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.

C O N T E N T S

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

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

Then Estelle says, we 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; so a kind of general view that the Fifth Amendment applies equally in the two.

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

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

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

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

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

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

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

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

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

MS. LENZ: No.

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

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

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

JUSTICE SCALIA: Under Federal law, you

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

MS. LENZ: Oh, absolutely. Absolutely.

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

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

JUSTICE SCALIA: Of course.

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

JUSTICE SOTOMAYOR: Well, there was a

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

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

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

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

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

him.

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

MS. LENZ: Mitchell, yes.

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

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

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

concerned."

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

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

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

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

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

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

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

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

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

jury followed the instructions and considered the mitigating circumstances.

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

MS. LENZ: Yes, sir.

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

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

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

the one psychological factor of remorse.

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

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

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

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

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

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

JUSTICE GINSBURG: Is your position

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

MS. LENZ: Yes. Yes, Justice Ginsburg.

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

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

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

MS. LENZ: Could you repeat the question?

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

(Pause.)

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

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

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

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

MS. LENZ: Well, it makes sense --

JUSTICE KENNEDY: -- in a sentencing hearing.

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

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

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

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

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

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

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

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

to consider the mitigating circumstances.

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

MS. LENZ: No, they were not.

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

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

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

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

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

does have the burden.

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

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

MS. LENZ: Well, I do think --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: I see.

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

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

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

MS. LENZ: I'm sorry?

JUSTICE SOTOMAYOR: Mitchell was about sentencing.

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

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

MS. LENZ: Does Mitchell overrule Estelle?

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

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

JUSTICE BREYER: No, Mitchell doesn't.

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

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

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

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

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

And I'm sorry. What was your question?

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Komp.

ORAL ARGUMENT OF LAURENCE E. KOMP,

APPOINTED BY THIS COURT,

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

That's much different than a burden of

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

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

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

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

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

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

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

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

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

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

that's straight out of the Carter --

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

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

JUSTICE SOTOMAYOR: Nothing -- zero equals zero.

MR. KOMP: Correct. And so --

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

MR. KOMP: Right. And --

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

MR. KOMP: Correct.

JUSTICE KENNEDY: But that still doesn't

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

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

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

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

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

MR. KOMP: Correct.

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

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

MR. KOMP: Correct.

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

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

So the question for you is why does that

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

And your response to that is what?

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

When you get to that --

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. KOMP: I --

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

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

JUSTICE SCALIA: Okay.

MR. KOMP: Absolutely not. And --

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

MR. KOMP: I think that --

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

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

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

MR. KOMP: I was not.

JUSTICE BREYER: But you know it pretty

well.

MR. KOMP: Yes.

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

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

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

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

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

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

JUSTICE BREYER: That's not what I'm

thinking of.

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

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

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

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

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

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

JUSTICE SCALIA: What about remorse? Wasn't

remorse at issue?

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

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

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

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

JUSTICE SCALIA: Right.

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

JUSTICE BREYER: Then the answer --

MR. KOMP: Yes.

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

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

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

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

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

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

JUSTICE KENNEDY: Suppose we read Mitchell

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

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

JUSTICE SOTOMAYOR: But we could --

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

MR. KOMP: I believe that Estelle settled

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

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

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

JUSTICE SCALIA: No reasonable jurors could say otherwise?

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

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

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

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

MR. KOMP: Right. This Court --

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

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

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

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

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

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

JUSTICE SOTOMAYOR: Did the prosecutor argue that?

MR. KOMP: No. No.

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

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

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

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

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

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

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

MR. KOMP: Absolutely.

JUSTICE SCALIA: Really?

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

JUSTICE SCALIA: Well, what --

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: You can finish your --

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Lenz, you have 5 minutes remaining.

REBUTTAL ARGUMENT OF SUSAN R. LENZ

ON BEHALF OF THE PETITIONER

MS. LENZ: Thank you.

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

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

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

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

circumstances, the prosecution's burden.

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

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

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

MS. LENZ: The mitigation was?

JUSTICE SOTOMAYOR: Was very close to the Wiggins case.

MS. LENZ: I'm sorry?

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

MS. LENZ: I think --

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

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

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

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

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