No. 12-794

Supreme Court of the United States

RANDY WHITE, WARDEN,
Petitioner,

v.

ROBERT KEITH WOODALL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

Jack Conway
Attorney General of Kentucky

Susan Roncarti Lenz*
Assistant Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601
(502) 696-5342
susan.lenz@ag.ky.gov

Counsel for Petitioner
Commonwealth of Kentucky

* Counsel of Record

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

CONSTITUTIONAL PROVISIONS

OTHER SOURCES

CAPITAL CASE
REPLY BRIEF FOR PETITIONER

As shown in the Petition for Writ of Certiorari, the Sixth Circuit has once again completely failed to abide by 28 U.S.C. §2254(d)(1) in ruling that a no adverse inference instruction is constitutionally required in the penalty phase of a capital trial where the defendant has pled guilty to all crimes and aggravating circumstances and in ruling that the Kentucky Supreme Court's ruling to the contrary was unreasonable. This Court has never squarely addressed whether a prophylactic *Carter*[1] instruction is constitutionally required in the penalty phase of a trial, where a non-testifying defendant has pled guilty to all the crimes and aggravating circumstances.

Neither *Estelle*[2] nor *Mitchell*[3] extended the *Carter* remedy–a right to no adverse inference instruction–to the circumstances presented in this case. In the absence of clearly established Federal law, as determined by this Court, Woodall cannot show that the Kentucky Supreme Court's ruling on the claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 131 S.Ct. 770, 786-787 (2011). Woodall ignores *Richter* in his Brief in Opposition.

The Sixth Circuit's decision to grant a writ of habeas corpus "is a textbook example of what the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) proscribes: 'using federal habeas corpus review as a vehicle to second-guess the reasonable

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[1] *Carter v. Kentucky,* 450 U.S. 288 (1981).
[2] *Estelle v. Smith*, 451 U.S. 454 (1981).
[3] *Mitchell v. United States*, 526 U.S. 314 (1999).

decisions of state courts.'" *Parker v. Matthews*, 132 S.Ct. 2148, 2149 (2012) (recently reversing the Sixth Circuit for substituting its own interpretation of Kentucky law in a capital case). AEDPA bars federal courts from granting habeas relief, in the face of the state court denial of relief on the merits, if there is no "clearly established Federal law, as determined by [this Court]" on the issue. Yet, that is precisely what the Sixth Circuit did here.

In addition, the Sixth Circuit, in finding that the alleged error was not harmless, compounded its failure to abide by AEDPA by improperly converting the *Brecht v. Abrahamson*[4] "substantial and injurious effect" harmless error standard into a "possible-harm" standard.

In his Brief in Opposition, Woodall nonetheless argues that the Sixth Circuit merely applied an established general rule to a new factual situation and properly applied harmless error review. As explained below, neither contention has merit.

[4] *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

I. As in *Parker v. Matthews*, certiorari is warranted to address the Sixth Circuit's grant of federal habeas corpus relief in the absence of "clearly established Federal law, as determined by [this Court]."

There is no clearly established federal law regarding whether a no adverse inference instruction is required in a capital penalty phase when a non-testifying defendant has pled guilty to all the crimes and aggravating circumstances and no such facts are in dispute.

Woodall argues this case is merely about applying a general principle to a specific factual circumstance. Brief in Opposition, 4-5, 11-12. *Mitchell*, however, did not clearly establish that a no adverse inference *Carter* instruction is required in this case.

As explained in the Petition for Writ of Certiorari, pages 3-5, 9-11, and 13-19, *Mitchell* dealt specifically with the sentencing court drawing an adverse inference with respect to a fact which increased the sentencing consequences. Mitchell only admitted "some of" the amount of cocaine she had sold; the court told Mitchell it held her silence against her in determining the penalty range.[5] This Court pointed out that "[t]he

[5]Woodall alleges that Petitioner "inaccurately" states that the trial court never indicated it would use Woodall's silence against him. Brief in Opposition, 6. The relevance of this claim is questionable given the fact that Woodall was sentenced to death by a jury. In any event, the Petition for Writ of Certiorari, on page 8, quotes what the trial court said regarding its decision to not give the jury a no adverse inference instruction. The trial court never

Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege." *Mitchell*, at 330. The *Mitchell* Court was clearly concerned with requiring the state to produce evidence against a defendant and not allowing the state to force the evidence from a defendant's "own lips." *Mitchell*, at 326. *Mitchell* did not permit a negative inference to be drawn about guilt with regard to factual determinations respecting the circumstances and details of the crime.

The *Mitchell* Court also noted, "[w]hether silence bears upon the determination of the lack of remorse, or upon acceptance of responsibility . . . is a separate question. It is not before us and we express no view on it." *Mitchell, at 330.*. Considering that *Mitchell* expressly exempted lack of remorse and acceptance of responsibility findings from its holding, and considering that Woodall pled guilty to all the crimes and aggravating circumstances, the Kentucky Supreme Court had good reason to believe that the Fifth Amendment did not require a *Carter* instruction.

As examples of this Court distinguishing between mere application of a general rule and the absence of clearly established law, see *Carey v. Musladin*, 549 U.S. 70 (2006); *Wright v. Van Patten*, 522 U.S. 120 (2008) ("Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor, 'it cannot be said that the state court unreasonabl[y]

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indicated it would use Woodall's silence against him and never told the jury that it could do so. The jury heard nothing about Woodall's silence from either the trial judge or the State.

appli[ed] clearly established Federal law.'" "Under the explicit terms of § 2254(d)(1), therefore, relief is unauthorized."); *Chaidez v. United States*, 133 S.Ct. 1103 (February 25, 2013).

Although the Sixth Circuit found that *Estelle* extended a defendant's Fifth Amendment protection to the penalty phase and that *Mitchell* extended that protection where a defendant has pled guilty, neither *Estelle* nor *Mitchell* clearly established a constitutional right to a no adverse inference *Carter* instruction in the circumstances presented in this case. In fact, the Sixth Circuit could only cite to one of its own cases for the proposition that Woodall was entitled to a no adverse inference instruction. See Appendix to Petition for Writ of Certiorari, App. 7a.

In addition, *Estelle* and *Mitchell* are distinguishable, as both involved government or court actions that penalized the defendant by exposing the defendant to greater punishment for exercising the Fifth Amendment privilege. The punitive element so critical in *Estelle* and *Mitchell* – the State's use of the defendant's silence to impose greater punishment – is wholly absent in Woodall's case.

In order to prevail on federal habeas review, Woodall would have to show that his interpretation of the law is the *only* reasonable interpretation. *Cf. Lambrix v. Singletary*, 520 U.S. 518, 538 (1997). Woodall cannot show that *no other* interpretation of the law is reasonable. This is especially so given that *Mitchell* expressly exempted lack of remorse and acceptance of responsibility findings from its holding.

In an effort to bring his case under the purview of *Mitchell*, Woodall argues that the sentencing hearing

was about far more than remorse in so far as extensive evidence about mitigating matters was introduced as well as evidence regarding the aggravating circumstances. Brief in Opposition, 15-17. Woodall argues that the jury instructions support his claim. A review of the instructions reveals that Woodall benefited from instructions to which he was not entitled. In addition, Woodall's argument that the sentencing hearing was about more than remorse misses the point that the mitigation part of sentencing is a discrete and fundamentally different part of sentencing than the part concerned with aggravating circumstances. *Carter*, *Estelle*, and *Mitchell* all concerned facts in which the prosecution had the burden of proof to convict or enhance the sentence. *Cf. Ring v. Arizona*, 536 U.S. 584 (2002).

Woodall first points out that Jury instruction No. 1 instructed the jury to presume him innocent of the aggravating circumstances unless it believed from the evidence that the aggravating circumstances existed beyond a reasonable doubt. Clearly, this instruction was both incorrect and superfluous as Woodall had already admitted guilt to all charges, including the aggravating circumstances. The aggravating circumstances were not contested.[6]

There were simply no facts regarding the

[6]During closing argument, trial defense counsel candidly explained to the jury that Woodall had pled guilty to the murder, kidnapping, and rape of Sarah Hansen because he was guilty. Transcript of Evidence 12, 1625-26. Specifically, trial defense counsel said, "[the prosecutor] has talked to you about aggravating circumstances, and I said before, and I will tell you again, he [Woodall] did those things. We do not deny that. We've not offered a defense to that. He did those things." *Id.*

circumstances of the crimes that were in dispute for the factfinder. To the extent Woodall argues that certain mitigating circumstances were in dispute, it should be pointed out that mitigating circumstances were to be proven by trial defense counsel, not by the State. In addition, the jury was instructed to consider mitigating circumstances under Instruction No. 4. Transcript of Record VIII, 1140.

It should also be pointed out that Kentucky is not a weighing state and did not have to weigh the mitigating circumstances against the aggravating circumstances. KRS 532.025; *Perdue v. Commonwealth*, 916 S.W.2d 148, 169 (Ky. 1995); *Bowling v. Commonwealth*, 942 S.W.2d 293, 306 (Ky. 1997); *Hodge v. Commonwealth*, 17 S.W.3d 824, 854 (Ky. 2000). Because Kentucky is a non-weighing state, Kentucky law permits a jury to consider non-statutory aggravating circumstances (such as lack of remorse) once a statutory aggravating circumstance has been found beyond a reasonable doubt. *Hodge v. Haeberlin*, 2006 WL 1895526, at 70-71 (E.D. Ky. July 10, 2006), affirmed on other grounds, 579 F.3d 627 (6th Cir. 2009).

Woodall also claims that the jury was not required to fix a death sentence if "upon the whole of the case" the jury had a "reasonable doubt" it was appropriate. He argues the jury was required to make a finding that no reasonable doubt existed as to the death sentence. Instruction No. 6, to which Woodall is referring, did not require the jury to make a finding of death beyond a reasonable doubt. Transcript of Record VIII, 1142. The Kentucky Supreme Court has ruled that KRS 532.025 does not require the jury to find that death is

the appropriate punishment beyond a reasonable doubt or to resolve any reasonable doubt in favor of a prison sentence. *Skaggs v. Commonwealth*, 694 S.W.2d 672, 680 (Ky. 1985); *Meese v. Commonwealth*, 348 S.W.3d 627, 723 (Ky. 2011). Again, Woodall benefited from an instruction to which he was not entitled.

Woodall also asserts that a single juror could have prevented the death penalty. Woodall misunderstands Kentucky law. Kentucky law requires that all 12 jurors agree upon the verdict, including the sentence verdict, and the failure to do so in the penalty phase *requires a penalty phase retrial*. Kentucky Criminal Rules 9.82(1) and 9.88; *Skaggs v. Commonwealth*, 694 S.W.2d 672, 681 (Ky. 1985). In other words, Kentucky does not follow the "one juror veto" rule adopted in some states that permits a single juror to preclude a death sentence and require that the court impose a prison sentence.

II. Certiorari is warranted to address the Sixth Circuit's use of a "possible-harm" standard in finding that the alleged error was not harmless, rather than the *Brecht v. Abrahamson* standard of "substantial and injurious effect."

Woodall's Brief in Opposition, at page 21, argues that harmless error analysis requires the court to speculate regarding the effect of the alleged error and that the Sixth Circuit properly applied *O'Neal v. McAninch*, 513 U.S. 432 (1995). To the contrary, the Sixth Circuit improperly analyzed harmless error. A court of appeals cannot properly find error harmless

under *Brecht* by using the reasoning, "Because we cannot know what led the jury to make the decision it did, and because the jury may well have based its decision [to sentence Woodall to death] on Woodall's failure to testify, we cannot conclude that this is a case of "harmless error.'" The Sixth Circuit used an impermissible "possible-harm" standard. Under the Sixth Circuit's standard, no error will ever be harmless because one can never know what led a jury to its decision and it is always possible that a jury based its decision on the alleged error in question. But that is not the standard under *Brecht*.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Jack Conway
Attorney General of Kentucky

Susan Roncarti Lenz*
Assistant Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601
(502) 696-5349
susan.lenz@ag.ky.gov

* Counsel of Record