No. 12-794

In the Supreme Court of the United States

RANDY WHITE, WARDEN, PETITIONER

v.

ROBERT KEITH WOODALL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR TEXAS AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE

A state prisoner has secured federal habeas relief on Fifth Amendment grounds despite his failure to overcome the relitigation bar of 28 U.S.C. 2254(d) and the harmless-error doctrine. This latest act of Sixth Circuit lawlessness is of particular interest to the State of Texas because, as a forthcoming certiorari petition will explain, the Fifth Circuit recently committed a similar error. See Appl. to Recall & Stay Mandate Pending Cert. 13-14, *Stephens* v. *Gongora*, No. 13A243 (U.S. Aug. 31, 2013) (arguing that this Court could hold certiorari petition and then GVR in light of this case); *Gongora* v. *Thaler*, 2013 WL 4080710, at *8 (5th Cir. Aug. 13, 2013) (Smith, J., dissenting from denial of rehearing en banc) (noting this "similar case in which the Supreme Court recently granted certiorari"). Moreover, as a direct beneficiary of Section 2254(d),

Texas has a general interest in advancing "the principles of comity, finality, and federalism" that motivated Congress to enact that key provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003) (quoting *Michael Williams* v. *Taylor*, 529 U.S. 420, 436 (2000)). Accordingly, Texas submits this amicus brief in support of petitioner.

SUMMARY OF ARGUMENT

The Sixth Circuit's grant of federal habeas relief violates Section 2254(d), as construed in *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), and *Mitchell* v. *Esparza*, 540 U.S. 12 (2003) (per curiam). *Harrington* held that if a federal habeas court can imagine any reasonable basis for a state court's decision to reject a claim on the merits, then the relitigation bar of Section 2254(d) forecloses relief. And *Mitchell* held that if a state court is not unreasonable in rejecting a claim under the harmless-error standard of *Chapman* v. *California*, 386 U.S. 18 (1967), then federal habeas relief is likewise precluded by Section 2254(d).

Taken together, these holdings make this a straightforward case. The Kentucky Supreme Court could have rejected respondent's *Carter* claim[1] on the reasonable ground that the error was harmless

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[1] See *Carter* v. *Kentucky*, 450 U.S. 288, 305 (1981) (holding that the Fifth Amendment, as interpreted by *Griffin* v. *California*, 380 U.S. 609 (1965), and incorporated by the Fourteenth Amendment, gives a criminal defendant in state court the right, upon request, to a jury instruction that his decision not to testify cannot be used to make an adverse inference of guilt).

beyond a reasonable doubt under *Chapman*. As the Sixth Circuit dissent argued, albeit under *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), the trial court's refusal to give a no-adverse-inference instruction at the penalty phase was harmless in light of the overwhelming evidence of respondent's horrific crimes and lack of remorse, his plea of guilt as to the crimes and aggravating circumstances, and the prosecutors' silence about his silence.

The Sixth Circuit did not explain why such a harmless-error disposition by the Kentucky Supreme Court would have been not only wrong but unreasonable. Nor could the Sixth Circuit provide a satisfactory explanation, given its shilly-shally reliance upon the "grave doubt" rule of *O'Neal* v. *McAninch*, 513 U.S. 432 (1995). When a federal court is that uncertain about harmlessness, it is hardly in a position to condemn a state court's harmless-error decision as "so lacking in justification that there [would be] an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 131 S. Ct. at 786-787.

ARGUMENT

SECTION 2254(d) PRECLUDES FEDERAL HABEAS RELIEF BECAUSE THE STATE COURT COULD HAVE REASONABLY REJECTED RESPONDENT'S *CARTER* CLAIM ON HARMLESS-ERROR GROUNDS

Recent history suggests that the Court granted here with a view to reverse the Sixth Circuit in yet another habeas case. See, *e.g.*, *Metrish* v. *Lancaster*, 133 S. Ct. 1781 (2013); *Parker* v. *Matthews*, 132 S. Ct. 2148 (2012) (per curiam); Recent Case, *Sixth Circuit Interprets "Clearly Established Federal Law"*

Narrowly: Bunch v. Smith, 126 Harv. L. Rev. 860, 866-867 (2013). Texas respectfully submits that there is more than one way to skin this cat. The certiorari petition presented a pair of questions—one on Section 2254(d) and one on the harmless-error doctrine. By combining those two concepts, the Court can reverse the Sixth Circuit without having to explore the limits of *Carter* v. *Kentucky*, 450 U.S. 288 (1981), or determine whether "grave doubt" truly exists within the meaning of *O'Neal* v. *McAninch*, 513 U.S. 432 (1995).

A. Respondent raised a penalty-phase *Carter* claim on direct appeal in the Kentucky Supreme Court, where it was rejected on the merits. Pet. App. 261a-263a. He later urged the same claim in his federal habeas application and got a warmer reception from the Western District of Kentucky. See *id.* at 44a-64a; but see *id.* at 176a-184a.

A divided panel of the Sixth Circuit affirmed the district court's grant of federal habeas relief. Pet. App. 12a. According to Judge Martin's majority opinion, AEDPA's relitigation bar did not foreclose relief on the *Carter* claim because respondent satisfied the "unreasonable application" exception of Section 2254(d)(1). *Id.* at 5a-9a (holding that the Kentucky Supreme Court unreasonably refused to extend *Carter*'s holding to the penalty phase of a capital trial in which the defendant pleaded guilty to the crimes and aggravating circumstances).

The Sixth Circuit went on to hold that the *Carter* error was not harmless under *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), because the judges in the majority harbored "grave doubt" under *O'Neal*. Pet. App. 9a-12a. Wrote Judge Martin:

> Because we cannot know what led the jury to make the decision that it did, and because the jury may well have based its decision on [respondent's] failure to testify, we cannot conclude that this is a case of "harmless error." * * * Given our grave doubt that the jury's recommendation was not influenced by adverse inferences drawn from [respondent's] decision not to testify, we "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error."

Id. at 11a (quoting *O'Neal*, 513 U.S. at 437 (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946))); accord *id.* at 63a (conveying district court's equally indecisive conclusion).

In her dissent, Judge Cook pointed to the "mountain of undisputed evidence that [respondent] abducted, raped, maimed, and drowned a sixteen-year-old high school student," and concluded that the majority's "[p]ure conjecture does not establish grave doubt." Pet. App. 13a, 24a-29a.

B. The Sixth Circuit's grant of federal habeas relief contravenes Section 2254(d). In deciding whether respondent can get the benefit of Section 2254(d)(1)'s "unreasonable application" exception to the relitigation bar, the Sixth Circuit should have "determine[d] what arguments or theories supported or * * * could have supported[] the state court's decision"—taking care not to "overlook[] arguments that would otherwise justify the state court's result"—and then "ask[ed] whether it is possible

fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Harrington* v. *Richter*, 131 S. Ct. 770, 784, 786 (2011); see also *id.* at 786 ("If this standard is difficult to meet, that is because it was meant to be."). *Harrington* thus establishes that a prisoner's entitlement to federal habeas relief does not depend on the quality of the state court's reasoning process, but on the quality of his underlying claim. A prisoner who invokes the "unreasonable application" exception bears the burden of "showing there was no reasonable basis for the state court to deny relief"—he must contend with what the state court *could have* said against his claim, rather than what it *did* say. *Id.* at 784.

Mitchell v. *Esparza*, 540 U.S. 12 (2003) (per curiam), identified the harmless-error doctrine as one of the potentially reasonable bases for a state court to reject a prisoner's claim on the merits. The Court there held that Section 2254(d) precluded federal habeas relief as to a claim because the state court had not been unreasonable in rejecting it under the harmless-error standard of *Chapman* v. *California*, 386 U.S. 18 (1967). See *Mitchell*, 540 U.S. at 17-19. The Court explained its summary reversal of the Sixth Circuit as follows: "We may not grant [a] habeas petition * * * if the state court simply erred in concluding that the State's errors were harmless; rather, habeas relief is appropriate only if the [state court] applied harmless-error review in an 'objectively unreasonable' manner." *Id.* at 18.

Harrington and *Mitchell* combine to make short work of this case because the Kentucky Supreme

Court could have reasonably rejected respondent's *Carter* claim as harmless error.

The jury that condemned respondent to die learned how he had kidnapped a sixteen-year-old named Sarah Hansen, slashed her throat with a box cutter, disrobed and raped her, and then drowned her in a lake. Pet. App. 259a-260a. Faced with overwhelming evidence of his "revolting and despicable" crimes, *id.* at 30a, respondent pleaded guilty to murder, rape, and kidnapping, and to all of the aggravating circumstances. *Id.* at 27a-28a, 128a, 260a-261a. The jury was apprised of this guilty plea and of a prior sexual-abuse conviction. Pet'r Br. 4, 6 (citing state court record). "On the issue of remorse, the jury heard independent testimony from [respondent's] mother that, shortly after the murder, [he] came to her house, sat in a recliner, and watched television as if nothing had happened." Pet. App. 27a. Respondent did not testify, but his witnesses presented a mitigation case revealing, among other things, that he had an IQ in the 70s and a spastic colon that his mother and grandmother treated with suppositories made of soap. Pet'r Br. 7-8. Family members also testified that respondent had sexually abused several cousins. *Id.* at 8-9. The prosecutors remained silent about respondent's silence, never drawing the jury's attention to his failure to take the stand. Pet. App. 28a; see also *id.* at 45a (noting that prosecutors did not object to respondent's request for a no-adverse-inference instruction at penalty phase).

In her dissent from the Sixth Circuit's decision, Judge Cook surveyed the record and argued that any *Carter* error in this case was harmless under *Brecht* and *O'Neal*. Pet. App. 27a-28a.[2] The Kentucky Supreme Court could have similarly concluded, based on the predominance of aggravation over mitigation and the fact that prosecutors never mentioned respondent's failure to testify, that the trial court's failure to deliver a no-adverse-inference instruction to the jury was "harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. Such a conclusion would be reasonable, if not correct, so Section 2254(d) precludes federal habeas relief.

The Sixth Circuit did not even attempt to explain why this harmless-error approach by the state court is "so lacking in justification that there [would be] an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 131 S. Ct. at 786-787. And any effort to do so would have failed because the Sixth Circuit based its own harmless-error conclusion on *O'Neal*'s "grave doubt" rule. Pet. App. 5a, 9a-12a; see also Br. in Opp. 21 (conceding respondent's agreement with Sixth Circuit's *O'Neal* conclusion). This means that the federal judges who granted habeas relief were "uncertain" and "in virtual equipoise as to the harmlessness of the error" under *Brecht*, because they deemed "the record [to

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[2] See also *Burns* v. *Secretary*, 720 F.3d 1296, 1305-1307 (11th Cir. 2013) (holding penalty-phase *Carter* error harmless under *Brecht* because "the mitigators here were weak and the aggravators were strong," and because "the state never once commented on [defendant's] failure to testify").

be] so evenly balanced" that they could say no more than that respondent was "*quite possibly* being held in custody in violation of the Constitution." *O'Neal*, 513 U.S. at 435, 437, 442 (internal quotation marks omitted); see also *id.* at 442 ("We also are assuming that the judge's conscientious answer to the question, 'But, did that error have a "substantial and injurious effect or influence" on the jury's decision?' is, 'It is extremely difficult to say.' ").

If the Sixth Circuit could not bring itself to say unequivocally that respondent's *Carter* error was harmless under *Brecht*, how could it plausibly declare that the Supreme Court of Kentucky would be not only wrong but unreasonable to hold that error harmless under *Chapman*? "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro* v. *Landrigan*, 550 U.S. 465, 473 (2007). The Sixth Circuit's manifest uncertainty would have kept it from reaching that threshold, had it bothered to try.

C. In *Fry* v. *Pliler*, 551 U.S. 112, 120 (2007), the Court suggested that it "makes no sense to require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former." The quoted sentence does not threaten the Section 2254(d) argument put forth in this brief.

The *Fry* Court carefully tempered its observation about the harmless-error hierarchy by inserting the word "when." This case reveals the wisdom of that analytical hedge. It makes perfect sense to require formal application of both tests when the *Brecht* test does not subsume the AEDPA/*Chapman* test, as will

be true for cases in which the *Brecht* test cannot be answered without resort to *O'Neal*'s "grave doubt" rule. With *Harrington* having tightened up Section 2254(d), moreover, it is less likely now than when *Fry* was decided that the *Brecht* test will subsume the AEDPA/*Chapman* test. Cf. *Price* v. *Thurmer*, 637 F.3d 831, 839 (7th Cir. 2011) (Posner, J.) (noting *Harrington*'s "rather unexpected vigor").

In any event, the quoted dictum from *Fry* did not overrule the holding of *Mitchell*. See *Johnson* v. *Acevedo*, 572 F.3d 398, 403-404 (7th Cir. 2009) (Easterbrook, J.); *Ruelas* v. *Wolfenbarger*, 580 F.3d 403, 413 (6th Cir. 2009); *Gongora* v. *Thaler*, 2013 WL 4080710, at *7-*8 (5th Cir. Aug. 13, 2013) (Smith, J., dissenting from denial of rehearing en banc). Having held in *Mitchell*, 540 U.S. at 17-19, that the AEDPA/*Chapman* test can be employed to deny federal habeas relief, the Court is free to follow the same course here. To argue otherwise would be to contend "that dicta have overtaken holdings," and thus to "reverse[] the accepted hierarchy of legal authority." *United States* v. *Askew*, 529 F.3d 1119, 1148 & n.3 (D.C. Cir. 2008) (Griffith, J., concurring) (citing, *inter alia*, *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 379 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend * * * .")).

The Sixth Circuit panel divided over whether "grave doubt" exists within the meaning of *O'Neal*. Compare Pet. App. 5a (majority opinion of Martin, J.) (expressing grave doubt "[b]ecause we cannot know what led the jury to make the decision that it did"), with *id.* at 29a (Cook, J., dissenting) ("Pure conjecture does not establish grave doubt.").

Petitioner makes a strong argument that the dissent got it right, and that any *Carter* error is therefore harmless under *Brecht*. Pet'r Br. 43-48. The Court need not go that far, however, because *Harrington*, *Mitchell*, and Section 2254(d) foreclose federal habeas relief unless this Court can say what the Sixth Circuit could not—namely, that the Kentucky Supreme Court would be objectively unreasonable to hold harmless any *Carter* error in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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September 2013