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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.

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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