No. _____

In the Supreme Court of the United States

ARTEZ HAMMONDS,
Petitioner,

v.

COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In *Griffin v. California*, 380 U.S. 609 (1965), this Court held that a jury cannot be invited to draw an adverse inference from a criminal defendant's decision not to testify. Then, in *Carter v. Kentucky*, 450 U.S. 288 (1981), it held that, even in the absence of a jury being asked to draw an adverse inference, a prophylactic instruction must inform a jury that it could draw "no adverse inference" from a defendant's decision not to testify.

The Eleventh Circuit has now issued a decision that directly conflicts with *Carter* and *Griffin* by approving an instruction that does not satisfy *Carter* when dealing with an attempt to "cure" a *Griffin* violation resulting from outrageous prosecutorial misconduct. Although the Ninth Circuit has issued a decision in direct conflict with *Carter*, and other circuits have come close to crossing the line, the Eleventh has managed to undermine both *Griffin* and *Carter* in a single case.

1. Under *Griffin* and *Carter*, can jury instructions that omit the "no adverse inference" language—and do not otherwise cover it—"cure" a prosecutor's willful invitation that the jury draw such a negative inference?

2. Where the objected-to instructions fail to satisfy *Griffin* and *Carter*, can the Fifth Amendment violation be deemed harmless, when that determination is largely dependent upon the erroneous determination that the instructions were sufficient to "cure" the *Griffin* violation?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Artez Hammonds respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit affirming the denial of habeas corpus relief, following a split decision of the Alabama Supreme Court denying relief on direct appeal.

OPINIONS BELOW

The opinion of the Eleventh Circuit is unpublished, *Hammonds v. Comm'r, Ala. Dep't of Corrs.*, 712 F. App'x 841 (11th Cir. 2017), and is attached as Pet. App. 1a. The decision of the district court denying relief was published, *Hammonds v. Allen*, 849 F. Supp. 2d 1262 (M.D. Ala. 2012), and the relevant portion is attached as Pet. App. 21a. The majority and dissenting opinions of the Alabama Supreme Court are published, *Ex parte Hammonds*, 777 So. 2d 777 (Ala. 2000), and attached as Pet. App. 25a.

JURISDICTION

The Eleventh Circuit issued an opinion on October 17, 2017. Pet. App. 1a. The Eleventh Circuit denied Mr. Hammonds' timely petitions for rehearing and rehearing en banc on December 20, 2017. Pet. App. 30a. On March 2, 2018, Justice Thomas granted Mr. Hammonds' application for an extension of time within which to file a petition for writ of certiorari to May 19, 2018. Pet. App. 31a. Because May 19, 2018 is a Saturday, the petition is due on May 21, 2018. Sup. Ct. R. 30.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment, in relevant part, provides, "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Eighth Amendment, in relevant part, provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment, in relevant part, provides, "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), in relevant part, provides:

> (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.

28 U.S.C. § 2254(d).

STATEMENT OF THE CASE

I. The State's case

At trial, the State presented evidence that Marilyn Mitchell suffered 37 stab wounds, bruises consistent with rape, and had her throat slashed. Witnesses testified that Mr. Hammonds had delivered bedroom furniture to Ms. Mitchell's home, where he engaged in conversation with her, and that he commented to his co-worker on her attractiveness. Small amounts of Mr. Hammonds' blood and semen were present at the scene and his thumbprint was found on a telephone in the bedroom. Mr. Hammonds was later seen in possession of a ring consistent in description with an engagement ring stolen from Ms. Mitchell,[1] and a man claimed he had had a conversation with Mr. Hammonds at a bar he described as featuring bikini dancers in which Mr. Hammonds (who is black) stated that he liked to "hurt" white women sexually.

II. The defense case

DNA evidence was relatively new at the time of Mr. Hammonds' 1997 trial, and the general public was not nearly as familiar with it as it is today. Trial counsel thus challenged the validity of DNA evidence in general and specific to the case.

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[1] As noted in Mr. Hammonds' application for a COA, the woman who testified to this, Valerie Rivers, has since *recanted* her testimony. And, as raised in his Amended § 2254 petition, had trial counsel interviewed Rivers, they would have learned the police intimidated her and showed her a picture of the ring prior to her describing it. Additionally, had trial counsel interviewed Daryl White, they would have learned that Mr. Hammonds never showed him a diamond engagement ring (Rivers testified she saw the ring when Mr. Hammonds showed it to White).

Trial counsel further countered the inferences the State invited the jury to make from the evidence. Regarding the small amounts of Mr. Hammonds' blood found at the scene, defense counsel pointed to the fact that, as part of Mr. Hammonds' work delivering bedroom furniture, he had to return to the delivery truck to cut wood for the bedframe. This demonstrated that Mr. Hammonds' thumbprint and small amounts of his blood at the crime scene did little to establish his guilt.

Counsel also drew sharp attention to the sloppiness of the police investigation, noting that, while investigators found blood on the victim's fingernail, remarkably, it was not tested to determine its source. Additionally, a "Domino's" restaurant cup found adjacent to the victim's head—and shown in crime scene photos—was never tested for biological evidence, including DNA, hair fragments, or secretions.

Counsel also offered a reasonable explanation for the presence of Mr. Hammonds' thumbprint on the telephone, positing he may well have lifted the phone off the floor and placed it on the nightstand when previously delivering the bedroom furniture. Further, while only one print was linked to Mr. Hammonds, the sources of 11 other fingerprints found in the apartment were never determined.

As for the claim that Mr. Hammonds liked to hurt white women, supposedly uttered in a bar employing bikinis dancers, the defense presented testimony—from the owner of the bar—that there were no bikini dancers at the bar during the time period in question. The defense further showed that an FBI profile of the assailant concluded he was likely a white male. Mr. Hammonds is black. Furthermore, the

defense pointed out that hair and fibers found at the scene were determined to be from a Caucasian.

Finally, Counsel provided testimony from a nursing assistant who worked with Ms. Mitchell, establishing that Ms. Mitchell had been sexually assaulted by, and remained fearful of, a white male patient at the hospital where she had been employed at the time of her murder. Illustrating the newness of DNA evidence at the time of trial, the nursing assistant, when questioned about whether she believed in DNA evidence, replied, "I can't say that I do."

III. Jury deliberations

During deliberations at the guilt phase, the jury sent out two questions for the trial court involving the strength or existence of evidence. First, the jury asked whether a fingerprint had been found on the toilet seat in Ms. Mitchell's home (none had been). Second, the jury asked when the bedroom telephone—bearing Mr. Hammonds' thumbprint—had been installed. The victim's fiancé had provided conflicting/confusing testimony regarding the issue: first testifying that it was installed before the date of the murder, then that he could not remember and, finally, stating that it had not been installed prior to delivery of the furniture.

IV. The prosecutor's deliberate comment on Mr. Hammonds' decision not to testify

Prior to trial, trial counsel, citing prosecutor Doug Valeska's history of misconduct, filed motions in limine, including one seeking an order directing Mr. Valeska to make no reference to Mr. Hammonds' decision not to testify. Mr. Valeska

protested and, discussing the various motions, stated, "If I make improper argument or objections, the Court can sustain or do the remedy that the Court sees fit. . . . They ask me to limit things before we even get to trial." The court explained that some of the matters trial counsel was seeking to keep out were, indeed, "clearly improper" for a trial, and cited as examples "arguments on the defendant's conduct and failure to testify."

Trial counsel expressed his concern that Mr. Valeska would inject improper statements into the trial: "Our problem, Your Honor, is that once he says something that is improper, you cannot unring that bell. . . . A simple, curative instruction from the Court saying please don't consider what Mr. Valeska just said is not going to be adequate." The trial court responded, "To me, it is like you want me to assume Mr. Valeska will do something improper. . . . I don't expect him to argue to the jury that . . . [Mr. Hammonds] did not testify." To this, Mr. Valeska responded, "I assure the Court I won't do that."

Mr. Hammonds' counsel responded that, although he "would hope Mr. Valeska would not do that . . . [he had] been involved in cases where that [had] not always been the case." Ultimately, the trial court granted the motion in limine, and ordered Mr. Valeska to make no comment on Mr. Hammonds' decision not to testify.

Nonetheless, despite both the court's order and his vehement assurances to the court that he would not do so, Mr. Valeska did comment on Mr. Hammonds' decision not to testify at trial. During the testimony of Greg Gordon, Mr. Hammonds' co-worker, trial counsel asked questions intended to explain Mr. Hammonds'

fingerprint on Ms. Mitchell's phone. Among the questions was whether, had Mr. Gordon seen a phone on the bedroom floor, he would have picked it up and placed it on the nightstand they had delivered. As a follow-up to his affirmative response, trial counsel asked, "Mr. Hammonds would have done the same thing, wouldn't he?"

Mr. Valeska objected, since Mr. Gordon could not testify as to what someone else would do, and the trial court sustained the objection. However, Mr. Valeska seized the opportunity to draw attention to the fact that Mr. Hammonds had elected not to testify, and inject the argument that Me. Hammonds *should* testify and explain his version of the evidence, proclaiming, "Let him [Mr. Hammonds] testify."

The trial court, clearly angered by the injection of the comment, responded, "You don't need to make statements. You just need to make your objection and state your grounds. I had sustained it. There was no need for you to say anything else." The trial court found that the statement constituted an improper comment infringing on Mr. Hammonds' right to not testify, and the prosecutor admitted that he was, in fact, referring to Mr. Hammonds when he made the statement. Nonetheless, the court denied Mr. Hammonds' motion for a mistrial. Instead, the court merely reprimanded the prosecutor and gave a jury instruction intended to cure the constitutional violation.

V. The trial court's deficient curative instruction and Mr. Valeska's further misconduct

The trial court's instruction stated: "Under the law the Defendant has the privilege to testify in his own behalf or not. He cannot be compelled to testify against

himself, and that no *presumption of guilt or innocence* of any kind should be drawn from his failure to testify." (emphasis added).

> THE COURT: Ladies and gentlemen of the jury, there was a statement made by the Prosecution, an objection by the Defense, which was sustained. The remark, and I'm not sure in which manner it was intended, but it basically said, let him testify. It can be taken several ways, but such remarks are improper, and the jury should disregard that remark by Mr. Valeska. Statements of counsel as I told you are not any evidence in this case and should not be used by you or considered by you as evidence. Under the law the Defendant has the privilege to testify in his own behalf or not. He cannot be compelled to testify against himself, and that no presumption of guilt or innocence of any kind should be drawn from his failure to testify.

Undaunted by his earlier reprimand, Mr. Valeska, in closing argument, committed additional misconduct when he argued, absent context or evidentiary support, that Mr. Hammonds "couldn't keep [his] stories straight in prison." This misconduct not only violated the principles of this Court's holding in *Estelle v. Williams*, 425 U.S. 501, 503 (1976), but also the trial court's order that Mr. Valeska not "say anything about [Mr. Hammonds] being in prison right now or any other convictions." The trial court denied trial counsel's motion for mistrial, instead choosing to "cure" it by instructing the jury that comments by the attorneys were not evidence.

VI. The Alabama Supreme Court's 6 to 3 decision

In declining to grant relief, the Alabama Supreme Court noted that it was "almost persuaded that the trial judge erred in denying Hammonds's motion for mistrial" in this "close case" because the prosecutorial misconduct was so blatant, while warning that it did "not sanction such prosecutorial conduct and that such conduct could cause an appellate court to overturn a conviction." *Ex parte Hammonds*, 777 So. 2d at 778. Nonetheless, it "conclude[d], as did the Court of Criminal Appeals, that the trial judge corrected any harm by giving appropriate corrective instructions." *Id.*

Three justices dissented. Justice Houston, joined by Justice Lyons, asserted that Mr. Valeska's "improper comments require[d] reversal." *Id.* at 778 (Houston, J., dissenting). Justice Johnstone, dissenting separately, emphasized that the supposedly "curative" instruction:

> [O]mits the required statement that the jury could not draw any *inference* from the defendant's failure to testify . . . . While the trial judge did caution the jury not to draw any "presumption of guilt or innocence" from the defendant's failure to testify, the defendant was more imperiled by the likelihood that the jury would draw an adverse *inference*, a much more common legal and mental operation. The prosecutor's comment was both flagrant and prejudicial, and the curative instruction was inadequate . . . .

Id. at 780 (Johnstone, J., dissenting) (emphases in original).

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit has decided an important federal question in a capital murder case in direct conflict with this Court's decisions in *Griffin v. California*, 380 U.S. 609 (1965) and *Carter v. Kentucky*, 450 U.S. 288 (1981).

A. This Court's precedents in *Griffin* and *Carter* clearly establish that, where the jury is invited to draw an adverse inference from a defendant's election not to testify, generalized instructions regarding the burden of proof and that prosecutorial statements are not evidence, are not sufficient to cure the Fifth Amendment error.

In *Griffin*, this Court held that "the Fifth Amendment . . . forbids . . . comment on the accused's silence." *Griffin*, 380 U.S. at 610. At Griffin's trial, the trial court instructed the jury that "a defendant has a constitutional right not to testify," and that the exercise of that right "does not create a presumption of guilt or by itself warrant an inference of guilt" nor "relieve the prosecution of any of its burden of proof." *Id.* However, this Court held that this instruction was insufficient, because other instructions allowed the jury to "take that failure into consideration as tending to indicate the truth of [the State's] evidence and as indicating that among the

inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable." *Id.*

Thus, *Griffin* clearly establishes that, even where a jury is instructed that a defendant's decision not to testify does not "by itself warrant an inference of guilt," such an instruction alone is not constitutionally sufficient where either the court or the prosecutor has invited the jury to draw an adverse inference from the defendant's silence.

Emphasizing the necessity of its holding, this Court explained that adverse commentary on a defendant's invocation of his right not to testify was reminiscent of "the inquisitorial system of criminal justice." *Id.* at 614. Thus, allowing such commentary imposes an unacceptable penalty upon defendants wishing to invoke the privilege because "[i]t cuts down on the privilege by making its assertion costly." *Id.*

In *Carter* this Court explained, "The *Griffin* case stands for the proposition that a defendant must pay *no court imposed price* for the exercise of his constitutional privilege not to testify." *Carter*, 450 U.S. at 301 (emphasis added). This Court explained that, as in Mr. Hammonds' case, "[t]he penalty was exacted in *Griffin* by adverse comment on the defendant's silence." *Id.* Then, answering the question it left open in *Griffin*, this Court "h[e]ld that a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify" by giving a prophylactic cautionary instruction. *Id.* *Carter* clearly establishes that, even when a criminal defendant's decision not to testify otherwise goes unmentioned by the trial court or

the prosecution, a criminal defendant is entitled to a prophylactic, non-curative instruction on the issue. As this Court emphasized: "Even without adverse comment, the members of a jury, unless instructed otherwise, may well draw adverse inferences from a defendant's silence." *Id.*

B. The direct conflict between the Eleventh Circuit's decision here and this Court's precedent.

Echoing the Alabama Supreme Court, the Eleventh Circuit correctly held that the prosecutor's conduct was egregious. *Hammonds*, 712 F. App'x at 851-52 (recognizing Mr. Valeska's "flagrant" misconduct that "plainly violated" Mr. Hammonds' Fifth Amendment right against self-incrimination, and Mr. Valeska's extensive history of such behavior).[2] Despite recognizing the error, and expressing its "tempt[ation]" to grant Mr. Hammonds a new trial, *id.* at 852, the Eleventh Circuit ultimately affirmed the denial of relief in direct conflict with this Court's decisions in *Griffin* and *Carter*. *Id.*

[2] The panel noted that Mr. Valeska's misconduct was so egregious that it was sending a copy of its opinion to the Alabama State Bar. *Id.* This will not be the first judicial complaint lodged against Mr. Valeska for prosecutorial misconduct. Former Alabama Supreme Court Chief Justice Sue Bell Cobb filed a bar complaint against him for misrepresenting facts at a parole hearing. *See* Kent Faulk, *Former Alabama Chief Justice Sue Bell Cobb Files Complaint Against Houston County D.A.*, AL.com (BIRMINGHAM NEWS), Feb. 16, 2016, http://www.al.com/news/birmingham/index.ssf/2016/02/former_alabama_chief_justice_f.html. Mr. Valeska's range of misconduct has made national news in recent years as well. *See* Shaila Dewan & Andrew W. Lehren, *An Alabama Prosecutor sets the Penalties and Fills the Coffers*, N.Y. Times, Dec. 12, 2016 at A1. https://www.nytimes.com/2016/12/13/us/alabama-prosecutor-valeska-criminal-justicereform .html; *see also* Shaila Dewan, *Forcing a District Attorney's Hand*, N.Y. Times, Dec. 30, 2016. https://www.nytimes.com/2016/12/30/insider/forcing-a-district-attorneys-hand.html Mr. Valeska does not appear to have suffered any consequences from his repeated misconduct.

Despite the egregiousness of Mr. Valeska's intentional misconduct, the Eleventh Circuit decided that the "instruction to the jury *to disregard* the prosecutor's improper remark immediately blunted its impact," before declaring the instruction to be sufficient because it could not "conclude that its imprecision *caused* the jury to draw any adverse inference." *Id.* at 853 (emphases added). In reaching its conclusion, it paraphrased the "curative" instruction in a way that minimized the fact that it only compounded the violation, describing it as an instruction that the jury was "to draw no presumption from [Mr.] Hammonds's exercise of his Fifth Amendment privilege." *Id.* Notably, the court did not quote the portion of the instructions that purported to so instruct the jury because, of course, it did not exist. The actual portion it paraphrased was that "no presumption of guilt *or innocence* of any kind should be drawn from his failure to testify." (emphasis added). The Eleventh Circuit also credited the trial court's general instruction that statements of counsel are not evidence, as further rendering the faulty instruction harmless. *Id.* at 853-54.

For the reasons set forth in Justice Johnstone's dissent, because the instructions failed to inform the jury that it was to draw no adverse inference from Mr. Hammonds' decision not to testify, *Ex Parte Hammonds*, 777 So. 2d at 780 (Johnstone, J., dissenting), the Eleventh Circuit's decision directly conflicts with this Court's holdings in both *Griffin* and *Carter*. Permitting this to go unaddressed by this Court in a capital murder case will embolden other circuits and state appellate courts—not to mention prosecutors—to disregard this Court's precedent, which, as described below, the Ninth Circuit has already done, undermining the Fifth

Amendment's protections and eviscerating this Court's role as the final arbiter of what the Constitution means.

C. The Eleventh Circuit's decision has widened the direct conflict with *Carter* begun by the Ninth Circuit and taken that error further by directly contravening *Griffin*, both inviting other circuits to join in disregarding this Court's clear commands, and effectively creating a circuit split.

In determining that the "curative" instruction was sufficient, the Eleventh Circuit relied on the Ninth Circuit's decision in *United States v. Castaneda*, 94 F.3d 592 (9th Cir. 1996). *Hammonds*, 712 F. App'x at 854 (citing *Castaneda*). In addition to adopting the faulty reasoning of the Ninth Circuit undermining *Carter*, however, the Eleventh Circuit went even further, issuing a decision also in conflict with *Griffin*. Because it has now widened the circuit split and done so in a way that contravenes both *Griffin* and *Carter*, this Court should grant certiorari to resolve the split, prevent the error from expanding, and reiterate its clear precedent.

1. The Ninth and Eleventh Circuit decisions are in direct conflict with *Griffin* and *Carter*.

In *Castaneda*, the Ninth Circuit held that a prophylactic jury instruction regarding the defendant's election not to testify was sufficient despite the fact that it lacked the specific language—from *Carter*—that the jury was to draw no adverse inference from the election. *Castaneda*, 94 F.3d at 596. In reaching its conclusion, the Ninth Circuit reasoned that, because the trial court had otherwise reminded the jury of the defendant's general right not to testify or present evidence, the instruction sufficiently satisfied *Carter*. *Id.* Aside from approving an even more problematic

"curative" (as opposed to the prophylactic instruction requested in *Castaneda*) instruction, the Eleventh Circuit's decision echoes *Castaneda*. *Hammonds*, 712 F. App'x at 854-55.

Recognizing that *Castaneda* patently contravenes *Carter*, a member of the Ninth Circuit—Judge Gould—has since made a convincing case for correcting the error, *United States v. Soto*, 519 F.3d 927, 936 (9th Cir. 2008) (Gould, J. concurring). Judge Gould's suggestion has been cited with approval by a subsequent panel of the Ninth Circuit. *United States v. Padilla*, 639 F.3d 892, 896 (9th Cir. 2011).

Judge Gould's concurrence described *Castaneda* as "a mistake waiting to be corrected," and expressed his "hope that [the Ninth Circuit will eventually] remedy the confusion caused by *Castaneda* and bring this circuit's jury instruction jurisprudence into complete harmony with the Supreme Court's mandate in *Carter*." *Soto*, 519 F.3d at 936 (Gould, J., concurring). He further explained, "While purporting to acknowledge Supreme Court authority [*Carter* and its progeny], our opinion in *Castaneda* effectively ignored it by holding that a model Ninth Circuit jury instruction regarding the presumption of innocence and the government's burden of proving guilt beyond a reasonable doubt 'sufficiently covered the substance of Castaneda's proposed'" *Carter* instruction. *Id.* Judge Gould explained that, "[i]n deciding *Carter*, however, the Supreme Court dismissed an almost identical 'presumption of innocence' jury instruction as 'no substitute for the explicit instruction that the petitioner's lawyer requested.'" *Id.* (quoting *Carter*, 450 U.S. at 304). After noting that there were two possible bases for the *Castaneda* decision (that

the requested instruction was adequately covered in other instructions or that it was harmless error), Judge Gould concluded, "[E]ither interpretation is inconsistent with the Supreme Court's guidance in *Carter* [and its progeny]." *Id.* at 936 n.1.

Three years later, in *Padilla*, a panel of the Ninth Circuit "agree[d]" with Judge Gould's assessment, declaring *Castaneda* "troublesome in many respects." *Padilla*, 639 F.3d at 896. However, it noted that "this case does not present the appropriate opportunity to revisit *Castaneda*" because "of the more expansive instruction provided in Padilla's case—one that conforms to the Supreme Court's dictate in *Carter*[.]" *Id.*[3]

Thus, the Ninth Circuit, has recognized that "*Castaneda* represents a mistake waiting to be corrected," *Soto*, 519 F.3d at 936, and "troublesome in many respects," *Padilla*, 639 F.3d at 896. Yet, the Eleventh Circuit here has not only embraced the erroneous reasoning of *Castaneda*, but created an even greater conflict with this Court's precedent.

2. The Eleventh Circuit has not only widened a circuit split by adopting the Ninth Circuit's faulty reasoning in *Castaneda*, but also expanded on that error—in direct conflict with *Griffin*—by applying its reasoning to a case where the jury instructions were not given prophylactically, but were necessary to cure an egregious invitation to draw an adverse inference from Mr. Hammonds' silence.

In addition to extending the "close enough" standard created by the Ninth Circuit in *Castaneda*, in direct conflict with *Carter*, to another circuit, the Eleventh

[3] At issue in *Padilla* was whether the trial judge was required to give the *Carter* instruction a second time, prior to deliberations.

Circuit has also expanded it in violation of *Griffin*. In *Castaneda*, the defendant merely sought a *Carter* instruction as a prophylactic measure. There was no underlying *Griffin* violation to cure. In Mr. Hammonds' case, there was a blatant *Griffin* violation, and the deficient instruction thus failed to comport with both *Carter* and *Griffin*.

In *Griffin*, the jury was instructed that "a defendant has a constitutional right not to testify," and the exercise of that right "does not create a presumption of guilt or by itself warrant an inference of guilt" or "relieve the prosecution of any of its burden of proof." *Griffin*, 380 U.S. at 610. Nonetheless, this Court held the instruction to be insufficient, because other instructions allowed the jury to "take that failure into consideration as tending to indicate the truth of [the State's] evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable." *Id.* Thus, an instruction that a defendant's decision not to testify does not "by itself warrant an inference of guilt" is not sufficient where the jury is *otherwise invited* to draw an adverse inference from that decision, as happened in Mr. Hammonds' case.

The Eleventh Circuit's decision also directly conflicts with this Court's precedent, by imposing a requirement that Mr. Hammonds prove that the faulty "curative" instruction "*caused* the jury to draw an adverse inference." *Hammonds*, 712 F. App'x at 854 (emphasis added). Nowhere in *Griffin* or *Carter* is there any indication that jury instructions themselves must *cause* the constitutional violation. Rather, purported "curative" instructions are required to do just that: cure error. As

is evident from *Griffin*, when an instruction intended to cure the error is insufficient, the constitutional violation continues. As in *Griffin*, the error here was not cured by the defective and constitutionally insufficient "curative" instruction.

The Eleventh Circuit's expansion of the Ninth Circuit's decision in *Castaneda* is far more dangerous to the Fifth Amendment rights of criminal defendants and disregards both *Griffin* and *Carter*, as *Castaneda* involved no comment on the defendant's silence—prosecutorial or otherwise. *Castaneda*, 94 F.3d at 596. In *Castaneda*, there was neither prosecutorial misconduct, nor any suggestion to the jury that it *should* draw an adverse inference from the defendant's silence and, thus, no constitutional violation to cure.

3. The First, Second, and Tenth Circuits' decisions.

Other circuits have come close to joining the Ninth and Eleventh Circuits in making *Carter* errors. However, the instructions approved in those cases did not ultimately offend this Court's precedents. In *United States v. Ladd*, 877 F.2d 1083 (1st Cir. 1989), the First Circuit found that *Carter* was satisfied by the following instruction: "The burden to prove he is guilty is on the government. He has no burden to prove he is not guilty. He has no burden to testify. He does not have to explain. He does not have to present any evidence. And the fact that the defendant does not do so *cannot even be considered by you* in arriving at your verdict." *Ladd*, 877 F.2d at 1089. Similarly, the Tenth Circuit approved an instruction informing the jury: "You *should not consider* the fact that the defendant did not testify in arriving at your verdict." *Welch v. City of Pratt, Kan.*, 214 F.3d 1219, 1221 (10th Cir. 2000) (emphasis

added). And, in an unpublished decision, the Second Circuit approved an instruction informing the jury that it "may not consider [the defendant's] decision [not to testify] *in any way, shape or form*." *United States v. Singh*, 1995 WL 595548 at *2 (2d Cir. 1995) (unpublished) (emphasis added). The same is true of the Eleventh Circuit's prior decision in *United States v. Russo*, 796 F.2d 1443 (11th Cir. 1986), which the *Hammonds* panel also cited. *Hammonds*, 712 F. App'x 853-54. As in *Ladd*, *Welch* and *Singh*, although not quoting the magic language of "no adverse inference," the approved instruction in *Russo* was broad enough to convey that message, instructing: "if a Defendant elects not to testify, you should not consider that *in any way* during your deliberations." *Id.* at 1454-55 (emphasis added).

In each of the foregoing decisions, the jury was ultimately instructed—in some form—that it could not consider *the defendant's lack of testimony – at all*. Conversely, Mr. Hammonds' jury was not instructed not to consider his lack of testimony, but only not to consider the "[s]tatements of counsel." Even if the jury disregarded the prosecutor's statement, it was not told it could not consider Mr. Hammonds' decision not to testify at all.

Additionally, and importantly, in each of the foregoing decisions approving wording not identical to the "no adverse inference" language of *Carter*, the circuits were merely addressing prophylactic instructions. Thus, they were engaged in a straightforward application of *Carter*, with no underlying *Griffin* violation to cure. Mr. Hammonds' case is vastly different. It involved a "flagrant" *Griffin* violation and

a constitutionally inadequate "curative" instruction. Thus, the Eleventh Circuit's error is not only in direct conflict with *Carter*, but also directly contravenes *Griffin*.

Rather than heeding the Ninth Circuit's subsequent cautions regarding *Castaneda*—or giving broader instructions like those approved in the other circuit precedent described above—the Eleventh Circuit has instead taken *Castaneda* one impermissible step further: allowing a jury instruction that both failed to satisfy *Carter* and, due to Mr. Valeska's "flagrant" prosecutorial misconduct, also failed to satisfy *Griffin*. This Court's holdings in *Griffin* and *Carter* squarely foreclose such an approach.

In denying Mr. Hammonds relief, the Eleventh Circuit eviscerated this Court's clear precedents in *Griffin* and *Carter*. The prosecutor egregiously called the jury's attention to Mr. Hammonds' decision not to testify, and invited the jury to draw an adverse inference from that decision. The Eleventh Circuit effectively held that the overall jury instructions were "close enough" to cure the prosecutor's egregious conduct because the jury was generally told it should "disregard" the prosecutor's comments, the instruction told the jury to make no presumption regarding Mr. Hammonds' guilt or innocence, and the jury was told that statements of counsel are not evidence. *Hammonds*, 712 F. App'x at 853-55.

As this Court has commanded, the precision and accuracy of jury instructions is "perhaps *nowhere more important* than in the context of the Fifth Amendment privilege against compulsory self-incrimination, since too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too

readily assume that those who invoke it are . . . guilty of crime . . . ." *Carter*, 450 U.S. at 302 (citation omitted) (emphasis added).

The Eleventh Circuit's misapplication of this Court's clear dictates in *Griffin* and *Carter* expands upon the Ninth Circuit's erroneous application of *Carter* in *Castaneda*. If this Court allows the Eleventh Circuit's decision in Mr. Hammonds' case to stand, not only *Carter*, but *Griffin* itself will be effectively eviscerated. The Eleventh Circuit has broken new ground in undermining this Court's *Griffin*/*Carter* precedents, in a manner no other circuit has done. Not only does the Eleventh Circuit's decision directly contradict this Court's precedent, it also magnifies the effective circuit split initiated by the Ninth Circuit in *Castaneda* and invites other circuits to follow suit—widening the error the Ninth Circuit itself has acknowledged needs fixing. This Court should grant certiorari not only to vindicate its precedents and the Fifth Amendment, but also to stop the misapplication of *Carter* already evident in *Castaneda* from now invading this Court's even more settled, and important, decision in *Griffin*.

II. This Court should also grant certiorari because the Eleventh Circuit's harmlessness determination is in direct conflict with this Court's decisions in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and *Kotteakos v. United States*, 328 U.S. 750 (1946), and because the harmlessness finding was inextricably bound up with the Eleventh Circuit's incorrect application of *Griffin* and *Carter*.

This Court should also grant certiorari because the Eleventh Circuit's harmlessness determination is in direct conflict with this Court's decisions in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and *Kotteakos v. United States*, 328 U.S. 750

(1946). Additionally, the harmlessness finding was inextricably intertwined with the panel's erroneous interpretation of *Griffin* and *Carter*. In other words, the panel found that the error was harmless, in large part, *because* it impermissibly found the jury instructions to be sufficient. Indeed, the Eleventh Circuit incorrectly stated that the instruction informed the jury to draw no presumption (which it patently did not), and found that other instructions sufficiently cured the error, in blatant violation of both *Carter* and, even more egregiously, *Griffin*. And, the Alabama Supreme Court on direct review also held "that the trial judge *corrected any harm* by giving *appropriate corrective instructions*." *Ex Parte Hammonds*, 777 So. 2d at 778 (emphasis added). But, as explained above, these findings patently contravene this Court's commands in *Griffin* and *Carter*, and expand on an already problematic misapplication of those precedents by the Ninth Circuit.

A. The direct conflict with *Brecht*.

The Eleventh Circuit erroneously assigned a more stringent standard than *Brecht* requires. In *Brecht*, this Court held that the most defendant-friendly standard of review for harmless error (the "harmless beyond a reasonable doubt" standard of *Chapman v. California*, 386 U.S. 18 (1967)) was inapplicable on collateral review. *Brecht*, 507 U.S. at 622-23. Instead, such error is assessed using the slightly less defendant-friendly standard set forth in *Kotteakos*. *Brecht*, 507 U.S. at 622-23.

In making its harmlessness determination, the Eleventh Circuit discussed this Court's decision in *Fry v. Pliler*, 551 U.S. 112, 119-20 (2007), which applied *Brecht*. *Hammonds*, 712 F. App'x at 849-50. While it is true that, in *Fry*, this Court declared

that *Brecht* remained the harmless error standard after AEDPA, it also held that *Brecht* merely "subsumed" AEDPA/*Chapman*. *Id.* at 119-20. What *Fry* did not hold was that *Brecht* either represents a *markedly* higher standard than under AEDPA/*Chapman* or a nearly insurmountable burden for petitioners to overcome.

Fry's author, Justice Scalia, subsequently noted that this Court has adopted at least four standards for assessing harmless error. *United States v. Dominguez Benitez*, 542 U.S. 74, 86 (2004) (Scalia, J., concurring). While, of the four, *Chapman* is the most defendant-friendly, Justice Scalia explained that *Brecht* ranks second because, under it, a petitioner is not required to demonstrate that, absent the constitutional violation, the outcome of his trial would have been different. *Id.* Rather, as the Eleventh Circuit previously recognized, he need only prove that the constitutional error "*contributed to* the conviction." *Hittson v. GDCP Warden*, 759 F.3d 1210, 1234 (11th Cir. 2014).

As the partial concurrence in *Fry* articulated, "[T]he *Brecht* standard . . . imposes a significant burden of persuasion *on the State*." *Fry*, 551 U.S. at 122 (Stevens, J., concurring in part) (citing *Kotteakos*). "[T]he question is not were they [the jury] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or *reasonably may be taken to have had* upon the jury's decision." *Kotteakos*, 328 U.S. at 764. (emphasis added). Where there is constitutional error to begin with, a conviction can only stand where the reviewing court "is *sure* that the error *did not influence the jury*, or had but *very slight* effect." *Id.* (emphasis added).

The panel inflated Mr. Hammonds' burden under *Brecht*, downplayed the harm flowing from Mr. Valeska's misconduct and the trial court's deficient instruction, and overemphasized the strength of the evidence. In so doing, the panel failed to recognize that Mr. Hammonds met the *Brecht* standard, in direct conflict with this Court's precedent.

B. The direct conflict with *Kotteakos*.

The panel disregarded both the instruction's use of the term "failure," and the prosecutor's argument that Mr. Hammonds "couldn't keep his stories straight in prison." *Hammonds*, 712 F. App'x at 856-57. The opinion incorrectly dismissed these concerns as not violating Mr. Hammonds' Fifth Amendment right, and failed to consider them among the totality of the circumstances. *Id.* As shown below, this places the Eleventh Circuit's decision in direct conflict with this Court's holding in *Kotteakos*.

While the inclusion of the phrase "*failure* to testify" in the instruction does not alone create constitutional error, it is, as the Seventh Circuit has noted, "problematic because it [signals that the defendant] has neglected a responsibility to present testimony and other evidence." *United States v. Skidmore*, 254 F.3d 635, 640 (7th Cir. 2001). If a mere prophylactic instruction was at issue, this wording would not be as problematic. However, because Mr. Valeska not only noted that Mr. Hammonds was not testifying, but argued that he *should* do so, the inclusion of "failure" in the instruction *amplified* the effect of the misconduct.

The same is true of Mr. Valeska's argument that Mr. Hammonds "couldn't keep his stories straight in prison." While this comment, standing alone, was not a Fifth Amendment violation, it reminded the jury that it had not heard Mr. Hammonds' story *from Mr. Hammonds*. Although the panel effectively dismissed this contention as speculative, *Hammonds*, 712 F. App'x at 857, assessing a jury's thoughts about evidence is, as Chief Justice Rehnquist articulated, always speculative. *Sullivan v. Louisiana*, 508 U.S. 275, 284 (1993) (Rehnquist, C.J., concurring) ("[A]ny time an appellate court conducts harmless-error review it necessarily engages in some speculation as to the jury's decision-making process; for in the end no judge can know for certain what factors led to the jury's verdict.").

Despite the severity of the prosecutor's misconduct, the Eleventh Circuit, in direct conflict with this Court's decision in *Kotteakos*, considered each concern separately, rather than as part of the totality of the circumstances. *Kotteakos*, 328 U.S. at 764. Because there remained a significant risk that the jury considered Mr. Hammonds' decision not to testify, he paid "a court imposed price," *Carter*, 450 U.S. at 300, and the constitutional error "*contributed to* the conviction." *Hittson*, 759 F.3d at 1234 (emphasis added).

The Eleventh Circuit conducted its harmlessness assessment in conflict with *Kotteakos* by wrongly declaring the evidence of guilt "overwhelming," *Hammonds*, 712 F. App'x at 858, based on a cursory—and incomplete—accounting of the record, and ignored the doubt injected by trial counsel. Further, it paid no heed to the fact

that at least one juror was not so overwhelmed. As noted above, during jury deliberations at the guilt phase, the jury asked two questions of the trial court, both involving the strength or existence of evidence. First, the jury asked whether a fingerprint had been found on the toilet seat in Ms. Mitchell's home (none had been). Second, it asked when the bedroom telephone bearing Mr. Hammonds' thumbprint was installed. The only reason for the jury to have asked this was to assess the reasonableness of trial counsel's argument that Mr. Hammonds could have handled the phone while moving the furniture. Had the evidence been overwhelming, such questions would not have been asked.

Finally, the Eleventh Circuit ignored the most compelling evidence that the case was not overwhelming: Mr. Valeska's willingness to commit "flagrant" prosecutorial misconduct in violation of the Constitution—and court orders—not once but twice. Common sense and trial experience holds that when the evidence in a case is overwhelming, a prosecutor doesn't engage in desperate and unethical behavior to salvage it.

As this Court has cautioned, in assessing the harmlessness of error, "[t]he crucial thing is the impact of the thing done wrong on the minds of other men, *not on one's own*, in the *total setting*." *Kotteakos*, 328 U.S. at 764 (emphasis added). By ignoring exculpatory evidence and juror (and Mr. Valeska's) doubts, the panel overvalued the evidence of guilt and acted in direct conflict with *Kotteakos*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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