In the

Supreme Court of the United States

LONNIE JOE CARTER,	)	
	)	
PETITIONER,	)	
	)	
V.	)	No. 80-5060
	)	
COMMONWEALTH OF KENTUCKY,	)	
	)	
RESPONDENT.	)	

Washington, D.C.
January 14, 1981

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IN THE SUPREME COURT OF THE UNITED STATES

LONNIE JOE CARTER, Petitioner,	:	
v.	:	No. 80-5060
COMMONWEALTH OF KENTUCKY, Respondent.	:	

Washington, D. C.

Wednesday, January 14, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 o'clock p.m.

APPEARANCES:

KEVIN MICHAEL McNALLY, ESQ., Assistant Public Advocate, State Office Building Annex, 3rd Floor, Frankfort, Kentucky 40601; on behalf of the Petitioner.

ROBERT V. BULLOCK, ESQ., Assistant Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in Carter v. Kentucky. Mr. McNally, you may proceed whenever you are ready.

ORAL ARGUMENT OF KEVIN MICHAEL McNALLY, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case comes here from Hopkinsville, Kentucky, after petitioner was convicted of third degree burglary and persistent felony offender in the first degree, and was sentenced to 20 years.

The issue that this case brings here today was presented to the Kentucky Supreme Court which affirmed Mr. Carter's conviction. The issue is whether, under the circumstances of this case and by virtue of the Fifth and Fourteenth Amendments to the United States Constitution, a protective or prophylactic instruction must be given upon the defendant's request regarding the defendant's exercise of his Fifth Amendment privilege.

QUESTION: Can we begin with the proposition that the State of Kentucky through its Legislature as a matter of policy has said that no one should talk about this issue to the jury?

MR. McNALLY: The Kentucky Legislature as did most

states passed a statute permitting the defendant to testify and stating that no comment shall be made.

QUESTION: That's what I'm addressing myself to, the prohibition against comments.

MR. McNALLY: The instruction itself does not specifically address the issue of a protective instruction. The Kentucky Supreme Court has on a number of occasions interpreted that statute to mean that no comments at all may be permitted regarding the defendant's failure to testify.

QUESTION: And the question here that you're bringing to us is not whether this would be a sensible and a sound thing to do but that the Constitution requires that the prophylactic instruction be given on request even though the Kentucky statute says it is not to be?

MR. McNALLY: Well, I must disagree on one minor point with you, Mr. Chief Justice. The statute doesn't address the issue of instruction and the Kentucky court has held, taken conflicting positions on that point.

QUESTION: But doesn't the statute say it should not be mentioned?

MR. McNALLY: It says no comments shall be made.

QUESTION: Yes. Well, what does that mean, except --

MR. McNALLY: Well, as this Court indicated in Lakeside, what the prohibition in Griffin, for example, was that no adverse comment shall be made. And that would be,

we think, a reasonable interpretation of the statute. But we do not bring here a question of state interpretation. And as the Chief Justice pointed out, this is not a case of what is the most desirable rule, although our position is, we submit, by light of the vast majority of authorities, the most desirable rule.

The question here is, as referred to in Cupp v. Naughten, what exactly does the Constitution specifically require? And that's what makes this case different from any other alleged instructional error.

We want to indicate right at the outset our sensitivity to the undercurrent in the Commonwealth's brief that somehow we're asking this Court to be a sort of author for Kentucky form instructions. Again what makes this case different is the basic, fundamental nature of the Fifth Amendment privilege. It takes it out of the realm of all other, we think, alleged instructional errors that might be presented to this Court at various times.

We present two analyses for the Court's considerations, the first finding its genesis in the Fifth Amendment privilege itself, the second in the Due Process Clause of the Fifth Amendment. And while, of course, these themes are interrelated, for a logical analysis we have discussed them separately in our brief and will do so in this argument, if the Court permits.

We have no intention of dwelling on the facts of this case but there are two principal factual themes we would like to emphasize. What they do is dramatize legal principles which perhaps in another case we might be arguing in the abstract. The first of those is what we would call the "roar" of the defendant's silence at trial. There was a continuing theme throughout this trial that the defendant refused to explain himself at any point in the proceedings. He refused to explain himself to the police, and this was testified to by two police officers at trial; was repeatedly emphasized by the prosecutor's questions; and even a waiver form was introduced in which, on the bottom of it in big back letters was written, "Defendant refuses to answer questions" or something -- I'm paraphrasing.

Not only was there mention during the testimony regarding the defendant's refusal to give his reasons why he was admittedly arrested under incriminating circumstances, but the prosecution's arguments to a subtle extent, we will admit, but the prosecution's arguments certainly brought that to the attention of the jury.

QUESTION: Well, is your submission limited to the fact situation here, or are you urging as a general proposition that upon request, upon request by the defendant, the instruction that you sought and was denied must be given?

MR. McNALLY: That is our alternative contention.

QUESTION: That's on the alternative; I see.

MR. McNALLY: In the alternative. Of course, our primary reliance is on the facts of this case. However, would we not have these, what I would call, illustrative facts in this case, of the legal principles, we would still be making the same arguments.

QUESTION: Well, now, while I have you interrupted, may I ask, and do you also take the position that if the trial judge decides to give an instruction like this without a request, that you should be at liberty to object?

MR. McNALLY: Well, that would depend on the individual state procedure.

QUESTION: That was decided in Lakeside.

MR. McNALLY: That was the issue decided in Lakeside, and we certainly don't question Lakeside. It's one of the primary authorities upon which we rely.

MR. McNALLY: The other facts at trial which emphasize the defendant's refusal to testify or explain himself were -- even the defense argued, for example. Defense counsel attempted to deal with this issue as best he could without the protection of the trial court, and the only way he apparently thought he could do that was to mention the fact, what was, in fact -- it was obvious to the jury and everyone else in the courtroom -- and state that the defendant had the right not to testify. He stated that, in fact, the defendant doesn't have

to do anything. Now, while that is constitutionally accurate, we submit that it may have been perceived as either inaccurate by the jury or perhaps even arrogance on the part of defense counsel.

This illustrates why we need the court's protection. There is no effective way a trial lawyer can deal with this issue, at least under the circumstances of this case, other than in instruction from the court. For example, he couldn't tell the jury, even if that were permitted, why the defendant did not testify, for to do so, would bring about the exact evil he was trying to avoid.

The other illustrative factual theme in this case is that the defendant in this case, we submit the record demonstrates that he did not, he declined to testify for reasons which were neutral on the question of guilt or innocence. The defense counsel made it clear that in an in-chambers hearing that possibly the only reason defense -- I'm sorry -- the only reservation he had regarding testimony was his fear of impeachment. I don't think that any reasonable reading of the record would give rise to the challenge that the Commonwealth makes that impeachment was not the reason why he did not testify. And indeed, in the court below the Commonwealth admitted in their brief that "most definitely the impeachment influenced the appellant in his decision not to take the stand."

QUESTION: I still don't understand why the reason is of interest to us?

MR. McNALLY: Merely because it illustrates, Mr. Justice Marshall, the point that has been made in perhaps the abstract in other cases, that there are neutral reasons why a defendant would decide not to testify at trial. It is illustrative, it is not necessary.

QUESTION: Well, does the Fifth Amendment say anything about that?

MR. McNALLY: No, it doesn't, Mr. Justice Marshall.

QUESTION: Does any other law say anything about that?

MR. McNALLY: No, it doesn't, and --

QUESTION: Well, why is it then of interest to us?

MR. McNALLY: It's relevant to the Fourteenth Amendment issue which we are also raising.

QUESTION: How is it relevant?

MR. McNALLY: It's relevant because the Fourteenth Amendment --

QUESTION: The defendant has a right to do it for any reason under the sun.

MR. McNALLY: Under the Fifth Amendment, absolutely, Mr. Justice Marshall.

QUESTION: Well, then, why is the reason important?

MR. McNALLY: Because this Court's interest and

concern in due process analysis has been the truth-seeking function, and we submit that under the facts of this case the jury --

QUESTION: Well, how do you get truth by a man not testifying?

MR. McNALLY: The point we are trying to make, Mr. Justice Marshall, is that the jury naturally and we think --

QUESTION: I withdraw the question because I'm holding you up.

MR. McNALLY: -- concluded that -- well, I think it's an important question. The jury concluded that the defendant didn't testify as jurors often will because he was guilty, and in fact that was not the case. In that sense, under a due process analysis, a protective instruction is necessary because it is relevant to the truth-seeking function of the trial, and in that sense this fact is relevant.

QUESTION: If a judge on his own initiative gave such an instruction, I suppose he might be subject to an objection that he was calling attention to something which the defendant wanted to avoid?

MR. McNALLY: Conceivably. That was the issue in Lakeside, and the issue that was --

QUESTION: Is that the rationale of it?

MR. McNALLY: Excuse me, Mr. Chief Justice?

MR. McNALLY: Is that the rationale of that side

of it?

MR. McNALLY: We frankly -- frankly, we disagree with the argument that a defendant in some cases will not notice, the jury will not notice that a defendant does not testify. However, that is not essential to this particular case and again, we are not suggesting that Lakeside was wrongly decided. Indeed, we put great reliance on the rationale of this Court in Lakeside.

QUESTION: Well, Mr. McNally, I gather then the argument you're now making is largely a due process argument, not a Fifth Amendment argument, is it?

MR. McNALLY: We're making both, Mr. Justice Brennan.

QUESTION: I know you are, but here, for this purpose, you're saying, due process required this instruction in the context of these facts.

MR. McNALLY: That's correct.

QUESTION: And that's your reliance --

MR. McNALLY: That's correct.

QUESTION: Your alternative is that in any event the Fifth Amendment, in every case where you ask it, requires that the instruction be given.

MR. McNALLY: Mr. Justice Brennan, that is exactly our position. And I'll explain why that is if I may.

Now, we differ with the Commonwealth's suggestion that we're asking this Court to expand the parameters of the

Fifth Amendment privilege. We think that our position can withstand an historical analysis, and we think that for these reasons. At the time of the enactment of the Fifth Amendment a defendant was not permitted to testify. This was, as this Court recognized in Wilson v. United States, considered a protection for him. In other words, there was a feeling at the time that a defendant if he were permitted to testify would be under some form of compulsion to do so lest the jury take an adverse inference against him.

In approximately 1878 Congress, as did many states, passed statutes permitting defendants to testify. Once they did so, we think that a -- the jury, naturally, will take an adverse inference against a defendant who declines to exercise that privilege. Since at the time of the adoption of the Fifth Amendment the defendant was not permitted to testify, he was not expected to do so. Now, he is. And in that sense we request a protective instruction under the Fifth Amendment so that this Court can restore the original balance. We are not asking the Court to tip the balance in the favor of the defendant.

QUESTION: Do you think the jurors were always familiar with the precise state of the legislation in the state as pre-1915 or post-1915, that the defendant was not allowed to testify or he was allowed to testify?

MR. McNALLY: I have never read a trial transcript

from 1850, Mr. Justice Rehnquist, but I think it's reasonable to conclude that jurors at that time knew that the defendant was not permitted to testify. Now, whether counsel told them that or whether they knew it from being intelligent and civic-minded citizens, I don't know, but I think that is a reasonable conclusion.

QUESTION: Was there anything to prevent in those days defense counsel from telling the juror that even if the Court or the judge didn't do it?

MR. McNALLY: Not that I am aware of, Mr. Chief Justice. We also submit that our Fifth Amendment analysis finds great support in prior decisions of this Court. In Wilson v. United States, this Court first held that comment, adverse comment was prohibited. It did so under a federal statute and not under the Fifth Amendment. In Bruno v. United States shortly thereafter this Court dealt with the exact issue presented here and ruled, not as a matter of federal constitutional law, but pursuant to the federal statute, that an instruction was required. An unanimous Court decided that.

Subsequently, in Malloy v. Hogan, this Court held the Fifth Amendment applicable to the states through the Fourteenth Amendment. Immediately after that the Court dealt with the issue presented in Wilson in Griffin v. California. And the Court stated at that time that the

federal statute while obviously not constitutional in nature is merely an enactment of the Fifth Amendment, and the Court suggested that you could substitute the words Fifth Amendment for the word Act and the spirit of the self-incrimination privilege would be captured.

We submit that as Wilson was translated into the holding in Griffin, so Bruno must be translated into the result we seek here. In Malloy v. Hogan this Court rejected the argument that somehow a watered-down version of the Fifth Amendment privilege should be applied to the states. We submit that that same analysis produces the result that we seek in this case.

Another Fifth Amendment point that we would like to address ourselves to is the penalty theory, if you will, of Griffin. The Court might ask, where is the compulsion in this case? Where is the penalty extracted? Well, the penalty that we identify in this record, and indeed in any case where a defendant doesn't testify, is the unchecked speculation, if I could use the words of the dissenters in Griffin, what the jury will do in regard to the defendant's failure to testify. That is, we think a constitutionally significant form of compulsion -- and in that sense, this case fits within the Griffin analysis -- and indeed, we would submit, as the Court may recall, in Griffin there was certain protective comments by the California trial judge.

He indeed told that jury that the defendant in fact had a constitutional right not to testify. He also permitted them to take adverse inference from the failure, and the prosecutor also commented, but in the sense that a protective instruction was given in Griffin, this case is even more dramatically illustrative of a penalty extracted for exercise of the privilege.

QUESTION: Mr. McNally, if you're right -- compelled on request the giving of this instruction, why doesn't the Fifth Amendment also require the giving of the instruction whether or not a request is made?

MR. McNALLY: Well, that issue is not presented --

QUESTION: I know it's not.

MR. McNALLY: -- in this case.

QUESTION: I know. We're looking down the road.

MR. McNALLY: There is a countervailing legitimate, we think, state interest in the situation that you refer to, Mr. Justice Brennan, and that is the requirement that issues be first presented to a trial judge so that he may rule upon, he may in fact, give an instruction upon request. Therefore, the whole issue is eliminated. That distinction is a very important --

QUESTION: My hypothetical is a case in which no request is made. Indeed, it's not made because counsel would, thinks it would not be helpful and perhaps might be harmful

to the accused. But nevertheless, if it must be given on request, because the Fifth Amendment requires it, why must it not be given just as a matter of course?

MR. McNALLY: Well, this Court has held in cases such as Wainwright v. Sykes, for example, that trial counsel can waive issues of federal constitutional negligence.

QUESTION: If he doesn't request it, it is to be treated as if he waived it, is that it?

MR. McNALLY: That would be our position, although that is again not presented --

QUESTION: That would be an intelligent waiver.

MR. McNALLY: It may be under the facts --

QUESTION: Well, how could it be an intelligent waiver if it wasn't mentioned?

MR. McNALLY: Well, it may be a tactical waiver. Whether it's intelligent or not, Mr. Justice Marshall, we'd have to examine the particular case.

QUESTION: Well, it may be the reason for no request may be more than a waiver, it may be an affirmative reason as, by the reasoning of the dissenting opinion in Lakeside.

MR. McNALLY: If trial counsel waives his right to this instruction?

QUESTION: As a matter of tactics.

MR. McNALLY: Well, as defense counsel in Lakeside did exactly that.

QUESTION: Exactly. And there was a dissenting opinion, joined in part by Mr. Justice Marshall, that agreed with the reasoning of defense counsel.

QUESTION: Does that make it great?

MR. McNALLY: We would like to turn, if the Court permits --

QUESTION: Dissenting.

MR. McNALLY: -- once again to our Fourteenth Amendment analysis and make some --

QUESTION: Could you tell me, do the counsel in Kentucky argue before or after the judge instructs?

MR. McNALLY: The counsel argues after the judge instructs, Mr. Justice White.

QUESTION: And did you try to get him to join you?

MR. McNALLY: I did not, Mr. Justice White.

QUESTION: Trial counsel did suggest to the jury that the defendant wasn't required to take the stand --

MR. McNALLY: He did.

QUESTION: -- and that -- now, doesn't that bear on your due process argument? The prosecutor didn't say to the contrary. And the judge certainly didn't indicate to the contrary.

MR. McNALLY: Well, we would disagree on a few points, Mr. Justice White.

QUESTION: I only made one.

MR. McNALLY: We would disagree on your general point to the extent that the prosecutor did not take any advantage or did not denigrate the particular right; to that extent. Secondly, I think this Court recognized in Taylor v. Kentucky that while counsel's arguments may be relevant in the overall due process analysis, counsel's instructions are not a -- I'm sorry -- counsel's arguments are not a substitute for the court's instructions.

QUESTION: But, in Kentucky, I take it, that counsel can tell a jury what he thinks the law is, even though the judge hasn't instructed on it?

MR. McNALLY: I don't believe that's the law of our jurisdiction.

QUESTION: Well, he just did, this counsel did.

MR. McNALLY: He did it in contravention of Kentucky law and he got away with it without objection from the prosecutor. And I think the reason for that may answer your question. The reason why he got away with it is --

QUESTION: I just bring it up because it does bear on your due process argument in this particular case.

MR. McNALLY: I would agree that it's relevant, Mr. Justice White, and I would submit that the reason why there was no objection by the prosecutor is that defense counsel simply can't deal with the issue and he may have been in the eyes of the jury hurting himself. Because without the support of the trial judge

his statement of the law may be dismissed as either inaccurate, as we mentioned before, or just simply arrogant, stating that the defendant doesn't have to do anything, may not have sat well with the jury.

QUESTION: And if you get away from the facts of this particular case, then the question is simply the one reserved in Griffin, I take it? Whether, in every case, regardless of the factual setting or anything else, an accused is entitled to an instruction that his silence need not be considered, if he requests such an instruction?

MR. McNALLY: Well, we think that issue, the per se rule, if you will, that's presented in this case -- we argued it below and it's well presented -- the Court may not choose to reach that, but we think it is framed in this case, Mr. Justice Rehnquist.

QUESTION: And it was explicitly left open in the Griffin case, wasn't it?

MR. McNALLY: I believe that also was mentioned in Lakeside, Mr. Justice Stewart.

QUESTION: What if a state's decided that the instruction about the burden of proof and the presumption of innocence was so basic, so fundamental to the whole proceeding, that it required that before any evidence was received the judge give the certain general instruction explaining both, in every case?

MR. McNALLY: Before any evidence is received?

QUESTION: Before any evidence; and would explain it, as a good many judges do now, in both federal and state courts, on the theory that then the jury will better understand the evidence as it comes in, and they will not be sitting around for two or three days wondering what the defendant is going to say in answer to these charges.

MR. McNALLY: Mr. Chief Justice, I don't know that the Due Process Clause goes to the timing of a particular instruction. I think any petitioner would have to be satisfied if the court instructs the jury, and I don't think that the timing of that particular instruction would be an issue of constitutional magnitude.

If I may address myself to just a few points in terms of a due process analysis, again, number one, this instruction deals with a specific constitutional right. Number two, this Court has recognized that a defendant's testimony is expected, even in a case that doesn't present the facts that we have here. Number three, instructions do work, and it's basically a pillar of our criminal justice system. Instructions are effective, and this Court recognized that, of course, in Lakeside. Number four, silence is ambiguous. Again, if you take away the facts of this case, silence, as this Court noted in Doyle v. Ohio, pretrial is ambiguous; it is even more so at trial, insolubly ambiguous.

Again, the truth-seeking function is undermined because there may be reasons why a defendant such as Mr. Carter declines to testify, unrelated to guilt or innocence.

And the final two points are that, while it's not dispositive of the due process issue presented, we find widespread support in the overwhelming number of jurisdictions. Our research has only disclosed three, or perhaps four, jurisdictions that don't give this instruction upon request. And finally, the last criterion is that state interest. And I would ask the Court to examine what important State interest is at stake here? The only articulated interest in the Commonwealth's brief is that the instruction should be prohibited in the defendant's own interest, and we submit that the Commonwealth stating that it's in the defendant's interest not to get a protective instruction is not the kind of basic exercise of a state's jurisdiction which need be given due -- perhaps it needs to be given due deference but not undue deference in any Fourteenth Amendment analysis. And unless the Court has questions, I will reserve --

QUESTION: I have just one question. You've said several times that you think the Lakeside case helps you. I'm not sure I understand why you think it helps you.

MR. McNALLY: Well, the holding of it is really neutral on the question presented in this case.

QUESTION: Maybe it's neutral, but you seem to think it helped you.

MR. McNALLY: Well, what I was referring to was the language, and specifically on two points: the first being that juries will notice a defendant's failure to testify, even if in that case defense counsel takes great pains to avoid any mention of the issue. We think that is a significant point in this case. And the second point being that protective instructions are effective. There was language in the majority opinion which addressed itself to those two, and we think they are important considerations for our due process analysis. To that extent.

QUESTION: Also, the definition of that word comment in Lakeside helps you, I think.

MR. McNALLY: Again, Mr. Justice Stewart, we agree. We'll reserve the remainder of our time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Bullock.

ORAL ARGUMENT OF ROBERT V. BULLOCK, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The facts in this case point overwhelmingly to the guilt of the petitioner, in this particular instance. If you will recall, Officer Ellison was driving her cruiser down the street, saw an alley, looked in the alley and saw something

suspicious. She backed up, shined her light down the alley, saw two individuals crouched. They took off running, She went down the alley and saw that there was a hole in the side of Young's Hardware Store. She gave out a call on her police radio for Officer Davis who was in the vicinity. He saw petitioner running down an alley; he gave chase. They apparently ran parallel for a period of time, at which time Officer Davis cut across and almost ran into the petitioner.

When Officer Ellison saw him, saw the individual at the hardware store, he was carrying a gym bag, what she described as a gym bag. He had on distinctive looking clothing, sort of orange pants, and so forth. He was apprehended by Officer Davis --

QUESTION: How does this, counsel, how does this bear on the issue that's presented here?

MR. BULLOCK: I believe two-fold, Your Honor. If it please the Court, first, I would think the Court would be reluctant to reverse any case on which there was overwhelming evidence of guilt. And second --

QUESTION: Well, then, are you suggesting a harmless error argument?

MR. BULLOCK: We have in our brief; yes.

QUESTION: What you're telling us now is harmless error argument?

MR. BULLOCK: Yes, sir.

QUESTION: Counsel, have you read Brewer v. Williams?

MR. BULLOCK: Yes, sir. I understand that position. The second issue, if it please the Court, is that it would appear to us that there was very little likelihood under any circumstances that the defendant in this particular case would have taken the stand. As such, we are suggesting that this in effect may be a manufactured type constitutional issue, because the facts were so overwhelming. It would be very unlikely for any defense counsel to recommend to his client that he would take the stand.

QUESTION: Couldn't that easily have been solved by giving the instruction, if he was so guilty? Why didn't you give the instruction? Why didn't you object to it if he was so guilty?

MR. BULLOCK: Why wasn't it objected to? The lower court in Kentucky was bound in effect by the Supreme Court of Kentucky in its decision in Green v. Commonwealth.

QUESTION: It had no option.

MR. BULLOCK: That's basically true. That's right.

QUESTION: Then they would have had to do it whether he was guilty or innocent, wouldn't they? Wouldn't they?

MR. BULLOCK: Yes.

QUESTION: Wouldn't they have to take the same position?

MR. BULLOCK: That's right.

QUESTION: Well, then, what are the facts of interest to us?

MR. BULLOCK: The point, I guess, I was pointing to, Mr. Justice Marshall, is that this was a foregone conclusion and in effect the constitutional issue itself was manufactured because they knew that he wasn't going to be able to take the stand in a case like this.

QUESTION: Well, isn't the constitutional issue the only issue before us?

MR. BULLOCK: Well, there's two constitutional issues according to my brother, Mr. McNally.

QUESTION: Well, do you think we took the case to decide a harmless error question?

MR. BULLOCK: No, sir.

QUESTION: Well --

MR. BULLOCK: To find a Fifth Amendment violation in this particular case, there must be a finding of compulsion under the Fifth Amendment cases. We would agree that there is a difference in some of the cases which indicate, the trilogy of cases, Bruno, Griffin, and Lakeside, which indicate maybe a preference for this type of an instruction. The Supreme Court of Kentucky, as you've noted, does not believe that the instruction should be given, and in fact they have stated on numerous occasions that they believe it does

more harm than good.

On the other hand, as we've noted, there is some indication that this Court would prefer the instruction. As has been pointed out many times by the Court, differences or incongruity within the limits of fundamental fairness is at the heart of our federal systems. The formulation of procedural rules to govern the administration of criminal justice in the various states is properly a matter of local concern. Of course, that's always subject to the parameters of the United States Constitution.

QUESTION: Are you suggesting Kentucky is kind of a lean instruction state where the preference within constitutional limits, not just on this particular kind of a charge but on any charge, is that you just don't charge the jury at trial?

MR. BULLOCK: Well, that has been stated in at least one Kentucky case, but the State -- my point is, the State of Kentucky can be different, if it chooses to be, as long as it falls within the parameters of the United States Constitution.

QUESTION: Is that parameters or perimeters?

MR. BULLOCK: I thought it was parameters. Maybe it's perimeters.

In discussing compulsion -- and this Court has looked at cases similar to this, but, this issue --

the defendant in this case did not testify. We suggested why he probably did not testify. But since he did not testify, there was in fact no compulsion to testify under the Fifth Amendment. The procedures that were used were the normal procedures of a trial, such as required for a decision on the defendant's part. He has to decide in a case like that whether he wants to testify or not to testify, and this is the normal state of trial procedure. It is not compulsion by the State of Kentucky in a situation like this.

QUESTION: Would you think that knowing in advance what kind of instruction the judge would give one way or the other would have any influence on his decision?

MR. BULLOCK: It might.

QUESTION: Then aren't you admitting that there is some compulsion, if there's no instruction when he wants it?

MR. BULLOCK: I don't believe so.

QUESTION: Well, if you say that the fact the judge is not going to give the instruction may influence him not to testify, then isn't that a factor that may tend to compel him not to testify?

MR. BULLOCK: But, sir, this is not a compulsion by the State of Kentucky. This is the normal trial situation as opposed to something that the State has compelled upon the defendant.

QUESTION: Well, the State has a rule that the

judge can't give this kind of instruction. That rule, it seems to me you have just suggested, does have an impact on his decision.

MR. BULLOCK: Yes. The Court --

QUESTION: But you're saying it is not a form of compulsion.

MR. BULLOCK: Well, the court has held in the past that it's not a form of compulsion for a defendant to have to make hard choices in the case, such as, the Court has held that when an individual decides to take the stand and testify in his own defense, there can be cross-examination, and cross-examination as to the guilt on that particular case. And that's not considered compulsion. Likewise, the Court in a single verdict death penalty case has said, even though a man may have to plead for his life, his very life, the fact that if he gets on the stand and may be cross-examined, this is not considered compulsion; McGautha case.

The supposition that a failure of a particular defendant to testify is a supposition, it's not a proven fact as such. No one knows what an individual jury will think or will not think.

QUESTION: What would you imagine a jury would think, other than that the man is guilty?

MR. BULLOCK: I think that they may well not notice at all.

QUESTION: So they're not, they wouldn't think anything of it?

MR. BULLOCK: They may not notice at all, or discuss it.

QUESTION: They may not notice it?

MR. BULLOCK: In -- that's been part of the supposition of the Kentucky courts on this particular issue. But there is an additional part of the instruction in this particular case, if you will recall. The court in this case instructed that the jury shall consider the evidence alone and in arriving at its decision on guilt or innocence, the failure to testify is obviously not evidence, and its consideration would have violated the court's instruction. Therefore --

QUESTION: May I ask just one more question.

MR. BULLOCK: Certainly.

QUESTION: Do you want me to assume that there is a possibility that throughout the jury proceedings not one of the 12 will mention the fact that he didn't take the stand?

MR. BULLOCK: That there is a possibility?

QUESTION: Yes.

MR. BULLOCK: Yes, sir.

QUESTION: There is a possibility that that will not happen?

MR. BULLOCK: I'm sorry, maybe I misunderstood

your question. Would you rephrase it, please?

QUESTION: You said originally that you could have assume that nobody noticed it. Am I to assume that not one of the 12 noticed it?

MR. BULLOCK: In a given case?

QUESTION: Yes.

MR. BULLOCK: There could be such a case; yes, sir.

QUESTION: Go ahead.

MR. BULLOCK: We would take the position that to reverse this particular case on the no inference instruction would stretch the constitutional principles behind the Fifth Amendment in an unprecedented manner and would in effect give an inequitable result. Neither the Fifth or Fourteenth Amendments cause a penalty, since the Court has created no undue or additional pressure upon the defendant to take the stand. Any of the consequences of the silence are defendant's choice, a part of trial tactics and not caused by the courts or the statutes of the State of Kentucky.

If we may, let me draw an analogy between this and the situation in Taylor v. Kentucky and Kentucky v. Wharton. In those two court cases, this Court held that under certain factual patterns where the evidence was not overwhelming, there may be a totality of circumstances that constitutionally require a presumption of innocence instruction in that case. The Court in Wharton, however, pointed out that there is not

an absolute right to the presumption of innocence instruction. In Wharton it was held there was no such right to the presumption of innocence instruction. We feel that in this particular case there is no constitutional requirement to give the no inference instruction. The two types of instructions are somewhat similar. It has been attacked in the petitioner's brief, or it has been stated in the petitioner's brief, that the State of Kentucky has not been consistent, has waffled back and forth on the question of whether it's best to give the no inference instruction.

Just to brliefly respond, the Kentucky court has consistently maintained that no inference instruction is not in the best interests of an accused. However, in one case, at least, it by dicta said that the instruction under those circumstances might have been allowed. It was later repudiated.

QUESTION: Well, hasn't the deviation by the Kentucky court been on the construction of the meaning of the Kentucky statute?

MR. BULLOCK: Yes, sir.

QUESTION: What the no comment rule means?

MR. BULLOCK: Yes, sir.

QUESTION: And so the Kentucky court has not been completely consistent about that?

MR. BULLOCK: That's correct; yes. At first it

says that no one may comment whatsoever.

QUESTION: You mean, that's the present law?

MR. BULLOCK: That is the present law, yes, sir.

QUESTION: It would be that the statute means that this instruction must not be given?

MR. BULLOCK: This instruction must not be given.

QUESTION: And that's the present law of Kentucky, isn't it?

MR. BULLOCK: Yes, sir.

QUESTION: If the law is that no one would comment, what about the defendant's own lawyer explaining to the jury that there is a Fifth Amendment privilege, and so forth?

MR. BULLOCK: He made that, and in this particular --

QUESTION: I know he made it, but your adversary indicated that he did it illegally.

MR. BULLOCK: Yes. We pointed that out in our brief.

QUESTION: So your view is that even his own lawyer in Kentucky is not permitted to?

MR. BULLOCK: That's what case law in Kentucky says; yes, sir.

QUESTION: Would the question arise in the case where a guilty verdict is returned? Who is there to complain about it, then, if there's no appeal? The problem is academic then, isn't it?

MR. BULLOCK: Yes, sir. My brother, Mr. McNally, has gone through a tremendous task of trying to catalog the various states as to their holdings on the no inference instruction. We do not specifically disagree as to each of these cases in our brief. The reason is that it would have caused a brief in and of itself. We would point out that there is room for difference of opinion as to the holding of the various states, and it would be our position, more importantly, that it really isn't germane in and of itself, since conceivably there could be 49 states that require the no inference instruction and Kentucky be the lone state the other way. But as long as there was no constitutional violation, Kentucky would be within its rights as a separate state.

The petitioner in this case received a fair trial. One of the questions earlier was whether a judge could explain various rights during a voir dire. That's exactly what happened in this particular case. The defendant's rights were explained to the jury. It was stated that he was presumed by the law to be innocent. The judge took great pains to explain and make sure that there was a fair trial during the voir dire. And, as I mentioned, there was an instruction that they could find the defendant guilty only from the evidence alone.

QUESTION: What is your view on Lakeside v. Oregon?

Do you think that case helps you or hurts you?

MR. BULLOCK: We think it helps us. The gist of it as far as we can see is that it may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection and each state is, of course, free to forbid its trial judges from doing so as a matter of state law. If they can forbid them from giving the instruction over the objection of counsel, we feel that they should likewise be able to forbid the instruction, period.

QUESTION: Well, but, does that follow? Because, isn't the Fifth Amendment privilege by its very nature something that is up to the defendant either to exercise his right not to testify or to testify? That's the whole theory of it, that the option is the defendant's.

MR. BULLOCK: Yes, but there must in that case be some compulsion. And in this case there was no compulsion.

In conclusion, we would suggest that constitutional rights must be jealously guarded and the Constitution must be looked at in behalf of the defendant. But the public, likewise, must be safe and secure with the knowledge that the perpetrators of crime will be punished if they're guilty. Constitutional grounds for reversal should not be manufactured or decided on tenuous or speculative grounds. In this case it is our position there is neither a Fifth nor a Fourteenth Amendment violation of law.

If there are no further questions, I will --

MR. CHIEF JUSTICE BURGER: Very well. Do you have anything further, Mr. McNally?

MR. McNALLY: Just a few points, if I may.

ORAL ARGUMENT OF KEVIN MICHAEL McNALLY, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. McNALLY: I'd just like to address ourselves briefly to the question of harmless error since we didn't originally address that.

First of all, it was not presented below, and after the discussion this morning, it's clear to me it's not jurisdictional but we think that there are good reasons why this Court would not want to reach that particular issue at this time. Since Kentucky is one of the few jurisdictions with jury sentencing, we feel that any harmless error analysis would have to include Kentucky's unique procedure and in that sense the policy is correct, that it would be better to let the Kentucky Supreme Court address that issue first.

But secondly, if the Court were to address it, Bruno v. United States as I understand it is one of the leading federal cases on harmless error, and again, a unanimous Court rejected the contention that the refusal to protect the construction is harmless error in that case.

QUESTION: That was under a specific federal statute though, wasn't it?

MR. McNALLY: Substantial rights, I believe, Mr. Justice Rehnquist, is the key phrase in the statute you refer to. And we submit that the Court's holding in Bruno that the substantial rights of the defendant were affected without any factual analysis in the opinion indicates that in this case it also affected the substantial rights; and further, that the Chapman and Harrington analysis is a stricter standard from our perspective than even the federal harmless error statute, and in that sense, since it's not harmless error in federal court, it couldn't possibly be harmless error once this court addresses, if it does, the question in federal constitutional terms.

And finally, the evidence, we submit, is not overwhelming in a constitutional sense, and indeed, we admit that there are substantial incriminating circumstances under which the defendant was arrested. One other reason why a harmless error analysis wouldn't be practical in this situation is, is that the stronger the incriminating circumstances the stronger the desire of the jury is going to be to hear the defendant testify in the first place. And in that sense we submit that harmless error analysis would be inappropriate as to this question.

Finally, I might address myself to the statement that the issue was somehow manufactured by trial counsel. We submit that, first of all, the Commonwealth conceded

below, as I mentioned earlier, that the defendant did not testify because of his fear of impeachment. But even, as Mr. Justice Marshall pointed out, even if those facts weren't in this case, they are not necessary to this case, they are merely illustrative of the legal point that we were trying to make.

Unless there are any questions, I believe I've made all the points that we feel are necessary.

MR. CHIEF JUSTICE BURGER: Very well, thank you, gentlemen. The case is submitted.

(Whereupon, at 1:44 o'clock p.m., the case in the above-entitled case was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-5060

LONNIE JOE CARTER

V.

COMMONWEALTH OF KENTUCKY

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