No. 25-5374

ORIGINAL

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 Alabama Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Mr. Artez Hammonds, Z-630
Holman Correctional Facility
Holman 3700
Atmore, AL 36503

Filing *pro se*

—Oral Argument Requested—

CAPITAL CASE

QUESTIONS PRESENTED

1. Given an expanding circuit, and now state court, split regarding whether, under *Griffin v. California*, 380 U.S. 609 (1965) and *Carter v. Kentucky*, 450 U.S. 288 (1981), jury instructions which omit the "no adverse inference" language—and do not otherwise cover it— can "cure" a prosecutor's willful invitation that the jury draw such a negative inference, should this Court grant certiorari to both resolve the split, and protect the integrity of this Court's holdings in *Griffin* and *Carter*?

2. Because the Alabama courts have now been presented with an opportunity to address, and remedy, the major due process concerns raised by Justice Sotomayor in *Townes v. Alabama*, 139 S.Ct. 18, 20 (2018) (Sotomayor, J. statement regarding denial of certiorari), should this Court grant certiorari to vindicate federal due process, equal protection, and fundamental fairness, particularly in light of the fact that the Alabama Courts have recently granted relief to appellants who faced far lesser violations of their Sixth Amendment right against self-incrimination than did Mr. Hammonds?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

LIST OF RELATED CASES

- *Hammonds v. State*, 777 So. 2d 750 (Ala. Crim. App. 1999)
- *Ex parte Hammonds*, 777 So. 2d 777 (Ala. 2000)
- *Hammonds v. State*, CR-02-0143, slip op. (Ala. Crim. App. March 11, 2005)
- *Ex parte Hammonds*, writ denied, no opinion (Ala. Aug. 19, 2005)
- *Hammonds v. Allen*, 849 F. Supp. 2d 1262 (M.D. Ala. 2012)
- *Hammonds v. Comm'r, Ala. Dep't of Corrs.*, 712 F. App'x 841 (11th Cir. 2017)
- *Hammonds v. Dunn*, 586 U.S. 840 (2018)

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

OPINIONS BELOW

The Alabama Supreme Court denied my petition for an original writ of certiorari on April 1, 2025. A copy of the order is attached as Appendix A.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

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.

STATEMENT OF THE CASE

Before my trial, my trial counsel, citing prosecutor Doug Valeska's long history of misconduct, filed pretrial motions in limine, including one asking the

court to order Valeska to make no references to my decision not to testify.[1] Trial counsel explained, "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."[2] Over Valeska's vociferous objection, noting that he was well aware of his constitutional obligations as a prosecutor, the trial court granted the motion.[3]

Despite both the trial court's clear directive, and Valeska's assurances of his proper conduct as a prosecutor, Valeska nonetheless took the first chance he had to not only comment on my decision not to testify, but to also signal to the jury that I should testify and explain my version of the evidence, stating, "Let him [Mr. Hammonds] testify."[4] The court denied my motion for a mistrial,[5] merely reprimanding Valeska and giving a "curative" instruction that was legally incorrect.[6] The 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

---

[1] Vol. 2, C.263; Vol. 13, R.530-31. (For ease of reading, record cites are provided in footnotes, and are to the federal habeas corpus checklist record utilized in federal court during 28 U.S.C. § 2254 proceedings (*Hammonds v. Allen,* Case No. 1:05–cv–831–MEF; 849 F. Supp.2d 1269, 2012 WL 1030089, at *30 (M.D. Ala. Mar. 27, 2012). However, the State Court record citations also follow each checklist citation).
[2] Vol. 13, R.527-28.
[3] *Id.*, R.534.
[4] Vol. 25, R.219.
[5] *Id.*, R.227.
[6] *Id.*, R.226-27.

himself, and that no *presumption of guilt or innocence* of any kind should be drawn from his failure to testify."[7]

Valeska committed further misconduct when, again despite a trial court order forbidding such a comment, he argued in closing, absent context or evidentiary support, that I "couldn't keep [his] stories straight in prison,"[8] intimating I had told different versions of events and, thus, should have told my version of events to the jury.

REASONS FOR GRANTING THE PETITION

I. This Court should grant an original writ in order to resolve a growing split between both circuit courts of appeal, and now the Alabama courts, vindicate this Court's longstanding holdings in *Griffin* and *Carter*, and ensure the proper application of constitutional law in courts of inferior jurisdiction.

As discussed above, courts have been disconcerted, but unfortunately not aghast enough, by the prosecutor, Doug Valeska's, abhorrent behavior in my case. Indeed, even on direct appeal, though the Alabama Supreme Court affirmed my conviction, three Justices of the Alabama Supreme Court dissented, contending I should be entitled to a new trial due to Valeska's "flagrant" misconduct, as explained herein. *See Ex parte Hammonds*, 777 So. 2d 777 (Ala. 2000) (Houston, Lyons and Johnstone, JJ., dissenting).

---

[7] *Id.*, R.228 (emphasis added).
[8] Vol. 34, R.857.

In federal court, I was again denied relief, but that denial was due in large part to the significant constraints placed on the federal courts in habeas corpus cases, pursuant to the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. Section 2254. *Hammonds v. Comm'r, Ala. Dep't of Corrs.*, 712 F. App'x 841, 852 (11th Cir. 2017). But in denying relief, the Eleventh Circuit misapplied the Alabama Supreme Court's precedent in a manner which could well lead future courts to conclude that this Court had adopted the same faulty reasoning. That reasoning, however, is so patently incorrect that even the Ninth Circuit Court of Appeals, which initially employed the same faulty analysis, has since criticized its own reasoning, with a later panels calling upon the circuit to address the matter en banc in order to correct the mistake, so that the constitutional protections against prosecutorial comment on an accused's right to silence is not damaged by the faulty reasoning the prior panel employed. Yet, the Eleventh Circuit not only employed the same faulty reasoning as the original Ninth Circuit panel, but it actually relied upon the case the Ninth Circuit itself has since cautioned it almost assuredly decided (and indeed did decide) incorrectly.

A. **The Eleventh Circuit, and the Ninth before it, misinterpreted not one, but two of this Court's precedents. In so doing, those circuits eviscerated both the clear commands of this Court, and the constitutionally sacred right to decline to testify against onesself.**

In addressing this claim on appeal in federal habeas proceedings, the Eleventh Circuit correctly held that Valeska's conduct was egregious.

Hammonds, 712 F. App'x at 851-52 (recognizing Mr. Valeska's "flagrant" misconduct that "plainly violated" my Fifth Amendment right against self-incrimination, and Mr. Valeska's extensive history of such behavior).[9] Despite recognizing the error, and expressing its "tempt[ation]" to grant me 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 v. California*, 380 U.S. 609 (1965) and *Carter v. Kentucky*, 450 U.S. 288 (1981). *Id.*

Despite the egregiousness of 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

---

[9] As noted previously, the opinion 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.

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 [my] exercise of his Fifth Amendment privilege." *Id.* Notably, the Eleventh Circuit did not quote the portion of the instructions that purported to so instruct the jury because, of course, those instructions 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.

1. **The Eleventh Circuit's decision has expanded the direct conflict with *Carter v. Kentucky* begun by the Ninth Circuit, and taken that error further by also contravening *Griffin v. California*. Because the ASC failed to clarify it did not employ, and does not endorse, the Eleventh Circuit's faulty reasoning, nor the Ninth Circuit's before it, the errors/circuit split perpetuated by those circuits stand at greater risk of spreading.**

    (a) ***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 emphasized, "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 my 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*, therefore, clearly established 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 and this Court's precedent.

Echoing the ASC, the Eleventh Circuit correctly held that Valeska's conduct was egregious. *Hammonds*, 712 F. App'x at 851-52 (recognizing Mr. Valeska's "flagrant" misconduct that "plainly violated" my Fifth Amendment right against self-incrimination, and Mr. Valeska's extensive history of such behavior). Despite recognizing the error and expressing its "tempt[ation]" to grant me 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.*

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 on direct appeal, however, because the instructions failed to inform the jury that it was to draw no adverse inference from my 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, particularly in a capital murder case, will embolden other circuits and state appellate courts—not to mention prosecutors—to disregard the clear commands of *Griffin* and *Carter*, which, as described below, the Ninth, and now Eleventh, Circuits have already done, undermining the Fifth Amendment's protections and eviscerating the constitutional right to have no adverse inference drawn from a defendant's decision not to testify.

(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 [this[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.*[10]

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

---

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

(2) **The Eleventh Circuit has not only widened a faulty application of *Carter* by adopting the Ninth Circuit's faulty reasoning in *Castaneda*, but it 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 my 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 Circuit 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 my 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 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 my case.

The Eleventh Circuit's decision also directly conflicted with this Court's precedents by imposing a requirement that I 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, further demonstrating why this Court should reaffirm and vindicate its precedents. However, the instructions approved in those cases did not ultimately offend *Griffin* and *Carter* in the manner it did here. 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, my jury was *not* instructed not to consider my 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 my 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. My 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 Valeska's "flagrant" prosecutorial misconduct, also failed to satisfy *Griffin*. *Griffin* and *Carter* squarely foreclose such an approach.

In denying me relief, the Eleventh Circuit eviscerated the Supreme Court's clear precedents in *Griffin* and *Carter*. Mr. Valeska egregiously called the jury's attention to my 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 my 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*. 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 precedents, but it also magnifies the error initiated by the Ninth Circuit in *Castaneda* and invites other courts to follow suit—widening the error the Ninth Circuit itself has since acknowledged needs fixing. And the Alabama Supreme Court's refusal to clarify and vindicate Griffin, Carter, and the right against self-incrimination only heightens the need for this Court to now intervene.

This continued devolution of *Griffin*, *Carter*, and the right against self-incrimination in general, demonstrates why this Court must act, even more so now that the ASC has also failed to do so: to prevent the misconception that this Court endorses the patently incorrect application of constitutional precedent inherent in the Eleventh Circuit's opinion. And, of course, in so doing, being intellectually honest, and in combination with the other inequities described herein, this Court should, in re-taking-up the matter, recognize that the jury instruction in my case, for the reasons articulated by Justice Johnstone in his initial dissent, failed to cure the patent constitutional violation in my trial, and should order that I be granted a new trial.

II. **This Court should grant the writ because allowing my conviction, obtained in violation of the Constitution, to stand not only risks allowing misperceptions about this Court's legal reasoning to contribute to a further erosion of the Fifth Amendment and this Court's precedents ensuring its efficacy, but also represents a manifest injustice. Recent decisions of the Alabama Court of Criminal Appeals render my execution arbitrary, in violation of federal due process and fundamental fairness.**

It cannot be denied that "death is different." *Gregg v. Georgia*, 428 U.S. at 188 (discussing *Furman v. Georgia*, 408 U.S. 238 (1972)).

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Furman, 408 U.S. at 306 (Stewart, J., concurring).

Although some disparities in application are necessarily going to exist in any system, it is a manifest affront to justice to allow for the patent dissimilar application of the law by the lower courts in cases where the prosecutorial misconduct was objectively less egregious than it was in a case involving application of the death penalty. Indeed, though the death penalty itself, has been held constitutional, this Court has long made clear that it is unconstitutional to

apply capital punishment in a manner rendering its application arbitrary. *See Furman*, 408 U.S. at 305, 358-59.[11]

But in two recent opinions the Alabama Court of Criminal Appeals has granted inmates relief in cases where the prosecutors commented negatively upon, and drew the jury's attention to, the respective defendants' decisions not to testify. *See Sykes*, 2024 WL 1947829, *9; *Powell*, 2024 WL 1947990, *8. However, in both cases, the prosecutorial misconduct was significantly *less* egregious than Valeska's was in my trial.

For example, in *Sykes*, the ACCA overturned the defendant's conviction where the prosecutor had commented: "There's only two people in the world that know what happened in that house. One of them's dead, and the other one is sitting right over there at the end of that table. (Indicating)." *Sykes*, 2024 WL 1947829 at *9.

Similarly, in *Powell*, the conviction was overturned because the prosecutor told the jury: "You know there is only one person in this room who knows where the gun is. One person, he is sitting over there. That guy knows where the gun is." *Powell*, 2024 WL 1947990 at *8. Additionally, the prosecutor noted: "There is one

---

[11] As noted in n. 1, *supra*, In *Furman*, the Court relied on both principles of due process and the Eighth Amendment's prohibition against cruel and unusual punishment. 408 U.S. at 241, 305, 358-59.

man in this courtroom who knows where that gun is, one man and he is sitting right over there next to that jury box." *Id.*

Thus, in both cases, the prosecutor noted merely that the defendants likely had information, and there was therefore perhaps an implication it would have been nice to hear from them. *Sykes*, 2024 WL 1947829 at *9; *Powell*, 2024 WL 1947990 at *8-9. Yet, because the implication was still there, and no instruction was given to cure that implication once injected into the trial, as the court explained in *Powell*, if there is still a direct reference to the defendant's decision not to explain something, it is "precisely the type of comment that is forbidden under the Constitution." 2024 WL 1947990 at *9.

That, of course, is what happened in my case, and it happened in much more egregious fashion. Indeed, Valeska did not merely indicate that I may have information it might be nice to hear directly from me. Instead, he effectively called upon me to testify, saying "Let him [me] testify."[12] To demonstrate the severity of it from the record, the violation was so blatant that Valeska did not even attempt to pretend he was talking about someone else. When the objection was lodged, he openly admitted he was referencing me. Vol. 25, R. 225-27.

The State will no doubt argue, as it did below, that *Sykes* and *Powell* are distinguishable because, in *Sykes*, there was no objection, 2024 WL 1947829 at *9, and in *Powell*, the objection was overruled. 2024 WL 1947990 at *8. Thus,

[12] Vol. 25, R. 219.

there were no "curative" instructions given. However, that brings us full circle. While the State may contend that the law of the case requires this Court to maintain its prior ruling, much higher laws of equal protection, due process, fundamental fairness, and common decency require that this Court, upon taking the case up to clarify the law and protect the integrity of not only its decisions, but of the Constitution of the United States, also recognize that, as articulated in Justice Johnstone's original dissent, because the trial court *did not* instruct the jury properly to draw *no* adverse inference from Valeska's egregious statement about my decision not to testify, my trial was no fairer than Sykes's or Powell's.

Indeed, the violation was even vastly more offensive to not only the constitution, but to the integrity of the Alabama judicial system. After all, it should go without saying that a pre-trial order requiring the prosecutor to refrain from commenting on my decision not to testify should have been unnecessary. Mr. Valeska's own protestations to the motion for such an order only serve to highlight that fact. (Vol. 13, R. 529). Yet, the trial court, recognizing Valeska's long record of disregarding the Constitution at his personal whim, granted my counsel's request to so instruct Valeska. (Vol. 13, R. 534). Thus, the court directly ordered Valeska not to do so. (Vol. 13, R. 534).

Yet, despite his vehement assurances he would do no such thing, (Vol. 13, R. 529), he made certain to inject it into the trial. (Vol. 25, R. 219). And he did so in a manner that not only drew attention to the fact that I had opted not to testify, but by implication invited the jury to draw a negative inference from my decision.

Thus, Valeska's patent disregard for the law demonstrated flippancy not only toward my constitutional rights, but also toward the trial and appellate courts. His actions were so egregious, he was almost daring the court to declare a mistrial, as it should have done, and simultaneously daring the appellate courts to overturn the conviction. His actions demonstrated the epitome of a man who felt he was immune from any more than a mere talking-to from the court, and an ineffectual jury instruction that would, just as my trial counsel predicted, fail to "unring that bell." He received both.

But this Court clarified, in *Carter*, "[t]he *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." 450 U.S. at 301 (emphasis added). This Court explained that, as in my case, "[t]he penalty was exacted in *Griffin* by adverse comment on the defendant's silence." *Id.* The Court emphasized that, "Even without adverse comment, the members of a jury, unless instructed otherwise, may well draw adverse inferences from a defendant's silence." *Id.* This Court has also emphasized that, in such situations, "[t]he jury must be told to draw *no adverse inference* from a refusal to testify . . . ." *Id.* Because the jury instruction in my case failed to instruct the jury that it must draw *no adverse inference*, the instruction was deficient.

In denying me relief, with respect, the ASC contravened *Griffin* and *Carter*, and unreasonably determined that the jury instruction had effectively cured the harm done by the prosecutor's comments, by holding: "We conclude, as did the

Court of Criminal Appeals, that the trial judge corrected any harm by giving appropriate corrective instructions." *Ex parte Hammonds*, 777 So. 2d at 778. Simply put, the trial court did *not* give "appropriate" corrective instructions. On the contrary, the trial court gave instructions which not only failed to cure the harm, but actually compounded the error.

Three of Alabama Supreme Court's justices dissented from the majority opinion on this issue. Justice Houston, joined by Justice Lyons, asserted that reversal was appropriate due to the prosecutor's "flagrant" misconduct. *Id.*

Justice Johnstone filed a separate dissenting opinion, emphasizing that the trial court's supposedly "curative" instruction:

> . . . omits 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) (emphasis in the original).

Indeed, the most egregious flaw in the instruction was its inconsistency with this Court's clearly established dictate that *no* adverse inference may be drawn from a defendant's decision not to testify, and the "defendant must pay *no* court imposed price for the exercise of his constitutional privilege not to testify." *Carter*, 450 U.S. at 300 (emphasis added); *see also United States v. Richardson*,

764 F.2d 1514, 1529 (11th Cir. 1985) ("The jury must be told to draw *no adverse inference* from a refusal to testify; defendants may have that instruction as of right.") (emphasis added).

A. The cumulative effect of multiple errors compounded the effect of the misconduct.

Court's must additionally consider the cumulative effect of misconduct and the court's errors in correcting it in deciding whether prosecutorial misconduct was cured by the court's instructions. *United States v. Blakey*, 14 F.3d 1557, 1560-62 (11th Cir. 1994). It is axiomatic that "juries are presumed to follow the court's instructions." *CSX Trans., Inc. v. Hensley*, 556 U.S. 838, 841 (2009) (citing *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987)). Because the jury was not properly instructed to draw *no* adverse inference, it could have improperly considered my lack of testimony to make negative credibility determinations regarding my defense. And that may even have carried over to sentencing, where I again elected not to testify, and the prosecutor noted my purported history of having lied to family and friends about prior crimes.[13]

Moreover, the jury would have been more likely to infer that I was guilty of other crimes and was seeking to avoid cross-examination, particularly when combined with the prosecutor's reference to me not being able to "keep [my] stories straight in prison." This comment added fuel to the fire the prosecutor previously injected into my case by again implicitly referencing my decision not to testify.

---

[13] Vol. 35, Tab # R-46, TR. 1160.

The comment was, in effect, saying to the jury, "If he was willing to tell his story in prison, why didn't Mr. Hammonds get on the stand to tell which version was correct during this trial?" Indeed, the timing of this comment, during closing arguments and without evidentiary support, increased its impact.[14] This demonstrates why even the ASC's majority held that this was a "close case." *Ex parte Hammonds*, 777 So. 2d at 778. By holding that the instructions were "appropriate,"[15] and cured the harm, the ASC recognized that there *was* harm. But the supposedly curative instructions failed to actually cure the harm.

Additionally, disclosing to the jurors that I had been previously incarcerated represented a violation of the principle of *Estelle v. Williams*, 425 U.S. 501 (1976). And, once again, the trial court's instruction failed to cure the error. The instruction did not counsel the jury to disregard the comment but merely told the jury that comments of the attorneys were not evidence.[16] As this Court has explained, "Jurors are not lawyers; they do not know the technical meaning of 'evidence.'" *Carter*, 450 U.S. at 303. And as Justice Johnstone explained in his dissenting opinion in my case:

> The prosecutor gratuitously injected this remark in flagrant violation of the trial judge's concerted and repeated instructions not to mention the defendant's being in prison for an unrelated conviction. The only exception to the trial judge's prohibition on counsel in this regard was an allowance for testimony regarding taking the defendant's blood sample in prison. The

---

[14] Vol. 34, Tab # R-33, TR. 857.
[15] *Id.*
[16] Vol. 34, R. 859.

> exception did not include or allow the prosecutor's argument that the defendant "couldn't keep the stories straight in prison," and no one had previously mentioned the defendant's prison incarceration to the jury. The trial judge erred by denying the defendant's motion for a mistrial and giving an inadequate curative instruction. The curative instruction was, in essence, simply the standard instruction that the lawyers' arguments are not evidence. *This curative instruction accomplished nothing toward unringing the bell wrongfully rung by the prosecutor.*

Ex parte Hammonds, 777 So. 2d at 780-81 (Johnstone, J., dissenting) (emphasis added).

The instruction given in response to the prosecutor's comment on my decision not to testify did nothing to dissuade the jury from drawing *an adverse inference* about me and using it against me. Indeed, by the instruction's specific command, nothing would have prohibited the jury from having used my lack of trial testimony against me during the penalty phase where I again elected not to testify, drawing an adverse inference that my lack of testimony showed a lack of faith in my own case, a lack of respect for the jury's intelligence, or any other adverse inference.

Further, in instructing the jury, the trial court characterized my decision not to testify as a "failure to testify."[17] By characterizing my election as a "failure" to not testify, the instruction not only failed to cure the adverse inference intended by the prosecutor's comment but effectively reinforced and compounded it. As the

---

[17] Vol. 25, R. 228 (emphasis added).

Seventh Circuit has explained, use of the term "failure" in this context *itself* conveys an adverse inference. *United States v. Skidmore*, 254 F.3d 635, 640 (7th Cir. 2001). Indeed, by characterizing the exercise of a constitutional right as a "failure," the trial court was conveying to the jury that the defendant's choice to exercise the right was somehow deficient, or negative. *Id.* As the Seventh Circuit has articulated:

> We agree with Skidmore that his decision . . . should not have been referred to as a 'failure' of any kind on his part. The court's use of this word in the instruction is problematic because, as Skidmore notes in his brief, it carries with it the possible implication from the court to the jury that Skidmore has *neglected a responsibility* to present testimony . . . . A conscious decision by a defendant not to testify . . . should not be characterized in the instructions as constituting a failure on the part of a defendant. Ironically, the district court used the word failure in explaining to the jury that . . . it was not permitted to draw any negative conclusions from [Skidmore's] decision to exercise this right. *Id.*

The Sixth Circuit, following *Skidmore*'s lead, even changed the title of its pattern jury instructions from "Defendant's Failure to Testify" to "Defendant's Election Not to Testify." *See* Sixth Circuit Pattern Jury Instruction 7.02A (2005) (Committee Commentary). This change was made "to more accurately characterize the decision." *Id.* (citing *Skidmore*, 254 F.3d at 640). The "failure" language is notably absent from other federal pattern jury instructions also, including the Eleventh Circuit's pattern instruction, which states simply "if a Defendant *elects not to testify*, you can not consider that *in any way* during your deliberations." Eleventh Circuit Pattern Jury Instruction 2.2, Duty to Follow

Instructions/Presumption of Innocence (When Any Defendant Does not Testify) (emphasis added).

Looking cumulatively at the prosecutor's initial "let him testify" comment; his later comment regarding my silence while in prison (and the comment on my imprisonment itself); combined with the legal errors in the jury instructions, the trial court's instructions utterly failed to cure the adverse inferences injected into my trial. As this Court has emphasized, 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).

Thus, the ASC's determination that the trial court issued "appropriate" curative instructions is flatly belied by the plain text of the erroneous instruction. Juries are presumed to follow the court's instructions. *CSX Trans., Inc.*, 556 U.S. at 841 (citing *Greer*, 483 U.S. at 766 n.8). Following the court's instructions in my case, the jury did not know to make ***no*** adverse inference from my silence. Combining the prosecutor's statements, and the other factors detailed above, it was objectively unreasonable for the Alabama Supreme Court to have found that the jury instruction was "appropriate," and thus cured the harm.

Presented with the opportunity to preserve its integrity and admit it made a mistake when it first decided my case, the ASC here declined to do so. To decline to do so while granting relief in less egregious cases renders my conviction, and certainly my execution, arbitrary, and fundamentally unfair. As Justice Gorsuch has articulated: "[W]ho wouldn't hold a rightly diminished view of our courts if we

allowed individuals to [face harsher penalties] than the law requires only because we were unwilling to correct our own obvious mistakes?" *Hicks v. United States*, 137 S. Ct. 2000, 2001 (2017) (Gorsuch, J. concurring) (citation omitted).

III. Additional equitable considerations render the execution of my sentence unconscionable, particularly in combination with a series of unseemly mistakes involved in this matter—unseemly conduct which Justice Sotomayor has called upon to be corrected but remains unaddressed.

Finally, questions and odd occurrences involving both unauthorized attempts to change the record in favor of the State's case, and even such a lack of courthouse security that my case file was rifled through while the case was still active on appeal, create a situation in which this Court should be particularly aggrieved. Adding to this the inexcusable loss of evidence, by State personnel, that became relevant and important during future appeals, particularly in combination with the other injustices involved in this case, lend additional support to the conclusion that my conviction should be overturned under the principles of due process and fundamental fairness.

During my appeal to the Eleventh Circuit, the State drew the circuit's attention to a purported "corrected" page of the trial court record in this case. (Commissioner's Exhibit A in the Eleventh Circuit proceedings). The document, entitled "Certificate of Replacement Page to the Official Record on Appeal," was purportedly created and signed 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 who has considered this case, was created by court reporter William R. Moeglin.[18]

The circumstances that surround this purported change risk the integrity of the judicial system, in that it at least creates an appearance of impropriety, with multiple branches of the State involved with either direct constitutional violations during trial, as well as later attempts to alter the record in a manner favorable to the State, and detrimental to me. To add insult to injury, when my counsel in state post-conviction/habeas proceedings attempted to listen to the tape for herself, her investigator was told the tape could no longer be found. Thus, not only did the prosecutor comment, plainly and egregiously (and after the trial court ordered him directly not to do so), on my right to elect not to testify. But the trial court refused to grant a mistrial and, when then failing to instruct the jury properly, and being criticized for the faulty instruction by a Justice of this Court, scrambled to alter the record, in a manner unauthorized by this Court's rules, and which is something only the appellate courts even have the authority to do. And, it did so with no evidentiary hearing, and now having reportedly lost the original and best evidence supporting the accuracy of the original transcript (written by the original court reporter).

Ms. Woodall states that she made her attempt to alter the appellate record as a result of a "review . . . performed at the request of" the trial court judge several

---

[18] Vol. 35, Tab #R-51, TR. 1254-55.

days after the Alabama Supreme Court issued the last reasoned state court opinion in this matter. Ex. A at 1. Thus, it was after Justice Johnstone issued his dissent, noting that the trial court had not instructed the jury to draw no adverse inference from my decision not to testify, the trial court reporter, reportedly acting at the behest of the judge, and outside of any statutory or rule authority, purportedly checked the tape recording of the trial. After doing so, the court reporter claimed that the judge actually had said "guilt or inference of any kind" rather than "guilt or innocence of any kind." *Id.*

Far from placing the government's overall performance, or the process afforded to me in the case, in a better light, however, this instead represents an inexcusably unfair process. And, for the reasons outlined in the prior section, if the ASC was, properly, not recognizing any change, and the record in fact was accurately recorded in the first instance by the original reporter, then it follows inevitably that this Court, with response, misapprehended the efficacy of the trial judge's instruction. That being the case, to allow my conviction to stand, when the Alabama courts have now (properly) *granted* relief, even quite recently, in cases where similar prosecutorial misconduct, also uncured by a proper jury instruction, warranted reversal, even though the misconduct was objectively less egregious than it was in my case, would undermine the integrity of this Court, the United States Constitution, and principles of due process and fundamental fairness. This, of course, is all the truer given the heightened seriousness of allowing such disparate treatment where the punishment is ultimate and irreversible. *See*

Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (emphasizing the inherently different nature of death penalty cases and the importance of heightened due process (citing *Furman*, 408 U.S. at 309-310)).

In the first place, this "correction" followed absolutely no established procedure for effectuating any sort of change to the official record. Indeed, neither the trial court, nor court reporter, even have authority to order such a correction, as the Alabama Supreme Court's rules permit correction only by motion of the parties, or by the *appellate* court's own initiative. Ala. R. App. P. 10(g).

Second, logically, "guilt and innocence" go together like "peanut butter and jelly." It is not my contention that the trial court mis-instructed the jury intentionally. But the trial court's intent is *irrelevant*. Juries are presumed to follow instructions, and the instructions given were deficient, regardless of the judge's intent in giving them. And it is hardly unlikely that the judge said the word "innocence," given that he was not using the phrase, "draw no inference of any kind," but was actually saying the phrase, "guilt or . . . ."

Third, though I do not intend to attack the intentional veracity of the court reporter, the concept that people tend to hear what they have been told they will hear is a powerful one of which this Court can no doubt take judicial notice. Indeed, "best evidence" rules almost universally require that original recordings themselves, and not transcripts along, be offered, in part due to the suggestibility inherent in one first being told what to expect to hear. (*See, e.g.*, *United States v. Chavez*, 976 F.3d 1178, 1193-1203 (10th Cir. 2020) (discussing myriad reasons

why, even if a tape is in a different language, the recording remains the best evidence, and juries should be able to listen to whether they were hearing the foreign language words the transcripts purport to represent). The timing of the judge's request for the court reporter to again listen to the tape, immediately after Justice Johnstone's dissent pointed out the instruction's deficiency, indicates that the judge believed it may have said "inference" rather than "innocence." Thus, the court reporter would have been listening with the hope of so hearing and, in turn, would have been more likely to hear what she was listening to hear. However, that is *not* what the court reporter who originally transcribed the proceedings heard.[19] In any event, it is entirely improper for the court officials, outside of any proper procedures, and with no evidentiary hearing, to unilaterally declare that the record says something other than what the official record says. Basic principles of due process dictate that, in order to effectuate such a change, I, at the very least, should have been afforded the opportunity to have the tape played in an evidentiary hearing.

That, in turn, leads to the final concerns about the process afforded to me in this case. Not only was I not afforded any sort of evidentiary hearing regarding the purported "correct" contents of the tape, but I, through my attorney in Rule 32, was denied any opportunity to review the contents of the tape. Indeed, in state post-conviction/habeas proceedings, my counsel had one of her investigators go to

---

[19] Vol. 35, Tab #R-51, TR. 1254-55.

the Clerk's office to attempt to listen to the tape. However, she was informed that she could not do so, because the tape was *missing*.

And it should be noted that I do not stand alone in my criticism of the unseemly nature of these State actions. Indeed, Justice Sotomayor has noted that Alabama trial courts have tried this now on a couple of occasions, including in my case, sharply criticizing the ASC's tacit and licit approvals of such unseemly tactics as inherently unfair. *See Townes v. Alabama*, 139 S.Ct. 18, 20 & n.2 (2018) (Sotomayor, J. statement regarding denial of certiorari (describing this entire process as "troubling").[20] Justice Sotomayor explained:

> In a matter of life and death . . . all should take great care to protect the reviewing courts' opportunity to learn what was said to the jury before (the defendant) was convicted of capital murder and sentenced to death. Yet the trial court, after its unilateral intervention in [the defendant's] appeal resulted in dueling transcripts, failed to preserve the recording at issue—despite the fact that [the] case was still pending direct review, and, consequently, his conviction was not yet final. As a result, the potential for this Court's full review of [the defendant's] conviction has been frustrated. *Id.*

Although the overall problematic nature of the proceedings did not, in Justice Sotomayor's assessment, themselves warrant relief in the case, she nonetheless notes that, "the trial court's failure to preserve the original recording gives cause for deep concern." *Id.* at 19. She concluded:

> The Constitution guarantees certain procedural protections when the government seeks to prove that a

[20] Justice Sotomayor also discussed disapprovingly the State of Alabama's similar practices in my case, *Hammonds,* 712 F. App'x at 847-48.

> person should pay irreparably for a crime. A reliable, credible record is essential to ensure that a reviewing court—not to mention the defendant and the public at large—can say with confidence whether those fundamental rights have been respected. *Parker v. Dugger*, 498 U.S. 308, 321 812 (1991) ("It cannot be gainsaid that meaningful appellate review requires that the appellate court consider the defendant's actual record"). By fostering uncertainty about the result here, the trial court's actions in this case erode that confidence. That gives me—and should give us all—great pause. *Id.* at 20.

And, yet, the unseemly nature of all the government and courts did in *Townes* falls far short of what has transpired in my case. In the first place, in *Townes*, the Alabama Court of Criminal Appeals, "remanded the case and directed the trial court to appoint a new court reporter to listen to the audio recording and retranscribe the trial court proceedings." *Id.* Thus, in *Townes*, at least the proceedings effectuating the change in the record were initiated by the proper court, and altered pursuant to the proper statutory authority, as Justice Sotomayor noted. *Id.* at 19 & n.1 (citing Ala. R. App. P. 10(g)). On the contrary, here, upon a critical dissent from one of this Court's Justices, the trial court scrambled to alter the record, and did so outside of any authority, absent any direction from the appellate courts to do so, and without any kind of hearing or appropriate procedure employed.

And not only did the courthouse, like in *Townes*, then promptly lose the recording, but, during my initial appeal itself, Houston County Courthouse officials raised concerns publicly that workers on a renovation project for the

courthouse had rifled through my file. *See Security Problems Plague Courthouse*, Jim Cook, Dothan Eagle, Dec. 7, 2002 at 1-A, 6-A. It should go without saying that not only I, but also the court system and the public, have an interest in processes and procedures guaranteeing a transparent, and secure, system. They have an interest in knowing they can rely on the integrity of that record. And, they have an interest in knowing the record will not be tampered with, either by non-court personnel, or by court personnel acting outside their statutory authority. Yet the same investigator on my team who was told the tape was missing, when allowed to view evidence in the file room, noticed that the evidence in some of the labeled bags, including the tissue paper that was central to the State's case, was missing.[21]

Here, the record has literally been rifled through by non-court personnel after hours. Without any statutory authority, the trial court and trial clerk attempted to alter the record unilaterally after a Justice of this Court criticized the trial court's faulty instruction. And, to top things off, the very recording the trial court scrambled to claim said something different from what the original court reporter transcribed, has gone missing, along with potentially the tissue paper that was key to the State's case.

---

[21] This again demonstrates a lack of care. There was no notation in the evidence envelope stating that it was being stored in a different location, or where, if so, it was stored.

To allow my capital conviction to stand, where the record demonstrated conclusively that, like the defendants in *Sykes* and *Powell*, my trial was infected with the taint of the prosecutor's egregious misconduct, and that taint went uncorrected, renders my execution unconstitutionally arbitrary, standing alone. But, here, there also exists the unseemly nature of the of court system itself scrambling to alter the record, outside any statutory authority and outside the rules, and with no evidentiary hearing to afford me the opportunity to challenge the purported change—a change that was of significant importance, not only to me, but to future courts' determinations of the constitutional questions at stake in the case. And I would not now even have the opportunity to prove the veracity of the trial court's original, certified, transcripts as the recording has now, per the clerk's office, gone missing.

At worst, the public could wonder whether the tape is missing because it does, in fact, confirm that the trial court instructed the jury in the manner the original court reporter certified. But, even if the tape was simply misplaced after having been retrieved to re-listen to it, for an official court recording of a death penalty trial, one that was pivotal to a Justice of this Court's opinion and would be important in subsequent proceedings, to go missing, such incompetence does not comport with the principles of fundamental fairness and due process. *See Woodson*, 428 U.S. at 303.

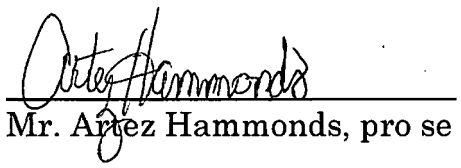
The people of the United States should be able to have confidence not only in the reliability of capital verdicts, but also in the administration of fair and

equitable justice. In this case, this Court should act to vindicate this Court's longstanding precedents on Fifth Amendment protections and jurisprudence. In so doing, it should order that I be granted a new trial. *See Hicks*, 137 S.Ct. at 2001 (Gorsuch, J. concurring) ("[W]ho wouldn't hold a rightly diminished view of our courts if we allowed individuals to [face harsher penalties] than the law requires only because we were unwilling to correct out own obvious mistakes?").

CONCLUSION

I respectfully request that this Court, in reflection of "great pause" that Justice Sotomayor articulated arising from even less serious concerns in *Townes*, 139 S.Ct. at 20, grant my petition for a writ of certiorari to the Alabama Supreme Court, and order that I be granted a new trial that comports with the requirements of the United States Constitution. Additionally, given the impropriety of executing someone, the constitutional violations in whose case mirror or exceed those in cases recently granted relief, carrying out my execution would be arbitrary, manifestly unjust and, thus, unconstitutional. Finally, given the now expanding, incorrect application of this Court's precedents in *Griffin* and *Carter*, this Court should grant certiorari to halt a growing split among the circuits, and now a State court, undermining this Court's clear Fifth Amendment jurisprudence.

Respectfully submitted,



Mr. Artez Hammonds, pro se