No. 09-900

In the Supreme Court of the United States

LINDA ANITA CARTY,

Petitioner,

v.

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

Respondent.

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

Capital Case

REPLY OF PETITIONER

Michael S. Goldberg*
Maryanne Lyons
Marisa C. Hurd
Joshua Nix
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, Texas 77002
(713) 229-1234
michael.goldberg@bakerbotts.com

COUNSEL OF RECORD

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

No. 09-900

In the Supreme Court of the United States

LINDA ANITA CARTY,

Petitioner,

v.

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

Respondent.

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

Capital Case

REPLY OF PETITIONER

INTRODUCTION

The State's brief in opposition should be read exactly for what it is: a transparent attempt to manufacture a procedural bar and rewrite the record so as to divert attention from an unquestionably certiorari-worthy case. The State employs this desperate ruse because this case presents the ideal vehicle for resolving important issues arising from divergent

approaches to assessing prejudice in ineffective assistance of counsel claims.[1]

This case is ideal because no one—including the Fifth Circuit or the State—disputes that trial counsel's performance was deficient with respect to *both* phases of the trial. Thus, questions about the proper prejudice assessment dictate the outcome. Moreover, an honest appraisal of the record plainly demonstrates that this case squarely presents the question this Court believed it was taking in *Bell v. Kelly*, 128 S. Ct. 2108 (2008).

ARGUMENT

I. The State's challenges to the first question presented are illusory.

A. Carty's ineffectiveness claim was not procedurally defaulted.

Although the State devotes eight pages to its argument that "procedural default poses an independent bar to federal court review" of Carty's claims (Resp't's Br. 7), its brief is devoid of an indispensable element: an actual procedural default. The State wholly fails to cite to any part of the record where the state courts invoked an independent and adequate state procedural rule to deny relief. The reason for this is simple; it never happened. Thus, no procedural default exists (or was even asserted). This is

---

[1] In support of Carty's petition, the British Government filed an amicus brief detailing the prejudice flowing from the State's and trial counsel's failure to inform the British consulate about Carty's arrest, violating the Bilateral Consular Convention. The State, however, apparently deemed these arguments unworthy of a response.

why the Fifth Circuit reached the merits of Carty's claims—and why this Court is free to review the Fifth Circuit's opinion adjudicating Carty's claims.

There has been just one procedural question about the claims advanced in Carty's Additional Further Response: whether she properly exhausted them in state court. As the State repeatedly has conceded—until its latest filing—whether Carty exhausted these "additional" claims in state court also would be determinative of procedural default:

- In its initial district court answer, the State conceded that Carty exhausted all but one claim and asserted no other grounds for procedural default. (USCA5 1039.)

- After the district court *sua sponte* raised exhaustion (USCA5 1744-49), the State still advanced no argument independent of exhaustion for finding procedural default (USCA5 1916-21).

- In its principal brief to the Fifth Circuit, the State argued that "[t]he Court should also find the unexhausted claims procedurally defaulted as argued in the Director's Opposition to COA" without mentioning any other basis for finding procedural default. (Appellee's Br. 39 n.13.)

- Correspondingly, in its opposition to COA, the State argued that procedural default barred Carty's claims "for the same

> reasons" asserted in its main brief, i.e., that Carty's claims were unexhausted. (Appellee's Opp. to Req. for COA 23-24.)[2]

The Fifth Circuit succinctly described everyone's shared understanding (up until now) of this issue:

> Carty's success on the exhaustion issue would by definition remove the procedural bar to federal review. . . . While exhaustion and procedural default are two distinct concepts, in cases where procedural default is based on the failure to exhaust, waiver of exhaustion waives both.

(Pet. 66a-67a.) Carty succeeded on the exhaustion issue (and thereby the procedural default issue) by proving that the State waived exhaustion (Pet. 23a-25a); and the State does not challenge the Fifth Circuit's holding in this Court.

Now, for the first time, the State attempts to mislead this Court with a baseless, unsupported assertion that the state courts invoked an independent and adequate ground for denying relief. The State asserts that the "Texas courts rejected the ineffective-assistance claim raised in the first question as untimely under state law." (Resp't's Br. 3; *see also id.* at 4 ("The state habeas court rejected the federal claims urged in petitioner's first question presented because they were raised too late.").) This is a fabrication. At no point did any state court rule that Carty's claims were untimely,

---

[2] Thus, the State waived this argument by not advancing it below. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1474 (2009).

and repeatedly asserting to the contrary does not make it true.[3]

As this Court repeatedly has instructed, federal habeas review is precluded only where the state court "clearly and expressly states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263 (1989) (internal quotations and citation omitted); *see also Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983); *Ruiz v. Quarterman*, 504 F.3d 523, 527 (5th Cir. 2007).

Under Texas law, "[i]f an amended or supplemental application is not filed within the time specified . . ., the court *shall* treat the application as a subsequent application under this section." TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(f) (Vernon Supp. 2009) (emphasis added). If the state habeas court had considered Carty's Additional Further Response untimely, it would have performed the procedural tasks required by Section 5, including forwarding the document to the Texas Court of Criminal Appeals ("TCCA") and assigning it an ancillary file number. *Id.* § 5(b) & (f). The state habeas court did not do so. Instead, it forwarded the entirety of Carty's state

---

[3] The State artfully attempts to massage a procedural default ruling out of the Fifth Circuit's opinion by noting the court's holding that there was insufficient evidence of an agreement between the parties in state court about Carty's amending her application. (Resp't's Br. 7.) But this was an alternative argument to why Carty fairly presented and thus properly exhausted her claims. If the Fifth Circuit had found for Carty on this point, then it would not have needed to reach waiver (again, not contested by the State here). The State's misleading suggestion that the Fifth Circuit found a procedural bar distorts the record, and the opinion below speaks for itself on this point.

habeas application to the TCCA, which treated no portion of her filings as an abuse of the writ.[4] Indeed, the State's own authorities demonstrate the TCCA's practice of expressly dismissing untimely claims as an abuse of the writ. (Resp't's Br. 5.)

Because the TCCA's denial of relief omitted any reference to its being based on an independent and adequate state law ground, the Fifth Circuit did not err, as the State suggests in its footnote 1, in applying *Bledsue v. Johnson*, 188 F.3d 250, 254 (5th Cir. 1999), and reaching the merits of Carty's claim.[5]

---

[4] Further, the State never requested that Carty's Additional Further Response be prohibited as a subsequent application. The recommended procedure when the State receives an untimely writ is to prepare a motion/order that states the submitted filing is subsequent and should be sent to the TCCA. (USCA5 2679-80.) The State's handbook even emphasizes use of the phrases "procedurally barred" and "procedurally defaulted" "because the federal courts are bound by [state] procedural bars." (USCA5 2677-78.)

[5] The State's contention that Carty "recognized" that procedural default would bar federal review independent of exhaustion is simply wrong. (Resp't's Br. 8.) On appeal, Carty reiterated what the State and district court had confirmed—if Carty's claims were exhausted, there would be no procedural bar. (Appellant's Br. 12 ("The district court erred by concluding that Carty's claims were unexhausted. Therefore, procedural default does not bar federal review.").) That Carty argued in the alternative in her Motion for Additional COA Issues cannot excuse the State's waiver. (Appellant's Mot. for Add'l COA Issues 21 (arguing that even if Carty's claims were unexhausted, it is debatable as to whether they were procedurally defaulted).)

B. The first question is squarely presented by this case.

Despite acknowledging that "the rule [applied by the Fifth Circuit] does bear a conceptual relationship to a developed disagreement about AEDPA deference" (Resp't's Br. 13), the State nevertheless asserts that the first question "is not fairly presented by the facts" of Carty's case (*id.* at 10). But the State incorrectly conflates the *Bell* conundrum with the defective facts of *Bell* itself. The *Bell* conundrum is whether AEDPA deference should apply when new, non-defaulted *Strickland* evidence properly is considered for the first time in federal habeas proceedings. This Court could not reach that question in *Bell*; no new evidence was considered. Now, under the facts of Carty's case, it can.

The State further attempts to obfuscate the issue by claiming that the "dichotomy between adjudicated and unadjudicated claims of ineffective assistance has been adopted by every circuit to consider the question." (*Id.*) However, of the ten cases cited by the State to support this proposition, only six involved an ineffectiveness claim. And of those six, only *Riley v. Cockrell*, 339 F.3d 308, 318 (5th Cir. 2003), applied the piecemeal deference challenged by Carty. Citing the remaining cases is not only inapposite, but also demonstrates a fundamental misunderstanding of the first question presented. Carty did not present any new *claims* of ineffective assistance in federal court; she presented new, non-defaulted *evidence* of her claim in federal court. Because the state court failed to consider this evidence, and did not expressly hold it procedurally barred, it never adjudicated Carty's ineffective assistance claim "on the merits." "To dispose of a claim without considering the facts supporting it is not a

decision on the merits." *Wilson v. Workman*, 577 F.3d 1284 (10th Cir. 2009) (en banc).

The State's attempt to downplay the relevance of *Workman* is similarly misguided. Admittedly, the Tenth's Circuit's observation that "the [Fifth Circuit's] *Valdez* decision is not necessarily in conflict with our holding today," *id.* at 1295, was reasonable when decided. But the decision below has removed any doubt. The Fifth Circuit now has cemented a circuit split concerning the very issue this Court was worried about in *Bell*—whether AEDPA's deference requirement applies when new, non-defaulted *Strickland* evidence is considered for the first time in federal court.

C. The Fifth Circuit's piecemeal application of AEDPA deference is fundamentally irreconcilable with *Strickland*, directly passing upon the first question.

The State's final argument against review, that Carty never asked the Fifth Circuit to apply de novo review to the entirety of her ineffectiveness claim (Resp't's Br. 13), barely warrants mention. To be sure, Carty briefed her ineffectiveness claim below under *Riley*, the controlling Fifth Circuit law (which, like the decision below, is fundamentally flawed). At that time, this Court had already dismissed *Bell* as improvidently granted and so chose not to resolve the question. But Carty was not required to ask the Fifth Circuit to overrule governing precedent to advance her claim here. *United States v. Williams*, 504 U.S. 36, 44 (1992) (finding "that a party demand overruling of a squarely applicable, recent circuit precedent" to be "unreasonable"); *see also Harris Trust & Sav. Bank v.*

Salomon Smith Barney Inc., 530 U.S. 238, 245 n.2 (2000) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.") (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534, (1992)).

II. This case presents an ideal vehicle to hold that courts must cumulate all instances of deficient performance before applying a single sentencing prejudice assessment.

First, with regard to part A of Carty's second question presented, the State's assertion that Carty did not adequately press her "spillover effects" claim (Resp't's Br. 14-17) falls flat. From the beginning of Carty's quest for federal habeas relief, she advocated for cumulating counsel's errors and reweighing the totality of the case in aggravation versus mitigation. (USCA5 35 ("Cumulatively, these errors mandate that her . . . sentence be vacated."), 53 ("[T]he question is whether the cumulative errors of counsel rendered the jury's findings, either as to guilt or punishment, unreliable.") (citing *Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir. 1999)), 76-77, 128-29.) Carty again pressed this argument in the Fifth Circuit. (Appellant's Br. 47, 59-62; Reply Br. 15 (explaining that due to counsel's errors, "the jury was left to weigh the scant outline of a woman who was described as someone who does not start fires and is not cruel to animals against the prosecution's evidence of a lying, reckless woman involved in the drug underworld and who fabricated multiple pregnancies.").) The only evidence of Carty's *repeatedly* lying about her pregnancies was Corona's testimony. This evidence clearly aggravated the jury's

view of Carty during punishment and *only* reached the jury due to counsel's culpability-phase error.

With regard to part B of Carty's second question and her third question, the State would have this Court believe that while "[p]erhaps more could have been said . . . concerning the effect of counsel's errors" (Resp't's Br. 19), the Fifth Circuit properly cumulated all categories of mitigating evidence. But there is no mistaking the erroneous test that the court applied: it segregated instances of deficient performance and applied a separate prejudice inquiry to each, rather than cumulating all instances and applying a singular prejudice inquiry. Specifically, the court split Carty's singular mitigation claim (Appellant's Br. 46-63), into four subclaims: (1) failure to put on more testimony from her family who testified and testimony from other family members (reviewed under AEDPA and denied); (2) failure to call Corona and Mathis (reviewed de novo, found to be deficient performance, but denied for lack of prejudice); (3) failure to present the St. Kitts witnesses (reviewed de novo, found to be deficient performance, but denied for lack of prejudice); and (4) failure to present evidence of trauma from Carty's rape (deemed waived) (Pet. 38a-43a). Moreover, the court failed to aggregate the postconviction evidence with the mitigating evidence originally presented by Carty's family. (*See id.*) Because the Fifth Circuit assessed prejudice in this piecemeal fashion, it violated this Court's teachings in *Strickland*, *Wiggins*, and *Williams*.

The State's remaining objections go to the outcome of the prejudice inquiry, not whether certiorari is warranted to consider the manner in which the Fifth Circuit misapplied the prejudice test, in conflict with other circuits. (*See* Pet. 26-27.)

The State baldly asserts that evidence from the 17 St. Kitts witnesses should be discounted as "weak and stale." (Resp't's Br. 23.) Yet, such evidence provided an otherwise wholly-absent version of not only the beginning half of Carty's life, but also of her continuing contact with her closest island friends. Qualitatively and quantitatively, it would have enhanced her defense, allowing "the jury to see [her] as someone they d[id] not want to kill." (USCA5 2326). *Blanton v. Quarterman*, 543 F.3d 230, 236 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 2383 (2009) (explaining that court must "weigh the quality and quantity of the available mitigating evidence"). Most importantly, without this testimony, the jury saw only the picture of a woman with no friends, no contacts—a simple loner not worth saving.

The State concludes that the "omitted piece[s] of mitigation evidence w[ere] individually weak" (Resp't's Br. 22), and when combined with the existing mitigation evidence, "do[] not establish a reasonable probability that jury would have chosen a life sentence" (*id.* at 24). However, "even when *some* mitigating evidence is presented at trial, prejudice is still possible if that evidence is substantially incomplete." *See Walbey v. Quarterman*, 309 F. App'x 795, 802 (5th Cir. 2009) (unpublished); *Lewis v. Dretke*, 355 F.3d 364, 368 (5th Cir. 2003). Just so here, where counsel's "mitigation defense" consisted only of boilerplate violent offender questioning.

This Court should grant review because the Fifth Circuit erred by failing to evaluate the totality of available mitigation evidence to determine whether the balance of aggravating and mitigating circumstances warranted death.

The Eleventh Circuit's recent commission of this error—"*separately* consider[ing] each category of mitigating evidence and [holding] it was not unreasonable for the state court to discount each category as it did"—resulted in reversal by this Court. *Porter v. McCollum*, 130 S. Ct. 447, 452 (2009) (emphasis added). This Court, by contrast, cumulated all four categories of mitigating evidence and concluded that Porter was prejudiced by his counsel's deficiency. *Id.* at 454. This Court's own assessment of the sentencing-prejudice inquiry reveals that courts *must* perform this cumulation. *See id.* This Court may wish to grant, vacate, and remand for reconsideration in light of *Porter*.

III. The Fifth Circuit improperly applied *Lockhart*.

The State concedes that the Fifth Circuit would have erred had it "require[d] that petitioner show something more than a reasonable probability of a different outcome" but argues that the court avoided error because its "stray citation" to *Lockhart v. Fretwell*, 506 U.S. 364 (1993), was "innocuous." (Resp't's Br. 27-28.)

The Fifth Circuit, however, did not merely innocuously cite *Lockhart*—it *applied* it. As stated in the first paragraph of its discussion of conviction prejudice: "[A]lthough this is a close case, [Carty] has not *made the requisite showing* that "[Corona's] testimony rendered her conviction '*fundamentally unfair or unreliable*.'" (Pet. App. 33a (emphasis added) (citing *Ransom v. Johnson*, 126 F.3d 716, 721 (5th Cir. 1997), and quoting *Lockhart*, 506 U.S. at 369).) By stating *Lockhart*'s test as providing the "requisite" standard, and then concluding that Carty failed to

satisfy that test, the Fifth Circuit applied *Lockhart*. (*Id.*) The court then emphasized its reliance on *Lockhart*: "Corona's testimony was undoubtedly damaging to Carty's defense, but it did not render her conviction *fundamentally unreliable*." (*Id.* (emphasis added).) The Fifth Circuit therefore subjected Carty to a more stringent prejudice inquiry than *Strickland* requires. *See Williams v. Taylor*, 529 U.S. 362, 394 (2000) (reversing improper *Lockhart* prejudice analysis).

Finally, in contrast to the State's belief that "[t]he Fifth Circuit is well aware of the limited circumstances in which *Lockhart*'s heightened prejudice standard applies" (Resp't's Br. 26), the court erroneously has applied *Lockhart* at least three other times (Pet. 32). Accordingly, the Fifth Circuit needs additional guidance on the correct application of *Strickland*'s prejudice standard.

CONCLUSION

For all these reasons and those briefed in Carty's petition, this Court should grant certiorari.

Respectfully submitted.

Michael S. Goldberg*
Maryanne Lyons
Marisa C. Hurd
Joshua Nix
BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana Street
Houston, Texas 77002
(713) 229-1234
michael.goldberg@bakerbotts.com

*COUNSEL OF RECORD

April 8, 2010