No. 17-9046

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

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PETITIONER'S REPLY TO COMMISSIONER'S BRIEF IN OPPOSITION TO PETITION FOR 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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I. The Commissioner's reliance on the fact that Mr. Hammonds' trial counsel did not specifically request a "no-adverse-inference" instruction serves only to demonstrate the Commissioner's, and the Eleventh Circuit's, misunderstanding of the interplay between this Court's holdings in *Griffin v. California*, 380 U.S. 609 (1965) and *Carter v. Kentucky*, 450 U.S. 288 (1981).

The Commissioner's argument that the Eleventh Circuit's decision does not expand upon the Ninth Circuit's direct contravention of this Court's precedent in *United States v. Castaneda*, 94 F.3d 592 (9th Cir. 1996), misconstrues completely this Court's decisions in *Carter* and *Griffin*.

The Commissioner places great emphasis on the fact that Mr. Hammonds' trial counsel did not request a "no-adverse-inference" instruction, and repeatedly notes that, under *Carter*, a court is only required to give a "no-adverse-inference" instruction when requested. Commissioner's Brief in Opposition (Br. in Opp'n) at 18-19, 21-22. Further attempting to distinguish the Ninth Circuit's erroneous application of *Carter* in *Castaneda*, the Commissioner claims that it has no "application to the case currently before this Court because, as the Eleventh Circuit found, there was no *Carter* violation," while reemphasizing that "there is no *Carter* violation in this case because [Mr.] Hammonds did not request a 'no-adverse-inference' instruction." Br. in Opp'n at 21-22.

This argument, like the Eleventh Circuit's opinion, fails to recognize that *Carter*, standing alone, implicates only requests for *prophylactic* instructions, and thus represents an attempt to distract this court from the central issue at hand. If this case had involved the mere failure to give a prophylactic instruction informing the jury not to take Mr. Hammonds' lack of testimony into account against him, there would have been no *Carter* violation.

Unlike in *Carter*, however, in Mr. Hammonds' case, there was a blatant *Griffin* violation: Valeska intentionally and dramatically drew attention to Mr. Hammonds' decision

not to testify, and invited the jury to draw a negative inference from that lack of testimony, pronouncing, "Let him [Mr. Hammonds] testify." Here, *Griffin* error was already present, and the trial court had a responsibility to cure that error via a proper instruction that the jury was to draw no adverse inference–something the instruction patently failed to do. The deficient instruction therefore failed to comport with not only *Carter*, but also *Griffin*, and the circuit split is far from illusory. As detailed in the petition, the Ninth Circuit's *Castaneda* decision conflicts with this Court's commands in *Carter*, as the Ninth Circuit itself has since recognized. *United States v. Soto*, 519 F.3d 927, 936 (9th Cir. 2008) (Gould, J., concurring); *United States v. Padilla*, 639 F.3d 892, 896 (9th Cir. 2011).

Furthermore, the Eleventh Circuit's decision in Mr. Hammonds' case not only expands that same misapplication of *Carter*, it also blatantly ignores this Court's commands in *Griffin*, as detailed in the petition and below.

Because there was already *Griffin* error injected into the trial, and Mr. Hammonds requested a mistrial, Mr. Hammonds had no obligation to object to the trial court's faulty instruction. He had already requested a mistrial, and told the court that any instruction would be useless in curing the error. Mr. Hammonds' trial counsel specifically criticized merely giving an instruction, emphasizing it would be futile because, "You can't unring that bell." It would make no sense to require trial counsel, after moving for a mistrial and informing the court that no instruction would be helpful, to then seek improved wording of an instruction trial counsel had already proclaimed would be worthless. And Alabama law makes this clear.

The Alabama Court of Criminal Appeals has explained that, when a defendant moves for a mistrial, he is not required to ask for a curative instruction, much less correct the court's rendering of a faulty one. *Harrison v. State*, 706 So. 2d 1323, 1326 (Ala. Crim. App. 1997).

"A motion for mistrial includes all lesser prayers for relief." *Id.* (citations omitted). "[W]hen a litigant makes a motion for a mistrial immediately after the question or questions are asked that are the grounds made the basis of the motion for the mistrial, and the grounds for the motion are clear and definite, then the motion for mistrial will preserve for review lesser prayers for relief, such as an objection . . . ." *Id.* (citation omitted).

The federal system recognizes this as well. In *United States v. Taylor*, 514 F.3d 1092, 1095-96 (10th Cir. 2008), then-Judge Gorsuch identified "two extremes" in such cases: one where a defendant contemporaneously moves for a mistrial, and one where there is no objection at all. In *Taylor*, the defendant was "somewhere between those two extremes," insofar as he did object, but did not move for a mistrial prior to the court giving a curative instruction—one about which he lodged no complaint. Mr. Hammonds' case is the first extreme, as trial counsel promptly moved for a mistrial, stating clearly the grounds for his motion, and objected to the adequacy of any instruction. Thus, if any cure was to be had in the giving of an instruction, it was the trial court's responsibility to effectuate it properly. This, the trial court patently failed to do.

In *Harrison*, "the prosecutor made a direct comment on Harrison's failure to testify, and there was no prompt curative instruction given to the jury." 706 So. 2d at 1327. Thus, the defendant was entitled to a new trial. Mr. Hammonds' case is the same. Because the instruction failed to inform the jury that it was to draw "no adverse inference" from Mr. Hammonds' decision not to testify, "there was no prompt curative instruction given to the jury." *Id.* (emphasis added). And, as in *Harrison*, trial counsel was under no obligation to assist the court in fashioning an instruction, when he had already moved for a mistrial and noted that no instruction could cure the misconduct, thus preserving all lesser relief.

II. The separate jury instructions upon which the Commissioner, and the panel, rely also did nothing to cure the harm done by the prosecutor's statements, and the reliance on those instructions again demonstrates the violation of this Court's clear command in *Griffin*.

The Commissioner argues, and the panel additionally found, that separate jury instructions helped to cure the error. Br. in Opp'n at 18-19; *Hammonds*, 712 F. App'x at 855-56. For example, the Commissioner notes that the trial court instructed the jury that Mr. Hammonds' "failure to make such a request (to testify) shall not request any presumption against him nor be the subject of any comment by counsel; that is the State." Br. in Opp'n at 18 & n.2. However, neither this instruction, nor any other instruction regarding the State's burden, can serve as a substitute for (or excuse the failings of) the deficient instruction given at the moment of Valeska's flagrant misconduct.

First, the jury instructions were given well after the harmful statements. Even a proper routine instruction on the general right not to testify, given at the close of trial and not at the time of the misconduct, is insufficient to cure the violation. *See Girts v. Yanai*, 501 F.3d 743, 759 (6th Cir. 2007) (explaining that improper prosecutorial argument referring to the defendant's failure to testify was not cured by a jury instruction on that issue, because the instruction was not given promptly after the improper statements). Second, as with the other failed instruction, it was facially deficient in that it again referenced Mr. Hammonds' decision not to testify as a "failure." Third, it only referenced "presumption" and did not alert the jury that it could draw "no adverse inference."

Finally, and most importantly, it did not tell the jury that Mr. Hammonds' decision not to testify "shall not *create* any presumption against him." Rather, the instruction stated only that his "failure" to testify "shall not *request* any presumption against him." By

misstating the instruction in such a fashion, it effectively became worthless, as no jury could possibly have known what the court was trying to convey.

The Commissioner even admits that erroneousness of the jury instruction, but claims this was a mere "misstatement" on the part of the trial court, which likely *meant* to say "shall not *create* any presumption." Br. in Opp'n at 18 & n.2. Effectively, this is what the Commissioner, and the panel, are contending about the "guilt or innocence" failed jury instruction as well -- that it was apparently "close enough" because it may have been a slip of the tongue, so reviewing courts should simply rubber-stamp the matter because they know what the trial court *meant*.

But this is not the law. Indeed, if a trial court incorrectly stated that a person was "guilty until proven innocent," a reviewing court would know that the trial judge simply misspoke. This would, however, hardly render such an instruction valid. Juries are presumed to follow the court's instructions. *CSX Trans., Inc. v. Hensley*, 556 U.S. 838, 841 (2009) (citation omitted). That, of course, is the crux of the problem in this matter.

Pursuant to *Griffin*, Mr. Hammonds was entitled to a trial free from any negative prosecutorial comment about his decision not to testify. 380 U.S. at 610. Once such an adverse inference is injected into the trial, per *Carter*, the harm may be cured by a jury instruction telling the jury that it must draw "no adverse inference" from his decision not to testify. 450 U.S. at 301.

As the Alabama Supreme Court has stated, "anything less can in no way cure the error." *Ex parte Wilson*, 571 So. 2d 1251, 1265 (Ala. 1990) (emphasis added). Yet Mr. Hammonds received exactly that: less. The trial court failed to properly instruct the jury that it should draw *no adverse inference* from Mr. Hammonds' decision not to testify. If, as this Court and countless others have held, juries are presumed to follow the instructions,

there can be no reasonable assurance that the jury did not draw a negative inference from Mr. Hammonds' decision not to take the stand.

The Commissioner further credits, as did the panel, the fact that the trial court instructed the jury properly regarding overall burden of proof, used the language of "the jury should disregard," and gave the general instruction that statements of counsel are not evidence. Br. in Opp'n at 19; *Hammonds*, 712 F. App'x at 855-56. This, however, is not what this Court's precedent requires. Rather, the correctness 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).

If the Commissioner and the panel are correct, then this Court decided *Griffin* incorrectly. 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." 380 U.S. at 610. Nonetheless, this Court held these instructions *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 additional correct instruction, including 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.

III. By ignoring the jury's two guilt-phase questions and the totality of the evidence undermining the State's case, the Commissioner's argument echoes the panel's incorrect harmlessness conclusion, which was inextricably bound up with its incorrect determination that the trial court's instructions sufficiently "cured" the harm.

The Commissioner also emphasizes the panel's finding of harmlessness. Br. in Opp'n at 24-25. In so doing, the Commissioner makes two of the same mistakes the panel made. First, he fails to recognize that the Eleventh Circuit's harmlessness finding was inextricably bound up with its erroneous determination that the jury instructions were, in fact, curative. *Hammonds*, 712 F. App'x at 854. Second, he repeats the panel's incorrect conclusion that the evidence of guilt "overwhelming," *id.*, cursorily describing the evidence supporting Mr. Hammonds' guilt, while ignoring the evidence undercutting the state's case and the questions the jury asked during deliberations. It cited Mr. Hammonds' delivery of bedroom furniture to the victim's home the day before the murder, small amounts of blood[1] and semen that matched his DNA, his purported possession of a diamond ring similar to one stolen from the victim,[2] and his thumbprint "on the telephone in [the victim's] bedroom." *Id.*

The panel, however, failed to address the full context of this evidence. And the Commissioner makes the same mistake, taking liberties with the evidence and stating

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[1] The panel's characterization of Mr. Hammonds' blood in the townhouse as "blood spatters," is technically correct. However, there were not large amounts of Mr. Hammonds' blood at the scene. Rather, out of the large amount of blood tested, only five small "spatters" matched Mr. Hammonds.

[2] As noted in Mr. Hammonds' application for a COA, COA Application at 33-35, Valerie Rivers has since *recanted* her testimony. And, as raised in the Amended § 2254 petition, Am. Pet. at 19, 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 originally claimed she saw the ring when Mr. Hammonds showed it to White). While Mr. Hammonds' request for a COA on this issue, pursuant to *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), was denied, the panel saw fit to cite her now-highly-suspect testimony in denying relief.

certain allegations as conclusive fact, without recognizing how those allegations have been undermined by other evidence.

A. The Commissioner overstates the case against Mr. Hammonds.

Although Mr. Hammonds delivered furniture to the victim's home prior to the murder, the delivery process included Mr. Hammonds returning to the delivery truck *to cut wood for the bedframe*. Finding Mr. Hammonds' thumbprint and small amounts of his blood at the crime scene, then, did little to establish his guilt. Conversely, while investigators found blood on the victim's fingernail, it was never tested to determine its source—a fact ignored by the Commissioner and the panel but of which the jury was aware.

Both the Commissioner and the panel also ignored investigative sloppiness casting doubt on the evidence, including the presence of a "Domino's" restaurant cup adjacent to the victim's head that was never tested for DNA, hair fragments, or secretions.

Mr. Hammonds' thumbprint on the telephone was also of low probative value. As trial counsel posited to the jury, Mr. Hammonds may well have lifted the bedroom phone off the floor when delivering the bedroom furniture. Further, while only one print was identified as belonging to Mr. Hammonds, the source(s) of eleven other tested fingerprints found in the apartment did not match Mr. Hammonds.

While Mr. Hammonds is black, evidence pointed to a white perpetrator. An FBI profile of the likely assailant concluded he was a white male. Hair and other biological material found at the scene were from a Caucasian. And, the victim had been sexually assaulted by, and continued to fear, a white male patient at the hospital where she worked.

Additionally, the Commissioner points out that one witness claimed Mr. Hammonds had stated that he "seemed to entertain a special animosity toward Caucasian women and liked to hurt them sexually." Br. in Opp'n at 9. It is true that Valeska repeatedly injected

race into the trial by asking a particular witness (Malcolm Wells) what Mr. Hammonds had purportedly told him about what he said "he liked to do, if anything, to white Caucasian women." Valeska followed up with repeated questions about whether the two had "anymore (sic) discussions at that time about White women," and what Mr. Hammonds "likes to do with White women." However, Wells' testimony was discredited as being quite embellished. For example, Wells claimed to have met Mr. Hammonds at a club that had "bikini dancers." However, the owner of the club (Foy Ready) testified that there had been no bikini dancers at the club.

Moreover, the Commissioner presents as fact that Mr. Hammonds smoked a cigarette over the victim after the murder, flicking cigarette ashes onto body. Br. in Opp'n at 12. Again, the Commissioner fails to note that this was based solely on the testimony of one officer who claimed to have seen ashes on the victim's body. However, this testimony was highly discredited, as it was totally uncorroborated. Even the medical examiner who initially examined and inventoried Ms. Mitchell's body, testified that he neither saw nor recorded any such ashes.

Tellingly, during guilt-phase deliberations, 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. There had *not*. Second, it asked at what point the telephone bearing Mr. Hammonds' thumbprint had been installed.[3] The only reason for the jury to have asked this was to assess the reasonableness of trial

[3] The victim's fiancé provided conflicting/confusing testimony regarding when the telephone had been installed, first testifying that it had been there prior to the date of the murder; later that he could not remember when it had been installed; and finally that he believed it had not been installed prior to delivery of the furniture.

counsel's suggestion that Mr. Hammonds touched the phone while moving the furniture, injected by trial counsel immediately before Valeska asserted that Mr. Hammonds should testify.

These evidentiary questions were clearly important to one or more jurors. Had the jury been overwhelmed by the evidence, including the presence of Mr. Hammonds' DNA,[4] such questions would not have been asked.

The Commissioner, however, claims that Mr. Hammonds' contention regarding these two jury questions should be dismissed as "pure speculation." Br. in Opp'n at 25. However, as Chief Justice Rehnquist emphasized, "[A]ny time an appellate court conducts harmless-error review it necessarily engages in some speculation as to the jury's decisionmaking process; for in the end no judge can know for certain what factors led to the jury's verdict." *Sullivan v. Louisiana*, 508 U.S. 275, 284 (1993) (Rehnquist, C.J., concurring).

Additionally, although it may appear to present-day jurists that DNA evidence renders any trial errors harmless, DNA was relatively new at the time of Mr. Hammonds' trial. Indeed, trial testimony highlighted this fact: when asked whether she believed in DNA evidence, a medically aware nursing assistant who worked with the victim stated, "I can't say that I do."

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 v. United States*, 328 U.S. 750, 764 (1946) (emphasis added). By ignoring exculpatory evidence and indications of juror doubts, the panel overvalued (and the

[4] The DNA evidence included a "tissue"/"paper towel" not found until four days after the incident.

Commissioner overvalues) evidence of guilt, particularly in light of the newness of DNA evidence at the time.

B. Although chastised by the Eleventh Circuit for doing so, the Commissioner continues to excuse Valeska's misconduct.

Not only does the Commissioner overstate the "overwhelming" nature of the evidence, but he continues—as he was severely chastised by the Eleventh Circuit panel for doing on appeal—to downplay the egregiousness of Valeska's misconduct, blatantly drawing attention to Mr. Hammonds' election not to testify, and inviting the jury to draw an adverse inference from that election.

The Eleventh Circuit not only properly characterized Valeska's conduct as "flagrant," it also noted that the misconduct was intentional and in "violation of the court's pre-trial order—an order that should not have even been necessary in the first place, since it is a basic tenet of constitutional law that the government may not use against the defendant his decision not to testify." *Hammonds*, 712 F. App'x at 851. The panel further noted, "[T]he instruction really should not have been necessary in Hammonds's case, since Valeska had been reprimanded in prior cases for engaging in precisely the same unconstitutional and unethical behavior." *Id.*

The panel did not stop at criticizing Valeska. It also chastised the Commissioner for attempting to downplay and excuse Valeska's misconduct, emphasizing that the "insistence on defending this improper conduct implicitly condones the unethical tactics that Valeska used, and it invites the State's current crop of prosecutors to likewise engage in such unsavory conduct." *Id.* at 851-52. Specifically, the panel condemned the Commissioner's characterization of Valeska's comment as "a few stray words" and an "offhand comment." *Id.*

Undeterred by the Eleventh Circuit's reprimand, the Commissioner boldly reasserts the exact same language before this Court. To the contention that Valeska clearly felt he needed to bolster his case by drawing attention to Mr. Hammonds' lack of testimony, the Commissioner not only again calls the contention "mere speculation," but again insists Valeska's misconduct was nothing "more than a few stray words." Br. in Opp'n at 25.[5]

Of most significance however, is that the finding of harmlessness was—both in the Eleventh Circuit and the Alabama Supreme Court—in large part based upon the erroneous finding that the jury instructions complied with this Court's commands in *Griffin* and *Carter*. Thus, the Commissioner's attempts to excuse the misapplication of *Brecht v. Abrahamson*, 507 U.S. 619 (1993) and *Kotteakos* also fall short.

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*. *Hammonds*, 712 F. App'x at 853-56. And the Alabama Supreme Court also held "that the trial judge corrected any harm by giving *appropriate corrective instructions*." *Ex Parte Hammonds*, 777 So. 2d at 778. But, as explained above, if the instructions in this case were appropriate and truly curative, then this Court's decision in *Griffin* cannot stand.

Because the instructions patently contravene those required by *Griffin* and *Carter*, and were inextricably linked with the lower court findings of harmless error, this Court should not, as the Commissioner suggests, decline to grant certiorari on the basis of harmlessness. Rather, this Court should grant certiorari in order to vindicate *Griffin* and

[5] In the Commissioner's Statement of the Case, he could not bring himself to acknowledge that Valeska had engaged in improper conduct at all, stating Valeska "*purportedly* made two improper comments." Br. in Opp'n at 1 (emphasis added).

Carter and quell the expansion of the circuit split created by the Ninth and Eleventh Circuits' misapplication of those precedents in *Castaneda* and *Hammonds*.

IV. The Commissioner's continued attempts to "correct" the record serves only to highlight the egregiousness of the flawed jury instruction.

A. There was no alteration of the official record, and no reason to believe the jury heard anything other than what the settled record reflects.

No doubt in light of the severe deficiency of the jury instruction, the Commissioner attempts to convince this Court that the established record was "corrected," or at least imply that, if it was not – it was inaccurate. Br. in Opp'n at 2 & n.1, 5 (contending that a purported "Certificate of Replacement Page to the Official Record on Appeal" filed by a court reporter different from the one who originally transcribed and certified the record represents the "correct" version of the record). As this Court has made clear, however, "the record under review [in the federal courts] is limited to the record in existence at that same time *i.e.*, the record before the state court." *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011).

In Mr. Hammonds' case, after three Justices of the Alabama Supreme Court found the jury instruction failed to cure Valeska's blatant misconduct, the original trial court judge attempted to have a new court reporter[6] alter the record by filing a purported "Certificate of Replacement Page to the Official Record on Appeal" with the Alabama Supreme Court. However, this was not the official record upon which the Alabama courts relied, effectuated no change to the record, and was ignored by the Alabama Supreme Court. Thus, this desperate attempt to alter the record failed to effectuate any such change. Additionally, there

[6] The purported "Certificate of Replacement Page to the Official Record on Appeal," was created by "Carla H. Woodall, Special Roving Court Reporter for the Twentieth Judical [sic] Circuit of the State of Alabama[.]" But, the official transcript, accepted and relied upon by every court to have considered this case, was created by court reporter William R. Moeglin.

is no reason why this (or any) Court should believe that the jury heard anything differently than what the original court reporter transcribed and the state courts relied upon.

1. The state court record never changed.

The Alabama Supreme Court relied on the record as it was originally transcribed by the court reporter at the time of the original proceedings. One of the dissenting justices based his determination regarding the deficiency of the instructions on the very language the later court reporter sought to alter. *Ex parte Hammonds*, 777 So. 2d 777, 780 (Ala. 2000) (Johnstone, J. dissenting). After the new "special roving" court reporter filed the purported "replacement page," the Alabama Supreme Court denied Mr. Hammonds' application for rehearing, making no alterations to the majority or dissenting opinions. *Id.* at 777 (noting denial of rehearing). Thus, in compliance with its own rules,[7] the Alabama Supreme Court made no change to the official record. The Eleventh Circuit panel, recognizing this Court's clear mandate in *Pinholster*, came to this same conclusion: no change to the record was ever made. *Hammonds v. Comm'r*, 712 F. App'x 841, 848-49 (11th Cir. 2017) (citing *Pinholster*, 563 U.S. at 182). This Court should similarly ignore the Commissioner's continued attempt to alter the record.

[7] Rule 10(g) of the Alabama Rules of Appellate Procedure provides the means by which a transcript and record in a criminal appeal can be supplemented or corrected. The rule permits such correction pursuant to the timely request of either party, or by the appellate court, "on motion of a party or on its own initiative[.]" Ala. R. App. P. 10(g). Neither party, nor the Alabama Supreme Court, ever requested any change. While an applicant seeking rehearing can challenge the facts as stated in the Court's opinion, or offer his or her own version of the facts, Ala. R. App. P. 40(e), this would not effectuate a change to the record

2. There is no reason to believe the initial transcript was erroneous, or that the jury heard anything different than what the official record reflects.

By conclusorily stating that the purported "replacement page" represents the "actual[]" version of the record, Br. in Opp'n at 2 n.1, the Commissioner apparently hopes that—even if this Court declines the improper (under *Pinholster*) invitation to find the official record was altered—it will subconsciously believe the trial court did, in fact, use the word "inference" instead of "innocence." However, the court reporter who created—and verified the accuracy of—the original transcript transcribed, "guilt or innocence."[8] Thus, there is no reason to believe the jury heard what the "special roving court reporter" claimed to have heard when listening for—and likely hoping to hear—the word "inference." Rather, the jury naturally heard what the original court reporter transcribed: that the jury was to draw merely "no presumption of guilt or innocence"[9] from Mr. Hammonds' decision not to testify—a jury instruction that fell far short of curing the error this Court condemned in *Griffin*.

CONCLUSION

Nothing in the Commissioner's Brief in Opposition alters either the Eleventh Circuit's direct contravention of this Court's precedents, or the existence of, and expansion upon, the circuit split begun by the Ninth Circuit in *Castaneda*. This Court should grant certiorari to stop expansion of the split, and protect the integrity of its holdings.

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[88] Further, there was never an evidentiary hearing, and no court, not even the trial court, certified that there was any error. Moreover, a representative from Mr. Hammonds' legal team was unable listen to the tape because—after the special court reporter obtained it—it went missing, thus eliminating any possibility of confirming or refuting the allegation that the transcript was inaccurate.

[9] Indeed, because the trial court failed to give a proper "no adverse inference" instruction—and employed the phrase "guilt or…"—it is only natural for the judge to have stated—and the jury to have heard—"guilt or innocence." The two words go together as naturally as "peanut butter" and "jelly."

Respectfully submitted,

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