No. 12-794

IN THE

Supreme Court of the United States

RANDY WHITE, WARDEN,

Petitioner,

v.

ROBERT KEITH WOODALL,

Respondent.

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

BRIEF FOR RESPONDENT

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STATEMENT OF FACTS AND CASE

A. Introduction

Robert Keith Woodall chose not to testify at his capital sentencing trial. He requested a jury instruction that his silence not be held against him. The trial court denied the instruction, stating that the jury could consider his failure to offer testimony. The Kentucky Supreme Court upheld the denial of the instruction. The two questions before this Court are whether the Kentucky Supreme Court unreasonably applied this Court's clearly existing federal law, and, if its application was unreasonable, whether the error prejudiced Woodall.

B. Woodall pled guilty and requested jury sentencing.

Woodall pled guilty to the abduction, rape and murder of Sarah Hansen, a sixteen year-old high school student. TE 405-417. He requested and received jury sentencing. Woodall attempted to *voir dire* the jurors to assess their understanding that Woodall did not have to testify and that a decision not to testify could not be held against him. However, the trial court refused this inquiry. TE 697-8.

The Commonwealth presented eleven witnesses. TE 1191-1342. The evidence established that Ms. Hansen was kidnapped from a convenience store parking lot, taken to an isolated location, raped, then murdered. *See id.* Woodall had previously been convicted and sent to prison for two counts of sexual abuse. TE 1330-1331. The prosecutor and his assistant read into the record an abbreviated version of the guilty plea. JA 25-30. From

this simulated colloquy, the jury heard Woodall plead guilty to three crimes: murder, kidnapping, and rape. JA 27-28. The jury also heard Woodall's waiver of his "right against self-incrimination, which means you don't have to say anything . . ." JA 29.

Going beyond the factual predicate of the plea, the Commonwealth introduced testimony by a blood spatter expert theorizing the position of Ms. Hansen during the crime and other circumstances regarding the crime. TE 1274-75. Woodall objected to the nature of this evidence. Overruling this objection, trial court allowed this testimony:

> You've got a defendant who's pled guilty to some pretty atrocious crimes, and you're asking this jury to make a – set a penalty. I think that the Commonwealth should have a certain amount of leeway in putting forth its theory as to how this crime occurred, and for that reason, I'm going to let him testify to this.

TE 1276. The trial court also overruled a later objection related to the extent of the theorized struggle by Ms. Hansen. TE 1283-4.

Woodall presented fourteen mitigation witnesses. TE 1343-1585. The jury learned that at the age of 17, Woodall tested with a full scale IQ of 74. TE 1501. His IQ range was between 69-79 considering the standard error of measurement. TE 1501-1502. Although he was 17, Woodall functioned at the age equivalency of an 11 or 12 year-old. TE 1503. The testing psychologist recommended that Woodall's school move him to a special program for educable mentally handicapped children. TE 1505.

At trial, Woodall's IQ tested at 78. TE 1526. He again placed in the borderline range of intelligence. TE 1534. Other testimony established that Woodall had a personality disorder with borderline and paranoid traits. TE 1546. This disorder "impairs a person's ability to relate to other people and to interact appropriately in society." TE 1558. However, Woodall is someone who does well in a controlled environment. TE 1578. Woodall exhibited good behavior while incarcerated. TE 1490-1492. In jail, he was cooperative, did not complain, and did not have conflicts with prisoners or guards. *Id.*

Woodall was the son of a teenage mom, who suffered from depression. TE 1421, 1433, 1454. She was not nurturing; rather than care for her children she would play videogames or watch television. TE 1408. Woodall's mother was unmotivated to "do anything." TE 1408-9. She had trouble maintaining a job and a home; the trailer was often full of dirty dishes, dirty clothes, and vermin. TE 1409-10. Woodall's aunt recalled: "[I]t was just nasty, and the roaches was just crawling all over." TE 1421.

Woodall's dad was an absent father and a poor provider. TE 1435, 1450, 1476. He had money for alcohol and pot, but no money to feed his kids. TE 1435. He did not work much. *Id.* He cheated on Woodall's mother, which led to a divorce. TE 1436. After Woodall's father moved out, Woodall and his siblings would rarely see him. TE 1415. Even when his father scheduled visitation, he often failed to show up. TE 1415, 1439.

Throughout his childhood, Woodall and his siblings lived in poverty. On occasion, they had to walk to their grandparents' home to get water. TE 1410, 1435. One

winter the family had no heat. TE 1410. Woodall often appeared at his grandparents' home unwashed, unfed, and smelling like sour milk. TE 1409, 1411.

Growing up, Woodall had incontinent bowels. TE 1436. He defecated without warning. *Id.* His condition persisted into middle school. TE 1417-18. Woodall would hide his soiled underwear around the house. *Id.* The bowel condition had begun as constipation when Woodall was just an infant. TE 1439. His grandmother testified, "[H]e would always draw his little old legs up and just scream and turn red as a beet." *Id.* His family sought to relieve the pain by inserting slivers of soap into his rectum. *Id.* Woodall's expert told the jury that this treatment was a form of sexual abuse. TE 1581. The expert also testified that victims of sexual abuse are more likely to become sexual offenders. *Id.*

Earlier in the trial when Woodall's father was on the stand, a juror asked him if he knew if anyone had sexually abused Woodall. TE 1480. He answered, "Not that I know of." *Id.*

The Commonwealth cross-examined each of Woodall's witnesses. TE 1353-1355, 1364-1367, 1373-1376, 1380-1383, 1389-1395, 1427-1430, 1445, 1461-1474, 1480, 1488-1490, 1493, 1508-1516, 1548-1554, 1582-1585. Particularly, the prosecutor cross-examined Woodall's mother about his immediate post-crime behavior. TE 1464-1471. Woodall objected on relevance grounds. TE 1464-1465, 1468-1470. The prosecutor explained that his intended questions related to "remorse." TE 1469. In overruling this objection, the trial court said:

> Wait a minute now. Okay, you're talking about January the 25th, the night of the murder, the fact that this man went out and committed rape, murder, kidnapping, and his own mental state – and goes back home and lays down on the couch and watches television doesn't have anything to do with this case?

TE 1465; *see also* TE 1469-1470.

C. Woodall waived his right to testify and requested a *Carter* instruction protecting his election not to testify.

After the mitigation presentation, the trial court conducted a colloquy to determine whether Woodall knowingly, intelligently and voluntarily waived his right to testify. JA 33-34. The trial court twice informed Woodall that he had the "right to take the stand." *Id.* Thereafter, Woodall requested an instruction pursuant to *Carter v. Kentucky*, 450 U.S. 288 (1981): "A defendant is not compelled to testify and the fact that the defendant did not testify should not prejudice him in any way." JA 31.[1] The trial court asked the prosecutor: "I don't think the Commonwealth has objected to it being read?" JA 35. The prosecutor responded, "That is correct, your honor." JA 36.

---

1. The instruction approved of in *Carter*, 450 U.S. at 289, stated: "The [defendant] is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way." The only difference between Woodall's requested and *Carter* is the exclusion of "cannot be used as an inference of guilt."

The trial court, however, refused to give the instruction. The court stated: "I don't think [it's] intellectually honest and I don't think it's in keeping with the case law as far as sentencing is concerned." JA 36. The court relied on *Commonwealth v. McIntosh*, 646 S.W.2d 43 (Ky. 1983). *Id.* The judge also stated that giving the instruction "was not error where the guilt was overwhelming." *Id.* Defense counsel responded that *McIntosh* held it was error *not* to give a *Carter* instruction, albeit harmless in *McIntosh* under the whole of the case. JA. 38. The trial court, however, remained firm, stating:

> In the sentencing stage to me it defies logic, it defies common sense, it's not intellectually honest to tell this jury . . . that you go out and rape and murder and kidnap and admit to it and then offer no testimony, no explanation, no asking for forgiveness, no remorse, and the jury can't consider that. I just don't think it's logical, so that's why I'm not going to give it.

JA 38.

D. The jury was instructed that it had to find beyond a reasonable doubt that death was the appropriate punishment.

The trial court instructed Woodall's jury that the Commonwealth had to prove beyond a reasonable doubt that death was justified:

> If upon the whole of the case you have a reasonable doubt whether the Defendant should

> be sentenced to death, you shall instead fix his punishment at a sentence of imprisonment.

JA 44 (Instruction #6).

E. The jury heard closing argument and returned a death verdict.

Prior to closing, the defense moved *in limine* for the prosecutor not to comment on Woodall's lack of remorse. TE 1598-9. The prosecutor responded that he did not want to "expressly" say that Woodall had evidenced no remorse. TE 1599. However, he said he would comment on Woodall's demeanor as a proxy. *Id.* He further wanted to tell the jury that the guilty plea was not an acceptance of responsibility; rather it was a mere defense strategy. *Id.*

During closing argument, urging the jury to return death, the prosecutor twice mentioned Woodall's demeanor:

> [The defense will say] 'Keith has pled guilty. He's admitted he's done wrong, so we're not here for that,' and while we're talking about other defense strategies . . . [overruled objection] . . . You've heard everyone talk . . . everyone talk about their observations of the defendant. How many of those have told you that he's got a habit of sitting around looking down like this for a week at a time? Don't be fooled. Don't be fooled by that. That's not the defendant, Robert Keith Woodall.

JA 57-58;

> Now they're going to come up and try to argue a little bit in addition to why all his looking down, they're going to come back and they're going to say to you, 'Well, he had a mental illness. There was some problems.'

JA 64. In closing, the prosecutor also relied on the blood spatter expert's testimony for how the crime transpired. JA 54-56. He portrayed prolonged suffering. *Id.*

In Woodall's closing, defense counsel argued for life without the possibility of parole as the alternative to a death sentence. JA 68-69. Addressing the guilty plea, counsel argued: "[The prosecutor] can speculate as to why [Woodall] came into this Court and he said, 'I'm guilty of those things,' but he came in and he said, 'I'm guilty,' because he is guilty." JA 69.

The jury found both aggravators and returned a death verdict. JA 46

F. The Kentucky Supreme Court affirmed the trial court's denial of a *Carter* instruction.

The Kentucky Supreme Court affirmed Woodall's death sentence. Pet. App. 259a-312a. In so doing, the court also denied Woodall's claim of constitutional error in the trial court's refusal to provide a *Carter* instruction claim, stating:

> Woodall argues that he was denied due process, his right not to testify and a reliable sentence determination when the trial judge refused to instruct the jury to draw no adverse inference from the decision of Woodall not to testify

during the penalty trial. Woodall pled guilty to all of the charged crimes as well as the aggravating circumstances. The no adverse inference instruction is used to protect a nontestifying defendant from seeming to be guilty to the jury because of a decision not to testify. That is not the situation presented here. The instruction contemplated by *Carter* [], could not have changed the outcome of a guilty determination that the defendant acknowledged by his admission of guilt. There was no reason or need for the jury to make any additional inferences of guilt.

There is no error in this respect. Any possible error would be nonprejudicial because the defendant admitted the crimes and the evidence of guilt is overwhelming. Woodall claims that *Estelle* [], extended Fifth Amendment protection and thus the *Carter*, *supra*, rule to the penalty phase of a trial. *Estelle*, *supra*, is not a jury instruction case, unlike *Carter*. *Estelle* does not cite to *Carter* or indicate that *Carter* has been extended. The factual situation in *Estelle* is different from that presented in this case because it involved the use of an out-of-court statement the defendant made to a government expert. The statement in that case was in regard to a psychological examination by the government prosecutors which was used against the defendant without warning in the penalty trial. Neither *Carter* nor *Estelle* involved a guilty plea. Here, Woodall admitted guilt to all charges and did not contest the facts. He was not compelled to testify so there were

> no words that could be used against him so as to implicate the Fifth Amendment privilege as in *Estelle*.
>
> Woodall contends that *Mitchell* [], permits a guilty plea which does not waive the privilege against self-incrimination at the sentencing phase. *Mitchell*, *supra*, does not apply here. In *Mitchell*, the defendant pled guilty to federal charges of conspiring to distribute five or more kilograms of cocaine and of distributing cocaine within 1000 feet of a school or playground. She reserved the right to contest the amount of the cocaine at the penalty phase. The amount of the cocaine would determine the range of penalties. She only admitted that she had done "some of" the conduct charged. She did not testify. Three other codefendants did testify as to the amount of cocaine she had sold. Ultimately, the U.S. Supreme Court ruled that it would not permit a negative inference to be drawn about her guilt with regard to the factual determination respecting the circumstances and details of the crime. Here, Woodall did not contest any of the facts or aggravating circumstances surrounding the crimes.
>
> The decision of the trial court not to give an adverse inference instruction does not amount to constitutional error so as to require reversal. There is no violation of any section of the United States or Kentucky Constitution.

Pet. App. 261a-263a.

G. The Federal District Court and the Federal Circuit Court granted Woodall habeas relief after determining the Kentucky Supreme Court unreasonably and prejudicially denied the *Carter* instruction.

Woodall filed a federal habeas corpus petition, which included the ground that he was entitled to a *Carter* instruction. The district court granted relief:

> The issue before the Court is whether Woodall was entitled to a no adverse inference instruction. Unquestionably, Woodall was entitled to it. In this case, Woodall pleaded guilty to the underlying substantive offenses. He did not, however, agree that the sentence of death was appropriate. Instead, he retained the right to have his sentence determined by a jury of his peers. His Fifth Amendment right survived his guilty plea. *Mitchell v. United States,* 526 U.S. at 327. The government could not have compelled Woodall to testify against his will at his sentencing hearing. *Estelle v. Smith,* 451 U.S. at 454. Such conduct would have undoubtedly violated his Fifth Amendment right. *Id.* Woodall requested a no adverse inference instruction. Once requested, it should have issued. *Carter v. Kentucky,* 450 U.S. at 305. The trial judge could have given the requested instruction and prevented any undue and impermissible speculation by the jury. Even though the prosecution did not object to the instruction, the trial judge refused to issue it. In doing so, he ran afoul of clearly established

> constitutional principles and violated Woodall's constitutional rights. This is not a new rule of law as the Commonwealth argues. To the contrary, it is a logical application of then-existing Supreme Court precedent. And, the Kentucky Supreme Court's decision to reject this claim was an unreasonable application of *Carter, Estelle,* and *Mitchell.*

Pet App. 59a-61a. The district court held that the error was prejudicial, because absent the *Carter* instruction, "the jury may have based its decision to sentence Woodall to death on his failure to testify." Pet. App. 63a. The district court relied on the trial court's "forceful" statement that the jury logically would consider Woodall's silence. *Id.*

The Commonwealth appealed to the Sixth Circuit, which affirmed, concluding:

> We agree with the district court that reading *Carter*, *Estelle*, and *Mitchell* together, the only reasonable conclusion is that the trial court violated Woodall's Fifth Amendment rights by refusing to give a requested "no adverse inference" instruction. The Kentucky Supreme Court's denial of this constitutional claim was an unreasonable application of *Carter*, *Estelle*, and *Mitchell*. *See Williams*, 529 U.S. at 407 [] ("[A] state-court decision [is] an unreasonable application of [the Supreme] Court's precedent if the state court ... unreasonably refuses to extend [a legal] principle to a new context where it should apply.") … The district court held that a capital defendant has a Fifth

> Amendment right to a "no adverse inference" instruction during the sentencing phase of a trial, even if guilt has already been established through a plea agreement. We agree. "Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees." *Estelle*, 451 U.S. at 463 []. At stake in the penalty phase of a capital trial such as Woodall's is not only what specific punishment the defendant will receive, but whether he will be put to death. The due process clause requires that a trial court, if requested by the defendant, instruct the jury during the penalty phase of a capital trial that no adverse inference may be drawn from a defendant's decision not to testify.

Pet. App. 8a-9a.

The court then addressed prejudice:

> For purposes of federal habeas corpus review, a constitutional error that implicates trial procedures is considered harmless unless it had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 [] (1993)…"Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.' " *Brecht*, 507 U.S. at 637…

The Supreme Court has observed that "it is arguable that a refusal to give [a 'no adverse inference' instruction] can never be harmless." *Carter*, 450 U.S. at 304 [] (declining to reach the question because it was not then presented and had not been before the state court); see also *Lakeside v. Oregon*, 435 U.S. 333, 340 & n. 10 [] (1978) (discussing the likelihood that a jury will draw an adverse inference from a defendant's decision not to testify). "The Supreme Court has emphasized...that when a habeas court is in grave doubt as to the harmlessness of an error that affects substantial rights, it should grant relief." *Erwin*, 503 F.3d at 501 (internal quotation marks omitted). "[G]rave doubt" means "that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *O'Neal*, 513 U.S. at 435 []; see also *id.* at 437–38 [] ("[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.").

The warden argues that any error in the court's failure to instruct the jury was harmless because of the overwhelming evidence of Woodall's guilt presented during the penalty phase and the overwhelming evidence of the heinousness of the crimes, and because Woodall admitted the statutory aggravators necessary to impose the death penalty. If it were the case

that a finding of the existence of statutory aggravators compels the imposition of the death penalty, then perhaps the trial court's error would have been "harmless." But the finding of the aggravating circumstances did not compel the jury to recommend a death sentence: the jury could have rejected the death penalty even if it found the existence of aggravating circumstances beyond a reasonable doubt. *See Skaggs v. Parker*, 235 F.3d 261, 271 (6th Cir. 2000) (describing the variety of mitigating circumstances that a jury can consider during a penalty phase under Kentucky law). Because we cannot know what led the jury to make the decision that it did, and because the jury may well have based its decision on Woodall's failure to testify, we cannot conclude that this is a case of "harmless error." *See Carter*, 450 U.S. at 304 [] (noting that it is "arguable" that refusing to give a "no adverse inference instruction" is "never" harmless); *Ullmann v. United States*, 350 U.S. 422, 426 [] (1956) ("Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege."); *see also Bruno v. United States*, 308 U.S. 287, 294 [] (1939). Indeed, the trial court itself appears to have drawn an adverse inference from Woodall's decision not to testify: in denying the requested instruction, the trial court stated that it was "aware of no case law that precludes the jury from considering the defendant's lack of explanation of remorse

> or explanation of the crime or anything else once guilt has been adjudged in sentencing." The trial court's own inferences illustrate our concern. Given our grave doubt that the jury's recommendation was not influenced by adverse inferences drawn from Woodall's decision not to testify, we "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *O'Neal*, 513 U.S. at 437 [] (internal quotation marks omitted). Under these circumstances, "it is impossible to conclude that the substantial rights were not affected." *Id.* at 437–38 [] (internal quotation marks omitted). Therefore, under *O'Neal*, we treat the error as harmful and grant Woodall's petition on this basis.

Pet. App. 9a-12a.

SUMMARY OF ARGUMENT

The Fifth Amendment requires that a defendant receive a no-adverse-inference instruction upon request at a capital sentencing proceeding when he exercises his right not to testify. The Sixth Circuit committed no error in finding that the Kentucky Supreme Court unreasonably applied this Court's clearly existing precedents of *Carter v. Kentucky*, *Estelle v. Smith*, and *Mitchell v. United States*. This Court accepts that multiple cases can dictate a result. No requirement exists that there be an identical factual pattern before a legal rule must be applied. A state court can be unreasonable when it refuses to extend a governing

legal principle to a context in which the principle should have controlled.

Carter, *Estelle*, and *Mitchell* dictate that Woodall's Fifth Amendment right was violated. In *Carter*, the first case chronologically, this Court established that a no-adverse-inference instruction must be given if requested by a defendant. In *Estelle*, the next case, this Court found that the Fifth Amendment applies to a capital sentencing phase even after a jury's guilt finding. *Estelle* confirmed that there is no difference between the guilt and the penalty phases of a capital trial for purposes of the Fifth Amendment. Lastly, in *Mitchell*, this Court held that a guilty plea does not waive Fifth Amendment rights at a subsequent sentencing proceeding and no adverse inference may be raised by a defendant's exercise of his right not to testify. *Mitchell* treated *Estelle* as having extended the Fifth Amendment's requirements to sentencing generally and refused to create an exception to this rule for the sentencing phase of a criminal case.

Taken together, as they should be, these cases yield a logical conclusion. Under *Estelle*, the Fifth Amendment applies at a capital sentencing. Under *Mitchell*, a sentencing fact-finder is not permitted to draw adverse inferences from a defendant's silence even when there is a guilty plea. Under *Carter*, where a jury, as fact-finder, is prohibited from drawing adverse inferences, a no-adverse-inference instruction is required. Thus, upon request, a defendant must receive a *Carter* instruction at a capital sentencing proceeding when he exercises his right not to testify.

The Kentucky Supreme Court decision not to apply this clearly established law was unreasonable. The court unreasonably held that a guilty plea eliminated any Fifth Amendment protection. This is a cramped reading of *Carter* in light of *Estelle* and *Mitchell*. The court also found that *Estelle* did not apply because it was not a jury instruction case. This is a cramped reading of *Estelle* in light of *Carter* and *Mitchell*. The court next found that *Estelle* was not applicable because Woodall, unlike the defendant in *Estelle*, had not been compelled to testify against himself. This is a cramped reading of *Estelle* because the defendant in *Mitchell* had not been compelled to testify.

Focusing solely on guilt, the Kentucky Supreme Court also unreasonably found there were no contested facts at issue in Woodall's trial. The court failed to recognize that the prosecutor argued that the circumstances of the crime, beyond which Woodall had admitted, were a basis to impose death. It failed to recognize that the prosecution was affirmatively arguing that Woodall lacked remorse for his crime and that remorse, unlike the question left open by this Court in *Mitchell*, was an issue upon which Woodall had a right not to testify. The Court also failed to recognize that the prosecutor cross-examined the entirety of Woodall's case in mitigation. This put the extensive mitigation facts at issue. Moreover, the court did not consider that the jury instruction on the suitably of the death penalty required a finding that death was the appropriate punishment beyond a reasonable doubt.

This Court has applied the Fifth Amendment to a pure capital sentencing determination. *Estelle* considered a circumstance where the question before that jury was

a death penalty selection question similar to the question before Woodall's jury. Further, there is no requirement that a *Griffin v. California* error precede *Carter*'s application. *Carter* is an independent Fifth Amendment requirement.

Woodall was also prejudiced by the failure of Kentucky to provide him a no-adverse-inference instruction. This Court recognizes that jurors intuitively notice that a defendant has not testified and will hold a defendant's silence against him. As noted by the trial court, Woodall's jury would have wanted testimony and an explanation for what occurred. The jury also would have wanted to hear Woodall express remorse. Lastly, the jury would have wanted to hear Woodall confirm the truth of the mitigation.

This Court protects the reliability of capital sentencing proceedings, which includes the enforcement of fundamental constitutional rights. Woodall, at best borderline mentally retarded, was never going to be able to testify on his own behalf without risk of helping the prosecution's case for a death sentence. This Court has recognized that people with Woodall's intelligence make unreliable witnesses. This Court has also recognized that there are many reasons that any person may not want to testify. Because Woodall exercised his right not to testify, the Fifth Amendment should have protected Woodall from the adverse inference that the jury likely drew.

ARGUMENT

I. Woodall had a clearly established constitutional right to the no-adverse-inference instruction he requested during the capital penalty phase when he declined to testify. The adjudication of his claim in state court involved an unreasonable application of this Court's existing precedent.

A. 28 U.S.C. § 2254(d)'s Framework.

28 U.S.C. § 2254(d)(1), a provision of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), provides that a federal court may grant relief where the underlying state court merits decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Williams v. Taylor,* 529 U.S. 362, 404-05 (2000). Once satisfied, *de novo* review applies. *Wiggins v. Smith*, 539 U.S. 510, 528-34 (2003).

The phrase "clearly established law" employed in §2254(d)(1) "refers to the holdings, as opposed to the dicta, of this Court's decisions…" *Williams,* at 412. Holdings include the final disposition of a case as well as the preceding determinations "necessary to that result." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). This Court looks for "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003). Section 2254(d)(1) does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (*quoting*

Carey v. Musladin, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring)).

This Court explained in *Wright v. Van Patten,* 552 U.S. 120, 126 (2008), that federal law is "clearly established" when this Court's case law already provides a "clear answer" to the question presented. A habeas court is not limited to one Supreme Court case in making its decision. It may rely on a matrix of cases from this Court to identify the controlling principle in the case before it. *Abdul-Kabir v. Quarterman,* 550 U.S. 233, 257-258 (2007) (finding a state court's "formulation of the issue" unreasonable due to inattention to "the fundamental principles established by [this Court's] most relevant precedents."); *accord Tyler v. Cain*, 533 U.S. 656, 666 (2001).

This Court has identified different ways in which a state court's decision will violate the "unreasonable application" clause of § 2254(d)(1). A decision involves an unreasonable application of clearly established law where "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams,* 529 U.S. at 413. And, "[a] state determination may be set aside under this standard if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled." *Ramdass v. Angelone,* 530 U.S. 156, 166 (2000) (plurality opinion). Every federal circuit court of appeals has recognized this well-settled principle.[2]

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2. *Kibbe v. DuBois,* 269 F.3d 26, 36 (1st Cir. 2001); *Bierenbaum v. Graham*, 607 F.3d 36, 48 (2d Cir. 2010); *Williams*

This Court has consistently relied on the foregoing interpretation of AEDPA, and there is no reason to accept the Amicus of the Criminal Justice Legal Foundation (CJLF)'s invitation to depart from it. CJLF argues a federal court should require a case directly on point to conclude that the law is clearly established and find (d)(1) satisfied. CJLF Amicus Brief 10-16. Discounting all but a case on all fours as "clearly established" law distorts AEDPA, effectively requiring a petitioner to show the state court's ruling was "contrary to" Supreme Court law. It reads "unreasonable application" out of the statute. Adopting CJLF's proposed interpretation undermines AEDPA's text and this Court's interpretation of AEDPA. *See Lockyer*, 538 U.S. at 76; *Panetti*, 551 U.S. at 953.

Lastly, it must be noted that Texas' invocation of *Harrington v. Richter*, 131 S.Ct. 770 (2011) is misplaced. Texas Amicus Brief 6. Texas mistakenly believes the *Richter* rule of deference to silent decisions also applies to explicated state court decisions. *Id.* at 6. By its terms, *Richter* only applies to a state court's "summary rulings" or a "decision…unaccompanied by explanation" from state collateral proceedings. 131 S.Ct. at 784-85. As this Court explained in *Wetzel v. Lambert*, 132 S.Ct. 1195, 1199 (2012) and *Parker v. Matthews*, 132 S.Ct. 2148, 2151-2 (2012), an

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v. Price, 343 F.3d 223, 229 (3d Cir. 2003); *Booth-El v. Nuth*, 288 F.3d 571, 575-76 (4th Cir. 2002); *Penry v. Johnson,* 215 F.3d 504, 508 (5th Cir. 2000), *aff'd in part, rev'd in part*, 532 U.S. 782 (2001); *Campbell v. Coyle*, 260 F.3d 531, 539 (6th Cir. 2001); *Armstrong v. Bertrand,* 336 F.3d 620, 624 (7th Cir. 2003); *Carter v. Kemna,* 255 F.3d 589, 592 (8th Cir. 2001); *Miller v. Blackletter*, 525 F.3d 890, 895-96 (9th Cir. 2008); *Parker v. Scott*, 394 F.3d 1302, 1308 (10th Cir. 2005); *Kimbrough v. Secretary, DOC,* 565 F.3d 796, 799 (11th Cir. 2009).

unreasonable explicated decision can form the basis of habeas relief provided no stated alternative grounds are found to be reasonable.

B. This Court's precedent clearly establishes the Fifth Amendment right to a no-adverse-inference instruction in a capital sentencing trial.

This Court held that the Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard." *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). This Court endorsed this principle in *Estelle v. Smith*, 451 U.S. 454, 467 (1981).

The privilege against self-incrimination guarantees every criminal defendant the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). The Fifth Amendment privilege is applicable against the states through the Fourteenth Amendment. *See id.* at 6. This Court has construed the privilege "broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom." *In re Gault*, 387 U.S. 1, 50 (1967). In *Gault*, this Court rejected attempts to deny Fifth Amendment protections to juvenile proceedings because "the availability of the [Fifth Amendment] does not turn upon the type of proceeding in which its protection is invoked." *Id.* at 49.

In *Griffin v. California*, 380 U.S. 609, 615 (1965), this Court held that the guarantee against self-incrimination

includes a protection against comment by the prosecution on a defendant's silence, as well as jury instructions that a defendant's silence is not evidence of guilt. *Griffin,* which involved a capital trial, "stands for the proposition that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify." *Carter*, 450 U.S. at 301.

In *Lakeside v. Oregon*, 435 U.S. 333 (1978), this Court ruled that over a defendant's objection, the state could request and receive a no-adverse-inference instruction. The instruction protects against the inherent compulsion that exists when adverse inferences are drawn from a defendant's failure to take the witness stand. *Id.* at 339.

1. *Carter*: a no-adverse-inference instruction must be given if requested by a defendant.

Following *Lakeside*, in *Carter* (a non-capital case), the Court held that "a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify" by giving a no-adverse-inference instruction. *Carter*, 450 U.S. at 305. The Court explained:

> The *Griffin* case stands for the proposition that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify. The penalty was exacted in *Griffin* by adverse comment on the defendant's silence; the penalty may be just as severe when there is no adverse comment, but when the jury is left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence

> broad inferences of guilt . . . A trial judge has a powerful tool at his disposal to protect the constitutional privilege-the jury instruction-and he has an affirmative constitutional obligation to use that tool when a defendant seeks its employment. No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum. Even without adverse comment, the members of a jury, unless instructed otherwise, may well draw adverse inferences from a defendant's silence.

Id. at 301, 303. Failure to grant the instruction "exacts an impermissible toll on the full and free exercise of the [Fifth Amendment] privilege." *Id.* at 305.

2. *Estelle*: the Fifth Amendment applies to a capital sentencing phase even after a jury's guilt finding.

Two months after *Carter*, this Court decided the capital case of *Estelle v. Smith*, 451 U.S. 454 (1981). In *Estelle*, the defendant was compelled to undergo a pre-trial psychiatric examination. During the penalty phase, the prosecution called an examining doctor to testify to the defendant's future dangerousness which the state had to establish to obtain a death sentence. *Id.* at 468. The Court held that the protection of the Fifth Amendment extends to a capital trial's penalty phase due to the gravity of "the ultimate penalty of death." *Id.* at 462-63.

Estelle rejected the State's argument that the privilege against self-incrimination is extinguished "once guilt has been adjudicated." *Id*. at 462. "We can discern no basis to distinguish between guilt and penalty phases of [a defendant's] capital murder trial so far as the protection of the Fifth Amendment is concerned." *Id*. at 462-63. This Court concluded, "Any effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment." *Id.* at 463.

Petitioner asserts that this holding of *Estelle* is dicta. Pet. Br. 26. However, this Court's conclusion that the Fifth Amendment applies to capital sentencing proceedings was an essential basis of the ruling. *See Estelle*, at 461 ("Our initial inquiry must be whether the Fifth Amendment privilege is applicable in the circumstances of this case."). *Accord Buchanan v. Kentucky*, 483 U.S. 402, 421 (1987) (describing the preceding holding in *Estelle* as "noting that the Fifth Amendment was applicable in a capital sentencing hearing"). This Court's holdings of course include the final disposition of a case as well as the preceding determinations "necessary to that result." *Seminole Tribe of Fla.*, 517 U.S. at 67.

Petitioner also asserts that this Court in *Penry v. Johnson*, 532 U.S. 782, 795 (2001) restricted *Estelle*. Pet. Br. 31. This overstates the significance of *Penry*. *Penry* held Texas did not violate AEDPA on consideration of a question specifically left open in *Estelle*. 532 U.S. at 795. *Estelle* did not decide whether the Fifth Amendment protected a defendant who put his own mental state at issue. *Penry* did not disturb the essential basis of *Estelle* - that there is "no basis to distinguish between the guilt

and penalty phases of [a] capital murder trial so far as the protection of the Fifth Amendment is concerned." *Estelle*, at 462-3.[3]

3. *Mitchell*: a guilty plea does not waive Fifth Amendment rights at a subsequent sentencing proceeding, and no adverse inference may be raised by a defendant's exercise of his right not to testify.

Mitchell v. United States, 526 U.S. 314 (1999) eliminated any possible distinction between *Estelle*, in which the defendant was incriminated by his own statement, and *Griffin* and *Carter*, in which the defendants exercised their right not to testify. Mitchell pled guilty to federal drug charges without a plea agreement, but reserved the right at sentencing to contest the quantity of drugs, which had a direct bearing upon her minimum sentence. *Id.* at 317. As a consequence of her guilty plea, the judge ruled Mitchell had no right to remain silent: "'I held it against you that you didn't come forward today and tell me that you really only did this a couple of times . . . I'm taking the position that you should come forward and explain your side of this issue.'" *Id.* at 319.[4]

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3. In *Beathard v. State*, 767 S.W.2d 423, 431-2 (Tex. Cr. App. 1989), the Texas Court of Criminal Appeals specifically noted that its *Penry* decision was limited to psychiatric sanity examinations, which had no bearing or effect upon the entitlement to a *Carter* instruction under the Fifth Amendment at Beathard's capital sentencing trial.

4. This ruling mirrored the trial court's denial of a *Carter* instruction because the trial court indicated that Woodall would have to "offer testimony," "an explanation," "ask for forgiveness" or offer "remorse." JA 38. The trial court felt the jury could consider all of the above. *Id.*

This Court addressed two questions in *Mitchell*. First, whether a guilty plea waives the privilege in the sentencing phase, either as a result of the colloquy preceding the plea or by operation of law when the plea is entered. *Id*. at 316. Second, whether, in the course of determining facts bearing upon the severity of the sentence, a trial court may draw an adverse inference from the defendant's silence. *Id*. at 317.

Mitchell decisively answered the first "guilty plea" question: a "plea is not a waiver of the privilege at sentencing." *Id.* at 316. This Court acknowledged the well-established principle from *Estelle* that in a bifurcated proceeding, the Fifth Amendment right against self-incrimination survives even though guilt has already been determined. *Id*. at 325 (*citing Estelle*, 451 U.S. at 462).

Addressing the second question, the Court recognized that while there is no basis for invoking the privilege "where there can be no further incrimination," this principle is limited "to cases in which the sentence has been fixed and the judgment of conviction has become final." *Mitchell,* 526 U.S. at 314. The Court explained:

> Where the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony. As the Court stated in *Estelle:* "Any effort by the State to compel [the defendant] to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment." 451 U.S., at 463…"The essence of this basic constitutional principle is 'the requirement that the State which proposes to convict *and punish* an

> individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.' " *Id.,* at 462, (emphasis in original) (*quoting Culombe v. Connecticut*, 367 U.S. 568, 581-582 (1961)) . . . [I]t appears that in this case, as is often true in the criminal justice system, the defendant was less concerned with the proof of her guilt or innocence than with the severity of her punishment. Petitioner faced imprisonment from one year upwards to life, depending on the circumstances of the crime. To say that she had no right to remain silent but instead could be compelled to cooperate in the deprivation of her liberty would ignore the Fifth Amendment privilege at the precise stage where, from her point of view, it was most important.

Id. at 329-30. The Court declined to deviate from what it characterized as a broad rule:

> The normal rule in a criminal case is that no negative inference from the defendant's failure to testify is permitted. *Griffin v. California*, 380 U.S. 609, 614 [] (1965). We decline to adopt an exception for the sentencing phase of a criminal case with regard to factual determinations respecting the circumstances and details of the crime.

Id. at 327-8. *Mitchell* held that a defendant, even after a plea, should not be forced to be an "unwilling instrument of his or her own condemnation." *Id.* at 329.

C. The Kentucky Supreme Court's decision unreasonably applied these precedents.

The Fifth Amendment applies at a capital sentencing. *Estelle*, 451 U.S. at 462-3. Because he contested the appropriate sentence, Woodall's Fifth Amendment right survived his guilty plea. *Mitchell*, 526 U.S. at 327. A sentencing fact-finder is not permitted to draw adverse inferences from a defendant's silence. *Mitchell*, at 329-30. Indeed, the Commonwealth could not have compelled Woodall to testify against his will. *Estelle,* at 454. The trial court colloquied Woodall regarding the exercise of his right not to testify. Woodall requested a *Carter* instruction to prevent any adverse inferences from his silence. Once requested it should have issued. *Carter*, 450 U.S. at 305.

Instead of heeding *Estelle*'s and *Mitchell*'s commands that the Fifth Amendment applies to sentencing proceedings, and that a defendant is entitled to a *Carter* instruction when requested, the Kentucky Supreme Court did not recognize the Fifth Amendment's applicability to capital sentencing proceedings when there is a guilty plea. When a state court contravenes the "fundamental principles established" or categorical rules by this Court's "most relevant precedents," it unreasonably applies the law within the meaning of 28 U.S.C. § 2254(d). *Abdul-Kabir,* 550 U.S. at 258. In capital cases, multiple state courts have found *Carter* applicable to sentencing

proceedings.[5] Those few federal circuit courts to address it have followed suit.[6] Kentucky is an outlier.

1. The Kentucky Supreme Court unreasonably ruled that a guilty plea eliminated any Fifth Amendment protection.

The Kentucky Supreme Court's ruling that a guilty plea eliminated any Fifth Amendment protection ignores the clear lesson of *Mitchell*. The Kentucky Supreme Court rejected *Carter's* applicability on the basis that Woodall had pled guilty. Pet. App. 262a. According to the Kentucky Supreme Court, Woodall's guilty plea ended the inquiry. *Id.; see* Pet. Br. 30. The court also rejected the applicability of *Estelle* for the same reason. *Id.* However, *Estelle* applied the Fifth Amendment to a sentencing phase without distinguishing between guilt from a plea or a jury finding. 451 U.S. at 463.

While *Estelle* alone proves that Woodall maintained his Fifth Amendment rights at his post-plea capital sentencing, this Court in *Mitchell* pointedly ruled that a "plea is not a waiver of the privilege at sentencing." 526

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5. *People v. Leonard*, 40 Cal.4th 1370, 1424-25 (Cal. 2007); *Burns v. State*, 699 So.2d 646, 652 (Fla. 1997); *People v. Ramirez*, 457 N.E.2d 31, 35-37 (Ill. 1983); *State v. Edwards*, 116 S.W.3d 511, 540 (Mo. 2003); *State v. Munn*, 56 S.W.3d 486, 502 (Tenn. 2001); *State v. Middleton*, 368 S.E.2d 457, 461 (S.C. 1988); *Beathard v. State*, 767 S.W.2d 423, 431-2 (Tex. Cr. App. 1989).

6. *United States v. Whitten*, 610 F.3d 168, 198-200 (2nd Cir. 2010) (reversing federal death sentence on basis of *Carter* and *Griffin* errors at sentencing phase); *Middleton v. Evatt*, 1996 U.S. App. LEXIS 2181, *26-30 (4th Cir. 1996) (recognizing *Carter's* applicability to state capital sentencing proceeding).

U.S. at 316. *Mitchell* also recognized that "[t]reating a guilty plea as a waiver of the privilege at sentencing would be a grave encroachment on the rights of defendants." *Id.* at 324. *Mitchell* firmly ruled that "[t]o maintain that sentencing proceedings are not part of 'any criminal case' is contrary to the law and to common sense." *Id.* at 327. The Kentucky Supreme Court made the same error that the Third Circuit did in *Mitchell*. It carved out an exception to the Fifth Amendment. As a dissenting Justice of the Kentucky Supreme Court noted, the court simply failed to give effect to the "the plain language of *Mitchell*." Pet. App. 310a.

2. The Kentucky Supreme Court's decision unreasonably limited *Estelle* because it was not a jury instruction case.

The Kentucky Supreme Court also found that *Estelle* did not apply because it was not a jury instruction case like *Carter*. Pet. App. 262a. However, *Carter* recognized that the foundation for the right to a no-adverse-inference instruction upon request is the Fifth Amendment. 450 U.S. at 303. And both *Estelle* and *Mitchell* found that a defendant who has been found guilty, but has yet to be sentenced, retains Fifth Amendment protections. *Estelle*, at 462-63; *Mitchell*, at 329.

Estelle flatly rejected that Fifth Amendment protections did not apply to capital sentencing proceedings because there was "no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." 451 U.S. at 462-3. Thus, it is untenable that the protection of *Carter*, which was

decided two months before *Estelle,* would not be included in those Fifth Amendment protections applicable at a capital sentencing trial. Indeed, this Court rejected the government's similar attempt to limit the Fifth Amendment privilege at federal sentencing in *Mitchell*. "[T]o say that an adverse factual inference may be drawn from silence at a sentencing hearing held to determine the specifics of the crime is to confine *Griffin* by ignoring *Estelle*." *Mitchell*, 526 at 329.

3. The Kentucky Supreme Court's decision unreasonably required compelled testimony before *Estelle* applied.

The Kentucky Supreme Court held that Fifth Amendment protection does not extend to the penalty phase of a capital trial unless the defendant was compelled to testify, "as in *Estelle*." 262a; *see* Pet. Br. 27, 30. This conclusion unreasonably limits this Court's precedent. *Mitchell* held the Fifth Amendment privilege in the sentencing phase of "any criminal case" is not limited to instances in which the defendant was compelled to testify at trial and includes a protection against a trial court drawing an adverse inference from the defendant's silence. *Mitchell*, 526 U.S. at 329.

The Kentucky Supreme Court's opinion unreasonably applied this Court's authority by parsing it too finely. Unquestionably, *Griffin* prohibited *both* improper arguments and improper instruction. 380 U.S. at 610, 615. By the time *Estelle* was decided, this Court had issued *Lakeside, Griffin,* and *Carter* all of which bore on instructions related to inferences from the failure to testify. Moreover, in *Estelle*, this Court cited *Griffin*, noting

the importance of the reliability of capital sentencing proceedings. *Estelle*, 451 U.S. at 462-3. Furthermore, the Kentucky Supreme Court missed *Carter's* core reasoning. *Carter* reasoned that a trial judge has the "constitutional obligation to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify." *Carter*, 450 U.S. at 303. Nowhere is that weight more significant than in a capital sentencing. *Estelle*, at 462-3.

4. The Kentucky Supreme Court unreasonably ruled that this Court's precedents did not apply, because no facts were in dispute when the Commonwealth had to establish beyond a reasonable doubt that death was the appropriate sentence.

The Kentucky Supreme Court asserted that the Fifth Amendment did not apply to Woodall's penalty phase because he failed to contest any facts. Pet App. 262a-263a. Petitioner similarly argues that this lack of a factual contest at the penalty proceeding ends the matter. Pet. Br. 31; *Id.* at 22, 23, 30. The facts demonstrate otherwise. And the court's reasoning proves internally inconsistent because the court also recognized "in circumstances where there is a guilty plea, the Commonwealth still has the burden of proving … *that there is a basis for the death penalty.* It may introduce any relative and probative evidence necessary." Pet App. 298a (emphasis added).

One of the jury instructions given elucidates the contested issues under Kentucky law. Under Instruction #6, even if the jurors found Woodall guilty of an aggravating circumstance, his life was required to be spared, unless after considering the whole of the case,

every juror decided beyond a reasonable doubt that death was the appropriate penalty. JA 44. Petitioner argues that Woodall was not entitled to Instruction #6, and thus received a benefit to which he was not entitled. *See* Pet. Br. 36. This misapprehends Kentucky's law at the time of Woodall's trial.

Well after Woodall's trial, the Kentucky Supreme Court changed the burden of proof of its capital-sentencing jury instruction. *Brown v. Commonwealth,* 313 S.W.3d 577, 594 n.2 (Ky. 2010). However, *Brown* recognized that Woodall's Instruction #6 was the long-standing pattern instruction. *Id.* In *Parrish v. Commonwealth*, 121 S.W.3d 198, 207 (Ky. 2003), the Kentucky Supreme Court held this instruction "do[es] not violate the statutory system [and is] a proper statement of the law." The instruction was cited with approval in other capital cases. *See Purdue v. Commonwealth*, 916 S.W.2d 148, 168 (Ky. 1995); *Skaggs v. Commonwealth*, 803 S.W.2d 573, 575 (Ky. 1990).

Further, Petitioner avoids considering the *actual* instruction provided Woodall's jury. *See* Pet. Br. 36. Just like the jury instructions required a finding of the elements of the crime in *Carter*, the determination of the future dangerousness special circumstance question in *Estelle*, and the finding of the amount of drugs in *Mitchell*, Woodall's jury needed to find *beyond a reasonable doubt* whether Woodall should die.

Petitioner misinterprets *Mitchell* to argue that the protection of the Fifth Amendment privilege is limited to the "facts of the crime." Pet.Br. 32-33. Doing so, Petitioner disregards *Estelle* where this Court held the Fifth Amendment applied in the capital penalty phase

when a defendant's unwarned statement was used to prove his future dangerousness. Future dangerousness is a characteristic of the defendant, not a fact of the crime.

Moreover, circumstances of the crime were certainly at play in the jury's decision whether Woodall would live or die. Woodall's guilty plea did not determine *every* fact upon which the Commonwealth would rely in his effort to secure death.[7] At trial, over objection, the prosecutor, through the testimony of the blood spatter expert, sought to convince the jury that the crime occurred in a salacious and therefore more aggravated manner.

Certainly, the jurors were free to weigh the theorized details of the crime proffered by the prosecutor. They were also free to weigh lack of remorse as a non-statutory aggravator. Petitioner concedes that the prosecutor affirmatively pursued lack of remorse. Pet. Br. 40, 45. The state thus admits that it sought the death penalty on an aggravating ground on which Woodall exercised his right not to testify.

Estelle recognized the "the gravity of the decision" to be made at a capital penalty trial. 451 U.S. at 463. *Estelle* relied on this Court's capital jurisprudence. *Id.*, *citing Green v. Georgia*, 442 U.S. 95, 97, (1979); *Presnell v. Georgia*, 439 U.S. 14, 16 (1978); *Gardner v. Florida*, 430 U.S. 349, 357–358 (1977) (plurality opinion). This Court said that at a capital sentencing "the State is not relieved

7. Kentucky is a non-weighing state. *Ice v. Commonwealth*, 667 S.W.2d 671, 679 (Ky. 1984); *Stringer v. Black*, 502 U.S. 222, 229 (1992). The jury may consider in aggravation more than the statutory aggravating factors. *Brown v. Sanders*, 546 U.S. 212, 217 (2006).

of the obligation to observe fundamental constitutional guarantees." *Estelle*, at 463. Similarly, this Court has also said that a death sentence based on an aggravating factor that "authorizes a jury to draw adverse inferences from conduct that is constitutionally protected" is invalid. *See Zant v. Stephens*, 462 U.S. 862, 885 (1983) (citing *United States v. Jackson*, 390 U.S. 570 (1968)). Unmistakably, as recognized by *Estelle*, constitutionally protected conduct, in this case Woodall's exercise of his right not to testify, cannot be considered in a capital sentencing.

Here, the jury was able to consider Woodall's lack of testimony as to all the facts that were at issue. As more fully explained *infra*, the jury's natural inclination was to expect testimony from Woodall. When the trial court deprived the jurors of the no-adverse-inference instruction, this left them free to punish Woodall for what he did not provide, and it lessened the state's burden as to any facts at issue. This allowed a death verdict to be based on jurors' natural (but constitutionally impermissible) expectations rather than on reliable facts.

Petitioner seeks to exempt remorse from this case. Pet. Br. 29. Petitioner however, misreads *Mitchell*.[8] *Mitchell* did not leave open, as Petitioner contends, the question of whether silence bears upon lack of remorse as it pertains to a capital sentencing proceeding. *Mitchell* rather left open the question of whether a convicted

8. Petitioner misquotes *Mitchell* regarding the "separate question" left unanswered by cutting the Sentencing Guidelines language from the quote without the use of an ellipse. Pet. Br. 29. While doing so makes *Mitchell* appear more helpful to Petitioner's argument, the misquotation alters the meaning of the opinion. *See Mitchell,* at 330.

defendant has Fifth Amendment protections with respect to the federal sentencing guidelines remorse/acceptance of responsibility downward departure. 526 U.S. at 330. Under USSG § 3E1.1, a defendant bears the burden of proving a sentencing range reduction. It is a benefit to a defendant, not an enhancement, and comes after the statutory fixing of the proper sentencing range, and is only a contested issue if the defendant makes it so. Federal Sentencing Guidelines Manual, Chap. 3, Part E (2013-14).

Indeed, *Mitchell* would have played out in identical fashion if the sentencing range increase had been for lack of remorse rather than a quantity of cocaine. When the burden is on the prosecution, the Fifth Amendment applies and the prosecutor cannot meet his burden by utilizing a defendant's silence. Here, the prosecution affirmatively tried to prove the non-statutory aggravator of lack of remorse to carry its burden under Instruction #6.

Petitioner next argues that because the Commonwealth had no burden as to mitigation, the mitigation cannot fall into the purview of the no-adverse-inference instruction. Pet. Br. 37. Petitioner then concludes that Woodall's silence in this area could not have been used to relieve the prosecution from its burden of proof or subject Woodall to a harsher sentence. *Id.* This misapprehends the nature of the trial and disregards the Kentucky Supreme Court's express statement that the Commonwealth bore the burden to prove the death penalty. Pet. App. 298a. Facts were at issue. Here, the prosecution had a legal burden to prove that death was the appropriate punishment. JA 44. To that end, the prosecution's thorough cross-examination contested virtually each aspect of the mitigation case presented by Woodall.

The record does not disclose why Woodall did not testify. As *Carter* recognized there are numerous reasonable reasons any person may not want to testify. 450 U.S. at 300 n. 15 (timidity, nervousness, embarrassment, fear of impeachment, protection of others). Woodall's at best borderline retardation provides a likely reason he did not testify.[9] This Court has recognized:

> Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.

Atkins v. Virgina, 536 U.S. 304, 320-21 (2002). Thus, while Woodall may have wanted to express remorse (or to explain his actions, or to confirm his deleterious upbringing), he likely only could have done so at the risk of undermining or, worse, achieving the opposite of this goal.

The denial of this instruction assured that Woodall's death sentence was not merely a product of what had occurred in the courtroom. As this Court has said:

> An instruction prohibiting juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the trial, does not violate the United

9. Woodall's 74 IQ places him within the range of mental retardation considering the standard error of measurement. Am. Ass'n of Intellectual and Developmental Disabilities, Intellectual Disability: Definitions, Classification, and Systems of Supports (11th ed. 2010) at p. 35.

> States Constitution. It serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him. And to the extent that the instruction helps to limit the jury's consideration to matters introduced in evidence before it, it fosters the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." Indeed, by limiting the jury's sentencing considerations to record evidence, the State also ensures the availability of meaningful judicial review, another safeguard that improves the reliability of the sentencing process.

California v. Brown, 479 U.S. 538, 543 (1987) (citations omitted).

The necessity for a *Carter* instruction is plain. Like the defendant in *Mitchell*, as Woodall entered the penalty trial he had a legitimate fear of adverse consequences from his silence. *Mitchell* 526 U.S. at 326. As in *Mitchell*, the stakes were high. While for Mitchell the adverse inference from silence may have resulted in additional years of punishment, for Woodall the inference may have resulted in a death sentence. *See id.* at 329. As this Court stated in *Mills v. Maryland*, 486 U.S. 367, 383-384 (1988), the decision to "execute a defendant is unlike any other decision citizens and public officials" make, and there is "a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case."

In summation, Kentucky's refusal to permit Woodall's requested *Carter* instruction contravenes the "fundamental principles established" by this Court's "most relevant precedents," and thus, it unreasonably applied the law within the meaning of 28 U.S.C. § 2254(d)(1). *Abdul-Kabir,* 550 U.S. at 258. Indeed, this Court has never excluded the Fifth Amendment's protections based upon the type of proceeding in which it is invoked. *Estelle*, 451 U.S. at 462; *Gault,* 387 U.S. at 49. To the contrary, this Court has historically ruled that the Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard." *Counselman*, 142 U.S. at 562.

5. Petitioner's further arguments do not otherwise prove the correctness of the Kentucky Supreme Court's decision.

Petitioner proffers further reasons why the Kentucky Supreme Court's decision was correct. Because these reasons were not the basis of the Kentucky Supreme Court's explicated decision, they are not proper considerations under AEDPA. *See Wetzel*, 132 S.Ct. at 1199; *Parker*, 132 S.Ct. 2151-2. Upon *de novo* view, they also fail.

Petitioner states that this Court has never applied the Fifth Amendment to a pure sentencing issue. Pet. Br. 32. This is not the case. The issue of future dangerousness in *Estelle* was, at that time, the principal vehicle of the Texas death penalty statute for the consideration of aggravation and mitigation. *Jurek v. Texas*, 428 U.S. 262, 272-274 (1976). Petitioner mistakenly believes that Texas' future dangerousness question is an eligibility factor. Pet. Br. 26. However, under Texas law, it was a selection

question. *Jurek v. State*, 522 S.W.2d 934, 939-940 (1975). *Accord Lowenfeld v. Phelps*, 484 U.S. 231, 245 (1988) (discussing Texas' questions as selection factors). Texas' future dangerousness question is no different, for present purposes, than Woodall's Instruction #6. Both require the State to prove its case beyond a reasonable doubt.

Petitioner also insists that Woodall is not entitled to any Fifth Amendment protection because neither the judge nor prosecutor told the jury it could draw an adverse inference from Woodall's silence. Pet. Br. 31. However, *Carter* recognized an independent Fifth Amendment violation "even without comment." 405 U.S. at 303.

Petitioner also wrongly accuses the Sixth Circuit of creating new law. Pet. Br. 37-39. But where clearly established Supreme Court law consists of a principle that owes its origin to more than one case, it does not necessarily break new legal ground or impose new obligations. This Court noted in *Yarborough v. Alvarado*, that "[w]hile the difference between applying a rule and extending it is not always clear. Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." 541 U.S. 652, 666 (2004).

In *Mitchell* this Court noted, "Our holding today is a product of existing precedent . . . Although *Estelle* was a capital case, its reasoning applies with full force here." *Mitchell*, 526 U.S. at 329. *Mitchell*, a federal sentencing guidelines case, did not purport to modify or undermine *Carter's* or *Estelle's* holdings. It embraced them. The rule Petitioner favors would prohibit adverse inferences in non-capital federal sentencing proceedings (based ironically on *Estelle*, a capital case) but allow such inferences in capital sentencing proceedings (now ignoring the decision).

The Sixth Circuit did not take a narrow principle and enlarge it to reach a novel situation; nor did it extend established principles to a new situation. Nor did it take a general, high discretionary rule, and reject a state court's application of that rule. Rather, it simply found, as did this Court in *Mitchell*, that this Court's Fifth Amendment reasoning "applies with full force here." Consequently, it found unreasonable a state court's unwarranted restriction of this Court's well-established Fifth Amendment protections and concluded AEDPA does not permit a state court to contravene this Court's precedent, or to create exceptions to it.

The only reasonable conclusion from *Carter*, *Estelle* and *Mitchell* is that at the time of Woodall's trial, a defendant in a sentencing proceeding, capital or non-capital, in which the government retains the burden of proving facts relevant to a contested issue, possessed a Fifth Amendment right to a no-adverse-inference instruction upon request, regardless of whether guilt has previously been established through a plea agreement. As such, the Sixth Circuit's finding of unreasonableness was entirely correct.

II. The Fifth Amendment error had substantial and injurious effect.

A. The Sixth Circuit correctly applied the *Brecht* and *O'Neal* standards.

The Sixth Circuit, having found a Fifth Amendment violation, followed this Court's directives and applied the harmless error test of *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Pet. App. 9a. *Brecht* requires a reviewing court to consider, "in light of the record as a whole," whether the

error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 638.

In applying *Brecht*, the Sixth Circuit correctly found that it could not answer the prejudice question with absolute certitude. Pet. App. 10a-12a. Because of this, the court then applied this Court's standard set forth in *O'Neal v. McAninch*, 513 U.S. 432, 445 (1995). When the *Brecht* analysis yields "grave doubt" about whether the constitutional violation affected the verdict, the defendant must prevail. *Id.*; *accord Fry v. Pliler*, 551 U.S. 112, 121 n. 3 (2007).

1. The Sixth Circuit did not deviate from *Brecht* and *O'Neal*.

Assessing prejudice necessarily requires some element of speculation. Indeed, this Court has faulted a state court for citing the need to avoid speculation as justification for its failure to apply the applicable standard of review. *Sears v. Upton*, 130 S.Ct. 3259, 3266 (2010) (State court ruled it could not "speculate" as to what the effect of additional evidence would have been because *Strickland v. Washington*, 466 U.S. 668 (1984) "will necessarily require a court to 'speculate' as to the effect of the new evidence."). Similarly, an instructional omission requires a court to surmise the effect of its absence. Here, the Sixth Circuit correctly followed this Court's guidance in *Brecht* and *O'Neal*.

Petitioner claims that the Sixth Circuit engaged in "possible-harm review." Pet. Br. 46-48. However, the Sixth Circuit's analysis began with the following language from *Carter*: "[I]t is arguable that a refusal to give an

instruction similar to the one that was requested here can never be harmless." Pet. App. 9a (*citing Carter*, 450 U.S. at 304). *Carter* recognized the mischief attendant to a jury's natural inclination when a defendant does not testify. 450 U.S. at 304. This Court has also recognized this natural mischief previous to *Carter*. *See also Lakeside*, 435 U.S. at 340; *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-154 (1923). It was thus logical for the Sixth Circuit to rely on *Carter* as a starting point to measure the harm. *See* Pet. App. 9a. Indeed, the Sixth Circuit would have been remiss if it ignored this Court's most relevant pronouncement on the prejudice from this error.

The policies underlying *Carter* are important, here, because Kentucky is a non-weighing state. *See* FN 5, *supra*. The jury's sentencing decision was not confined to consideration of specific statutory aggravators. *Id.* Without the instruction, however, the jury could consider Woodall's constitutionally protected conduct as a basis to impose death. The Sixth Circuit recognized this:

> Given our grave doubt that the jury's recommendation was not influenced by adverse inferences drawn from Woodall's decision not to testify, we "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error."

Pet. App. 11a (citing *O'Neal*, at 437).

Lastly, this Court's emphasis on the importance of reliability at sentencing also illustrates why the Sixth

Circuit's application of *Brecht* then *O'Neal* rule was appropriate. While the record here contains bad facts, bad facts do not always result in death verdicts.[10] Moreover, in Kentucky, the penalty decision must be unanimous. Pet. App. 266a. It only takes one juror to hang a jury and prevent a death sentence. *Id.* Therefore, even a slight rebalancing of the proceedings might affect the verdict. Eliminating the jury's powerful natural inclination for an explanation from Woodall is not a slight rebalancing. It removes altogether an improper consideration, which lessened the state's burden to secure a death sentence.

2. Jurors will hold silence against a defendant unless instructed otherwise.

Carter recognized that a no-adverse-inference instruction is necessary so jurors will not "roam" and hold a defendant's silence against him. *Carter*, 450 U.S. at 301. People naturally want to hear an explanation from an accused wrongdoer. *Lakeside*, 435 U.S. at 340. Indeed, the no-adverse-inference rule "runs exactly counter to normal evidentiary inferences: If I ask my son whether he saw a movie I had forbidden him to watch, and he remains silent, the import of his silence is clear." *Mitchell*, 526 U.S. at 332 (Scalia, J., dissenting). As this Court has said,

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10. *See Ballard v. Commonwealth*, 2012 WL 601215 (Ky. 2012) (jury recommended life without parole for formerly convicted pedophile who sodomized and bludgeoned to death a 6-year-old); *Cross v. Commonwealth*, 2009 WL 4251649 (Ky. 2010) (jury recommended life without parole for defendant who strangled a woman and forced others to engage in sexual activity with her corpse); *Jackson v. Commonwealth*, 392 S.W.3d 907 (Ky. 2013) (jury recommended life without parole for defendant who committed a triple infanticide by arson).

"Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character." *Bilokumsky*, 263 U.S. at 153-154.

This Court also described how the law has long acknowledged that the unfettered citizen naturally draws inferences from a man's silence:

> It has often been noted that such inferences [from silence] may be inevitable. Jeremy Bentham wrote more than 150 years ago: "[B]etween delinquency on the one hand, and silence under inquiry on the other, there is a manifest connexion; a connexion too natural not to be constant and inseparable." 5 J. Bentham, *Rationale of Judicial Evidence 209* (1827). And Wigmore, among many others, made the same point: "What inference does a plea of privilege support? The layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime." 8 J. Wigmore, *Evidence* § 2272, p. 426 (McNaughton rev. 1961).

Lakeside, 435 U.S. at 340, fn. 10. This Court has found "dubious" the assumption that during a trial "the jurors have not noticed that the defendant did not testify and will not, therefore, draw adverse inferences on their own." *Id.* at 340.

Further, the jury will likely have required an explanation from Woodall based on narrative theory principles this Court has recognized. This Court explored these principles in *Old Chief v. United States*, 519 U.S. 172

(1997). Such principles show why the harm discussed in *Carter*, *Lakeside*, and *Bilokumsky* arises.

In *Old Chief*, this Court held that a prosecutor is not precluded from presenting evidence that proves her case when a defendant has conceded to facts that establish one of the elements. *Id.* at 187-188. This Court stated:

> Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them. Jury duty is usually unsought and sometimes resisted, and it may be as difficult for one juror suddenly to face the findings that can send another human being to prison, as it is for another to hold out conscientiously for acquittal. When a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment.

Id. Jurors come to the courthouse with expectations about what "proper proof should be." *Id.* at 188. "If suddenly

the prosecution presents some occurrence in the series differently, as by announcing a stipulation or admission, the effect may be like saying, 'never mind what's behind the door,' and jurors may well wonder what they are being kept from knowing." *Id.* at 188. This Court in *Old Chief* recognized:

> The assumption that jurors may have contrary expectations and be moved to draw adverse inferences against the party who disappoints them undergirds the rule that a defendant can demand an instruction forbidding the jury to draw such an inference.

519 U.S. at 189, fn. 9.[11]

Here, the Commonwealth and Woodall were telling competing stories as to the punishment. In the same way that in *Old Chief* a prosecutor's reliance on a stipulation would cause jurors to wonder what they are being kept from knowing, so did Woodall's silence alert the jurors to speculate what was "behind the closed door." *Old Chief*, 519

11. In *Old Chief*, this Court cited with approval a law review article by Stephen A. Saltzburg. *Id.* at 188-189 (citing Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 Cal. L. Rev. 1011 (1978)). Saltzburg argues that in making rulings, trial judges should consider jurors' inferences from the absence of evidence. Saltzburg at 1011. Negative inferences are "inferences drawn by factfinders from the absence of one or more pieces of evidence that they expect to be presented." *Id.* Saltzburg's states that "[i]f their expectations are not satisfied, triers of fact may penalize the party who disappoints them by drawing a negative inference against that party." *Id.* at 1019.

U.S. at 188. Without the requested instruction, Woodall's lack of testimony diminished the impact of his mitigation narrative. More injuriously, it enhanced the impact of the story the Commonwealth was telling in aggravation.

The natural inclination to expect an answer from a defendant is heightened in the context of a capital sentencing proceeding. Here, the Sixth Circuit was correct when it found that the jury naturally would have wanted testimony from Woodall. The court relied on the very words of the judge who presided over the trial:

> [T]he trial court itself appears to have drawn an adverse inference from Woodall's decision not to testify: in denying the requested instruction, the trial court stated that it was "aware of no case law that precludes the jury from considering the defendant's lack of explanation of remorse or explanation of the crime or anything else once guilt has been adjudged in sentencing." The trial court's own inferences illustrate our concern. Given our grave doubt that the jury's recommendation was not influenced by adverse inferences drawn from Woodall's decision not to testify, we "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *O'Neal*, 513 U.S. at 437 [] (internal quotation marks omitted).

Pet. App. 11a.

The Sixth Circuit's core holding is firmly rooted in this Court's authority regarding the obvious dangers in not providing an instruction. *Lakeside*, 435 U.S. at 340; *Old Chief*, 519 U.S. at 189 n. 9. Given this, the Sixth Circuit quite correctly had "grave doubt" as to whether the jury considered Woodall's failure to testify and used it against him. Woodall was penalized for asserting a constitutional protection, and it formed a basis of his death sentence.[12]

3. The jury would have wanted to hear Woodall express remorse.

The Fifth Amendment prohibits a prosecutor from establishing lack of remorse from a defendant's failure to testify. In *Estelle*, the defendant's lack of remorse was a factor in the psychologist's future dangerousness finding. *Id.* at 459-460. The circumstances of *Woodall* are logically indistinct: the prosecution used Woodall's silence as evidence of lack of remorse. To justify the death sentence, the prosecutor sought to prove the non-statutory aggravator of lack of remorse. Petitioner acknowledges remorse was at issue. Pet. Br. 40, 45.

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12. The *Amicus* of Arizona and Other States suggests that providing a *Carter* instruction will cause confusion and corrupt deliberations by hurting the state's ability to prove its case. Arizona Amicus Brief 11-18. However, the logic of *Carter*, *Lakeside*, and *Old Chief* illustrate that the only person who is hurt when they do not give testimony is the person not testifying. *Lakeside* found that the *Carter* instruction cured the only harm possible here: that the defendant's silence would be held against him. *Lakeside*, 435 U.S. at 339. Jurors are also presumed to follow their instructions. *Id.* The only harm to the state is they do not receive the benefit of a negative inference, which they are not entitled to anyway.

To meet his burden, the prosecutor was entitled to argue non-statutory aggravation, such as a defendant's courtroom demeanor and its bearing on lack of remorse. *See Fields v. Commonwealth*, 274 S.W.3d 375, 416-417 (Ky. 2008) *overruled on other grounds Childers v. Commonwealth*, 332 S.W.3d 64 (Ky. 2010). The prosecutor designed his closing to convince the jury that Woodall had expressed no remorse and had not accepted responsibility. TE 1598-99. The prosecutor ascribed a motive of fakery to Woodall's in-court demeanor of quietly keeping his head down:

> You've heard everyone talk…everyone talk about their observations of the defendant. How many of those have told you that he's got a habit of sitting around looking down like this for a week at a time? Don't be fooled. Don't be fooled by that.

JA 58. The prosecutor directly confronted Woodall's demeanor, and Woodall's demeanor was his silence. The prosecutor also emphasized Woodall's post-crime behavior as lack of remorse. JA 60-1.

In the absence of a no-adverse-inference instruction, the prosecutor's comments served the purpose of focusing the jury's attention on Woodall's lack of testimony. Because jurors want testimony, an otherwise proper prosecutorial comment can compound the prejudice from the error of not giving a *Carter* instruction. *See State v. Mayes*, 63 S.W.3d 615, 638, fn. 13 (Mo. 2001). Moreover, even if the prosecutor had not purposefully implied that Woodall lacked remorse, the jury would have held Woodall's silence against him anyway. *Lakeside*, 435 U.S. at 340. The lack

of the instruction assisted the Commonwealth in its case that Woodall was "evil" and remorseless. JA 51, 61.

Woodall pled guilty to the crime, which showed he accepted responsibility. Woodall also was a model prisoner in the jail, which showed lack of future danger. He also looked down while in court, which showed enough contrition for the prosecutor to feel he had to comment on it. A survey of capital juries also indicates that Woodall's decision to accept responsibility increased his odds of avoiding a death verdict. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1557, 1589-1592 (1998). "Jurors tend to react favorably to actions or strategies that communicate some acknowledgment of the defendant's responsibility for the crime." *Id.* at 1589.

Woodall attempted to hold the Commonwealth to its sentencing burden. He, undoubtedly with the guidance of his attorneys, made the decision not to take the stand. Woodall, given his intellectual and personality limitations, was not likely to make a good witness on remorse. Yet the jury would have wanted to hear him offer remorse. When he did not provide this, the jury would have held it against him. The lack of the instruction unduly aided the Commonwealth in this contest. *Carter*, 450 U.S. at 301; *Old Chief*, 519 U.S. at 189 n. 9.

4. The jury would have wanted an explanation from Woodall for his conduct.

The prosecution had a burden to justify a death sentence beyond a reasonable doubt. Pet. App. 298a. To help carry this burden, the Commonwealth used a blood

spatter expert to put in front of the jury theories related to the commission of the crime. TE 1274-1284. In closing, the prosecutor stated as fact that Ms. Hansen was alive and struggling for a prolonged period. JA 54-56.

The Commonwealth wanted to prove facts beyond the four corners of Woodall's guilty plea. Woodall had not said how the crime was accomplished; he had not said how long Ms. Hansen was awake and struggling. As each lurid detail of the prosecutor's closing summation was put before the jury, they would have increasingly wanted to hear from Woodall. Jurors would have wanted to know the facts. They would have wanted an explanation. And they would have penalized Woodall for not answering their questions. *Lakeside*, 435 U.S. at 340; *Old* Chief, 519 U.S. at 189 n. 9.

Woodall is not arguing that a prosecutor should be prohibited from putting before the jury the facts of the crime. The circumstances of the crime are an important consideration in the determination of the proper punishment in a capital case. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). However, a death sentence should not rest on adverse inferences from constitutionally protected conduct. *Estelle* 451 U.S. at 463. *Cf. Zant*, 462 U.S. at 885 (citing *Jackson*, 390 U.S. 570). Here, Woodall's silence was constitutionally protected. The lack of the *Carter* instruction put an improper thumb on the Commonwealth's side of the scale. *Cf. Stringer*, 503 U.S. at 232.

5. The jury would have wanted to hear Woodall confirm the mitigation.

This Court has also made clear that mitigating evidence plays a vital role in the reliability of capital punishment decisions. Under *Lockett v. Ohio*, 438 U.S. 586 (1978) a jury is required to have a full opportunity to consider "any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Id.* at 604 (plurality opinion). There is a "need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual." *Id.* at 605.

The Sixth Circuit properly recognized that a death verdict is not automatic. Pet. App. 10a-11a. The jury heard mitigating evidence that Woodall possessed limited intellectual functioning within the standard error of measurement for mental retardation; that he suffered from a personality disorder; that he was abandoned by his father; that he was neglected by his mentally ill mother; that he was sexually abused with soap suppositories; that he suffered extreme poverty; and that he exhibited good behavior while incarcerated. This Court has recognized the relevance of these types of mitigation. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) *overruled on other grounds by Atkins*, 536 U.S. 304; *Skipper v. South Carolina*, 476 U.S. 1, 7 (1986); *Lockett*, 438 U.S. at 604.

The trial court's refusal to properly charge the jury allowed the jurors to consider why Woodall did not testify and gave evidentiary weight to Woodall's silence. One or more jurors may have been led to believe that Woodall remained silent because his borderline intellectual

functioning was insignificant or that his mental illness did not burden him. Or they may have believed that the dysfunctional upbringing, the poverty, and the sexual abuse they heard about did not really affect Woodall because he did not bother to explain it to them himself. Or they may have doubted Woodall's amenability to prison.

One juror even asked Woodall's father whether anyone had sexually abused Woodall. TE 1480. The juror likely believed that those who are sexually abused are more likely to commit sex acts. Later testimony confirmed sexual offenders are more likely to have themselves been victims. TE 1581.[13] The juror was likely looking for an explanation for the offense. This Court has found sexual abuse mitigation to be compelling. *See Wiggins*, 539 U.S. at 535. The jury, or even one juror, may have held it against Woodall that he did not confirm the abuse or explain how the abuse – soap slivers or something worse - shaped his psyche and compelled his criminal acts.

The Commonwealth contested all of the mitigation. The prosecution's closing argument took pains to meet each piece of the mitigation narrative. JA 60-64. The Commonwealth affirmatively undertook the task of trying to prove that the mitigation was slight and, consequently, that death was appropriate. The court's refusal to properly charge the jury allowed it to penalize Woodall for not providing the missing pieces from the narrative of his life, aiding the Commonwealth in its case for death. *Old Chief,* 519 U.S. at 189, fn. 9.

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13. Petitioner states that Woodall in mitigation never tried to address why he committed the crime. Pet. Br. 37. However, Woodall clearly tied his sexual crimes to his own sexual abuse.

B. Alternatively, the Kentucky Supreme Court unreasonably applied *Chapman*.

Petitioner does not contest that *Brecht* and *O'Neal* are a proper framework for analyzing this case. *See* Pet. Br. 43-44. However, Texas, as Amicus for Petitioner, takes an inconsistent approach and believes that this Court's analysis should be whether under 28 U.S.C. § 2254(d) the Kentucky Supreme Court unreasonably applied the test of *Chapman v. California*, 386 U.S. 18 (1967). *Brief of Texas* 5-6. Texas' approach is flawed.

Texas' analysis is improper because this Court has already determined that § 2254(d) application is not necessary for errors of this category. *Fry v. Pliler*, 551 U.S. 112, 120 (2007). The "substantial and injurious" standard of *Brecht* subsumes the test of whether under § 2254(d) Kentucky unreasonably applied the *Chapman* "harmless beyond a reasonable doubt" standard. *Id.*

Texas' proposed approach is also flawed because Kentucky's prejudice analysis was unreasonable. The Kentucky Supreme Court decided prejudice as follows:

> The instruction contemplated by *Carter*[], could not have changed the outcome of a guilty determination that the defendant acknowledged by his admission of guilt. There was no reason or need for the jury to make any additional inferences of guilt.
>
> There is no error in this respect. Any possible error would be nonprejudicial because the defendant admitted the crimes and the evidence of guilt is overwhelming.

Pet. App. 261a-262a. The plain language illustrates that the Kentucky Supreme Court viewed the error as only implicating the guilt of the crime. However, *Chapman* analysis, like *Brecht* analysis, requires consideration of the "whole record." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). The error's effect cannot be compartmentalized to exclude the sentencing phase of a capital case.

A state court decision constitutes an "unreasonable application" of federal law under § 2254(d)(1) when it correctly identifies the applicable rule but applies that rule to the facts in an objectively unreasonable manner. *Lockyer*, 538 U.S. at 75. The Kentucky Supreme Court's singular focus was on whether Woodall was contesting "any of the facts or aggravating circumstances surrounding the crimes." Pet. App. 263a. However, the prejudice lies in how the lack of the instruction altered the jury's calculus as to the appropriateness of the death penalty.

The plain language of the Kentucky Supreme Court's decision can only be read as evincing a narrow view of the impact of a no-adverse-inference instruction, related only to the statutory aggravators. There is no alternate reasonable explicated reason for the decision. *See Wetzel*, 132 S.Ct. at 1199; *Parker*, 132 S.Ct. 2151-2. Instruction #6 required the jury to find beyond a reasonable doubt that death was the proper punishment. Facts were at issue regarding this question. Therefore, even if post-*Fry*, a § 2254(d) analysis of Kentucky's *Chapman* application was proper, this Court is not constrained by AEDPA due to the infirmities of the state court decision.

CONCLUSION

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

Respectfully submitted,

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