No. 12-794

IN THE

Supreme Court of the United States

RANDY WHITE, WARDEN,

Petitioner,

v.

ROBERT KEITH WOODALL,

Respondent.

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

RESPONDENT'S PETITION FOR REHEARING

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CASES

Respondent, Robert Keith Woodall, respectfully requests that this Court grant this petition for rehearing because the opinion incorrectly found that a portion of *Estelle v. Smith*, 451 U.S. 454 (1981) was dictum. Because of this error, the Court did not address that in this particular case the Commonwealth of Kentucky had a burden of proof as to the sentencing decision that was the functional equivalent of the decision made by the jury in *Estelle*.

ARGUMENT

This Court found that a portion of *Estelle v. Smith*, 452 U.S. 454 (1981) was dictum. Slip op. at 8, fn. 4. The Dissent disagreed. *Id.* at 2 (Breyer, J., dissenting). Given the plain language of *Estelle* and the subsequent reliance and repetition of this language in *Mitchell v. United States*, 526 U.S. 314 (1999), the Dissent's conclusion is correct.

The relevant passage of *Estelle* is as follows:

> The State argues that respondent was not entitled to the protection of the Fifth Amendment because Dr. Grigson's testimony was used only to determine punishment after conviction, not to establish guilt. In the State's view, "incrimination is complete once guilt has been adjudicated," and, therefore, the Fifth Amendment privilege has no relevance to the penalty phase of a capital murder trial. Brief for Petitioner 33–34. We disagree.
>
> The Fifth Amendment, made applicable to the states through the Fourteenth Amendment,

commands that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." The essence of this basic constitutional principle is "the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Culombe v. Connecticut*, 367 U.S. 568, 581–582, 81 S.Ct. 1860, 1867, 6 L.Ed.2d 1037 (1961) (opinion announcing the judgment) (emphasis added). *See also Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55, 84 S.Ct. 1594, 1596–1597, 12 L.Ed.2d 678 (1964); E. Griswold, *The Fifth Amendment Today* 7 (1955).

The Court has held that "the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *In re Gault*, 387 U.S. 1, 49, 87 S.Ct. 1428, 1455, 18 L.Ed.2d 527 (1967). In this case, the ultimate penalty of death was a potential consequence of what respondent told the examining psychiatrist. Just as the Fifth Amendment prevents a criminal defendant from being made " 'the deluded instrument of his own conviction,' " *Culombe v. Connecticut*, *supra*, at 581, 1867, *quoting* 2 Hawkins, Pleas of the Crown 595 (8th ed. 1824), it protects him as well from being made the "deluded instrument" of his own execution.

> **We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned.** Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees. *See Green v. Georgia*, 442 U.S. 95, 97, 99 S.Ct. 2150, 2152, 60 L.Ed.2d 738 (1979); *Presnell v. Georgia*, 439 U.S. 14, 16, 99 S.Ct. 235, 236, 58 L.Ed.2d 207 (1978); *Gardner v. Florida*, 430 U.S. 349, 357–358, 97 S.Ct. 1197, 1204–1205, 51 L.Ed.2d 393 (1977) (plurality opinion). Any effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment. Yet the State's attempt to establish respondent's future dangerousness by relying on the unwarned statements he made to Dr. Grigson similarly infringes Fifth Amendment values.

452 U.S. at 462-3 (emphasis added) (footnotes omitted). If this were the entirety of what *Estelle* had to say on the applicability of the Fifth Amendment to a capital sentencing phase, this Court would have been correct that the passage could be read as discussing the "availability" of the Fifth Amendment to the facts of *Estelle*. *See* Slip op. at 8, fn. 4. However, the emphasized "no basis to distinguish" language, relied upon by the Dissent in this case, *see* Slip op. at 2 (Breyer, J., dissenting), is later reinforced by this passage:

> The Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard," *Counselman v. Hitchcock*, 142 U.S. 547, 562, 12 S.Ct. 195, 198, 35 L.Ed. 1110 (1892), and the privilege is fulfilled only when a criminal defendant is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty ... for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493–1494, 12 L.Ed.2d 653 (1964).

452 U.S. at 467-8 (footnote omitted).

If *Estelle*'s reach was simply to the facts before it, this Court had no need to mention the protection of a silent defendant.[1] Nor was there any need to talk again of the Fifth Amendment in the broad terms expressed by *Counselman* and *Malloy*. Indeed, the plain language of *Estelle* understands a rule with a wider scope than the facts of *Estelle*. This scope also logically encompassed the just rendered *Carter v. Kentucky*, in which this Court held the Constitution required a no adverse inference upon request. 450 U.S. 288, 305 (1981). *Carter* even cited the same portion of *Malloy v. Hogan* that *Estelle* did. *Compare* 450 U.S. at 305 with 452 U.S. at 467-8.

Then, this Court issued *Mitchell v. United States*. Pertinent passages of *Mitchell* are as follows:

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1. Silence was also at issue in *Estelle*. As noted by the Court, the harm was not just the statements the defendant made, but the "remarks he omitted." *Estelle*, 451 U.S. at 464.

> Where the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony. As the Court stated in *Estelle*: "Any effort by the State to compel [the defendant] to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment." 451 U.S., at 463, 101 S.Ct. 1866. *Estelle* was a capital case, but we find no reason not to apply the principle to noncapital sentencing hearings as well.

526 U.S. at 326.

> Our holding today is a product of existing precedent, not only *Griffin* but also by *Estelle v. Smith*, in which the Court could "discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." 451 U.S., at 462-463, 101 S.Ct. 1866. Although *Estelle* was a capital case, its reasoning applies with full force here, where the Government seeks to use petitioner's silence to infer commission of disputed criminal acts. *See supra*, at 1314. To say that an adverse factual inference may be drawn from silence at a sentencing hearing held to determine the specifics of the crime is to confine *Griffin* by ignoring *Estelle*. We are unwilling to truncate our precedents in this way.

Id. at 329; *see also* at 328 ("normal rule in a criminal case is that no negative inference from the defendant's

failure to testify is permitted [citation omitted] We decline to adopt an exception… '"), 329 ("The rule against adverse inferences from a defendant's silence in criminal proceedings, including sentencing, is of proven utility"), 330 ("…an essential feature…"), 330 ("…a vital instrument…"). Clearly, in *Mitchell* this Court found *Estelle*'s reach to be broader than just the facts of *Estelle*. This Court then specifically extended that reach to a non-capital case. 526 U.S. at 326, 329. Indeed, the "no basis to distinguish" language in *Estelle* was the foundation on which both *Estelle* and *Mitchell* were built.

The language is not dictum nor is it a blanket application. Rather, this Court recognized the principle that there is "no basis to distinguish between the guilt and penalty phases…so far as the protection of the Fifth Amendment privilege is concerned." *Estelle*, 451 U.S. at 462-463; *Mitchell*, 526 U.S. at 326, 329. Thus, if the penalty phase operates like a guilt phase, the Fifth Amendment applies. In both *Estelle* and *Mitchell*, this Court applied this test to the facts before it.

Everything in both cases makes sense under this reading. Conversely, this Court's instant Opinion renders large portions of *Estelle* and *Mitchell* excessive verbiage. However, *Estelle* and *Mitchell* were not poorly constructed nor poorly reasoned. Indeed, *Mitchell*'s result – in reliance on *Estelle* - was a well-considered "product of [then] existing precedent." 526 U.S. at 329. Thus, this Court's finding that the "no basis to distinguish" language was dictum is incorrect.[2] The passage was a clear preliminary

2. The Opinion of the Court contains an inherent tension in this regard. This Court has long held dictum cannot be the basis of

determination necessary to the results of both *Estelle* and *Mitchell*. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996).

Next, this Court found the Kentucky Supreme Court decision was reasonable because it found no "facts and circumstances of the crime" were at issue. Slip op. at 7. As just explained, this is a reading of *Estelle* and *Mitchell* that does not recognize the correct application of the Fifth Amendment to sentencing. The Kentucky Supreme Court unreasonably failed to assess whether Woodall's capital sentencing trial bore the hallmarks of a trial on guilt. The Kentucky Supreme Court decision also unreasonably failed to recognize that *Estelle*'s future dangerousness instruction encompassed more than the "facts and circumstances of the crime."

The future dangerousness instruction in *Estelle* was, at that time, the principal vehicle of the Texas death penalty statute for the consideration of aggravation and mitigation. *Jurek v. Texas*, 428 U.S. 262, 272-274 (1976). The answer to the future dangerousness question determined whether the convicted defendant was to die. *Id.* The state bore a burden of proof of beyond a reasonable doubt. *Id.* at 267-8; *Estelle*, 451 U.S. at 466.

Likewise, in this case, Instruction #6 was the vehicle for the consideration of aggravation and mitigation:

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establishing clearly established law, but the Opinion of the Court then relied on dictum – in the form of a reserved question - as a basis to re-define what *Mitchell* described as a principle that was the "product of existing precedent." The proper reading of *Estelle* and *Mitchell* removes all tension.

> If upon the whole of the case you have a reasonable doubt whether the Defendant should be sentenced to death, you shall instead fix his punishment at a sentence of imprisonment.

JA 44. It required Woodall's jury to find beyond a reasonable doubt that the death penalty was warranted. *Id.* Kentucky bore the burden of proof. *Id.* The Texas and Kentucky instructions are functionally equivalent. Each is a death penalty selection question that bears the characteristics of a guilt phase question.[3]

Importantly, neither *Estelle* nor this case concerned a stand-alone question of remorse or acceptance of responsibility on which a defendant would have the burden of proof. Such questions are what this Court contemplated with the reserved question in *Mitchell*. *See* 526 U.S. at 330. Such questions do not have the characteristics of a guilt phase question. Here, by contrast, Instruction #6 placed upon Kentucky the burden of proving that the mitigation was insubstantial compared to the aggravation. It is akin to a guilt phase instruction requiring a state to prove the elements of a crime despite any affirmative defenses the defendant may have asserted – *i.e.* alibi, extreme emotional disturbance, duress.

Kentucky could have placed a burden of persuasion on Woodall as to the mitigation, but it did not. Respondent only had a burden of production. Thus, while Woodall

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3. Petitioner failed to respond or distinguish *Jurek* in its Reply Brief. Under the Eighth and Fourteenth Amendments, there is a long-standing difference between being found eligible for death and the ultimate selection of the death penalty.

had the option of putting before the jury evidence of say remorse, he had no obligation to do so. Moreover, because the prosecution sought the death penalty on the basis of lack of remorse, under Instruction #6 the prosecution assumed a burden of proving lack of remorse beyond a reasonable doubt. Kentucky could not avoid this burden by use of Woodall's silence. *See Estelle*, 451 U.S. at 469 ("…the State must make its case on future dangerousness in some other way.")

Instruction #6 is not a normative sentencing instruction. It is an up or down decision on the death penalty with the burden to prove death placed on the prosecution beyond a reasonable doubt. Indeed, this Court has recognized that the double jeopardy clause of the Fifth Amendment would apply to Instruction #6. *See Bullington v. Missouri*, 451 U.S. 430, 439, 445 (1981) (double jeopardy applies to capital sentencing proceedings that "have the hallmarks of the trial on guilt or innocence.") The Kentucky Supreme Court is in accord. *Brown v.* Commonwealth, 313 S.W.3d 577, 589-595 (Ky. 2010).

In sum, Instruction #6 operates identically to a typical guilt phase instruction. Thus, under the rule of *Estelle* and *Mitchell*, the protections of the Fifth Amendment – including a *Carter* instruction – were applicable to Woodall's sentencing trial.

CONCLUSION

Both *Estelle* and *Mitchell* have at their foundations the rule that if a sentencing phase resembles a guilt phase that the Fifth Amendment applies with full force. Here, the Kentucky Supreme Court was unreasonable because it did not recognize this principle and apply it to Woodall's penalty trial. This Court's deference to the Kentucky Supreme Court under AEDPA relies on readings of *Estelle* and *Mitchell* that fail to harmonize the holdings of these two cases.

Respondent asks this Court grant rehearing.

Dated: May 19, 2014 Respectfully submitted,

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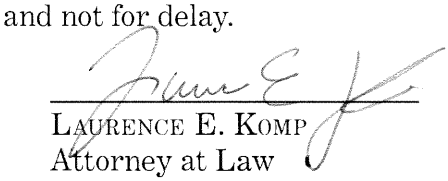
CERTIFICATE OF COUNSEL

As counsel for the Respondent, I hereby certify pursuant to Rule 44.1 that this petition for rehearing is presented in good faith and not for delay.



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