ORIGINAL

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-6840

TITLE MICHAEL P. JAMES, Petitioner v. KENTUCKY

PLACE Washington, D. C.

DATE February 28, 1984

PAGES 1 thru 45

(202) 628-9300

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - - - - - - - - - - - - - - - - - - - - - -x

3 MICHAEL P. JAMES, :

4 Petitioner, :

5 v. : No. 83-6840

6 KENTUCKY :

7 - - - - - - - - - - - - - - - - - - - - - - - - - -x

8 Washington, D.C.

9 Tuesday, February 28, 1984

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States

12 at 1:01 o'clock p.m.

13 APPEARANCES:

14 C. THOMAS HECTUS, ESQ., Louisville, Kentucky; on behalf

15 of the Petitioner.

16 MS. PENNY R. WARREN, ESQ., Assistant Attorney General of

17 Kentucky; Frankfurt, Kentucky; on behalf of the

18 Respondent.

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1 C O N T E N T S

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in James v. Kentucky.

4 Mr. Hectus, you may proceed whenever you are
5 ready.

6 ORAL ARGUMENT OF C. THOMAS HECTUS, ESQ.
7 ON BEHALF OF THE PETITIONER

8 MR. HECTUS: Mr. Chief Justice, and may it
9 please the Court:

10 This case is here on petition for writ of
11 certiorari to the Supreme Court of Kentucky. The issue
12 involved is whether or not the trial court was
13 constitutionally required to admonish the jury that they
14 could draw no adverse inference from petitioner's
15 failure to testify at his state criminal trial.

16 The Kentucky Supreme Court apparently applied
17 a procedural bar to the relief requested, relying on
18 this court's decision in Carter v. Kentucky that
19 although an instruction was constitutionally compelled,
20 an admonition was not. Implicitly, the Kentucky Supreme
21 Court also ruled that as a matter of substantive
22 constitutional criminal procedure, that petitioner was
23 not entitled to an admonition regardless of Kentucky
24 evidentiary rules.

25 QUESTION: Was there anything to prevent



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1 counsel, when the court ruled, to say I intend my motion
2 in the sense of an instruction, an admonition or an
3 instruction, in the alternative, treating them, even
4 though they are not, treating them as though they are
5 synonyms?

6 MR. HECTUS: Certainly, Mr. Chief Justice,
7 there is nothing requiring counsel from asking for
8 relief in the alternative.

9 QUESTION: Nothing preventing him.

10 MR. HECTUS: Nothing preventing him, and
11 certainly there was nothing preventing the trial court
12 from performing its obligation that once it was put on
13 notice that the defendant wanted some sort of jury
14 guidance, no matter how that jury guidance is phrased,
15 whether as an admonition, an oral, authoritative
16 communication to the jury, or as an instruction in
17 writing containing the law of the case, certainly I
18 think the judge was on notice as to the relief that the
19 defendant wanted. If he thought it was improper, I
20 think he had fair notice under the Kentucky rules of
21 criminal procedure to go ahead and give the instruction
22 that is also mandated under those same rules upon timely
23 request.

24 I think that this issue has great importance
25 because of the fact that the petitioner in this case was



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1 tried on three separate and distinct charges. He was
2 tried for receiving stolen property, a handgun that had
3 been stolen from the victim. He was tried for a
4 subsequent burglary. And he was also tried for a still
5 later rape, all of the same victim.

6 Petitioner presented no evidence in his behalf
7 as to either the receiving stolen property or as to the
8 burglary. He presented only evidence as to his apparent
9 lack of presence at the scene at the time of the rape.
10 So in other words, at the time this case went to the
11 jury on the receiving stolen property charge, the only
12 thing that the jury had before them was evidence that he
13 was in fact in possession of a handgun which had been
14 stolen. There was no evidence showing that possession
15 was in any way knowing, and I think in that particular
16 case the absence of the admonition was critical.

17 As to the burglary, the only evidence of the
18 burglary of May 1, 1981 of the victim's residence
19 linking the petitioner to that residence was one
20 fingerprint on the inside of a door panel at
21 petitioner's apartment.

22 QUESTION: Well, when you emphasize one, would
23 it have made any difference if there were eight of
24 them?

25 MR. HECTUS: I think it would have made a

1 difference depending upon where those fingerprints
2 were. I think the locations of certain fingerprints are
3 more incriminating than the location of the fingerprint
4 in this case. In this case the victim testified that
5 petitioner had been in her apartment on several other
6 occasions. It is not unreasonable to assume that
7 somebody entering or leaving an apartment might leave
8 their fingerprint on the inside of a glass door panel as
9 opposed to, for example, a safe breaking case where a
10 defendant's fingerprints are found on the inside of a
11 safe to which he had no legal or proper access. I think
12 in this case that fingerprint was certainly neutral as
13 to incriminating the defendant.
14 The defendant had asked for a severance of
15 that particular charge from the other charges. That
16 severance was denied, and I think that that is one of
17 the things that the Court should consider in considering
18 the entire context of this case. We are not merely
19 speaking to petitioner's rape conviction here which was
20 subsequently enhanced in terms of sentencing to a life
21 sentence on the basis of his being a persistent felony
22 offender, which --
23 QUESTION: Mr. Hectus, was the defendant in
24 the case below represented by different counsel at
25 trial?

1 MR. HECTUS: Yes, Justice O'Connor.

2 QUESTION: And counsel, for whatever reason,

3 did not request a written or present the court with a

4 written instruction in this regard?

5 MR. HECTUS: No, but I would like to point out

6 to you --

7 QUESTION: And Kentucky law, I take it, is

8 perfectly clear that only written instructions will be

9 given and that counsel has to present written

10 instructions?

11 MR. HECTUS: It is perfectly clear that the

12 trial court has an obligation to instruct the jury in

13 writing. It is not perfectly clear because it is not a

14 matter of state law that the defendant has to tender

15 written instructions in order to preserve that issue.

16 Kentucky rule of criminal procedure specifically

17 provides that the defendant can request an instruction

18 or by motion request an instruction or object to an

19 instruction.

20 Certainly here there was an adequate motion

21 made.

22 QUESTION: And in Kentucky law -- all right.

23 And in Kentucky law there has been a distinction made,

24 has there not, between instructions and admonitions?

25 MR. HECTUS: Absolutely. An admonition has



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1 been defined in Kentucky law as any authoritative
2 communication of the court to the jury regarding their
3 duty or conduct as jurors. I certainly think that with
4 regard to the Fifth Amendment privilege, an admonition
5 with regard to the defendant's Fifth Amendment privilege
6 and the use to which the jury should put that has to do
7 with their duty as jurors.
8 So I think that we come squarely within the
9 terms of an admonition. As a matter of fact, this Court
10 is well aware that oftentimes when Griffin errors are
11 committed by prosecutors with regard to comment on the
12 defendant's failure to testify, the appropriate relief
13 is for the court to admonish the jury that they can't
14 consider the defendant's failure to testify.
15 I certainly don't think that it would be
16 logical to have to wait for an error of that magnitude
17 before you are entitled as a matter of constitutional
18 law to the relief that was requested in this case.
19 If I could get back procedurally, there are
20 some other important points that I think the Court ought
21 to consider with regard to the overall context of the
22 request for the instruction, its importance to this
23 case, and later with regard to the Commonwealth of
24 Kentucky's assertion of harmless error.
25 One, the judge did overrule defendant's motion



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1 for severance. That was critical later on due to the
2 extreme paucity of the Commonwealth's evidence of the
3 burglary. Furthermore, the prosecutor noted his
4 intention early on, prior to presentation of any
5 evidence, that he was going to impeach the defendant
6 with a prior forgery conviction. The defendant in the
7 persistent felony offender stage of this trial,
8 contested that that was in fact a felony conviction and
9 asserted that it was a misdemeanor conviction.
10 I think that it is implicit in the defendant's
11 failure to testify in this case that because the judge
12 was going to allow that forgery conviction which he
13 contested to be used as impeachment, that that was a
14 consideration in his failure to testify, so that we are
15 dealing with a reason, a likely inference for his
16 failure to testify that is unrelated to guilt or
17 innocence, and I think that that is an important
18 consideration.
19 During the voir dire, the defense counsel was
20 precluded from fully exploring with the jury their
21 feelings, their attitudes about the defendant's failure
22 to testify if in fact he did not testify. Defense
23 counsel was allowed to inquire as to one juror's
24 attitude. After exploring that attitude with the juror,
25 defense counsel attempted to explore the rest of the

1 venire's attitude toward that particular
2 consideration --
3 QUESTION: Sometimes a judge's ruling on that
4 score in that stage is to prevent error getting into the
5 case right at the outset because of the view that that
6 is a good way, a good way to call attention to the
7 failure to testify by having a great deal of discussion
8 about it when they are picking a jury.
9 MR. HECTUS: That may be, Mr. Chief Justice,
10 but I think in this point, the trial judge's response to
11 his attempt to do that was that the jurors have already
12 been instructed that they are to decide this case on the
13 law and the evidence. This Court specifically
14 repudiated that sort of admonition or instruction in
15 Carter as being a substitute for a full explanation as
16 to the defendant's right to not testify.
17 QUESTION: At what stage did your client
18 request the admonition to the jury, Mr. Hectus?
19 MR. HECTUS: At the close of all the evidence,
20 and apparently during the instruction conference.
21 QUESTION: So that if his request for an
22 instruction had been given -- for an admonition had been
23 granted by the trial court, the trial court would have
24 admonished the jury presumably at the next time the jury
25 was brought in, which might have --

1 MR. HECTUS: Presumably, immediately prior to
2 his giving the law of the case in the instruction.
3 QUESTION: And are there written instructions
4 given to the jury in Kentucky?
5 MR. HECTUS: Yes, as an --
6 QUESTION: So that the jury takes the --
7 MR. HECTUS: The normal practice is to give a
8 copy of the written instructions to the jurors.
9 QUESTION: Under your client's request, the
10 admonition, being oral, would not have gone in writing.
11 MR. HECTUS: Assuming that the request for an
12 admonition wasn't an inadvertent use of the word, or
13 request for an instruction, yes, then I assume that he
14 wanted them to be orally admonished right then and there
15 prior to the instructions.
16 QUESTION: Well, you are not suggesting, are
17 you, that the trial court was obligated to determine
18 whether the lawyer's request was inadvertent?
19 MR. HECTUS: Not at all. I'm not suggesting
20 that at all. I think that the request for an admonition
21 in this case is a perfectly logical request. If the
22 defendant was entitled to instruction, as the Kentucky
23 Supreme Court agreed, then certainly he's entitled to
24 less than what this Court has mandated, assuming this
25 Court finds that an admonition is in any way less than

1 an instruction.

2 I don't think that that's true because I think

3 this Court's concern in this area has been with jury

4 guidance, and I think that the concept of jury guidance

5 includes either an admonition or instruction, and --

6 QUESTION: Well, I come back to the practice

7 in Kentucky. Is it not unusual for counsel not to make

8 a written request for an instruction?

9 MR. HECTUS: I don't think that's unusual at

10 all, Mr. Justice Powell.

11 QUESTION: And the court makes its own

12 instructions without any help from counsel?

13 MR. HECTUS: Usually during the instruction

14 conference, instructions are discussed, and most

15 instructions, from my practice in Kentucky, including

16 some --

17 QUESTION: What do you discuss if there is

18 nothing in writing?

19 MR. HECTUS: Well, for example, lesser

20 included offenses, whether or not --

21 QUESTION: Was this particular question of

22 admonition discussed in this conference?

23 MR. HECTUS: Apparently it was. The --

24 QUESTION: It's not clear from the record, to

25 me, as I read it.



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1 MR. HECTUS: The record apparently was not
2 made during the instruction conference, but when the
3 proceedings went back on the record, defense counsel
4 indicated that there had been a request for an
5 admonition on the defendant's failure to testify, and
6 the apparent request for a no inference admonition.
7 There was also indication from defense counsel that that
8 had been overruled. There was no response from either
9 the Court or to the -- or by the prosecutor as to
10 defense counsel's assertion of that. I am sure had tha
11 not occurred, that there would have been some response.
12 QUESTION: Did counsel except on the record to
13 the overruling by the judge?
14 MR. HECTUS: There is no requirement in
15 Kentucky for exceptions.
16 QUESTION: In Kentucky.
17 MR. HECTUS: The reason I think that the whole
18 notion of instructions and the request for the
19 admonition in Kentucky is not really important is
20 because the Kentucky practice, as this Court is aware I
21 think from cases like Taylor v. Kentucky, is to give
22 very spartan and skeletal instructions, in this Court's
23 own language, they give very brief instructions which
24 have only to do with the elements of the crime, which
25 come right out of the statute book.

1 In response to this Court's mandate that on
2 request the courts in Kentucky give an instruction on
3 the presumption of innocence, the response of the
4 Kentucky courts has been to instruct the defendant is
5 presumed to be innocent. That's it. There is no
6 fleshing out of instructions in Kentucky.
7 I think when compared to federal instructions,
8 the difference is extreme. While this Court has not
9 constitutionally condemned that, I think it is a factor
10 to consider.
11 QUESTION: Well, it might actually, if one
12 were looking at the thing from some other planet, spare,
13 skeletal instructions might be better than these
14 convoluted things you see some courts give where, you
15 know, the presumption of innocence takes fifteen pages
16 to define, and the jurors are all asleep at the end of
17 the definitions.
18 MR. HECTUS: I would respectfully assert that
19 I would prefer the fleshed out sort.
20 QUESTION: And in some places, years ago, the
21 instructions were in effect do what you want to, I mean,
22 do what you think is just.
23 MR. HECTUS: Nonetheless, I think that now
24 there are at least certain constitutional
25 prerequisites. This Court indicated in Carter that the



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1 trial judge had an obligation upon request to diminish
2 the possibility of the jury drawing any adverse
3 inference from the defendant's failure to testify.
4 If I could proceed on with some of the
5 evidence in this case, which I also think has to do both
6 with the consideration of whether this should have been
7 given and the consideration, given that it wasn't,
8 whether it was harmless error --
9 QUESTION: Mr. Hectus, before you do that, let
10 me just ask one question similar to the one Justice
11 Powell asked. As I read the appendix, the critical
12 statement is the defendant requests, in the present
13 test, that an admonition be given to the jury that no
14 emphasis be given to the defendant's failure to testify,
15 which was overruled, sort of internally inconsistent,
16 but you read that as indicating that in the instruction
17 conference, such a request was made and overruled.
18 MR. HECTUS: I think that the Kentucky Supreme
19 Court and the Commonwealth of Kentucky per the Attorney
20 General's Office have assumed that that was the state of
21 affairs.
22 QUESTION: I see. And then immediately after
23 that happened, he went ahead and gave the instructions.
24 So if the admonition had been given, it would have been
25 given right in, as part of the --



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1 MR. HECTUS: Prior to instructions.

2 QUESTION: I mean, at the same time.

3 MR. HECTUS: Prior to instructions, right.

4 And in fact, the Court reads the instructions, as is the

5 federal practice, and then would give the instructions.

6 So the only thing -- the defendant would have been

7 prejudiced, in fact, by not having that included in the

8 written instructions to the jury, but certainly this

9 Court has indicated it's unwilling to presume that

10 jurors do not listen to the admonitions of the trial

11 court.

12 QUESTION: And the oral admonition and the

13 oral instructions are given consecutively, right

14 together.

15 MR. HECTUS: Assuming that there are any

16 admonitions to give.

17 QUESTION: Right, okay.

18 MR. HECTUS: Moving on with the evidence,

19 after Ms. Richardson testified --

20 QUESTION: Counsel, in Kentucky practice, is

21 there just one copy of the written instructions that

22 goes into the jury room, or does each juror get a copy?

23 MR. HECTUS: There is not a rule on it. In my

24 experience, I have only seen that happen, it is

25 basically according to a judge's preference. There is



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1 no rule prohibiting it and there is no rule mandating
2 it. Most judges will only send back one copy of the
3 instructions.

4 QUESTION: All right. As far as you know, do
5 many states have this practice?

6 MR. HECTUS: With regard to the -- with regard
7 to the instructions?

8 QUESTION: Of written instructions going into
9 the jury room?

10 MR. HECTUS: I don't think that it's novel.
11 I'm not sure whether it's unusual.

12 Two state police officers, Trooper John Sparks
13 and Detective Claude Owen, very briefly testified as to
14 the arrest of the defendant. I would like to point out
15 to the Court that both those officers, in response to
16 questions by the prosecutor, made statements in front of
17 the jury as to the defendant's exercise of his Fifth
18 Amendment privilege. Trooper Sparks specifically said
19 in response to a question, after advising the defendant
20 of his rights, he did not make any statement whatsoever
21 regarding anything. I would submit that that's an error
22 in violation of Doyle v. Ohio that is unpreserved, but I
23 certainly think the Court should consider it in deciding
24 whether or not this error is harmless.

25 Detective Owen also testified that the



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1 defendant made nc statement upcn his arrest. This was a
2 post-arrest, post-Miranda comment on silence.
3 Detective Courtney went on tc make a statement
4 that the only statement that he recalled the defendant
5 making was that he didn't own a gym bag. Of course,
6 Detective Ccurtney, Detective Owen and Trccper Sparks
7 were all present at the time and neither Trooper Sparks
8 or Detective Owen recalled that statement.
9 Mr. Evans testified as to the fingerprint cn
10 the inside of the glass. Of ccurse, that in and of
11 itself is nct either incriminating or exculpatcry,
12 depending on the circumstances. Mr. Evans did state,
13 thcugh, that fingerprints cn the inside of buildings can
14 remain for years, again reminding the Court that Ms.
15 Richardson had stated the defendant had been in her
16 apartment on several occasicns.
17 There was also some evidence from a serologist
18 as to the Group A secretions on some rags that were
19 found and that the victim was a Group A secreter,
20 apparently trying tc ccrroborate the victim's story.
21 Later on the prosecutor made a reference to the fact
22 that the defendant's wife did not testify, in violation
23 of Kentucky statute cn spousal immunity, tc the effect
24 that had the victim's wife been a Group A secreter, she
25 wculd hav been brought forward, which I think is still

1 yet another consideration of the Court, to decide
2 whether or not this error was harmless.
3 Finally, David Adams testified, who is her
4 immediate supervisor, that she came back upset from
5 lunch. He also testified that she was four and a half
6 hours late, that her job performance had been
7 fluctuating in the preceding weeks.
8 The defendant then presented evidence simply
9 as to the rape charge. Mr. Marion Bates testified that
10 he was actionally in the basement of the defendant's
11 residence where the rape allegedly occurred, and that he
12 heard no noises up there but a record player going on.
13 He specifically recalls leaving that apartment sometime
14 between 20 minutes to 1:00 and 1:00 o'clock in the
15 afternoon to work on his car in the driveway, which was
16 nextdoor to the defendant's residence. He also
17 specifically recalled seeing the defendant leave at ten
18 minutes -- at 2:00 o'clock or shortly before 2:00
19 o'clock. The defendant testified that she was
20 unlawfully imprisoned by the defendant in his apartment
21 from approximately a short time after 12:30 until almost
22 4:30. So there was defense evidence calling into
23 question the victim's account of the case.
24 Then a Mr. Lambert also testified that he
25 often would show Mr. Bates the basement in the apartment



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1 where the defendant lived and where the crime allegedly
2 occurred, didn't recall the specific date, but did
3 corroborate Mr. Bates' testimony to the extent that he
4 said he often shows Mr. Bates that property because it
5 was under renovation.

6 It was at this point, after all the evidence,
7 that the defendant requested the admonition that was
8 denied.

9 In the prosecutor's closing argument, he made
10 two references to the defendant's failure to contradict
11 the victim's story. I think that at least the Federal
12 Circuit Courts have held that when the defendant is the
13 only person that can contradict testimony, that a
14 reference to the failure to contradict is an indirect
15 reference on the failure to testify, which again is two
16 occurrences of Griffin error. There was no request for
17 an admonition in that particular --

18 QUESTION: Well, an alibi witness would
19 contradict, too, or ten alibi witnesses if he was off at
20 a football game with them. So your statement is not
21 accurate that only, only the defendant could
22 contradict.

23 MR. HECTUS: I think under the circumstances
24 of this particular case where the defendant's evidence
25 was limited to the rape charge and there wasn't any

1 evidence on the other charges, that that had to be
2 considered by the jury as a reference to the defendant,
3 even though --
4 QUESTION: Did he bring in any alibi
5 witnesses?
6 MR. HECTUS: As to those charges?
7 QUESTION: Did he bring any alibi witnesses
8 saying he was somewhere else at the time?
9 MR. HECTUS: No, sir.
10 QUESTION: Well, such witnesses could
11 contradict.
12 MR. HECTUS: If such witnesses were available,
13 but then, we don't know whether they were available or
14 not or why he did not. I think that --
15 QUESTION: Well, I suppose a fact-finder or a
16 judge or anyone else in the courtroom would assume the
17 reason they didn't bring alibi witnesses is because
18 there weren't any.
19 MR. HECTUS: Right, and that's exactly the
20 point, Mr. Chief Justice, that they would assume that
21 the reason he didn't bring any evidence forward and the
22 reason he didn't testify was because he guilty. The
23 Court indicated in Lakeside v. Oregon that that is the
24 natural inference.
25 QUESTION: Of course, a great many people

1 think that's what juries do, no matter what any judge
2 instructs or admonishes them.
3 MR. HECTUS: Well, Mr. Chief Justice, all I
4 can say is that I would agree with the Court's statement
5 in Lakeside that the Court has yet not come to a
6 conclusion that juries are going to disregard
7 admonitions or instructions of the court. I think that
8 in this particular case, the Court has to assume that if
9 they were instructed to disregard this, then they
10 would. That is the basis and the rationale of the
11 Court's holding in Carter v. Kentucky. If that's not
12 held true, then Carter doesn't make sense.
13 Now --
14 QUESTION: Nor does Griffin.
15 QUESTION: Nor does Griffin, nor does
16 Griffin.
17 QUESTION: Nor Chapman.
18 QUESTION: Would you want Carter to depend on
19 such a weak reed as Griffin?
20 MR. HECTUS: I think Carter simply stands for
21 the proposition that Mr. Justice Stevens and Mr. Justice
22 Brennan stated in their concurring opinion that
23 whether -- I take that back -- in Lakeside, that whether
24 or not the jury is going to be given any guidance on the
25 failure to testify is going to be up to counsel and the

1 defendant, and in this particular case, it's obvious
2 that counsel and the defendant requested some jury
3 guidance and were denied it.

4 I would like to talk briefly about what I
5 think are the constitutional underpinnings of this
6 case. Obviously the Court's familiar with Wilson that
7 applied a federal statute precluding comment on a
8 defendant's failure to testify. Wilson was
9 constitutionalized in Griffin. Bruno, which was a
10 precursor to Carter, mandated that upon request, a jury
11 be instructed as to a defendant's failure to testify.
12 Also in Bruno, the Court held that it was not going to
13 apply the harmless error rule to that type of error
14 because it didn't have to do with the mere etiquette of
15 trial rules.

16 In Malloy v. Hogan, this court stated that a
17 defendant should suffer no penalty as a result of his
18 exercise of his Fifth Amendment privilege. In later
19 cases, particularly Lakeside and Carter, the Court found
20 that when a defendant either requests instruction on the
21 Fifth Amendment, or alternatively, when the Court gives
22 it over the defendant's objection, that all that does is
23 prevent undue speculation, I believe the Court's
24 language was to the effect of allowing a jury to roam at
25 large guided only by its untutored instincts with regard



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1 to the meaning of the Fifth Amendment privilege. The
2 Court also cited in footnotes that many commentators and
3 many sociologists believe that most persons are going to
4 equate the failure to testify with guilt.
5 Again, in this case, there was an apparent
6 reason for not testifying, not having to do with guilt
7 or innocence, that being the defendant's threatened
8 impeachment with a felony conviction which was at issue
9 in a subsequent proceeding as a persistent felony
10 offender.
11 If I can move on to the procedural bar that
12 was applied by the Kentucky Supreme Court, they
13 basically stated that the defendant asked for the wrong
14 relief, consequently, he is barred from the correct
15 relief. In addition to the fact that I don't think that
16 the defendant asked for relief that was constitutionally
17 improper, I don't think that the state has substantial
18 interest in applying a procedural bar to a Fifth
19 Amendment violation. This Court took into consideration
20 a Fifth Amendment violation in Brooks v. Tennessee and
21 conceded that the State of Tennessee had a substantial
22 interest in making a defendant testify first in that it
23 precluded the defendant from coloring his testimony due
24 to other defense witnesses testifying first, the
25 defendant changing his testimony. This Court conceded

1 that that was as substantial interest and stated that
2 was not compelling enough to overcome his Fifth
3 Amendment violation by infringing upon the right of the
4 defendant to decide when he will testify or if he will
5 testify. It also infringed on his Sixth Amendment right
6 to counsel.
7 I think in this particular case, Kentucky has
8 advanced no substantial interest that would overcome the
9 Defendant's Fifth Amendment right to jury guidance on
10 this particular issue. I think Henry v. Mississippi
11 also speaks as to the state's interest in applying a
12 procedural bar.
13 QUESTION: Is your basic argument, Mr. Hectus,
14 that your client was entited to an instruction because
15 he had requested something almost like an instruction or
16 that he was entitled to an admonition because he had
17 requested an admonition?
18 MR. HECTUS: My basic argument is that he was
19 entitled to an admonition, at the very least.
20 If I have a few minutes, I would like to
21 address the state's assertion of harmlessness.
22 First, I would like to say that I don't think
23 that this type of error can ever be harmless, based upon
24 the Court's pronouncement in Bruno, based upon the
25 Court's pronouncement in Malloy, that no watered-down

1 version of the privilege applies to the states.

2 The significance of Lakeside as to

3 harmlessness is the following: The Court in Lakeside

4 stated that the petitioner Lakeside's assertion that the

5 trial court intruded on his Fifth Amendment privilege by

6 giving an instruction rested on two very doubtful

7 instructions, one, that the jury didn't notice the

8 defendant didn't testify, and two, that the jury would

9 disregard any admonition or instruction. In this case

10 we are left with the proposition that this Court

11 certainly believes that the jury noticed that the

12 defendant didn't testify, that they were not given the

13 benefit of any jury guidance.

14 As I pointed out in my brief, this is not like

15 a Griffin error, which I think the Court believes may be

16 harmless. As I stated earlier in my argument, when a

17 Griffin error occurs, even though in Griffin it was a

18 combination of the trial court and the prosecutor,

19 currently Griffin errors are most often committed by a

20 prosecutor. The relief is an admonition by the trial

21 court. There is no relief for this type of error in

22 violation of Carter.

23 Again, it also invades the Sixth Amendment

24 right to counsel which I don't think that the Court

25 should hold harmless. There are numerous reasons why if

1 the Court finds that it can be susceptible to harmless
2 error analysis, it should not be harmless in this case.
3 One, the court's refusal to sever the burglary charge
4 and the RSP charge, of which there was very little or
5 scant evidence, the limitation of voir dire, the two
6 Doyle errors by Detective Sparks and Detective Owen, the
7 Griffin errors in closing argument by the prosecutor,
8 the violation of the spousal immunity privilege by the
9 prosecutor in closing argument, the fact that
10 petitioner's failure to testify was not related to guilt
11 or innocencese, the fact that petitioner's defense as to
12 the rape charge tended to raise a reasonable doubt as to
13 his presence at the scene of the crime, and finally,
14 that if this Court's statement in Lakeside and later in
15 Carter is true that an inference that the jury might
16 draw from failure to testify as to the defendant's guilt
17 is inevitable, then certainly it occurred in this case
18 by virtue of the fact that the jury convicted this
19 defendant of a burglary charge where there was certainly
20 no evidence of an entry other than one fingerprint in an
21 apartment where he had been before.
22 If this case had been tried alone, I think
23 that the defendant would have been entitled to a
24 directed verdict as a matter of law on that kind of
25 evidence.

1 And finally

2 QUESTION: Was there a motion for a directed
3 verdict on that count?

4 MR. HECTUS: There was a motion for a directed
5 verdict as to all counts.

6 QUESTION: Well, not separately as to some?

7 MR. HECTUS: No, sir, it wasn't articulated
8 such that it broke the -- that defense counsel broke
9 down the evidence as to each charge, but he did move for
10 a directed verdict of acquittal after the Commonwealth's
11 evidence and after the state's evidence.

12 Thank you.

13 CHIEF JUSTICE BURGER: Ms. Warren?

14 ORAL ARGUMENT OF MS. PENNY R. WARREN, ESQ.,
15 ON BEHALF OF THE RESPONDENT

16 MS. WARREN: Mr. Chief Justice, and may it
17 please the Court:

18 I would like to take a moment to address the
19 suggestion that this was an inadvertent request for an
20 admonition when in fact the trial counsel meant to ask
21 for an instruction. I believe that the case was
22 practiced throughout in the Kentucky Supreme Court as
23 though all he asked for was an admonition, and that's
24 what he intended.

25 In the State Court brief, which is reproduced



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1 in our appendix, the claim is that the trial court erred
2 by failure to admonish --
3 QUESTION: What page are you on?
4 MS. WARREN: Pardon me?
5 QUESTION: What page are you on?
6 MS. WARREN: On page 1a in the Addendum, Your
7 Honor, and this is Petitioner's brief before the state
8 court -- the trial court refused to admonish the jury,
9 and then the first sentence, Appellant, by counsel,
10 requested that an admonition be given, and on page 2a at
11 the top, appellant submits that the requested admonition
12 is now constitutionally mandated, and in their footnote
13 that trial counsel apparently requested an admonition
14 rather than a written instruction.
15 QUESTION: Where are you, Ms. Warren, in
16 the --
17 MS. WARREN: Respondent's brief. I apologize.
18 QUESTION: The back part?
19 MS. WARREN: Yes, sir, the addendum reproduces
20 the state court brief.
21 QUESTION: Thank you.
22 QUESTION: If we were to --
23 QUESTION: Is it not -- I'm sorry --
24 QUESTION: If we were to treat the request for
25 an admonition as it was phrased, to wit, for an



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1 admonition, would it be a proper subject under Kentucky
2 law for an admonition, the instruction on the failure of
3 the defendant to testify?
4 MS. WARREN: Justice O'Connor, in Kentucky the
5 term "admonition" means only an oral comment by the
6 judge for two purposes: one, a curative purpose to
7 eliminate from the jury's consideration evidence that
8 was improperly presented to them, the classic example
9 being incriminating impeachment evidence, to limit their
10 consideration only for impeachment purposes; and the
11 other purpose of an admonition is to guide the jury as
12 to their duties, you are not to speak with others
13 outside of the courtroom.
14 There's approximately 60 years of case law in
15 Kentucky, three or four cases over that timeframe,
16 fairly clearly establishing this distinction, and that
17 instructions are written and are not admonitions.
18 QUESTION: Do I judge from your answer to
19 Justice O'Connor's question the admonitions are really
20 something that occurs during the testimony of
21 witnesses --
22 MS. WARREN: Yes.
23 QUESTION: -- such as the objection is
24 sustained and the jury admonished to disregard it, that
25 it really fulfills quite a different function, it isn't

1 just an oral instruction?

2 MS. WARREN: That's correct. It is not an

3 oral instruction, and Kentucky case law I believe is

4 very clear on that point.

5 QUESTION: And yet in Kentucky practice one

6 may have oral instructions, may he not, if he asks for

7 them?

8 MS. WARREN: Yes, Your Honor. The case law on

9 that is quite old and --

10 QUESTION: Is quite what?

11 MS. WARREN: Quite old. I belief the case law

12 is something like 1912, but of course, it is still the

13 law in Kentucky, and we acknowledge that it is.

14 QUESTION: Well, I was living in 1912 and --

15 MS. WARREN: My comment was that the -- now

16 othe rules of procedure say, you know, shall be written,

17 and I don't know that the Kentucky court, after 70 years

18 of experience with the written instructions, would now

19 say that they may be waived, but in fact they do, and it

20 is the law in Kentucky today, you may waive written --

21 if there is a clear waiver -- and all instructions are

22 given orally, all are given alike.

23 QUESTION: Would that require waiver by the

24 state as well as the defendant?

25 MS. WARREN: According to current case law, it

1 appears to be only the defendant

2 QUESTION: May I ask you a question about the

3 material that you called our attention to at the

4 beginning of your argument?

5 MS. WARREN: Yes.

6 QUESTION: That, as I read it, it really is

7 just a repetition of the colloquy that is found on page

8 11 of your brief where the defendant merely said the

9 defendant requested an admonition be given to the jury

10 that no emphasis be given to the defendant's failure to

11 testify, which was overruled. That's the same statement

12 that's quoted in the other brief, as I read it.

13 MS. WARREN: Yes, sir, but --

14 QUESTION: So do we have anything in the

15 record other than that one sentence about what really

16 happened here?

17 MS. WARREN: I believe we do have some

18 inferences.

19 QUESTION: Do you have some --

20 MS. WARREN: No, we do not have an

21 expression.

22 QUESTION: No quotation in the transcript?

23 MS. WARREN: No quotation. This isn't --

24 QUESTION: Well, then, do you disagree with

25 your opponent's reading of this as something that was

1 requested during the conference on instructions?

2 MS. WARREN: I believe it was requested during

3 the conference because of the choice of terms, which was

4 overruled, yes, Your Honor.

5 QUESTION: Yes, so that it was asked by the

6 defendant's lawyer as something to be given to the jury

7 along with the written instructions. Wouldn't that be

8 true, because the evidence was all over. It's the only

9 time he could have done it.

10 MS. WARREN: It would have been an oral

11 comment by the court preceding the reading of the

12 instructions.

13 QUESTION: Immediately preceding.

14 MS. WARREN: And then the instructions --

15 QUESTION: Immediately preceding the

16 instruction.

17 MS. WARREN: That's correct, Your Honor.

18 QUESTION: Because the instructions were given

19 right after that comment.

20 MS. WARREN: That's correct, Your Honor.

21 I also would note that in the discussion --

22 I'm sorry, in the record, we have some inferences of

23 experienced attorney. I am looking particularly at the

24 discussion at the very beginning of trial where he, on

25 pages 13 through 17 of the Joint Appendix, where he is

1 arguing with the trial judge a rather complex point
2 concerning our persistent felony offender statute, and
3 the issue there is whether the term "probation"
4 qualifies as a term of imprisonment for purposes of
5 Kentucky law. An attorney who understands the
6 importance of words and the distinction between words,
7 an attorney who throughout this record has planned his
8 strategy and who anticipates the fact that the defendant
9 will not testify, and then when he quoted, he repeated
10 on the record what had occurred before, he repeated it
11 for purposes of preserving the record, he did not choose
12 a common term such as I want you to tell the jury or I
13 want the jury to be advised, he chose a word of art, and
14 we submit that he was familiar with the words of art,
15 and there are strategic reasons for not wanting
16 written --
17 QUESTION: Would it have been error as a
18 matter of Kentucky law for the judge to have given the
19 admonition he had requested?
20 MS. WARREN: Yes, Your Honor, it would have
21 been.
22 QUESTION: It would have been?
23 MS. WARREN: Because instructions must be
24 given in writing; this is an instructional --
25 QUESTION: And if the judge orally tells the

1 jury something that he doesn't put in writing, he
2 commits error?
3 MS. WARREN: Yes, Your Honor.
4 QUESTION: It's a rather strange procedure.
5 MS. WARREN: Oral instructions, separate,
6 isolated oral instruction is not permitted in Kentucky.
7 I would also note for the Court that we submit
8 this is a case in which there is not an attempt to apply
9 Carter but an attempt to expand Carter, and I believe
10 petitioner in his brief makes that rather clear on
11 several occasions. He says that the Carter case
12 mandates both admonitions and instructions. He -- under
13 the, using the term "functional equivalency" says that
14 we are to focus o the underlying purpose of the defense
15 attorney's request for protecting a Fifth Amendment
16 right and that Carter mandates that a state provide any
17 of various forms of relief that serve that underlying
18 purpose.
19 He acknowledges that an instruction pursuant
20 to Carter was available to him. Again, in state court
21 the acknowledgement was that it was not requested, the
22 written instruction was not requested, nor after he said
23 that the judge had denied his request for admonition did
24 he turn around and say, well, okay, judge, then I would
25 like the written instruction. He did not pursue any

1 alternative form of relief --

2 QUESTION: Ms. Warren.

3 MS. WARREN: Yes, sir.

4 QUESTION: Is there a decision of the Kentucky

5 Supreme Court says that an oral request for instruction

6 is not appropriate?

7 MS. WARREN: No, Your Honor. Oral requests

8 are appropriate.

9 QUESTION: Oh, well --

10 MS. WARREN: Oral instructions, a separate,

11 isolated oral instruction or an instruction given by way

12 of an admonition are not appropriate, Your Honor, and I

13 believe there are some cases cited in the brief.

14 QUESTION: So you don't have to write out

15 anything, he just has to ask him to give an

16 instruction.

17 MS. WARREN: Good practice is to prepare

18 written instructions so that there is something to

19 discuss in that charging conference, but no, it is not

20 required. You may do it by motion.

21 And again, we are at a disadvantage in this

22 case because we do not know the discussion that

23 occurred. Defense counsel chose not to put it on the

24 record, and we don't know precisely what was --

25 QUESTION: Well, I find this record very

1 confusing. It is hard to tell what was said when and
2 where, and it is a very incomplete, uninformative
3 record, it seems to me. I know you didn't prepare it.
4 MS. WARREN: Yes, sir.
5 Are you speaking of this particular segment of
6 it as just isolated from context?
7 QUESTION: Well, that's just one element. The
8 whole appendix, I haven't looked at the record beyond
9 the appendix.
10 MS. WARREN: The position of Kentucky in this
11 case is that the defendant had available to him a
12 constitutionally adequate vehicle to protect his Fifth
13 Amendment right, but now he insists that he has a right
14 to ride in every other car going in the same direction
15 so long as it serves that underlying purpose. We submit
16 that Carter was not to be the beginning of litigation on
17 this subject but in fact establish a prophylactic rule
18 to bring to an end this type of litigation.
19 Carter closed the circle on this issue in a
20 manner that provides every defendant in all
21 jurisdictions to have available a constitutionally
22 adequate safeguard upon request. Petitioner here would
23 initiate an endless spiral of litigation based on
24 strategic decisions of functional equivalency. The line
25 of reasoning ignores the nature of the request, it

1 ignores any rules applicable to it, and ignores any
2 state interest that might be involved, and instead,
3 focuses on the underlying purpose.
4 If Carter mandates alternative forms of relief
5 under this analysis, as James states it, functional
6 equivalency, we submit then Carter would also mandate
7 that the defendant be permitted to put a witness on the
8 stand to say that there shall be no adverse inference
9 from the defendant's failure to testify. Any number of
10 alternatives would then become functional equivalents, I
11 choose not to do it this way, I prefer another.
12 QUESTION: May I go back to my confusion about
13 Kentucky law for a minute?
14 MS. WARREN: Yes, sir.
15 QUESTION: I understood you to tell me that it
16 would be error in Kentucky to give an oral instruction
17 on the law.
18 MS. WARREN: Yes, a defendant may waive all
19 written instructions under Kentucky law, and all --
20 QUESTION: But could he not waive a -- your
21 brief at pages 24 and 25 quote the law as I understand
22 it to say that if it is clear that the defendant was
23 satisfied to have the instruction be given orally, that
24 there is no error.
25 MS. WARREN: That applies to all -- all



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1 instructions may be given orally or all written, but we
2 found no authority that would suggest that you should
3 isolate one and pull it out.
4 QUESTION: But is there any authority in
5 Kentucky for the proposition that if the defendant asks
6 for one oral instruction, as he did here, or you call it
7 an admonition, and the judge gives it, that that would
8 be error?
9 MS. WARREN: There is not a case on that
10 point, Your Honor. This is the first time this issue
11 has been presented.
12 QUESTION: So there is no consistent body of
13 state law that supports that.
14 MS. WARREN: There is a body of state law that
15 says that there must be a clear waiver --
16 QUESTION: The instruction should be in
17 writing unless the defendant asks for it to be oral.
18 MS. WARREN: Waives. Then again, in --
19 QUESTION: And here he asked for it to be
20 oral.
21 MS. WARREN: He asked for this particular --
22 he asked for an admonition which is a term of art in
23 Kentucky meaning an oral comment, not an instruction,
24 but an oral comment by the court. Again, strategically,
25 we think he wanted less emphasis on this particular

1 subject, not before the jury, not in writing to be read
2 over and over, but to have been commented upon and
3 passed by. There is no provision in Kentucky law for an
4 admonition on an instructional issue.
5 Kentucky would also note that this type of
6 functional equivalency argument would also apply to
7 other constitutional rights and to other instructional
8 issues. Why not have a defendant throw the burden of
9 proof instruction out and ask that it be treated
10 differently? If all instructions are given orally, then
11 ask that that be given written, again, we would turn
12 defense attorneys' strategic decisions into rulemaking
13 organs, the state court procedure.
14 This Court rejected a similar notion in
15 Lakeside, and we request that it be rejected here. This
16 is not an attempt to use Carter but, in fact, an attempt
17 to misuse Carter, and it would place judges in a posture
18 of forever being subject to hindsight interpretation as
19 to what is the functional equivalent. We urge this
20 Court to hold that Carter means what it says, an
21 admonition -- I'm sorry, an instruction must be made
22 available -- terrible slip of the tongue -- must be made
23 available upon request, and Carter is not to be expanded
24 to include all ingenious defense remedies that they may
25 desire.

1 QUESTION: But can you really call this an
2 ingenious defense remedy, saying he wants this
3 particular admonition?
4 MS. WARREN: In that it was --
5 QUESTION: Why wouldn't the judge give it? I
6 just don't understand it.
7 MS. WARREN: Your Honor, I am at a
8 disadvantage, and we are all at a disadvantage because
9 we do not know what was discussed before. I can only
10 say that I believe the trial court --
11 QUESTION: We don't know if the judge said you
12 can have it in writing if you want it but you can't have
13 it orally. That's --
14 MS. WARREN: I believe the -- I'm sorry.
15 QUESTION: That's what you are assuming he
16 must have said something like that.
17 MS. WARREN: Yes, Your Honor, and again,
18 during that early discussion when there was some
19 confusion about what the defense attorney wanted, when
20 we were talking about the persistent felony offender
21 issue, when the judge had some confusion, he clarified
22 and he repeatedly asked defense counsel. We do not have
23 any of that discussion, we do not have the
24 clarification. I would submit there is an inference
25 that he understood defense counsel wanted exactly what

1 he asked for, an admonition. That's the only inference
2 that we can draw from it.
3 QUESTION: Well, in Kentucky do you -- I take
4 it that you regard the term "admonition" as being
5 something of less force than an instruction.
6 MS. WARREN: Yes, Your Honor.
7 QUESTION: Other than the technical
8 differences you are talking about.
9 MS. WARREN: It serves very different purposes
10 andf also is not that directive on the law to be applied
11 by the jury in their deliberations. It is a comment by
12 the court during the course of trial.
13 QUESTION: Well, do you think in Kentucky a
14 juror or a jury can have greater latitude in
15 disregarding an admonition than an instruction?
16 MS. WARREN: They certainly must follow the
17 advice and caution of the trial court, but I believe in
18 Kentucky that all instructions are presented in a
19 unified manner, whether it be all oral or all written,
20 and in my practice, I have never seen any request for an
21 oral instruction at all. They are always written, and
22 they are submitted in the same way and then made
23 available to the jury.
24 If this Court should decide that Carter does
25 compel an admonition in addition to an instruction, then

1 Kentucky requests that the case be remanded for
2 determination as to whether or not that error were
3 harmless. The state court did not decide that issue
4 because it determined that there was no error. Any
5 discussion of harmless error by the Kentucky Supreme
6 Court would have been advisory at that point.
7 Petition suggests that the Kentucky court
8 would not hold the error harmless and there is no need
9 to remand, but we would respectfully disagree. The
10 charges against James were for rape, burglary and
11 receiving stolen property, arising from incidents within
12 a two-week time frame and all involving the same
13 victim. The defense as to the rape was basically
14 mistaken identity or fabrication, and similar defenses,
15 mistaken identity or no involvement or alibi. Defense
16 counsel portrayed the victim as seeking an excuse for
17 her absence that afternoon to satisfy her employer.
18 Witnesses were presented to argue that had the events
19 taken place as she testified, they would have been seen
20 crossing the short yard, and in fact, petitioner was
21 seen leaving his apartment at some time when the victim
22 testified that she was being held inside at gunpoint.
23 This testimony of the defense witnesses was
24 based on recollection of common events on routine days
25 many months earlier, and the testimony as to the timing

1 was not inconsistent with the fact that the victim was
2 not seen. The testimony on the timeframes put Mr. Bates
3 in the basement at about the same time the yard crossing
4 occurred, and his statement was that he stayed out in
5 the yard sometimes until four. The victim said she left
6 at 4:30. So it was not at all surprising that she was
7 not seen.

8 There were not the numerous adverse comments
9 as there were in Chapman, nor was there an adverse
10 instruction, and counsel repeatedly -- defense counsel
11 repeatedly said there is no evidence on this issue. In
12 cases such as this where there is merely a possibility
13 of misinterpretation, we submit the weight of evidence
14 is more significant.

15 The prosecution presented an unequivocal
16 identification of the victim. James' positive
17 fingerprint was found on the back door of the house, and
18 I believe the victim's testimony was that he had come to
19 use the phone, and the trial record reflects the phone
20 is in the front room. Also, Mr. James, I believe the
21 testimony reflects, was six feet eleven inches tall, and
22 this fingerprint was on the bottom inside of a glass
23 storm door after it was pushed out. Also, there were
24 prompt reports to the police corroborating the victim's
25 testimony, and there was medical evidence.

1 Mr. James had in his possession within a few
2 hours of the rape cloth strips that were impregnated
3 with the saliva of a blood type -- a secreter with a
4 blood type similar to that of the victim's, and also in
5 his possession was the pistol stolen from her apartment
6 two weeks earlier.
7 We believe it is clear beyond a reasonable
8 doubt that the jury would have returned a verdict of
9 guilty and request this Court to affirm the Kentucky
10 Supreme Court decision finding that there was no error,
11 or if it finds that it is error, to remand it for an
12 appropriate decision by the Kentucky Court.
13 CHIEF JUSTICE BURGER: Thank you, Counsel.
14 The case is submitted.
15 We will hear arguments next in Patton v.
16 Yount.
17 (Whereupon, at 1:50 p.m., the case in the
18 above-entitled matter was submitted.)
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CERTIFICATION

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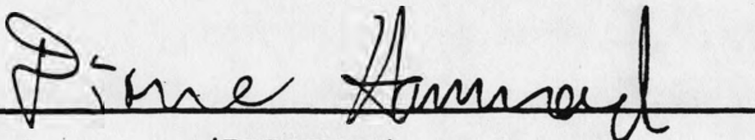
BY 

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