctional Institutions Division (Respondent).

This Petition for Writ of Certiorari is not filed by or on behalf of a nongovernmental corporation. *See* SUP. CT. R. 29.6.

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No. _____

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Texas death row prisoner LINDA ANITA CARTY, by counsel, respectfully asks this Court to grant a writ of certiorari to review the judgment of the United State Court of Appeals for the Fifth Circuit denying habeas corpus relief.

OPINIONS BELOW

The Fifth Circuit panel's opinion, *Carty v. Thaler*, 583 F.3d 244 (5th Cir. 2009), is attached as Appendix A. The Fifth Circuit panel's earlier opinion denying Carty's

Motion for Additional COA is attached as Appendix B. The order denying panel rehearing is attached as Appendix C. The relevant decisions of the United States District Court for the Southern District of Texas (orders denying relief and partially granting COA) are attached as Appendices D and E, respectively.

JURISDICTION

The Fifth Circuit entered judgment on September 17, 2009, and denied panel rehearing on October 27, 2009. This Petition is timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment guarantee of counsel, applicable against the States through the Fourteenth Amendment's due process clause, and 28 U.S.C. §§ 2253 and 2254; they read, in relevant part:

U.S. CONST. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

U.S. CONST. amend. XIV

> Section 1. . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Title 28, U.S.C. § 2253

> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an

appeal may not be taken to the court of appeals from—

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court

. . .

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Title 28, U.S.C. § 2254

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

This death penalty case is unique because the deficiency of trial counsel's performance is uncontested. The Fifth Circuit held that Carty's representation fell

below the level of objective reasonableness required by *Strickland v. Washington*, 466 U.S. 668 (1984). *See Carty*, 583 F.3d at 259, 265. Even the State admitted when questioned about counsel's failure to contact Carty's husband: "[I]t was an oversight and *we certainly don't defend that.* (5th Cir. Oral Arg't 34:26 (emphasis added).) The record verifies that counsel failed at almost every stage to provide constitutionally effective representation.

This is not a matter of second-guessing strategic decisions made during trial because counsel performed *no investigation* on which a legitimate trial strategy could be based. First, counsel never even spoke to Carty's husband, José Corona, who both the State and the Fifth Circuit recognized "provided motive and context for what would otherwise be a wholly inexplicable crime." *Carty*, 583 F.3d at 261; (USCA5 1828-29). Corona did not want to testify against Carty but felt he had no choice because counsel failed to contact him or inform him of Texas's spousal privilege. (USCA5 187.)

Second, counsel failed to speak with Charlie Mathis, the DEA agent to whom Carty reported when she was a confidential informant. While counsel failed to elicit favorable testimony from Mathis during the culpability phase (which alone was deficient), the Fifth Circuit noted that there was no "sufficient justification" for failing to place Mathis on the stand during the punishment phase. *Carty*, 583 F.3d at 265. If called, Mathis would have testified that Carty "is not a violent person," and that he did not believe she would be "a future danger." (USCA5 183.) It is difficult to imagine more powerful testimony than for one of the State's star witnesses—who is also a government official—to testify that Carty would not be a future danger to society.

Third, although counsel was aware that Carty was from St. Kitts and obtained funds from the court to conduct an "overseas investigation," counsel did not travel to St. Kitts and therefore failed to collect abundant and powerful mitigating evidence. (Tr. 3:11-13, 21; USCA5 510; *see also infra* Section II.C.) Instead, counsel merely placed Carty's mother, daughter, and sister on the stand—none of whom was prepared to testify—and elicited rote testimony based on boilerplate questions.

The jury was left with no choice but to conclude that Carty had no friends or colleagues that would speak on her behalf. That is simply not the case. What counsel failed to investigate and present to the jury—but has emerged during postconviction proceedings—is a life-worthy image of Linda Carty as appreciated through, *inter alia*, the eyes of the former Prime Minister and deputy Prime Minister of St. Kitts, and more than a dozen former teachers, pupils, and friends.

The Fifth Circuit found that counsel was deficient as to each of the issues on which Carty was granted COA and labeled this a "close case" as to whether Carty was prejudiced by these failures. But the Fifth Circuit concluded that Carty was not prejudiced only through erroneous applications of this Court's precedents. And now Carty faces death in a case where—despite her repeated requests—she *never* has received even an evidentiary hearing on, much less full review of, her constitutional claims in either state or federal court.

I. Procedural History

Carty was convicted of capital murder and sentenced to death in Texas state court in 2002. The

Court of Criminal Appeals (CCA) affirmed. *Carty v. State*, No. 74,295, 2004 WL 3093229 (Tex. Crim. App. Apr. 7, 2004) (unpublished). Carty pursued state post-conviction relief;[1] the CCA adopted the state habeas court's recommendations and denied relief. *Ex parte Carty*, No. WR-61,055-01 (Tex. Crim. App. Mar. 2, 2005) (unpublished).

Following the CCA's denial, Carty timely filed her federal habeas petition. The district court granted the State's motion for summary judgment, denied Carty's motion for evidentiary hearing and petition, and dismissed her case with prejudice. (App. D.) The district court partially granted COA (App. E), and the Fifth Circuit denied Carty's motion for additional COA issues (App. B). After oral argument, the Fifth Circuit affirmed. (App. A.) Panel rehearing was denied (App. C), and this Petition follows.

II. Facts Material to the Questions Presented

Early on May 16, 2001, four men with guns broke into the apartment where Joana Rodriguez lived with her husband, her infant son, and her husband's cousin. (Tr. 20:54-55.) Demanding money and drugs, the men tied up Rodriguez's husband and cousin, and kidnapped Rodriguez and the baby. (Tr. 20:33-34, 39-40, 56, 62-63.) Rodriguez's body was later found in a car trunk; she had suffocated. (Tr. 21:142-43.) The baby was found unharmed. (Tr. 21:125-26, 136-37.) Carty was arrested in connection with the crime. (Tr. 4:70.) Despite Carty's protests, on September 18, 2001, the court

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[1] During state habeas proceedings, the British Government contacted Baker Botts and requested that it participate in Carty's case. (SHR 477-79.)

appointed Jerry Guerinot[2] as Carty's counsel (Tr. 2:4-6; USCA5 199-200) and Windi Akins as co-counsel (Tr. 3:4).

A. Counsel's deficient investigation and trial preparation

To begin, trial counsel *never* even met with Carty until approximately two weeks before voir dire, and then only for about 15 minutes. (USCA5 200.) Similarly, counsel's investigator, John Castillo, began his rudimentary investigation only two weeks before trial. This "investigation" consisted of speaking briefly with Carty, inspecting Carty's residence and the location where Rodriguez's body was found, and issuing trial subpoenas. (USCA5 200, 222-34.) Although this limited investigation disclosed that Carty was a foreign national, counsel did not inform Carty of her rights as a St. Kitts and British citizen to consular contact and assistance under the Vienna Convention and the Bilateral Treaty.[3] (USCA5 192, 197, 199.)

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[2] At the time, Guerinot was handling at least seven other felony cases, including another capital case, and was serving as a city prosecutor. (USCA5 125, 644-63.) Twenty of Guerinot's clients have been sentenced to death. David Rose, *Lethal Counsel*, THE OBSERVER, December 2, 2007, at 25 (USCA5 2716).

[3] Carty would have exercised such rights (USCA5 199), and the British and the St. Kitts Governments would have assisted in obtaining counsel of Carty's choice, identifying and locating fact and character witnesses, and facilitating visas for any foreign witnesses (USCA5 192-93, 195-97). *See* Vienna Convention on Consular Relations art. 36.1(b), Apr. 24, 1963, 596 U.N.T.S. 261; United Kingdom Consular Officers Convention art. 16(1), T.I.A.S. No. 2494, 3 U.S.T. (ratified Aug. 8, 1952).

During interviews with Castillo and court-appointed psychologist Dr. Jerome Brown, Carty provided detailed information about Corona (USCA5 206, 209, 228-30, 250, 252, 263-64, 445, 447, 516) and Mathis (USCA5 228-29, 516). Carty likewise provided specific details about her family and St. Kitts background to Castillo and Dr. Brown. (USCA5 249, 253, 446, 515.) Carty also informed each about being raped and then giving up for adoption a daughter. (USCA5 209, 447, 516.)

Counsel never investigated these significant leads. The information Carty provided demonstrated that she and Corona shared a common-law marriage. (USCA5 209, 250, 252, 263-64, 445, 447, 516.) Notwithstanding, counsel *never even interviewed Corona*, who would become an indispensible witness for the State to establish its theory of the case. (USCA5 187, 510.) Counsel similarly never interviewed Mathis about his knowledge of the offense or asked if he would provide mitigating testimony. (USCA5 183.) Counsel barely spoke to Carty's family who testified during punishment (USCA5 466, 478, 489, 510), leaving them completely unprepared to testify (USCA5 466, 489). Counsel did not contact any of Carty's other family in Houston or elsewhere. (USCA5 510, 554, 557, 562, 565, 568.) Nor did counsel perform any St. Kitts-related investigation. (USCA5 510.)

Counsel also failed to contact or interview any of the alleged accomplices, including Josie Anderson, Marvin "Junebug" Caston, Chris Robinson, and Zebediah Combs, and failed to contact the State's medical examiner, Dr. Paul Schrode. (*See* USCA5 481.)

B. Culpability phase

Lacking any forensic evidence linking Carty to the crime, the State solely relied upon the testimony of Corona, Mathis, and Carty's alleged accomplices to establish Carty's guilt. Corona testified that Carty had told him she was pregnant on several occasions but never had a baby. Corona thought Carty was lying about being pregnant, so he wanted to leave her. (Tr. 20:190, 200-03.) Corona finally left Carty in early May 2001. (Tr. 20:205-06.) Corona testified that Carty called him on Tuesday, May 15, to tell him she would have his baby boy the next day, and on Wednesday, May 16, to tell him it would be that day. (Tr. 20:208-09.)

It is universally agreed that Corona's testimony provided context and motive for an otherwise wholly inexplicable crime—supporting the State's theory of the case that Carty was obsessed with her husband and would do anything to keep him. *Carty*, 583 F.3d at 261; (Tr. 24:143-44, 145, 149, 153-54; USCA5 1828-29, 1835). The Fifth Circuit correctly noted that counsel's failure to interview Corona or inform him of the spousal privilege was objectively unreasonable and constituted deficient performance, but incorrectly applied a more stringent standard than *Strickland* requires to find no conviction prejudice. *Carty*, 583 F.3d at 259, 261.

Mathis testified that Carty was no longer on the DEA's "books" as a confidential informant (Tr. 21:96-98), which the prosecution relied on as evidence of Carty's propensity towards lying (Tr. 24:149-50).

The State also presented testimony from Anderson, Caston, Robinson, and Combs, each of whom admitted being involved in the crime. (*See* Tr. 21:229; 22:63-65, 176-204; 23:108-09.) Counsel did not request a

jury instruction that these State's witnesses were accomplices as a matter of law. Counsel compounded this error by failing to object when, during closing arguments, the prosecution misstated Texas law regarding accomplices by stating that Anderson, Caston, and Combs could not be accomplices as a matter of law because they were not present during the actual kidnapping itself. (Tr. 24:110-12.) Counsel also did not review videotaped police statements until after trial began and therefore was unable to edit and thus use any portion of these prior statements for impeachment. (Tr. 22:25, 104; 23:13-14.)

C. Punishment phase

According to the former Prime Minister of St. Kitts, Dr. Kennedy Simmonds, Carty was "one of the most outstanding people in her area" "who was able to bring people together to support a good cause" with regard to her involvement with the political party People's Action Movement (PAM). (USCA5 498.) The former deputy Prime Minister, Michael Powell, recounted Carty's courageous volunteering as a young PAMite. (USCA5 580.) Close friends and fellow teachers highlighted Carty's caring dedication, especially to the "weaker" students (*see* USCA5 619, 629), while the former St. Kitts Education Minister, Sidney Morris, described how Carty raised money to "keep the school running" (USCA5 729). Fellow church members described Carty's leadership in "neighborhood clean ups and visiting the sick." (USCA5 716.) Although the Fifth Circuit found that this undisputed, positive testimony (*e.g.*, USCA5 757-69) "would have provided a much more nuanced and detailed vision of Carty's life and contributions to the St. Kitts community," it incorrectly found that Carty was not

prejudiced by counsel's failure to conduct the very overseas investigation counsel had obtained funds to complete. *Carty*, 583 F.3d at 265-66.

Mathis would have testified regarding Carty's nonviolent nature and her valuable service as a DEA informant, including his willingness to put Carty back "on the books" as an informant. (USCA5 182-83.) Mathis's testimony would have been especially compelling given that he is a government officer and key State's witness.

Carty's immediate family would have provided substantial testimony about her personality as an involved mother and effective teacher (USCA5 461-64, 476-78, 487-89) instead of just responding to boilerplate questioning to state that Carty followed rules and did not start fires, vandalize or steal, or harm animals (Tr. 26:56-60, 67-69, 81-82). Other members of Carty's family would have testified about her generous nature, involvement with church and the community, and prior abusive relationships. (USCA5 553-69.)

Trial counsel never provided Dr. Brown with details about Carty's medical, work, and family history, or with the State's theory of the case. (Tr. 26:10-11; USCA5 470-74.) Consequently, Dr. Brown's testimony was undermined on cross tending to portray Carty as a liar and someone who might pose a future danger (Tr. 26:29, 32, 41-42; USCA5 471-74), contradicting his assessment that the deliberate planning and nature of the crime was inconsistent with Carty's character. (USCA5 469-70, 515-19.) Based on Carty's background records and information, Dr. Brown would have asserted that Carty posed no continuing threat. (USCA5 471-74.)

Trial counsel's failure to perform any mitigation investigation—whether in the United States or in St. Kitts—left the jury with the mistaken impression that Carty was a liar and a criminal with no one other than immediate family members willing to testify on her behalf. This is far from the case.

REASONS FOR GRANTING THE PETITION

This Petition provides this Court with a vehicle to clarify a number of issues related to the right to effective assistance of counsel that have caused great confusion in the lower courts.

I. This Court should grant certiorari to resolve a conflict regarding whether piecemeal application of 28 U.S.C. § 2254(d) deference and de novo review is appropriate where the state court did not adjudicate the entirety of petitioner's ineffectiveness claim.

The Fifth Circuit's divide-and-conquer method of reviewing Carty's *Strickland* claim deprived her of the opportunity to experience de novo review of her fully developed IAC claim. This is not a case where Carty raised new evidence for the first time in federal proceedings in an attempt to circumvent AEDPA. Here, Carty presented to the state court the additional *Strickland* evidence considered by the Fifth Circuit—however, the state court simply ignored it and never adjudicated the merits of Carty's full *Strickland* claim.

Section 2254(d) itself limits application of the deference standard to "any claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). As the Tenth Circuit has discerned, "an ineffectiveness claim has not been adjudicated on the

merits when the state court failed to consider the evidence on which the defendant based his claim." *Wilson v. Workman*, 577 F.3d 1284, 1293 (10th Cir. 2009) (en banc). Therefore, as long as the defendant properly presents his evidence to the state court (*i.e.*, there is no procedural bar) and "otherwise satisfies AEDPA's requirements, the federal court will review the claim de novo." *Id.*; *see also Cargle v. Mullin*, 317 F.3d 1196, 1212 (10th Cir. 2003) ("Given the [state court's] procedural rejection of nearly all of petitioner's allegations of ineffectiveness, an adequate assessment of prejudice arising from the ineffectiveness of petitioner's counsel has never been made in the state courts, so we have no state decision to defer to under § 2254(d) on this issue.").

Workman involved two federal habeas actions where the Oklahoma Court of Criminal Appeals refused to consider non-record evidence in support of the defendants' IAC claims, relying on a technical procedural rule. 577 F.3d at 1286-87. The Tenth Circuit reasoned that:

> Under AEDPA, federal courts must defer to the state court's resolution of a claim when the state court has adjudicated the petitioner's claim "on the merits." If there has been no adjudication on the merits, we review the claim de novo. In the cases before us, the state court disposed of mixed questions of law and fact, but did so on a factual record that was, solely as a result of the state procedural rule, incomplete. We hold that when the state court makes such findings on an incomplete record, it has not made an

> adjudication on the merits to which we owe any deference.
>
> The merits question presented is whether, in light of non-record evidence, trial counsel's performance satisfied constitutional standards. If, because of procedural obstacles to supplementing the record, the state court does not consider the material, non-record evidence that has been diligently placed before it, it perforce does not provide an answer to that question. Ineffective assistance claims based on a failure to investigate will almost always involve evidence not contained within the record . . . . If the state court fails to consider the very evidence that the claim is based upon, then the state court has not adjudicated the merits of the claim.

Id. at 1290-91.

There is nothing radical about this conclusion. *Strickland* itself established that a reviewing court must "independently reweigh[] the evidence" and "consider the totality of the evidence" when "assessing the prejudice from counsel's errors." 466 U.S. at 695. This means *all* the evidence. *Accord Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (noting that in capital sentencing context "we reweigh the evidence in aggravation against the totality of available mitigating evidence"). But Carty never received that chance.

Here, the CCA completely ignored all the *Strickland* evidence Carty attached to her Additional Further Response. Although the district court

determined that such evidence was unexhausted and thus subject to a federal procedural bar (App. C. 126a), the Fifth Circuit held that the State expressly waived exhaustion pursuant to Section 2254(b)(3), *Carty*, 583 F.3d at 257. Indeed, the Fifth Circuit found that the CCA "adjudicated part, but not all, of her claim of ineffective assistance," *id.* at 253, and agreed that Carty had met AEDPA's exhaustion requirement, *id.* at 257. Yet, contrary to the Tenth Circuit's decision in *Workman*, the Fifth Circuit applied AEDPA's deferential standard to all the critical evidence that Carty presented with regard to counsel's investigation and presentation of Carty's family members during the punishment phase.[4] *Id.* at 253 ("We review under AEDPA's heightened standard the portion of Carty's claim of trial counsel's ineffective assistance in presenting mitigation evidence that the CCA adjudicated on the merits."), 264. To further confuse its review, the Fifth Circuit applied de novo review to "the rest"/"the remainder" of Carty's IAC claim. *Id.* at 253, 265.

The Fifth Circuit's deviated manner of review is legally incorrect and fundamentally unfair because Carty's entire claim has never been adjudicated on the merits in state *or* federal court. As the *Workman* court explained:

> AEDPA entitles a defendant to receive de novo review of his claim from *some* court .... If the state court does not perform this review because it has limited its

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[4] This included all the expanded family affidavits presented with Carty's Additional Further Response, which the state court failed to consider.

> review to the trial record, and the federal court does not perform this review because it nonetheless defers to the state court's judgment, then de novo review will never be performed.

577 F.3d at 1293 (emphasis in original). Carty does not seek two bites at the apple—only one proper bite, as she is entitled to under federal law.[5]

The *Workman* court explicitly recognized that it was already in direct conflict with Fifth Circuit law regarding whether to apply AEDPA deference to a state court's IAC determination when the state court fails to consider non-record evidence and made it clear that it had no intention of voluntarily reconciling this split: "[t]o the extent that our reasoning differs from that of the Fifth Circuit, we adhere to our view." *Id.* at 1295 (citing *Valdez v. Cockrell*, 274 F.3d 941, 953-54 (5th Cir. 2001)). The *Carty* decision only drives the wedge between the Fifth and Tenth Circuits deeper. While the Fifth Circuit now has recognized that there are

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[5] Carty also maintains that the Fifth Circuit should not have deferred to the state court's findings and conclusions related to counsel's investigation and presentation of mitigating evidence from her family because they were unreasonable determinations under Section 2254(d). For instance, the Fifth Circuit unreasonably determined that Carty's allegedly uncooperative behavior undermined the family aspect of her IAC claim despite her providing information on several family members, and that much of the family evidence could be discounted as cumulative despite this Court's pronouncements in *Williams* and *Wiggins*. *See Carty*, 583 F.3d at 264-65. However, the salient point for purposes of this particular issue is that all aspects of Carty's IAC claim must be reviewed de novo, which never occurred here.

circumstances where *Strickland* evidence should be given de novo review for the first time in federal court, it partitions its review by deferring to the incomplete portions of the evidence that the state court considered.

This acknowledged division between the Fifth and Tenth Circuits represents part of a broader split that has been percolating among the circuits concerning AEDPA's interpretation: whether Section 2254(d) requires deference when new *Strickland* evidence or evidence supporting a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), is presented for the first time during federal habeas. A fundamental disagreement exists among the circuits that has been brewing for nearly a decade. *See LeCroy v. Sec., Dep't of Fla. Corrections*, 421 F.3d 1237, 1262-63 (11th Cir. 2005) (examining split).

At least six circuits already have taken sides in this contentious debate. The Ninth and Tenth Circuits both have held that where new evidence is adduced at a federal hearing, AEDPA deference does not apply. *See Killian v. Poole*, 282 F.3d 1204, 1207-08 (9th Cir. 2002) (refusing to apply AEDPA deference when "[e]vidence of . . . perjury" is "adduced only at" federal hearing); *Harris v. Terhune*, 92 Fed. App'x 462, 463 (9th Cir. 2004) (same in *Strickland* context); *Miller v. Champion*, 161 F.3d 1249, 1253-54 (10th Cir. 1998) (holding that AEDPA deference does not apply when federal court holds evidentiary hearing).

On the other hand, the Second, Fifth, Sixth, and Seventh Circuits all have taken the position that the deferential standard of review mandated by Section 2254(d) "[does] not lose [its] force because an intervening evidentiary hearing is held in federal

court," even if material new evidence emerges.[6] *Wilson v. Mazzuca*, 570 F.3d 490, 500 (2d Cir. 2009); *accord Johnson v. Luoma*, 425 F.3d 318, 324, 328 (6th Cir. 2005); *Pecoraro v. Walls*, 286 F.3d 439, 443 (7th Cir. 2002); *Valdez*, 274 F.3d at 952. According to this view, additional "evidence obtained in such a [federal court] hearing is quite likely to bear on the reasonableness of the state courts' adjudication," but there is no reason "why it should alter the *standard* of federal review." *Pecoraro*, 286 F.3d at 443 (emphasis in original). Further, "[a]ny new evidence uncovered in the federal proceeding is relevant only insofar as it assists the habeas court in determining whether the state court reached an unreasonable application of law" under the AEDPA standard. *Mazzuca*, 570 F.3d at 500.

In *Bell v. Kelly*, 128 S. Ct. 2108 (2008), the Court granted certiorari to resolve this split. In *Bell*, the petitioner argued that the Fourth Circuit had agreed to split the baby by "agreeing with the Ninth and Tenth Circuits with respect to *Brady* materiality, yet siding with the Fifth, Sixth, and Seventh Circuits with respect to *Strickland* prejudice." Petition for Writ of Certiorari at 20, *Bell v. Kelly*, 129 S. Ct. 393 (2008) (No. 07-1223). However, *Bell* was dismissed as improvidently granted after oral argument. *Bell v. Kelly*, 129 S. Ct. 393 (2008). Indeed, the facts of *Bell* made it a poor vehicle to resolve this important split—the federal court ultimately heard very little in the way of new evidence not previously available in the state court.

But the defects in *Bell* are not present here. Indeed, Carty presents almost the exact case that this

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[6] Despite repeated requests, Carty was denied an evidentiary hearing in both state and federal court.

Court in *Bell* was "worried about around the corner." *Bell v. Kelly* Oral Arg't (Souter, J.) 47:1-2. The Court's greatest concern was with:

> the claim in which it is not defaulted, in the sense that he is at fault in any way for failing . . . to get his entire presentation now into the State court then. So that it is not a defaulted claim in the classic sense. It is not a claim in which he is at fault by having failed to present it in the State court.
>
> And in that case, if it cannot go back, if the State court will not take it back, don't we have to find at least implicit in [AEDPA] the possibility of litigating the—the fully developed claim in the Federal court without a need to defer to the State court findings?

Id. at 45:17-46:6. This case should trouble this Court even more than *Bell* because Carty did not adduce any new evidence in a federal evidentiary hearing. But even though the Fifth Circuit agreed that the bulk of Carty's IAC claim was not defaulted, it refused to apply de novo review to her whole claim.

The Fifth Circuit's decision thus creates a new but conceptually related split with the Tenth Circuit: When the state court fails to consider evidence, and the evidence is not defaulted for federal habeas review, what standard of review applies to the petitioner's unitary IAC claim? Under the Fifth Circuit's analysis, the unacceptable answer is that a petitioner in Carty's position can never receive a complete adjudication of her fully developed *Strickland* claim. Congress surely

did not intend this result. Even the express language of section 2254(d) demonstrates that deference is only owed where a claim is "adjudicated on the merits." As the Tenth Circuit rightly determined, there must be implicit in the statute the opportunity for a defendant in Carty's position to receive de novo review of her *entire* claim—not just pieces of it.

II. This Court should grant certiorari to resolve conflicts among the lower courts as to whether *Strickland* requires that the prejudice from deficiencies at the culpability phase be considered in aggregation, together with all categories of mitigating evidence.

In *Strickland*, this Court instructed courts how to assess prejudice for claims of IAC: "When a defendant challenges a death sentence . . . , the question is whether there is a reasonable probability that, absent the *errors*, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695 (emphasis added). "In making this determination, a court . . . must consider the *totality* of the evidence before the judge or jury." *Id.* at 695–96 (emphasis added).

In *Williams* and *Wiggins*, this Court reaffirmed that courts must conduct *one* sentencing prejudice assessment in which *all* the relevant errors involving IAC are cumulated and then reweighed. *See Wiggins*, 539 U.S. at 534 ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."); *Williams*, 529 U.S. at 397-98 (finding state court's sentencing prejudice determination unreasonable where it "failed to evaluate

the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation"). Not only must courts cumulate the effects of both culpability and punishment phase errors, but also courts must view "the entire postconviction record" "as a whole and cumulative of mitigation evidence presented originally" when assessing sentencing prejudice. *Williams*, 529 U.S. at 399.

The Fifth Circuit's ruling in this case strayed far from what appears to be this Court's clear mandate. First, it failed to remove the improper culpability phase aggravating evidence from the sentencing prejudice assessment. *See Carty*, 583 F.3d at 262–66. Second, it conducted separate and independent sentencing prejudice assessments for the instances of deficient performance it found related to mitigating evidence—counsel's failure to investigate and present the mitigating evidence from Mathis, Carty's former DEA boss, and from 17 of Carty's friends and colleagues in St. Kitts, including former fellow teacher and pupils, as well as the former Prime Minister, deputy Prime Minister, and Education Minister of St. Kitts—and failed to aggregate the postconviction evidence with such mitigating evidence as was originally presented by Carty's family. *See id.* at 265–66.[7] By contrast, the Fifth Circuit should have removed the improper aggravating evidence from the scale, then added *all* the

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[7] The court also failed to consider additional evidence tending to refute future dangerousness and tending to inject lingering doubt, other mitigating evidence related to Dr. Brown and Carty's rape, and other errors affecting sentencing prejudice because, as argued in Section V, it incorrectly did not grant COA on the majority of Carty's IAC claim. (*See* App. B.)

mitigating evidence together, and finally analyzed whether the balance of aggravating and mitigating circumstances warranted death.

A. **The Fifth Circuit's failure to remove improper aggravating evidence in *Carty* defies what appears to be the clear mandate of *Strickland* and its progeny that the spillover effects of culpability phase errors must be considered when analyzing sentencing prejudice.**

Other courts of appeals have concluded that the spillover effects of culpability phase ineffectiveness must be considered when assessing sentencing prejudice. The Tenth Circuit, in *Cargle v. Mullin*, affirmed granting Cargle's habeas petition because he received IAC during the sentencing phase. 317 F.3d 1196, 1199–1200 (10th Cir. 2003). The court noted that its "consideration of petitioner's claim of error at the penalty phase may be cumulated with guilt-phase error, so long as the prejudicial effect of the latter influenced the jury's determination of sentence." *Id.* at 1208. It is a "commonsense notion" that a "guilt-phase error" can have a "continuing, cognizable effect on the penalty phase." *Id.* As such, the court considered one culpability phase error by counsel that had been ignored below because the "decision to grant relief on ineffective assistance grounds is a function of the prejudice flowing from all of counsel's deficient performance—as *Strickland* directs it to be." *Id.* at 1212.

Similarly, the Eleventh Circuit, in *Smith v. Wainwright*, 741 F.2d 1248 (11th Cir. 1984), concluded that Smith was entitled to a hearing on his IAC claim. *Id.* at 1252. The court held that counsel's error during the culpability phase, in not impeaching two witnesses

during cross-examination with their pretrial statements, *see id.* at 1254, "may not only have affected the outcome of the guilt/innocence phase, it may have changed the outcome of the penalty trial," *id.* at 1255, particularly where "jurors may well vote against the imposition of the death penalty due to the existence of 'whimsical doubt,'" *id.* Finally, the Ninth Circuit has held that "[t]he combination of counsel's guilt and penalty phase deficiencies . . . combined to deny Daniels effective representation and prejudiced the outcome of his penalty phase trial." *Daniels v. Woodford*, 428 F.3d 1181, 1210 (9th Cir. 2005).

Here, the Fifth Circuit and the State both agreed that Corona provided "motive and context" for the crime. *Carty*, 583 F.3d at 261. Corona provided "the best evidence of their break up a mere two weeks before Rodriguez's murder, of [Carty's] statements at that time that she was pregnant, and of his belief that she was lying about being pregnant." *Id.* at 261. Indeed, the Fifth Circuit acknowledged the "obvious and no small inference that Carty kidnaped Rodriguez's baby and killed Rodriguez to prove to Corona that she had birthed his son and thereby reestablish their relationship." *Id.*

Corona, however, *never* should have testified. Because Corona and Carty agreed that they shared a common-law marriage, *id.* at 259, Corona enjoyed a marital privilege under Texas law that would have excused him from testifying, *see id.* at 258, 261. But Carty's trial counsel failed to contact and interview Corona, much less inform him of his privilege. *Id.* at 259. The Fifth Circuit found that "trial counsel performed objectively unreasonably by failing to interview Corona to determine if he could or would

assert a marital privilege." *Id.* Moreover, the court expressed this was a "close case" for conviction prejudice. *Id.* at 259, 261. It did not, however, remove Corona's aggravating testimony from the scale when assessing sentencing prejudice. *See id.* at 262–66.[8]

Even if the jury still would have convicted Carty without Corona's testimony (which Carty argues against in Section IV),

> [t]he fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt—doubt based upon reason—and yet some genuine doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt—this absence of absolute certainty—can be real.

Wainwright, 741 F.2d at 1255 (quoting *Smith v. Balkcom*, 660 F.2d 573, 580-81 (5th Cir. Unit B 1981), *modified*, 677 F.2d 20, *cert. denied*, 459 U.S. 882 (1982)). "[J]urors may well vote against the imposition of the death penalty due to the existence of 'whimsical doubt.'" *Id.*

Therefore, a powerful chance exists that absent any context and explanation for why Carty committed

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[8] Corona's testimony entered the evidence pool for sentencing purposes because Texas law *requires* the jury "to consider all evidence admitted at the guilt or innocence stage" for the aggravation Special Issues and "all of the evidence" for the mitigation Issue. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(b), (d)(1) (e)(1) (Vernon 2006).

this crime, which Corona clearly provided according to the Fifth Circuit and the State, *Carty*, 583 F.3d at 261, at least one juror would have entertained a genuine, lingering doubt about Carty's guilt—enough to give him pause when choosing whether to impose death.[9] Moreover, Corona's testimony certainly had a "continuing, cognizable effect on the penalty phase," *Cargle*, 317 F.3d at 1208, because it magnified the strength of the evidence of future dangerousness the prosecution presented during the punishment phase. Without Corona's presentation of Carty as a compulsive, obsessed liar, the State's aggravation case is reduced primarily to Carty's prior arrest for auto theft and a dismissed drug charge. *Carty*, 583 F.3d at 250.

B. The Fifth Circuit's decision to engage in separate prejudice inquiries for each of counsel's failures to investigate and present mitigating evidence violates *Strickland*, *Wiggins*, and *Williams*.

The Fifth Circuit further conducted separate prejudice assessments for the various instances of deficient performance involving counsel's failure to investigate and present mitigating evidence. *Carty*, 583 F.3d at 264-66. Instead, the Court should have conducted a single prejudice assessment for the instances of deficient performance it found with regard

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[9] The Fifth Circuit recognized that the State exploited the power of a husband's words during closing: "that every time [he] tried to end [their relationship], Carty announced she was pregnant" and that "[w]hat Carty wanted, . . . needed, was [the baby] because her life was falling apart and she needed the baby to bring it back together again." *Carty*, 583 F.3d at 261.

to Corona[10] and Mathis and Carty's St. Kitts friends and colleagues and also should have cumulated all the mitigating evidence assessed during habeas with what was presented at trial. *See Wiggins*, 539 U.S. at 534; *Williams*, 529 U.S. at 398-99.

By granting certiorari, this Court can ensure that lower courts do not persist in refusing to cumulate all categories of mitigating evidence, as required by *Williams* and *Wiggins*. In contrast with several other circuits,[11] the Fourth and Eleventh Circuits affirmatively have joined the Fifth Circuit in refusing to cumulate all instances of deficient punishment phase performance when assessing sentencing prejudice. *See Carty*, 583 F.3d at 265–66; *Porter v. Attorney General*, 552 F.3d 1260, 1274 (11th Cir. 2008) (analyzing each of petitioner's punishment phase ineffectiveness errors separately for sentencing prejudice), *rev'd in part sub nom. Porter v. McCollum*, 130 S. Ct. 447 (2009) (per

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[10] Reasonably competent counsel would have informed Corona about his marital privilege to keep him from testifying during the culpability phase. *Carty*, 583 F.3d at 259. In such circumstances, counsel would not have chosen to call Corona at sentencing. But even ignoring counsel's culpability phase error, once Corona had testified, counsel committed further error by not calling him to offer mitigating testimony. *See id.* at 265.

[11] *See Stevens v. McBride*, 489 F.3d 883, 897–98 (7th Cir. 2007) (finding sentencing prejudice based on multiple punishment phase errors); *Marshall v. Hendricks*, 307 F.3d 36, 115 (3d Cir. 2002) ("A proper prejudice determination requires the reviewing court to reweigh the aggravating and mitigating factors with all of the corrections taken into account."); *Silva v. Woodford*, 279 F.3d 825, 847 (9th Cir. 2002) (finding sentencing prejudice after cumulating mitigation deficiencies); *Skaggs v. Parker*, 235 F.3d 261, 274 (6th Cir. 2000) (same as *Stevens*).

curiam); *Hedrick v. True*, 443 F.3d 342, 352–54 (4th Cir. 2006) (same), *cert. denied*, 548 U.S. 928 (2006); *Crawford v. Head*, 311 F.3d 1288, 1321 (11th Cir. 2002); *Holladay v. Haley*, 209 F.3d 1243, 1250-51 (11th Cir. 2000).

Here, Carty presented favorable testimony about her DEA informant activities, and supportive statements from 17 St. Kitts colleagues and friends, including former government officials, about her "life and contributions to the St. Kitts community" through her political, social, religious, and charitable activities, and through her teaching. *Carty*, 583 F.3d at 265-66 ("Indeed, these witnesses would have provided a much more nuanced and detailed vision of Carty's life[.]").[12] Had it respected *Strickland* and its progeny, the Fifth Circuit would have cumulated all the instances of deficient punishment phase performance related to Mathis and the 17 St. Kitts witnesses, together with the mitigating evidence adduced from her family at trial, when assessing sentencing prejudice and found that at least one juror would have agreed not to sentence Carty to death based on a much richer, positive depiction of Carty drawn from the various aspects of her life. This is particularly the case when such positive evidence is reweighed against the State's case absent Corona's

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[12] The Fifth Circuit, like the district court, improperly discounted the positive St. Kitts evidence as being removed in time and location from Carty's life at the time of the crime. *See Carty*, 583 F.3d at 265. This Court in *Williams* clearly prohibited such treatment: "Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." 529 U.S. at 398.

testimony, *and* in light of Carty's lack of criminal history of violence.[13]

III. This Court may reverse and remand this case for further consideration in light of *Porter v. McCollum*.

After the Fifth Circuit's decision in this case, this Court suggested that courts *must* cumulate all instances of deficient penalty phase performance when assessing sentencing prejudice. *See Porter*, 130 S. Ct. at 454. In *Porter v. McCollum*, this Court held that Porter established that his counsel provided deficient sentencing phase performance, *id.* at 453, and that the deficient performance caused him prejudice, reversing the Eleventh Circuit, *see id.* at 455–56, which had "*separately* considered each category of mitigating evidence and held [that] it was not unreasonable for the state court to discount each category," *id.* at 452 (emphasis added). This Court instead cumulated all four categories of mitigating evidence—Porter's "heroic military service," his "struggle to regain normality" after a war, "his childhood history of physical abuse," and "his brain abnormality." *Id.* at 454. Though this Court did not state explicitly that the Eleventh Circuit erred in conducting piecemeal prejudice inquiries, its own assessment demonstrates the correct cumulation. This Court should grant certiorari to hold explicitly

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[13] Also, Carty never would be able to abduct a child in prison society. *See Berry v. State*, 233 S.W.3d 847, 863-64 (Tex. Crim. App. 2007) (considering defendant's lack of criminal record and improbability of becoming pregnant in prison in decision to reform death sentence to life in prison).

what *Porter* intimated and prevent the Fourth, Fifth, and Eleventh Circuits from again engaging in separate prejudice assessments for each instance of sentencing-phase deficient performance. Alternatively, this Court should reverse and remand this case for further consideration in light of *Porter*.

IV. This Court should grant certiorari because the Fifth Circuit improperly applied the prejudice standard from *Lockhart v. Fretwell*, further exhibiting a pattern in the circuit of misapplying *Lockhart*.

This Court also should grant certiorari to correct the Fifth Circuit's improper assessment of conviction prejudice. The Fifth Circuit erred in applying *Lockhart v. Fretwell*, 506 U.S. 364 (1993), and thus subjected Carty to a more stringent prejudice inquiry than *Strickland* requires.[14]

In *Lockhart*, this Court held that a *Strickland* prejudice "analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart*, 506 U.S. at 369. *Lockhart* involved counsel's failure to object to an instruction in a sentencing proceeding. *See id.* at 366. At the time of sentencing, the objection likely was meritorious, "[b]ut by the time the Eighth Circuit reviewed respondent's ineffective assistance claim, on-point Circuit authority bound that court to hold the

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[14] *Strickland* prejudice only requires a showing of "a reasonable probability that at least one juror would have struck a different balance" on guilt or on punishment. *Wiggins*, 539 U.S. at 537-38.

objection meritless." *Id.* at 374 (O'Connor, J., concurring). Justice O'Connor "point[ed] out that [*Lockhart*] will, in the vast majority of cases, have no effect on the prejudice inquiry under *Strickland*," *id.* at 373 (O'Connor, J., concurring), because it "was predicated . . . on the suggestion that [the petitioner] might have been denied a right the law simply does not recognize," *id.* at 375 (internal quotation marks omitted).

In *Williams*, this Court indeed explained that "*Lockhart v. Fretwell* do[es] not justify a departure from a straightforward application of *Strickland* when the ineffectiveness of counsel *does* deprive the defendant of a substantive or procedural right to which the law entitles him." 529 U.S. at 393 (alteration and emphasis in original) (citation omitted). In cases not involving the unique circumstances of *Lockhart*—where the law subsequently changes and eliminates an arguable error by trial counsel—this Court prohibits applying the *Lockhart* standard. *See Williams*, 529 U.S. at 394.

Lockhart's rule has no applicability here because Carty's IAC claim is not predicated on the suggestion that she was denied a right that the law no longer recognizes. Her claim is based in part on the simple failure to adequately prepare and present the case, and as found particularly by the Fifth Circuit, that "trial counsel performed objectively unreasonably by failing to interview Corona to determine if he could or would assert a marital privilege." *Carty*, 583 F.3d at 259. This rule of privilege still exists, without alteration, under the Texas Rules of Evidence. *See* TEX. R. EVID. 504(b)(1).

But the Fifth Circuit nevertheless applied the *Lockhart* standard. Indeed, in the very first paragraph of its discussion of conviction prejudice, the Fifth Circuit cited, quoted, and applied *Lockhart*: "[A]lthough this is a close case, [Carty] has not made the requisite showing that "[Corona's] testimony rendered her conviction 'fundamentally unfair or unreliable.'" *Carty*, 583 F.3d at 261 (citing *Ransom v. Johnson*, 126 F.3d 716, 721 (5th Cir. 1997) (quoting *Lockhart*, 506 U.S. at 369)). The Fifth Circuit treated *Lockhart* as controlling law by quoting *Lockhart* as providing the "requisite" standard. *See id.*[15]

In *Williams*, this Court reversed the Supreme Court of Virginia in a similar case. *See* 529 U.S. at 393. Because the Virginia Supreme Court "read our decision in *Lockhart* to require a separate inquiry into the fundamental fairness even when Williams is able to show that his lawyer was ineffective and that his ineffectiveness probably affected the outcome of the proceeding," *Williams*, 529 U.S. at 393, this Court reversed, *id.* at 399. This Court found that the Virginia Supreme Court's analysis, which involved rejecting the prisoner's argument that *Strickland* governs, included the improper application of *Lockhart*. *See Williams*, 529 U.S. at 394. This Court noted that the trial court demonstrated the correct assessment of prejudice in a non-*Lockhart* case: "Unlike the Virginia Supreme Court, the state trial judge omitted any reference to

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[15] Beyond the Fifth Circuit's reliance on *Lockhart* in its opinion, a review of oral argument reveals that the most significant issue confronting the panel was whether "[t]he prejudice standard under *Strickland* is more strict and narrower than what [Carty was] arguing for." (5th Cir. Oral Arg't 12:34.) "[T]he question really comes down to the *Strickland* standard." (*Id.* at 16:32.)

Lockhart and simply relied on our opinion in *Strickland* as stating the correct standard for judging ineffective-assistance claims." *Id.*

Despite this Court's mandate in *Williams* to the contrary, here the Fifth Circuit applied *Lockhart*. The Fifth Circuit did cite *Strickland*, *see Carty*, 583 F.3d at 262, but this nod does not change the fact that in applying *Lockhart*, the court applied the wrong standard. In *Williams*, this Court found error, even though the Virginia Supreme Court cited to *Strickland* after applying *Lockhart*. *See Williams*, 529 U.S. at 394.

This is not an isolated incidence of error. The Fifth Circuit repeatedly has applied *Lockhart* in erroneous circumstances, thus requiring this Court's intervention. *Kunkle v. Dretke*, 352 F.3d 980, 991 (5th Cir. 2003) (rejecting IAC claim based on counsel's failure to present mitigating evidence because petitioner failed to "show that counsel's errors 'rendered the result of the proceeding fundamentally unfair or unreliable'" (quoting *Rector v. Johnson*, 120 F.3d 551, 563 (5th Cir. 1997))); *Johnson v. Cockrell*, 301 F.3d 234, 239 (5th Cir. 2002) (holding that counsel's error in calling father of victim at sentencing phase "certainly fell far short of prejudicing the defendant's case to such an extent that it 'rendered sentencing fundamentally unfair or unreliable'" (quoting *Lockhart*, 506 U.S. at 369)); *see also Bell v. Quarterman*, 330 Fed. App'x 492, 493 (5th Cir. Aug. 3, 2009) (finding that petitioner did not demonstrate "that any error by counsel [in not calling him to testify] was so serious as to 'render[] the result of the trial unreliable or the proceeding fundamentally unfair'" (quoting *Lockhart*, 506 U.S. at 372)). None of these cases warranted application of the *Lockhart* standard. Clearly, the Fifth

Circuit needs to be instructed again on the correct course of applying *Strickland*'s prejudice standard.

Here, the Fifth Circuit, the district court, and even the State all have agreed that Carty suffered deficient performance from her counsel. With regard to prejudice, the Fifth Circuit applied the wrong standard—placing too heavy a burden on Carty—and yet still concluded that "this is a close case." *Carty*, 583 F.3d at 261. If it was a close case under the wrong, higher standard, then Carty should prevail under the correct one. This Court either may state as much in its opinion, as this Court did in *Porter*, or remand to allow the Fifth Circuit to apply the correct standard.

V. This Court should grant review to decide whether the Fifth Circuit's unusual practice of carving a unitary Sixth Amendment claim of ineffective assistance of counsel into multiple distinct "claims," and then deciding whether each such truncated "subclaim" justifies issuance of a COA, violates Section 2253 and *Strickland*.

Another way in which the Fifth Circuit divided up the issue of ineffectiveness in order to ensure that Carty would never receive a full evaluation of her unitary claim involved its denial of COA. (*See* App. B.) The district court similarly had approached the IAC claim in a piecemeal fashion and only had granted a COA on certain portions. *See Carty*, 583 F.3d at 252. Thus, in assessing prejudice, the lower courts could not view the cumulative effects stemming from *all* the ways in which counsel performed deficiently.

This unusual practice of carving up ineffectiveness claims at the COA stage resulted in a complete failure (1) to consider the additional, at the

very least debatable, errors related to, amongst other things,[16] counsel's not informing Carty of her Vienna Convention and Bilateral Treaty rights (App. B 56a-58a),[17] and more significantly, (2) to cumulate such errors as part of the totality of evidence that would have factored into the conviction prejudice and sentencing prejudice analyses. As the district court had granted Carty COA on two "subclaims" of ineffectiveness relating to both trial phases, the Fifth Circuit properly should have granted COA as to the entirety of her IAC claim.

The Fifth Circuit departs from the only sensible reading of 28 U.S.C. § 2253(c), which provides that a petitioner who makes "a substantial showing of the denial of *a constitutional right*" is entitled to permission to appeal an adverse district court decision. 28 U.S.C. § 2253(c)(2) (emphasis added). Without debate, Congress

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[16] Carty also alleged she was prejudiced in her conviction and death sentence by counsel's errors in not adequately presenting and preparing her case, including failing to interview or adequately prepare for the cross-examination of any State witness, such as Mathis, Dr. Schrode, Robinson, and Combs; not soliciting testimony from or adequately preparing defense expert Dr. Brown; not effectively investigating and presenting a future dangerousness defense; failing to properly investigate cause of death and cast doubt on specific intent; conducting an inadequate and inflammatory voir dire; and not objecting to prejudicial argument regarding suppressed evidence and improper accomplice argument and instructions. (*See* App. B.)

[17] The Fifth Circuit denied COA despite its recognition that the Vienna Convention-related aspect of Carty's IAC claim may be "relevant to the development of facts supporting mitigation" (App. B 58a n.6), which illustrates the irrationality of divvying up a single IAC claim for COA purposes.

guarantees such federal appeal for any petitioner who makes this showing. The Sixth Amendment right to effective assistance of counsel is clearly *"a* constitutional right" within the meaning of Section 2253. While such "constitutional right" may be infringed by any number and type of specific instances of counsel's deficiencies, it remains a unitary right. Therefore, as soon as a petitioner has shown that any error by counsel dipped below prevailing professional standards and is reasonably likely to have affected the verdict, she has satisfied the plain language of Section 2253 and should be provided the opportunity to brief all aspects of her ineffectiveness claim, rather than just those aspects arbitrarily granted COA. Instead of applying Congress' straightforward requirement, the Fifth Circuit permits carving a petitioner's claim that she was "deni[ed] a constitutional right" into multiple constituent "issues," and then requires her to satisfy Section 2253's standard with respect to each of those constituent aspects of her claim, considered individually. This approach frustrates Congress' aim of ensuring meaningful review for petitioners who present a substantial claim of relief.

Moreover, *Strickland* requires a cumulative, not piecemeal, analysis of counsel's deficiencies and their resulting prejudice. *Strickland* refers at least ten times to the "errors" of counsel, in the plural, to describe the appropriate prejudice inquiry. *See, e.g.*, 466 U.S. at 694-96.[18] The collective impact of counsel's errors altogether therefore lies at the very core of the *Strickland* prejudice inquiry.

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[18] *See also Wiggins*, 539 U.S. at 534; *Williams*, 529 U.S. at 394, 398-99.

The Fifth Circuit's implicit refusal to evaluate the cumulative impact of multiple errors by counsel not only runs afoul of *Strickland*, but also directly conflicts with the views of the Second, Seventh, and Ninth Circuits. *See, e.g., Malone v. Walls*, 538 F.3d 744, 762 (7th Cir. 2008) (remanding for district court to conduct new prejudice inquiry: "[*Strickland*] prejudice may be based on the cumulative effect of multiple errors.") (quoting *Hough v. Anderson*, 272 F.3d 878, 891 n.3 (7th Cir. 2001)); *Silva*, 279 F.3d at 834 (granting COA on IAC: "cumulative prejudice from trial counsel's deficiencies may amount to sufficient grounds for a finding on ineffective assistance of counsel."); *Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991) (noting that because petitioner's "claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions, all his allegations of ineffective assistance should be reviewed together").

Nor is *Carty*'s ruling an aberration in circuit practice. *See also Skinner v. Quarterman*, 528 F.3d 336, 342-45 (5th Cir. 2008) (granting COA on certain IAC aspects while denying COA as to others); *Gonzales v. Quarterman*, 458 F.3d 384 (5th Cir. 2006) (same); *Martinez v. Dretke*, 404 F.3d 878, 878 (5th Cir. 2005) (same).

If a reasonable probability of prejudice exists with respect to any aspect of a petitioner's IAC claim, logic demands that the court should grant COA as to the entire IAC claim. Otherwise, the court unacceptably risks underestimating the collective impact of counsel's deficient performance on the

verdict.[19] This Court should intervene to correct the Fifth Circuit's practice and ensure that the entirety of Carty's claim receives appropriate review.

CONCLUSION

This Court should grant Carty's petition for certiorari, or in the alternative, reverse and render relief, or reverse and remand for further consideration.

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[19] The Fifth Circuit brushed aside the possibility of cumulative prejudice from all of counsel's errors here: "the ostensible errors that did occur did not 'so infect[] the entire trial that the resulting conviction violates due process.'" (App. B 59a-60a (quoting *Derden v. McNeel*, 978 F.2d 1453, 1454 (5th Cir. 1992) (en banc)).) The problem with this sweeping statement, aside from the fact that *Derden* did not address cumulative prejudice from multiple IAC errors but instead addressed the due process doctrine of cumulative trial errors, is that the district court already had determined that reasonable jurists could find a possibility of prejudice from two other aspects of Carty's IAC claim. (App. B 48a.)

Respectfully submitted.

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