No. 12-794

In The Supreme Court Of The United States

RANDY WHITE, Warden, *Petitioner,*

v.

ROBERT KEITH WOODALL, *Respondent.*

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

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether Petitioner has presented compelling reasons to grant the Petition, where the Sixth Circuit correctly applied AEDPA principles from (and consistent with) *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Tyler v. Cain*, 533 U.S. 656 (2001), *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007), and *Panetti v. Quarterman*, 551 U.S. 930 (2007) to a trial court's failure to provide a no-negative inference instruction at a capital sentencing hearing because it was "intellectually dishonest," "illogical" and "lacked common sense" for a defendant to "offer no testimony" and "no explanation" to the jury, and such application does not conflict with a decision of this Court or a Court of Appeals nor does it implicate an important federal question that has not been settled by this Court in *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)?

2. Whether Petitioner has presented compelling reasons to grant the Petition, where the Sixth Circuit's application of *O'Neal v. McAninch*, 513 U.S. 432 (1995) does not conflict with a decision of this Court or a Court of Appeals nor does it implicate an important federal question that has not been settled by this Court?

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Respondent, Robert Keith Woodall, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the United States Court of Appeals for the Sixth Circuit's opinion in this case. The Sixth Circuit's opinion is reported as *Woodall v. Simpson*, 685 F.3d 574 (6th Cir. 2012).[1] The Sixth Circuit declined to review the State's *en banc* request. *Woodall v. Simpson*, 2012 U.S. App. LEXIS 23974 (6th Cir. 2012), Apx. 313a.

INTRODUCTORY STATEMENT

Respondent had pled guilty. Thus, the main event for Respondent's jury was whether he should live or die. Respondent's life was the sole, critical contest before the jury. During that adversarial proceeding, the State presented eleven witnesses and Respondent presented fourteen.

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[1] Due to it's ruling, the Sixth Circuit pretermitted the consideration of three other issues. Apx. 12a. One of those appellate issues relates to the denial of funds for expert assistance as it relates to Respondent's *Atkins v Virginia*, 536 U.S. 304 (2002) claims. In support thereof, Respondent attached support from Dr. Denis Keyes, who was cited by this Court in *Atkins* and a nationally renowned mental retardation expert, that additional testing was merited. R. 28-2, 30-2, JA 120-23, 118-19.

Further, the jury received numerous instructions regarding whether to consider aggravation, and how to consider aggravation and mitigation.

Respondent did not testify at the penalty phase, and requested a *Carter* instruction informing the jury that he had no obligation to testify and that no adverse inference could be drawn from his failure to do so. The state agreed, interposing **no objection** to the *Carter* instruction. TE 1589, JA 69. The trial court rebuffed Respondent stating that it would not be "intellectually honest" to give the instruction. *Id.* The trial judge wrongly found that Fifth Amendment principles **did not** apply at the penalty phase: "In the sentencing stage to me it defies logic, it defies common sense, it's not intellectually honest to tell this jury...that you go out and rape and murder and kidnap and admit to it and then offer no testimony, no explanation, no asking for forgiveness, no remorse, and the jury can't consider that. I just don't think its logical, so that's why I'm not going to give it." TE 1591-92, JA 71-72 (*see* Attached).[2]

Indisputably, the Fifth Amendment extends to both phases of bi-furcated sentencing proceedings. *Carter v. Kentucky*, 450 U.S. 288 (1981), established that a defendant has the right to receive a no adverse inference if one is requested under the Fifth Amendment. In *Estelle v. Smith*, 451 U.S. 454 (1981), this Court extended the Fifth Amendment to penalty proceedings in a capital case irrespective of a previous guilt finding, and did not differentiate a guilt finding via an adversarial process versus a plea. This Court then held in *Mitchell v. United States,* 526 U.S. 314 (1999), that the above protections applied when guilt was established by a plea.

Both *Carter* and *Estelle* approach the Fifth Amendment's right to remain silent as a broad proposition applicable throughout a criminal case. Similarly, *Mitchell*, 526 U.S. at 329,

[2] "TR" refers to the trial transcript, "TE" refers to the transcript of evidence, and "JA" refers to the Joint Appendix filed with the Sixth Circuit by the parties.

recognized how its holding was dictated by what came before.[3] The Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard," *Counselman v. Hitchcock*, 142 U.S. 547 (1892), and the privilege is fulfilled only when a criminal defendant is guaranteed the right "to remain silent ... and to suffer no penalty ... for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

This clearly established federal authority from this Court presents a simple syllogism, which is based on long-standing principles of this Court's precedent:

A. When requested, a criminal defendant is entitled to an instruction respecting the right to remain silent at the guilt phase of trial (*Carter*);

B. The same right to remain silent also applies to the sentencing portion of a capital trial (*Estelle*);

C. Therefore when requested, a criminal defendant is entitled to an instruction respecting this right at sentencing.

The syllogism's completion was foregone after *Estelle*. Indeed, *Estelle* required application of the Fifth Amendment to capital habeas proceedings. *Estelle* did not distinguish between guilt derived from a trial versus a plea. However, as if there was any doubt, *Mitchell* applied the right to a sentencing held after a guilty plea.

These principles were unquestionably violated in Respondent's case. Over a vigorous dissent, the Kentucky Supreme Court upheld the trial judge, concluding the Fifth Amendment offered no protection to Woodall at the penalty phase.

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[3] "Our holding today is a product of existing precedent, not only *Griffin* but also by *Estelle v. Smith,* in which the Court could 'discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned.' 451 U.S., at 462-463 []. Although *Estelle* was a capital case, its reasoning applies with full force here, where the Government seeks to use petitioner's silence to infer commission of disputed criminal acts. *See supra,* at 1314. To say that an adverse factual inference may be drawn from silence at a sentencing hearing held to determine the specifics of the crime is to confine *Griffin* by ignoring *Estelle.* We are unwilling to truncate our precedents in this way." *Mitchell*, 526 U.S. at 329.

The district court found the Kentucky Supreme Court's categorical exclusion of the Fifth Amendment at a capital sentencing hearing unreasonable. The majority opinion (Judges Martin and Griffin) of the Sixth Circuit correctly affirmed, finding that:

> The Kentucky Supreme Court's denial of this constitutional claim was an unreasonable application of *Carter, Estelle*, and *Mitchell. See Williams*, 529 U.S. at 407 ("[A] state-court decision [is] an unreasonable application of [the Supreme] Court's precedent if the state court ... unreasonably refuses to extend [a legal] principle to a new context where it should apply."); *Mason v. Mitchell*, 543 F.3d 766, 772 (6th Cir. 2008) ("Clearly established law ... encompasses more than just bright-line rules laid down by the Supreme Court. It also clearly includes legal principles and standards enunciated in the Court's decisions." (alterations and internal quotation marks omitted)). The district court held that a capital defendant has a *Fifth Amendment* right to a "no adverse inference" instruction during the sentencing phase of a trial, even if guilt has already been established through a plea agreement. We agree. "Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees." *Estelle*, 451 U.S. at 463. At stake in the penalty phase of a capital trial such as Woodall's is not only what specific punishment the defendant will receive, but whether he will be put to death. The *due process clause* requires that a trial court, if requested by the defendant, instruct the jury during the penalty phase of a capital trial that no adverse inference may be drawn from a defendant's decision not to testify.

Woodall, 685 F.3d at 579, Apx. 8a-9a.

In its first question, the State contends that, by failing to accept the Kentucky Supreme Court's ruling as binding, the Sixth Circuit committed a "textbook" violation of 28 U.S.C. 2254 (d)(1) ("AEDPA") by engaging in simple "second guessing" of the state court ruling. Pet. 15-16. Taken on its own terms, the State's request is for "simple error correction" – which is not a reason for this Court to take a case. *See e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 422, n.1 (1995).

But what the State is really proposing is a radical departure from this Court's established habeas jurisprudence. It is fundamental that a federal court reviewing a state court judgment may look to a general principle announced by this Court and determine whether the state court unreasonably failed to apply those principles to specific factual circumstances. Indeed, in the

very first AEDPA case ever decided by this Court, this Court noted that a "state-court decision also involves an unreasonable application of this Court's precedent if the state court... unreasonably refuses to extend [a legal] principle to a new context where it should apply." *Williams v. Taylor*, 529 U.S. 362, 407 (2000). As noted more recently by Justice Kennedy, writing for the Court in *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007): "That the standard is stated in general terms does not mean [a state's more specific] application was reasonable." *See also id.* (*quoting Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., conc.)) ("AEDPA does not 'require ... some nearly identical factual pattern before a legal rule must be applied'").

There is no reason to depart from this Court's AEDPA constructions. One of the simplest reasons for denying the State's request for review is that the construction of AEDPA urged by the State is simply not supportable and contrary to this Court's long-standing AEDPA authority. There is no need to change this clear standard.

In its second question, the State contests a pure application of *O'Neal v. McAninch*, 513 U.S. 432 (1995), where the majority found that in the circumstances of Woodall's case there existed "grave doubt." *Woodall*, 685 F.3d at 580-581, Apx. 9a-12a. The State's only argument boils down to a disagreement with the result, whether "grave doubt" exists, arguing that the majority erred in applying *O'Neal*. Pet. 23-24. A debate over whether a constitutional error is prejudicial in a fact intensive case does not merit cert review just because a party is dissatisfied with how a federal district court and a circuit court of appeals ruled on the issue. Again, taken on its own terms, the State's request is for "simple error correction" – which is not a reason for this Court to take a case. *See, e.g., Kyles*, 514 U.S. at 422, n.1.

STATEMENT OF THE CASE[4]

The State correctly notes that the trial prosecutor did not oppose or object to the *Carter* instruction requested by Respondent. Pet. p. 8.[5] However, the State inaccurately states that the trial court never indicated that it would use Respondent's silence against him. This simply ignores the trial court's on-the-record statements.

In that ruling, the trial court stated that he would not tell the jury that "you can go out and rape, murder and kidnap and admit it and then offer no testimony, no explanation, no asking for forgiveness, no remorse, and the jury can't consider that." TE 1591, JA 71.[6] Stated another way, the trial court denied the *Carter* instruction on the basis that the jury could consider the failure of Respondent himself to offer "testimony" and the lack of an "explanation," which would be logically expected and common sense dictated. The motive behind the trial court's ruling was that it would be "illogical," "defy common sense," and that it would be "intellectually dishonest" to provide such an instruction. TE 1589, 1591, JA 69, 71.

Consistent with Respondent's reading of the record and contrary to the State's statement, the district court aptly noted that the trial court used Respondent's silence against him "...given the fact that the trial judge so forcefully stated on the record that he felt that the jury could consider Woodall's failure to offer an explanation for the crimes. If the trial judge, a man trained in the law, held this fact against Woodall... ." Slip Op. p. 22, Apx. 63a. The majority echoed

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[4] The evidence and procedural history of this case is set out accurately in the opinions filed below. *See*, Apx. 3a-5a, 33a-37a. This summary is offered for the Court's convenience and to respond to certain representations made in the State's Petition which Respondent views as inaccurate or incomplete.

[5] The tendered instruction read: "A defendant is not compelled to testify and the fact that the defendant did not testify should not prejudice him in any way." TR 1099, JA 153.

[6] During voir dire, the trial court refused the defense's request that it be allowed to ask prospective jurors if they understood that Respondent did not have to testify during the penalty trial and whether any decision to do so would be held against him. TE 697, JA 141.

this sentiment, noting "the trial court itself appears to have drawn an adverse inference from Woodall's decision not to testify." *Woodall*, 685 F.3d at 581, Apx. 11a.

Setting this aside, the trial court's ruling was manifestly incorrect. In *Carter*, 450 U.S. 288, the Court held that if a defendant requests, a court must instruct the jury that the defendant has no obligation to testify and that no adverse inference can be drawn from his failure to do so. The Court reasoned that a trial judge has the "constitutional obligation to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." *Id.* at 303. Further, this Court held in *Estelle*, 451 U.S. 454, there is "no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees." *Id.* at 462-63.

Thus, while the trial court felt it was "illogical," "intellectually dishonest" and "lacked common sense" to protect Respondent's Fifth Amendment rights at his sentencing hearing, *Estelle* had noted decades before that a capital defendant possessed such protections regardless of a conviction, i.e. that there was no there was "no basis to distinguish between the guilt and penalty phases." *Estelle* did not distinguish between guilt derived from a trial versus a plea. Further, while the trial court expected an explanation, this Court has held that requiring an explanation also violated the Fifth Amendment. *Mitchell,* 526 U.S. 314. Quite pointedly in *Mitchell*, this Court noted that:

- "To maintain that sentencing proceedings are not part of 'any criminal case' is contrary to the law and to common sense." *Id.* at 327.[7]

[7] Obviously, this Court's finding as to what common sense dictates contradicts and overrides the trial court's common sense view to the contrary.

- "The concerns which mandate the rule against negative inferences at a criminal trial apply with equal force at sentencing." *Id.* at 329.

The State also downplays the vehemence and analysis of the dissent from Respondent's direct appeal case. *See Woodall v. Commonwealth*, 63 S.W.3d 104, 134-35 (Ky. 2002). Justice Stumbo noted that the majority opinion, by focusing solely on the guilt phase, was contrary to this Court's *Mitchell* decision noting:

> The majority opinion states that this is not an error because Appellant entered a guilty plea to the charges and the evidence of guilt was overwhelming. Because he pled guilty, according to the majority, a no adverse inference instruction could have no effect on a determination of guilt and, thus, no negative inferences could be drawn by the jury from Appellant's silence.
>
> The plain language of *Mitchell v. United States,* 526 U.S. 314 [] (1999), disputes the conclusion reached by the majority. Therein, the United States Supreme Court stated as follows:
>
> > The rule against adverse inferences from a defendant's silence in criminal proceedings, including sentencing, is of proven utility. Some years ago the Court expressed concern that "[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege." ... [T]here can be little doubt that the rule prohibiting an inference of guilt from a defendant's rightful silence has become an essential feature of our legal tradition.... The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights. 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.
>
> *Mitchell,* 526 U.S. at 329 [], quoting *Ullmann v. United States,* 350 U.S. 422 [] (1956).
>
> The majority would have us eradicate the important Constitutional right involved here by failing to require the trial court to give the requested instruction. The majority states that the instruction is not necessary because Woodall did not contest any of the facts or aggravating circumstances surrounding the crimes. That may be so, but Appellant did contest the sought penalty of death during his

> penalty phase trial. He cross-examined the eleven witnesses presented by the Commonwealth and presented fourteen witnesses of his own who testified about Appellant's life and the effects his upbringing had on him. As noted in *Mitchell,* 526 U.S. at 327 [], "it appears that in this case, as is often true in the criminal justice system, the defendant was less concerned with the proof of [his] guilt or innocence than with the severity of [his] punishment." For Appellant herein the stakes could not have been higher and his Fifth Amendment rights could not have been more important.

Woodall, 63 S.W.3d at 134-35; Apx. 309a-311a.

Subjecting the claim to AEDPA review, the district court concluded that the Kentucky Supreme Court's decision was an unreasonable application of this Court's clearly existing federal law:

> The issue before the Court is whether Woodall was entitled to a no adverse inference instruction. Unquestionably, Woodall was entitled to it. In this case, Woodall pleaded guilty to the underlying substantive offenses. He did not, however, agree that the sentence of death was appropriate. Instead, he retained the right to have his sentence determined by a jury of his peers. His Fifth Amendment right survived his guilty plea. *Mitchell v. United States,* 526 U.S. at 327. The government could not have compelled Woodall to testify against his will at his sentencing hearing. *Estelle v. Smith,* 451 U.S. at 454. Such conduct would have undoubtedly violated his Fifth Amendment right. *Id.* Woodall requested a no adverse inference instruction. Once requested, it should have issued. *Carter v. Kentucky,* 450 U.S. at 305. The trial judge could have given the requested instruction and prevented any undue and impermissible speculation by the jury. Even though the prosecution did not object to the instruction, the trial judge refused to issue it. In doing so, he ran afoul of clearly established constitutional principles and violated Woodall's constitutional rights. This is not a new rule of law as the Commonwealth argues. To the contrary, it is a logical application of then-existing Supreme Court precedent. And, the Kentucky Supreme Court's decision to reject this claim was an unreasonable application of *Carter, Estelle,* and *Mitchell.*

Slip Op. pp. 19-20; Apx. 59a-61a. Thus, the district court found the Kentucky Supreme Court's categorical exclusion of the Fifth Amendment at a capital sentencing hearing was an unreasonable application of clearly existing federal law from this Court.

The majority opinion of the Sixth Circuit correctly affirmed, finding that:

> The Kentucky Supreme Court's denial of this constitutional claim was an unreasonable application of *Carter, Estelle*, and *Mitchell. See Williams*, 529 U.S. at 407 ("[A] state-court decision [is] an unreasonable application of [the Supreme] Court's precedent if the state court ... unreasonably refuses to extend [a legal] principle to a new context where it should apply."); *Mason v. Mitchell*, 543 F.3d 766, 772 (6th Cir. 2008) ("Clearly established law ... encompasses more than just bright-line rules laid down by the Supreme Court. It also clearly includes legal principles and standards enunciated in the Court's decisions." (alterations and internal quotation marks omitted)). The district court held that a capital defendant has a *Fifth Amendment* right to a "no adverse inference" instruction during the sentencing phase of a trial, even if guilt has already been established through a plea agreement. We agree. "Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees." *Estelle*, 451 U.S. at 463. At stake in the penalty phase of a capital trial such as Woodall's is not only what specific punishment the defendant will receive, but whether he will be put to death. The *due process clause* requires that a trial court, if requested by the defendant, instruct the jury during the penalty phase of a capital trial that no adverse inference may be drawn from a defendant's decision not to testify.

Woodall, 685 F.3d at 579; Apx. 8a-9a. The majority opinion did not "substitute" its judgment for the Kentucky Supreme Court's; rather, the majority opinion properly stated the AEDPA standard. *Woodall*, 685 F.3d at 578, Apx. 5a.

The majority opinion then explored the applicable and clearly established Supreme Court precedent. *Id.* at 578-579, Apx. 5a-8a. Thereafter, the majority examined the Kentucky Supreme Court's decision in the context of this Courts precedent and concluded the state court's decision was an unreasonable application of that precedent, applying AEDPA as defined by this Court. *Woodall*, 685 F.3d at 579, *citing to Williams*, 529 U.S. at 407; Apx. 9a. In taking this measured approach, the majority thoughtfully required Respondent to overcome AEDPA prior to considering whether Respondent was entitled to relief.

ARGUMENTS AS TO WHY CERTIORARI SHOULD BE DENIED

I. THERE IS NO REASON FOR THIS COURT TO SECOND-GUESS ITS LONG-STANDING AND WELL-SETTLED AEDPA PRECEDENT THAT A STATE COURT CAN UNREASONABLY REFUSE TO APPLY A GENERAL CONSTITUTIONAL PRINCIPLE TO A PARTICULAR SET OF FACTS.

The petition for certiorari does not raise any question that warrants review by this Court. There is neither a misapplication of this Court's authority nor is there a conflict between the Sixth Circuit's ruling and the decision of any other court of appeals. Indeed, each court of appeals has applied AEDPA in the same fashion as the majority opinion herein.

Petitioner attempts to manufacture a conflict with a statement from one of this Court's precedents. However, the record does not support the Petitioner's asserted conflict. Setting this aside, the purported conflict involving federal sentencing guideline cases does not control federal habeas review of state capital sentencing proceedings.

A. The Majority Followed AEDPA.

As noted above, the State's main contention is that AEDPA was violated because the Sixth Circuit "second-guessed" the Kentucky Supreme Court's determination. In so arguing, the State advocates a construction of AEDPA that this Court has heretofore rejected, and it would constitute a sea change to this Court's AEDPA jurisprudence.

In this Court's very first AEDPA case, this Court noted that a "state-court decision also involves an unreasonable application of this Court's precedent if the state court... unreasonably refuses to extend [a legal] principle to a new context where it should apply." *Williams*, 529 U.S. at 407. Likewise, in *Wiggins v. Smith*, 539 U.S. 510, 520 (2003), this Court echoed that "a federal court may grant relief when a state court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced.'"

This Court has specifically found a state court decision unreasonable for refusing to apply a principle derived from a series of cases. *See Tyler v. Cain*, 533 U.S. 656, 666 (2001) (multiple cases can dictate a result); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 259-264 (2007) (same). Justice Kennedy, writing for the Court in *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007), noted: "That the standard is stated in general terms does not mean [a state's more specific] application was reasonable." *See also id.* (quoting *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., conc.)) ("AEDPA does not 'require ... some nearly identical factual pattern before a legal rule must be applied'").

This Court has not departed from this approach, and the State agrees. Indeed, the State even describes this component in its cert petition. Pet. p. 16 ("AEDPA does not require a 'nearly identical factual pattern before a legal rule must be applied.' *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007)").

In short, AEDPA requires an issue-by-issue examination of the state court's treatment of a claim. A reviewing court must faithfully apply AEDPA to the legal claim and state court record before it in the context of this Court's clearly existing federal law. Thus, this Court's AEDPA analysis rebuts the State's suggestion that just because Respondent won, AEDPA was violated; rather, it reinforces that the State's chief complaint is that it simply disagrees with the result of the court below.

What the State proposes is contrary to a fundamental rule of federal habeas jurisprudence, long-adopted by this Court. In ascertaining the basis for the state courts' rejection of a federal constitutional claim, federal courts must look to not just one case when considering a general principle. The State proposes to change that rule to require federal courts to deny relief, unless and until there is black letter authority directly on point.

The Sixth Circuit merely applied this Court's AEDPA authority as to a legal question and the state court record before it. In so doing, the Sixth Circuit identified and applied the required and the correct AEDPA standard from *Williams*, 529 U.S. at 407, Apx. 8a. Applying this AEDPA standard, the Panel concluded that the state court unreasonably determined Respondent's *Carter* instruction claim. *Id.*, Apx. 8a-9a

Thus, the writ should be denied because the State makes the unexceptional request that this Court grant certiorari to review properly stated, settled legal principles to the *Carter* instruction request of this case. Under such circumstances, certiorari is simply not warranted. *See* Supreme Court Rule 10 (certiorari not warranted where lower court applied facts to properly stated rule of law); *Kyles*, 514 U.S. at 422, n.1; *id.* at 456 (Scalia, J., dissenting).

B. No Conflict Among The Circuits.

It is also important to note a contention that is missing from the State's petition: there is no suggestion that the Court must intervene to resolve a split among the federal appellate circuits. Indeed, the one habeas case cited by the State in its Petition assumed that there was a requirement to comply with a Carter instruction request at the penalty hearing of a capital case. *See Edwards v. Roper*, 688 F.3d 449 (8th Cir. 2012) cited at Pet. p. 19. Thus the Sixth Circuit's conclusion is entirely congruent with the decision of the other federal circuit court to address this issue.

Indeed, the State even recognizes that the panel majority "got it right" when it acknowledged that "the Fifth Amendment privilege extends to the sentencing phase of criminal trial and that a generic guilty plea does not waive the right." Pet. p. 18. But then, the State indicates that *Carter* protections do not apply. This Court has never indicated that the Fifth Amendment applies at a capital sentencing hearing with the exception of *Carter*; simply, the

Fifth Amendment applies (as conceded by the State) and that necessarily encompasses the *Carter* protections. There is no exception to this Court's seemingly clear pronouncement in *Estelle*, 451 U.S. at 462-63, that there is "no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees."

The State is trying to parse the authority of this Court too fine, just as the Government did in *Mitchell*. This Court rejected a similar parsing of constitutional principles holding:

> To say that an adverse factual inference may be drawn from silence at a sentencing hearing held to determine the specifics of the crime is to confine *Griffin* by ignoring *Estelle*. We are unwilling to truncate our precedents in this way.

Mitchell, 526 U.S. at 329. The State is urging a similar truncation of this Court's precedents.

The writ should also be denied because the State cannot demonstrate a conflict between the judgment below and the decision of any other federal court of appeals as to *Carter's* applicability. *See* Supreme Court Rule 10(a). While the State in a footnote notes a *possible* conflict on the application of *Mitchell* in varying and diverse circumstances from Respondent's case (Pet pp. 19-20 n. 4),[8] the State specifically disavows requesting cert on that alleged conflict. Pet p. 21 ("...Court need not, of course, decide the correct interpretation of *Mitchell* for purposes of this case.")

Further, there is no conflict with the Sixth Circuit's AEDPA analysis because every other Circuit Court has followed the dictates of this Court - from *Williams* through *Panetti* - that a

[8] Respondent does not concede a conflict pertinent to this case exists. Also, the conflict that Petitioner asserts is overblown. Only one case cited by Petitioner actually extends *Mitchell* beyond *Mitchell's* holding: *United States v. Caro*, 597 F.3d 608 (4th Cir. 2010). The two other alleged extension cases do not even mention *Mitchell* in their opinions. Both are actually cases on post-arrest silence, which is a different issue. In the end, though, Petitioner simply wants to reframe the issue and ignore the real matter before the Court. *See* Section C, *infra*.

legal principle sometimes must extend to a new context. *See e.g. Gattis v. Snyder*, 278 F.3d 222, 234 (3rd Cir. 2002) *cert. denied* 123 S.Ct. 660 (2002); *Brooks v. Dretke*, 444 F.3d 328, 329-332 (5th Cir. 2006); *Gautt v. Lewis*, 489 F.3d 993, 1004 (9th Cir. 2007) *cert denied* 128 S.Ct. 1477 (2008). Each of the just cited cases also relies on multiple holdings of this Court to reach their respective results. *Id.* Further, other circuits, while not specifically applying the principle, noted that it is the proper test. *See e.g. Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000); *Carter v. Kemna*, 255 F.3d 589, 591 (8th Cir. 2001).

Thus, the State's argument regarding application of the AEDPA standard does not satisfy any of the established criteria for this Court to grant review on *certiorari.* There is no active controversy amongst the Courts of Appeals regarding the issue.

C. This Case is Not About Remorse.

The State's reliance on the below dissent's "remorse" arguments also misapprehends the underlying constitutional issues at play. At issue is much, much more. In relying on this isolated principle, the State seeks to manufacture a cert question. However, neither the record below nor this Court's authority supports the State's attempt.

There are two critical short-comings with this argument. First, the argument hinges upon an assumption that once the plea was entered the only improper inference that could be made by Respondent's jury related to a lack of remorse. However, this is not simply about "remorse;" the trial court explained this was also about an expectation of "testimony," and an "explanation." TE 1591-92, JA 71-72; *see Mitchell* (finding Fifth Amendment violation when lack of explanation used against defendant). Thus, the State is attempting to shoe-horn this "round-peg" of a legal issue into a "square hole."

Second, this wrongly assumes something that is not true – that once Respondent pled guilty, there was no longer anything being contested. *See* Pet. p. 18 ("...in the absence of disputed facts (as in Woodall's case), Woodall's silence would demonstrate only a lack of remorse"). The State simply ignores this Court's authority, and Kentucky death penalty procedures as reflected by the actual instructions given to Respondent's jury during a contentious penalty phase.

Indeed, this Court has been crystal clear that there is no difference between the guilt and penalty phase in a capital case. *Estelle*, 451 U.S. at 462-63 (there is "no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. **Given the gravity of the decision to be made at the penalty phase**, the State is not relieved of the obligation to observe fundamental constitutional guarantees.") (emphasis added). Thereafter in *Mitchell*, 526 U.S. 314, this Court noted that:

- "To maintain that sentencing proceedings are not part of 'any criminal case' is contrary to the law and to common sense." *Id.* at 327.
- "The concerns which mandate the rule against negative inferences at a criminal trial apply with equal force at sentencing." *Id.* at 329.

As further noted in *Mitchell*, the State cannot "enlist the defendant in this process [of securing a more severe punishment] at the expense of the self-incrimination privilege." *Id.* Consequently, the State is asking this Court to revisit a well-worn and decided issue, upon which the Sixth Circuit followed this Court's existing precedent.

Further, it is worth noting that the State never sets out or acknowledges the trial court's instructions to the jury, which conflict with its arguments. In those instructions, the trial court noted that the jury "will presume [Respondent] innocent of these aggravating circumstance or

circumstances" (Instruction 1 (TR 1137, JA 159)), and that the jury had to "consider such mitigating or extenuating facts" that they "believe to be true" (Instruction 4 (TR 1140, JA 162)). Critically, Instruction No. 6 rebuts the State's point, where the trial court instructed Respondent's jury about what was being contested:

> If you have a reasonable doubt as to the truth or existence of one or both of the aggravating circumstance or circumstances listed in Instruction No. 2, you shall not make any finding with respect to it.
>
> If upon the whole case you have a reasonable doubt whether the Defendant should be sentenced to death, you shall instead fix his punishment at a sentence of imprisonment.

TR 1142, JA 164. Thus, the jury, despite the guilty plea, was not automatically required to find the aggravators.

More importantly, however, the jury was not required to fix a death sentence if "upon the whole of the case" they had a "reasonable doubt" it was appropriate, i.e. Kentucky does not have an automatic death penalty. Put another way, the jury was required to make a finding that no reasonable doubt existed as to a death sentence. This decision encompassed more than just the aggravation and mitigation. It also encompassed an explanation for the crime – something Respondent never provided. The trial court should have given a no adverse inference instruction. It then would have been clear that Respondent's silence about the "whole of the case" should not have been held against him.

Respondent's penalty phase was a contentious proceeding. As in *Mitchell*, there were facts in dispute for the fact-finder. Respondent's low IQ, the conditions of his upbringing, and his sexual abuse were all disputed issues. The State contested all the mitigation presented via Respondent's fourteen witnesses and presented eleven witnesses in support of the aggravation and to rebut Respondent's mitigation. A single juror could have prevented death. *Wendling v.*

Commonwealth, 137 S.W. 205, (Ky. 1911) (Section 7 of the Kentucky Constitution provides the right to a trial by jury and that all of the jurors must agree upon the verdict.)

The analytical heart of the State's petition is its argument that only an expression of remorse relates to the failure to provide a *Carter* instruction. Not only is there no such artificial distinction, but the record specifically refutes such a contention via the statements of the trial court requiring "testimony" from Respondent and an "explanation," and the jury instructions which delineated the very real life and death decision being contested before the jury. The heart of the State's argument is thus made entirely of straw.

D. Conclusion.

Despite the State's many inventions, what is absent from the State's petition is any cogent explanation as to why this case deserves the Court's review on certiorari. The petition clearly fails to meet any of this Court's traditional criteria. The State does not even pretend that the Sixth Circuit's opinion is in conflict with a decision of any of the other federal Courts of Appeals. *See*, Supreme Court Rule 10(a). Indeed, the Sixth Circuit's AEDPA and *Carter/Estelle/Mitchell* analysis is completely congruent with that of the other Circuits.

Nor is there any colorable suggestion that the Sixth Circuit has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Rule 10(a). On the contrary, the Sixth Circuit's opinion in this case demonstrates a scrupulous effort to apply AEDPA's precise principles and tools set out by this Court's several opinions in the area. While the State certainly takes exception with the Sixth Circuit's thinking, and the result reached using those principles, that is obviously not a reason for this Court to expend its resources for error correction. *See, e.g.*, *Kyles*, 514 U.S. at 422, n.1.

For the same reason, it is manifest that the Sixth Circuit did not decide some new question of federal law that requires this Court's attention or that conflict with this Court's precedent. *See*, Supreme Court Rule 10(c). The Sixth Circuit simply examined the state court's resolution of a *Carter* claim under the standard set out in §2254(d)(1), and it used the same analytical methods endorsed by this Court in *Williams* through *Panetti*.

II. THE SIXTH CIRCUIT SIMPLY APPLIED THIS COURT'S LONG-STANDING *O'NEAL V. MCANINCH*, 513 U.S. 432 (1995).

Petitioner's second stated reason for wanting this court to grant a writ of certiorari is nothing more than its dissatisfaction with the result: " [t]he Sixth Circuit compounded its failure to abide by AEDPA by finding that the alleged error was not harmless." Pet. 21.

After deciding the state court decision involved an unreasonable application of this Court's clearly existing federal law, the Sixth Circuit proceeded to harmless error review. *Woodall*, 685 F. 3d at 6-8, Apx. 8a-12a.. The Court addressed the question of whether the Kentucky Supreme Court's error "substantially influenced the jury's decision." *O'Neal*, 513 U.S. at 436.[9] The majority considered "all that happened" in the trial before deciding it could not "conclude that this case is harmless error." *Woodall*, 685 F.3d at 7, Apx. 11a-12a.

In weighing the impact of the error in light all that happened in the trial[10], the majority observed that the finding of aggravating circumstances was not the end of its analysis because "the jury could have rejected the death penalty even if it found the existence of aggravating circumstances beyond a reasonable doubt." *Id.* Indeed, the trial record is far from one sided. The State misapplies the harmless error standard by ignoring Petitioner's evidence presented in mitigation of a death sentence. Pet. 23-24 (quoting Dissent at Apx. 27a). Again, the issue at

[9] In *O'Neal*, this Court reversed the Sixth Circuit for failing to give the benefit of "grave doubt" to the habeas petitioner.

[10] *See Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) (The proper inquiry is whether, in light of the record as a whole, the error "had substantial and injurious effect or influence in determining the jury's verdict.")

hand was imposition of a penalty, not guilt; thus, the State focuses on the wrong stage of the proceedings. *See Mitchell*, at 329-330 ("well-established that Fifth Amendment survives even after guilt determined")

While the record shows that the jury heard evidence of Petitioner's criminal acts, the jury also heard evidence in mitigation of penalty including that Keith Woodall possesses borderline limited intellectual functioning with a I.Q. test in high school of 74 (TE 1374, 1501);[11] physical and financial abandonment in early childhood by one parent (TE 1415, 1419, 1438, 1454, 1478) and severe neglect likely resulting from mental illness from the other parent (TE 1408-1411); sexual abuse (TE 1581); and extreme poverty (TE 1410, 1435).

The Sixth Circuit's "consideration of all that happened" at trial was proper and necessary under this Court's law. When the jurors were allowed to speculate about why Petitioner did not testify, one or more may have speculated, among other things, that Petitioner's borderline intellectual functioning was insignificant, that he did not care to offer any explanation about the crimes or the other charged and uncharged sexual offenses for which they had heard evidence, or that his mitigation witnesses were not credible (or at least that the dysfunctional upbringing and sexual abuse they heard about did not really have any effect on Petitioner because he did not bother to explain it to them, himself).

Furthermore, the Sixth Circuit recognized that the failure to give the no-inference instruction may be harmless. *Woodall*, 685 F.3d at 580-81, Apx. 10a.-11a. But, the majority also recognized that it cannot lightly discount the possible prejudicial effects of such error as the Warden does in his petition. *Id.* As this Court well knows, the right to receive a no-inference instruction was created in recognition of the fact that "many, even those who should be better

[11] Dr. Denis Keyes, who was cited by this Court in *Atkins*, has indicated that additional testing is merited in Respondent's case. R. 28-2, 30-2, JA 120-23, 118-19. Woodall's score is within the recognized five point standard deviation; additionally, trial counsel averred that a score of 68 was misplaced by them. (TR 235, JA 175).

advised, view [the fifth amendment] privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are ... guilty of crime...." *Carter*, 450 U.S. at 302 (quoting *Ullman v. United States*, 350 U.S. 422, 426 (1956)). Viewing the evidence with these cautions in mind, the majority correctly relied upon *O'Neal v. McAninch*, 513 U.S. 432, 445 (1995) to conclude that in the circumstances of Woodall's case there existed "grave doubt." *Woodall*, 685 F.3d at 580-581, Apx. 11a-12a.

The Warden complains that the majority was merely speculating. This, however, is the nature of assessing prejudice, and this Court has faulted a state court for refusing to conduct the applicable standard of review on the basis of speculation. *Sears v. Upton*, 130 S.Ct. 3259, 3266 (2010) (State court ruled it could not "speculate" as to what the effect of additional evidence would have been, this Court reversed noting *Strickland* "will necessarily require a court to 'speculate' as to the effect of the new evidence."). Just as a reviewing court will have to assess the evidence within the context of a *Strickland* claim, conducting the *Brecht/O'Neal* analysis "will necessarily require a court to 'speculate' as to the effect of the" error.

The Warden's only argument boils down to a disagreement with the result, arguing that the majority erred in applying *O'Neal*. The only disagreement is over whether "grave doubt" exists. A debate over whether a constitutional error is prejudicial in a fact intensive case does not merit a writ of certiorari.

Indeed, in *California v. Roy*, 519 U.S. 2, 5 (1995), this Court reiterated the "grave doubt" standard where, this Court noted: "[i]n *O'Neal*, supra, this Court added that where a judge, in a habeas proceeding, applying this standard of harmless error, 'is in grave doubt as to the harmlessness of an error,' the habeas 'petitioner must win.' 513 U.S. at 437." Some courts have granted habeas relief applying this standard (*see Wood v. Ercole*, 644 F.3d 83, 99 (2nd Cir.

2011), *Tucker v. Varner*, 83 Fed. Appx. 462, 467-468 (3rd Cir. 2003), *Sherrors v. Woodford*, 425 Fed. Appx. 617, 620 (9th Cir. 2011)), while others have been denied relief. *See Lee v. Smeal*, 447 Fed. Appx. 357, 361-362 (3rd Cir. 2011); *Jones v. Polk*, 401 F.3d 257, 265-266 (4th Cir. 2005); *Tyson v. Trigg*, 50 F.3d 436, 447 (7th Cir. 1995); *Turner v. Hernandez*, 357 Fed. Appx. 797, 799 (9th Cir. 1995); *Tuttle v. Utah*, 57 F.3d 879, 892 (10th Cir. 1995). In short, the State is not indicating that the *O'Neal* standard is unworkable or that federal courts are struggling with its application; they are simply dissatisfied with the result herein.

Further, what is incontestable is that the number of cases which are decided by the "grave doubt" standard, as noted in *O'Neal*, are rare. Indeed, the State does not cite a single one that generates a conflict or problem area. Thus, there are not – and never will be – enough such cases to warrant the expenditure of this Court's time and resources to consider the application of a settled standard.

In conclusion, the Sixth Circuit's opinion is not in conflict with a decision of any of the other federal Courts of Appeals. *See*, Supreme Court Rule 10(a). Indeed, the Sixth Circuit's application of *O'Neal* is completely congruent with that of the other Circuits. Further, there is no colorable suggestion that the Sixth Circuit has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Rule 10(a). While the State certainly takes exception with the Sixth Circuit's thinking, and the result reached using those principles, that is obviously not a reason for this Court to expend its resources for error correction. *See, e.g., Kyles*, 514 U.S. at 422, n.1.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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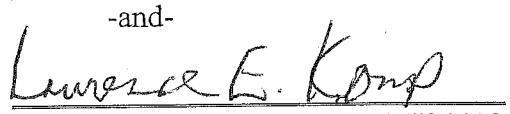

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APPENDIX TO BRIEF IN OPPOSITION

that right to do so? Do you understand that?

DEFENDANT: Yes sir.

THE COURT: After conference and consultation with your attorneys you have chosen and you chose voluntarily not to testify in this case?

DEFENDANT: Yes sir.

THE COURT: Okay. While we're in here -- let's go off the record just a minute.

(Off record discussion.)

THE COURT: Okay, we are reviewing instructions.

MS. GIORDANO: Judge, I don't have a copy of the sentences, the ones that we looked at last week. Are they the same? Have you made any changes?

THE COURT: They're the same except for the adding of the mitigating circumstances. Do you want to look at them?

MS. GIORDANO: Yeah.

THE COURT: I'm going to go ahead and address the other issue --

MS. GIORDANO: Okay, that's fine.

THE COURT: -- the tendered instruction. It was on my desk. I guess it's still there. The defendant has tendered an instruction to be given

at this sentencing stage on the defendant's right not to testify, and I'm going to refuse that tendered instruction. It is marked and tendered, and I think I need to state my grounds for the record. I don't think that the Commonwealth objected to it being read. Is that correct?

MR. VICK: That is correct, your honor.

THE COURT: And the Court -- it might be a easy way out to go ahead and give it, except I don't think intellectually honest and I don't think it's in keeping with the case law as far as sentencing is concerned. The Court has the responsibility of not just giving instructions to juries just for the sake of protecting the record and being beyond abundance of caution. It's the responsibility of the Court not only to be a gatekeeper to evidence, but also to be fair on the law. This defendant has waived his right to self-incrimination and has entered pleas to committing the crimes of rape and murder and kidnapping and has asked the jury to set his sentence. The Court is aware of no case law that precludes the jury from considering the defendant's lack of expression of remorse or explanation of the crime or anything else once guilt has been adjudged

in sentencing. In fact, the case that the Court has looked to, the case of Commonwealth versus McIntosh, which is a 646 S.W. 2d 43 case, and the best I can tell from Shepardizing it, the latest statement on this issue, and it was a case where the instruction was not given in the guilt or innocence phase, and the Court -- I don't know whether it was the Court of Appeals or the Supreme Court -- the Supreme Court of Kentucky said that it was not error where the guilt was overwhelming, and here we have a guilty plea. I just don't think that it's appropriate to instruct the jury that the failure of the defendant to take the stand when he stands convicted of these very serious crimes is in keeping with the law.

MS. GIORDANO: What was the cite on that?

THE COURT: 646 S.W. 2d 43. Didn't I cite that?

MS. GIORDANO: I think you did. We just didn't --

THE COURT: Okay. Anyway, do ya'll want to add anything on that in support of that instruction?

MR. BAKER: We'd just like to read the case if it's -- while we're doing this.

THE COURT: It's pretty short.

MR. BAKER: Yeah, that's what I noticed.

THE COURT: And after you read it if you want to come back and put something on the record, we'll let you do so. Let's go off the record a minute.

(Off record discussion.)

THE COURT: This is their response.

MR. BAKER: Judge, just having read that one page decision, the case seems to me to read that it certainly is error, but they might not reverse you on that seems to be the holding on that, but it does hold it's error. It just is it -- in that case are they going to hold it large enough error to reverse on. So we would read that -- or I would read that as the Supreme Court saying that it's error not to give that instruction, and that would be the controlling case law, and that we were therefore entitled to it.

THE COURT: There's no question I'd give it if we were talking about guilt or innocence. In the sentencing stage to me it defies logic, it defies common sense, it's not intellectually honest to tell this jury -- I'm not trying to convince you all -- I'm just trying to make the record clear -- to tell this jury, the Court of law telling -- this

is the law of Kentucky that you can go out and rape and murder and kidnap and admit to it and then offer no testimony, no explanation, no asking for forgiveness, no remorse, and the jury can't consider that. I just don't think it's logical, so that's why I'm not going to give it.

MR. BAKER: Historically, I think you have the right not to testify because of the certain deficits you have vis-a-vis the Commonwealth. You don't have the access to police primarily, and that's why you have that right and you don't have to get up there and incriminate yourself, and I think the same thing would apply to penalty. That if there's a reason you have that constitutional right not to testify, it would be all the more so in a death penalty case not to have to get up there.

THE COURT: Well, we'll see, I'm sure.

MR. BAKER: I'm not going to convince you, am I, your honor?

THE COURT: We'll see.

MS. GIORDANO: Okay. We'll be glad to see.

THE COURT: Well, it would be easier for me to give, but I just feel I have a responsibility to the Court --