No. 12-794

IN THE

Supreme Court of the United States

RANDY WHITE, Warden,

Petitioner,

vs.

ROBERT KEITH WOODALL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345
briefs@cjlf.org

Attorney for Amicus Curiae Criminal Justice Legal Foundation

QUESTIONS PRESENTED

1. Whether the Sixth Circuit, violated 28 U. S. C. § 2254(d)(1) by granting habeas relief on the trial court's failure to provide a no adverse inference instruction even though this Court has not "clearly established" that such an instruction is required in a capital penalty phase when a non-testifying defendant has pled guilty to the crimes and aggravating circumstances.

2. Whether the Sixth Circuit violated the harmless error standard in *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993), in ruling that the absence of a no adverse inference instruction was not harmless in spite of overwhelming evidence of guilt and in the face of a guilty plea to the crimes and aggravators.

This brief *amicus curiae* addresses Question 1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Statute

Secondary Authorities

IN THE

Supreme Court of the United States

RANDY WHITE, Warden,

Petitioner,

vs.

ROBERT KEITH WOODALL,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, the just punishment for the horrible crime of the kidnapping, rape, and murder of

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

a 16-year-old girl has been needlessly delayed for 7 years and counting after the state courts' thorough review of the case was completed. This extended delay has occurred in a case of no doubt of guilt, no doubt of the circumstances of the crime, and only the flimsiest mental claims made against the perpetrator's eligibility for the punishment. In other words, there is no possibility of a miscarriage of justice in this case. Such needless delay in the execution of a clearly just punishment is contrary to the rights of victims of crime that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

In 1997, Sarah Hansen was 16 years old. She was a "high school cheerleader, an honor student, a musician, a member of the National Honor Society and the Beta Club and a medalist in swimming and diving." *Woodall* v. *Commonwealth*, 63 S. W. 3d 104, 114 (Ky. 2001). On January 25, she went out to rent a movie and never returned. Robert Keith Woodall kidnapped her, raped her, slashed her throat, and dumped her in a lake. The overwhelming evidence included fingerprints and DNA. Woodall pleaded guilty and admitted the aggravating circumstances. See *id*., at 114-115.

Woodall did not testify at the penalty phase. The trial judge refused his request to instruct the jury not to draw any adverse inference from the fact he had not testified. On appeal, the Kentucky Supreme Court found that this refusal was not error and in the alternative that any error was harmless. See *id*., at 115. The state court considered and distinguished three precedents of this Court. In particular, *Mitchell* v. *United States*, 526 U. S. 314 (1999), was distinguishable because in that case, "the U. S. Supreme Court ruled that it would not permit a negative inference to be

drawn about [the defendant's] guilt with regard to the factual determination respecting the circumstances and details of the crime. Here, Woodall did not contest any of the facts or aggravating circumstances surrounding the crimes." *Ibid*.

Following direct review, two collateral attacks on the sentence were denied by the state circuit court. These denials were affirmed by the Kentucky Supreme Court, and this Court denied certiorari. See App. to Pet. for Cert. 34a-35a (District Court opinion). This stage of review took another four years.

Seven years ago, Woodall filed a federal habeas petition with 30 claims. See App. to Pet. for Cert. 35a-37a. His claim of mental retardation was not supported by any credible evidence. See App. to Pet. for Cert. 147a. He claimed that his lawyers should have presented an insanity defense, but the defense expert found no evidence of thought disorder or psychosis. See App. to Pet. for Cert. 155a. Aside from these factually unsupported claims, Woodall's claims did not contend that he was innocent of the crime or ineligible for the penalty. That is, there is no substantial claim in this case of a miscarriage of justice. Cf. *Sawyer* v. *Whitley*, 505 U. S. 333, 339, 346-347 (1992).

The magistrate judge recommended denial of all claims. The District Court granted relief on claim one, the no-adverse-inference instruction claim presently before this Court, and claim two, a claim on jury selection. The District Court granted a certificate of appealability on claim five, instruction on mitigation. See App. to Pet. for Cert. 31a, 35a. The Court of Appeals for the Sixth Circuit affirmed on the first claim and declined to reach the others. *Woodall* v. *Simpson*, 685 F. 3d 574, 578 (2012). This Court granted certiorari on June 27, 2013.

SUMMARY OF ARGUMENT

The purpose of Congress in enacting habeas corpus reform in the Antiterrorism and Effective Death Penalty Act of 1996 was "to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." The first of these goals has clearly not been achieved. More concrete rules are required to expedite the processing of habeas cases, especially capital cases, and achieve the goals of the statute.

A federal court in habeas corpus is authorized to override a state court decision on the merits when it is "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States . . . ." 28 U. S. C. § 2254(d)(1). While the scope of a rule established by a precedent is sometimes a difficult question, this case suggests a bright line rule that can simplify and speed the decision in many cases. The state court's decision on a question of law cannot be contrary to a Supreme Court precedent when that precedent expressly distinguishes the question from the one it is deciding.

In *Williams* v. *Taylor*, 529 U. S. 362, 407-408 (2000), this Court noted but did not endorse a prior holding by the Fourth Circuit that a state court decision could be an "unreasonable application" of Supreme Court precedent if it "unreasonably refuses to extend that principle to a new context where it should apply." The Court of Appeals in the present case incorrectly attributed this statement to the *Williams* Court itself. This language should now be expressly disapproved. As the present case illustrates, it threatens to enable lower federal courts to smuggle in the back door exactly the kind of rulings that Congress sought to bar when it limited "clearly established Federal law" to the precedents of this Court. The "unreasonable application"

clause should be limited to the application of this Court's precedents to particular facts, not extension of those precedents to new territory.

ARGUMENT

I. Section 2254(d) requires more objective definition to achieve Congress's primary objective.

Congress enacted the habeas corpus chapter of the Antiterrorism and Effective Death Penalty Act of 1996 " 'to curb delays, to prevent "retrials" on federal habeas, and to give effect to state convictions to the extent possible under law.' " *Williams* v. *Taylor*, 529 U. S. 362, 404 (2000) (quoting opinion of Justice Stevens in the same case). "It cannot be disputed that Congress viewed [28 U. S. C.] § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved." *Ibid*.

It also cannot be disputed that goal number one, curbing delays, has not been achieved. A study in 2007 found that capital habeas filings were "taking at least twice as long to finish, on average, than prior to AEDPA." N. King, F. Cheesman, & B. Ostrom, Final Technical Report: Habeas Litigation in U. S. District Courts 60 (2007). That figure does not necessarily mean that AEDPA was the cause of increased delay, but it does mean that the principal purpose of the Act to reduce delay was not achieved.

The principal purpose was not achieved because the law was not implemented the way Congress intended it. "By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court," with two exceptions. *Harrington* v. *Richter*, 562 U. S. __, 131 S. Ct. 770, 784, 178 L. Ed. 2d 624, 638 (2011). The

first, most commonly litigated exception, sets a standard that "is difficult to meet . . . because it was meant to be." *Id.*, 131 S. Ct., at 786, 178 L. Ed. 2d, at 641. In other words, cases meeting the standard are supposed to be rare. Review of the state court decision on the factual record in the state court, see *Cullen* v. *Pinholster*, 563 U. S. __, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557, 569 (2011), to determine whether "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents," *Richter*, *supra*, 131 S. Ct., at 786, 178 L. Ed. 2d, at 641, should be a quick matter for nearly all claims. No discovery or evidentiary hearing is required to decide a claim on the state court record. Decisions so patently wrong as to meet the *Richter* standard rarely occur and are obvious when they do.

A heavy share of the blame for the failure to implement the law as intended rests with certain judges of the federal courts of appeals and district courts. In case after case, this Court has found shocking disregard of the statutory mandate. For example, in *Parker* v. *Matthews*, 567 U. S. __, 132 S. Ct. 2148, 2149, 183 L. Ed. 2d 32, 34-35 (2012) (*per curiam*),

> "the United States Court of Appeals for the Sixth Circuit set aside two 29-year-old murder convictions based on the flimsiest of rationales. The court's decision is a textbook example of what . . . (AEDPA) proscribes: 'using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts.' "

In *Felkner* v. *Jackson*, 562 U. S. __, 131 S. Ct. 1305, 1307, 179 L. Ed. 2d 374, 378 (2011) (*per curiam*), "The state appellate court's decision was plainly not unreasonable. There was simply no basis for the Ninth Circuit to reach the opposite conclusion, particularly in such a dismissive manner." In *Richter*, *supra*, the

Court of Appeals "explicitly conducted a *de novo* review" and "all but ignored 'the only question that matters under § 2254(d)(1)' " 131 S. Ct., at 786, 178 L. Ed. 2d, at 640. Not since the "massive resistance" campaign in the wake of *Brown* v. *Board of Education*, 347 U. S. 483 (1954), has there been such widespread defiance of the law of the land by officials with a duty to enforce it.

Yet this Court also bears a share of the responsibility. When experience shows that a rule of law expressed in general terms has provided too much leeway for evasion and that such evasion is widespread, it is time to establish more concrete rules. *Pinholster* and *Richter* are important steps toward making AEDPA effective in achieving Congress's goals, but more needs to be done. This case suggests two specific rules that can be established to facilitate prompt decision of the § 2254(d) question in a significant number of cases. First, a proposed rule is not "clearly established" by this Court's precedents if the most recent case in the series expressly distinguishes the question and declines to express an opinion on it. Second, it is time to officially lay to rest the notion that extension of this Court's precedents into new territory on habeas corpus can be smuggled in through the back door via the "unreasonable application" clause.

II. A decision is not "contrary to" a Supreme Court precedent if the precedent itself declares the issue to be a separate question from the one it decides.

Williams v. *Taylor*, 529 U. S. 362 (2000), was this Court's first thorough examination of the standard enacted by Congress in 28 U. S. C. § 2254(d).

> "In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied—the state-court adjudication resulted in a decision that (1) 'was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States,' or (2) 'involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.' Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id*., at 412-413.

Both the state and federal courts in this matter understood that three principal Supreme Court precedents require consideration: *Carter* v. *Kentucky*, 450 U. S. 288 (1981), *Estelle* v. *Smith*, 451 U. S. 454 (1981), and *Mitchell* v. *United States*, 526 U. S. 314 (1999). See Brief for Petitioner 10-11, 14-16 (summarizing decisions). Of these, *Mitchell* is both the most recent and the closest to the point. Only *Mitchell* involves a silent defendant in the penalty phase of a case. See 526 U. S., at 328. *Carter* involved a request for an instruction in the guilt phase, see 450 U. S., at 294, and *Smith* involved testimony based on an interview with the

defendant introduced as positive evidence against him. See 451 U. S., at 459-460.

Applying *Williams*, the first question is whether the Kentucky Supreme Court "arrive[d] at a conclusion opposite to that reached by this Court on a question of law" in *Mitchell*. That would only be possible if both cases address the same question of law. In some cases, determining the scope of the question may be difficult, but not in *Mitchell*. The answer is crystal clear on the face of the opinion.

Right out of the gate, *Mitchell* tells us that it addresses two questions, one of which is pertinent here. "The second question is whether, in determining *facts about the crime* which bear upon the severity of the sentence, a trial court may draw an adverse inference from the defendant's silence. We hold a sentencing court may not draw the adverse inference." 526 U. S., at 316-317 (emphasis added). After noting the general rule against negative inferences from failure to testify, *Mitchell* holds, "We decline to adopt an exception for the sentencing phase of a criminal case *with regard to factual determinations respecting the circumstances and details of the crime*." *Id*., at 328 (emphasis added).

Why does the *Mitchell* Court repeatedly go out of its way to specify facts, circumstances, and details *of the crime* as the inferences forbidden by its rule? The answer comes at the end.

> "The 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. Whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in § 3E1.1 of the United States Sentencing Guide-

> lines (1998), *is a separate question*. It is not before us, and we express no view on it." *Id*., at 330 (emphasis added).

This is as clear as it gets. There is an important distinction between using the defendant's silence to infer facts about the crime on which the government has the burden of proof and considering such silence when determining if the defendant has established reasons to sentence him to less than he otherwise deserves. The arguments against use of silence are less potent in the latter situation, which is the present case, and that difference is sufficient to make it a different question.

The separateness of the two questions is beyond dispute in this case, because the *Mitchell* opinion expressly says that the question it decided does not include the latter. The state court therefore did not decide a question of law opposite to a decision of this Court. The state court also did not decide a case on "materially indistinguishable facts," because *Mitchell* expressly distinguishes the two situations. A federal habeas court cannot grant relief under the "contrary to" prong of § 2254(d)(1).

III. A state court's decision not to extend a Supreme Court precedent beyond its existing scope is *per se* not an "unreasonable application."

In *Williams v. Taylor*, 529 U. S. 362, 407 (2000), the Court indicated that "[t]he Fourth Circuit's interpretation of the 'unreasonable application' clause of § 2254(d)(1) is generally correct." The word "generally" is important here. Summarizing the Fourth Circuit's interpretation, not its own, the *Williams* Court said,

> "a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. See [*Green* v. *French*,] 143 F. 3d [865] at 869–870." *Ibid*.

The *Williams* Court was dubious about this portion of the interpretation.

> "Although that holding *may perhaps be correct*, the classification does have some problems of precision. Just as it is sometimes difficult to distinguish a mixed question of law and fact from a question of fact, it will often be difficult to identify separately those state-court decisions that involve an unreasonable application of a legal principle (or an unreasonable failure to apply a legal principle) to a new context. Indeed, on the one hand, in some cases it will be hard to distinguish a decision involving an unreasonable extension of a legal principle from a decision involving an unreasonable application of law to facts. On the other hand, in many of the same cases it will also be difficult to distinguish a decision involving an unreasonable extension of a legal principle from a decision that 'arrives at a conclusion opposite to that reached by this Court on a question of law,' *supra*, at 405. *Today's case does not require us to decide* how such 'extension of legal principle' cases should be treated under § 2254(d)(1). For now it is sufficient to hold that when a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case, a federal court applying § 2254(d)(1) may conclude that the state-court decision falls within that provi-

> sion's 'unreasonable application' clause." 529 U. S., at 408-409 (emphasis added).

"May perhaps be correct" is hardly a ringing endorsement, yet the Court of Appeals in the present case quoted the *Williams* Court's summary of *Green* v. *French* as if it were a holding of *Williams* itself. See *Woodall* v. *Simpson*, 685 F. 3d 574, 579 (CA6 2012). That it most assuredly is not. *Williams* expressly disclaimed any decision on this point and omitted any "extension" language from its own statement of the rule, quoted *supra*, at 8.

The present case illustrates once again the wisdom of Justice Holmes's famous statement for the Court in *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355 (1908):

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."

Just where that point is located is a matter of opinion, and until this Court renders the authoritative word, courts that are not bound to follow each other's precedents may legitimately disagree.

Griffin v. *California*, 380 U. S. 609 (1965), was a stretch from the actual constitutional right of self-incrimination, so much so that four Justices of this Court agreed it was "a breathtaking act of sorcery" that ought not be further extended. See *Mitchell* v. *United States*, 526 U. S. 314, 336 (1999) (Scalia, J., dissenting). Yet *Carter* v. *Kentucky*, 450 U. S. 288 (1981), did extend *Griffin* from a ban on affirmative use to a right to a prophylactic jury instruction, and *Mitchell*, by the barest of majorities, extended it in a different dimen-

sion to a ban on affirmative use of silence in the sentencing phase to prove facts relevant to the crime on which the government has the burden of proof. See 526 U. S., at 330. With each proposed extension, the case for extension grows weaker and the countervailing policies grow stronger. Is the use of defendant's silence to negate the mitigating factor of remorse beyond the "certain point" where the countervailing policies "become strong enough to hold their own"? The *Mitchell* Court expressly declined to decide that question, as it is a separate one and was not before the Court. See *ibid*.

Allowing the lower federal courts in habeas corpus to substitute their judgment for the considered opinions of the state courts on these difficult questions of law is exactly what Congress sought to prevent when it limited "clearly established Federal law" for the purpose of § 2254(d)(1) to that "determined by the Supreme Court of the United States." This Court is unique as the only federal court with the authority to establish precedents that are binding on state court. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 898-899 (1998). A state court that disagrees with a lower federal court's precedent may very well be right, as "right" is subsequently determined by this Court, and Congress inserted this phrase to allow state courts to make their own judgments, limited only by this Court's precedents. See *id*., at 947-948.

Adopting the *Green* v. *French* "extension" language, as the Court of Appeals did in the present case, would let in through the back door the very kinds of decisions that Congress barred from the front door. Instead, that language should be expressly repudiated. The first step is to determine the "clearly established Federal law as determined by the Supreme Court of the United

States." If the state court considered the relevant Supreme Court precedents and none establishes a rule governing the situation before it, the federal habeas court can stop at that point and deny relief on that claim.

In some cases, of course, the scope of the rule established by a Supreme Court precedent will be debatable, and this Court has noted the difficulty of that decision more than once. See, *e.g.*, *Yarborough* v. *Alvarado*, 541 U. S. 652, 666 (2004); *Williams* v. *Taylor*, *supra*, 529 U.S., at 408. Certainly a Supreme Court precedent does not have to be made on indistinguishable facts before the question becomes one of applying an existing rule to specific facts versus extending a rule to new territory. See *Panetti* v. *Quarterman*, 551 U. S. 930, 953 (2007).

Carey v. *Musladin*, 549 U. S. 70 (2006), illustrates the distinction. The Court of Appeals took two Supreme Court precedents regarding state-sponsored displays in the courtroom and extended them to purely private actions. That was error under § 2254(d)(1). See *id*., at 75-77. Concurring in the judgment, Justice Kennedy noted that there were other Supreme Court precedents involving prejudicial actions at trial by private actors, but those cases involved far more inflammatory acts than the spectator buttons at issue in *Musladin*. See *id*., at 80-81. If the claim had been made under these precedents, the § 2254(d)(1) question would have involved the "application" clause, but rejection of the claim would have been reasonable. A broad rule may furnish the applicable rule, but the state court has great leeway in its application. See *Alvarado*, 541 U. S., at 664. A narrower rule gives the state court less leeway where it applies, but the state court's refusal to extend it to new territory is not a ground for federal habeas relief.

This discussion presupposes that the state court actually does grapple with the extension question, as the Kentucky Supreme Court did in the present case. "When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires." *Panetti*, 551 U. S., at 953. *Lafler* v. *Cooper*, 566 U. S. __, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), arguably involved extension of a rule into new territory. See *id*., 132 S. Ct., at 1395-1396, 182 L. Ed. 2d, at 418-419 (Scalia, J., dissenting). If the state court had decided on that basis, a more difficult AEDPA question would have been presented. However, the state court in *Cooper* made an antecedent error rendering its decision "contrary to clearly established federal law," satisfying the AEDPA requirement. See *id*., 132 S. Ct., at 1390, 182 L. Ed. 2d, at 413 (citing *Panetti*). In contrast, *Chaidez* v. *United States*, 568 U. S. __, 133 S. Ct. 1103, 1105, 185 L. Ed. 2d 149, 154 (2013), found that an extension of the right of effective assistance of counsel into new territory was a "new rule" for the purpose of *Teague* v. *Lane*, 489 U. S. 288 (1989), which is generally equivalent to finding it is not "clearly established" for the purpose of § 2254(d)(1). See *Williams* v. *Taylor*, 529 U. S., at 412.

The extension language of *Green* v. *French* is unnecessary, dangerous, and potentially misleading. It is time to officially lay it to rest. If the existing Supreme Court precedents really do require extension to reach the case before the state court, it lies within that court's authority to decide whether the extension is warranted. That decision is subject to review only by this Court by writ of certiorari and not by the lower federal courts by writ of habeas corpus. The purpose of federal habeas is only to enforce the state courts' duty

to obey precedents binding on them, not to "push the envelope," further expanding the already large federal intrusion into state procedure. The "unreasonable application" clause of § 2254(d)(1) is limited to the application of existing rules to particular facts. The statement of the rule in *Williams* v. *Taylor*, 529 U. S., at 412-413, quoted *supra*, at 8, is complete.

The Kentucky Supreme Court was correct that no precedent of this Court forbids consideration of the defendant's silence in the absence of disputed facts about the crime or requires a prophylactic jury instruction in those circumstances. See *Woodall* v. *Simpson*, 685 F. 3d, at 581 (Cook, J., dissenting). The authority of the federal habeas court stops there.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit should be reversed.

September, 2013

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation