No. 12-_____

Supreme Court of the United States

RANDY WHITE, WARDEN,
Petitioner,

v.

ROBERT KEITH WOODALL,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Robert Keith Woodall, amidst overwhelming evidence of his guilt, pled guilty to kidnapping, raping, and murdering a 16-year-old child, and thus pled guilty to all aggravating circumstances. At the penalty phase trial, the prosecutor elected to present evidence of guilt and the circumstances of the crimes. Woodall did not testify; and his request that the jury be instructed not to draw any adverse inference from his decision not to testify (a "no adverse inference instruction") was denied. He was sentenced to death by a Kentucky jury. The Kentucky Supreme Court affirmed.

Even though this Court has never held that a defendant is entitled to a no adverse inference instruction at the sentencing phase of a trial where the defendant has pled guilty to the offense and all aggravating circumstances, the Sixth Circuit granted habeas relief to Woodall on the ground that the trial court's failure to provide such an instruction violated his Fifth Amendment right against self-incrimination. The questions presented are:

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.

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APPENDIX

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Kentucky respectfully petitions for a writ of *certiorari* to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit (App. 1a-29a) is reported at 685 F.3d 574. The opinion of the district court (App. 30a-173a) is unreported, but can be found at 2009 WL 464939. The opinion of the magistrate judge (App. 174a-258a) is unreported, but can be found at 2008 WL 5666261. The opinion of the Kentucky Supreme Court (App. 259a-312a) is reported at 63 S.W.3d 104.

STATEMENT OF JURISDICTION

The Sixth Circuit entered its judgment on July 12, 2012. App. 314a-315a. A petition for rehearing *en banc* was denied on October 3, 2012. App. 313a. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254. The Sixth Circuit granted Petitioner's motion to stay issuance of the mandate pending review by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution

> "No person shall be . . . compelled in any criminal case to be a witness against himself . . ."

28 U.S.C. §2254(d)(1)

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

STATEMENT OF THE CASE

A. Legal Background

The first question presented by this petition concerns whether the Sixth Circuit disregarded the limits Congress imposed on federal habeas review in 28 U.S.C. §2254(d)(1) when it ruled that a no adverse inference instruction is required in the penalty phase of a capital trial where the defendant has pled guilty to all crimes and aggravating circumstances — and when it ruled the Kentucky Supreme Court's ruling to the contrary was unreasonable. This Court has never squarely addressed whether a no adverse inference instruction is constitutionally required in the penalty phase of a trial, where a non-testifying defendant has pled guilty to *all* the crimes and aggravating circumstances.

The three decisions of this Court to which the Sixth Circuit looked are *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). In *Carter*, the Court held that when a defendant makes a proper request, the trial court must instruct the jury, in the *guilt* phase of a trial, that a defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt. In that case, the defendant introduced no evidence at all on behalf of the defense in either the guilt or the penalty phase of the trial. The trial court refused the defendant's requested instruction that his failure to testify in the guilt phase could not be used as an inference of guilt. This Court ruled that the trial court should have given

the requested no adverse inference instruction. The rule in *Carter* helps to protect a non-testifying defendant, in the guilt phase of trial, from an inference of guilt by virtue of his or her silence.

In *Estelle v. Smith,* which also did not involve a guilty plea and which did not mention *Carter,* Smith was not advised of his right to remain silent at a pre-trial psychiatric examination and defense counsel was not notified prior to the penalty phase that the examining psychiatrist would testify. The State then used the substance of Smith's *Miranda*[1]-violative disclosures during the pre-trial psychiatric examination against Smith during the penalty phase. This Court found that Smith had been denied his Fifth Amendment right to remain silent and his Sixth Amendment right to assistance of counsel in submitting to the pre-trial psychiatric interview. This Court stated, "*[i]n these distinct circumstances,* the Court of Appeals correctly concluded that the Fifth Amendment privilege was implicated." *Id.,* at 466 (Emphasis added).

Finally, in *Mitchell*, the defendant pled guilty to federal charges of conspiring to distribute five or more kilograms of cocaine and of distributing cocaine. She reserved the right to contest at her sentencing the amount of the cocaine, which would determine the range of penalties. She only admitted that she had done "some of" the proffered conduct. She did not testify; however, three other co-defendants did testify as to the amounts of cocaine she had sold. The sentencing court relied on the testimony of the

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

co-defendants due to Mitchell not testifying to the contrary. The sentencing court also specifically told Mitchell: "I held it against you that you didn't come forward today and tell me that you really only did this a couple of times . . . I'm taking the position that you should come forward and explain your side of this issue." *Mitchell,* at 319.

This Court pointed out 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." *Mitchell,* at 330. The Court would not permit a negative inference to be drawn about Mitchell's guilt with regard to factual determinations respecting the circumstances and details of the crime. This Court also noted, "[w]hether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility . . . is a separate question. It is not before us and we express no view on it." *Id.* The *Mitchell* Court was clearly concerned with requiring the state to produce evidence against a defendant and not allowing the state to force the evidence from a defendant's "own lips." *Mitchell*, at 326.

The four dissenting justices in *Mitchell* criticized the majority's holding and its refusal to address whether its holding applied to situations other than where a sentencing court was determining the facts of the offense. In the dissenting opinion, Justice Scalia further noted that "the threat of an adverse inference does not 'compel' anyone to testify." *Id.,* at 331.

B. Facts

On January 25, 1997, in Muhlenberg County, Kentucky, Robert Keith Woodall kidnapped 16-year-old Sarah Hansen, slashed her throat twice, raped her, and threw her in a nearby icy cold lake leaving her to drown.

At the time of her death, Sarah Hansen was a high school cheerleader, an honor student, an "incredible trumpet player," a member of both the National Honor Society and the Beta Club, and a medalist in swimming and diving.

On the night of her murder, Sarah had planned to watch a video with her family and her boyfriend. She drove the family mini-van to the local Minit Mart to rent a movie. Just before she left her home, her mother walked her to the door, saying, "Bye bye, I love you." Sarah's mother never saw her alive again.

Woodall, who did not know Sarah and who had just gotten out of prison for serving time on a conviction for two counts of sexual abuse and who had also sexually abused two of his young cousins, was in the Minit Mart around the same time as Sarah. Woodall was angry because his girlfriend was out with friends. Another girl had walked into the Minit Mart right before Sarah, and Woodall had remarked he would like to "have a piece of that."

When Sarah failed to return home after a few hours, her family called the police. The police subsequently found the mini-van Sarah had been driving lodged in a ditch at a lake approximately 1.5 miles from the Minit Mart. A large amount of Sarah's blood was in the ditch just under the driver's

door and large amounts of her blood were everywhere inside the van, including the driver's seat, steering wheel, gear shift lever and ignition switch. A box cutter with Sarah's blood on it was found near the van.

The police followed a trail of blood from the van down a gravel road. The bloody trail continued for 400-500 feet before it trickled out. There were then drag marks from that point out to the dock of the lake. The drag marks extended out to the edge of the dock. Sarah's unclothed body was found floating in the water next to the dock.

Her throat had been deeply slashed twice. Each cut was 3.5 to 4 inches long. In addition to her trachea having been severed (which would have rendered Sarah unable to speak), multiple muscles supporting Sarah's head and neck were also severed. Sarah had multiple bruises and abrasions on her head and face and all over the rest of her body. She had drown to death.

After Woodall abducted Sarah, raped, and murdered her, he went to his mother's house where he fell asleep in a recliner watching television.

A bloody tennis shoe print matching Wooodall's shoes was found on the pier next to Sarah's body. Woodall's fingerprints were found on and in the van. Muddy and wet clothing was found under Woodall's bed. Sarah's blood was found on Woodall's jeans and sweatshirt. Woodall's DNA was found on Sarah's vaginal swabs. Faced with overwhelming evedence of guilt, Woodall, who initially gave conflicting statements regarding his activities on the night he murdered Sarah, pled guilty to all of the crimes and

aggravating circumstances, and, after a penalty phase trial, received a death sentence and two life sentences.

C. Procedural History

1. Caldwell Circuit Court

During Woodall's penalty phase trial, where the prosecutor elected to present the overwhelming evidence of Woodall's guilt even though Woodall had pled guilty to all crimes and aggravating circumstances, the trial court discussed the jury instructions, out of the hearing of the jury, with both the prosecutor and trial defense counsel.

Trial defense counsel asked the trial court to instruct the jury not to speculate about Woodall's decision not to testify. The prosecutor did not object. The trial court declined to give the instruction, stating it was aware of no case law that precluded "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." The trial court further stated it was not logical to tell the jury that the law of Kentucky is "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." The trial court never indicated it would use Woodall's silence against him and never told the jury that it could do so.

2. Kentucky Supreme Court

On direct appeal, Woodall argued that a combination reading of *Carter, Estelle,* and *Mitchell* constitutionally required a no adverse inference instruction be given in the penalty phase after the entry of a guilty plea. The Kentucky Supreme Court carefully considered each case and disagreed. The court distinguished the facts, and therefore the applicability of the limited holdings in *Carter, Estelle,* and *Mitchell* to Woodall's case. *Woodall v. Commonwealth,* 63 S.W.3d 104, 115 (Ky. 2002). App. 259a-263a.

First, the Kentucky Supreme Court noted that the no adverse inference instruction contemplated in the guilt phase in *Carter* was used to protect a non-testifying defendant from appearing to be guilty because of a decision to not testify. Given that Woodall had pled guilty to all of the charged crimes, as well as the aggravating circumstances, there was no need for the jury to make any additional inferences of guilt. The court also noted that any possible error would be nonprejudicial because Woodall had admitted the crimes and evidence of his guilt was overwhelming. App. 261a-262a.

The Kentucky Supreme Court then considered *Estelle* and Woodall's argument that *Estelle* extended the Fifth Amendment protection, and thus the *Carter* instruction to the penalty phase of a trial. The Kentucky Supreme Court noted that *Estelle* was not a guilty plea case, not a jury instruction case, did not cite to *Carter,* and did not indicate that *Carter* had been extended. *Estelle* involved the use of an

out-of-court statement the defendant made to a government psychiatric expert. The statement was used against the defendant without warning in the penalty trial. The court noted that Woodall had not contested any of the facts and had not been compelled to testify so as to implicate the Fifth Amendment privilege as in *Estelle*. App. 262a.

In addition, the Kentucky Supreme Court found that *Mitchell* was distinguishable and did not apply. In *Mitchell*, the defendant pled guilty to federal charges of conspiring to distribute five or more kilograms of cocaine and of distributing cocaine. She reserved the right to contest the amount of the cocaine at her sentencing. The amount of the cocaine would determine what the range of penalties would be. She only admitted to "some of" the charged conduct. A sentencing hearing was held to determine the facts and circumstances surrounding the crimes. The sentencing court specifically told Mitchell it held her silence against her. The Kentucky Supreme Court noted that Woodall did not contest any of the facts or aggravating circumstances surrounding the crimes. App. 262a-263a.

In addition to finding no error, the Kentucky Supreme Court further ruled, even if there were error, any possible error would be non-prejudicial because Woodall admitted to the crimes and aggravating circumstances and the evidence of guilt was overwhelming. App. 263a.

One justice dissented, pointing out that while Woodall did not contest any of the facts or aggravating

circumstances, he did contest the requested penalty of death.[2] App. 309a-311a.

3. Magistrate Judge's Report

The magistrate judge's report recommended that the district court reject Woodall's claim and concluded that the Kentucky Supreme Court's adjudication of the claim was not contrary to or an unreasonable application of United States Supreme Court precedents. App. 176a-184a.

The magistrate judge noted Woodall had argued that absent the instruction, the jury may have drawn an improper inference of lack of remorse due to his silence. The magistrate judge pointed out that *Mitchell* specifically stated that the Court expressed no opinion on whether silence bears upon the determination of a lack of remorse or upon acceptance of responsibility. App. 182a.

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[2]The jury does not have to find that death is the appropriate penalty beyond a reasonable doubt or to resolve any reasonable doubt in favor of a prison sentence. *Skaggs v. Commonwealth,* 694 S.W.2d 672, 680 (Ky. 1985); *Meece v. Commonwealth*, 348 S.W.3d 627, 723 (Ky. 2011). Kentucky law requires that all twelve jurors agree upon the verdict, including the sentence verdict, and the failure to do so in the penalty phase requires a penalty phase retrial. Kentucky Criminal Rules 9.82(1) and 9.88; *Skaggs v. Commonwealth,* 694 S.W.2d 672, 681 (Ky. 1985). In other words, Kentucky does not follow the "one juror veto" rule adopted in some States that permits a single juror to preclude a death sentence and in effect require that the court impose a prison sentence.

4. United States District Court

The United States District Court read *Carter, Estelle,* and *Mitchell* together and stated, "[t]here is but one reasonable conclusion that can be reached — 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." App. 58a.

The district court engaged in a harmless error analysis under *Brecht v. Abrahamson,* 507 U.S. 619 (1993) and concluded the alleged error was not harmless because the court could not "say for certain that the jury did not" hold Woodall's failure to testify against him. App. 61a-63a.

5. United States Court of Appeals for the Sixth Circuit

A divided panel (2-1) of the Sixth Circuit granted a writ in Woodall's favor entitling him to a new sentencing trial.

Judge Martin, joined by Judge Griffin, generalized the holdings in *Carter, Estelle,* and *Mitchell,* and concluded that Woodall, who had pled guilty to all the charged crimes and aggravating circumstances and did not contest the facts and circumstances of the crimes, was entitled to a no adverse inference instruction in the penalty phase of his trial. App. 4a-9a.

Specifically, the Sixth Circuit found that *Estelle* extended a defendant's entitlement to Fifth Amendment protection to the penalty phase and that *Mitchell* extended Fifth Amendment protection even

where a defendant has pled guilty. App. 6a-9a. The Sixth Circuit then cited to one of its own cases, *Finney v. Rothgerber,* 751 F.2d 858, 863-64 (6th Cir.1985)[3], for the proposition that Woodall was entitled to a no adverse inference instruction once he requested it. App. 7a.

While suggesting that the refusal to give a no adverse inference instruction might never be harmless, the majority stated, "[b]ecause 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.'" App. 11a.

Judge Cook, dissenting (App. 12a-29a.), found that "despite a mountain of undisputed evidence that petitioner abducted, raped, maimed, and drowned a sixteen-year-old high school student," the Sixth Circuit opinion disregarded the Kentucky Supreme Court's analysis and found a violation of clearly established law, and "ultimately resolves the matter in favor of speculation, worrying that the jury may have punished petitioner for failing to testify," and in so doing, defied AEDPA deference and this Court's harmless error teachings. App. 12a-13a.

Judge Cook pointed out that neither *Estelle* nor *Mitchell* extended the *Carter* remedy — a right to a no adverse inference instruction — to the circumstances

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[3]The Sixth Circuit, in *Finney*, indicated Finney was entitled to have the jury instructed that no inference of guilt could be drawn from his failure to testify in the persistent felony offender phase of his trial where the prosecutor still had to prove Finney was guilty of being a persistent felony offender.

presented in this case. App. 19a. Furthermore, both *Estelle* and *Mitchell* involved government or court actions that penalized the defendant by exposing the defendant to greater punishment for exercising the Fifth Amendment privilege; and most importantly, the state did not shift its burden of proving a disputed aggravating factor to Woodall. App. 21a-22a. In sum, the punitive element so critical in *Estelle* and *Mitchell* — the state's use of the defendant's silence to impose greater punishment — is wholly absent in Woodall's case. App. 22a.

Judge Cook noted that the state neither sought an adverse inference nor opposed Woodall's request for a *Carter* instruction. In the absence of disputed facts, Woodall's silence would demonstrate only a lack of remorse. "Considering that *Mitchell* expressly exempted lack-of-remorse and acceptance-of-responsibility findings from its holding, 26 U.S. at 330, the state has good reason to believe that the Fifth Amendment did not require a *Carter* instruction here." App. 22a.

In discussing harmless error, Judge Cook stated, "The majority compounds its error by engaging in a form of *possible*-harm review that verges on a presumption of prejudice. This leniency appears both in its emphasis on dicta opining about the likelihood that juries draw adverse inferences, and in its ultimate finding of a 'very real risk' of prejudice. Alas, the correct harmless-error standard does not permit such speculation, and neither does the undisputed evidence of this heinous crime." App. 24.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit violated 28 U.S.C. §2254(d) when it used federal habeas corpus review as a vehicle to second-guess the reasonable decision of the Kentucky Supreme Court and when it granted relief in the absence of "clearly established Federal law, as determined by [this Court]."

The Sixth Circuit's decision "is a textbook example of what the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) proscribes: 'using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts.'" *Parker v. Matthews,* 132 S.Ct. 2148, 2149 (2012) (recently reversing the Sixth Circuit for substituting its own interpretation of Kentucky law in a capital case). One of AEDPA's primary innovations was barring federal courts from granting habeas relief, in the face of a state court denial of relief on the merits, if there is no "clearly established Federal law, as determined by [this Court]" on the issue. Yet that is precisely what the Sixth Circuit did here.

The Sixth Circuit reasoned that the logic of *Carter*, *Estelle*, and *Mitchell* logically extend to this case. They do not. Those decisions do not suggest that a person such as Woodall, who had pled guilty to all the charged crimes and aggravating circumstances and who did not contest the facts and circumstances of the crimes, is entitled to a no adverse inference instruction in the penalty phase of his trial. More fundamentally, it was not the province of the Sixth Circuit to engage in that

speculation in this case. Section 2254(d)(1) barred the Sixth Circuit from granting habeas relief based on a rule of its own, not this Court's, devising.

Under 28 U.S.C. §2254(d)(1), a writ of habeas corpus may not be granted on a claim that a state court has resolved on the merits unless the decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." In *Harrington v. Richter*, 131 S.Ct. 770 (2011), this Court clarified the limited scope of habeas review under that provision.

> Section 2254(d) reflects the view that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal. As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Id., at 786-787 (Citations omitted).

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), but the legal rule must be "squarely established" by this Court.

Knowles v. Mirzayance., 556, U.S. 111, 122 (2009). *See also*, *Howes v. Fields*, 132 S.Ct. 1181, 1187 (2012). Clearly established federal law refers to the holdings, as opposed to the dicta, of decisions of this Court at the time of the relevant state court decision. *Carey v. Musladin*, 549 U.S. 70, 74 (2006).

Although the Sixth Circuit's reading of the applicable case law is one way to synthesize the cases, this Court has not squarely addressed the legal proposition advanced here — that Woodall was entitled to a prophylactic instruction in the penalty phase of trial where the facts and circumstances of the crimes were not in dispute. The Sixth Circuit's proposed application is subject to fairminded disagreement.

As noted in Judge Cook's dissent, the Kentucky Supreme Court did not believe that this Court's holdings clearly established the right to a *Carter* instruction in the penalty phase of a capital trial where the defendant has pled guilty to all the crimes and aggravating circumstances and where the facts and circumstances of the crimes are not in dispute. Despite thorough consideration by the Kentucky Supreme Court, "[t]he majority improperly dismisses their judgment (as well as the Report and Recommendation of the federal magistrate judge) without so much as a nod to the standard that the judgment be beyond the purview of fairminded jurists. This stance not only flouts the AEDPA standard, but also undermines the animating purposes of AEDPA deference: comity, finality, and federalism." App. 23a. AEDPA deference precludes the majority from substituting its judgment for that of the State's highest court.

Although *Estelle* and *Mitchell* generally recognize that the Fifth Amendment privilege extends to the sentencing phase of criminal trials and that a generic guilty plea does not waive the right, neither case extended the *Carter* remedy — a right to a no adverse inference instruction — to those specific circumstances. App. 18a-19a. In fact, *both Estelle and Mitchell involved an adverse inference that effectively shifted the government's burden of proving a disputed aggravating circumstance to the defendant. Accordingly, both cases involved government or court actions that penalized the defendant by exposing the defendant to greater punishment for exercising the Fifth Amendment privilege.* App. 21a-22a.

In Woodall's case, the state's burden of proving a disputed aggravating factor was not shifted to Woodall. The state neither sought an adverse inference nor opposed Woodall's request for a *Carter* instruction during the sentencing hearing. *Id.* And as the Kentucky Supreme Court quite reasonably explained, "[t]he no adverse inference instruction is used to protect a nontestifying defendant from seeming to be guilty to the jury because of a decision not to testify. That is not the situation presented here." App. 261a.

As Judge Cook further points out, in the absence of disputed facts (as in Woodall's case), Woodall's silence would demonstrate only a lack of remorse. "Considering that *Mitchell* expressly exempted lack-of-remorse and acceptance-of-responsibility findings from its holding, 526 U.S. at 330, the state has good reason to believe that the Fifth Amendment did not require a *Carter* instruction here." App. 22a. Put another way, this Court expressly left open what the

Sixth Circuit says this Court has clearly established. That is a basic violation of AEDPA.

Simply put, *Carter, Estelle,* and *Mitchell* do not clearly establish a rule of law applicable to Woodall's case. None of the Fifth Amendment cases cited by the Sixth Circuit clearly establishes the right to a *Carter* instruction in the circumstances of Woodall's case. The Sixth Circuit's position extends the specific holdings in those cases and thereby creates a new rule of constitutional law. *See, United States v. Whitten*, 623 F.3d 125, 131-132 (2nd Cir.2010)(Livingston, J., joined by three other judges, dissenting from denial of *en banc* rehearing, noting that applying *Carter v. Kentucky* to the penalty phase of jury trial was new principle of constitutional law); *Edwards v. Roper,* 688 F.3d 449, 461 (8th Cir.2012)(assuming for the sake of argument that *Mitchell, Carter,* and *Estelle,* required a *Carter* instruction in the penalty phase, but finding denial of the instruction was harmless).

Mitchell has divided courts across the country in terms of drawing adverse inferences to increase the defendant's sentence. The case law of sister circuits breaks down into two broad groups: those cases that expand *Mitchell's* underlying principle to related but ultimately different legal questions, and those cases that take *Mitchell's*' limitation at face value and restrict it to its express rule of decision.[4] *Id., at* *8.

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[4]Cases that favor an expansive view of *Mitchell* include: *United States v. Caro,* 597 F.3d 608, 629 (4th Cir.2010)(collecting conflicting cases on *Mitchell's* applicability to the nonstatutory sentencing factor of remorse); *United States v. Roman,* 371 F.Supp.2d 36, 50 (D.P.R.2005)(dealing with lack of remorse as an aggravator); and *United States v. Cooper,* 91 F.Supp.2d 90, 112-13

(D.D.C.2000)(noting defendant's failure to express remorse would encroach on defendant's right to remain silent).

Cases that favor a narrow application of *Mitchell* include: *Burr v. Pollard,* 546 F.3d 828 (7th Cir.2008) (holding that silence can be consistent not only with the exercise of one's Fifth Amendment right, but also with a lack of remorse);and *United States v. Ronquillo*, 508 F.3d 744, 749 (5th Cir.2007)(*Mitchell* inapplicable because defendant admitted all pertinent facts of the offenses). Additionally, three sister circuits have balked at and expressed apparent skepticism toward expanding *Mitchell's* no adverse inference rule beyond its clear holding: *United States v. Seward,* 583 F.3d 1045, 1048-49 (8th Cir.2009)(held that sentencing court could hold defendant's false denial against him); *Lee v. Crouse,* 451 F.3d 598, 605-06 (10th Cir.2006)(Supreme Court has not answered whether an adverse inference can be drawn at sentencing from a defendant's refusal to submit to psychological evaluation when that refusal does not relate to the facts of the crime);and *United States v. Romero-Rendon,* 220 F.3d 1159, 1163 n. 4 (9th Cir.2000)(use of presentence report to increase defendant's sentence did not violate *Mitchell*). Both the express language and the majority of circuits favor a narrow interpretation of *Mitchell*.

The Sixth Circuit has previously addressed *Mitchell* on three separate occasions: *Ketchings v. Jackson*, 365 F.3d 509 (6th Cir.2004)(Fifth Amendment rights violated where defendant refused to admit guilt in sentencing hearing and judge held it against him); *United States v. Kennedy*, 499 F.3d 547 (6th Cir.2007)(District Court did not violate Fifth Amendment by taking account of defendant's unwillingness to complete a psychosexual evaluation); and in this case, *Woodall v. Simpson,* 685 F.3d 574 (6th Cir.2010). The majority in *Woodall* reached its conclusion as to the necessity of a *Carter* instruction by making an "intermediate holding" on the scope of *Mitchell,* that is the no adverse inference rule warranted a prophylactic instruction in order to protect the right. *Miller v. Lafler,* 2012 WL 5519677 (6th Cir.Nov. 14, 2012)(unpublished), at *8.

This Court need not, of course, decide the correct interpretation of *Mitchell* for purposes of this case. It is enough that this Court has not clearly established whether a no adverse inference instruction was required; and that fairminded jurists can and do disagree on the applicable scope of *Mitchell*.

II. The Sixth Circuit improperly converted the *Brecht v. Abrahamson* "substantial and injurious effect" harmless error standard into a "possible-harm" standard.

The Sixth Circuit compounded its failure to abide by AEDPA by finding that the alleged error was not harmless. As pointed out by Judge Cook;

> "[T]he majority compounds its error by engaging in a form of *possible*-harm review that verges on a presumption of prejudice. This leniency appears both in its emphasis on dicta opining about the likelihood that juries draw adverse inferences, and its ultimate finding of a 'very real risk' of prejudice. Alas, the correct harmless-error standard does not permit such speculation, and neither does the undisputed evidence of this heinous crime."

App. 24a.

The Sixth Circuit uses pure conjecture to establish grave doubt and ignores the evidence as a whole including overwhelming evidence of Woodall's guilt of

the heinous crimes and evidence that Woodall lacked remorse for the crimes. Instead, the Sixth Circuit erroneously based its ruling upon the possibility that the jury "may" have sentenced Woodall to death because he didn't testify. Specifically, the Sixth Circuit stated, "Because we cannot know what led the jury to make the decision it did, and because the jury may well have based its decision [to sentence Woodall to death] on Woodall's failure to testify, we cannot conclude that this is a case of 'harmless error.'" App. 11a. Under the Sixth Circuit's standard, no error will ever be harmless because one can never know what led a jury to its decision and it is always possible that a jury based its decision on the alleged error in question. But that is not the standard under *Brecht v. Abrahamson,* 507 U.S. 619 (1993).

In *Brecht*, at 637, this Court adopted the following standard for harmless error review in habeas cases: whether the constitutional error had "substantial and injurious effect or influence in determining the jury's verdict." *Id.*, *citing Kotteakos v. United States,* 328 U.S. 750 (1946). The harmless error standard adopted in *Brecht* continues to apply to all habeas cases even after enactment of the AEDPA. *Fry v. Pliler,* 127 S.Ct. 2321 (2007).

This standard "protects the State's sovereign interest in punishing offenders and 'good-faith attempts to honor constitutional rights,' while ensuring that the extraordinary remedy of habeas corpus is available to those 'whom society has grievously wronged[.]'" *Calderon v. Coleman,* 525 U.S. 141, 146 (1998) (Citations omitted). *Calderon* further states:

> The social costs of retrial or resentencing are significant . . .[t]he State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error. *Brecht, supra*, at 637, 113 S.Ct. 1710.

Id.

In *O'Neal v. McAninch,* 513 U.S. 432, 437 (1995), this Court recognized that the rare case might sometimes arise where the record is so evenly balanced that a conscientious judge is in "grave doubt" as to the harmlessness of an error. Recognizing that the circumstance of "grave doubt" is "unusual," this Court stated, "Normally a record review will permit a judge to make up his or her mind about the matter. And indeed a judge has an obligation to do so." *Id.,* at 435.

As pointed out by Judge Cook, "review of the record here leaves little room for doubt, let alone grave doubt. App. 27a. The state presented eleven witnesses and the defense fourteen. The sentencing jury heard undisputed evidence of the abduction, rape, maiming, and drowning of the victim; Woodall admitted as much by virtue of his guilty plea. Forensic evidence corroborated these facts. *Id.* "On the issue of remorse, the jury heard independent testimony from petitioner's mother that, shortly after the murder, petitioner came to her house, sat in a recliner, and watched television as if nothing had happened." *Id.* Petitioner even benefitted from a jury instruction he did not deserve, which told jurors to presume his innocence of the

aggravating factors he had admitted, unless the state presented proof beyond a reasonable doubt. *Id*. *See Delo v. Lashley,* 507 U.S. 272, 278-279 (1993)(an instruction is constitutionally required only when there is a "genuine danger" that the jury will convict based on something other than the State's lawful evidence. Once the defendant has been convicted, the presumption of innocence disappears).

In contrast, the jury heard nothing about Woodall's silence from the state or from the trial court. Despite this, the Sixth Circuit assumes "a very real risk" that his silence "had substantial and injurious effect or influence" on the verdict. As Judge Cook aptly asked in her dissent, "why would it?" App. 27a-28a.

In light of the record as a whole, the fact that Woodall did not get a no adverse inference instruction had no "substantial and injurious effect or influence in determining the jury's verdict." The Sixth Circuit failed to consider the record as a whole and did not give enough weight to the aggravating circumstances. *Cf. Bobby v. Van Hook,* 130 S.Ct. 13, 20 (2009). Instead, the Sixth Circuit erroneously based its ruling upon the possibility that the jury "may well have based its decision [to sentence Woodall to death] on Woodall's failure to testify." Woodall received the death penalty based upon what he did, not based upon the fact that he did not testify.

CONCLUSION

For the reasons stated above, the petition for writ of *certiorari* should be granted and this Court should reverse the judgment of the Sixth Circuit.

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