No. _____

In The
Supreme Court of the United States

CATHY LYNN HENDERSON,

Petitioner,

v.

NATHANIEL QUARTERMAN, 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

PETITION FOR A WRIT OF CERTIORARI

JANI J. MASELLI
808 Travis Street, 24th Floor
Houston, TX 77002
Telephone: (713) 757-0684
Facsimile: (713) 650-1602

MICHAEL L. BANKS
MORGAN, LEWIS & BOCKIUS, LLP
1701 Market Street
Philadelphia, PA 19103-2921
Telephone: (215) 963-5000
Facsimile: (215) 963-5001

GEORGE A. CUMMING, JR.
Counsel of Record
MOLLY MORIARTY LANE
MORGAN, LEWIS & BOCKIUS, LLP
One Market – Spear Tower
San Francisco, CA 94105
Telephone: (415) 442-1198
Facsimile: (415) 442-1001
Internet: gcumming@morganlewis.com

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CAPITAL CASE*

QUESTIONS PRESENTED

1. Does *Texas v. Cobb*, 532 U.S. 162 (2001), preclude review of a capital murder conviction based upon evidence obtained when – after petitioner exercised her *Miranda* rights during custodial interrogation and asked for an attorney, to whom she later entrusted confidential, incriminatory information – the State then compelled her attorney to disclose the very information that petitioner lawfully refused to provide to the police?

2. Did the court of appeals err in holding that *Cobb* precludes adjudication of any of the constitutional claims implicated by the State's tactic because, on the day the State court compelled petitioner's attorney to betray her client's confidences, petitioner had been charged only with kidnapping, and that her sixth amendment right to counsel on the murder charge did not attach until the State preferred that charge one day after it wrested the incriminating evidence from petitioner's attorney?

3. Was petitioner denied the effective assistance of counsel on her direct appeal to the Texas Court of Criminal Appeals, when her appellate attorney failed to perfect the record and therefore did not present an argument critical to the Texas court's review of petitioner's claims?

---

* We advise the Court that, on November 20, 2006, the state court ordered that petitioner be executed on April 18, 2007.

LIST OF PARTIES

The names of all parties appear in the caption.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

LIST OF APPENDICES

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

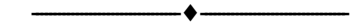
OTHER:

OPINIONS BELOW

The opinion of the court of appeals (*Appendix*, 1a-24a) is reported at 460 F.3d 654 (5th Cir., August 11, 2006). The district court's orders (1) denying the petition for a writ of habeas corpus and granting summary judgment for respondent (*App.* 56a-108a); (2) denying a motion to alter or amend the judgment (*App*. 109a-116a); and (3) granting a certificate of appealability on certain issues (*App*. 117a-124a), are not reported.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The full texts of amendments five and six to the Constitution of the United States of America are printed at *App*. 127a. Although involved only tangentially, the full texts of Sections 19.02 (murder), 19.03 (capital murder) and 20.03 (kidnapping) of the Penal Code of the State of Texas are printed at *App*. 128a-131a.



JURISDICTION

The district court had jurisdiction of the petition for a writ of habeas corpus under 28 U.S.C. § 2254, and denied relief in its order filed March 31, 2004. *App*. 56a. The district court issued a timely certificate of appealability on July 15, 2004 (*App*. 117a), and the court of appeals therefore had jurisdiction under 28 U.S.C. §§ 1291 and 2253(c)(1)(A). Its decision was filed August 11, 2006 (*App*. 1a), and

[1] The Appendix also includes (at 25a-55a) an unreported *per curiam* opinion of the same panel of court of appeals, denying a certificate of appealability on issues that the district court previously declined to certify. We include this opinion in aid of a full understanding of the facts of record below, but petitioner does not seek review of the court of appeals' denial of a certificate of appealability.

a timely petition for rehearing was denied on September 13, 2006. *App*. 125a. Under this Court's Rule 13.3, this petition for a writ of certiorari is therefore due by December 12, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Summary and Fundamentals

In 1995, a Travis County, Texas jury convicted petitioner Cathy Lynn Henderson of murder of an infant, a capital crime under TEXAS PENAL CODE § 19.03(a)(8) (murder of "an individual under six years of age," *App*. 130a). Petitioner was originally arrested on a charge of kidnapping the infant, for whom she was his daily caregiver. During *Mirandized* interrogation,[2] petitioner told the F.B.I. that the baby died accidentally in her home, after which she panicked, buried the body near Waco, Texas, and fled to Missouri. However, petitioner refused to disclose the location of the gravesite, and refused to draw a map depicting that location. She asked instead for an attorney.

Petitioner then met with her *Miranda*-provided attorney, disclosed the location of the gravesite, and drew a map of that location. When the State learned that petitioner had prepared the confidential map to assist her attorneys in providing legal advice, it compelled one of those attorneys to surrender the map, used it to find the infant's body, and charged petitioner with capital murder the next day.

The Texas Court of Criminal Appeals ("TCCA") affirmed the conviction upon a newly minted, *ex post "*exception" to the attorney client privilege, *viz*: the "strong public policy interest of protecting a child from death or serious

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966), amplified in *Edwards v. Arizona*, 451 U.S. 477 (1981).

bodily injury," *Henderson v. State*, 962 S.W.2d 544, 557 (1997), *cert. denied sub nom., Henderson v. Texas*, 525 U.S. 1978 (1998) ("*Henderson I*").

After denial of state habeas relief, petitioner filed her first federal habeas petition, seeking relief on, *inter alia*, several constitutional questions arising from the State's compelling her attorney to betray petitioner's confidences. The district court, however, declined to adjudicate the merits of any of these questions, holding instead that review was precluded by *Texas v. Cobb*, 532 U.S. 162 (2001) ("*Cobb*"). *App*. 73a-79a. The court of appeals affirmed, adopting the district court's reasoning that, on the day the State seized the confidential map from petitioner's attorney, petitioner was charged only with kidnapping, and that she therefore had no sixth amendment right to counsel on the murder charge, because that charge was not preferred until one day after the State seized the confidential map. *App*. 12a-18a.[3]

The district court also denied relief on the claim that petitioner's appellate counsel provided ineffective assistance when he failed to designate, as part of the record on appeal, a transcript during which the Texas lower court hearing judge said, "I'm convinced that the child is deceased, and since I'm convinced the child is deceased, I really don't see how it can be an ongoing crime." Appellate counsel thus did not argue how the lower court's finding knocked the props from beneath the "exception" created by the TCCA. The district court nevertheless held that this

[3] As an alternate ground of disposition of *one* of the claims the district court thought implicated by *Cobb*, it also held that this claim had not been exhausted. *App*. 70a-73a. The court of appeals held that review of the exhausted claims was barred by *Cobb*, but did not address whether review of the one unexhausted claim was also barred by *Cobb*. *See App*. 11a. Petitioner does not now seek this Court's review of the "exhaustion" ruling, because if the decision below is reversed, there will be time enough for the district court to reconsider it.

claim did not satisfy the "prejudice" component of *Strickland v. Washington*, 466 U.S. 668 (1984). *App*. 90a-94a, 109a-116a. The court of appeals affirmed on the same ground. *App*. 19a-24a.

B. Petitioner's Arrest and Exercise of Her *Miranda* Rights

On the morning of January 21, 1994, the parents of Brandon Baugh delivered their three-month-old baby to petitioner, the infant's daily caregiver, at petitioner's home near Austin, Texas. Tragically, Brandon died later that day when, according to petitioner, he fell from her arms and struck his head upon the concrete floor of the home. Petitioner had nursing experience, but when her efforts to provide cardiopulmonary resuscitation did not succeed, petitioner panicked, buried the infant's body near Waco, and fled to Missouri.

On February 1, 1994, the Federal Bureau of Investigation arrested petitioner in Kansas City on federal and Texas kidnapping warrants. F.B.I. Special Agent Michael Napier promptly initiated custodial interrogation, beginning with the familiar *Miranda* warning. Petitioner first offered exculpatory reasons for the baby's disappearance, but the Agent persisted and

> Later, through leading questions, Napier elicited from [Henderson] a confession that she killed the baby. He asked [her], "When you say the whole thing, are you talking about that Brandon is dead, that you know where the body's located, that it was an accident, that you're sorry? [She] responded by nodding her head. Later, Napier said, "Brandon's dead. It was an accident." To this statement, [Ms. Henderson] replied, "Yes." Napier asked, "Did you bury him?" [She] responded, "Of course I did. He's just a baby." *Henderson I*, *supra*, 962 S.W.2d at 564.

Agent Napier then asked petitioner to sign a written statement, to tell him the specific location of the infant's

gravesite, and to draw a map depicting that location. The Agent's persistence doubtless brought home to petitioner both the seriousness of her circumstances and the significance of the *Miranda* admonition he had delivered only moments before. Petitioner therefore refused to sign any statement, refused to disclose the location of the gravesite, refused to draw the map requested by Agent Napier, and asked instead for the assistance of an attorney. Napier then terminated his interrogation, precisely as *Miranda* and *Edwards* required of him. *Id*.

Petitioner then met with Assistant Federal Public Defender Ronald Hall, the attorney initially provided in response to her request for the guiding hand of counsel. She spoke with him privately and in confidence, telling Hall where she had buried the body of Brandon Baugh, and drawing for Hall a sketch-map of that location as a means of reducing her words to paper. After petitioner agreed to extradition to Texas, attorney Hall sent the map and other confidential information to a Texas attorney, Nona Byington, who agreed to represent petitioner until the State court appointed a criminal law specialist to assume petitioner's defense. Although there are issues as to Hall's improper disclosure of the *existence* of the confidential map to law enforcement authorities (*see App*. 10a, 118a-119a), he maintained the confidence of his *communications* with his client, and did not succumb to the blandishment of a federal prosecutor who urged Hall to "accidentally leave a copy of the map on the fax machine" when Hall sent it to Ms. Byington. *Henderson I*, *supra*, 962 S.W. 2d at 549.

C. The State Compels Attorney Byington to Surrender Her Client's Map

After State officials learned that petitioner had exercised her *Miranda* rights and refused to draw a map for Agent Napier, but that attorney Byington now had the map drawn for attorney Hall, they turned the heat upon Ms. Byington. A grand jury subpoenaed Byington, and the

local Sheriff demanded that she hand over the map. When Ms. Byington refused, the Sheriff had her arrested on a charge of "tampering with evidence," and his officers searched her office and automobile, albeit to no immediate avail. *Id*. The Sheriff also defamed Ms. Byington to an eager press, labeling her an "accomplice to an ongoing crime" (*App*. 26a). This whipped-up public frenzy well-summarized in THE TEXAS LAWYER'S edition of February 14, 1994 (at 1):

> Anyone listening to the radio call-in shows in Austin recently had no doubt who was the most hated lawyer in central Texas. Austin's Nona Byington, three years out of law school and representing a woman accused of abducting a missing 3-month-old boy, endured five days of vilification for refusing to give authorities the maps her client had drawn showing the location of the infant's body.

On February 7, 1994, the grand jury issued another subpoena demanding that Ms. Byington relinquish her client's map. But the hated and vilified Ms. Byington continued to stand her ground; she refused to comply, asserting the confidentiality of the privileged communications and her client's rights under the fifth, sixth, and fourteenth amendments. The State immediately sought a court order compelling attorney Byington to surrender the map, on pain of jail if she refused.

An evidentiary hearing on the State's motion was held the same day. Consistent with the Sheriff's inflammatory defamations, the State chiefly argued that by withholding the map, attorney Byington was facilitating the "ongoing crime" of kidnapping, and that the crime-fraud exception to the attorney client privilege therefore trumped petitioner's assertion of the privilege. However, after considering all the evidence presented to him at the hearing, the presiding judge rejected the "ongoing kidnapping" argument, saying, "*I'm convinced that the child is*

deceased, and since I'm convinced the child is deceased, I really don't see how it can be an ongoing crime."[4]

The next morning (February 8, 1994), however, the judge nevertheless ordered Ms. Byington to surrender the map, saying that the map was not a confidential communication because, at the time she prepared it for attorney Hall, petitioner harbored the subjective intent of assisting the authorities in locating the infant's body. *See Henderson I*, *supra*, 962 S.W.2d at 550, and *App*. 5a. Presumably, this "finding" was based upon law enforcement authorities' "subjective belief that any map was made with the [subjective] intent of aiding law enforcement." *App.* 3a, 28a.

Ms. Byington reluctantly capitulated to the court's order and, using the seized map, State authorities located the body of Brandon Baugh on the evening of February 8. On February 9, 1994 the State charged petitioner with the capital murder of Brandon Baugh. *App*. 5a.

Before trial, the same judge revisited his ruling of February 8, this time under a defense motion to suppress the evidence to which the seized map had led the State. The motion was denied on the same ground of non-confidentiality, and also upon the ground that the crime-fraud exception to the attorney client privilege nullified Ms. Byington's refusal to betray her client's confidences. The judge ignored his prior finding that the child was dead, and revived the "ongoing kidnapping" rationale that he refused to invoke at the hearing on February 7-8, 1994. He then added that if the child were dead, the crime-fraud exception for "abuse of corpse" came into play. *Henderson I, supra*, 962 S.W.2d at 550.

---

[4] *See Henderson v. State*, 977 S.W.2d 605, 606 (TCCA 1998) ("*Henderson II*") (Overstreet, J., dissenting from denial of petition for rehearing and for leave to withdraw the mandate, quoted *post*, pp. 10-12).

Unless otherwise stated, all emphasis in quoted materials has been supplied.

Trial was held in May 1995, and the jury convicted petitioner on the sole charge of capital murder of an infant, in violation of TEXAS PENAL CODE § 19.03(a)(8).[5] The State's chief evidence was of petitioner's flight to Missouri after the infant died, her burial of the body instead of informing authorities of the death, and the testimony of the County Medical Examiner, who opined that the head trauma sustained by the infant was greater than one might expect had he simply fallen from petitioner's arms to the floor of her home. (Trial Transcript of May 17, 1995, at 1088-1106, and 1133-49 (State's summation of the evidence)).

At the penalty phase, the jury was informed that, if a life sentence were imposed, petitioner would have to spend at least forty years in prison before even being considered (at age 78) for release (Tr. of May 25, 1995, at 862-64). The jury nevertheless answered "Yes" to the question whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" (*id*., at 869, 923). The jury then answered "No" to the second of the two questions put to it by the court, this one dealing with mitigation. *Id*., at 869, 923.[6] The trial judge thereupon sentenced petitioner to death. *Id*., at 924.

---

[5] Before trial, the State withdrew the kidnapping charge under TEXAS PENAL CODE § 20.03(a), and the State never charged petitioner with a second count of capital murder "during the course of a kidnapping," *id*., § 19.03(a)(2). Perhaps these charges were omitted because an element of each is an unlawful "abduction." *See App*. 76a-77a (citing and quoting §§ 19.03(a) and 20.03(a)), and *App*. 16a, parsing the kidnapping statutes as requiring "proof that the child have been taken from his guardians." As the infant died in petitioner's home the same day his parents delivered him there for daycare, the element of a felonious "abduction" or "taking" could not be proved. *See post*, pp. 22-23.

[6] The mitigation question was phrased thus (Tr. of May 25, at 869):

> "Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability

(Continued on following page)

D. Affirmance by the Texas Court of Criminal Appeals

Although Ms. Henderson's federal habeas petition sought relief on a number of grounds, we limit the remainder of this Statement (parts D and E) to the dispositions pertinent to the Questions Presented.

1. The Direct Appeal – *Henderson I*

On direct appeal of the capital conviction, the TCCA affirmed in *Henderson I*, albeit not on the grounds invoked by the lower court. The TCCA began by explaining in some detail why the trial court's reliance upon the crime-fraud exception was flatly wrong "under either the kidnapping or abuse of corpse theory" (962 S.W.2d at 553). The TCCA also declined to endorse the lower court's alternate explanation of non-confidentiality of the map seized from attorney Byington, saying instead that "for purposes of this opinion, we shall assume without deciding, that the maps were intended to be confidential." *Id.*, at 551.

Instead, the Texas high court held that, as a matter of first impression, the confidentiality heretofore vouchsafed by the attorney client privilege must "yield to the strong public policy interest of protecting a child from death or serious bodily injury." *Id*. at 557. A few pages later, the TCCA recognized the constitutional implications of its "exception," but brushed them aside, saying:

> The Supreme Court has held that compelled disclosure of information from a defendant's attorney does not implicate the defendant's Fifth Amendment right against self-incrimination, even if government compulsion of the same information from the defendant personally would

---

of the defendant, that there is a sufficient mitigating circumstance or circumstances that a sentence of life imprisonment rather than a death sentence be imposed?"

> have violated that right. *Fisher v. United States*, 425 U.S. 391, 397-400, (1976). (*Id*., 962 S.W.2d at 559).[7]

Accordingly, the TCCA held that the only factual predicate to the application of its new "exception" to the privilege was the "sincerity" of police belief that the infant might still have been alive at the time the map was seized, and that this determination lay within "the exclusive province of the trial court." *Id*., 962 S.W.2d at 557, n. 12.

2. Denial of Rehearing – *Henderson II*

In reaching its conclusion that the issue was one of "sincerity" of police belief, the TCCA was unaware that the lower court had made no such finding, and instead had found that "the child is deceased," and that the State's theory of an "ongoing crime" was without foundation in the record. The TCCA's unawareness resulted because petitioner's appellate counsel failed to include in the record the critical hearing transcript of February 7, 1994. Appellate counsel therefore had no basis in the record to argue that the State had not proved the factual predicate to the new "exception" created by the TCCA. *App*. 22a-23a.

Some while after the TCCA affirmed the conviction, petitioner's state habeas counsel located the February 7 hearing transcript. Petitioner then moved the TCCA for rehearing and for leave to withdraw the mandate. The motion was summarily denied in *Henderson II, supra*, 977 S.W.2d at 605, but Judge Overstreet dissented, saying (*id*., at 606):

> [A]ppellant's motion suggesting that we grant such rehearing informs us that a transcription of a newly discovered *in camera* hearing, which contains information relevant to the disposition of points of error one and two, has recently been

[7] This view of *Fisher*'s holding is not accurate. *See post*, pp. 25-26.

recovered. This transcription shows that the trial judge, in determining whether to order production of the maps in question, believed that the decedent in this case was already dead and thus there was no continuing kidnapping. Specifically, *in camera*, the trial judge said,

> "I'm convinced that the child is deceased. And since I'm convinced the child is deceased, I don't really see how it can be an ongoing crime."

The trial judge added that he didn't see how he was going to order appellant's attorney to reveal the maps. He even commented that appellant's attorney was "doing the right thing" and that "the rest of us must do the right thing. You've shamed us into it." Nevertheless, when the trial judge reappeared in open court with the world watching and all shame was apparently brushed aside, the trial judge ordered appellant's attorney to produce the maps, which aided law enforcement officials in locating the decedent.

This newly discovered transcription of the *in camera* proceeding certainly contains evidence that could impact this Court's analysis, since this Court initially concluded that "at the time the trial court compelled production of the maps, authorities had reason to believe that the baby might still be alive." *Henderson v. State*, 962 S.W.2d 544, 557 (Tex. Crim. App. 1997). However, as quoted above, the trial judge, who was the fact finder on the map production/suppression claims, point blankly did not believe the decedent was still alive. And such a conclusion simply makes sense – how can a three-and-a-half-month-old infant who has been abandoned and left alone outside for several days still be alive?

Of course this evidence of the *in camera* hearing may not alter the conclusion of this Court, i.e. even after considering it this Court may very

> well still conclude that points one and two must be overruled. However, we should withdraw the mandate and grant rehearing to at least address this new evidence and dispose of the points based upon a complete record. Because this Court refuses to do so, I dissent.

E. Proceedings Below

After petitioner's state habeas efforts were unsuccessful, she filed a timely petition for a writ of habeas corpus in the district court below. It denied all relief, and granted summary judgment for respondent, in its order of March 31, 2004. *App*. 56a-108a. The district then issued a certificate of appealability on certain of the issues (*App*. 117a-124a), and the court of appeals denied a COA on the issues not so certified. *App*. 25a-55a. After oral argument, the court of appeals then affirmed on the certified issues in its decision of August 11, 2006 (*App*. 1a-24a), and denied a timely petition for rehearing on September 13, 2006. *App*. 125a-126a.

1. On the Issues Said to Implicate *Texas v. Cobb*

The district court did not reach the merits of petitioner's claims of constitutional violations in the seizure of the map from her attorney, or her claims of ineffective assistance of the attorneys who acted for her in regard to the map. Instead, it held that *Cobb* precluded relief on each of those claims, reasoning that on February 8, 1994 – the day on which the map was seized and the infant's body found – petitioner had only been charged with kidnapping, and that any sixth amendment right to counsel on the murder charge did not arise until the following day, when the State charged petitioner with capital murder of Brandon Baugh. *App*. 73a-79a.

On one (but only one) of these *Cobb*-implicated claims, the district court also denied relief on the alternate ground

that petitioner had not exhausted that claim in her state habeas petition (*App*. 71a-73a), but in its order of July 15, 2004, the district court nevertheless granted a certificate of appealability under 28 U.S.C. § 2253(c)(1)(A), on *all* the *Cobb*-implicated issues, saying:

> The *Texas v. Cobb* rule, addressed at length in the Court's March 31, 2004 opinion, has always struck this Court as harsh and in this situation, where Henderson was at the time of the allegedly problematic conduct charged with kidnapping the same child she was eventually charged with murdering, there seems significant danger of gamesmanship by authorities. * * * [I]n this case, with its extreme factual scenario, the petitioner should at least be able to argue that the existing precedent is distinguishable and a different conclusion than the one reached by the Court in this case is warranted. *App*. 122a.

On the *Cobb*-implicated claims that had been exhausted, the court of appeals affirmed on the same rationale as that of the district court. *App*. 12a-18a. On the single *Cobb*-implicated claim that the district court held, alternatively, had not been exhausted, the court of appeals simply affirmed on the ground of failure to exhaust. *App*. 11a.

2. On the Claim of Ineffective Assistance of Appellate Counsel

The district court also held that petitioner's claim of ineffective assistance of her appellate counsel did not satisfy *Strickland*'s prejudice component. *See App*. 91a-92a (initial order of the district court); reiterated at *App*. 109a-116a (order denying motion to alter or amend the judgment). The district court reasoned that the "focus" of the exception to the privilege created by the Texas high court was upon "the mind-set of the authorities, as opposed to the belief of the [trial] judge" (*App*. 92a), and that the judge "could have believed, simultaneously: (1) that

Brandon was dead, and (2) there was a remote possibility that he was alive, and the law enforcement officials had some basis for believing Brandon was still alive." *App*. 115a. The court of appeals affirmed upon the same essential rationale. *App*. 19a-24a.

REASONS FOR GRANTING THE WRIT

1. *Texas v. Cobb* Does Not Support the Decision Below, and this Court Should Reject the Effort to Extend *Cobb* to Situations that Do Not Implicate Any of *Cobb*'s Concerns

Just three terms ago, in *Missouri v. Seibert*, 542 U.S. 600 (2004), this Court strongly disapproved State efforts to end-run the protections secured by *Miranda.* Here, the State employed a different tactic, but one to the same end of compelling petitioner to incriminate herself notwithstanding her plain and unambiguous assertion of her right not to do so. Indeed, the State's tactic here is even more troublesome than that of the double-questioning method of *Seibert*, for it would be difficult to imagine a maneuver more at odds with *Miranda* – and with this Court's jurisprudence[8] – than invasion of the confidentiality of a *Miranda*-provided attorney's communications with her client in order to secure the very information that the police could not and did not wrest from petitioner herself.

The court of appeals' use of *Cobb* to fence-off merits review of these important questions deserves review by this Court. The decision below is not adumbrated by *Cobb*, does not arise in a setting that implicates *any* of the jurisprudential considerations that animated *Cobb*, and is not faithful to *Cobb*'s careful explanation that *Miranda* provides the bulwark protection of the right to counsel

[8] *See Fisher v. United States*, 435 U.S. 391 (1976), and other decisions discussed *post*, pp. 23-28.

before a suspect has been indicted on the offense to which the interrogation pertains.

Quite unlike the respondent in *Cobb*, petitioner is not asking the courts to annul her *Mirandized* statements to F.B.I. Agent Napier, much less to do so under the guise of "time shifting" the postindictment waiver standards of *Michigan v. Jackson*, 475 U.S. 625 (1986), to preindictment interrogations governed by *Miranda*. Petitioner simply seeks merits review of her underlying constitutional claims that the State violated her right to remain silent and her right to counsel by forcing her attorney to betray her confidences, and that the assistance of her trial court attorneys in attempting to prevent the State from doing so was constitutionally ineffective. Merits review will not implicate either *Jackson* or the concern about police confusion in a setting governed by *Miranda* and not by *Jackson*.

The court below accused petitioner of seeking an "exception" to *Cobb* (*App*. 17a), but the shoe really is on the other foot: It is respondent who seeks a sharp and unprincipled departure from the jurisprudential considerations that informed *Cobb*. No other court of appeals has pushed *Cobb* in the direction of the court below, and in a capital case, time and circumstance do not justify postponing resolution to another day. As well, review and reversal will open the gateway to the district court's adjudication of the troublesome and important questions implicated in the TCCA's new "exception" to the confidential relationship between defense attorneys and their clients.

(a) This Case Does Not Implicate *Cobb*'s Concerns About the Difference in the Waiver Standards of *Miranda* and *Jackson*

At bottom, *Cobb* resolved a conflict between *Miranda*'s standard of waiver of the right to counsel during the interrogation of uncharged crimes, and the greater hurdle imposed by *Jackson*, when and if police wish to interrogate

a defendant about a crime on which he has already been charged. From a law enforcement and societal perspective, the *Miranda* standard is a good deal more forgiving than is that of *Jackson*, for *Miranda* is an appropriately tailored accommodation of the need for elbow-room during ongoing police investigation of suspected but yet-unverified criminal activity. *See Moran v. Burbine*, 475 U.S. 412, 426 (1986).

In *Cobb*, the respondent confessed to robbery, and was indicted on that charge. Some months later, he confessed to the then-unindicted crime of murder. This Court stressed that on each occasion, "police scrupulously followed *Miranda*'s dictates when questioning respondent." *Cobb*, 532 U.S. at 171. Respondent Cobb was therefore in a pickle of his own making, for "giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility" of the suspect's confession. *Missouri v. Seibert*, *supra*, 542 U.S. at 608-09 (plurality opinion of Souter, J.).

With nowhere to go under *Miranda*, Cobb asked the TCCA to annul the State's "ticket of admissibility" by shifting *Jackson*'s postindictment waiver standard backward in time to preindictment interrogation of *any* uncharged crime that was "factually related" to the already-charged crime of robbery. The TCCA agreed, and held that Cobb's fully-*Mirandized* second confession to murder was nevertheless inadmissible under *Jackson*. Thus, *Cobb v. State*, 93 S.W.3d 1, 6 (TCCA 2000):

> [O]nce the right to counsel has attached and has been invoked, *any* subsequent waiver during police-initiated interrogation is *ineffective* unless counsel has first given *permission* for the interrogation. *Michigan v. Jackson*, 106 S. Ct. at 1411.

But counsel's "permission" is no part of the *Miranda* regime; it is quite enough that police advise the suspect that he may speak with an attorney if he wishes, but that if he waives that right, anything he says can and will be used against him in a court of law. The advise-waive

regime of *Miranda* therefore represents a carefully balanced compromise between the polar extremes of prohibiting custodial interrogation altogether, or retaining the unsatisfactory practice of considering "the totality of all the surrounding circumstances" case-by-case. *Dickerson v. United States*, 530 U.S. 428-434 (2000). *Miranda*'s compromise also accommodates the continuing "need for police questioning as a tool for effective law enforcement" and society's "compelling interest in finding, convicting and punishing those who violate the law." *Moran v. Burbine, supra*, 475 U.S. at 426.

As a practical matter, the Texas high court's use of *Jackson* to nullify a *Mirandized* confession to murder upset *Miranda*'s longstanding compromise, rendering *Miranda* a dead letter in the many settings in which police are investigating other crimes of which the defendant remains a yet-uncharged suspect. *See Cobb*, 532 U.S. at 169-72. As Justice Kennedy expatiated in his concurring opinion in *Cobb* (*id*., at 174-75):

> As the facts of the instant case well illustrate, it is difficult to understand the utility of a Sixth Amendment rule that operates to invalidate a confession given by the free choice of suspects who have received proper advice of their *Miranda* rights but waived them nonetheless. The *Miranda* rule, and the related preventative rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), serve to protect a suspect's voluntary choice not to speak outside his lawyer's presence. The parallel rule announced in *Jackson*, however, *supersedes* the suspect's voluntary choice to speak with investigators.

"*Supersedes*" is precisely the right word for the reason explained by Justice Scalia, dissenting in *Dickerson v. United States*, *supra*, 530 U.S. at 449:

> Counsel's presence is not required to tell the suspect that he *need* not speak; the interrogators can do that. The only good reason for having

> counsel there is that he can be counted on to advise the suspect that he *should not* speak. See *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in result in part and dissenting in part) ("Any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances") (emphasis in original).

This Court therefore reversed the TCCA's decision in *Cobb*. It was as at pains to stress not only police "scrupulous" adherence to *Miranda* before interrogating Mr. Cobb, but also *Miranda*'s role in the provision of a right to counsel on uncharged crimes. The Court's majority therefore assured the dissenting Justices that fealty to *Miranda* remains an entirely satisfactory means of assuring the right to counsel before formal charges have been preferred. Thus (532 U.S. at 171-72, n. 2):

> [T]he dissenters give short shrift to the Fifth Amendment's role (as expressed in *Miranda* and *Dickerson*) in protecting a defendant's right to consult with counsel before talking to police. Even though the Sixth Amendment right to counsel has not attached to uncharged offenses, defendants retain the ability under *Miranda* to refuse any police questioning, and, indeed, charged defendants presumably have met with counsel and have had the opportunity to discuss whether it is advisable to invoke those Fifth Amendment rights. Thus, in all but the rarest of cases, the Court's decision today will have no impact whatsoever upon a defendant's ability to protect his Sixth Amendment right.

In the present case, the decision of the court of appeals flouts the very *Miranda* analysis that is the critical underpinning of *Cobb*. Petitioner chose not to continue speaking with F.B.I. Agent Napier, and broke off his interrogation by requesting an attorney. Mr. Cobb did neither, and the conflict between *Miranda* and *Jackson* simply is not present here at all. The court of appeals did

not merely give "short shrift" to *Miranda*, it ignored it altogether in the teeth of *Cobb*'s *ratio decidendi.*

The only thing that perhaps need be added is that, although the preindictment right to counsel under *Miranda* is sometimes said to flow more from the fifth amendment than directly from the sixth, this is a distinction without any meaningful difference on the facts of this case. Counsel's office under *Miranda* is to protect the suspect's right not to incriminate herself during interrogation, and that is the same office of sixth amendment counsel during any postindictment interrogation as well. *See Patterson v. Illinois*, 487 U.S. 285, 294, n. 6, and 299, n. 12 (1988):

> An important basis for our analysis is our understanding that an attorney's role at postindictment questioning is rather limited, and substantially different from the attorney's role in later phases of criminal proceedings. At trial, an accused needs an attorney to perform several varied functions – some of which are entirely beyond even the most intelligent layman. Yet during postindictment questioning, a lawyer's role is rather unidimensional: largely limited to advising his client as to what questions to answer and which ones to decline to answer. * * * *
>
> We note, incidentally, that in the *Miranda* decision itself, the analysis and disposition of the waiver question relied on this Court's decision in *Johnson v. Zerbst*, 304 U.S. 458 (1938) – a *Sixth Amendment* waiver case. See *Miranda*, 384 U.S., at 475. From the outset, then, this Court has recognized that the waiver inquiry focuses more on the lawyer's role during such questioning, rather than the particular constitutional guarantee that gives rise to the right to counsel at that proceeding. See *ibid.*; see also *Moran v. Burbine*, 475 U.S., at 421. Thus, it should be no surprise that we now find a strong similarity between the level of knowledge a defendant must have to waive his

> Fifth Amendment right to counsel, and the protection accorded to Sixth Amendment rights. (emphasis in original).

Accordingly, the scope of the right to counsel under the two Amendments differs only in a respect not present here – the standard of waiver under *Miranda* and that under *Jackson*. In this context, the statement that the sixth amendment is "offense specific" is simply a convenient shorthand means of explaining why the *Jackson* standard is inapplicable during preindictment interrogation. This case implicates neither standard, because there was no waiver at all on the critical question of the location of the gravesite of the deceased infant. *Patterson* therefore scotches the court of appeals' effort to portray petitioner's right to counsel as one arising *only* under the sixth amendment, and not equally under the fifth, per *Miranda*.

(b) This Case Does Not Implicate *Cobb*'s Concern About "Police Confusion"

As well, this case does not implicate *Cobb*'s additional concern that time-shifting the *Jackson* standard would require police to wrestle with "the dissent's vague iterations of the 'closely related to' or 'inextricably intertwined with' test that would defy simple application," leading to the unacceptable consequence that "police likely would refrain from questioning certain defendants altogether." (*Cobb*, 532 U.S. at 174).

Petitioner seeks no relief based upon the timing or content of the *Miranda* admonition that F.B.I. Agent Napier delivered to her, and she seeks no relief based on what she admitted to the Agent before invoking her *Miranda* rights. Napier correctly advised petitioner that she had a right to counsel, and that if she voluntarily chose to speak without first seeking counsel's advice, *anything* she said could be used against her. Words of broader dimension would be difficult to imagine, and they capture for a lay person the point that *Miranda* is not

"offense specific." Petitioner therefore *knew* that if she answered any questions about the infant's death, she did so at her peril. *Miranda* also did not obligate Agent Napier to advise petitioner that "any lawyer worth his salt will tell [you] in no uncertain terms to make no statement [to me] under any circumstances." *Watts v. Indiana, supra*, 338 U.S. at 59, because the Constitution

> does not require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.

Moran v. Burbine, supra, 475 U.S. at 422.

Accordingly, the State's problem here has nothing whatsoever to do with the timing or content of Agent Napier's admonition or any "confusion" on his part. The State's only "problem" was that petitioner heeded Napier's warning, stopped talking, and asked for an attorney. *Cobb* has nothing whatsoever to do with that "problem," precisely because respondent Cobb either paid no attention to the *Miranda* admonition, or voluntarily chose to speak anyway. Again, therefore, no principled application of *Cobb* can be used to erect a barrier to review of the merits of the State's attempt to solve its "problem" by converting attorney Byington into a witness against her client.

(c) *Cobb* Does Not Sanction State Invasion of Petitioner's Right to Counsel Simply Because the Ultimate Fruit Differed from that Asserted to Justify the Invasion

The district court was also correct in expressing its concern for the harshness of applying *Cobb* "in this situation, where Henderson was at the time of the allegedly problematic conduct charged with kidnapping the same child she was eventually charged with murdering, there seems danger of significant gamesmanship by authorities." *App*. 122a. On February 8, 1994, the State wrested the map from attorney Byington and found the body of Brandon

Baugh. It charged petitioner with capital murder the next day. All agree that, on February 8, (i) petitioner had a right to counsel, under *Miranda*, on the yet-uncharged crime of murder, (ii) petitioner had a sixth amendment right to counsel on the kidnapping charge; (iii) the kidnapping charge was the basis of the lower court's order compelling attorney Byington to surrender the map; and (iv) the TCCA's affirmance rested upon a "public policy" of permitting police to search for the person of Brandon Baugh, in dire jeopardy were he still alive.

Even if one ignores petitioner's ongoing right to counsel under *Miranda*, taking the State and its high Court at their respective words about the "kidnapping" basis for invading petitioner's confidences with her attorney, does not lead to the conclusion that a sixth amendment violation is somehow erased by the happenstance that the State turned out to be wrong in seeking the map on the basis of a kidnapping charge, because young Baugh died in petitioners' home two weeks before the order requiring seizure was obtained. This result cannot be squared with *Cobb*, least of all in the light of petitioner's invocation of her *Miranda* rights, which in *Cobb* this Court stressed as the bulwark protection of a suspect's rights in a preindictment setting. Any effort to draw a distinction between the right of counsel under *Miranda*, and the right of counsel under the sixth amendment, makes no sense at all, for the very reasons explained in *Patterson v. Illinois*, quoted *ante*, pp. 19-20.

The court of appeals did not respond at all to the district court's expression of concern about the "harshness" of a mechanical application of *Cobb* in this setting. Instead, it brushed the point aside simply by saying that under *Blockburger v. United States*, 284 U.S. 299, 304 (1932), kidnapping and murder are separate offenses, because kidnapping requires proof of felonious abduction, i.e., "that the child [had] been taken from his guardians." *App*. 16a. But this misses the central point of another difference between this case and *Cobb*. In that case, the

State obtained Mr. Cobb's confessions to two crimes, and it was at liberty to, and did, convict him on both. Here in contrast, the State seized the map in order to determine, ultimately, *which* of two separate charges would support a conviction – kidnapping *or* murder, but not both for want of any "abduction" in the death of the infant in petitioner's home on the day his parents brought him there for caregiving. *See ante*, p. 8 & n. 5.

Nothing in *Cobb* supports any principled reason for the implicit holding below, which was that *if* the police found Brandon alive, petitioner would have a full opportunity to litigate the merits of fifth and sixth amendment violations attending seizure of the map, but that these claims simply evaporated *because* Brandon died in petitioner's home, and the map was seized the day before the State preferred the capital murder charge. Perversely, it could be said that petitioner would have been better off without a *Miranda*-provided attorney, because then there would have been no surrogate from whom the State could extract the incriminating evidence that petitioner refused to disclose to Agent Napier during custodial interrogation. That would stand *Miranda* on its head. The decision below is more than just "harsh"; it is also a perfect example of what this Court, speaking through Justice Frankfurter, once called "mechanical jurisprudence in its most glittering form," *Bindczyck v. Finucane*, 342 U.S. 76, 85 (1951).

2. Review Should Be Granted as a Gateway to Consideration of the Important Questions Arising in the *Henderson I* Decision of the Texas Court of Criminal Appeals

The constitutional questions implicit in *Henderson I* are themselves important and troublesome, for never before has this Court suggested or approved invasion of the attorney privilege to secure evidence that the client is lawfully entitled to withhold from the police. The writ should therefore be granted as a gateway to the full

consideration of these important questions by the district court in the first instance.

At bottom, the right to counsel would be hollow indeed were counsel subject to even the risk, much less the reality, of being conscripted to reveal that which the client may not be compelled to disclose. The right to remain silent "contains an implicit assurance that silence will carry no penalty," *Doyle v. Ohio*, 426 U.S. 610, 618 (1976), and a penalty more severe than compelled disclosure of confidential information imparted only to counsel would be difficult to imagine. It is of course no answer to say that in such circumstances, the penalty may be "avoided" by refusing to confide in one's attorney, for as Justice White observed for the Court in *Fisher v. United States*, *supra*, 425 U.S. at 403:

> The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer, and it would be difficult to obtain fully informed legal advice.

This is hardly a novel proposition, *see*, *e.g., Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) ("assistance [of counsel] can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

The TCCA itself seemed to recognize some of this, but ended up getting things backwards. It said that in *Fisher*, this Court authorized law enforcement to seize client documents from an attorney, *even when* those materials would be privileged and *not* obtainable if sought from the client herself. *Henderson I*, *supra*, 962 S.W.2d at 558-59. But *Fisher* holds just the reverse, as a side-by-side comparison discloses:

***Henderson I*, at 558-59:**	***Fisher*, 425 U.S. at 404:**
The Supreme Court has held that compelled disclosure of information from a defendant's attorney does not implicate the defendant's Fifth Amendment right against self-incrimination, *even if* government compulsion of the same information from the defendant personally would have violated that right. *Fisher v. United States*, 425 U.S. 391-397-400	Where the transfer is made for the purpose of obtaining legal advice, the attorney-client privilege would be defeated unless the privilege is applicable. "It follows, then, that when the client himself would be privileged from production of the document, either as a party at common law or as exempt from self-incrimination, the attorney having possession of them is *not bound to produce*." [quoting WIGMORE].

Fisher's holding is thus that "attorneys, while barred from directly asserting their clients' fifth amendment privilege, could resist the summonses on the ground of attorney-client privilege if the fifth amendment would have prevented compelled disclosure of the documents while in the [client's] possession." S. Alito, *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 43 (1986). This is why *Fisher* necessitated resolution of whether preexisting business records of the taxpayers' accountants would have been unavailable to the Government had they been sought from the taxpayers themselves, rather than from the taxpayers' attorneys. This Court's holding that the taxpayers themselves could not object to disclosure of the documents in their own hands was therefore quite unremarkable. *See Fisher*, 425 U.S. at 409 ("The accountant's workpapers are not the taxpayer's. They were not prepared by the taxpayer and they contain no testimonial declarations by him."). Here in contrast, petitioner prepared the incriminating maps, and provided them to her attorneys in order to obtain the very legal advice that *Fisher* protects.

Fisher also informs this Court's decisions disapproving exceptions to attorney client and other privileges based upon "policy considerations" in which a court *ex post* determines that the privilege must, in the words of the Texas high court, "yield" to the importance of the information demanded of the confidant. *See Upjohn Corp. v. United States*, 449 U.S. 383, 392-93 (1981) (quoting *Fisher* and *Blackburn*, and explaining that exceptions "frustrate[ ] the privilege," and "an uncertain privilege . . . is little better than no privilege at all").

In *Jaffe v. Redmond*, 518 U.S. 1 (1996), the Court approved the Seventh Circuit's endorsement of a psychotherapist-patient privilege that, like the attorney client privilege, "is rooted in the imperative need for confidence and trust," *id.*, at 10, but it then added (*id*., at 17-18):

> We part company with the Court of Appeals on a separate point. We reject the balancing component of the privilege implemented by that court and a small number of States. Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in *Upjohn*, if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." 449 U.S. at 393.

And most recently in *Swidler & Berlin v. United States*, 524 U.S. 399, 409 (1998), the Court again returned to these basic themes:

> Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just

> that reason, we have rejected use of a balancing test in defying the contours of the privilege. *See Upjohn*, 449 U.S. at 393; *Jaffee*, 518 U.S. at 17-18.

The Texas high court's decision in *Henderson I* introduces the same uncertainties to which these decisions speak, and leads to the same confusion (albeit among criminal defense attorneys, rather than the police), that *Cobb* identified. *Ante*, pp. 20-21. Indeed, the State does not come with very good grace defending a rule of law laced with the same uncertainties that it vigorously cited in urging reversal of its own high Court in *Cobb*.[9]

As well, a rule of law that, as a practical matter, either imperils or impedes counsel's full and frank communications with her client is much like the "no communications" order disapproved in *Geders v. United States*, 425 U.S. 80 (1976). *See Strickland v. Washington*, *supra*, 466 U.S. at 686 (the "Government violates the right to effective assistance of counsel when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense," citing *Geders*).

Still further, when attorney Byington was put to the choice of going to jail or sacrificing her client's interests, there was an immediate and irreconcilable conflict between her interests and those of her client. *See Cuyler v. Sullivan*, 446 U.S. 335 (1980). This shows another vice of efforts to force attorneys to betray their clients' confidences. The "public policy" rationale of *Henderson I* would

---

[9] *See* Pet. Br. in *Cobb*, No. 99-1702, 1999 U.S. Briefs (Lexis) 1702 at *23 ("when faced with an ongoing investigation into a prospectively indefinable 'factual scenario,' the police will not be able to foresee what distinct crimes may come to light"), and Brief for the United States as Amicus Curiae in *Cobb*, *id*. at *26 (the decision below "would have the adverse practical effect of discouraging law enforcement officers from approaching a suspect about [uncharged] criminal activity" and would "unnecessarily frustrate the public's interest in the investigation of criminal activities").

apply equally to State efforts to wrest information from the suspect herself, but that would be unavailing. Threatening jail to an already-incarcerated defendant is a labor to no purpose, but it is quite another thing to threaten her attorney with incarceration, particularly in the highly volatile atmosphere that the State itself orchestrated when the Sheriff "publicly accused Byington of being an accomplice in an ongoing crime." *App*. 28a.

This Court should not preclude district court consideration of these important questions, least of all by fencing them off by an unprincipled extension of its decision in *Cobb*.

3. Petitioner's Ineffective Assistance of Counsel Claim Also Implicates the Important Question of Circumvention of *Miranda*

If Henderson I's "public policy" exception to the attorney-client privilege can ever be justified, and *if* the decision in *Cobb* places that issue beyond the reach of federal habeas (or any other) review, then the exception should be narrowly tailored, and it is critical that the judge who pierces the veil does so only on the most defensible ground supported by the record. Here, that did not happen.

The court below mistakenly viewed the issue as nothing more than a disagreement between what the authorities "believed" and what the judge who issued the map seizure order "believed" after considering all the evidence presented at the February 7, 1994 hearing on the State's motion to compel attorney Byington to disclose her client's confidential communications, reduced to writing in the form of the map. *App*. 23a. But this approach impoverishes the critical role of judicial oversight of State efforts to go where the Constitution may otherwise forbid. As dissenting Judge Overstreet correctly observed in *Henderson II*, *supra*, 977 S.W.2d at 606:

> However, as quoted above, the trial judge, who was the *fact finder* on the map production/suppression claims, point blankly *did not believe* the decedent was still alive. And such a conclusion simply makes sense – how can a three-and-a-half-month-old infant who has been abandoned and left alone outside for several days still be alive?

"Sincerity" of police belief is not the appropriate touchstone because there never has been, and never will be, any application for search or seizure unaccompanied by police "sincerity." The office of a judicial hearing is therefore to test such claims on the basis of credible, objective facts, and when appellate counsel failed to perfect the record, petitioner was deprived of the opportunity to show the TCCA why its newly minted "exception" had no support in the record.

Strickland's touchstone is *not* that the TCCA "*would have* reached the same conclusion had it possessed the missing transcript" (*App*. 25a), for that invokes the obverse of *Strickland*'s statement that

> [W]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. * * * The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. (466 U.S. at 693-94).

Accordingly, the correct standard is that the

> defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. at 694.

Respectfully, no confidence at all can be reposed in a death sentence imposed under the circumstances of this case, and counsel's inexplicable failure to perfect the

record on the critical issue of what the trial court found and did not find reinforces that conclusion. Indeed, the district court ultimately had to speculate about what the state judge "could have believed" (*App*. 115a), but what the judge said he believed from the evidence was clear and unambiguous. "I'm *convinced* that the child is dead."

CONCLUSION

The petition should be granted.

Dated: December 12, 2006.

Respectfully submitted,

GEORGE A. CUMMING, JR.
Counsel of Record
MICHAEL L. BANKS
MOLLY MORIARTY LANE
MORGAN, LEWIS & BOCKIUS LLP

JANI J. MASELLI

Attorneys for Petitioner