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

2 (11:10 a.m.)

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

5 Ms. Lenz.

6 ORAL ARGUMENT OF SUSAN R. LENZ

7 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 MS. LENZ: No.

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

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

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

25 JUSTICE SCALIA: Under Federal law, you

1 don't think the judge could say, ladies and gentlemen of  
2 the jury, this defendant has already pleaded guilty to a  
3 horrible crime. This is a punishment hearing. He has  
4 chosen not to -- not to testify in this -- in this  
5 hearing.

6 You -- you are -- if you wish, you may take  
7 his failure to testify as an indication that he does not  
8 have remorse, that he is not sorry. He could have come  
9 before you said and, said I am terribly sorry, I wish I  
10 had never done it, I will never do it again. He has  
11 chosen not to testify. You may, if you wish, take that  
12 into account in determining whether -- whether there is  
13 remorse. You can't say that.

14 MS. LENZ: Oh, absolutely. Absolutely.

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

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

23 JUSTICE SCALIA: Of course.

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

1 JUSTICE SOTOMAYOR: Well, there was a  
2 factual dispute as to how much the witness -- the victim  
3 had suffered. How about a statement about that?

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

11 And trial counsel --

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

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

21 MS. LENZ: Yes, Justice Kagan. The  
22 prosecutor could have said that because that is a  
23 selection factor. That -- the fact of whether the  
24 victim struggled is not a fact that makes the defendant  
25 eligible for the death penalty, so because the -- the

1 prosecutor had no burden of proof on that, the defendant  
2 wasn't in -- in jeopardy of having the burden shifted to  
3 him.

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

8 MS. LENZ: Mitchell, yes.

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

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

19 JUSTICE BREYER: What do we do about -- I  
20 mean, I think the relevant pages are -- it's at 526 U.S.  
21 328 to 330, probably read those 17 times. All right.  
22 When I looked at those, I saw they reaffirm Estelle.  
23 As they quote Estelle, they say its reasoning applies  
24 with full force. Estelle says, "The court could discern  
25 no basis to distinguish between the guilt and penalty



1 phases of Respondent's capital trial so far as the  
2 protection of the Fifth Amendment privilege is  
3 concerned."

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

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

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

1           He wanted the Estelle instruction.           The  
2 judge wouldn't give it. That's the argument against  
3 you, I think. And I would like to hear your specific  
4 response.

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

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

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

22           MS. LENZ:           The difference is the burden of  
23 proof. How his parents raised him is a mitigating  
24 circumstance. Mr. Woodall had the burden of proof on  
25 mitigating circumstances. The jury was instructed they

1 had to consider the mitigating circumstances. So  
2 whether Mr. Woodall testified or not, we assume that the  
3 jury followed the instructions and considered the  
4 mitigating circumstances.

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

11 MS. LENZ: Yes, sir.

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

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

24 JUSTICE SCALIA: In this case, of course,  
25 the question is even narrower. That instruction would

1 forbid the jury from even taking into account his  
2 failure to testify on -- on the one factor of remorse --  
3 the one psychological factor of remorse.

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

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

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

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

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

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

1           So there's a difference.           So --

2           JUSTICE GINSBURG:           Is your position,  
3 basically, that this is in the nature of a -- an  
4 affirmative defense and that defendant carries the  
5 burden on remorse -- and what was the other one that  
6 Mitchell saved out? Acceptance of responsibility?

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

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

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

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

21          MS. LENZ:           Could you repeat the question?

22          JUSTICE KENNEDY:           Would it be an acceptable,  
23 workable rule to say that in a sentencing hearing, on  
24 any issue where the defendant has the burden of proof  
25 the prosecution is entitled to an instruction that

1 silence can be the basis for an inference against the  
2 defendant on those issues?

3 (Pause.)

4 JUSTICE KENNEDY: I mean, you have to either  
5 say yes or no. If -- if you say no, then I ask why  
6 remorse is different? If you say yes, then remorse is  
7 included within that.

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

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

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

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

17 JUSTICE KENNEDY: -- in a sentencing  
18 hearing.

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

25 JUSTICE KENNEDY: The -- the assumption in

1 my question is that the defendant has the burden of  
2 proof on a certain number of issues in the sentencing  
3 hearing. As to all of those issues, it seems to me it  
4 has to be your position that the government is entitled  
5 to the instruction that I described.

6 Or you're just going to stand up and say,  
7 well, remorse is different, but I -- we need to know  
8 what -- what your argument is.

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

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

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

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

1 failure to produce evidence.

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

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

8 MS. LENZ: No, they were not.

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

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

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

25 MS. LENZ: I don't think it speaks to who



1 has the burden. It just speaks to the fact that they're  
2 required to consider --

3 JUSTICE GINSBURG: I thought we -- it wasn't  
4 controversial that, on mitigating factors, the defendant  
5 does have the burden.

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

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

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

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

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

21 JUSTICE KAGAN: Well, where does that  
22 difference come from? Because I thought that, every  
23 time and in every circumstance that we've prohibited an  
24 adverse inference, we've also required a requested jury  
25 instruction. I don't know of a -- of a case or any

1 principle that would suggest that we can tear those two  
2 things apart and say, well, look, an adverse inference  
3 is prohibited, but, no, you don't get an instruction.

4 MS. LENZ: Well, the -- the only situation  
5 that I'm aware of that the Court has -- that it has  
6 extended Griffin with this Carter instruction is in the  
7 guilt phase, where the prosecution is still required  
8 to prove guilt.

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

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

23 JUSTICE BREYER: I didn't see that in  
24 Mitchell. But let -- let me go back, just elaborating  
25 on that, to Justice Alito's first question. I want to

1 see if this issue is still in the case. You looked at  
2 the instruction, and the instruction is just a broad  
3 instruction. It says no adverse inference may be drawn  
4 from anything. All right.

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

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

22 So what's the objection to the instruction,  
23 on its breadth? Not only is it the same, but the  
24 government never objected that it was too broad, and the  
25 only issues in the case were factual. They were about

1 what happened to him in his childhood, namely,  
2 sentencing facts.

3 And the instruction that you did read about  
4 what they should consider referred to facts and  
5 circumstances. And where, in Estelle, does it say that  
6 matters at sentencing related to facts and  
7 circumstances, you don't have to give the very  
8 instruction that Carter and Estelle required?

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

17 JUSTICE BREYER: I see.

18 MS. LENZ: Carter is talking about guilt,  
19 and it's limited. And also, the Carter instruction had  
20 to do with the guilt phase, rather than the sentencing  
21 phase. And Estelle was not a jury instruction case and  
22 didn't say anything about Carter whatsoever. So Estelle  
23 didn't extend Carter at all.

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

Official

1 MS. LENZ: I'm sorry?

2 JUSTICE SOTOMAYOR: Mitchell was about  
3 sentencing.

4 MS. LENZ: Yes, Mitchell was about  
5 sentencing. And Mitchell is the case which answers  
6 the -- the last part of your question, Justice Breyer.  
7 You said where does it say facts and circumstances of  
8 the crime? That language is in Mitchell.

9 Mitchell clearly says that no adverse  
10 inferences may be made on facts and circumstances of the  
11 crime upon which the prosecution has the burden of proof  
12 and -- and upon which will increase --

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

15 MS. LENZ: Does Mitchell overrule Estelle?

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

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

22 JUSTICE BREYER: No, Mitchell doesn't.

23 MS. LENZ: Or excuse me. Estelle doesn't  
24 say that. Estelle's not that broad. It doesn't speak  
25 about a jury instruction, and even Mitchell doesn't

1 say -- it -- it says something very broad, the Fifth  
2 Amendment applies during the penalty phase, but it  
3 doesn't make a distinction between the eligibility part  
4 of the penalty phase and the selection part of the  
5 penalty phase.

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

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

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

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

22 JUSTICE KAGAN: I think my question was just  
23 the breadth of these statements about everything that  
24 applies at trial with respect to adverse inferences also  
25 applies at the sentencing phase, with the possible

1 exception of adverse inferences about remorse. That's  
2 the way I read the cases.

3 MS. LENZ: Well, I'm not sure I agree with  
4 your reading of the cases, but even if -- even if that  
5 is the correct reading of the case and that adverse  
6 inferences apply to everything, but factors such as lack  
7 of remorse or downward adjustment in the sentencing  
8 guidelines, that leaves a huge hole in Mitchell.

9 You could drive a truck through that hole  
10 because, as Justice Scalia pointed out in his dissent in  
11 Mitchell, the bulk of what sentencing is about are these  
12 other factors, the other factors, what kind of childhood  
13 he had, mitigation and all of that sort of thing. So  
14 there's still a lot of room.

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

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
18 Mr. Komp.

19 ORAL ARGUMENT OF LAURENCE E. KOMP,  
20 APPOINTED BY THIS COURT,  
21 ON BEHALF OF THE RESPONDENT

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

24 In Estelle, this Court held that there are  
25 no -- there's no basis to distinguish between guilt and

1 penalty phases in a capital trial. Mitchell did not  
2 disturb that ruling -- did not overrule that ruling.  
3 As -- as this Court indicated, the key components of the  
4 Mitchell opinion that have been discussed today are from  
5 pages 328 to 330. And on -- those pages are littered  
6 with the discussion of what the clear principles of this  
7 Court's authority are.

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

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

20 MR. KOMP: Your Honor, if I may, and just  
21 to -- to -- under Kentucky law, there is -- I think  
22 Justice Alito sort of spoke to this -- or I forget which  
23 Justice. There's a difference between a burden of  
24 production and a burden of proof. And absolutely, a --  
25 a defendant in -- in a sentencing hearing has the burden



1 of production, as a proponent of what is going to be  
2 their mitigation theory.

3 That's much different than a burden of  
4 proof. In this case, Instruction 6, which is found at  
5 Joint Appendix Page 44, the burden of proof was on the  
6 government to establish that the aggravating  
7 circumstances, both the statutory aggravating  
8 circumstances and the nonstatutory aggravating  
9 circumstances, had to outweigh the mitigating evidence.

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

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

21 And then the judge gives the instruction  
22 that you requested, a defendant is not compelled to  
23 testify, and the fact that the defendant did not testify  
24 should not prejudice him in any way.

25 So, now, I'm back in the jury room, and I

1 say, well, now I have to consider mitigating evidence.  
2 And -- you know, there are a lot of things that could be  
3 mitigating in a capital case. I'd like to know about  
4 the defendant's childhood. I'd like to know whether the  
5 defendant was -- was abused. I'd like to know whether  
6 the defendant was remorseful.

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

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

23 JUSTICE ALITO: No, it doesn't really. It  
24 says the fact that he didn't testify, and he could have  
25 testified about child -- about his childhood or about

1 remorse or any of these other things, that shouldn't  
2 prejudice him in any way.

3 MR. KOMP: And that's right -- that's the --  
4 that's straight out of the Carter --

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

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

16 JUSTICE SOTOMAYOR: Nothing -- zero equals  
17 zero.

18 MR. KOMP: Correct. And so --

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

22 MR. KOMP: Right. And --

23 JUSTICE SOTOMAYOR: So you can't take away  
24 from the zero, create evidence from his silence, just as  
25 you can't from his silence outweigh the aggravating

1 circumstances; correct?

2 MR. KOMP: Correct.

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

9 MR. KOMP: In -- in that circumstance,  
10 again, he -- he can't -- they can't -- for instance,  
11 Kentucky is a nonweighing State, so that means that they  
12 can -- that nonstatutory aggravation is on the table,  
13 anything they want to consider.

14 And what this Carter instruction would  
15 prohibit is -- is preventing his failure to testify, his  
16 failure to offer a lack of remorse, to say, I'm sorry,  
17 which are the natural inclinations of what jurors --  
18 natural inclinations, but constitutionally impermissible  
19 inclinations, from adding that onto the death side of  
20 the scale. And you're right --

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

25 MR. KOMP: In this -- in this case, no.

1 Remorse was not a mitigation theory that was presented  
2 by defense counsel.

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

5 MR. KOMP: Correct.

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

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

15 MR. KOMP: Correct.

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

23 Estelle says, I would think, that you have a  
24 right to a Carter instruction in respect to some  
25 sentencing factors, namely future dangerousness. The

1 last sentence on the page of Mitchell says, we are not  
2 deciding whether you're entitled to that instruction in  
3 respect to other sentencing factors, namely,  
4 remorse.

5 So the question for you is why does that  
6 thing -- that sentence about remorse in Mitchell, why  
7 isn't it at least ambiguous about whether your client is  
8 entitled to that instruction here?

9 And your response to that is what?

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

16 When you get to that --

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

21 And the question is why doesn't that caveat  
22 suggest, at the very least, that the instruction that  
23 you asked for was so broad that it went beyond what this  
24 Court has decided because the instruction that you asked  
25 for did not distinguish remorse from other issues that

1 were going to come before the jury at the sentencing  
2 phase.

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

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

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

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

1           MR. KOMP:           I think you have -- we have to  
2 examine what Mitchell -- Mitchell, again, was framed as  
3 a Federal sentencing guidelines case, and that passage I  
4 read earlier from Mitchell, the next sentence is, "And  
5 although Estelle was a capital case, its reasoning  
6 applies with full force here, where the government seeks  
7 to use Petitioner's silence to infer commission of  
8 disputed acts."

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

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

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

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

24           CHIEF JUSTICE ROBERTS:           Right.

25           MR. KOMP:           Or possibly noncapital cases,



1 because this Court didn't simultaneously accept Estelle  
2 as the clearly existing law and then cut it.

3 CHIEF JUSTICE ROBERTS: Well, but you're  
4 saying it has to be clear, objectively beyond reasonable  
5 disagreement, to say that, when the court says lack of  
6 remorse in a sentencing guideline case, it still thinks  
7 there's a different rule for lack of remorse in a  
8 selection case such as this.

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

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

22 MR. KOMP: Under this Court's -- the then  
23 Texas statute, as defined by this Court in Jurek, that  
24 special circumstances question at that time was a  
25 selection factor. It was not an eligibility factor.

1 Eligibility had already been determined. And that's  
2 based on this Court's authority of Jurek. And we -- and  
3 we cited to State v. Beathard in the Red Brief, which is  
4 Texas's description of their -- of those special  
5 circumstances questions at the time.

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

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

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

1 instruction.

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

5 MR. KOMP: I -- I can't speak -- I don't  
6 want to speak too broadly for what happens, but it's --  
7 I think when both parties usually agree, the instruction  
8 is given, but I don't want to stretch it too far and say  
9 that on every occasion.

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

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

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

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

24 MR. KOMP: I --

25 JUSTICE SCALIA: At most, it shows that he

1 didn't think that there was anything wrong with it.

2 Does that mean we have to think there was nothing wrong  
3 with it?

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

5 JUSTICE SCALIA: Okay.

6 MR. KOMP: Absolutely not. And --

7 JUSTICE ALITO: Well, what it may show is  
8 that the prosecutor didn't think that it was going to  
9 make a difference, and so why raise an objection that  
10 could create everything that's happened since then, over  
11 something that isn't going to make a difference in a  
12 case where you have an incredibly heinous crime?

13 The prosecutor may have thought, this jury  
14 is going to return the verdict that I want anyway, even  
15 if this instruction is given.

16 MR. KOMP: I think that --

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

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

25 JUSTICE BREYER: What I say -- what we said

1 here, what I've gathered from the record, as best we've  
2 been able to see it, is in that sentencing hearing --  
3 you were there?

4 MR. KOMP: I was not.

5 JUSTICE BREYER: But you know it pretty  
6 well.

7 MR. KOMP: Yes.

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

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

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

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

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

1 there?

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

5 JUSTICE BREYER: That's not what I'm  
6 thinking of.

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

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

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

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

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

24 MR. KOMP: In this -- in this -- pardon me.  
25 In this circumstance, what -- the facts that were going

1 on in this hearing, the -- that instruction could go to,  
2 again, holding his -- his silence as to how -- and  
3 offering -- failure -- failing to offer an explanation  
4 and respond --

5 JUSTICE SCALIA: What about remorse? Wasn't  
6 remorse at issue?

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

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

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

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

17 JUSTICE SCALIA: Right.

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

20 JUSTICE BREYER: Then the answer --

21 MR. KOMP: Yes.

22 JUSTICE KAGAN: I'm sorry. So how was it an  
23 issue at the hearing? Because that would seem to cut  
24 against you very strongly, Mr. Komp. If remorse is an  
25 issue at the hearing, remorse is the very thing that, in

1 Mitchell, we said we have not decided. And then you  
2 have no clearly established law to rely on.

3 And I appreciate that this was before  
4 Mitchell, rather than after Mitchell; but it suggests  
5 that there was always a question about whether Estelle  
6 applied to remorse.

7 MR. KOMP: Estelle dealt with that in the  
8 capital context. Again, the -- the distinction that  
9 we're drawing from Mitchell is that -- that Mitchell did  
10 not modify Estelle. It expanded Estelle into a Federal  
11 sentencing or other criminal case -- cases. It did not  
12 touch -- it remained intact the prohibition of -- of  
13 using silence.

14 Again, Estelle dealt with silence, and  
15 silence that was used to support a lack of remorse,  
16 which was used to support the --

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

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

22 JUSTICE KENNEDY: Suppose we read Estelle as  
23 saying that, on the issue of remorse, it is an open  
24 question whether or not the self-incrimination privilege  
25 is applicable. Suppose we read it that way. And



1 suppose we think that, in your case, remorse was an  
2 issue at the penalty phase. Does that not mean that  
3 this issue was not clearly decided? That's -- it has a  
4 bearing on this case?

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

7 JUSTICE KENNEDY: Suppose we read Mitchell  
8 as saying that on the -- where remorse is at issue, it  
9 is not settled whether or not there is a Fifth Amendment  
10 self-incrimination right; and it is not settled that the  
11 defendant is entitled to an instruction about silence,  
12 number one.

13 Number two, suppose we think, as I think to  
14 be the case, that remorse was an issue in this trial in  
15 the penalty phase. Does that not mean that the rule is  
16 unclear and you're not clearly entitled to an  
17 instruction on that issue?

18 MR. KOMP: I -- I disagree because these --  
19 these capital sentencing proceedings are not just about  
20 remorse or lack of remorse. And what -- what would  
21 happen in that circumstance is -- is, right now, you  
22 have a bright line. And if -- if we accept remorse out  
23 of this in the capital sentencing context, there's two  
24 problems with that.

25 One, we would have hybrid Carter

1 instructions, and there would be -- we'd have to figure  
2 out, all right, which instruction would fit if we  
3 looked --

4 JUSTICE SOTOMAYOR: But we could --

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

8 MR. KOMP: I believe that Estelle settled  
9 this, and Mitchell did not cut back on Estelle in the  
10 capital sentencing context and that Estelle imported the  
11 no-adverse instruction that's required by Carter.

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

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

20 JUSTICE SCALIA: No reasonable jurors could  
21 say otherwise?

22 MR. KOMP: One, I don't think this Court in  
23 Williams said that -- that -- or not -- that AEDPA is  
24 not a subjective juror/judge contest. And if you read  
25 Mitchell and it talks about this is a product of our

1 existing precedent, this is a rule of proven utility,  
2 this is an essential feature of our justice system,  
3 the -- the rule was -- was absolutely clear that -- that  
4 these no -- no-adverse-inferences could be raised. And  
5 that was a -- a rule of proven utility.

6 And all that Mitchell did in that one  
7 sentence is reserve a question that -- that may or may  
8 not be applicable in Federal sentencing or noncapital  
9 sentencing. It did not cut back on Estelle, which said  
10 for -- that there is no basis to distinguish between the  
11 guilt and penalty phases of capital cases.

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

19 MR. KOMP: Right, this Court --

20 CHIEF JUSTICE ROBERTS: But that's perfectly  
21 clear. I mean, if you were arguing the other way, you  
22 would say, well, the question is whether it's clearly if  
23 there's a clear difference between lack of remorse in  
24 the sentencing guideline case and lack of remorse in a  
25 capital case, and everybody knew that, so that when

1 Mitchell just said it doesn't apply to lack of remorse  
2 in the sentencing guidelines, nobody would think that  
3 meant that there was an open issue on the capital  
4 context.

5 MR. KOMP: I -- no, we would think it's an  
6 open issue because if you -- if you go through the --  
7 the Mitchell opinion and how it builds on the no  
8 adverse -- no adverse inference and talks about Griffin  
9 and Estelle, and then the -- the key language is at --  
10 at 329. "Although Estelle was a capital case, its  
11 reasoning applies with full force here."

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

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

20 MR. KOMP: I think in two manners. One is  
21 when you're -- relates to using the right to silence as  
22 a penalty, which is the natural inclination of -- of the  
23 jurors. So they're going to hold his -- his failure to  
24 testify against him. And they'll do it twofold.  
25 They'll actually put it on the scale. He didn't say

1 that he was sorry, he didn't personally offer remorse,  
2 so we're going to consider that as not --

3 JUSTICE SOTOMAYOR: Did the prosecutor argue  
4 that?

5 MR. KOMP: No. No.

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

8 MR. KOMP: Well, they -- that's the natural,  
9 what this Court recognizes -- the natural inclinations  
10 of what jurors do. And this prosecutor -- and it's laid  
11 out in our Red Brief -- although he technically said,  
12 "I'm not going to argue lack of remorse, but I'm going  
13 to do everything, but that." So that was clearly  
14 where -- where he was pointing.

15 The other -- what -- the other impact it has  
16 is this was a case that there was strong mitigation.  
17 This is somebody who's borderline mentally retarded, has  
18 a personality disorder, which doesn't allow him to  
19 function in society, but there's also a strong element  
20 of Skipper evidence.

21 So when you're asking for a life without  
22 parole and you have expert testimony saying this  
23 individual is not going to be a danger to correction  
24 officers, and you have a jailer that testifies that he's  
25 well-mannered and well-behaved and is not a problem at

1 all, and you have the background that he has, this --  
2 that's a strong mitigation narrative.

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

8 JUSTICE SCALIA: And you think that made the  
9 difference, that the jury would not have condemned your  
10 client to death, had it not been for the fact that they  
11 drew an adverse inference from -- they knew all the  
12 horrific details of the crime. They had heard all of  
13 your mitigating evidence.

14 And you think what -- what tipped the  
15 balance -- or at least we think it plausibly could have  
16 tipped the balance, is -- is this failure to give the  
17 no-adverse inference instruction?

18 MR. KOMP: Absolutely.

19 JUSTICE SCALIA: Really?

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

23 JUSTICE SCALIA: Well, what --

24 JUSTICE KAGAN: Mr. Komp, did the Sixth  
25 Circuit apply the wrong harmless standard here? It

1     seemed to a apply the standard that would be applicable  
2     on direct review, rather than on habeas review; is that  
3     correct?

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

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

10            MR. KOMP:            I think the reference to Carter  
11     was to talk about -- we're talking about assessing the  
12     harmfulness of this error or the harmlessness of this  
13     error in the context of an instruction that wasn't  
14     given, where the instruction that's not given prevents  
15     negative inferences.

16            So the reference to Carter was to talk about  
17     what -- what the natural inclination for the failure to  
18     give the instruction is. It was sort of a framework of  
19     what's going on. So I don't think it was used in that  
20     circumstance.

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

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

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

5 CHIEF JUSTICE ROBERTS: You can finish  
6 your --

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

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13 Ms. Lenz, you have 5 minutes remaining.

14 REBUTTAL ARGUMENT OF SUSAN R. LENZ

15 ON BEHALF OF THE PETITIONER

16 MS. LENZ: Thank you.

17 I would just like to point out, at the  
18 beginning of his responsive argument, my colleague was  
19 talking about the selection factors in Estelle. And  
20 whether they're called selection factors or whatever  
21 they're called, the prosecutor had to prove future  
22 dangerousness beyond a reasonable doubt in order to  
23 render the defendant in that case death eligible.

24 There were three things that the prosecution  
25 had to prove, and that was one of them. So those



1 selection factors, or whatever you want to call them,  
2 operated as aggravating circumstances for the death  
3 penalty, so I just wanted to make sure that the Court is  
4 clear on that.

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

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

12 So my only point is, regardless of  
13 nomenclature, they operated as aggravating  
14 circumstances, the prosecution has burden of proof.

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

21 MS. LENZ: That's not true, Justice  
22 Sotomayor, because it would depend on what the violation  
23 is -- what the error is. I think, in this case, when  
24 you consider the absence of this prophylactic  
25 instruction in comparison with the heinousness of the

1 crimes, the guilty plea, the overwhelming evidence, his  
2 prior convictions for sexual abuse, his post-crime  
3 conduct, all of it, when you consider that together --

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

6 MS. LENZ: The mitigation was?

7 JUSTICE SOTOMAYOR: Was very close to the  
8 Wiggins case.

9 MS. LENZ: I'm sorry?

10 JUSTICE SOTOMAYOR: The mitigation evidence  
11 offered here was very close to the Wiggins case --  
12 similar mitigation.

13 MS. LENZ: I think --

14 JUSTICE SOTOMAYOR: And there, we held there  
15 was harmful error.

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

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

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1           The case is submitted.

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

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