No. 12-794

In The
Supreme Court of the United States

RANDY WHITE, WARDEN,

Petitioner,

v.

ROBERT KEITH WOODALL,

Respondent.

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

PETITIONER'S BRIEF ON THE MERITS

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September 11, 2013

CAPITAL CASE
QUESTIONS PRESENTED

Robert Keith Woodall, amidst overwhelming evidence of his guilt, pleaded guilty to kidnapping, raping, and murdering a 16-year-old child, and thus pleaded 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; 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 pleaded guilty to all offenses and all aggravating circumstances, the Sixth Circuit determined that the Kentucky Supreme Court unreasonably applied this Court's holdings from three cases in violation of Woodall's 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 pleaded guilty to the crimes and aggravating circumstances.

CAPITAL CASE

QUESTIONS PRESENTED – Continued

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.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

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

STATEMENT OF JURISDICTION

The Sixth Circuit entered its judgment on July 12, 2012. Pet. App. 314a-315a. A petition for rehearing *en banc* was denied on October 3, 2012. Pet. App. 313a. This court has jurisdiction pursuant to 28 U.S.C. §1254(1). 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 –
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> > (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. Trial Court Proceedings

1. Woodall's Guilty Plea to Murder, Kidnapping, and Rape

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 ice cold lake to drown. As a result, he was indicted for murder, kidnapping, and rape. Facing overwhelming evidence of his guilt, Woodall opted to plead guilty to all of the charged crimes for which he was accused, including the aggravating circumstances. J.A. 12-13.

During the plea colloquy, Woodall told the court he was not aware of ever having suffered from a

mental disease or defect, that he was satisfied with the job his lawyers had done, and that he had read and understood his motion to enter a guilty plea. Woodall understood what facts the Commonwealth would have to prove beyond a reasonable doubt in order to convict him on each of the offenses. J.A. 11-12. And Woodall admitted the following: he had committed the capital offense of murder by cutting Sarah Hansen with a sharp object and drowning her, while engaged in the offense of first-degree rape; he had committed the capital offense of kidnapping Sarah Hansen and not releasing her alive; and he committed first-degree rape by engaging in sexual intercourse with Sarah Hansen through the use of forcible compulsion in which she received serious physical injury and death.[1] J.A. 13. He also understood, *inter alia*, he had a right against self-incrimination which meant he did not have to say anything and the Commonwealth would have to prove his guilt beyond a reasonable doubt. He understood he was giving up those rights by pleading guilty. J.A. 14.

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[1] *See* Kentucky Revised Statute (KRS) 532.025(2)(a)2 (capital sentencing statute), which states in relevant part, the following aggravating circumstances: "The offense of murder or kidnapping was committed while the offender was engaged in the commission of . . . rape in the first degree . . . ."

2. Penalty Phase Trial Evidence

a. Evidence from Prosecution Witnesses

The prosecution witnesses testified as follows: 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. 9 T.E. 1192.[2]

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. 10 T.E. 1341.

Woodall was in the Minit Mart around the same time as Sarah. 9 T.E. 1197, 1200. He did not know Sarah and had, the year before, gotten out of prison for serving time on a conviction for two counts of sexual abuse; he had also sexually abused two of his cousins. 10 T.E. 1330-1331, 1429-1430. Woodall was angry because his girlfriend was out with friends. 9 T.E. 1199. Another girl had walked into the Minit Mart right before Sarah, and Woodall had remarked he would like to "have a piece of that." *Id*. at 1246-1247.

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[2] References to the trial transcripts of evidence are to the volume and page number, so 9 T.E. 1192 refers to page 1192 of the ninth volume of the Transcript of Evidence.

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 one mile 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. *Id*. at 1206-1209.

A trail of blood led 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. *Id*. at 1210-1211.

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 drowned to death. *Id*. at 1221-1225.

During the investigation, the police learned that Woodall had left the Minit Mart a few minutes before Sarah's arrival. *Id.* at 1200. Woodall gave the police conflicting statements about what he had done after work on the night of the murder. *Id*. at 1236-1237. A

bloody tennis shoe print matching Woodall's shoes was found on the pier next to Sarah's body. *Id*. at 1232-1233, 1237-1238. Woodall's fingerprints were found on and in the van. *Id*. at 1240, 1306-1311. Muddy and wet clothing was found under Woodall's bed. Sarah's blood was found on Woodall's jeans and sweatshirt. *Id*. at 1241, 1264. And Woodall's DNA was found on Sarah's vaginal swabs. 10 T.E. 1327-1328.

Prior to the prosecutor calling the last witness, a portion of Woodall's guilty plea colloquy was read to the jury. J.A. 23-30. Specifically, the jury heard that Woodall admitted to committing the capital offense of murder by cutting Sarah Hansen with a sharp object and drowning her, while he was engaged in the offense of first-degree rape; the capital offense of kidnapping Sarah, where she was not released alive; and the offense of first-degree rape by engaging in sexual intercourse with Sarah by the use of forcible compulsion in which she received serious physical injury and death. The jury also heard that Woodall indicated he understood he was giving up certain rights in exchange for pleading guilty, such as the right against self-incrimination and the Commonwealth's obligation to prove his guilt beyond a reasonable doubt. J.A. 27-29. Neither the trial court nor the prosecutor asked the jury to infer anything negative from the fact that Woodall chose not to testify. J.A. 49-66.

b. Evidence from Woodall's Witnesses

Woodall introduced witnesses who testified as follows: Woodall was a quiet, average, well-disciplined student in elementary school. 10 T.E. 1347. He also had a spastic colon and would have to be sent home for accidental bowel movements.[3] *Id*. at 1349, 1412, 1436. By the time Woodall was in the tenth grade, he had become withdrawn and would fall asleep in class. *Id*. at 1358-1359.

Woodall was evaluated in 1991 and found to have no diminished capacity and no emotional or neurological problems. *Id*. at 1370-1376. Woodall's full scale IQ was 74; he was not mentally retarded. 11 T.E. 1501, 1511, 1554. Woodall was an overachiever in some categories and an underachiever in other categories. *Id*. at 1512. His IQ of 74 allowed the school to classify him as "educably mentally handicapped." This designation entitled him to special support to help him reach functional, adult-levels skills in subjects such as reading and writing. *Id*. at 1505-1506.

Woodall was also evaluated at the Kentucky Correctional Psychiatric Center in 1998 and found to have

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[3] Woodall's grandmother would put soap into warm water and place it in Woodall's rectum to help with his constipation. 10 T.E. 1412, 1439. Woodall's mother would also cut a sliver of soap to use as a suppository, but would not put it in water before using it on Woodall. *Id*. at 1412-1413. One of Woodall's witnesses, Dr. Gail Spears, who never interviewed Woodall, testified that using soap as a suppository was a form of sexual abuse. 11 T.E. 1564, 1581.

full scale IQ of 78. *Id*. at 1519-1520, 1525-1526. There was no indication of any kind of organic brain impairment. *Id*. at 1530-1531. A review of all of Woodall's subtests did not reveal the presence of any significant strengths or weaknesses. *Id*. at 1526. Woodall's profile suggested a personality disorder not otherwise specified with paranoid and borderline traits, and an adjustment disorder with mixed anxiety and depressed mood. *Id*. at 1539, 1545-1546. He was further diagnosed with having abused marijuana. *Id*. at 1545. His profile described a man who was impulsive, hostile, bitter, and unempathetic. 11 T.E. 1540. Woodall stated, during the course of his mental health interview, that he knew that a person who would take someone hostage, force someone to have sex, or kill someone, would be engaging in illegal criminal activities. *Id*. at 1549.

Woodall's mother's home was dirty; it had roaches and mice. 10 T.E. 1409-1410. Woodall's parents were divorced and Woodall's father was not a good provider. 11 T.E. 1476-1478; 10 T.E. 1435, 1438. They did not always have utilities. 10 T.E. 1410. Woodall, his mother, and his siblings would stay with his grandparents "a whole lot." *Id*. at 1414-1415. Woodall spent a lot of time at his grandparents' house; he wanted to stay with his grandparents and his aunts and uncles. *Id*. at 1437. His grandmother and aunt provided care for him for "a pretty good while." *Id*. at 1417.

Woodall's aunt testified that Woodall sexually abused two of her daughters over a three-year period. *Id*. at 1422. Woodall, however, was never convicted for

abusing these two cousins; he went to prison for molesting someone else. *Id*. at 1430. Woodall's grandmother testified that Woodall had sexually abused three of her grandchildren. *Id*. at 1445. Woodall was terminated from the Sex Offender Treatment Program while in prison due to "excessive unexcused absences." 11 T.E. 1552.

Woodall's mother indicated to the jury that after Woodall abducted Sarah, raped, and murdered her, he went to his mother's house where he fell asleep in a recliner watching television. 10 T.E. 1464-1466.

3. Discussion Regarding *Carter* Instruction

During Woodall's penalty phase trial, after all evidence was presented, the trial court discussed the jury instructions, out of the hearing of the jury, with both the prosecutor and defense counsel.

Defense counsel asked the trial court to instruct the jury as follows: "A defendant is not compelled to testify and the fact that the defendant did not testify should not prejudice him in any way." J.A. 31. 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. J.A. 35-39.

4. The Verdict

The jury deliberated one hour and eight minutes before sentencing Woodall to death for the murder of Sarah Hansen. 12 T.E. 1638-1640. Specifically, the jury found the following aggravating circumstances to exist: "That the defendant's act of kidnapping and murder was engaged in the commission of rape in the first degree." J.A. 46. The jury deliberated 23 minutes before fixing Woodall's punishment for kidnapping and first degree rape at two consecutive life sentences. 12 T.E. 1646-1647.

B. Direct Appeal Ruling

On direct appeal, Woodall argued that the failure of the trial court to give the penalty phase jury a no-adverse-inference instruction violated his Fifth Amendment right against self-incrimination. He relied on a combination reading of *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). *Carter* held that, upon request at the close of the guilt phase of a trial, the jury must be instructed that a defendant's failure to testify cannot be used to infer guilt. In *Estelle*, which did not involve any

request for a no-adverse-inference instruction, the Court stated that it "can 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." And *Mitchell* held, among other things, that a court may not draw adverse inferences from a defendant's silence when determining contested facts and circumstances about the crime that, by statute, determine the severity of the sentence. The Kentucky Supreme Court carefully considered each case and disagreed that they require a no-adverse-inference instruction during the penalty phase of a trial in which the defendant has pleaded guilty to the crimes and all aggravating circumstances. Pet. App. 261a-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 nontestifying defendant from the appearance of guilt because of a decision not to testify. Given that Woodall had pleaded guilty to all of the charged crimes, as well as the aggravating circumstances, the court explained, "[t]here was no reason or need for the jury to make any additional inferences of guilt." Pet. 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 neither a guilty plea case nor a jury instruction case, did not

cite *Carter,* and did not indicate that it was extending *Carter*. *Estelle* involved the use of an unMirandized 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*. Pet. App. 262a.

The Kentucky Supreme Court next found that *Mitchell* was distinguishable and did not apply. In *Mitchell*, the defendant pleaded 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, which would determine the penalty range. She only admitted to "some of" the charged conduct. A sentencing hearing was held to determine the facts and circumstances surrounding the crimes, during which the sentencing court specifically told Mitchell that it held her silence against her. The Kentucky Supreme Court concluded that *Mitchell* did not govern because it differed from this case in a fundamental way: Woodall did not contest any of the facts or aggravating circumstances surrounding the crimes. Pet. App. 262a-263a.

In the alternative, the Kentucky Supreme Court held that any possible error would be "nonprejudicial" because Woodall had admitted to the crimes and aggravating circumstances and evidence of his guilt was overwhelming. Pet. App. 261a-262a.

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. Pet. App. 309a-311a. Another justice joined the dissent on unrelated grounds, but found "failure to give a no adverse inference instruction, if erroneous, harmless because the defendant not only pled guilty, but admitted to the aggravating circumstances." Pet. App. 312a.

C. Federal Habeas Corpus Rulings

1. Magistrate Judge's Report

Woodall filed a habeas corpus petition in the U.S. District Court for the Western District of Kentucky. The district court referred the case to a magistrate judge. The magistrate judge 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 this Court's precedents. Pet. App. 176a-184a.

The magistrate judge noted that 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. Pet. App. 182a.

2. United States District Court

The U.S. District Court rejected the magistrate's recommendation. It 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." Pet. 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. Pet. App. 61a-63a.

3. United States Court of Appeals for the Sixth Circuit

A divided panel (2-1) of the Sixth Circuit affirmed the judgment of the U.S. District Court. Judge Martin, joined by Judge Griffin, generalized the holdings in *Carter, Estelle,* and *Mitchell,* and concluded that Woodall, who had pleaded 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. Pet. App. 4a-9a. The court found that the Kentucky Supreme Court's denial of the claim was an unreasonable application of *Carter*, *Estelle*, and *Mitchell*.

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 pleaded guilty. Pet. App. 6a-9a. The court also referred to one of its own cases in finding that Woodall was entitled to a "no adverse inference" instruction. Pet. App. 7a. In support of its ruling, the court said that a state court decision is 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. Furthermore, the court said that clearly established law also includes legal principles and standards enunciated in this Court's decisions. Pet. App. 8a.

The Sixth Circuit then ruled that the error was not harmless. After 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.' " Pet. App. 11a. The court based its determination, in part, on "grave doubt" that the jury's recommendation was not influenced by adverse inferences drawn from Woodall's decision not to testify. *Id.*

Judge Cook, dissenting, pointed out that neither *Estelle* nor *Mitchell* extended the *Carter* remedy – a right to a no-adverse-inference instruction – to the circumstances presented in this case. Pet. App. 19a.

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. Pet. 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. Pet. 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, 526 U.S. at 330, the state has good reason to believe that the Fifth Amendment did not require a *Carter* instruction here." Pet. App. 22a.

In discussing harmless error, Judge Cook stated, "[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 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." Pet. App. 24.

SUMMARY OF ARGUMENT

I. The Sixth Circuit disregarded the limits Congress imposed in 28 U.S.C. §2254(d)(1) when it granted habeas relief based on its conclusion that a no-adverse-inference instruction is required in the penalty phase of a capital trial where the defendant has pleaded 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 pleaded guilty to all the crimes and aggravating circumstances. Section 2254(d)(1) forecloses habeas relief based on a rule this Court has not clearly established; and it forecloses relief when the state court's ruling is not "an error . . . beyond any possibility for fairminded disagreement." Both obstacles foreclosed habeas relief in this case.

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*, this 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 and should not prejudice him in any way." The *Carter* instruction 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*, which did not involve a guilty plea and which did not mention or extend *Carter*, this Court prohibited the use of the defendant's pre-trial statement, given during a court-ordered mental evaluation obtained in violation of the *Miranda* rule, to establish his eligibility for the death penalty. *Estelle* did not establish any clear rules regarding when no-adverse-inference instructions are required.

Finally, in *Mitchell*, this Court prohibited a sentencing court from using a defendant's failure to testify to infer guilt of a sentencing factor that the prosecutor was required to prove to increase the sentence. The 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." 526 U.S. 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. The Court left open the question of whether silence bears on the issue of remorse.

Neither *Carter*, *Estelle*, nor *Mitchell* clearly established a rule that requires a no-adverse-inference

instruction during a penalty phase proceeding where the defendant has pleaded guilty to the crime and all aggravating circumstances. *Carter* dealt with proving guilt only; *Estelle* involved using a defendant's unwarned statement against him at sentencing; and *Mitchell* involved a trial court using a defendant's failure to testify to shift or reduce the prosecution's burden of proof regarding facts of the case the government needed to prove for a mandatory minimum sentence to be imposed.

Mitchell therefore differs from this case in multiple important ways: Unlike here, it involved the sentencer actually making an adverse inference based on silence; it involved facts regarding the crime itself; it involved facts as to which the government bore the burden of proof; and it involved facts that, if found, would increase the sentencing range. Those features of the case were critical to the *Mitchell* Court's reasoning, which emphasized that the government cannot meet its burden of proving the facts of the crime by "enlist[ing]" a silent defendant. *Mitchell*'s narrow scope is confirmed by the Court's leaving open whether the jury can take a defendant's silence into account when assessing lack of remorse or acceptance of responsibility. The Court has left open when those adverse inferences may, or may not, be made in a sentencing proceeding. The harm that the *Mitchell* Court sought to address is simply not present in this case. The Sixth Circuit, in finding that a modified *Carter* instruction is required in these circumstances, has created a new rule of constitutional law in violation of §2254(d)(1).

Because *Carter*, *Estelle*, and *Mitchell* do not clearly establish a rule that requires a prophylactic jury instruction in a case such as this, habeas relief is barred under §2254(d)(1). And the Kentucky Supreme Court's refusal to extend *Carter*, *Estelle*, and *Mitchell* to this type of case was not "an error . . . beyond any possibility for fairminded disagreement."

II. Even if the judge should have given a no-adverse-inference instruction, the absence of such an instruction did not have "substantial and injurious effect on the jury's verdict," as required for habeas relief under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). In addition to Woodall's admission of guilt of the brutal and senseless crimes, the jury also heard evidence of his prior sexual abuse convictions and the fact, that after he raped the young victim and threw her in the lake to drown, he fell asleep watching television, as if nothing had happened. Given this undisputed overwhelming evidence, there is no reasonable basis to conclude that the absence of a modified *Carter* instruction had a substantial and injurious effect or influence in determining the jury's verdict.

In order to find the alleged error was not harmless, the Sixth Circuit watered down the *Brecht* standard into a possible-harm standard and failed to consider the overwhelming case for the death sentence on the facts presented. The Sixth Circuit stated that it could not conclude that Woodall's case was a case of harmless error "[b]ecause 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 . . . ." The standard used by the Sixth Circuit would, in effect, preclude harmless error in nearly every death penalty case. Under the correct standard, the error here (assuming arguendo there was one) was harmless.

ARGUMENT

I. The Sixth Circuit violated 28 U.S.C. §2254(d) when it granted habeas relief in the absence of clearly established Federal law, as determined by this Court, and when it second-guessed the reasonable decision of the Kentucky Supreme Court.

The Sixth Circuit granted habeas relief based on its conclusion that the Kentucky Supreme Court unreasonably applied rulings of this Court. Specifically, the Sixth Circuit concluded that Woodall had a constitutional right to a no-adverse-inference instruction at the close of his penalty phase trial – a trial held after he pleaded guilty in open court to all the crimes for which he was accused, including aggravating factors. That decision contravened the limits Congress imposed in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

Under the "unreasonable application" clause of 28 U.S.C. §2254(d)(1), a federal court can grant habeas relief only if the state court's merits ruling was "an unreasonable application of, clearly established Federal law, as determined by [this Court]." As this

Court recently explained, §2254(d) "is a guard against extreme malfunctions in the state criminal justice systems." *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011). Accordingly, to obtain "habeas corpus . . . , a state prisoner must show that the state ruling on the claim . . . 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 (internal quotation marks and citations omitted).

That showing cannot be made here. As explained below, this Court has not clearly established that a no-adverse-inference instruction is required after the defendant has pleaded guilty to all the facts and circumstances of the crimes, including aggravating circumstances. And the Kentucky Supreme Court's refusal to extend this Court's precedents to create such a right was not "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."

A. There is no clearly established Federal law, as determined by this Court, regarding whether a *Carter* instruction is required in the penalty phase of a trial after a defendant has pleaded guilty to the crimes and all aggravating circumstances.

The Sixth Circuit read *Carter*, *Estelle*, and *Mitchell* as collectively creating a rule requiring a modified *Carter* instruction in the penalty phase when a defendant has pleaded guilty to all crimes and aggravating

circumstances and the specifics of the crimes and aggravating circumstances are uncontested. Those cases do no such thing. Each of the cases dealt with far different circumstances than this case and was premised on reasoning that does not necessarily extend to this context.

Woodall did not merely ask the Kentucky courts to apply a general rule to a new fact pattern; he asked the court to create a new rule regarding when courts must provide no-adverse-inference instructions. But AEDPA authorizes habeas relief based only on a state court's failure to reasonably apply "clearly established" law as determined by *this* Court. Woodall's request for habeas relief must therefore fail.

1. *Carter*, *Estelle*, and *Mitchell* established rules regarding a defendant's silence that do not extend beyond the finding of facts "respecting the circumstances and details of the crime" that, if found, increase the sentencing range.

Carter v. Kentucky. The no-adverse-inference rule was established in *Griffin v. California*, 380 U.S. 609, 614-615 (1965). In *Griffin*, the Court held that a prosecutor or judge cannot tell the jury that it may draw an adverse inference of guilt based on a defendant's failure to testify during the guilt-innocence phase of a trial. In that case, the trial judge instructed the jury that it may "take that failure [to testify] into consideration as tending to indicate the truth of [the

State's] evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable." *Id*. at 610. The Court found that such an instruction violates the Fifth Amendment right against self-incrimination by penalizing a defendant for exercising that right. *Id*. at 614.

The Court extended *Griffin* in *Carter v. Kentucky*, 450 U.S. 288 (1981), by holding that upon a defendant's request, the trial court must instruct the jury that it may not draw an inference of guilt from the defendant's failure to testify. *Carter* explained that the penalty exacted in *Griffin* by adverse comment on the defendant's silence "may be just as severe when there is no adverse comment, but when the jury is left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt." *Id*. at 301.

Carter clearly establishes a right to a no-adverse-inference instruction during the guilt-innocence phase of a trial only. Unlike this case, *Carter* did not involve a guilty plea. Carter contested his guilt, did not testify, and then asked the trial court to instruct the jury that he "is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way." *Id.* at 294.[4]

[4] The prosecutor, during the guilt phase, commented on Carter's silence by remarking that if there were a reasonable explanation why Carter had run when he saw the police, it was "not in the record." *Id*.

Carter did not address whether a no-adverse-inference instruction is required during the sentencing phase of a trial, let alone where the defendant has pleaded guilty to all aggravating facts that bear on the sentencing range.

Estelle v. Smith. In *Estelle v. Smith*, 451 U.S. 454 (1981), this Court held that Smith's Fifth Amendment privilege against self-incrimination was violated when the prosecutor, during a capital penalty phase, used *Miranda*-violative statements Smith made during a court-ordered psychiatric examination to prove his future dangerousness (one of three findings which required the jury to impose the death penalty in Texas).

During the penalty phase of Smith's trial, the prosecution called a state-appointed psychiatrist to testify regarding Smith's future dangerousness. The court had earlier ordered Smith to meet with the psychiatrist; and he was not warned that his statements to the psychiatrist could be used against him. Smith did not testify during the penalty phase. Based on Smith's account of the crime during the interview, the doctor testified that Smith was a severe sociopath, that he would continue his previous behavior, that his sociopathic condition would get worse, that he had no regard for property or life, that there was no treatment to modify his behavior, that he would commit similar crimes if given the opportunity, and that he had no remorse. In other words, the doctor testified to Smith's future dangerousness. *Id*. at 464. Texas was required to prove future dangerousness

beyond a reasonable doubt and used Smith's own statements to do so. *Id*. at 466.

The Court found that the essence of the Fifth Amendment was "the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Id*. at 462 (emphasis in original). "To meet its burden, the State used respondent's own statements, unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty. In these distinct circumstances, the Court of Appeals correctly concluded that the Fifth Amendment privilege was implicated." *Id*. at 466.

The rule clearly established by *Estelle* is that a defendant's Fifth Amendment rights are violated when the state tries to meet its burden of proving a defendant is death-eligible by using against him unwarned statements he made to a psychiatrist pursuant to a court order. The Court also stated (in response to the state's contention that "incrimination is complete once guilt has been adjudicated") that it 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." *Id*. at 462-463. That statement is *dicta* to the extent it bears on any issue beyond what was before the Court. *See United States v. Rubin*, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J., concurring) ("A judge's power to bind is limited to

the issue that is before him; . . . ."); *see also Illinois v. Lidster*, 540 U.S. 419, 424 (2004) ("We must read this and related general language in [the Court's prior opinion] as we often read general language in judicial opinions – as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering."). And the circumstances when a no-adverse-inference instruction is required are well beyond what was before the Court in *Estelle* – a decision that (as noted) did not mention *Carter* and which involved use of a defendant's statement rather than inferences drawn from his silence.

Mitchell v. United States. In *Mitchell v. United States*, 526 U.S. 314 (1999), the Court held that (1) a guilty plea is not a waiver of the Fifth Amendment privilege at sentencing; and (2) a sentencing court may not draw an adverse inference in determining facts about the crime which, if found, would increase the sentencing range. The Court did not declare that a *Carter* instruction is required at the close of *every* post-guilty plea penalty phase where the defendant does not testify; and it did not declare that a *Carter* instruction is required when no facts as to which the government bears the burden of proof are in dispute.

Mitchell pleaded guilty to federal charges of conspiring to distribute five or more kilograms of cocaine and of distributing cocaine, but did not plead guilty to the drug quantity attributable to her under the conspiracy count. She faced a 10-year mandatory

minimum sentence if the quantity was more than 5 kilograms. After the government explained the factual basis for the charges, the district judge asked Mitchell, "Did you do that?" She answered, "Some of it." *Id*. at 318. Mitchell's co-defendants testified regarding the amount of cocaine Mitchell had sold, but Mitchell put on no evidence and did not testify to rebut her co-defendants' testimony. The court found the co-defendants' testimony to be credible, ruled that she sold more than 5 kilograms, and therefore imposed the mandatory minimum sentence of 10 years. The district judge 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." *Id*. at 319.

In reversing, the Court held that it "decline[s] to adopt an exception" to *Griffin* "for the sentencing phase of a criminal case with regard to factual determinations respecting the circumstances and details of the crime." *Id*. at 328. The Court reiterated that the Fifth Amendment prevents a person from being compelled in any criminal case to be a witness against himself and underscored that the central purpose of the Fifth Amendment privilege was "to protect a defendant from being the unwilling instrument of his or her own condemnation." *Id*. at 329. And the Court explained that "[t]o 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*." *Id*. at 329.

The Court tied its holding closely to the government's burden of proof. "The question was whether the Government had 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." *Id.* at 330. The Court added the caveat that "[w]hether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility" – matters on which the government does not bear the burden of proof – "is a separate question. It is not before us, and we express no view on it." *Id.*

Mitchell clearly establishes that, at a sentencing hearing, the government cannot attempt to meet its burden of proving a fact "respecting the circumstances and details of the crime" that, if found, increases the sentencing range by inferring the existence of that fact from the defendant's failure to testify. By contrast, the decision expressly left open – and thus established no clear law – on whether the sentencer may draw inferences from a defendant's silence when assessing other matters, such as remorse or acceptance of responsibility.

2. *Carter*, *Estelle*, and *Mitchell* do not clearly establish a constitutional right to a no-adverse-inference instruction during a penalty phase proceeding that follows a defendant's plea of guilty to the crimes and all aggravating circumstances.

The *Carter-Estelle-Mitchell* trilogy does not clearly establish a rule that entitled Woodall to a no-adverse-inference instruction. Standing alone, *Carter* plainly falls short, for it did not reach beyond the guilt-innocence phase. *Griffin*, which *Carter* extended, dealt only with the guilt phase of a trial. *See Portuondo v. Agard*, 529 U.S. 61, 69 (2000) ("*Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt"). The instruction Carter sought asked that the jury be barred from drawing "an inference of guilt." *Carter*, 450 U.S. at 289. And nothing in the opinion suggested its holding extended to a sentencing hearing. *See also id*. at 307 (Stevens, J., concurring) (stating that the Court's holding was "limited to cases in which the defendant has requested that the jury be instructed not to draw an inference of *guilt* from the defendant's failure to testify") (emphasis added).

Estelle likewise cannot bear the weight the Sixth Circuit placed on it. As discussed, *Estelle* did not involve what inferences a jury may, or may not, draw from a defendant's silence. How could it, since it dealt with the government's use of a defendant's *statement*? To be sure, *Estelle* broadly stated that it could

"discern no basis to distinguish between the guilt and penalty phases." This Court has held time and again, however, that "clearly established Federal law" within the meaning of §2254(d)(1) refers to the holdings, as opposed to the *dicta*, of decisions of this Court. *Berghuis v. Smith*, 559 U.S. 314, 332-333 (2010); *Thaler v. Haynes*, 559 U.S. 43, 47 (2010) (*per curiam*); *Carey v. Musladin*, 549 U.S. 70, 74 (2006). Further, the Court has stated that it "has never extended *Estelle*'s Fifth Amendment holding beyond its particular facts." *Penry v. Johnson*, 532 U.S. 782, 795 (2001).

That leaves *Mitchell*. But the leap from *Mitchell*'s holding to the rule proposed by Woodall is a long one. *Mitchell* (1) did not involve a requested no-adverse-inference instruction (the judge, during a sentencing hearing, expressly drew an adverse inference); and (2) involved "factual determinations respecting the circumstances and details of the crime" (3) as to which the government bore the burden of proof, and which (4) if found, would increase the sentencing range. None of those factors appears here.

Neither the trial court nor the prosecutor told the jury that it should or may draw an adverse inference from Woodall's failure to testify. More importantly, through his guilty plea, Woodall acknowledged his guilt beyond a reasonable doubt of murder and the aggravating facts that made him eligible for the death sentence. Thus, the sentencing hearing did not involve disputed facts "respecting the circumstances and details of the crime," issues as to which the

government bore the burden of proof, or facts that, if found, would increase the sentencing range.

These differences between *Mitchell* and this case are not minor and inconsequential. *Mitchell* extended *Griffin*, not *Carter*, to a sentencing hearing. This Court still has not expressly held that a *Carter* no-adverse-inference instruction is required at a sentencing proceeding before a jury. And intervening case law calls into question whether *Mitchell* even counts as a "sentencing" case. In *Alleyne v. United States*, 133 S.Ct. 2151 (2013), the Court held that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." *Id*. at 2155. The disputed facts in *Mitchell* were therefore elements of the offense, not mere sentencing factors. When the trial judge held that Mitchell sold more than 5 kilograms of cocaine, the judge was finding – based in large part on an inference from Mitchell's silence – that Mitchell was guilty of a greater offense. This Court has never held that *Griffin*, let alone *Carter*, applies to what current law would consider purely a sentencing proceeding.

Even putting that aside, *Mitchell* rested heavily on the government's relieving itself of its burden of proof through adverse inferences from a defendant's silence. *See* 526 U.S. at 330. That is closely connected to *Mitchell*'s emphasis that the adverse inference regarded facts "respecting the circumstances and details of the crimes." *Id*. at 328; *see also id*. at 329 (respecting "the commission of disputed criminal acts"); *id*. (respecting "the specifics of the crime"); *id*. at 330

("relevant to the crime"). It is normally the government's burden to prove the facts of the crime; and under *Apprendi* and later cases, it is the government's burden to prove beyond a reasonable doubt facts that increase "the prescribed range of sentences to which a defendant is exposed." *Alleyne*, 133 S.Ct. at 2158 (plurality opinion).

That *Mitchell* did not clearly establish that a no-adverse-inference instruction was required here is confirmed by the Court's statement that "[w]hether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility is a separate question" upon which "we express no view." 526 U.S. at 330. That caveat dooms any contention that the *Carter* instruction applies to the entirety of all sentencing proceedings in which the defendant does not testify. And it is consistent with reading *Mitchell* as focused on facts related to the crime itself as to which the government bears the burden of proof.

3. Woodall's arguments about Kentucky law do not bring him within the purview of *Mitchell*.

Here, even before the penalty phase began, the government had met its burden of proof as to all facts on which it carried the burden, including all facts that would increase the sentencing range. Woodall argues that certain facts were in dispute such as Woodall's low IQ, the conditions of his upbringing, and whether he was sexually abused. Brief in

Opposition (BIO) 17. These "facts" do not, however, pertain to the circumstances of the crimes; they are alleged mitigating circumstances. States may require mitigating circumstances to be proven by the defense, *see Delo v. Lashley*, 507 U.S. 272, 276 (1993) (*per curiam*); *Kansas v. Marsh*, 548 U.S. 163, 170-173 (2006). Kentucky follows that procedure. *See Thompson v. Commonwealth,* 147 S.W.3d 22, 48-50 (Ky. 2004). The absence of any requirement under Kentucky law to weigh aggravating against mitigating circumstances further rules out any burden on the prosecution regarding mitigation. KRS 532.025; *id.,* 147 S.W.3d at 49-50. The absence of a *Carter* instruction therefore did not create the risk that the government would relieve itself of its burden of proof or that Woodall's silence could be used to subject him to a higher sentencing range.

Although Woodall points out that Jury instruction No. 1 (J.A. 40) instructed the jury to presume him innocent of the aggravating circumstances unless it believed from the evidence that the aggravating circumstances existed beyond a reasonable doubt (BIO 16-17), this instruction was both incorrect and superfluous as Woodall had already admitted guilt to all charges, including the aggravating circumstances. An aggravating circumstance may be found at either the guilt or penalty phase. *Tuilaepa v. California*, 512 U.S. 967, 971-972 (1994) (citing *Lowenfield v. Phelps*, 484 U.S. 231, 244-246 (1988); *Flamer v. Delaware*, 68 F.3d 736, 758 (3rd Cir. 1995) (*en banc*) (Alito, J.) (upholding jury instruction directing jury to apply guilt

phase verdict in finding aggravating circumstance)). "Once the defendant has been convicted fairly in the guilt phase of the trial, the presumption of innocence disappears." *Lashley*, 507 U.S. at 278 (citing *Herrera v. Collins*, 506 U.S. 390, 399 (1993)). "An instruction is constitutionally required only when, in light of the totality of the circumstances, there is a 'genuine danger' that the jury will convict based on something other than the State's lawful evidence, proved beyond a reasonable doubt." *Id.* at 278 (citing *Kentucky v. Whorton*, 441 U.S. 786, 789 (1979) (*per curiam*)).

In spite of the instruction, the aggravating circumstances were not contested. During closing argument, trial defense counsel candidly explained to the jury that Woodall had pleaded guilty to the murder, kidnapping, and rape of Sarah Hansen because he was guilty. Specifically, trial defense counsel said, "[the prosecutor] has talked to you about aggravating circumstances, and I said before, and I will tell you again, he [Woodall] did those things. We've not denied that. We've not offered a defense to that. He did those things." J.A. 69. There was simply no dispute regarding the facts and circumstances of the crimes.

A discussion between the trial court, the prosecutor, and trial defense counsel sheds some light on why the jury was instructed on aggravating circumstances in spite of the fact that Woodall had already pleaded guilty to those circumstances. The parties believed that KRS 532.025 required the jury to specify the aggravating circumstances on which it relied. Therefore, the jury was instructed regarding aggravating

circumstances due to a perceived statutory requirement, not because the aggravating circumstances were contested.

In addition, Woodall's claim regarding Jury instruction No. 6 (J.A. 44), that the jury was precluded from imposing a death sentence if the jury had a reasonable doubt, also fails. BIO 17. First, the Kentucky Supreme Court has ruled that KRS 532.025 does not require the jury to find that death is the appropriate punishment beyond a reasonable doubt or to resolve any reasonable doubt in favor of a prison sentence.[5] *Skaggs v. Commonwealth*, 694 S.W.2d 672, 680 (Ky. 1985); *Meese v. Commonwealth*, 348 S.W.3d 627, 723 (Ky. 2011). To the extent the instruction suggested otherwise, Woodall again benefited from an instruction to which he was not entitled. Second, Woodall claims (BIO 17) that this instruction mattered because it meant the jury "was required to make a finding" regarding "an explanation for the crime," and the jury should have been instructed not to hold his silence "against him" in making that determination. That argument is incoherent. Woodall's guilty plea

[5] Woodall's argument that a single juror could have prevented the death penalty (BIO 17) misses the point that Kentucky does not follow the "one juror veto" rule adopted in some states which permits a single juror to preclude a death sentence and requires that the court impose a prison sentence. Kentucky law requires that all 12 jurors agree upon the verdict, including the sentence verdict, and the failure to do so in the penalty phase *requires a penalty phase re-trial*. *Skaggs v. Commonwealth*, 694 S.W.2d 672, 681 (Ky. 1985).

waived any contention that he committed this brutal murder, kidnapping, and rape because he was high on drugs, was intoxicated, or had some other legally relevant excuse. His mitigation case during the penalty phase trial could have tried to address why he committed the crime (though it is hard to imagine what such an argument would have consisted of). He did not pursue that argument, though, making it difficult to understand what "fact" the jury could have inferred against him based on his silence. Further, the prosecution did not have the burden of proving any facts regarding why Woodall committed the crime. Motive was not an element of the crimes or aggravating circumstances. Therefore, as with the mitigating circumstances that Woodall actually argued, the absence of a *Carter* instruction related to this issue could not have created the risk that the government would relieve itself of its burden of proof or that his silence could be used to subject him to a higher sentencing range.

Therefore, none of Woodall's contentions about the jury instructions are sufficient as a matter of Federal law to bring his case within the scope of the *Mitchell* ruling.

4. The absence of clearly established law defeats Woodall's claim for habeas relief.

Because there was no "clearly established" Federal law requiring the trial court to give the no-adverse-inference instruction here, §2254(d)(1) barred the

Sixth Circuit from granting habeas relief. Woodall cannot overcome this absence of clearly established law by contending that this Court would likely extend its precedents to this new terrain. Even if that were so – and it is not – the rule he requests would be a new one, not a clearly established one.

The Sixth Circuit's contrary conclusion conflicts with *Carey v. Musladin*, 549 U.S. 70, 77 (2006), and *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (*per curiam*). In *Musladin*, this Court addressed the rule announced in *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986), that "certain courtroom practices are so inherently prejudicial that they deprive the defendant of a fair trial." *Musladin*, 549 U.S. at 72. The Ninth Circuit applied that general rule and held that a California state court was objectively unreasonable in rejecting the claim that the defendant's due process rights were violated when, during the trial, front-row spectators wore buttons with a photograph of the victim. *Id*. at 73-74 (citing *Musladin v. Lamarque*, 427 F.3d 653, 656-658 (2005)). This Court reversed on the ground that it had not "clearly established" that such conduct could violate the right to a fair trial. *Id*. at 76-77. Whereas *Williams* and *Flynn* involved *state-sponsored* courtroom practices (such as compelling a defendant to wear prison clothes), this case involved *spectator* conduct. *Musladin*, 549 U.S. at 76. And "[t]his Court has never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial." *Id*.

At a high level of generality, the rule that "certain courtroom practices are so inherently prejudicial that they deprive the defendant of a fair trial" applied in *Musladin*, who argued that the logic of *Williams* and *Flynn* extended to his case. The Court disagreed because whether those cases extended to this different situation "[was] an open question in our jurisprudence." So too here. Likewise, in *Van Patten*, the Court addressed whether the Seventh Circuit properly granted habeas relief on the ground that a lawyer's participation at a plea hearing via speakerphone constituted a "complete denial of counsel" subject to the standard of *United States v. Cronic*, 466 U.S. 648 (1984). The Court reversed the grant of habeas relief because "[n]o decision of this Court . . . squarely addresses the issue in the case." 552 U.S. at 125, 126. *See also Nevada v. Jackson*, 133 S.Ct. 1990, 1994 (2013) (*per curiam*) (criticizing court of appeals for using too "high a level of generality" when finding there to be "clearly established law"); *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) ("this Court has held on numerous occasions that it is not 'an unreasonable application of clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court").

5. At the very least, no clearly established law required the trial court to give the specific instruction proposed by Woodall.

Woodall did not request a true *Carter* instruction; he requested a modified *Carter* instruction that would have told the jury, "A defendant is not compelled to testify and the fact that the defendant did not testify should not prejudice him in any way." J.A. 31. By its plain terms, the proposed instruction would have told the jury it could not take Woodall's silence into account when assessing whether he showed a lack of remorse. The trial court concluded that a defendant's silence bears on that determination, and accordingly rejected the instruction. J.A. 36-39. That conclusion cannot possibly have misapplied clearly established law, given that *Mitchell* expressly left open whether a defendant's "silence" may "bear[ ] upon the determination of lack of remorse." 526 U.S. at 330.

The issue of remorse was before the penalty phase jury. The prosecutor elicited testimony on cross-examination showing that Woodall's actions after murdering Sarah Hansen showed a lack of remorse. 10 T.E. 1464-1466. Woodall's proposed instruction would have barred the jury from taking his silence into account with respect to that issue, as noted by the trial judge when he rejected the instruction (stating that he did not believe Kentucky law permitted a defendant to "go out and rape and murder and kidnap and admit to it and then offer no testimony, . . . no remorse, and the jury can't consider

that"). J.A. 38. That decision did not contravene clearly established law, even if *Carter*, *Estelle*, and *Mitchell* reach further than §§I(A)(1)-(2), *supra*, contend they do.

B. The Kentucky Supreme Court's decision was not "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."

The Sixth Circuit concluded that the Kentucky Supreme Court unreasonably applied *Carter*, *Estelle*, and *Mitchell* because it "'unreasonably refuse[d] to extend [a legal] principle to a new context where it should apply.'" Pet. App. 8a (quoting *Williams v. Taylor*, 529 U.S. 362, 407 (2000)). That holding is mistaken for two basic reasons.

First, the Sixth Circuit failed to heed the caution this Court expressed in *Yarborough v. Alvarado*, 541 U.S. 652 (2004), about granting habeas relief on that ground. The Court agreed that "[t]here is force to th[e] argument" made by the state that "if a habeas court must extend a rationale before it can apply to the facts at hand then the rationale cannot be clearly established at the time of the state-court decision." *Id*. at 666. "Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions of law." *Id*.

Although §2254(d)(1) does not require a "nearly identical factual pattern before a legal rule must be

applied," *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007), the legal rule must be "squarely established" by this Court. *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009). This case is not akin to the Court applying the general standard of *Strickland v. Washington*, 466 U.S. 668 (1984), to one of the myriad circumstances regarding defense counsel's performance. 556 U.S. at 123. Here, Woodall is asking that *Griffin* and *Carter* be extended to a new portion of a trial, one that involves very different issues and considerations than the portion of a trial to which *Griffin* and *Carter* previously extended. *Cf. Sawyer v. Whitley*, 505 U.S. 333, 347 (1992) (holding that a defendant can show "actual innocence of the death penalty" by showing innocence of aggravating factors, but not by challenging the exclusion of mitigation evidence).

Second, the Sixth Circuit's holding fails on its own terms. Even if *Carter*, *Estelle*, and *Mitchell* clearly established the law governing this case, the Kentucky Supreme Court did not unreasonably apply it. This Court has long held that "[i]t is not enough that a federal habeas court, in its independent review of the legal question, is left with a firm conviction that the state court was erroneous . . . . Rather, that application must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003) (internal citations and quotation marks omitted). In response to courts of appeals' failure to heed that caution, this Court more recently restated it more emphatically: to obtain "habeas corpus from a federal court, a state prisoner must show that the state

court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter,* 131 S.Ct. at 786-787 (internal quotation marks and citations omitted).

Given the many important differences discussed above between this case and *Carter*, *Estelle*, and *Mitchell*, the Kentucky Supreme Court's refusal to extend those cases' holdings to this case does not remotely meet that standard. Fairminded jurists could readily disagree over how far this Court's no-adverse-inference precedents should extend. The Sixth Circuit failed to heed the limits Congress imposed on federal habeas when it enacted AEDPA in 1996.

II. Even if there were error, it was harmless under the *Brecht v. Abrahamson* "substantial and injurious effect" standard.

A. Trial error is harmless unless it had substantial and injurious effect or influence in determining the jury's verdict.

In *Brecht v. Abrahamson,* 507 U.S. 619 (1993), 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.* at 637 (quoting *Kotteakos v. United States,* 328 U.S. 750 (1946)). 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) (*per curiam*) (citations omitted). As the Court explained: "The social costs of retrial or resentencing are significant . . . . The 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." *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, "[n]ormally 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.

B. The absence of a *Carter* instruction in this case did not have substantial and injurious effect on the jury's verdict.

Even if the judge should have given a no-adverse-inference instruction, its absence did not remotely have substantial and injurious effect on the jury's verdict. The brutality and senselessness of Woodall's

crimes, and his post-crime conduct, overwhelm any negative inference the jury may have drawn from his silence. In addition to Woodall's plea of guilt, the jury heard undisputed evidence that he kidnapped the 16-year-old victim, beat her from head to toe, and cut her throat twice, severing her trachea and her supporting neck muscles. After raping her, he dragged her, unclothed, down a gravel road where he threw her in an ice cold lake to drown. An abundance of forensic evidence corroborated Woodall's brutal and heinous crimes. In addition, regarding the issue of remorse, the jury heard testimony from Woodall's mother that, shortly after the murder, Woodall came to her house, sat in a recliner, and fell asleep watching television as if nothing had happened. Besides these atrocious crimes, the jury heard evidence that Woodall had previously been convicted of sexually abusing someone else and while serving his prison sentence, he was terminated from the Sexual Offender Treatment Program for excessive absences. Furthermore, Woodall's aunt testified he had sexually abused two of her daughters.

In addition to evidence of Woodall's guilty plea, the jury also heard evidence regarding mitigating circumstances. These circumstances included, among other things, that Woodall had a spastic colon, that he had an IQ of 74, that he grew up in a dirty impoverished house, that he abused cannabis, and that he had a personality disorder with paranoid and borderline traits.

In light of the record as a whole, the absence of the *Carter* instruction cannot be said to have had "substantial and injurious effect or influence in determining the jury's verdict."

C. The Sixth Circuit erred when it engaged in speculation and possible-harm review.

In spite of the overwhelming evidence of guilt of these heinous crimes, and in spite of the fact that the jury heard nothing about Woodall's silence from either the prosecution or the trial court, the Sixth Circuit assumed that there was "a very real risk" that his silence "had substantial and injurious effect or influence" on the verdict. The court committed two fundamental errors in holding that any error here was not harmless. It watered down the *Brecht* standard into a possible-harm standard; and it did not consider the overwhelming case for the death sentence on the facts presented.

Specifically, the Sixth Circuit stated, "[b]ecause 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.'" Pet. App. 11a. Under that 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

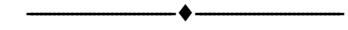
decision on the alleged error in question. But that is not the standard under *Brecht*.

The Sixth Circuit used pure conjecture to establish grave doubt and ignored the evidence as a whole including overwhelming evidence of Woodall's guilt of the heinous crimes and circumstantial evidence that Woodall lacked remorse for the crimes based upon his conduct after 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. As Judge Cook noted, this is a mere possible-harm standard. "Alas, the correct harmless-error standard does not permit such speculation, and neither does the undisputed evidence of this heinous crime." Pet. App. 24a.

While the Sixth Circuit paid lip-service to *Brecht* by citing its "substantial and injurious effect" standard, the court actually concluded it could not say the alleged error was harmless because there was no way to tell what led the jury to make the decision it did. Pet. App. 11a. The court, in support of its position, stated that the trial court "appears to have drawn an adverse inference from Woodall's decision not to testify: in denying the requested instruction, the trial court stated that it was 'aware of no case law that precludes the jury from considering the defendant's lack of explanation of remorse or explanation of the crime or anything else once guilt has been adjudged in sentencing.'" J.A. 36. But the jury did not hear this statement, and it was the jury, not the trial court, that recommended Woodall's death sentence.

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 consideration to the aggravating circumstances.

Woodall received the death penalty based upon what he did, not based upon the fact that he did not testify. There is no reasonable basis to conclude that the absence of the modified *Carter* instruction and the mere failure of Woodall to testify substantially influenced the jury to ignore Woodall's mitigating evidence and to impose the death sentence without regard to the evidence.



CONCLUSION

For the reasons stated above, the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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