No. 12-794

In The
Supreme Court of the United States

RANDY WHITE,

Petitioner,

v.

ROBERT KEITH WOODALL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE LOS ANGELES COUNTY PUBLIC DEFENDER'S OFFICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE* [1]

The Los Angeles County Public Defender (LACPD) is primary trial counsel in the County of Los Angeles for all persons who, charged with crimes, are indigent and unable to afford private counsel. The Los Angeles County Public Defender protects the life and liberty of adults and children in matters having penal consequences. LACPD's mandate is to ensure equal treatment within the justice system by safeguarding liberty interests and upholding the rights of individuals.

Established in 1914, the Los Angeles County Public Defender's Office is both the oldest and largest full service local governmental defender in the United States, with offices in 39 locations

1. Counsel for each party has consented to the filing of this Brief, as indicated by letters filed with the Clerk of the Court. SUP. CT. R. 37.6. Pursuant to Rule 37.6, *Amicus Curiae* states that no counsel for a party authored any part of this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

throughout the county with over 700 lawyers.[2] LACPD handles approximately 70% of felony and 55% of misdemeanor cases prosecuted in the county. Its caseload includes roughly 90,000 felony, 400,000 misdemeanor, and 40,000 juvenile cases and 60 capital cases each year.[3] It also provides representation for some 12,000 persons in mental health commitment proceedings as well as a variety of other matters. LACPD also provides capital litigation training for attorneys, paralegals, and investigators of the Public Defender, Alternate

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2. Los Angeles County is one of the most active jurisdictions in the nation in terms of the number of capital defendants sentenced to death, according to a study conducted by The Death Penalty Information Center. "In 2009 Los Angeles County, California sentenced the same number of people to death as the State of Texas." Dieter, Richard, *The 2% Death Penalty: How A Minority of Counties Produce Most Death Cases At Enormous Costs to All*, Death Penalty Information Center (2013), available at deathpenaltyinfo.org/documents/TwoPercentReport.pdf. In 2012 Los Angeles County was ranked number six in the nation amongst leading counties in death sentences. *Ibid.*

3. The number of capital cases handled by the LACPD is highly dynamic given the size of Los Angeles County and the number of cases filed by the Los Angeles County District Attorney. Additionally, some cases are settled by a plea bargain, some are given a "Life Letter" (meaning the District Attorney elects not to seek the death penalty), special circumstance allegations qualifying the defendant for the death penalty are removed, or a conflict of interest requires the LACPD to recuse the office from the case. Given the nature of capital case preparation, a true death case will remain open for years before the trial commences.

Public Defender, and Federal Public Defender, as well as the private defense bar.

Amicus Curiae, as the largest criminal defense firm in the nation, has a strong interest in protecting the fairness and accuracy of criminal sentencing proceedings, especially in capital cases. The decision whether a criminal defendant testifies during the penalty phase of trial is a decision made with "the guiding hand of counsel" and requires consideration of many factors that are unique to each defendant and the nuances of each case. *Estelle v. Smith*, 451 U.S. 454, 471 (1981). *Amicus curiae* will elucidate some of the reasons why a criminal defendant does not testify at a penalty trial and why a *Carter* instruction is necessary to protect the integrity of capital sentencing proceedings. *Carter v. Kentucky*, 450 U.S. 288, 303 (1981).

SUMMARY OF THE ARGUMENT

The Sixth Circuit decision appropriately applied this Court's established precedent when it recognized that criminal defendants have a clearly established constitutional right to a requested "no adverse inference" instruction during the penalty phase of a capital trial where the defendant does not testify. A *Carter* instruction is constitutionally required to prevent jurors from giving evidentiary weight to a defendant's failure to testify.

Jurors are naturally inclined to draw adverse inferences from the defendant's silence. Without

this limiting instruction the defendant's election not to testify becomes weighted in favor of aggravation as jurors speculate and attribute the defendant's silence to negative character traits. "The burden of establishing the existence of any of the aggravating circumstances is on the prosecution." *Walton v. Arizona*, 497 U.S. 639, 643 (1990). Permitting the jury to infer aggravation from the defendant's failure to testify gives the government an unearned non-statutory aggravator which the jury will consider.

Silence which is the product of a criminal defendant's decision not to testify cannot be reliably interpreted. A defendant's decision not to testify at sentencing is based upon a variety of considerations including those that focus on the defendant's ability to effectively communicate. Silence is particularly susceptible to misinterpretation when it is taken out of context. When a defendant remains silent and elects not to testify during sentencing proceedings, there are too many variables to permit anyone to draw any reliable inferences from that silence, and any attempt to draw adverse inferences would be based upon caprice and speculation. A penalty phase trial that allows jurors to make life and death decisions based upon ambiguous and speculative evidence offends the principle that "the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

ARGUMENT

THE FIFTH AMENDMENT REQUIRES THAT A CRIMINAL TRIAL JUDGE MUST GIVE A "NO ADVERSE INFERENCE" JURY INSTRUCTION WHEN REQUESTED BY A DEFENDANT

> 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. . . . Accordingly, . . . 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.

Carter, 450 U.S. 288, 303 (1981).

A. Jurors' Natural Inclination Is to Give Aggravating Weight to the Defendant's Decision Not to Testify.

"It has been almost universally thought that juries notice a defendant's failure to testify. '[The] jury will, of course, realize this quite evident fact,

even though the choice goes unmentioned. . . . [It is] a fact inescapably impressed on the jury's consciousness.'" *Carter*, 450 U.S. 288, 301 n.18 (1981). It is doubtful that "jurors have not noticed that the defendant did not testify and will not, therefore, draw adverse inferences on their own." *Lakeside v. Oregon*, 435 U.S. 333, 340 (1978).

The assumption by *Amicus* of Arizona and Other States that "there . . . is no possibility that a jury will presume the existence of an adverse fact based on the defendant's silence" (Arizona Brief, p.4) is as dubious today as it was when it was discredited by this Court in *Lakeside*, 435 U.S. at 340, (noting "Federal constitutional law cannot rest on speculative assumptions so dubious as these"). As Justice Stewart noted, it is human nature to ascribe adverse inferences to a defendant's failure to testify:

> It has often been noted that such inferences 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, *Rational 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. 333, 348 n.10 (1978).

In *Lakeside* the trial court forced a "no adverse inference" instruction on the defendant. This Court held that ". . . .[t]he salutary purpose of the instruction, 'to remove from the jury's deliberations any influence of unspoken adverse inferences,' was deemed so important that it there outweighed the defendant's own preferred tactics." *Carter*, 450 U.S. at 301.

B. Upholding the Sixth Circuit Decision Will Promote the Fairness and Accuracy of Sentencing Proceedings.

In *Carter* this Court recognized that the Fifth Amendment is a broad privilege.

> [It] reflects many of our fundamental values and most noble aspirations: our willingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; . . . our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which

> dictates 'a fair state-individual balance by requiring the government . . . , in its contest with the individual to shoulder the entire load,' . . . ; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' [Citation.]

Carter, 450 U.S. at 299.

These pillars of the Fifth Amendment privilege apply equally to sentencing proceedings. "Where the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony." *Mitchell v. United States*, 526 U.S. 314, 326 (1999). Nowhere is the fear of adverse consequences more palatable than when a defendant faces the ultimate penalty of death.

For this reason, death penalty proceedings stand apart from ordinary sentencing proceedings and require the highest degree of reliability.

> By now it is settled law that 'the penalty of death is qualitatively different' from any other sentence, *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976) (plurality opinion), and that 'this qualitative difference between

> death and other penalties calls for a greater degree of reliability when the death sentence is imposed,' *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (plurality opinion).

Clemons v. Mississippi, 494 U.S. 738, 772 (1990) (Brennan J., concurring and dissenting). These principles make it imperative to "use the unique power of the jury instruction to reduce that speculation to a minimum." *Carter*, 450 U.S. at 303.

It is not consistent with the "fair play" pillar of the Fifth Amendment to relieve the State of its "burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances . . . ." *Walton v. Arizona*, 497 U.S. 639, 650 (1990) (holding that a death penalty statute must not preclude consideration of relevant mitigating factors). If jurors are permitted to draw an adverse inference from the defendant's failure to testify, the government is relieved of its obligation to "prove the existence of aggravating circumstances." This type of "freebie" aggravation offends basic principles of fair play.

More importantly, "the need for individualized consideration [is] a constitutional requirement in imposing the death sentence." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). Drawing an adverse inference against a criminal defendant who elects not to testify in the penalty phase of the trial offends the

principles of individualized consideration by painting all non-testifying defendants with the same scarlet letter of suspicion without regard to their individualized reasons for not testifying. As is discussed more fully, *infra*, a defendant's decision whether to testify is based on many factors unique to each defendant and the issues in the case.

> The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. . . . The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

Ibid.

C. Silence Which Is the Product of a Criminal Defendant's Decision Not to Testify Cannot Be Reliably Interpreted.

Silence is particularly susceptible to misinterpretation when it is taken out of context. A defendant's decision not to testify at sentencing is based upon a variety of considerations including those that focus on the defendant's ability to effectively communicate.

There are many reasons why a defendant may not testify during the penalty phase of a trial. This Court recognizes that:

> not everyone . . . can safely venture on the witness stand . . . . Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not everyone, however honest, who would, therefore, willingly be placed on the witness stand.

Carter, 450 U.S. at 300.

The intrinsic ambiguity of silence was recognized last term by this Court in *Salinas v. Texas*, __ U.S. __; 133 S.Ct. 2174 (2013). In *Salinas*, this Court rejected the claim that Mr. Salinas's silence during his interview by the police must have been an invocation of the Fifth Amendment privilege, saying:

> But whatever the most probable explanation, such silence is "insolubly ambiguous." See *Doyle, v. Ohio*, 426 U. S. 610, 617 (1976). To be sure, someone might decline to answer a police

> officer's question in reliance on his constitutional privilege. But he also might do so because he is trying to think of a good lie, because he is embarrassed, or because he is protecting someone else. Not every such possible explanation for silence is probative of guilt, but neither is every possible explanation protected by the Fifth Amendment. Petitioner alone knew why he did not answer the officer's question, and it was therefore his "burden . . . to make a timely assertion of the privilege."

Id. at 2182; citation omitted.

Similarly, a defendant's silence by not testifying at the penalty phase of a capital trial is inherently ambiguous. The reasons why a defendant would not testify during the penalty phase of a trial are nuanced and complex. Each defendant and case is unique so there can be no "one size fits all" explanation for the decision whether or not to testify. This is precisely why it is imperative that jurors and judges refrain from drawing adverse inferences from the defendant's decision not to testify.

i. Defendants with mental or intellectual disabilities.

An inarticulate defendant makes a poor witness. Defendants who struggle with mental

illness, emotional, learning, or intellectual disabilities are more likely to avoid the witness stand simply because they do not have the skills necessary to be a successful witness.[4] Many defendants are on a medication regime that interferes with their ability to testify effectively.

"[W]ithin juvenile and adult correctional institutions language disorders have been found at rates ranging from three to ten times that of the general population." Michele LaVigne & Gregory Van Rybroek, *"He got in my face so I shot him": How defendant's language impairments impair attorney-client relationships,* University of Wisconsin Law School, Series Paper No. 1228 at 4, available at http.ssrn.com/abstract=2314546.[5] Defendants who suffer from a learning disability are at a disadvantage during direct examination and especially cross examination.

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4. A U.S. Department of Justice study in 2005 showed that 56.2% of State prison inmates and 64.2% of local jail inmates suffered from mental health problems, including major depression, mania, and psychotic disorders. Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates,* U.S. Department of Justice, Dec. 14 2006, at 2-3, available at

http://www.bjs.gov/content/pub/pdf/mhppji.pdf. Comparatively, only 10.6% the general population in the United States over the age of 18 report any symptoms of a mental disorder. *Id.* at 3.

5. This Legal Studies Research Paper is scheduled to be published in the CUNY Law Review, Vol. 17 in 2014.

> Due to their weak narrative skills "impaired individuals have difficulty relating a story that could be understood by the listener who does not share the same experience or knowledge. They tend to describe 'significantly fewer bits of information about the context of the story and the events that initiated it.' . . . [They] are less able to describe a character's plan, the cause and effects of the character's actions, and the character's motivations. Researchers have expressed particular concern over how these young men would have fared when they attempted to 'tell their story in the forensic context.'"

Id. at 24-25.

Attorneys who perceive these weaknesses in their clients will usually try to keep their clients off the witness stand because they know that "clients with language impairments can't testify." *Id.* at 27.

ii. Youth

"Regions of the brain, and brain functions, are not fully developed by age 18 (and often for

substantial years beyond that age),[6] inhibiting or affecting the capacity to engage in 'long term planning, regulation of emotion, impulse control, and the evaluation of risk and reward.'" Jules Epstein, *Silence: Insolubly Ambiguous and Deadly: The Constitutional, Evidentiary and Moral Reasons for Excluding 'Lack of Remorse' Testimony and Argument in Capital Proceedings,* 14 Temple Pol. & Civ. Rts. L. Rev. 45 (Fall, 2004). An immature defendant who takes the stand will often engage in behaviors, such as smiling or laughing inappropriately, due to nervousness rather than callousness. Jurors would show no sympathy for such inappropriate displays, regardless of the reason.

iii. Environmental influences

The ability of a defendant to testify effectively is often impacted by his incarceration. Prolonged incarceration requires a defendant to acquire survival skills which prevent any displays of emotion. This is especially true for a defendant who, at best, will receive a sentence of life without the possibility of parole.

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6. A UCLA neuroscience study of brain maturation in adolescent and young adults show development continuing, on average, through age 25. Sowell et al., *In vivo evidence for post-maturation in frontal and striatal regions*, 2 Nature Neuroscience 10 (1999), available at

www.loni.ucla.edu/~esowell/nn1099_859.pdf.

> [P]risoners learn quickly to become hypervigilant and ever-alert for signs of threat or personal risk. Because the stakes are high, and because there are people in their immediate environment poised to take advantage of weakness or exploit carelessness or inattention, interpersonal distrust and suspicion often result. Some prisoners learn to project a tough convict veneer that keeps all others at a safe distance. Indeed, as one prison researcher put it, many prisoners 'believe that unless an inmate can convincingly project an image that conveys the potential for violence, he is likely to be dominated and exploited throughout the duration of his sentence.

Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-prison Adjustment,* University of California, Santa Cruz Prison to Home Conference, 2002, at 81, available at http://www.urban.org/UploadedPDF/410624_PyschologicalImpact.pdf.

iv. Uncooperative defendants

It is a mistake to assume that defendants enthusiastically participate in their attorneys' efforts to save their lives. Often, clients are not accurate historians of mitigation. They tend to minimize the

traumas suffered during their childhood development. Sometimes they refuse to acknowledge that they were the victims of abuse, either due to the embarrassment of being victimized, or because they do not want to air their families' "dirty laundry," or because they want to spare their families from the pain of participating in emotional testimony. Some defendants are so overwhelmed by grief or shame that they express to their attorneys a desire to admit the charges and accept the penalty of death.

These types of dynamics have been discussed in case law when it became relevant to ineffective assistance of counsel claims. In *Porter v. McCollum*, 558 U.S. 30 (2009), the defendant was described by his attorney as "fatalistic and uncooperative" because the defendant instructed his attorney not to speak with the defendant's ex-wife or son. *Porter v. McCollum*, 558 U.S. 30, 40 (2009).

> In *Deere I*, 41 Cal.3d 353, (1985). . . [D]efendant was adamant, in counsel's words, that '[h]e does not want any evidence presented on his behalf because in his heart that is his private life and to bring that evidence into court would violate his relationships with everybody he holds dear and respects in this world. And to him, those relationships are more important than anything else, including his life.' (*Deere II*, *supra*, 53 Cal.3d [705], 714.)

People v. Snow, 30 Cal.4th 43, 119 (2003).

v. Innocence

Innocent people are convicted of crimes they did not commit, including capital murder. The Innocence Project reports:

> Of more than 300 people exonerated through post-conviction DNA testing, more than 25% were convicted of murder. Eighteen were sentenced to die; others were charged with capital murder but narrowly escaped the death penalty, and still others would likely have been charged with capital crimes if the death penalty had been in place at the time of their trials.

The Death Penalty, Innocence Project, http://www.innocenceproject.org/Content/The_Death_Penalty.php (last visited Nov. 15, 2013). An innocent defendant who takes the witness stand during penalty and professes his innocence would risk offending/alienating the jury who rendered the verdict of guilt. Furthermore, an innocent defendant cannot express remorse for a crime he did not commit.

A penalty phase trial that allows jurors to make life and death decisions based upon ambiguous

and speculative evidence offends the principle that "the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). A defendant's decision not to testify is based on decisions made in consultation with counsel that are irrelevant to a jury's consideration of aggravating and mitigating circumstances. Therefore jurors should receive a *Carter* instruction advising them that they are not to draw any adverse inferences from a defendant's silence.

CONCLUSION

The Sixth Circuit decision appropriately applied this Court's established precedent when it recognized that criminal defendants have a clearly established constitutional right to a requested "no adverse inference" instruction during the penalty phase of a capital trial where the defendant does not testify. Jurors are naturally inclined to draw adverse inferences from the defendant's silence. Without this limiting instruction, the defendant's election not to testify becomes weighted in favor of aggravation as jurors speculate and attribute the defendant's silence to negative character traits.

Silence is particularly susceptible to misinterpretation when it is taken out of context, and any attempt to draw adverse inferences from that silence would be based upon caprice and speculation. "It is of vital importance to the

defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Zant v. Stephens*, 462 U.S. 862, 885 (1983). For the above stated reasons, the judgment of the Sixth Circuit should be affirmed.

Respectfully submitted this 19th day of November, 2013.

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