No. 12-794

In The Supreme Court of the United States

RANDY WHITE, WARDEN,

Petitioner,

v.

ROBERT KEITH WOODALL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

JACK CONWAY
ATTORNEY GENERAL
OF KENTUCKY
SUSAN RONCARTI LENZ*
ASSISTANT ATTORNEY GENERAL
IAN G. SONEGO
SPECIAL ASSISTANT
ATTORNEY GENERAL
1024 CAPITAL CENTER DRIVE
FRANKFORT, KENTUCKY 40601
(502) 696-5342
susan.lenz@ag.ky.gov
Attorneys for Petitioner

**Counsel of Record*

December 3, 2013

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

ARGUMENT 4

I. The Kentucky Supreme Court did not unreasonably apply law clearly established by this Court 4

A. This Court's decisions did not clearly establish Woodall's right to the no-adverse-inference instruction he requested 4

B. AEDPA bars habeas relief in this case 13

II. Even if there were error, it was harmless under the *Brecht v. Abrahamson* standard 15

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000).....10, 12

Boyde v. California, 494 U.S. 370 (1990).....17, 18

Brecht v. Abrahamson, 507 U.S. 619 (1993).....*passim*

Burt v. Titlow, 571 U.S. ___, slip op. at 6 (Nov. 5, 2013).....15

Calderon v. Coleman, 525 U.S. 141 (1998).....17

California v. Ramos, 463 U.S. 992 (1983).....11

Carter v. Kentucky, 450 U.S. 288 (1981).....*passim*

*Chaidez v. United States,*133 S.Ct. 1103 (2013).....14

Chapman v. California, 386 U.S. 18 (1967).....16, 17, 18, 20

Doan v. Carter, 548 F.3d 449 (6th Cir. 2008).....16

Estelle v. McGuire, 502 U.S. 62 (1991) 18

Estelle v. Smith, 451 U.S. 454 (1981).....*passim*

Gongora v. Thaler, 710 F.3d 267 (5th Cir. 2013) 21

Griffin v. California, 380 U.S. 609 (1965) 6, 10, 20

Harrington v. Richter, 131 S.Ct. 770 (2011) 3, 15

Hedgpeth v. Pulido, 555 U.S. 57 (2008) 16

Hodge v. Commonwealth, 17 S.W.3d 824 (Ky. 2000) 10

Hunt v. Commonwealth, 304 S.W.3d 15 (Ky. 2009) 10

Illinois v. Lidster, 540 U.S. 419 (2004) 5

TABLE OF AUTHORITIES – Continued

Page

Jensen v. Romanowski, 590 F.3d 373 (6th Cir. 2009) 16

Lambrix v. Singletary, 520 U.S. 518 (1997) 14

Mitchell v. United States, 526 U.S. 314 (1999).....*passim*

Ramdass v. Angelone, 530 U.S. 156 (2000).....14

Ring v. Arizona, 536 U.S. 584 (2002).....12

Rose v. Clark, 478 U.S. 570 (1986).....18, 20

Saffle v. Parks, 494 U.S. 484 (1990).....11

Sawyer v. Whitley, 505 U.S. 333 (1992) 12

Skaggs v. Commonwealth, 694 S.W.2d 672 (Ky. 1985) 10

St. Clair v. Commonwealth, 140 S.W.3d 510 (Ky. 2004) 10

State v. Middleton, 368 S.E.2d 457 (S.C. 1988).....20

Sullivan v. Louisiana, 508 U.S. 275 (1993).....16

Teague v. Lane, 489 U.S. 288 (1989) 14

Thompson v. Commonwealth, 147 S.W.3d 22 (Ky. 2004).....10

Tuilaepa v. California, 512 U.S. 967 (1994) 11

Tyler v. Cain, 533 U.S. 656 (2001) 13

United States v. Hasting, 461 U.S. 499 (1983) 20, 21

Yarborough v. Alvarado, 541 U.S. 652 (2004).....14, 15

Yates v. Evatt, 500 U.S. 391 (1991) 18

Zant v. Stephens, 462 U.S. 862 (1993) 11

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V. 2, 4, 5, 7

FEDERAL STATUTES AND REGULATIONS

28 U.S.C. §2244(b)(2)(A) 14

28 U.S.C. §2254(d)(1) 2, 3, 7, 13, 14

§3E1.1 of the United States Sentencing Guidelines (1998) 6, 8

REPLY BRIEF FOR PETITIONER

This Court has held that a defendant who does not testify during the guilt-innocence phase of a trial is entitled to an instruction telling the jury that it should not draw any adverse inferences of guilt based on his silence. *Carter v. Kentucky*, 450 U.S. 288 (1981). And the Court has held that a sentencer may not draw an adverse inference, from a defendant's silence, with regard to a specific fact about the circumstances of the crime that would increase the sentencing range. *Mitchell v. United States*, 526 U.S. 314 (1999). This Court has never held, however, that a defendant is entitled to a no-adverse-inference instruction at a sentencing proceeding with respect to facts as to which the defendant bears the burden of proof. And it specifically left open whether a sentencer may draw an adverse inference of lack of remorse from a defendant's silence. *Id.* at 330.

The Kentucky Supreme Court therefore did not unreasonably apply clearly established law when it held that Robert Keith Woodall was not entitled to the broad no-adverse-inference instruction he requested at his capital sentencing proceeding. Woodall pleaded guilty to the crimes and aggravating circumstances that rendered him eligible for the death penalty. The no-adverse-inference instruction Woodall requested thus did not relate to his guilt or innocence or to the facts that rendered him eligible for the death sentence – the situations covered by this Court's precedents. Rather, his requested instruction encompassed terrain this Court has not yet reached and

would have barred the jury from inferring a lack of remorse based on his silence. This Court's precedents did not clearly establish Woodall's entitlement to such an instruction. In granting habeas relief to Woodall, the Sixth Circuit therefore disregarded the limits imposed by 28 U.S.C. §2254(d)(1), whose "unreasonable application" clause authorizes relief only when a state court ruling was "an unreasonable application of, clearly established Federal law, as determined by [this Court]."

Woodall defends the Sixth Circuit ruling by relying on the same faulty syllogism as the Sixth Circuit: (1) *Carter* held that the Fifth Amendment requires a no-adverse-inference instruction during the guilt-innocence phase of a trial; (2) *Estelle v. Smith*, 451 U.S. 454 (1981), held that the guilt and punishment phases of a trial should be treated the same for Fifth Amendment purposes; and therefore (3) as confirmed by *Mitchell*, a no-adverse-inference instruction is required during sentencing proceedings. BIO 3; Resp. Br. 16-19. That analysis reads *Estelle* for far more than it is worth, ignores express limits on *Mitchell*'s scope, and wrongly collapses the distinction between the *eligibility* phase and the *selection* phase of capital sentencing. Given the fundamentally different nature of those two phases, this Court has treated them differently in numerous contexts. Until the Court holds that they must be treated the same in this particular context, the law does not "clearly establish" the rule applied by the Sixth Circuit. Put another way, the Kentucky Supreme Court's

refusal to extend *Carter*, *Estelle*, and *Mitchell* to this case was not "an error . . . beyond any possibility for fairminded disagreement," as required for relief under the "unreasonable application" clause of §2254(d)(1). *Harrington v. Richter*, 131 S.Ct. 770, 786-787 (2011).

Alternatively, even if the trial court erred in not giving the requested no-adverse-inference instruction, that error did not have "substantial and injurious effect on the jury's verdict," as required by *Brecht v. Abrahamson*, 507 U.S. 619 (1993). In concluding otherwise, the Sixth Circuit made two fundamental errors, repeated by Woodall. It converted the *Brecht* standard to a possible-harm standard and it failed to take into account all the evidence the jury considered when deciding upon the punishment. Given Woodall's admission of guilt of the brutal and senseless crimes, his prior sexual abuse convictions, and his conduct after he raped the young victim and threw her in the lake to drown, any inferences the jury may have drawn from Woodall's silence did not have a "substantial and injurious effect." The Sixth Circuit's judgment should be reversed.

ARGUMENT

I. The Kentucky Supreme Court did not unreasonably apply law clearly established by this Court.

A. This Court's decisions did not clearly establish Woodall's right to the no-adverse-inference instruction he requested.

Carter, *Estelle*, and *Mitchell* do not, individually or collectively, establish a right to a no-adverse-inference instruction during the selection phase of a capital sentencing proceeding where the defendant pleaded guilty to the capital offense and aggravating circumstances that made him eligible for the death penalty. Woodall's arguments to the contrary lack merit.

1. At times Woodall appears to suggest that *Estelle*, standing alone, established his right to the instruction. *See* Resp. Br. 32-34. That contention reflects a fundamental misapprehension of the sweep of this Court's decisions. To be sure, *Estelle* stated that "[w]e can discern no basis to distinguish between the guilt and penalty phases of [a defendant's] capital murder trial so far as the protection of the Fifth Amendment is concerned." 451 U.S. at 462-463. But the Court made that statement in addressing a Fifth Amendment claim made by a defendant whose un-Mirandized statement to a psychiatrist was being used against him to prove a fact necessary, under Texas law, to impose a death sentence. The Court

rejected Texas's contention that the Fifth Amendment does not apply at all "to the penalty phase of a capital murder trial," which would have meant the state could introduce statements a defendant was compelled to make. *Ibid*.

Statements in this Court's decisions are not properly read as definitively resolving "quite different circumstances that the Court was not then considering." *Illinois v. Lidster*, 540 U.S. 419, 424 (2004). The Court in *Estelle* was not considering a defendant's silence, adverse inferences, and jury instructions. *Estelle* therefore did not clearly establish any law regarding jury instructions intended to forestall adverse inferences from a defendant's silence. The *Mitchell* Court certainly took into account *Estelle*'s statement that it discerned no basis to distinguish between the guilt and penalty phases when it considered the use of adverse inferences to find a fact that increased the sentencing range. 526 U.S. at 329. But *Estelle* did not clearly establish the legal rule the Court ultimately adopted in *Mitchell* – much less the question the Kentucky Supreme Court faced here.

2. Woodall places the rest of his eggs in the *Mitchell* basket, contending that *Mitchell* established that "[a] sentencing fact-finder is not permitted to draw adverse inferences from a defendant's silence," Resp. Br. 30, and that various facts were in dispute during his sentencing proceeding. *Id*. at 35-36. As an initial matter, *Mitchell* did not involve a no-adverse-inference instruction; the trial court itself drew adverse inferences. Beyond that, Woodall ignores

important limitations expressly set out in *Mitchell* and ignores fundamental differences between the eligibility and sentencing phases of capital proceedings.

Mitchell did not hold that a defendant is entitled to a no-adverse-inference instruction any time a fact is disputed in a sentencing proceeding. Rather, it contains four express limitations. ***First***, *Mitchell* dealt only with facts as to which the government bore the burden of proof (whether Mitchell distributed more than five kilograms of cocaine). 526 U.S. at 330. ***Second***, *Mitchell* dealt only with facts that, if found, would increase the sentencing range – akin to aggravating facts that would make a defendant death-eligible. *Id*. 317-319. ***Third***, *Mitchell* specifically stated that it was addressing "factual determinations respecting the circumstances and details of the crime." *Id*. at 328; *see also id*. at 329 (respecting "the commission of disputed acts"); *id*. at 330 ("relevant to the crime"). And ***fourth***, *Mitchell* expressly stated that "[w]hether silence bears upon the determination of lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in §3E1.1 of the United States Sentencing Guidelines (1998), is a separate question" upon which "we express no view." *Ibid*.

a. Starting with the last limitation on *Mitchell*'s reach, Woodall cannot overcome the import of *Mitchell*'s expressly leaving open how *Griffin v. California*, 380 U.S. 609 (1965) applies to "the determination of lack of remorse." It should go without saying that an issue expressly left open in one of this Court's decisions is

not "clearly established" law. This Court has therefore *not* "clearly established" that a defendant is entitled to an instruction barring the jury from inferring lack of remorse from his silence. And that means §2254(d)(1) bars a grant of habeas relief based on a state court's refusal to issue such an instruction. Yet the Sixth Circuit granted habeas relief based on precisely that. *See* Opening Br. 40-42.

Woodall asked for a broad no-adverse-inference instruction that would have told the jury that "the fact that the defendant did not testify should not prejudice him in any way." J.A. 31. This instruction would have barred the jury from inferring lack of remorse from Woodall's silence, as he acknowledges. Resp. Br. 36-38, 51-53. And that is precisely why the trial court rejected it. J.A. 36-39. In short, the trial court answered an open question adversely to the defendant. Such a holding may not form the basis for habeas relief under §2254(d)(1).

Woodall attempts to deal with this by re-writing *Mitchell*. According to Woodall (Br. 37), "*Mitchell* did not leave open . . . the question of whether silence bears upon lack of remorse as it pertains to a capital sentencing proceeding." Rather, he contends, *Mitchell* "left open the question of whether a convicted defendant has Fifth Amendment protections with respect to the federal sentencing guidelines remorse/acceptance of responsibility downward departure." Resp. Br. 37-38. That is flatly incorrect.

To quote *Mitchell* again: "Whether silence bears upon the determination of lack of remorse, or upon

acceptance of responsibility for purposes of the downward adjustment provided in §3E1.1 of the United States Sentencing Guidelines (1998), is a separate question" upon which "we express no view." 526 U.S. at 330. The phrase "lack of remorse" stands alone and is not connected to the reference to the Guidelines, which is set off by commas. Indeed, a "lack of remorse" can never lead to a downward adjustment. The Court's reference to "the determination of a lack of remorse" can refer only to a finding that would lead a fact-finder to impose a higher penalty than it otherwise might. In short, then, the law did not clearly establish Woodall's right to an instruction – such as the one he requested – that would have told the jury not to infer lack of remorse from his silence.[1]

b. Woodall is no more successful in overcoming the import of the first three limitations in *Mitchell*. Woodall does not deny that he bore the burden of proving mitigating factors, that his proposed instruction encompassed those facts, yet that *Mitchell* addressed only facts as to which the *government* bore the burden of proof. And he has no response to

[1] Woodall insists (Br. 38) that "*Mitchell* would have played out in an identical fashion if the sentencing range increase had been for lack of remorse rather than a quantity of cocaine." Of course, if that were so, the Court would not have expressly left open "[w]hether silence bears upon the determination of lack of remorse. . . ." The Court plainly believed that adverse inferences with respect to lack of remorse might be appropriate even though adverse inferences with respect to the quantity of drugs sold were not.

Mitchell's statement that "[t]he question is whether the Government *has carried its burden of proving its allegations* while respecting the defendant's individual rights." 526 U.S. at 330 (emphasis added). The rule *Mitchell* established is that "[t]he Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege." *Ibid*. The Sixth Circuit adopted a far broader rule when it held that Woodall was entitled to his proposed instruction.

Another way of putting it is that *Mitchell* dealt only with facts that would increase the sentencing range, which are akin to aggravating facts that would make a defendant death-eligible. The government, of course, has the burden of proving such facts and they typically involve "the circumstances and details of the crime." *Mitchell*, 526 U.S. at 328. By contrast, the selection phase of sentencing – be it a judge imposing a discretionary sentence in a non-capital case or a jury in a capital sentencing proceeding – involves far different considerations. The government does not have the burden of proving most of the factors considered during the selection phase and many of them do not involve "the circumstances and details of the crime."[2]

---

[2] Kentucky allows the jury to consider evidence regarding non-statutory aggravating circumstances but does not impose any burden of proof on the prosecution regarding non-statutory aggravating circumstances because Kentucky is a non-weighing

(Continued on following page)

The Sixth Circuit's rule extended *Mitchell* to a vast new terrain.[3]

Woodall's principal response is "that the Commonwealth bore the burden to prove the death penalty," as shown (he contends) by Instruction No. 6. Resp. Br. 34-35. As an initial matter, the Kentucky Supreme Court directly stated – well before the trial in this case – that "[t]here is no requirement that the jury be instructed to find that death is the appropriate punishment beyond a reasonable doubt." *Skaggs v. Commonwealth*, 694 S.W.2d 672, 680 (Ky. 1985). Even putting to the side Woodall's effort to obtain habeas relief based on a jury instruction to which

---

State. *Hunt v. Commonwealth*, 304 S.W.3d 15, 50-51 (Ky. 2009). *Also see*, *Hodge v. Commonwealth*, 17 S.W.3d 824, 853-854 (Ky. 2000); *St. Clair v. Commonwealth*, 140 S.W.3d 510, 571 (Ky. 2004); *Thompson v. Commonwealth*, 147 S.W.3d 22, 49-50 (Ky. 2004).

[3] Indeed, as noted in our opening brief at 32, this Court has never held that *Griffin* or *Carter* applies to a genuine sentencing proceeding. *Mitchell* dealt only with facts that, if found, required imposition of an increased penalty range; and *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), held that such facts are elements of the offense, not mere sentencing factors. Woodall's only response (Br. 41-42) is that *Estelle* addressed a fact – future dangerousness – that was a selection factor under Texas law. Once again, though, Woodall wrongly reads *Estelle* – a case involving a compelled statement – as clearly establishing the law with respect to adverse inferences to be drawn from a defendant's silence. Further, because a Texas jury could not impose a death sentence without finding future dangerousness, *Estelle*, 451 U.S. at 457-458, that fact might properly be considered an element of the offense and not a mere sentencing factor.

he was not entitled, his argument lacks merit. This Court has long recognized that determining whether the death penalty should be imposed on a capital defendant is a fundamentally different inquiry than finding specific facts that determine whether a defendant is guilty or is eligible for the death penalty.

As Justice Brennan stated, "[t]he decision whether to impose the death penalty represents a moral judgment about the defendant's culpability, not a factual finding." *Saffle v. Parks*, 494 U.S. 484, 506 (1990) (Brennan, J., dissenting). "[S]entencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does." *California v. Ramos*, 463 U.S. 992, 1008, fn. 21 (1983) (quoting *Zant v. Stephens*, 462 U.S. 862, 902 (1993) (Rehnquist, J., concurring in the judgment)). There is therefore a "fundamental difference between the nature of the guilt/innocence determination . . . and the nature of the life/death choice at the penalty phase." *Id*. at 1007. Whereas to find guilt "the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt," a jury deciding whether to select death does not address a "similar 'central issue.'" *Id*. at 1008. That is why states do not have to instruct juries on "how to weigh any particular fact in the capital sentencing decision" and why juries may be given wide "discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed." *Tuilaepa v. California*, 512 U.S. 967, 979 (1994) (internal quotation marks omitted).

The difference between the eligibility phase and the selection phase of a capital proceeding is reflected in the different way criminal procedure rules apply to them. A defendant can excuse a procedural default by proving he is "innocent" of the statutory aggravating factor that made him eligible for the death sentence. *Sawyer v. Whitley*, 505 U.S. 333, 347 (1992). But a defendant may not prove "innocence" of the death penalty by proving "the existence of additional mitigating evidence" that bears "on the ultimate discretionary decision between the death penalty and life imprisonment." *Id*. at 343, 345. Similarly, the Court held in *Ring v. Arizona*, 536 U.S. 584, 589 (2002), that "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment," but has not extended *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to the penalty selection phase of a capital sentencing proceeding. As Justice Scalia explained in his concurring opinion in *Ring*, "What today's decision says is that the jury must find the existence of a *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so . . . ." 536 U.S. at 612-613.

In short, when this Court establishes a clear rule with respect to the eligibility phase of capital sentencing, it does not also clearly establish that rule with respect to the selection phase. *Mitchell*'s holding and reasoning pertain only to the former and, particularly in leaving open how lack of remorse should be treated, strongly suggest that a different rule may apply to

the latter. The Kentucky Supreme Court therefore did not fail to abide by "clearly established" law when it upheld the trial court's refusal to issue Woodall's proposed instruction.[4]

B. AEDPA bars habeas relief in this case.

For the reasons discussed above, this Court has not clearly established a rule that would entitle Woodall to his proposed instruction. That constitutes an absolute barrier to habeas relief under 28 U.S.C. §2254(d)(1), which authorizes relief only when a state court merits decision "was contrary to, or involved an unreasonable application of, *clearly established* Federal law, as determined by [this Court]" (emphasis added).

Woodall attempts to overcome that barrier by watering down §2254(d)(1). First, he maintains (Br. 21) that the Court can clearly establish a principle through "a matrix of cases." Even if that were the case, *but see* Criminal Justice Legal Foundation amicus brief 10-16, the rule produced by a "matrix of cases" would have to be "dictated" by pre-existing rulings of the Court. *Cf. Tyler v. Cain*, 533 U.S. 656,

[4] Woodall contends that multiple state and federal courts have applied *Carter* to capital sentencing proceedings. Resp. Br. 30-31 & fns. 5 & 6. First off, lower court decisions cannot clearly establish the law for AEDPA purposes. Second, his contention fails on its own terms because none of these cases involved guilty pleas by the defendants.

666-667 & fn. 7 (2001) (finding that this Court did not, through two separate opinions, make a rule retroactive for purposes of 28 U.S.C. §2244(b)(2)(A) because the habeas petitioner's proposed syllogism did not "necessarily dictate" that the Court had made the rule in question retroactive).[5] As discussed in Section I(A) above, *Carter*, *Estelle*, and *Mitchell* do not produce clearly established pre-existing rulings that "necessarily dictate" the rule adopted by the Sixth Circuit.

Second, Woodall argues that habeas relief may be granted if a state court unreasonably declines "'to extend the governing legal principle to a context in which the principle should have controlled.'" Resp. Br. 21 (quoting *Ramdass v. Angelone*, 530 U.S. 156, 166 (2000) (plurality opinion)). But he has no response to the concern expressed by this Court four years later that "[t]here is force to th[e] argument" made by the state that "if a habeas court must extend a rationale before it can apply to the facts at hand then the rationale cannot be clearly established at the time of the state-court decision." *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004). "Section 2254(d)(1)

[5] In applying the *Teague v. Lane*, 489 U.S. 288 (1989), non-retroactivity doctrine the Court has required that the application of a new rule must be "dictated" by precedent existing at the time that the prisoner's direct appeal concluded. *Chaidez v. United States*, 133 S.Ct. 1103, 1107 (2013). "And a holding is not so dictated, we later stated, unless it would have been 'apparent to all reasonable jurists.'" *Id.*, quoting, *Lambrix v. Singletary*, 520 U.S. 518, 527-528 (1997).

would be undermined if habeas courts introduced rules not clearly established under the guise of extensions of law." *Ibid*.

Nor was the Kentucky Supreme Court in any way "unreasonable" in declining to extend *Carter*, *Estelle*, and *Mitchell* to this case. A state court "unreasonably" applies this Court's clearly established law when it makes "an error . . . beyond any possibility for fairminded disagreement." *Burt v. Titlow*, 571 U.S. ___, slip op. at 6 (Nov. 5, 2013) (quoting *Harrington v. Richter*, 131 S.Ct. 770, 786-787 (2011)). Given the various other contexts in which this Court has not applied the same rules to the eligibility and selection phases of capital sentencing, and the limits expressly set out in *Mitchell*, fairminded jurists could readily disagree whether to extend *Carter*, *Estelle*, and *Mitchell* to this case.

II. Even if there were error, it was harmless under the *Brecht v. Abrahamson* standard.

As explained in our opening brief (at 43-48), the Sixth Circuit applied an improper harmless-error standard and, as a consequence, reached the wrong result. In defending the Sixth Circuit, Woodall repeats many of its errors and adds several of his own.

1. Woodall insists (Br. 43-44) that the Sixth Circuit "applied the harmless error test of *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)." And there is no denying that the court began its harmless-error discussion by citing *Brecht* and reciting its

"substantial and injurious effect" standard. But as the court elaborated on its understanding of the *Brecht* standard, things quickly went awry. The court cited two of its own precedents as establishing that "[t]o determine the effect of an error, the court must determine 'whether the [outcome that was] actually rendered in this trial was *surely unattributable* to that error.'" Pet. App. 9a (emphasis added) (quoting *Doan v. Carter*, 548 F.3d 449, 459 (6th Cir. 2008)). But *Doan* – which also was purporting to apply *Brecht* – borrowed that "surely unattributable" language from *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993), which was describing the more defendant-friendly standard of *Chapman v. California*, 386 U.S. 18 (1967).

The court also relied on a prior Sixth Circuit decision which held that an error in a habeas case is harmful unless the court can "*be certain* that the error had 'no small effect' on the jury's verdict." Pet. App. 12a (emphasis added) (quoting *Jensen v. Romanowski*, 590 F.3d 373, 381 (6th Cir. 2009). This Court has stated emphatically, however, that "an 'absolute certainty' standard is plainly inconsistent with *Brecht*." *Hedgpeth v. Pulido*, 555 U.S. 57, 62 (2008) (*per curiam*). Finally, the Sixth Circuit here added still another incorrect gloss on the standard by stating: "Because we cannot know what led the jury to make the decision that it did, and because the jury may well have based its decision on Woodall's failure to testify, we cannot conclude that this is a case of 'harmless error.'" Pet. App. 11a. As Judge Cook

explained in her dissent, that is "a form of *possible*-harm review that verges on a presumption of prejudice." Pet. App. 24a. But mere speculation that the jury was improperly influenced by a constitutional error is not sufficient. *Calderon v. Coleman*, 525 U.S. 141, 146 (1998) (*per curiam*).[6]

2. The Sixth Circuit took another wrong turn when it failed to assess the importance of the error in relation to other evidence presented during Woodall's sentencing proceeding. The court stated that "the overwhelming evidence of Woodall's guilt presented during the penalty phase and the overwhelming evidence of the heinousness of the crimes" were irrelevant because "the finding of the aggravating circumstances did not compel the jury to recommend a death sentence." Pet. App. 10a. That misses the point. Even if the overwhelming evidence of Woodall's guilt of a brutal murder, kidnapping, and rape did not "*compel* the jury to recommend a death sentence," it certainly was the key factor that *convinced* the jury to recommend a death sentence. The Sixth Circuit's failure to take that evidence into account misperceives the nature of the harmless-error inquiry. Woodall repeats that mistake by barely giving a nod to the brutal nature of the crime and the other factors that led the jury to impose a death sentence.

---

[6] *Boyde v. California*, 494 U.S. 370, 380, fn. 4 (1990), explained, "[W]e have held that a defendant cannot establish a constitutional violation simply by demonstrating that an alleged trial-related error could or might have affected the jury."

An error is not harmful (whether under *Brecht* or *Chapman*) merely because the jury was aware of the improper evidence or consideration. Virtually all errors subject to harmless-error review – including "unconstitutional comment on a defendant's silence" – "alter the terms under which the jury considered the defendant's guilt or innocence, and therefore all theoretically impair the defendant's interest in having the jury decide his case." *Rose v. Clark*, 478 U.S. 570, 582, fn. 11 (1986). The question is whether the "error" is "unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Yates v. Evatt*, 500 U.S. 391, 403 (1991) (applying the *Chapman* harmless-error standard).[7] And to answer that question, a court "must ask what evidence the jury actually considered in reaching its verdict" and then "weigh the probative force of that evidence as against the probative force of the error standing alone." *Id*. at 404.

Applied here, the outcome of that weighing is unmistakable: Any error was harmless. As summarized in our opening brief (at 4-9, 44-45), the prosecution presented overwhelming evidence of Woodall's guilt, the brutality of the crimes and aggravating circumstances, Woodall's prior sex crimes, and Woodall's failure to complete a sex offender treatment program. He kidnapped, raped, and intentionally murdered the

---

[7] *Yates* was disapproved in part on other grounds by *Estelle v. McGuire*, 502 U.S. 62, 72, fn. 4 (1991), citing *Boyde v. California*, *supra*.

victim, including throwing her into a lake to drown. Woodall has nothing to say about this side of the equation, treating it – like the Sixth Circuit – as if it were irrelevant to the harmless-error analysis.

On the other side of the ledger, Woodall cannot deny that the jury heard his mitigation evidence and considered it when deciding upon the appropriate punishment. He instead relies on the improbable chance that the jury might have inferred from his silence that he did not really experience poverty or have low intellectual functioning, a personality disorder, or a "dysfunctional upbringing." Resp. Br. 55-56. But apart from his blunderbuss assertion that a jury will simply "penalize[ ]" a defendant for not testifying (Br. 54), Woodall does not explain why a jury would ignore that mitigating evidence simply because he did not testify.

Similarly, there is no reason to believe the outcome of this case at all turned on whether the jury believed that Woodall's grandmother's administration of soap suppositories to deal with a bowel condition technically constituted sexual abuse. *But see* Resp. Br. 56. The fact of what the grandmother did, as opposed to its characterization, was not disputed. 10 T.E. 1446; J.A. 64.

Finally, Woodall contends (Br. 51) that "the prosecution used Woodall's silence as evidence of lack of remorse." Not so. Contrary to Woodall's argument, the prosecutor's reference to Woodall's hanging his head down during the trial was not a comment upon

Woodall's lack of remorse or his failure to testify, but instead was a comment upon how Woodall's behavior was different than the night he committed the crimes. J.A. 58; Pet. App. 285a-286a. If the jury concluded that Woodall lacked remorse, it was no doubt because the undisputed evidence showed that after he committed the crimes he returned to his mother's house and fell asleep watching television as if nothing had happened. 10 T.E. 1464-1466.

3. At bottom, Woodall effectively asks this Court to adopt a presumption that the failure to give the jury a no-adverse-inference instruction during a sentencing proceeding is never harmless. This Court's precedents foreclose that approach, and properly so. In *United States v. Hasting*, 461 U.S. 499, 509-512 (1983), the Court found a *Griffin* error to be harmless under the *Chapman* standard. And the Court approvingly cited *Hasting* in *Rose v. Clark*, where it stated that "unconstitutional comment on a defendant's silence" is not "immune from harmless-error analysis." 478 U.S. at 582, fn. 11. If *Griffin* error – which does not even require a court to speculate that the sentencer took the defendant's silence into account – can be harmless under the *Chapman* standard, it surely follows that *Carter* error can be harmless under *Brecht*.

Had the trial court or the prosecutor told the jury that Woodall's silence made him more deserving of death, this would be a closer case. *Compare State v. Middleton*, 368 S.E.2d 457, 461 (S.C. 1988) (finding *Carter* error harmless where "the solicitor made no

reference to the appellant's failure to testify"), *with Gongora v. Thaler*, 710 F.3d 267, 278-280 (5th Cir. 2013) (finding *Carter* error harmful where "the prosecutor's remarks on [the defendant's] failure to testify were numerous and blatant") (internal quotation marks omitted). But the trial court did not tell the jury to infer anything from Woodall's silence, and the prosecutor's closing argument did not mention Woodall's failure to testify or failure to express remorse. J.A. 50-66. There is therefore no reason to believe the court's failure to issue a no-adverse-inference instruction had a "substantial and injurious effect or influence in determining the jury's verdict."

Under the *Brecht* standard, taking into account the entire record, Woodall's guilty plea admissions, the overwhelming evidence of guilt, the facts and circumstances of the crimes and aggravating circumstances, Woodall's prior crimes, Woodall's mitigating evidence, and the closing arguments by counsel, the denial of Woodall's tendered modified *Carter* instruction did not have a substantial and injurious effect or influence in determining the jury's verdict. The Sixth Circuit majority failed in its duty to undertake any detailed review of the record as required by the Court's rulings. In the end, the Sixth Circuit failed to heed this Court's admonition: "[I]t is the duty of the reviewing court to consider the trial record as whole and to ignore errors that are harmless, including most constitutional violations." *Hasting*, 461 U.S. at 509.

CONCLUSION

For the foregoing reason, the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

JACK CONWAY
ATTORNEY GENERAL
OF KENTUCKY
SUSAN RONCARTI LENZ*
ASSISTANT ATTORNEY GENERAL
IAN G. SONEGO
SPECIAL ASSISTANT
ATTORNEY GENERAL
1024 CAPITAL CENTER DRIVE
FRANKFORT, KENTUCKY 40601
(502) 696-5342
susan.lenz@ag.ky.gov
Attorneys for Petitioner

**Counsel of Record*

December 3, 2013