

IN THE  
**United States Court of Appeals**  
FOR THE FIFTH CIRCUIT

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LINDA ANITA CARTY,

*Petitioner-Appellant,*

—v.—

NATHANIEL QUARTERMAN, Director, Texas Department of  
Criminal Justice, Correctional Institutions Division,

*Respondent-Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION (CASE NO. 4:06-CV-614)

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**BRIEF OF THE GOVERNMENT OF  
THE UNITED KINGDOM OF GREAT BRITAIN AND  
NORTHERN IRELAND AS *AMICUS CURIAE* IN  
SUPPORT OF PETITIONER-APPELLANT AND REVERSAL**

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May 4, 2009

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## **CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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## STATEMENT OF INTEREST

The Government of the United Kingdom of Great Britain and Northern Ireland, as *amicus curiae*, respectfully submits this brief in support of petitioner-appellant Linda Anita Carty. All parties have consented to the filing of this *amicus*.

This case is before the Court on appeal from the District Court's denial of Ms. Carty's petition for habeas corpus, by which she challenges her conviction for capital murder and death sentence based in part on the violation of her right to effective assistance of counsel at the trial and sentencing. Among the failures of Ms. Carty's trial counsel was his failure to notify or seek assistance from the British Consulate-General in Houston, Texas.

By a bilateral treaty duly ratified by both parties, the United States has undertaken an obligation to the United Kingdom to notify the appropriate British consular officials whenever a British national is detained in the United States. Convention on Consular Officers, U.S.-U.K., art. 16(1), June 6, 1951, 3 U.S.T. 3426 [hereinafter Bilateral Consular Convention]. By the same treaty, the United Kingdom has undertaken a reciprocal obligation to notify American consular officials whenever an American national is detained in the United Kingdom. *Id.* Under the plain terms of the Convention, the detainee's wishes as to notification have no bearing on the detaining state's obligation to notify the consulate. The



right of consular notification in multilateral and bilateral consular treaties is accepted as a necessary element to an individual's fair trial when tried abroad, and the concern that that right be respected is at its highest in capital cases for the straightforward reason that the State's objective to protect its nationals abroad is at its most compelling when a national's life is at risk.

In Ms. Carty's case, Texas authorities failed to comply with the obligation to notify British consular authorities of her detention, and Ms. Carty's trial counsel made no attempt to correct that failure. The United Kingdom raises the United States's breach of the Convention at this stage because it may not have a further opportunity to seek a remedy for the breach. Specifically, the United Kingdom submits this brief *amicus curiae* to provide the Court with an understanding of the rights and interests of the United Kingdom and of its national, Ms. Carty, in regard to the obligation of consular notification. The brief addresses the importance of consular assistance to foreign nationals, the rights and obligations of the United States and the United Kingdom under the Bilateral Consular Convention, and how consular involvement would have helped to ensure the fairness of Ms. Carty's trial.

It is a fundamental principle of international law that "[a] State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed . . . ." United Nations International Law Commission, Draft Articles on

Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex art. 35, U.N. Doc. A/RES/56/83 (Dec. 12, 2001). As a matter of international law, then, the clear breach of the Bilateral Consular Convention requires that this Court provide a remedy that will ensure that any consular assistance that the United Kingdom could have provided in the case of Ms. Carty be brought to bear on her trial and sentencing. Like the United States, the United Kingdom is committed to the rule of law. Hence, in light of the material assistance that could have been rendered in Ms. Carty's case, the United Kingdom calls upon this Court to reverse the District Court's decision and grant the writ of habeas corpus.

## **SUMMARY OF ARGUMENT**

Consular assistance has been internationally recognized as both an essential element of due process and an indispensable guarantee of other due process rights—most importantly, of the fundamental right to an effective defense. The United States and the United Kingdom concluded the Bilateral Consular Convention in recognition of the invaluable nature of the assistance that consular officials can provide. That Convention imposes a mandatory obligation on the receiving state to notify the consular officials of the foreign national’s arrest, irrespective of the national’s wishes.

Detained foreign nationals suffer from discrete and particular vulnerabilities that consular assistance seeks to redress, and the mandatory notification requirement enables consular officials to provide support to the detained national from the earliest phase of the proceedings. Consular officers act as a cultural bridge between the national and counsel, thus enabling the national to communicate openly, helping counsel to be fully aware of circumstances that warrant further investigation. Consular officers can also act to facilitate access to legal and investigative assistance.

In capital trials, counsel has an obligation to conduct a thorough investigation into the accused’s prior life experiences, character, and mental state, in order to present compelling evidence in the defense of that individual—both

during trial and sentencing. In the case of a foreign national, such investigations are often only possible with the logistical and political support of consular officials. Failure to take advantage of such assistance where available is inconsistent with fundamental principles of effective assistance of counsel.

British consular officers provide support in pre-trial proceedings in capital cases; it is common practice for them to facilitate the involvement of dedicated legal and investigative experts to take all appropriate steps to amass evidence and ensure that the national has the means to offer an adequate defense at trial and sentencing. At the time Ms. Carty was arrested, it was the practice of British consular officials to collaborate in the provision of this assistance with Reprieve, an organization providing substantial legal and investigative support to British nationals facing the death penalty. With the support of British consular officials and Reprieve, Ms. Carty's *pro bono* counsel Baker Botts LLP gathered forceful mitigating evidence, including affidavits from top officials in St. Kitts attesting to Ms. Carty's good character and a clinical psychiatric assessment showing a disturbing history of abuse and trauma leading up to the crime at issue. Had trial counsel sought the Consulate's assistance in time, this crucial evidence, which was directly responsive to the prosecution's characterization of Ms. Carty at trial and sentencing, could have been presented to the jury.

## ARGUMENT

### **I. THE PROTECTION OF NATIONALS ABROAD IS A CORE CONSULAR FUNCTION THAT CAN BE VITAL TO PRESERVING THE RIGHT TO A FAIR TRIAL.**

#### **A. The United States and Other Nations Have Long Recognized That Consular Assistance Can Be Crucial in Ensuring a Fair Trial to Individuals Charged with a Crime in a Country Other Than Their Own.**

The United States and the United Kingdom have long been actively involved in the protection of the rights of their respective nationals abroad. In addition—like numerous other nations around the world—they have long recognized that consular officials play a crucial role in providing that protection, and that the need for consular assistance is at its greatest when an individual is arrested in a foreign country. As the U.S. Department of State explains in its manual for U.S. foreign service officers:

Our most important function as consular officers is to protect and assist private U.S. citizens or nationals traveling or residing abroad. Few of our citizens need that assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail.

7 U.S. Dep't of State, *Foreign Affairs Manual* § 412 (Sept. 1, 2004), available at <http://www.state.gov/documents/organization/86604.pdf> (updated Oct. 7, 2008).

Individuals arrested in a foreign country often face obstacles of culture, fears of deportation, unfamiliarity with the criminal justice system, and isolation from their family, friends and community. Consular officers can provide numerous

forms of assistance to their nationals to assist them in receiving fair and equal treatment when charged with crimes abroad. Among other things, consular officers may assist the detainee in obtaining appropriate legal representation, including through facilitating the assistance of *pro bono* lawyers and, in capital cases, investigators. Consular officers can help dispel the detainee’s culturally-rooted misconceptions of an unfamiliar criminal justice system, and facilitate communication with defense attorneys and other actors in the criminal justice system—in effect, serving as a cultural bridge between the detained national and a foreign legal system. *See Ledezma v. State*, 626 N.W.2d 134, 152 (Iowa 2001) (“Consular officials can eliminate false understandings and prevent actions which may result in prejudice to the defendant.”). In addition—as this very case demonstrates, *see infra* Part II(B)—consular officials can facilitate the gathering of documentary evidence and help in locating witnesses in the national’s home jurisdiction that are necessary to the foreign national’s defense and would otherwise be inaccessible to defense counsel.

It is widely recognized, not just in the United States and the United Kingdom but internationally, that the availability of consular notification and access can be vital to ensuring a fair process for individuals charged with a crime in a country other than their own. For example, the Inter-American Court of Human Rights has opined that consular assistance forms part of “the minimum

guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial.” *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (Ser. A) No. 16, ¶ 122 (Oct. 1, 1999). Because of the potential obstacles and disadvantages confronting individuals in a foreign legal system, proceeding to trial without the benefit of the assistance of one’s own government is “prejudicial to the guarantees of the due process of law.” *Id.* ¶ 137. Similarly, the European Commission, in proposing a mandatory framework to ensure that member states of the European Union observe certain minimum due process rights of the defendant in criminal proceedings, recognized that consular notification and assistance are “safeguards to protect [the] fundamental rights” of foreign nationals accused of a crime. Eur. Comm’n, *Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings Throughout the European Union*, ¶ 7, COM (2004) 328 final (April 28, 2004).

Particularly in a capital case, consular notification and assistance can help a foreign national receive the meaningful and effective legal representation on which her life so frequently depends—and which standards of due process common to the United States and other Western democracies demand. The mere existence of defense counsel does not guarantee that the defendant has meaningful and effective

legal representation. As the Inter-American Court recognized, consular assistance “makes it possible for the right to the due process of law . . . to have practical effects in tangible cases.” Advisory Opinion OC-16/99, *supra*, ¶ 124.

**B. The Bilateral Consular Convention Reflects the Mutual Recognition by the United States and the United Kingdom of the Importance of Consular Notification.**

In 1951, the United States and the United Kingdom signed the Bilateral Consular Convention that codified the long-recognized customary rights of consular officers to assist their respective nationals abroad. Bilateral Consular Convention, *supra*. The following year, the President and Senate ratified the treaty as prescribed in the U.S. Constitution, and the United Kingdom likewise ratified the treaty as prescribed by its own laws.

Among other things, the Bilateral Consular Convention grants consular officers of each of the two countries the right “to visit without delay, to converse privately with and to arrange legal representation for, any national” of the respective country who is confined awaiting trial or otherwise detained. Bilateral Consular Convention, *supra*, at art. 16(1). More generally, the Convention authorizes consular officials to “assist any . . . national in proceedings before or in relations with the authorities of the territory, and, where necessary, arrange for legal assistance for him.” *Id.* at art. 15(3). To ensure that consular officials may effectively exercise these rights, the Convention requires that “[a] consular officer



shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody.” *Id.* at art. 16(1).<sup>1</sup>

The Bilateral Consular Convention requires immediate notification of the consulate regardless of whether the detained national requests it. *See id.* at art. 16(1). In this respect, the Bilateral Consular Convention differs markedly from the multilateral Vienna Convention on Consular Relations, which requires notification of the consulate only if the detained individual requests it. *See Vienna Convention on Consular Relations* art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.<sup>2</sup> By requiring mandatory notification, the Bilateral Consular Convention

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<sup>1</sup> The Bilateral Consular Convention defines “sending state” to mean the nation that accredited the consular officer (in this case, the United Kingdom), and defines “territory” to mean the area within which the consulate’s jurisdiction is located (in this case, the United States). *Bilateral Consular Convention, supra* at art. 2(1).

<sup>2</sup> This qualification was inserted into the Vienna Convention principally because of the United States’s concern for the right of a refugee not to have her own government notified of her detention. *Official Records*, Vol. I, U.N. Conference on Consular Relations, 2d Comm., 16th mtg., at 337, ¶ 39, U.N. Doc. A/CONF.25/16 (Mar. 4-Apr. 22, 1963). This concern does not apply to a bilateral convention between the United States and the United Kingdom to the same extent as it applies to a multilateral convention, such as the Vienna Convention, that is open to ratification by all U.N. member states. Remarkably, the district court in this case did not address any claims predicated on the bilateral U.S.-U.K. Consular Convention, even though the relevance of that treaty was briefed below; instead, it confined its discussion to the multilateral Vienna Convention. *See* Sept. 30, 2008 Order Denying Habeas Corpus, Record Excerpts of Petitioner-Appellant, Appx. Tab 5, pp. 72-77, 131-32 (R. 2806-2811, 2865-2866).

emphasizes the importance of this notification not just to the detained individual but also to the state of which he or she is a national.

The requirement of mandatory notification also demonstrates the importance that the United States and the United Kingdom place on consular notification. For example, a detained individual, notified of the availability of consular assistance by local police or courts, may not understand the nature or extent of the assistance that the consulate can provide. By making notification mandatory in all cases, the Bilateral Consular Convention ensures that consular officials can inform the detained individual of the resources that are available.

The United Kingdom has also recognized the importance of consular notification for foreign nationals detained within its own legal system. The United Kingdom has enacted detailed regulations to ensure that obligations of consular notification are respected. In particular, Code C issued by the U.K. Home Secretary under the Police and Criminal Evidence Act 1984 (PACE) requires the police to contact the embassy or consulate of every detained foreign national when required by a bilateral consular convention. Police and Criminal Evidence Act 1984 (Code of Practice C and Code of Practice H) Order, 2006, S.I. 2006/1938, ¶¶ 7(a), 7.2 (U.K.), *available at* [http://police.homeoffice.gov.uk/publications/operational-policing/2008\\_PACE\\_Code\\_C\\_\(final\).pdf?view=Binary](http://police.homeoffice.gov.uk/publications/operational-policing/2008_PACE_Code_C_(final).pdf?view=Binary) (updated Jan. 30, 2008).

The Code specifically notes that the United States is one of the countries with which the United Kingdom has a bilateral agreement requiring mandatory notification whenever one of its citizens is detained. PACE Code C, Annex F.

The United States, for its part, has treated consular conventions as self-executing law under Article VI of the U.S. Constitution, and therefore immediately binding on federal, state and local officials without the need for any implementing legislation. U.S. Dep't of State, *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them*, 44 (2003), available at [http://travel.state.gov/pdf/CNA\\_book.pdf](http://travel.state.gov/pdf/CNA_book.pdf) (updated Feb. 5, 2004).<sup>3</sup> Reflecting the terms of the Bilateral Consular Convention, the U.S. State Department has instructed federal, state and local police officials that the United Kingdom is a “mandatory notification” country, *id.* at 49—in other words, that “the nearest consular officials *must* be notified of the arrest or detention of a [British] national, **regardless of the national’s wishes,**” *id.* at 3 (italics and bold in original); *see also id.* at 14.

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<sup>3</sup> Although *Medellín v. Texas*, 128 S. Ct. 1346 (2008), held that Article 94(1) of the U.N. Charter, which requires compliance with International Court of Justice judgments, was non-self-executing, the Court assumed for the purpose of the opinion that the underlying consular notification obligation was self-executing. 128 S. Ct. at 1357 n.4.

The United States's failure to comply with that direction in this case constitutes a breach of the sovereign rights of the United Kingdom under the Bilateral Consular Convention. That breach requires that this Court provide a remedy that will appropriately reflect the material assistance the exercise of those rights would have brought to Ms. Carty. *See* United Nations International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex art. 35, U.N. Doc. A/RES/56/83 (Dec. 12, 2001); Restatement (Third) of the Foreign Relations Law of the United States § 901 & cmt. d (1987) (“Under international law, a state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make reparation, including in appropriate circumstances restitution[.]”). Because, as a result of Texas's breach, the United Kingdom was prevented from materially assisting its national at trial and at sentencing, habeas relief is warranted.

**C. Particularly in a Capital Case, Failure to Take Advantage of Consular Assistance Is Inconsistent with Effective Assistance of Counsel.**

Consular assistance can play a vital role in facilitating the gathering of evidence in capital cases, and particularly mitigation evidence at the penalty phase. Given this vital role, the right to effective assistance of counsel necessarily requires that defense counsel know about, and take advantage of, the assistance that a detained national's consulate can provide. Where, as here, the state failed to notify the consulate of the defendant's arrest and detention, it necessarily falls to defense

counsel—who is meant to look out for the interests of his or her client—to remedy the deficiency. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350 (2006) (“If [a defendant] raises [a consular notification] violation at trial, a court can make appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance.”).

On that basis, a number of courts in the United States have recognized that a conviction may be reversed for ineffective assistance of counsel where trial counsel has failed to take advantage of the benefits of consular assistance. For example, in *Valdez v. State*, 46 P.3d 703 (Okla. Crim. App. 2002), Oklahoma’s highest court in criminal matters held that a Mexican national’s claim directly under the Vienna Convention for Consular Relations was procedurally defaulted, but nonetheless overturned petitioner’s conviction on the ground that defense counsel was ineffective, in part because he took the case to trial without seeking the assistance of consular officials of the defendant’s country. *Id.* at 710-11. The court remarked:

We cannot ignore the significance and importance of the factual evidence discovered [after trial] with the assistance of the Mexican Consulate. It is evident from the record before this Court that the Government of Mexico would have intervened in the case, assisted with Petitioner’s defense, and provided resources to ensure that he received a fair trial and sentencing hearing.

*Id.* at 710.

In *Ledezma v. State*, 626 N.W.2d 134 (Iowa 2001), the Iowa Supreme Court found trial counsel ineffective, in part because counsel failed to investigate and present potentially exculpatory evidence, and ordered a new trial. The court noted in *dicta* that trial counsel had failed to avail himself of consular assistance:

When representing a foreign national criminal defendant, counsel has a duty to investigate the applicable national and foreign laws.... [A]ll criminal defense attorneys representing foreign nationals should be aware of the right to consular access ... and should advise their clients of this right. Criminal defense attorneys are not equipped to provide the same services as the local consulate.... [C]onsular access may very well make a difference to a foreign national, in a way that trial counsel is unable to provide.

*Id.* at 152 (citations omitted); *see also United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968, 980 (N.D. Ill. 2002) (finding defense counsel ineffective in case where state violated defendant's right to consular notification); *cf. Sanchez-Llamas*, 548 U.S. at 364 n.3 (Ginsburg, J., concurring in the judgment) (noting that defendant could have "rais[ed] an ineffective-assistance-of-counsel claim predicated on his trial counsel's failure to assert the State's violation of [his] rights" to consular notification).

Consistent with the views of these courts, both the American Bar Association and the State Bar of Texas have issued standards recognizing the duty of capital defense counsel to advise their clients of the availability of consular assistance. The ABA's guidelines, which seek to "embody the current consensus

about what is required to provide effective defense representation in capital cases,” make clear that “counsel representing a foreign national should . . . immediately advise the client of his or her right to communicate with the relevant consular office,” and that “counsel should also give careful consideration to the assertion of any legal rights that the client may have as a result of any failure of the government to meet its treaty obligations.” Am. Bar Ass’n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* 2, 73-74 (rev. ed. 2003) [hereinafter *ABA Guidelines*]. The Commentary to the ABA Guidelines also makes clear the importance of consular officers in “arrang[ing] for their nationals’ legal representation and to provide a wide range of other services. These include . . . enlisting the diplomatic assistance of their country to communicate with the State Department and international and domestic tribunals (e.g., through *amicus* briefs), assisting in investigations abroad, providing culturally appropriate resources to explain the American legal system, arranging for contact with families and other supportive individuals.” *Id.* at 74.

The State Bar of Texas, in its guidelines articulating the “statewide standard of practice for the defense of capital cases,” similarly calls on counsel representing a foreign national to “[i]mmediately advise the client of his or her right to communicate with the relevant consular office.” State Bar of Texas, *Guidelines and Standards for Texas Capital Counsel*, 69 Tex. Bar J. 966, 967, 971 (2006)

[hereinafter *Texas Bar Guidelines*]. Counsel in this case completely failed to comply with these duties.

U.K. law likewise recognizes that the absence of consular assistance may render criminal proceedings unfair. As discussed above, the rights relating to consular assistance are incorporated in PACE Code C, *see supra* Part I.B, and the Court of Appeal for England and Wales has held that a violation of PACE Code C raises a presumption that “prima facie at least the standards of fairness set by Parliament have not been met.” *R. v. Walsh*, 91 Crim. App. 161, 163 (C.A. 1989) (Eng.). One court held that, considering that the right to consular notification is a “lifeline for an arrested foreign national,” “compliance [is] extremely important” even if the foreign national has been resident in the United Kingdom for many years. Simon Farrell, *Case Note: Interviews of Foreign Nationals under PACE – R v Van Axel and Wezer (1991) 31 May, Snaresbrook Crown Court, HHJ Sich*, Legal Action, Sept. 1991, at 12; *see also* Gwilym Harbottle, *Case Note: Interviews of Foreign Nationals under PACE – R v Bassil and Mouffareg (1990) 28 July, Acton Crown Court, HHJ Sich*, Legal Action, Dec. 1990, at 23-24 (noting the importance of consular assistance to fair proceedings).



## **II. HAD CONSULAR OFFICIALS BEEN NOTIFIED OF MS. CARTY’S DETENTION AND TRIAL, THEY WOULD HAVE PROVIDED SUBSTANTIAL ASSISTANCE.**

### **A. As a Matter of Policy and Longstanding Practice, British Consulates Provide Assistance to British Nationals Accused of Crimes Overseas.**

For many decades, British consular officers have been dedicated to providing assistance to British nationals incarcerated abroad. The United Kingdom monitors the cases of British nationals facing the death penalty abroad particularly closely and is committed to assisting British nationals facing capital charges in the United States and elsewhere, including helping them to obtain a fair trial.

The U.K. Foreign and Commonwealth Office (FCO), which is the U.K. counterpart to the U.S. Department of State and oversees the United Kingdom’s consulates throughout the world, is strongly committed to “do[ing] everything that [it] appropriately can to prevent the death penalty from being sought or carried out” against British nationals. *Death Penalty Cases (British Citizens)*, 424 Parl. Deb., H.C. (6th Ser.) (2004) at 132WH (statement of Mr. Chris Mullin, then Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs). In a February 2001 statement to Parliament, the British Government made clear its policy “to make representations at whatever stage and level is judged appropriate from the moment that imposition of the death penalty on a British national becomes a possibility.” *Id.* at 131WH. This policy, having recently been announced in Parliament, would have been at the forefront of consular officials’

thinking in 2001. In October of 2001, the FCO formally launched the Pro Bono Lawyers Panel, which brings together some 35 lawyers who are experts in a number of areas, including human rights and criminal law. Members of the Panel can assist British nationals facing trial overseas where there are human rights concerns, including cases in which British nationals are facing the death penalty. Panel members are currently assisting, or have previously assisted, British nationals facing capital charges or execution in countries such as the United States, Sierra Leone, Nigeria, Ghana and Pakistan.

When British nationals are arrested and charged, particularly with capital crimes, British consular officers can, where appropriate, help ensure that the defendants understand the U.S. criminal justice system, monitor judicial proceedings, lobby prosecutors not to seek the death penalty, and facilitate communications between detained nationals and their family members. Kelly Aff. ¶¶ 7, 9, 10 (R. 192); *Death Penalty Cases (British Citizens)*, *supra*, at 131WH. The British Consulate can also help to ensure that detained nationals in capital cases have appropriate legal representation. In such cases, where the detainee has legal representation, the Consulate can provide appropriate assistance to counsel, which may include referring the case to *pro bono* lawyers and investigators. Kelly Aff. ¶ 8 (R. 193).

Since at least 2001, the FCO also has worked closely with Reprieve, a charity that provides substantial assistance to indigent persons facing the death penalty in the form of legal expertise, investigative assistance and support. Reprieve seeks to make its pre-trial involvement in cases as extensive as the case requires to ensure the highest standards of capital representation for the defendant, which includes engaging experienced *pro bono* counsel to ensure adequate legal representation, seeking out witnesses relevant to both the conviction and sentencing phases of trial, and, where necessary, conducting overseas investigations in the detainee's home country to gather mitigation evidence which would otherwise be missing from her defense. At the time Ms. Carty was arrested, it was the practice of the FCO to collaborate with Reprieve in assisting British defendants in death penalty cases.

Through the combined efforts of consular staff, Reprieve, and *pro bono* lawyers, British consular officers have enhanced the quality of legal representation for their nationals in numerous cases. Reprieve has had significant involvement in at least four cases at the trial level. The U.K. government has been involved in at least four cases in the United States where British nationals have faced capital charges or been sentenced to death, and subsequently the death penalty was not

sought by the prosecution, or was overturned on appeal.<sup>4</sup> According to Reprieve's records, to date no British national has been sentenced to death in the United States where Reprieve had been notified and therefore was able to intervene at the trial level.

**B. Consular Involvement Would Have Materially Aided Linda Carty's Defense.**

Had it been duly notified, the British Consulate would have facilitated the provision of substantial assistance to Ms. Carty and her counsel prior to and during her trial in 2001 and 2002. Kelly Aff. ¶¶ 8-12 (R. 193). Indeed, once the Consulate became aware of Ms. Carty's case after her conviction and sentence, it approached the District Attorney's office and indicated support for a request to suspend proceedings in order for her lawyers to supplement her State habeas corpus petition. Sept. 30, 2008 Order Denying Habeas Corpus, Appx. Tab 5, p. 46 (R. 2780); Kelly Aff. ¶ 12 (R. 193). The British Consulate also liaised with Reprieve, which, through Clifford Chance LLP, facilitated the engagement of new

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<sup>4</sup> Most recently, the British Government worked with Reprieve in the case of Kenneth Richey, a British-U.S. national who spent 21 years on death row in Ohio following his conviction and sentencing in 1987. In that case, the British Government made a number of interventions, including diplomatic representations, and *amicus curiae* briefs. Brief for the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae Supporting Petitioner, *Richey v. Mitchell*, 395 F.3d 660 (6th Cir. 2005) (No. 01-3477), *vacated*, 546 U.S. 74 (2005); Brief for the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae Supporting Petitioner-Appellant, *Richey v. Bradshaw*, 498 F.3d 344 (6th Cir. 2007) (No. 01-3477). Mr. Richey's death sentence was vacated, and he was released last year.

*pro bono* counsel and assisted in the gathering of important mitigating evidence that the jury had never had an opportunity to weigh before it imposed a sentence of death on Ms. Carty.

**1. Consular Officials Would Have Helped Ms. Carty Retain Experienced *Pro Bono* Attorneys and Investigators to Help Ensure That She Received a Fair Trial.**

In order to preserve the defendant's right to due process and a fundamentally fair trial in capital cases, British consular officers provide appropriate assistance to help ensure that British nationals have the means at their disposal to offer an adequate defense against the charges that they face. Kelly Aff. ¶¶ 8, 10 (R. 193).

Upon learning of Ms. Carty's case, the British Consulate collaborated with Reprieve, which secured the participation of her current habeas counsel, Baker Botts, on a *pro bono* basis, and liaised between the newly-appointed attorneys and Ms. Carty to ensure her full trust and cooperation. Kelly Aff. ¶ 8, 12 (R. 193). Reprieve continues to actively assist Baker Botts with Ms. Carty's case.

The record demonstrates that Mr. Gerald Guerinot, Ms. Carty's lead trial counsel, has a woeful record of representation in capital cases.<sup>5</sup> It has been reported that twenty of the thirty-nine capital defendants represented by Mr. Guerinot through 2007 have been sentenced to death. D. Rose, *Lethal Counsel*,

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<sup>5</sup> Mr. Guerinot, along with Windi Atkins, was appointed by the Court when Ms. Carty's family could not assemble funds fast enough to retain the counsel of her choice. Sept. 30, 2008 Order Denying Habeas Corpus, Appx. Tab 5, p. 26 (R. 2760).

The Observer, Dec. 2, 2007, at 25 (R. 2716). According to Ms. Carty, defense counsel was assigned by the Court against her wishes, *see* Carty Aff. ¶ 4 (R. 199-200); Sept. 30, 2008 Order Denying Habeas Corpus, Appx. Tab 5, pp. 85-86 (R. 2819-2820), and it appears that Ms. Carty's counsel met with her only once before trial, for fifteen minutes, and that he told her that he had not prepared her defense because of his daughter's wedding. Carty Aff. ¶ 5 (R. 200). Faced with this information, British consular authorities and/or Reprieve would have been able to help to ensure that Ms. Carty had appropriate legal representation prior to and during trial by facilitating the assistance of *pro bono* lawyers, investigators, and experts. *See* Kelly Aff. ¶¶ 8, 12 (R. 193).

## **2. Consular Officials and Reprieve Would Have Assisted Counsel In Gathering Critical Mitigating Evidence.**

Mitigating evidence—often relating to the defendant's background or mental state—serves to humanize the defendant in the eyes of the jury and is an essential component of the defense at the sentencing phase of every capital case. Indeed, armed with such mitigating evidence, consular officials or defense counsel can sometimes persuade prosecutors not to seek the death penalty in the first place. Kelly Aff. ¶ 7 (R. 192). Thus, it is imperative that defense counsel conduct a broad and thorough investigation of the defendant's background, mental condition, and life experiences to gather evidence that militates against the imposition of the death

penalty. As both the ABA and the State Bar of Texas Guidelines for capital defense counsel state,

[i]n deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following: Witnesses familiar with and evidence relating to the client's life and development, *from conception to the time of sentencing*, that ... would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death.

*ABA Guidelines, supra*, at 104 (emphasis added); *Texas Bar Guidelines, supra*, at 974 (emphasis added). Capital defense counsel are expected to “[t]horoughly investigate the basis for each potential claim,” *Texas Bar Guidelines, supra*, at 972, and affirmatively “seek information that supports mitigation or rebuts the prosecution’s case in aggravation,” *id.* at 974.

In the case of a foreign national, such investigations are necessarily costly, time-consuming, and logistically complicated because the required investigation may need to take place outside the country. In this case, it is not necessary to guess at what mitigation evidence competent trial counsel could have developed with the assistance of the British Consulate, *pro bono* lawyers and Reprieve, because it is clear from the record what evidence was available. After Ms. Carty’s conviction and death sentence, her new *pro bono* counsel, with the support of the British Consulate and the assistance of Reprieve, was able to develop substantial mitigation evidence from the former British colony of St. Kitts and Nevis, where

Ms. Carty had spent her formative years, and from a psychiatric expert who demonstrated the existence and relevance of an extreme psychiatric disorder suffered by Ms. Carty at the time of the crime—evidence that her trial counsel had failed to obtain.

This evidence included seventeen affidavits and statements of witnesses, many from prominent citizens of St. Kitts, who were prepared to testify to Ms. Carty's character and who described her as a courageous, religious, community-oriented and highly credible primary school teacher. *See, e.g.*, Buchanan Stmt. (R. 750); Hunkins Stmt. (R. 628); Archibald Stmt. (R. 619); Crooke Stmt. (R.726); Morris Stmt. (R. 729); Rochester Stmt. (R. 733-734). The former Prime Minister of St. Kitts described Ms. Carty as “someone who was willing to put herself on the line to improve things . . . to help people improve their lives, make the community better and allow young people to have a future,” “always willing to help people” and “a very active worker in her community.” Simmonds Aff. (R. 498). This evidence also established the belief of many of these witnesses that an act such as murder would be completely out of character for Ms. Carty. Powell Stmt. (R. 585); Archibald Stmt. (R. 619); Hunkins Stmt. (R.629); Spencer Stmt. (R.716-717); Turner Stmt. (R. 719).

With the support of the Consulate, Reprieve also could have assisted in obtaining medical and school records that would have explained Ms. Carty's



vulnerabilities, could have helped the jury understand her state of mind at the time of the crime that she was accused of committing, and undermined the prosecution's portrayal of her dangerousness. With the support of the Consulate and the assistance of Reprieve, Ms. Carty's *pro bono* counsel obtained an expert psychiatric report that recited acts of extreme violence and sexual degradation that Ms. Carty suffered at the hands of a boyfriend. *See* Bailey Aff. ¶¶ 13-17 (R. 2411-2412). That report also recited that she had been raped while in Houston, that as a result of the rape she had become isolated from her family, and that she had become pregnant from the rape, chose to bear the child, and then gave the baby up for adoption. *Id.* at ¶¶ 18-23 (R. 2412). From these facts, the expert concluded that Ms. Carty suffered from chronic post-traumatic stress disorder. *See* Bailey Aff. ¶¶ 7, 46-49 (R. 2409-2417).

Particularly given the character of the crime for which Ms. Carty was convicted, this evidence would have had a direct bearing on the deliberations of the jury at sentencing. In returning a sentence of death against Ms. Carty, the jury found that the state had proved the statutory aggravating circumstance that “there is a probability that [she] would commit acts of criminal violence that would constitute a continuing threat to society.” Feb. 21, 2002 Jury Verdict Assessing Death Penalty, Appx. Tab 4, p. 1. The jury also found that, taking into account

Ms. Carty’s “character and background,” there were no mitigating circumstances warranting a refusal to impose death. *Id.* at 2.

But the evidence of Ms. Carty’s “character and background” available to the jury was incomplete. The prosecution’s case on punishment depended on a portrayal of Ms. Carty as a person who “lived a life of lawlessness,” based on her recent life in Texas. Sept. 30, 2008 Order Denying Habeas Corpus, Appx. Tab 5, p. 27 (R. 2761). Not only could Reprieve have, with the support of consular officials, provided precisely the type of character evidence that could have rebutted the prosecution’s case, but had they been notified in a timely manner, they could have enabled trial counsel to present Ms. Carty’s severe psychiatric affliction as relevant mitigating evidence. Brief of Petitioner-Appellant at 58-9.

The district court, in dismissing the persuasive force of this evidence, expressly held that Ms. Carty had failed to present a link that could explain the “disconnect” between her life in St. Kitts and that in Texas. Sept. 30, 2008 Order Denying Habeas Corpus, Appx. Tab 5, p. 112 (R. 2846). To the contrary, the diagnosis and evidence assembled by Dr. Bailey—including the physically abusive relationship Ms. Carty suffered in Houston followed by a violent rape and resulting pregnancy—would have provided just that link. *See* Bailey Aff. (R. 2409-2417).

U.S. courts have recognized that where counsel does not present compelling evidence in mitigation and that failure flowed, in whole or in part, from his failure

to seek consular assistance, the assistance of counsel is ineffective and the death sentence must be reversed. *See, e.g., United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968, 980 (N.D. Ill. 2002); *Valdez v. State*, 46 P.3d 703, 710 (Okla. Crim. App. 2005); *cf. Ledezma v. State*, 626 N.W.2d 134, 152 (Iowa 2001). In Ms. Carty's case as in *Valdez*, "[i]t is evident from the record" that the Consulate "would have . . . provided resources to ensure that [petitioner] received a fair trial and sentencing hearing," and that "the evidence was not discovered due to trial counsel's ineffectiveness." *Valdez*, 46 P.3d at 710.

Ms. Carty's trial counsel simply failed to comply with his professional obligation to make use of the resources available to him—including consular assistance—to undertake a thorough investigation. That failure prevented the jury from hearing important and directly relevant mitigation evidence and fundamentally undermined the fairness of the proceedings that resulted in a sentence of death for Ms. Carty. *Cf. Walbey v. Quaterman*, No. 08-70007, 2009 WL 113778, at \*7-8 (5th Cir. Jan. 19, 2009) (unpublished) (granting habeas for ineffective assistance where counsel deficiently investigated petitioner's background and deficiently prepared expert psychiatric witness, noting that "even when some mitigating evidence is presented at trial, prejudice is still possible if the evidence is substantially incomplete."). For these reasons, the death sentence imposed on Ms. Carty cannot stand.

## CONCLUSION

For the reasons stated above, *amicus curiae* the Government of the United Kingdom of Great Britain and Northern Ireland respectfully urges the Court to reverse the judgment below and grant Ms. Carty a new trial, new sentencing or other appropriate relief.

Dated: New York, New York  
May 4, 2009

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 6,641 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 SP2 in 14-point Times New Roman. As permitted by 5th Cir. R. 32.1, footnotes are in 12-point Times New Roman.

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I hereby certify that two copies of this Brief of the Government of The United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Petitioner-Appellant and Reversal, with one (1) CD-Rom were sent by Federal Express Next Business Day Delivery to:

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