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IN THE SUPREME COURT OF THE UNITED STATES

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 RANDY WHITE, WARDEN, :
 Petitioner : No. 12-794
 v. :
 ROBERT KEITH WOODALL :
 - - - - - x

Washington, D.C.
 Wednesday, December 11, 2013

The above-entitled matter came on for oral
 argument before the Supreme Court of the United States
 at 11:10 a.m.

APPEARANCES:

SUSAN R. LENZ, ESQ., Assistant Attorney General,
 Frankfort, Kentucky; on behalf of Petitioner.
 LAURENCE E. KOMP, ESQ., Manchester, Missouri; appointed
 by this Court, on behalf of Respondent.

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P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 12-794, White v. Woodall.

Ms. Lenz?

ORAL ARGUMENT OF SUSAN R. LENZ

ON BEHALF OF THE PETITIONER

MS. LENZ: Mr. Chief Justice, and may it please the Court:

This Court has repeatedly held that a State prisoner cannot obtain habeas relief under AEDPA unless State court contravenes or unreasonably applies clearly established Federal law.

In this case, there was no clearly established Federal law. Under any interpretation of Carter, Estelle, and Mitchell, this Court has never extended Carter to the selection phase of a capital sentencing trial. Because there is no clearly established Federal law, the Kentucky Supreme Court was well within its authority to resolve this unresolved question in favor of affirming the sentence.

JUSTICE KAGAN: Ms. Lenz, could I ask you about what you just said? You said Carter, Estelle, and Mitchell; those are the three. So Carter says the Fifth Amendment requires that a criminal trial judge must give

1 a no-adverse-inference jury instruction when requested
2 by a defendant. And that was, of course, not a
3 sentencing case.

4 Then Estelle says, we discern no basis to
5 distinguish between the guilt and penalty phases of
6 Respondent's capital murder trial so far as the
7 protection of the Fifth Amendment; so a kind of general
8 view that the Fifth Amendment applies equally in the
9 two.

10 And then Mitchell holds -- it basically
11 repeats that from Estelle and says, we must accord the
12 privilege the same protection in the sentencing phase of
13 any criminal case, as that which is due in the trial
14 phase.

15 So when you put those together, Carter with
16 Estelle, Mitchell, how -- why do you think that there's
17 a gap?

18 MS. LENZ: Well, there's -- there is a gap
19 between Mitchell and Carter. First of all, Mitchell was
20 not a jury instruction case. In Mitchell, while the
21 defendant did plead guilty, she did not plead guilty to
22 all of the conduct, so there were still factors that
23 were being contested.

24 In this case, Mr. Woodall pled guilty to all
25 of the crimes and aggravating circumstances. Mitchell

1 and Estelle were both concerned with protecting the
2 defendant from the prosecution shifting its burden of
3 proof to the defendant.

4 In this case, there was no -- there was no
5 burden shifting because Robert Keith Woodall had already
6 pleaded guilty to the facts which the prosecutor was
7 required to prove beyond a reasonable doubt to render
8 Mr. Woodall eligible for the death penalty.

9 JUSTICE SOTOMAYOR: Do you think it would
10 have been okay for the trial court to instruct the jury
11 that they could use the defendant's silence against him?
12 Would the affirmative statement have been constitutional
13 and not a violation of the Fifth Amendment?

14 MS. LENZ: I do not think it would have been
15 proper. Under Kentucky law, the attorney could not
16 refer to --

17 JUSTICE SOTOMAYOR: No, I didn't ask about
18 Kentucky law. Do you think the Fifth Amendment permits
19 the judge to have said, use silence?

20 MS. LENZ: No.

21 JUSTICE SOTOMAYOR: Use silence to punish
22 him because he's just a bad person.

23 MS. LENZ: I -- I don't think so.

24 JUSTICE SOTOMAYOR: I mean, that doesn't --

25 JUSTICE SCALIA: Under Federal law, you

1 don't think the judge could say, ladies and gentlemen of
2 the jury, this defendant has already pleaded guilty to a
3 horrible crime. This is a punishment hearing. He has
4 chosen not to -- not to testify in this -- in this
5 hearing. You -- you are -- if you wish, you may take
6 his failure to testify as an indication that he does not
7 have remorse, that he is not sorry. He could have come
8 before you said and said I am terribly sorry, I wish I
9 had never done it, I will never do it again. He has
10 chosen not to testify. You may, if you wish, take that
11 into account in determining whether -- whether there is
12 remorse. You can't say that?

13 MS. LENZ: Oh, absolutely. Absolutely.

14 JUSTICE SCALIA: Well, then your answer
15 should have been otherwise.

16 MS. LENZ: Well, I guess I interpreted
17 Justice Sotomayor's question a little bit different
18 because she wasn't referring to facts in evidence or --
19 or to some type of evidence. But your question asks
20 the -- the question about whether silence bears on the
21 determination of a lack of remorse.

22 JUSTICE SCALIA: Of course.

23 MS. LENZ: And Mitchell specifically left
24 that open. In fact, Mitchell --

25 JUSTICE SOTOMAYOR: Well, there was a

1 factual dispute as to how much the witness -- the victim
2 had suffered. How about a statement about that?

3 MS. LENZ: Well, I don't think there was
4 actually a dispute about how much the victim suffered.
5 There, I think, you are referring to the testimony of
6 the blood spatter expert where -- wherein he was talking
7 about how the blood was splattered around, it indicated
8 that there had been quite a struggle when the victim's
9 throat was slashed. And trial counsel --

10 JUSTICE KAGAN: But take the -- take the
11 hypothetical, Ms. Lenz, that suppose, you know, the
12 prosecutor had said you just heard testimony from our
13 expert that -- the blood spattering expert, that the
14 victim's suffering was especially prolonged, and look,
15 the defendant didn't take the stand. Why didn't he take
16 the stand to deny that? All right?

17 So could the prosecutor have said that at
18 the sentencing hearing?

19 MS. LENZ: Yes, Justice Kagan. The
20 prosecutor could have said that because that is a
21 selection factor. That -- the fact of whether the
22 victim struggled is not a fact that makes the defendant
23 eligible for the death penalty. So because the -- the
24 prosecutor had no burden of proof on that, the defendant
25 wasn't in -- in jeopardy of having the burden shifted to

1 him.

2 JUSTICE KAGAN: So you're suggesting that
3 what we haven't decided, if you will, goes beyond the
4 remorse question of -- that we -- that we talked about
5 in -- not Mitchell, but -- is it Mitchell?

6 MS. LENZ: Mitchell, yes.

7 JUSTICE KAGAN: It goes beyond the remorse
8 question. And you're saying that really, in the
9 sentencing hearing, the Fifth Amendment has nothing to
10 do with -- with anything that happens there essentially,
11 because once -- once the person has been found eligible
12 for the death penalty, a prosecutor and a jury can --
13 can draw whatever inferences they want.

14 MS. LENZ: I think that the core purpose of
15 the Fifth Amendment has -- has been protected. Yes, I
16 do.

17 JUSTICE BREYER: What do we do about -- I
18 mean, I think the relevant pages are -- it's at 526 U.S.
19 328 to 330. Probably read those 17 times. All right.
20 When I looked at those, I saw they reaffirmed Estelle.
21 As they quote Estelle, they say its reasoning applies
22 with full force. Estelle says, "The court could discern
23 no basis to distinguish between the guilt and penalty
24 phases of Respondent's capital trial so far as the
25 protection of the Fifth Amendment privilege is

1 concerned."

2 I marked five separate statements in those
3 two pages that came to the same thing. I looked at
4 Estelle. Estelle has to do with the right to note --
5 note the comment that he wanted in respect to a
6 sentencing fact that the jury was going to decide;
7 namely, future dangerousness. Nothing to do with a fact
8 about the crime. A sentencing fact.

9 So then I said, well, what favors you here?
10 What favors you is the last sentence of the first
11 paragraph on 330, which says, "Whether silence bears
12 upon the determination of a lack of remorse or upon
13 acceptance of responsibility for purposes of the
14 downward adjustment provided in 3E1.1 of U.S. Sentencing
15 Guidelines is a separate question. It is not before us
16 and we express no view on it."

17 Right. It's, one, not just a sentencing
18 fact, but a state of mind of the defendant, lack of
19 remorse; two, it's in the sentencing guidelines; three,
20 it is a decision for a judge, not the jury. If it isn't
21 confined as I just said it, then Mitchell overrules
22 Estelle, what it explicitly denies doing. Here we have
23 sentencing facts, facts about his childhood.

24 He wanted the Estelle instruction. The
25 judge wouldn't give it. That's the argument against

1 you, I think. And I would like to hear your specific
2 response.

3 MS. LENZ: Well, in Estelle, that sentencing
4 factors future dangerousness, and the prosecution had to
5 prove that beyond a reasonable doubt in order to make
6 Mr. Smith eligible for the death penalty. That's a very
7 different fact than a factor of what you're speaking
8 about, which would be a selection factor and the
9 prosecution has --

10 JUSTICE BREYER: Well, I thought the
11 facts -- what was at issue here, he has put on witnesses
12 that show that he had a bad childhood and he didn't
13 himself testify about his bad childhood. And in that
14 context, he asked for the no silence/silence
15 instruction. The government did not object. The judge
16 then refused to give the instruction.

17 All right. Now, what's the difference
18 between the facts about how his parents raised him and
19 the fact of future dangerousness in Estelle?

20 MS. LENZ: The difference is the burden of
21 proof. How his parents raised him is a mitigating
22 circumstance. Mr. Woodall had the burden of proof on
23 mitigating circumstances. The jury was instructed they
24 had to consider the mitigating circumstances. So
25 whether Mr. Woodall testified or not, we assume that the

1 jury followed the instructions and considered the
2 mitigating circumstances.

3 JUSTICE ALITO: Ms. Lenz, am I correct, the
4 instruction that was requested but not given was as
5 follows: Quote, "A defendant is not compelled to
6 testify and the fact that the defendant did not testify
7 should not prejudice him in any way." That was the
8 instruction?

9 MS. LENZ: Yes, sir.

10 JUSTICE ALITO: So suppose that the -- you
11 put on evidence of -- to show that he was qualified for
12 the death penalty and put on evidence of aggravating
13 factors, and the defense put on absolutely no mitigation
14 evidence. The instruction would say, would it not, that
15 the fact that the defendant did not testify should not
16 prejudice him in any way with respect to the failure to
17 put on any mitigation evidence at all? Is that correct?

18 MS. LENZ: That's exactly right, Your Honor.
19 That's exactly right. So, in essence, it really shifts
20 the burden of proof, Mr. Woodall's burden of proof, back
21 to the prosecution.

22 JUSTICE SCALIA: In this case, of course,
23 the question is even narrower. That instruction would
24 forbid the jury from even taking into account his
25 failure to testify on -- on the one factor of remorse --

1 the one psychological factor of remorse.

2 And if you say that you're not entitled to
3 such an instruction on that, that alone would have --
4 would have been enough to deny the requested
5 instruction.

6 MS. LENZ: That's exactly right. That's
7 exactly right. And I think the judge indicates --

8 JUSTICE SOTOMAYOR: Could you call him to
9 ask him if he feels sorry?

10 If he has no Fifth Amendment right, could
11 you call him to the stand and ask him, are you sorry?

12 MS. LENZ: No, Justice Sotomayor, because
13 there are two rulings in Mitchell, and the first ruling
14 in Mitchell says that -- said that Mitchell still had
15 the Fifth Amendment right in the sentencing proceeding
16 after the guilty plea. That's the first ruling in
17 Mitchell.

18 But the second ruling in Mitchell then
19 limits that. It doesn't say there are no adverses, no
20 adverse inferences whatsoever that can be inferred. It
21 says no adverse inferences can be inferred on facts and
22 circumstances that the prosecutor is required to prove
23 which increase the penalty range. So there's a
24 difference. So --

25 JUSTICE GINSBURG: Is your position

1 basically that this is in the nature of a -- an
2 affirmative defense and that defendant carries the
3 burden on remorse -- and what was the other one that
4 Mitchell saved out? Acceptance of responsibility?

5 MS. LENZ: Yes. Yes, Justice Ginsburg.

6 JUSTICE GINSBURG: So if defendant says
7 nothing, then he hasn't -- he hasn't proved a mitigator.

8 MS. LENZ: That's right, and -- and he bears
9 the burden of proof on that and he bears the
10 consequences from failing to meet his burden on that.
11 The prosecution has absolutely no burden with regard to
12 mitigating circumstances.

13 JUSTICE KENNEDY: So would it have been an
14 acceptable and workable rule to say that in a sentencing
15 hearing, on any point where the defendant has the burden
16 of proof the government is entitled to testimony, that
17 silence can be the basis for an adverse inference?

18 MS. LENZ: Could you repeat the question?

19 JUSTICE KENNEDY: Would it be an acceptable,
20 workable rule to say that in a sentencing hearing, on
21 any issue where the defendant has the burden of proof
22 the prosecution is entitled to an instruction that
23 silence can be the basis for an inference against the
24 defendant on those issues?

25 (Pause.)

1 JUSTICE KENNEDY: I mean, you have to either
2 say yes or not. If -- if you say no, then I ask why
3 remorse is different? If you say yes, then remorse is
4 included within that.

5 MS. LENZ: Well, I think no, and remorse is
6 different because again that's a mitigating circumstance
7 upon which Woodall has the burden of proof.

8 JUSTICE SOTOMAYOR: I'm sorry. What did you
9 just say?

10 JUSTICE KENNEDY: I don't understand why
11 you're not entitled to the instruction on all issues as
12 to which the defendant has the burden of proof --

13 MS. LENZ: Well, it makes sense --

14 JUSTICE KENNEDY: -- in a sentencing
15 hearing.

16 MS. LENZ: It makes sense to not -- the
17 purpose of the no-adverse-inference instruction is to
18 protect the defendant from the prosecution shifting its
19 burden of proof, in other words using his silence to
20 prove one of the elements that the prosecution is
21 required to prove.

22 JUSTICE KENNEDY: The -- the assumption in
23 my question is that the defendant has the burden of
24 proof on a certain number of issues in the sentencing
25 hearing. As to all of those issues, it seems to me it

1 has to be your position that the government is entitled
2 to the instruction that I described. Or you're just
3 going to stand up and say, well, remorse is different.
4 But I -- we need to know what -- what your argument is.

5 MS. LENZ: You need to know why remorse is
6 different, is that what you're asking?

7 JUSTICE KENNEDY: Well, that's one way of
8 asking it, yes.

9 MS. LENZ: Yes. Well, I think it would be
10 the same answer. It's just that remorse is a mitigating
11 circumstance and the prosecution has no burden of proof
12 on mitigating circumstances. That's the defendant's
13 choice as to whether he wants to place evidence in the
14 record regarding any mitigating circumstances
15 whatsoever.

16 JUSTICE ALITO: Well, when a party has the
17 burden of producing evidence on something, isn't the
18 customary way of dealing with that to instruct the jury
19 that the defendant had the burden of producing evidence
20 to show this, rather than to -- to talk about inferences
21 that can be drawn from their failure, from that party's
22 failure to produce evidence.

23 MS. LENZ: Well, in this case the jury was
24 not instructed that Mr. Woodall had the burden of proof
25 on the mitigating circumstances. They were instructed

1 to consider the mitigating circumstances.

2 JUSTICE SCALIA: They also weren't
3 instructed to draw any inferences, were they?

4 MS. LENZ: No, they were not.

5 JUSTICE SCALIA: I mean the -- the issue
6 here is whether you must instruct them not to draw
7 inferences, not -- not whether -- whether -- anyway.

8 JUSTICE ALITO: Well, the jury was
9 instructed: "You shall consider such mitigating or
10 extenuating facts and circumstances as have been
11 presented to you in the evidence and you believe to be
12 true."

13 Now, I suppose they could have been -- the
14 mitigating evidence could have been put in by the
15 prosecution, but for the most part they're going to be
16 put in by the defense. So when the judge says you can
17 consider whatever mitigating evidence has been presented
18 to you, isn't that tantamount to saying that the
19 defendant has the burden of producing evidence of
20 mitigation if the defendant wants to do that?

21 MS. LENZ: I don't think it speaks to who
22 has the burden. It just speaks to the fact that they're
23 required to consider --

24 JUSTICE GINSBURG: I thought we -- it wasn't
25 controversial that on mitigating factors the defendant

1 does have the burden.

2 MS. LENZ: He does. He does. That's
3 correct.

4 JUSTICE GINSBURG: So is -- is there a
5 difference between the prosecutor saying, judge, I want
6 you to charge this jury that they can use defendant's
7 silence against him, or a judge on his own telling the
8 jury that, or the judge, as here, simply refusing to say
9 you can't take it into account?

10 MS. LENZ: Well, I do think --

11 JUSTICE GINSBURG: Are all those the same or
12 would you distinguish them?

13 MS. LENZ: I think there -- there is a
14 difference between the prosecution and the court not
15 telling the jury that, that they can take the
16 defendant's silence into consideration, I do.

17 JUSTICE KAGAN: Well, where does that
18 difference come from? Because I thought that every time
19 and in every circumstance that we've prohibited an
20 adverse inference we've also required a requested jury
21 instruction. I don't know of a -- of a case or any
22 principle that would suggest that we can tear those two
23 things apart and say, well, look, an adverse inference
24 is prohibited, but, no, you don't get an instruction.

25 MS. LENZ: Well, the -- the only situation

1 that I I'm aware of that the Court has, that it has
2 extended Griffin with this Carter instruction is in the
3 guilt phase, where the prosecution is still required
4 to prove guilt.

5 JUSTICE KAGAN: I guess I'm asking a
6 different question. Do you have any case that suggests
7 that those two things don't go hand and hand? Because
8 my -- my sort of reading of our case law is that they
9 do. Any time we've said an adverse inference is
10 prohibited, we've also said the defendant is titled --
11 is entitled to an instruction about adverse inferences
12 if he requests it.

13 MS. LENZ: Well, you said that in every
14 case, but one, I suppose, except for Mitchell; and
15 that's the most important case here. The Court in
16 Mitchell said that the jury couldn't infer anything
17 negative from the facts and circumstances of the crime
18 upon which the prosecutor --

19 JUSTICE BREYER: I didn't see that in
20 Mitchell. But let -- let me go back, just elaborating
21 on that, to Justice Alito's first question. I want to
22 see if this issue is still in the case. You looked at
23 the instruction, and the instruction is just a broad
24 instruction. It says no adverse inference may be drawn
25 from anything. All right.

1 So there seemed to be some objection you had
2 to the breadth of that instruction. So I looked at the
3 instruction. The instruction does say exactly what
4 Justice Alito said and you have said. It says the --
5 the instruction is -- "The defendant is not compelled to
6 testify, and the fact that he does not cannot be used as
7 inference of guilt and should not prejudice him in any
8 way," with a couple of, here, irrelevant modifications.
9 All right?

10 The instruction I just read you is not from
11 this case. It's from the Carter case. In the Carter
12 case, the court said that instruction must be given. It
13 must be given at the sentencing phase. So what they did
14 was copy the instruction out of the case, the very
15 instruction that the court said, in Carter, the Fifth
16 Amendment requires to be given in the sentencing phase.
17 And that was a noncapital case.

18 So what's the objection to the instruction,
19 on its breadth? Not only is it the same, but the
20 government never objected that it was too broad, and the
21 only issues in the case were factual. They were about
22 what happened to him in his childhood, namely,
23 sentencing facts.

24 And the instruction that you did read about
25 what they should consider referred to facts and

1 circumstances. And where in Estelle does it say that
2 matters at sentencing related to facts and
3 circumstances, you don't have to give the very
4 instruction that Carter and Estelle required?

5 MS. LENZ: All right. I have several things
6 to say. First of all, I disagree with two things,
7 respectfully, that you said about Carter. The
8 instruction in Carter was different. The instruction in
9 Carter was about guilt, and actually -- and Mr. Woodall
10 concedes -- they left that part out of this instruction.
11 This instruction says no negative inferences about
12 anything whatsoever. That's not what Carter said.

13 JUSTICE BREYER: I see.

14 MS. LENZ: Carter is talking about guilt,
15 and it's limited. And also, the Carter instruction had
16 to do with the guilt phase rather than the sentencing
17 phase.

18 And Estelle was not a jury instruction case
19 and didn't say anything about Carter whatsoever. So
20 Estelle didn't extend Carter at all.

21 JUSTICE SOTOMAYOR: But Mitchell did,
22 though, the sentencing aspect.

23 MS. LENZ: I'm sorry?

24 JUSTICE SOTOMAYOR: Mitchell was about
25 sentencing.

1 MS. LENZ: Yes, Mitchell was about
2 sentencing. And Mitchell is the case which answers
3 the -- the last part of the question, Justice Breyer.
4 You said where does it say facts and circumstances of
5 the crime? That language is in Mitchell. Mitchell
6 clearly says that no adverse inferences may be made on
7 facts and circumstances of the crime upon which the
8 prosecution has the burden of proof and -- and upon
9 which will increase --

10 JUSTICE BREYER: Does it overrule -- does it
11 overrule Estelle?

12 MS. LENZ: Does Mitchell overrule Estelle?

13 JUSTICE BREYER: Yes. Does Mitchell --
14 Estelle talks about -- you apply the same rule to facts
15 and circumstances of the sentence, in a capital case
16 anyway.

17 MS. LENZ: Well, I don't think Mitchell says
18 that. It's not that broad.

19 JUSTICE BREYER: No, Mitchell doesn't.

20 MS. LENZ: Or excuse me. Estelle doesn't
21 say that. Estelle's not that broad. It doesn't speak
22 about a jury instruction. And even Mitchell doesn't
23 say -- it -- it says something very broad, the Fifth
24 Amendment applies during the penalty phase, but it
25 doesn't make a distinction between the eligibility part

1 of the penalty phase and the selection part of the
2 penalty phase.

3 JUSTICE KAGAN: But in not making that
4 distinction, I mean, it does speak very broadly, and it
5 says, you know -- I'm reading another quotation from it.
6 "The rule against negative inferences at a criminal
7 trial apply with equal force at sentencing."

8 Now, it does have this exception for remorse
9 or a possible exception for remorse. But with that
10 exception, otherwise, it says the rule against adverse
11 inferences applies, doesn't it?

12 MS. LENZ: Well, the rule against adverse
13 inferences from Carter is all about incrimination and
14 guilt. And in this case, Mr. Woodall's pled guilty to
15 all of the crimes and aggravating circumstances. So his
16 eligibility for the death penalty was already met before
17 the penalty phase even began.

18 And I'm sorry. What was your question?

19 JUSTICE KAGAN: I think my question was just
20 the breadth of these statements about everything that
21 applies at trial with respect to adverse inferences also
22 applies at the sentencing phase, with the possible
23 exception of adverse inferences about remorse. That's
24 the way I read the cases.

25 MS. LENZ: Well, I'm not sure I agree with

1 your reading of the cases, but even if -- even if that
2 is the correct reading of the case and that adverse
3 inferences apply to everything but factors such as lack
4 of remorse or downward adjustment in the sentencing
5 guidelines, that leaves a huge hole in Mitchell. You
6 could drive a truck through that hole because, as
7 Justice Scalia pointed out in his dissent in Mitchell,
8 the bulk of what sentencing is about are these other
9 factors, the other factors, what kind of childhood he
10 had, mitigation and all of that sort of thing. So
11 there's still a lot of room.

12 If I may, I'd like to reserve the remainder
13 of my time.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 Mr. Komp.

16 ORAL ARGUMENT OF LAURENCE E. KOMP,

17 APPOINTED BY THIS COURT,

18 ON BEHALF OF THE RESPONDENT

19 MR. KOMP: Mr. Chief Justice, and may it
20 please the Court:

21 In Estelle, this Court held that there are
22 no -- there's no basis to distinguish between guilt and
23 penalty phases in a capital trial. Mitchell did not
24 disturb that ruling, did not overrule that ruling.
25 As -- as this Court indicated, the key components of the

1 Mitchell opinion that have been discussed today are from
2 pages 328 to 330. And on those pages are littered with
3 the discussion of what the clear principles of this
4 Court's authority are.

5 For instance, on page 329, "Our holding
6 today is a product of existing precedent. Not only
7 Griffin, but also by Estelle v. Smith in which the Court
8 could discern no basis to distinguish between the guilt
9 and penalty phases of respondent's capital murder trial
10 so far as the protection of the Fifth Amendment
11 privilege is concerned."

12 JUSTICE GINSBURG: But the courts in those
13 cases had a specific issue before it. Its attention
14 wasn't called to what I suggested is in the nature of an
15 affirmative defense. The defendant has the burden to
16 persuade the jury on mitigators.

17 MR. KOMP: Your Honor, if I may, and just
18 to -- to -- under Kentucky law, there is -- I think
19 Justice Alito sort of spoke to this, or I forget which
20 justice. There's a difference between a burden of
21 production and a burden of proof. And absolutely, a --
22 a defendant in -- in a sentencing hearing has the burden
23 of production, as a proponent of what is going to be
24 their mitigation theory.

25 That's much different than a burden of

1 proof. In this case, Instruction 6, which is found at
2 Joint Appendix Page 44, the burden of proof was on the
3 government to establish that the aggravating
4 circumstances, both the statutory aggravating
5 circumstances and the nonstatutory aggravating
6 circumstances, had to outweigh the mitigating evidence.

7 JUSTICE ALITO: Let me -- let me give you
8 this example. Let me pretend to be a juror in a -- in a
9 Kentucky capital case. And the -- and let's assume in
10 this case the prosecution puts on evidence to show
11 eligibility and some evidence of aggravating factors.
12 The defense puts on no evidence of mitigation.

13 Now, the judge tells me you shall consider
14 such mitigating or extenuating facts and circumstances
15 as have been presented to you in the evidence, and you
16 believe to be true. Okay? That's Instruction Number 4.
17 I assume that you don't have an objection to that.

18 And then the judge gives the instruction
19 that you requested: A defendant is not compelled to
20 testify, and the fact that the defendant did not testify
21 should not prejudice him in any way.

22 So now I'm back in the jury room, and I say,
23 well, now I have to consider mitigating evidence. And,
24 you know, there are a lot of things that could be
25 mitigating in a capital case. I'd like to know about

1 the defendant's childhood. I'd like to know whether the
2 defendant was -- was abused. I'd like to know whether
3 the defendant was remorseful.

4 And I haven't heard anything about this.
5 And I don't know what to do because the judge told me I
6 should consider the mitigating evidence that's been
7 presented to me. On the other hand, the judge told me
8 that the failure -- the fact that the defendant didn't
9 put on any mitigating evidence can't prejudice him in
10 any way. So what am I supposed to do?

11 MR. KOMP: Well, in that case, again, if --
12 if there's no mitigating evidence presented, you don't
13 know if it's what Instruction 4 will look -- look like.
14 But taking your hypothetical and you're in that jury
15 room, if you're given the Carter instruction -- again,
16 it wasn't given in this case. So if you're given that
17 Carter instruction, all that prohibits is -- is raising
18 a negative inference against the defendant for the
19 failure to exercise his right to testify.

20 JUSTICE ALITO: No, it doesn't really. It
21 says the fact that he didn't testify, and he could have
22 testified about child -- about his childhood or about
23 remorse or any of these other things, that shouldn't
24 prejudice him in any way.

25 MR. KOMP: And that's right -- that's the --

1 that's straight out of the Carter --

2 JUSTICE ALITO: Well, just tell me what I'm
3 supposed to do as a juror. The judge says consider the
4 evidence that's put before you, but the fact that the
5 defendant didn't put this evidence before you in the
6 form of his testimony shouldn't prejudice him in any
7 way. I'm -- I'm pulled in two different directions. I
8 don't know what to do.

9 MR. KOMP: Well, but he can't -- again, I
10 think in your hypothetical that he's presented nothing.
11 And so he can't be penalized again for presenting
12 nothing. And you can't allow --

13 JUSTICE SOTOMAYOR: Nothing -- zero equals
14 zero.

15 MR. KOMP: Correct. And so --

16 JUSTICE SOTOMAYOR: And the zero just can't
17 be added onto or taken away from. Zero is zero, not a
18 positive, not a negative.

19 MR. KOMP: Right. And --

20 JUSTICE SOTOMAYOR: So you can't take away
21 from the zero, create evidence from his silence, just as
22 you can't from his silence outweigh the aggravating
23 circumstances; correct?

24 MR. KOMP: Correct.

25 JUSTICE KENNEDY: But that still doesn't

1 answer Justice Alito's dilemma. You say he can't be
2 penalized for doing nothing, but the juror in Justice
3 Alito's hypothetical says: What am I supposed to do
4 when he didn't present anything, and I'm concerned about
5 that? I don't think you've answered the question.

6 MR. KOMP: In -- in that circumstance,
7 again, he -- he can't -- they can't, for instance,
8 Kentucky is a nonweighing State, so that means that they
9 can -- that nonstatutory aggravation is on the table,
10 anything they want to consider. And what this Carter
11 instruction would prohibit is -- is preventing his
12 failure to testify, his failure to offer a lack of
13 remorse, to say, I'm sorry, which are the natural
14 inclinations of what jurors -- natural inclinations but
15 constitutionally impermissible inclinations, from adding
16 that onto the death side of the scale. And --

17 JUSTICE GINSBURG: Was there any other --
18 defendant didn't say, I'm sorry. Was there -- was there
19 anything else? Did the defendant produce anything else
20 in the way of remorse?

21 MR. KOMP: In this -- in this case, no.
22 Remorse was not a mitigation theory that was presented
23 by defense counsel.

24 JUSTICE BREYER: A low IQ and a personality
25 disorder, I take it, were the mitigating factors?

1 MR. KOMP: Correct.

2 JUSTICE BREYER: So in a case where there
3 are witnesses who says there are two mitigating factors,
4 he has a very low IQ and he has a personality disorder,
5 he says nothing. The jurors go in the room. They have
6 to decide does he have a low IQ and personality disorder
7 and what weight should we give that as mitigators?

8 This instruction says: Jurors, do it. Just
9 when you do it don't take account of the fact that he,
10 himself, did not testify.

11 MR. KOMP: Correct.

12 JUSTICE BREYER: Is that -- that -- so that
13 jurors are perfectly clear, I would think. What I think
14 is difficult for you is just what your friend raised.
15 It is true that the Carter instruction refers to guilt.
16 You took that instruction, word for word, and you've cut
17 out "guilt" because this has nothing to do with guilt,
18 right.

19 Estelle says, I would think, that you have a
20 right to a Carter instruction in respect to some
21 sentencing factors, namely future dangerousness. The
22 last sentence on the page of Mitchell says: We are not
23 deciding whether you're entitled to that instruction in
24 respect to other sentencing fabricators, namely remorse.

25 So the question for you is why does that

1 thing -- that sentence about remorse in Mitchell, why
2 isn't it at least ambiguous about whether your client is
3 entitled to that instruction here?

4 And your response to that is what?

5 MR. KOMP: My -- my response to that is --
6 is twofold. One, as -- in -- as this Court was walking
7 through in the opening presentation, Mitchell was not
8 overruled -- or, I'm sorry, Estelle was not overruled by
9 Mitchell. It relied on Estelle and the Griffin line of
10 cases as the -- as the clearly existing authority.

11 When you get to that --

12 JUSTICE KAGAN: Well, Estelle might not have
13 been overruled, but there's a caveat that Mitchell puts
14 in, and it's a caveat about remorse and that remorse
15 might be different.

16 And the question is why doesn't that caveat
17 suggest, at the very least, that the instruction that
18 you asked for was so broad that it went beyond what this
19 Court has decided. Because the instruction that you
20 asked for did not distinguish remorse from other issues
21 that were going to come before the jury at the
22 sentencing phase.

23 So at the very least it seems that
24 instruction sort of blows by the question that we have
25 reserved.

1 MR. KOMP: Two points, and one is, when this
2 instruction was requested, Mitchell had not been
3 decided. So the slate was Griffin, Carter, Estelle, and
4 Mitchell came out prior to the Kentucky Supreme Court's
5 ruling. So this instruction was based on -- you know,
6 without the reservation that exists.

7 CHIEF JUSTICE ROBERTS: Well, but then the
8 reservation certainly suggests that at the time the
9 instruction was requested, it wasn't beyond any
10 fair-minded dispute, which is the standard. No one's
11 talked about the standard yet. The standard is that --
12 which you're complaining about -- that the error has to
13 be so well understood and comprehended in existing law
14 to be beyond any possibility of fair-minded
15 disagreement.

16 And it seems to me if shortly after the
17 instruction was requested the court itself said, oh,
18 that's different, we're not talking about that, it
19 certainly suggests that it was a subject of fair-minded
20 disagreement.

21 MR. KOMP: I think you have -- we have to
22 examine what Mitchell -- Mitchell, again, was framed as
23 a Federal sentencing guidelines case, and that passage I
24 read earlier from Mitchell, the next sentence is: "And
25 although Estelle was a capital case, its reasoning

1 applies with full force here, where the government seeks
2 to use Petitioner's silence to infer commission of
3 disputed acts."

4 And what -- what this Court was doing was
5 extending Estelle into the Federal sentencing guidelines
6 case, and it wasn't at the same time cutting back on
7 Estelle the Fifth -- the recognition that the Fifth
8 Amendment applies at the capital sentencing.

9 Our read of that exception, the language, is
10 that whether silence bears upon the determination of
11 lack of remorse or upon acceptance of responsibility for
12 purposes of the downward adjustment provided in the
13 sentencing guidelines is a separate question.

14 CHIEF JUSTICE ROBERTS: Not only that. Your
15 position must be that that is so clear as to be beyond
16 fair-minded disagreement.

17 MR. KOMP: It's clear that that relates to
18 fair -- to Federal sentencing guidelines cases.

19 CHIEF JUSTICE ROBERTS: Right.

20 MR. KOMP: Or possibly noncapital cases,
21 because this Court didn't simultaneously accept Estelle
22 as the clearly existing law and then cut it.

23 CHIEF JUSTICE ROBERTS: Well, but you're
24 saying it has to be clear, objectively beyond reasonable
25 disagreement, to say that when the court says lack of

1 remorse in a sentencing guideline case it still thinks
2 there's a different rule for lack of remorse in a
3 selection case such as this.

4 MR. KOMP: But I think the answer is found
5 within Estelle, because Estelle was based on the future
6 dangerousness, and the psychiatrist that -- or, pardon
7 me, psychologist that testified in Estelle, his finding
8 of future dangerousness, which is a selection question
9 which has nothing to do with eligibility, his finding of
10 future dangerousness was based on lack of remorse.
11 Estelle isn't just a compulsion case. There was a
12 component of silence.

13 CHIEF JUSTICE ROBERTS: I thought your
14 friend told us that future dangerousness was an
15 eligibility factor rather than a mere selection
16 criteria.

17 MR. KOMP: Under this Court's -- the then
18 Texas statute as defined by this Court in Jurek, that
19 special circumstances question at that time was a
20 selection factor. It was not an eligibility factor.
21 Eligibility had already been determined. And that's
22 based on this Court's authority in Jurek. And we -- and
23 we cited to State v. Brethard in the Red Brief, which is
24 Texas's description of their -- of those special
25 circumstances questions at the time.

1 So this Court has applied this Fifth
2 Amendment prohibition in a pure sentencing selection
3 occasion, and Estelle deals with -- there's a component
4 of silence to it because the psychologist that testified
5 as to the future dangerousness factor relied on the
6 silence of the individual, his failure specifically to
7 say I'm sorry and express remorse about the actions that
8 he did. And this Court cited that component as part of
9 what the psychologist relied on in making the future
10 dangerousness assessment.

11 So Estelle is not totally -- it obviously
12 has a compulsion component and it's driven by the
13 Miranda violation, but there is a component of Estelle
14 which relies specifically on silence and how the silence
15 was used to penalize the individual in becoming a factor
16 in favor of death in the selection process.

17 JUSTICE GINSBURG: I'm curious about one
18 facet of this case. This instruction was sought by the
19 defendant. The prosecutor had no objection to it. The
20 judge said: I'm sorry, I am not going to use that
21 instruction.

22 Is that common in Kentucky, that both
23 parties agree that an instruction should be given and
24 the judge says, I'm not going to give it?

25 MR. KOMP: I -- I can't speak -- I don't

1 want to speak too broadly for what happens, but it's --
2 I think when both parties usually agree, the instruction
3 is given. But I don't want to stretch it too far and
4 say that on every occasion.

5 And I -- I think it's important because this
6 was a -- the fact that the government didn't object, you
7 know, demonstrates that -- that the instruction should
8 have been given. If he -- if he felt that this
9 instruction shouldn't have been given, or there was no
10 legal basis for the instruction --

11 JUSTICE SCALIA: It doesn't demonstrate
12 anything of the sort. It just means that he didn't
13 object.

14 MR. KOMP: Well, I -- I think --

15 JUSTICE SCALIA: Maybe he was a very bad
16 lawyer. Who knows? We're -- we're going to determine
17 our law on the basis of whether a government lawyer made
18 an objection or not?

19 MR. KOMP: I --

20 JUSTICE SCALIA: At most, it shows that he
21 didn't think that there was anything wrong with it.
22 Does that mean we have to think there was nothing wrong
23 with it?

24 MR. KOMP: Oh, absolutely not, Your Honor.

25 JUSTICE SCALIA: Okay.

1 MR. KOMP: Absolutely not. And --

2 JUSTICE ALITO: Well, what it may show is
3 that the prosecutor didn't think that it was going to
4 make a difference, and so why raise an objection that
5 could create everything that's happened since then, over
6 something that isn't going to make a difference in a
7 case where you have an incredibly heinous crime. The
8 prosecutor may have thought, this jury is going to
9 return the verdict that I want anyway, even if this
10 instruction is given.

11 MR. KOMP: I think that --

12 JUSTICE ALITO: You don't think that's a
13 possibility?

14 MR. KOMP: I -- I think as a -- as a lawyer,
15 if you -- your -- the basis of your objection or your
16 failure to object is based on what you believe is -- is
17 legally required, especially when you're a prosecutor,
18 and -- and you have that added burden of not seeking a
19 conviction or not seeking the death sentence --

20 JUSTICE BREYER: What I say -- what we said
21 here, what I've gathered from the record, as best we've
22 been able to see it, is in that sentencing hearing --
23 you were there?

24 MR. KOMP: I was not.

25 JUSTICE BREYER: But you know it pretty

1 well.

2 MR. KOMP: Yes.

3 JUSTICE BREYER: Okay. There were five
4 matters at issue. He had a low IQ, a personality
5 disorder, the child with a troubled home, he had grown
6 up in poverty, he had been sexually abused. All right.
7 All of those things are basically factual matters about
8 his background.

9 Now, in that context, this instruction,
10 which was the Carter instruction without the word
11 "guilt," referring to his failure to testify is --
12 doesn't mention those five things specifically. It
13 doesn't say testify about those five things.

14 But in context, was there anything else in
15 that hearing that the jury could have thought failure to
16 testify referred to?

17 MR. KOMP: The -- in -- in --

18 JUSTICE BREYER: Is there anything else any
19 juror might have thought, oh, he didn't testify about
20 this other thing, too? Was there some other thing
21 there?

22 MR. KOMP: It doesn't, Your Honor, it just
23 doesn't go to mitigation, because I -- I think that
24 goes --

25 JUSTICE BREYER: That's not what I'm

1 thinking of.

2 MR. KOMP: But -- but -- right. But it
3 goes --

4 JUSTICE BREYER: I'm thinking of what is it
5 that we -- is there an issue in this case about whether
6 the instruction, on top of whatever other problems it
7 had, was too broad?

8 So I'm thinking, if that was the only issue,
9 if those are the only issues that this instruction could
10 have been thought of as referring to, we don't have to
11 get into the breadth matter. That's why I ask you. Was
12 there something else in that hearing that the jury might
13 have thought, oh, he didn't testify about it?

14 JUSTICE SCALIA: He's trying to help you,
15 counsel.

16 JUSTICE BREYER: He's got the point. But
17 you have to answer in terms of what the facts are at the
18 hearing.

19 MR. KOMP: In this -- in this -- pardon me.
20 In this circumstance, what -- the facts that were going
21 on in this hearing, the -- that instruction could go to,
22 again, holding his -- his silence as to how -- and
23 offering -- failure -- failing to offer an explanation
24 and respond --

25 JUSTICE SCALIA: What about remorse? Wasn't

1 remorse at issue?

2 MR. KOMP: Remorse wasn't put at issue by --
3 by Mr. Woodall.

4 JUSTICE SCALIA: Well, whatever. I mean,
5 the jury doesn't have to take that into account. Isn't
6 it one of -- one of the factors?

7 MR. KOMP: It -- it can be a factor, but it
8 can't -- this -- the lack of remorse as the nonstatutory
9 aggravator cannot be premised upon his silence.

10 JUSTICE BREYER: But was his remorse an
11 issue at the hearing?

12 JUSTICE SCALIA: Right.

13 MR. KOMP: Yes, his lack of remorse. Yes, I
14 think so.

15 JUSTICE BREYER: Then the answer --

16 MR. KOMP: Yes.

17 JUSTICE KAGAN: I'm sorry. So how was it an
18 issue at the hearing? Because that would seem to cut
19 against you very strongly, Mr. Komp. If remorse is an
20 issue at the hearing, remorse is the very thing that in
21 Mitchell we said we have not decided. And then you have
22 no clearly established law to rely on. And I appreciate
23 that this was before Mitchell rather than after
24 Mitchell; but it suggests that there was always a
25 question about whether Estelle applied to remorse.

1 MR. KOMP: Estelle dealt with that in the
2 capital context. Again, the -- the distinction that
3 we're drawing from Mitchell is that -- that Mitchell did
4 not modify Estelle. It expanded Estelle into a Federal
5 sentencing or other criminal case -- cases. It did not
6 touch -- it remained intact the prohibition of -- of
7 using silence. Again, Estelle dealt with silence, and
8 silence that was used to support a lack of remorse,
9 which was used to support the --

10 CHIEF JUSTICE ROBERTS: I'm sorry. It left
11 in -- Estelle left intact what?

12 MR. KOMP: I'm -- pardon me. Mitchell left
13 intact Estelle's application at the capital sentencing
14 proceeding.

15 JUSTICE KENNEDY: Suppose we read Estelle as
16 saying that on the issue of remorse, it is an open
17 question whether or not the self-incrimination privilege
18 is applicable. Suppose we read it that way. And
19 suppose we think that in your case, remorse was an issue
20 at the penalty phase. Does that not mean that this
21 issue was not clearly decided? That's -- it has a
22 bearing on this case?

23 MS. KOMP: Could you -- could you please
24 repeat the -- the first part? I --

25 JUSTICE KENNEDY: Suppose we read Mitchell

1 as saying that on the -- where remorse is at issue, it
2 is not settled whether or not there is a Fifth Amendment
3 self-incrimination right; and it is not settled that the
4 defendant is entitled to an instruction about silence,
5 number one. Number two, suppose we think, as I think to
6 be the case, that remorse was an issue in this trial in
7 the penalty phase. Does that not mean that the rule is
8 unclear and you're not clearly entitled to an
9 instruction on that issue?

10 MR. KOMP: I -- I disagree. Because
11 these -- these capital sentencing proceedings are not
12 just about remorse or lack of remorse. And what -- what
13 would happen in that circumstance is -- is right now you
14 have a bright line. And if -- if we accept remorse out
15 of this in the capital sentencing context, there's two
16 problems with that. One, we would have hybrid Carter
17 instructions and there would be -- we'd have to figure
18 out all right, which instruction would fit if we
19 looked --

20 JUSTICE SOTOMAYOR: But we could --

21 JUSTICE KENNEDY: But your -- your answer
22 that is what the law should be. My question is whether
23 or not at least the law is not open on that point,
24 unsettled.

25 MR. KOMP: I believe that Estelle settled

1 this and Mitchell did not cut back on Estelle in the
2 capital sentencing context, and that Estelle imported
3 the no-adverse instruction that's required by Carter.

4 JUSTICE SCALIA: It is. But you have to go
5 beyond saying I believe that. What you have to say to
6 prevail here is not only do I believe it, but no
7 reasonable juror -- no reasonable jurist could possibly
8 believe otherwise. Now, do you want to say that?

9 MR. KOMP: I -- pardon me. If you -- if we
10 look at Mitchell, and we look at the discussion of the
11 no-adverse-inference instruction --

12 JUSTICE SCALIA: No reasonable jurors could
13 say otherwise?

14 MR. KOMP: One, I don't think this Court in
15 Williams said that -- that -- or not -- that AEDPA is
16 not a subjective juror/judge contest. And if you read
17 Mitchell and it talks about this is a product of our
18 existing precedent, this is a rule of proven utility,
19 this is an essential feature of our justice system,
20 the -- the rule was -- was absolutely clear that -- that
21 these no -- no-adverse-inferences could be raised. And
22 that was a -- a rule of proven utility.

23 And all that Mitchell did in that one
24 sentence is reserve a question that -- that may or may
25 not be applicable in Federal sentencing or noncapital

1 sentencing. It did not cut back on Estelle, which said
2 for -- that there is no basis to distinguish between the
3 guilt and penalty phases of capital cases.

4 CHIEF JUSTICE ROBERTS: So -- so your
5 argument is when Mitchell said -- whether it applies to
6 lack of remorse or acceptance of responsibility for the
7 sentencing guidelines, that's a separate question. We
8 don't have any view on it. But at the same time the
9 Court said well, of course it applies in -- in the
10 other -- other context.

11 MR. KOMP: Right. This Court --

12 CHIEF JUSTICE ROBERTS: But that's perfectly
13 clear. I mean, if you were arguing the other way, you
14 would say, well, the question is whether it's clearly if
15 there's a clear difference between lack of remorse in
16 the sentencing guideline case and lack of remorse in a
17 capital case, and everybody knew that, so that when
18 Mitchell just said it doesn't apply to lack of remorse
19 in the sentencing guidelines nobody would think that
20 meant that there was an open issue on the capital
21 context.

22 MR. KOMP: I -- no, we would think it's an
23 open issue, because if you -- if you go through the --
24 the Mitchell opinion and how it builds on the no adverse
25 -- no adverse inference and talks about Griffin and

1 Estelle, and then the -- the key language is at -- at
2 329: "Although Estelle was a capital case, its
3 reasoning applies with full force here."

4 So this was a pushing forward of Estelle.
5 It wasn't a cutting back on Estelle.

6 JUSTICE GINSBURG: How could this be --
7 let's assume that you're right, that there was error.
8 How could it be harmful, given the -- that the
9 mitigators -- that the aggravators were not in dispute,
10 he had entered a guilty plea? So how was the defendant
11 harmed by the failure to give this instruction?

12 MR. KOMP: I think in two manners: One is
13 when you're -- relates to using the right to silence as
14 a penalty, which is the natural inclination of -- of the
15 jurors. So they're going to hold his -- his failure to
16 testify against him. And they'll do it twofold.
17 They'll actually put it on the scale: He didn't say
18 that he was sorry, he didn't personally offer remorse,
19 so we're going to consider that as not --

20 JUSTICE SOTOMAYOR: Did the prosecutor argue
21 that?

22 MR. KOMP: No. No.

23 JUSTICE SOTOMAYOR: So how would they have
24 put that on the scale?

25 MR. KOMP: Well, they -- that's the natural,

1 what this Court recognizes, the natural inclinations of
2 what jurors do. And this prosecutor -- and it's laid
3 out in our Red Brief -- although he technically said,
4 "I'm not going to argue lack of remorse, but I'm going
5 to do everything but that." So that was clearly
6 where -- where he was pointing.

7 The other -- what -- the other impact it has
8 is this was a case that there was strong mitigation.
9 This is somebody who's borderline mentally retarded, has
10 a personality disorder which doesn't allow him to
11 function in society. But there's also a strong element
12 of Skipper evidence. So when you're asking for a life
13 without parole and you have expert testimony saying this
14 individual is not going to be a danger to correction
15 officers, and you have a jailer that testifies that he's
16 well-mannered and well-behaved and is not a problem at
17 all, and you have the background that he has, this --
18 that's a strong mitigation narrative.

19 And if the defendant doesn't testify in
20 support of that, that undermines that mitigation
21 narrative. So the failure to testify and the failure to
22 offer this instruction has -- has sort of two -- two
23 arms. It --

24 JUSTICE SCALIA: And you think that made the
25 difference, that the jury would not have condemned your

1 client to death had it not been for the fact that they
2 drew an adverse inference from -- they knew all the
3 horrific details of the crime. They had heard all of
4 your mitigating evidence. And you think what -- what
5 tipped the balance, or at least we think it plausibly
6 could have tipped the balance, is -- is this failure to
7 give the no-adverse- inference instruction?

8 MR. KOMP: Absolutely.

9 JUSTICE SCALIA: Really?

10 MR. KOMP: Absolutely. And this Court
11 considers the death penalty case -- all death -- any
12 death penalty case has horrible facts.

13 JUSTICE SCALIA: Well, what --

14 JUSTICE KAGAN: Mr. Komp, did the Sixth
15 Circuit apply the wrong harmless standard here? It
16 seemed to apply the standard that would be applicable
17 on direct review rather than on habeas review; is that
18 correct?

19 MR. KOMP: I believe that they cited Brecht
20 and they cited O'Neal appropriately.

21 JUSTICE KAGAN: Because it seems to rely
22 primarily on Carter. And Carter applies the Chapman
23 standard, which is of course the direct review standard.

24 MR. KOMP: I think the reference to Carter
25 was to talk about -- we're talking about assessing the

1 harmfulness of this error or the harmlessness of this
2 error in the context of an instruction that wasn't
3 given, where the instruction that's not given prevents
4 negative inferences. So the reference to Carter was to
5 talk about what -- what the natural inclination for the
6 failure to give the instruction is. It was sort of a
7 framework of what's going on. So I don't think it was
8 used in that circumstance.

9 Where -- and when they ultimately came to
10 their conclusion, they relied, again, on citing
11 expressly the O'Neal standard.

12 JUSTICE ALITO: What do you think is the
13 worse adverse inference they might have drawn?

14 MR. KOMP: In this case, I think it's --
15 it's not offering an apology, not -- not saying why or
16 not explaining how. I think there's -- there's so many
17 things that --

18 CHIEF JUSTICE ROBERTS: You can finish
19 your --

20 MR. KOMP: -- that a juror wants to hear,
21 naturally wants to hear. And that's what the basis that
22 this Court held in Carter is this -- why this
23 instruction is appropriate.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Ms. Lenz, you have 5 minutes remaining.

2 REBUTTAL ARGUMENT OF SUSAN R. LENZ

3 ON BEHALF OF THE PETITIONER

4 MS. LENZ: Thank you.

5 I would just like to point out at the
6 beginning of his responsive argument my colleague was
7 talking about the selection factors in Estelle. And
8 whether they're called selection factors or whatever
9 they're called, the prosecutor had to prove future
10 dangerousness beyond a reasonable doubt in order to
11 render the defendant in that case death eligible. There
12 were three things that the prosecution had to prove and
13 that was one of them. So those selection factors or
14 whatever you want to call them operated as aggravating
15 circumstances for the death penalty. So I just wanted
16 to make sure that the Court is clear on that.

17 CHIEF JUSTICE ROBERTS: Your friend says
18 Jurek reads to the contrary.

19 MS. LENZ: No, Jurek does not read to the
20 contrary, no. I mean, I -- perhaps he's saying that
21 because of the reference to calling them selection
22 factors. When one speaks of selection factors, one
23 usually doesn't think of death-eligibility factors.

24 So my only point is, regardless of
25 nomenclature, they operated as aggravating

1 circumstances, the prosecution's burden.

2 JUSTICE SOTOMAYOR: If the only criteria to
3 determine harmlessness is the gruesome -- gruesome
4 nature of the crime, it appears to me that in almost
5 every death-eligible case I've come across, gruesomeness
6 is inherent. By your argument, there's never a case in
7 which a defendant can prove a harmful sentencing error.

8 MS. LENZ: That's not true, Justice
9 Sotomayor, because it would depend on what the violation
10 is, what the error is. I think in this case, when you
11 consider the absence of this prophylactic instruction in
12 comparison with the heinousness of the crimes, the
13 guilty plea, the overwhelming evidence, his prior
14 convictions for sexual abuse, his post-crime conduct,
15 all of it, when you consider that together --

16 JUSTICE SOTOMAYOR: But the mitigation was
17 very close to Wiggins.

18 MS. LENZ: The mitigation was?

19 JUSTICE SOTOMAYOR: Was very close to the
20 Wiggins case.

21 MS. LENZ: I'm sorry?

22 JUSTICE SOTOMAYOR: The mitigation evidence
23 offered here was very close to the Wiggins case, similar
24 mitigation.

25 MS. LENZ: I think --

1 JUSTICE SOTOMAYOR: And there we held there
2 was harmful error.

3 MS. LENZ: I think the mitigation was -- was
4 negligible in comparison to -- to the rest of the
5 crimes.

6 And the other point that I would just like
7 to make is that there was not clearly established law in
8 this case, and the Kentucky Supreme Court's decision was
9 not an error beyond any possibility for fair-minded
10 disagreement.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 The case is submitted.

14 (Whereupon, at 12:08 p.m., the case in the
15 above-entitled matter was submitted.)

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