IN THE SUPREME COURT OF THE UNITED STATES

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KANSAS, :

Petitioner :

v. : No. 04-1170

MICHAEL LEE MARSH, II. :

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Washington, D.C.

Wednesday, December 7, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:09 a.m.

APPEARANCES:

PHILL KLINE, ESQ., Attorney General, Topeka, Kansas; on behalf of the Petitioner.

REBECCA E. WOODMAN, ESQ., Topeka, Kansas; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Kansas v. Marsh.

General Kline.

ORAL ARGUMENT OF PHILL KLINE

ON BEHALF OF THE PETITIONER

MR. KLINE: Mr. Chief Justice, and may it please the Court:

This Court has never held that a specific structure for weighing aggravating and mitigating factors is required by the eighth amendment. Yet, this Court has consistently held that all that is required by the eighth amendment is for States to afford an opportunity to jurors to consider all mitigating evidence relevant to determination of a sentence other than death.

The Kansas statute, it is undisputed in this case, allowed the respondent to introduce all such evidence and that the jurors, under Kansas law, are specifically instructed to consider all such mitigating evidence on an individualized basis.

JUSTICE SOUTER: General, may -- may I -- I'd like to pose a question which at least gets to the nub of the issue, as I see it, and -- and get your response

to it.

The premise of my question is this. We -- we generally regard mitigation evidence as favoring life, aggravation evidence as favoring death. We've got a case in which the -- the assumption is that they are evenly balanced. The -- the pans of the scale are exactly even on that. Kansas says in that case the jury shall return the verdict of death.

If we are going to demand, as we have said that we're going to demand, that the determination -- that the death penalty determination be one of what we have called reasoned moral judgment, then what has to be supplied in order to make the Kansas provision consistent with reasoned moral justice, it seems to me, is a presumption in favor of death. Other things being equal, there is a presumption in favor of death.

And my question is, am I correct in saying that in order to hold your way, we have to hold that the eighth amendment -- is consistent with the eighth amendment to presume the appropriateness of death, other things being equal?

MR. KLINE: As the Court -- yes. As the Court has done in Walton, the standard in the --

JUSTICE SOUTER: You -- you agree that's --

that's a proper way to look at the issue then.

MR. KLINE: Well, to take the issue in its total context and refer to the instructions and the totality of what the jury is instructed, I would disagree that there is a presumption of death --

JUSTICE SOUTER: Then how do you get off the dime?

MR. KLINE: The jury is given in the instruction, instruction number 4 and instruction number 5, a direction as to the effect of their reasoned moral judgment.

JUSTICE SOUTER: Yes, but the -- the direction, as I understand it, is that if mitigation and aggravation are even, then the only way to come to a conclusion is to say, as the statute does, because the mitigation does not outweigh the aggravation, you should return a verdict of death. And that seems to me another way of saying there is a presumption that if aggravation and mitigation are equal, that the penalty should be death.

MR. KLINE: Instruction number 5 does instruct the juror, Justice Souter, that if the State meets the burden of proving beyond a reasonable doubt that the mitigating factors do not outweigh the aggravating factors, then the jury shall sentence the

defendant to death.

JUSTICE SCALIA: The State has made a judgment that this particular offense -- what's it called? Aggravated murder, you know, whatever --

MR. KLINE: First, they have to be convicted, Justice Scalia, of capital murder.

JUSTICE SCALIA: Capital murder, as its name implies, warrants a judgment of death unless there are mitigating factors that -- which indicate that that is not proper.

MR. KLINE: That is correct, Justice Scalia.

JUSTICE SCALIA: That's a moral judgment, isn't it?

MR. KLINE: That certainly is, and --

JUSTICE SCALIA: And even if the State had said the opposite, it -- it is a -- still a State-prescribed moral judgment. If the State had said capital murder warrants a judgment of death only if the mitigating factors outweigh the aggravating factors, that's still a State-prescribed moral judgment, isn't it?

MR. KLINE: That is correct.

JUSTICE BREYER: And can -- can you go back to Justice Souter's question for a minute? Because the way I'm thinking about this, I'm making two assumptions

that I'd like you to make: first, that there could be such a case, which I very much doubt, but -- but this is a lawyer's hypothetical, this whole thing, in a sense. But I'll make the assumption there could be such a case. Second, I will assume that our case law leaves this open, a matter that can be argued.

But suppose that we do make that assumption for the moment. Then what I'm thinking of is this made-up case is the case of the following. We have aggravating factors and break them down into molecules on a scale, and for every molecule of aggravation here, there is a molecule of mitigation there, so that the juror who is very conscientious ends up with the same number of molecules of equal weight on this scale. And in our made-up instance, Kansas says, if that's the situation, you must say death.

Now, if that's the case, how would you reconcile that with a view of the eighth amendment that says if you're going to sentence someone to death, there has to be something special about his case that means it's somewhat worse than the ordinary case because, after all, for every molecule of specialness that warranted death, we have a molecule of mitigation that doesn't?

So that's where I am, trying to get the cases

out of it and trying to take very seriously the hypothetical that is before us.

MR. KLINE: There -- thank you, Justice Breyer. There are several considerations and steps that must be approached and proven by the State before we get to that actual equation.

First of all, the State follows the guided discretion standard of this Court, as laid out in Furman and its progeny, to a very narrow definition of what capital murder is. In fact, the Kansas death penalty statute is one of the most narrow in the Nation.

And then past that point to the sentencing jury, the State must prove beyond a reasonable doubt at least one of eight specific aggravating factors exist with jury unanimity.

And then past that point, Kansas has complied with this Court's requirement under the eighth amendment for a juror to consider and give effect to all mitigating evidence relevant to a sentence other than death and that instruction is specifically pointed out in your appendix, pages 23 through 28.

Furthermore, the jurors are --

JUSTICE SCALIA: The Furman -- the -- it's hard to tell where the voice is coming from, I

know. We ought to get that fixed.

(Laughter.)

JUSTICE SCALIA: The Furman narrowing is produced by the very first part of subsection (e). If, by a unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in -- in section 24-4625 and amendments thereto exist -- that's the Furman.

MR. KLINE: That is correct, and --

JUSTICE SCALIA: And then beyond that you say if that is found, then the jury has to find that the existence of such aggravating does not outweigh.

MR. KLINE: That is correct. And that -- that is how it complies with your hypothetical, Justice Breyer.

JUSTICE BREYER: Well, you see, my hypothetical is designed to cut free of the language of the cases. I have no doubt you can go through the language and show that. And it's designed to say, but the very point of those cases is you do not send someone to death unless the jury decides that the circumstances here make him somewhat worse, at least one molecule worth of worse, than the typical person. And given the evenness of the balance, I don't see how we can say that, though I grant you, when you go back

to those words in the cases, you're right.

MR. KLINE: Well, the guided discretion of this Court has indicated that the State must be able to -- and a juror -- differentiate between a defendant who is convicted of the same crime as to the -- and sentenced to life as the defendant who is sentenced to the same crime and sentenced to death. And that is laid out, as Justice Scalia pointed out, in the definition of capital murder and the requirement of aggravated factors.

CHIEF JUSTICE ROBERTS: Of course, the -- the instructions don't tell the jury to weigh the molecules. They tell the jury that the State has to prove beyond a reasonable doubt that the mitigating molecules do not outweigh the aggravating molecules.

MR. KLINE: That is correct.

CHIEF JUSTICE ROBERTS: And how likely is it, if you have a jury who thinks the -- a juror, who thinks the molecules are precisely balanced, is going to conclude that the State has carried its burden of proving beyond a reasonable doubt that the 50 here don't outweigh the 50 here?

MR. KLINE: Mr. Chief Justice --

CHIEF JUSTICE ROBERTS: It's a theoretical proposition --

MR. KLINE: Mr. Chief Justice, we are dealing with a hypothetical that we believe does not exist in jury deliberations. A juror steps back and decides whether they can live with the decision that is before them and then decides whether the death penalty is warranted.

And in fact, Kansas law leads them to that reasoned moral decision. In Kansas law, in instruction number 4, which again is laid out in your appendix, instructs the juror that mercy, in and of itself, is sufficient to determine a sentence other than death.

JUSTICE KENNEDY: Well, let me ask -- ask you this. As a -- rather than presumptions, can we look at this case as a matter of shifting burdens of proof? I -- I take it the Constitution does not require the State to introduce mitigating evidence. That's -- that's the responsibility of the accused.

MR. KLINE: That is correct.

JUSTICE KENNEDY: And so what we're saying here is that when a State shows that the mitigators do not outweigh the aggravators, then it's the defendant's/accused's burden to go forward and show that they do.

MR. KLINE: Except -- you're correct, Justice Kennedy, except that the burden on the State is beyond

a reasonable doubt to demonstrate that, the highest burden allowed by law. And beyond that burden that was in the Arizona statute, which was functionally identical to the Kansas law, that was presented in this -- to this Court in Walton v. Arizona, and this Court rejected that very argument in that case. As you may recall, the Arizona law was that there was a responsibility for the defendant to demonstrate that mitigating factors were sufficiently substantial to call for leniency. The Arizona Supreme Court had decided that that meant that the mitigating factors must outweigh the aggravating factors.

And this Court accepted that case because of a conflict between the ninth circuit which held, as the Kansas Supreme Court did, in Adamson v. Ricketts, that that was an unconstitutional violation of the eighth amendment.

This Court resolved that conflict, and in fact, States relied on that resolution, as did the Kansas legislature, in articulating the very standard except Kansas goes further and keeps the burden on the State.

JUSTICE O'CONNOR: Yes. In Arizona, the burden was placed on the defendant, was it not --

MR. KLINE: That is correct, Justice

O'Connor.

JUSTICE O'CONNOR: -- to -- to prove the mitigation? And yet, the Court upheld that even in the equipoise situation.

MR. KLINE: That is correct, Justice O'Connor.

JUSTICE O'CONNOR: Over a dissent.

MR. KLINE: Correct. Justice Blackmun's dissent.

JUSTICE O'CONNOR: So Kansas does not put the burden on the defendant.

MR. KLINE: Not at any stage of the proceeding. The burden remains on the State to prove beyond a reasonable doubt.

JUSTICE KENNEDY: Well, but -- but I take it the State has no duty to adduce mitigating factors.

MR. KLINE: It is incumbent upon the defendant, Justice Kennedy, to bring forth factors in mitigation. The standard, though, in introduction is relevancy, and Kansas has met the -- the requirements of this Court, as it relates to the specific sentencing or individualized sentencing structure, by allowing the jury to consider all evidence relevant to the determination of a sentence other than death.

JUSTICE STEVENS: Of course, that means they

comply with Lockett.

I want to ask you one question that goes back to your colloquy with Justice Souter and Justice Scalia. Justice Scalia pointed out that the State has made a moral judgment on a certain state of facts, the death penalty shall be imposed and which you agreed with. And that was true in the cases back in 1975 and 6. There were some State statutes that mandated death based on the moral judgment of the State in certain circumstances. I think one was a North Carolina statute.

Do you ask us to reexamine those cases?

MR. KLINE: No, Justice Stevens. Actually the State's position is consistent with the previous decisions of this Court in this fashion.

JUSTICE STEVENS: It -- it does not rely on the proposition that there's a situation in which there's a mandated death penalty which is perfectly okay.

MR. KLINE: No, because there is a requirement upon the State in the sentencing phase to prove factors in aggravation with jury unanimity beyond a reasonable doubt that set aside this particular act in a different framework than those who commit capital murder and are convicted of capital murder. If the

State does not meet that burden --

JUSTICE STEVENS: Yes, but of course, the aggravators -- it would be permissible for a State to include the aggravators necessary to narrow the category in the definition of the crime itself.

MR. KLINE: This Court has held that it does. And Kansas has a very narrow death penalty in the definition of capital murder and also the specified aggravators that the State must prove.

JUSTICE STEVENS: But you would say that if the State met that burden and there was no mitigating or no substantial mitigating evidence, it would be permissible to -- for the State to mandate the death penalty.

MR. KLINE: Just as it is in Walton v. Arizona.

JUSTICE STEVENS: The answer is yes.

MR. KLINE: Yes. The answer is yes, Justice Stevens.

JUSTICE STEVENS: And you think that's fully consistent with the North Carolina case.

MR. KLINE: It is not fully consistent, I don't believe. It is consistent with the Walton case in that this Court said a mandatory death penalty is not unconstitutional, as long as the State

differentiates between those convicted of the same crime and who are sentenced to life and those who are convicted of the same crime and sentenced to death. Kansas clearly does that in the requirement that the State prove beyond a reasonable doubt that one of at least eight specific statutory aggravating factors exist in the case.

But Kansas goes further. Unlike in Walton v. Arizona, the burden remains on the State to also prove that the mitigating evidence proffered by the defendant who has the lowest threshold allowed by law, and all that is required by this Court -- that is relevancy -- that all of that evidence does not outweigh --

JUSTICE STEVENS: Well, it -- that's the way Justice Blackmun interpreted the majority, but the majority didn't quite say that because it said the burden on the defendant was to prove sufficient mitigation to justify something other than the death penalty. And conceivably one could have met that burden with substantial mitigating evidence that came out even.

MR. KLINE: Well, the --

JUSTICE STEVENS: Under the majority's opinion -- now, you're dead right about what Justice Blackmun said, but --

MR. KLINE: Justice Stevens, you are correct. The majority didn't specifically address that, but they also analyzed the case, much as Justice Kennedy just did, in saying that really what we're talking about is whether the State eventually at some point, once it has met the requirement of the individualized sentencing requirements of this Court, can say that death is appropriate. And the answer in this Court's jurisprudence has been clearly yes once we are able to set aside this defendant from other defendants convicted of the same crime.

JUSTICE STEVENS: But you would agree that it would be consistent with the -- the text of the majority opinion to say it really meant they have to prove enough mitigating evidence to make death the inappropriate sentence, which could be less than -- even a 50/50 balance?

MR. KLINE: Arguably, yes, Justice Stevens. And that is the language of the Arizona statute, but it would fly in the face of the interpretation of the Arizona Supreme Court, as well as the Ninth Circuit Court of Appeals in Adamson v. Ricketts which, subsequent to the Walton decision, held that Walton controlled and allowed the potentiality of equipoise to be constitutional.

Now, one thing I would like to --

JUSTICE O'CONNOR: Are you going to address the other questions? I think we added a question about whether the Kansas Supreme Court's judgment was adequately supported by an independent State ground. And I'm not sure that this has been adequately addressed.

Do we have jurisdiction here? The -- the Kansas Supreme Court vacated the capital murder judgment and remanded it and said it would have done it anyway because of the State law evidentiary error concerning admission of third party guilt evidence. So does that independent ground mean we don't have jurisdiction here on this thing?

MR. KLINE: No, Justice O'Connor, there is not an independent and adequate State ground for this decision. It is undisputed that the Kansas Supreme Court relies on this Court's interpretation of the eighth amendment for the interpretation of the cruel or unusual punishment clause of the Kansas constitution.

JUSTICE O'CONNOR: But there was another ground.

MR. KLINE: Yes, but it is not adequate and independent. The argument of the respondent is that the constitutional savings doctrine and severability

arguments are independent and adequate, and by their very nature, they are dependent rather than independent.

The Kansas Supreme Court engaged in a -- and I quote from the decision -- a full reexamination of the eighth amendment jurisprudence in coming to the conclusion in paragraph 25 of the syllabus, which is the law of the case in Kansas under Kansas law, that the Kansas death penalty statute is unconstitutional on its face. That was the first such holding in Kansas jurisprudence history finding that determination.

Previously, 3 years earlier, the court had found the death penalty statute constitutional as construed, and as this Court knows, you will not accept jurisdiction of a State court's interpretation or construction of a State law. So, therefore, this is the first opportunity that the State has had and I would say the last.

JUSTICE O'CONNOR: Well, but was this -- was this case remanded for a new trial?

MR. KLINE: It is, Your Honor.

JUSTICE O'CONNOR: And presumably, if there is a conviction and a sentence, you could come back here again by way of a cross appeal.

MR. KLINE: That would be incorrect, Justice

O'Connor. Kansas is prohibited. The prosecutors are prohibited and limited of the right of appeal in Kansas law as in most States.

And -- and this Court had a similar case in Neville v. South Dakota in which you construed South Dakota law as it relates to limiting the prosecution's ability to appeal and, through that construction, identified in an interlocutory basis, when the lower court passes on a constitutional measure that has import for this Court, that the inability of the State to be able to pursue that case renders jurisdiction under 28, section 1257. So --

JUSTICE GINSBURG: If I -- if I understand what the situation is, there is no death penalty in Kansas as a result of this decision.

MR. KLINE: That is correct, Justice Ginsburg. There is no death penalty. The highest court of our State has spoken and stricken it down as unconstitutional on its face.

JUSTICE GINSBURG: Has there been any movement in the legislature to change the law so you won't be in this situation where there is no death penalty?

MR. KLINE: Justice Ginsburg, there's significant discussion in the legislature, but that

discussion is somewhat mixed, as you might imagine, and some were concerned that action might moot this case. Right now there are 12 pending capital murder cases in Kansas which, if this Court does not reverse the Kansas Supreme Court, the State will not be able to seek capital murder charges and the death sentence in those cases.

JUSTICE STEVENS: Well, that wouldn't be true if you amended the statute though, would it? If you -- if they amended the statute to take the 50/50 problem out of it, which wouldn't seem to me all that difficult, you could still impose the death penalty on these other 12 people who haven't been tried.

MR. KLINE: It is our position, Justice Stevens, since their crimes were committed prior to any act of the legislature, we would be prohibited from seeking the death penalty.

JUSTICE STEVENS: Because of an ameliorating amendment to the death penalty statute?

MR. KLINE: That is -- that is our -- our position. It would have to take an entire --

JUSTICE STEVENS: I doubt if you'd take that position if they did it.

(Laughter.)

MR. KLINE: Well, Justice Stevens, if you put

me in that position, I will be an advocate for the State.

However, it is our position, as Justice Ginsburg alluded to, that the State has no death penalty and it would take a complete reenactment of the death penalty for the State to have one.

And that is borne out in case law. There is no uncertainty as it relates to the ability of the State to seek appeal in charging death once there is no death statute that is available. The references in Kansas law to KSA section 22-3602(b) are a very settled area of the law. The respondent argues that subsection (1) of that statute would allow us an opportunity to preserve this issue below. However, that only relates to the State being able to appeal charging documents, and the definitions of those documents are very specific in Kansas law.

Furthermore, subsection (3) states that a prosecutor can reserve an issue, but case law is very clear, and that is only if the Kansas Supreme Court sees that issue as important for the administration of justice, the uniform administration of justice, in the State, and has interpreted that to mean only where guidance of the supreme court is necessary. It is not a method for moving for rehearing. The Kansas Supreme

Court rejects that. We moved for reconsideration and reconsideration was not granted.

If this Court embarks, as the respondent asks it to, it will put in jeopardy 12 capital murder cases and prevent 12 capital murder cases from being pursued in Kansas. It will effectively strike down the laws of seven other States that have functionally identical statutes as Kansas.

And furthermore, it would effectively call into question the laws of five other States that do not even require any weighing mechanism whatsoever. This Court has never gone further and required a specific mechanism of weighing aggravating and mitigating circumstances and has relegated that duty, as it should, to the States as long as the juror has the opportunity to make the reasoned moral decision based on the consideration of all mitigating evidence relevant to a decision other than death that relates to the character, the background of the defendant, or the circumstances of the offense.

And if you would look in your joint appendix on pages 25 and 26, you will see the instructions that the State of Kansas gave in this case, and it is undisputed that the respondent's presentation of mitigating evidence was presented to the jury in full,

and additionally, the jury was specifically instructed to consider and give weight -- I'm sorry. It's pages 24 and 25 -- specifically instructed to give weight to all of that evidence. Pages 24 and 25. I am referring to instruction number 4. And you will see the delineation beginning on page 25 of all the mitigating evidence that was admitted as relevant in this case.

And I would also say that Kansas continues to bear a greater burden in its consideration -- for the juror's consideration in that the juror is instructed on paragraph 2 of instruction 4 that mercy in and of itself is sufficient -- is sufficient -- to outweigh the aggravating evidence presented by the State. So contrary to the --

JUSTICE SCALIA: I have no idea what that means. I mean, you -- you go into this very elaborate system, you know, molecules on one side, molecules on the other.

(Laughter.)

JUSTICE SCALIA: And then you throw the whole thing up in the air and say mercy alone is enough. I mean --

MR. KLINE: Justice Scalia, I think it is -- it is default for a life sentence. And I believe it is certainly an acknowledgement that what really

happens here is a juror steps back, after the consideration of all the evidence that this Court requires under the eighth amendment, and decides what they can live with: a sentence of death or a sentence of life. And one juror who has doubt can extend mercy.

And, Mr. Chief Justice, if it may please the Court, I'd like to reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, General.

Ms. Woodman, we'll hear now from you.

ORAL ARGUMENT OF REBECCA E. WOODMAN

ON BEHALF OF THE RESPONDENT

MS. WOODMAN: Mr. Chief Justice, and may it please the Court:

I'd like to devote the bulk of my time to answering the State's arguments on the merits because the constitutional issue presented by the Kansas capital sentencing statute is actually quite different than the State and its amici would have it appear. Their arguments rest on an erroneous assumption about the way the statute operates and the real issues that its operation raises.

Under the Kansas formula, prosecutors can and do urge jurors not to persevere in their decision-making if they are undecided regarding the balance of aggravating and mitigating circumstances. In other

words, if the decision is too hard to make, the sentence must be death. The formula --

CHIEF JUSTICE ROBERTS: But is it reasonable to suppose that one of those cases where it's too hard to decide is when there are 50 molecules on one side and 50 on the other? In other words, it would seem to me that that's an easy case to say that the State has not met its burden of proving beyond a reasonable doubt that the mitigating factors don't outweigh the aggravating ones when the evidence is evenly balanced.

MS. WOODMAN: No, Your Honor. I think that it's not right to think of this in terms of mathematical formulas, molecules on one side or the other. This is a subjective, qualitative determination that the jury makes, and whatever capital sentencing statute a State chooses, States are free to choose whatever structure they see fit to determine whether death is an appropriate sentence. However, States are not free to enact a statute that doesn't ensure a reliable determination that death is an appropriate sentence, and that's what we're dealing with here. It's a qualitative judgment and one can imagine, very easily I think, a scenario where jurors are deliberating. They take their jobs very seriously and they cannot make a determination whether aggravators

outweigh mitigators, or vice versa.

JUSTICE KENNEDY: Well, that's because the defendant hasn't introduced enough evidence of mitigation and that's the duty of the defendant to come forward with it.

MS. WOODMAN: Well, in -- in a situation of equipoise, by which I mean a state of indecision on whether the relative balance between aggravating and mitigating circumstances, burden of proof is not the sticking point there.

JUSTICE KENNEDY: Well, you say it's a state of indecision. The jury has decided that aggravating factors have been established.

MS. WOODMAN: But that -- that's -- that's the problem because that's not a reliable determination. It's no determination that based upon the individual --

JUSTICE KENNEDY: Why isn't it a reliable determination that, number one, it's a death-qualified accused in -- in any event, and there have been specific aggravators proved? That has been determined. It's now for the defendant, in effect, to show that the mitigating circumstances outweigh this. The -- and you have the bonus that the State has to prove beyond a reasonable doubt that the mitigators have not

outweighed the aggravators.

MS. WOODMAN: But the jury is specifically instructed under this formula that they have a third option, and that is where they can't make a decision, whether aggravators outweigh mitigators, or vice versa --

JUSTICE KENNEDY: They have made the decision. They have made the decision that the aggravators are there and have not been outweighed. They have made that decision.

MS. WOODMAN: But the jury is required to impose death at that point, and it is a decision that aggravators are not outweighed by mitigators. But this Court's eighth amendment jurisprudence requires --

JUSTICE KENNEDY: That's because the mitigation case hasn't been made.

MS. WOODMAN: The eighth amendment requires jurors to make a determination, based upon individual characteristics, whether death is an appropriate sentence, whether the defendant deserves death. And when the jury is in a situation of equipoise and is required to impose death, they're imposing death without having made that determination that death is an appropriate --

JUSTICE BREYER: No, no. They're -- they're

saying it is appropriate. They're saying it is appropriate. We have the people put in the box. The box is are they in a situation that is different from the average murderer. Yes. And they're making the determination that although they're in that box, that morally they're no different. Morally they're the same --

MS. WOODMAN: Well, there's no --

JUSTICE BREYER: -- because for every factor that makes them morally one way, there's a factor that makes them morally the other way. So they're different, but they're not morally different.

Now, that's -- that's what I think this case presents. And I -- I mean, I imagine a juror who's thinking just what I said. I don't know if there ever was such a juror, but if there was such a juror, the statute in this instant tells him what to do.

MS. WOODMAN: The statute does tell them what to do. It tells --

JUSTICE BREYER: It says where you think there is an equivalent, but not a moral difference, death.

MS. WOODMAN: Well, but if -- if you think -- if you look at the prosecutorial arguments, for example, that have been made in both the Kleypas and

Marsh cases, those prosecutorial arguments have urged the jurors to do exactly what I described, and that is to abdicate their decision to make a -- a determination based on the -- on individual characteristics on the question of whether death is an appropriate punishment for this individual offender based on the specific circumstances of this crime, and that if they're in equipoise, they have to impose a death sentence. That is encouraging the jurors to abdicate their decision to determine whether death is an appropriate sentence or not.

Then --

JUSTICE SCALIA: Ms. -- Ms. Woodman, you know, I -- I have not, you know, gone along with -- with most of our Walton jurisprudence anyway, but -- but what I have really always thought it demanded was really nothing more precise than that a jury has to be given the opportunity to grant mercy. I -- I'm not sure I would describe any of it as any more precise than that.

MS. WOODMAN: Well --

JUSTICE SCALIA: The jury has to be given the opportunity to say this poor devil doesn't deserve the death penalty. However you want to put that, you know, you can put the burdens here, the burdens there. You

can talk about equipoise or not. Does the jury have a chance to say this -- this fellow does not deserve the death penalty? That --

MS. WOODMAN: Well --

JUSTICE SCALIA: -- and clearly exists under this scheme, it seems to me. Any jury that -- that really thinks this person should not go to death can -- can do it. In fact, you know, I guess the statute does not demand that instruction, but that instruction that says -- what is it? The appropriateness of the exercise of mercy can itself be a mitigating factor. I mean, gee, what -- what else -- what else do you have to do?

MS. WOODMAN: But that's one factor among many that the jury has to consider. And the problem here is that the jury could have all of the information that a defendant has proffered as a basis for a sentence less than death, and a jury could still be unable to decide whether aggravation or mitigation is the weightier in a closely balanced case. And that is the problem here.

JUSTICE SCALIA: Any jury that thought this -- this person did not deserve death would have ample opportunity to give expression to that determination under this scheme.

MS. WOODMAN: Only if they persevere in that decision-making, and prosecutors urge them not to by telling them that they must impose death when they cannot decide the balance between aggravating and mitigating circumstances.

JUSTICE STEVENS: Ms. Woodman, you said that they didn't make such an argument in this case and in some other case, but you did not include the argument in the joint appendix, did you?

MS. WOODMAN: No, I did -- we did not include the prosecutorial closing arguments. They are in --

JUSTICE GINSBURG: Are you -- are you -- the -- the argument --

MS. WOODMAN: They are in the brief.

JUSTICE GINSBURG: There is a brief from the Kansas law professors, and this is the instruction from the Kleypas case?

MS. WOODMAN: Yes.

JUSTICE GINSBURG: If the aggravators are not outweighed by the mitigators, you shall impose the death penalty, not that you may, not that you can, but that you shall impose the death penalty. This is the duty you were sworn to uphold. Shows command. It means must. That's -- is that the type of instruction --

MS. WOODMAN: That's correct.

JUSTICE GINSBURG: -- the type of argument?

MS. WOODMAN: That's correct, and then in Mr. Marsh's case, which is part of the record in this case -- and I've cited to the record for that argument, which is at -- I apologize. It's at volume 54 at pages 54 and 55 of the record of the Kansas Supreme Court in the Marsh case. And in that case, the prosecutorial arguments told the jury that they can't even consider mitigating evidence unless they find that mitigating circumstances outweigh aggravating circumstances because the law has told you and the judge has told you that the law says that if the aggravating circumstances are not outweighed by mitigating circumstances, you shall return a verdict of death.

JUSTICE SCALIA: And therefore, they shouldn't consider mitigating at all, he told them?

MS. WOODMAN: No. This is not a question of not being able to consider mitigating circumstances. And as I said --

JUSTICE SCALIA: Is -- is this mercy instruction always given? Is that standard? Is it -- is it, in effect, that -- that mercy is -- is always one of the mitigating circumstances?

MS. WOODMAN: Yes. That's part of the jury

instructions in capital cases.

JUSTICE SCALIA: Gee, I -- I really don't see what -- what complaint you have then. Any jury that -- that thinks this person deserves mercy says, I think he deserves mercy, and that's -- that's a -- a mitigating circumstance that outweighs whatever aggravating circumstances there are.

MS. WOODMAN: But when you think about the difficulty of the individualized sentencing decision that the jury has to make, the -- one juror might feel that way, but it's only if they persevere in that decisionmaking. This statutory equipoise provision encourages jurors not to persevere in their decisionmaking. They're -- they're sitting around in the jury room. One juror --

CHIEF JUSTICE ROBERTS: What -- what is the statutory equipoise provision?

MS. WOODMAN: It says that if the jury finds the existence of at least one aggravating factor and determines further that any aggravating circumstances that exist are not outweighed by any mitigating circumstances found to exist, the sentence shall be death.

CHIEF JUSTICE ROBERTS: Well, that's my question. There is no --

JUSTICE SCALIA: If the State is --

CHIEF JUSTICE ROBERTS: There is no statutory equipoise provision. The State has a burden of proof to prove beyond a reasonable doubt that the mitigating factors don't outweigh the aggravating. That's what you mean by the statutory equipoise provision?

MS. WOODMAN: The statutory equipoise provision, as the Kansas Supreme Court found -- they construed this statute. They construed it to mean that it requires death when jurors are undecided about the balance between aggravating and mitigating circumstances. That construction of the statute is entitled to respect. And under --

JUSTICE SCALIA: Who said that? Excuse me. That -- that description of the statute.

MS. WOODMAN: The Kansas Supreme Court in the Kleypas case in holding it unconstitutional.

JUSTICE SCALIA: Yes, but it seems to me the statute doesn't really say that, does it? But I mean, what the statute says is that if it's in perfect equipoise, the State loses because the State has the burden of proving beyond a reasonable doubt that the -- that the mitigators do not outweigh the aggravators. It seems to me if a jury sees them in perfect equipoise, the jury would have to say the State has not

proven beyond a reasonable doubt that the mitigators do not outweigh the aggravators. What -- isn't that what a jury would have to say?

MS. WOODMAN: No. Under the statute, the State's burden of proof, which is beyond a reasonable doubt -- I'll grant that, but it's to prove beyond a reasonable doubt that the aggravators are not outweighed by the mitigators.

JUSTICE SCALIA: That's right. Okay. And -- and if the jury cannot decide whether the aggravators are outweighed by the mitigators, if they're in perfect equipoise, who loses?

MS. WOODMAN: The defendant.

JUSTICE SCALIA: No. The State loses. It's the State that has the burden of proving beyond a reasonable doubt that they are --

JUSTICE STEVENS: Well, the Kansas Supreme Court thought that --

MS. WOODMAN: The Kansas Supreme Court construed it to mean that a tie goes to the -- to the State.

JUSTICE BREYER: That's different from saying not decided. I thought the Kansas Supreme Court didn't speak of not decided. I thought it didn't speak in Kleypas about a jury who -- a juror who can't make up

its -- his mind. I thought it said the jury has made -- it assumed the juror has made up his mind. That's why I think it's artificial. It says where the jury finds. It finds equipoise as to the mitigating and aggravating circumstance, then death, that the jury has to find that.

MS. WOODMAN: But this is not about structuring decisionmaking. This is about terminating decisionmaking on the issue that is central to the eighth amendment requirements at the selection stage --

JUSTICE KENNEDY: Well, it's terminating it because there's not enough mitigating evidence.

JUSTICE BREYER: That's true I -- I think, isn't it?

And then the question is, does a State have a right not to do with burden of proof, not to do with anything else, but to have perhaps the artificial situation where the jury finds that the evidence is in equipoise whoever has the burden of proof. Put it all on you, whoever had it. That was their final conclusion. I find it is in equipoise.

Next question: what happens?

MS. WOODMAN: Well, the statute hasn't assigned a burden of proof, but still that's not the problem here.

JUSTICE BREYER: Oh, I agree with you. That's not the problem.

MS. WOODMAN: Because what the individualization requirement means, in this Court's own jurisprudence, is that mere consideration of mitigating circumstances is not enough. The Court said so in Tennard and in many other cases, Penry v. Johnson, that it's not enough that the sentencer be allowed to consider mitigating circumstances. It must be allowed to consider and give effect to those mitigating circumstances.

And when a jury cannot decide between aggravating and mitigating circumstances, when that jury is, nevertheless, required under this -- that situation to impose a sentence of death, the sentence of death has been imposed without the jury having made the requisite individualized sentencing decision under the eighth amendment at the selection stage.

JUSTICE STEVENS: I might point out -- I just looked at the question presented. It does assume -- and I guess is drafted by the Kansas Attorney General. The question is what happens when mitigating and aggravating evidence is in equipoise. So the assumption on which we took the case is that there will be cases in which there's equipoise.

MS. WOODMAN: That's right. And the Kansas Supreme Court found that that was a real possibility. And the Kansas Supreme Court found this statute unconstitutional in Kleypas because it violates the individualized sentencing requirement, and the court specifically found that it requires death when jurors are unable to decide the balance between aggravating and mitigating circumstances. That's how the statute was construed in Kleypas.

I would like to address the jurisdictional issue for a few moments, unless there are any further questions from the Court on the equipoise issue, which I'd be happy to answer. But one of the things I want to discuss today is the jurisdictional issue on the adequate and independent State law ground, which this Court asked the parties to brief.

I feel that the State misstates the issue there as well because in the Kansas Supreme Court, the State conceded the Federal unconstitutionality of the Kansas equipoise formula, as decided by the court in the Kleypas case 4 years ago, and defended in this case only on the contested State law ground of severability and bypassed raising a Federal question in a motion for a rehearing, which again relied solely on State law severability grounds.

JUSTICE SOUTER: No, but the -- the Attorney General said that the -- the fact that in this particular case the issue was focused on, in effect, sort of remedy, severance, and so on, was dependent upon the assumption about what Federal law required. It was dependent upon the earlier case which so held. So I don't -- and -- and what he seem -- says seems plausible to me. I -- I don't see how we can divorce the judgment here with the earlier judgment, which Kansas -- which the Kansas Supreme Court relied upon here, which was a Federal ground.

MS. WOODMAN: Well, it's clear that the Kansas Supreme Court's decision relies on severability as a basis for its decision, and it's true that the Kansas Supreme Court, in doing so, reiterated the Kleypas holding.

JUSTICE SOUTER: It wouldn't have even raised the issue had it not been for the earlier Federal holding. Isn't that correct?

MS. WOODMAN: That's right, but Mr. Marsh raised the issue on State law severability grounds. The State conceded that Mr. Marsh was entitled to have his death sentence vacated because of the unconstitutional equipoise provision.

JUSTICE SOUTER: Well, do you -- do you -- I

-- I take it this is the implication of your position. Do you take this position that in any instance in which a State supreme court decides a case on a Federal -- decides an issue on a Federal ground in case A, and for whatever reason, case A is not brought to this Court for review, that in every subsequent case in the State system, which depends upon State A, the State is totally without the -- or this Court is -- is totally without jurisdiction to review it?

MS. WOODMAN: Where the issue has not been pressed by a party in the State court, no, I don't --

JUSTICE SCALIA: Well, how could the issue be pressed? I mean, it had already been decided by the supreme court. I mean, what -- what could the State say to the trial court?

MS. WOODMAN: Well, we asked the court to overrule the severability decision in Kleypas. There was absolutely nothing preventing the State from arguing that the constitutional decision in Kleypas should be overruled. Absolutely nothing preventing that.

JUSTICE SCALIA: You think this -- you think the State has to challenge as unconstitutional a decision of the State supreme court in -- in the lower court, lower State court.

MS. WOODMAN: I think that they --

JUSTICE SCALIA: How do you expect the lower State court to come out on that?

MS. WOODMAN: Well, but futility is never a reason for not raising an issue. Criminal defendants are required to raise issues all the time in order to preserve them for later review. In Engle v. Isaacs, this -- this Court said futility is no excuse. And what is good for criminal defendants, very respectfully, is good for the State. And Justice Rehnquist said as much for the Court in the Court's decision in Illinois v. Gates, that -- that States are not exempt from the ordinary rules of procedure which govern this Court's jurisdiction.

And the fact of the matter is that the State not only did not raise the Federal issue in the Kansas Supreme Court below, which it could have, but it conceded the Federal unconstitutionality of the statute.

JUSTICE SCALIA: That's a little different from an adequate and independent State ground argument. You're -- you're now making a -- a waiver argument.

MS. WOODMAN: Well, there's a -- there's a relationship between the adequate and independent State law cases and the not pressed or passed upon cases

because, for example, in Michigan v. Long, this Court has said where an issue is pressed -- a Federal issue is pressed in the State courts, then this Court on review will resolve any ambiguity in the Court's opinion in favor of a presumption that the issue was passed upon by the State court.

But conversely, in Coleman v. Thompson, this Court held that where an issue is not pressed in the State courts, then the presumption will be the opposite. The presumption will be that the State court has not passed upon --

JUSTICE SCALIA: We -- we don't need a presumption here. I mean, the -- the only basis for inquiring into severability is the presumed unconstitutionality of the statute. I mean, that's the only basis why severability comes up. We don't have to presume anything.

MS. WOODMAN: But the Kansas Supreme Court didn't redecide that issue in the Marsh case.

JUSTICE SCALIA: It doesn't matter whether it redecided it. It -- it was the postulate of -- of its -- necessary postulate of -- of its decision in this case, it seems to me.

MS. WOODMAN: There -- well, under article III and under section 1257(a), there has to be a case

or controversy for this Court to review. There was no live case or controversy in the Kansas Supreme Court on the Federal question of whether the equipoise provision in the Kansas statute was constitutional. It was conceded that it was unconstitutional and the parties agreed on that. It was treated as settled. And all the Kansas Supreme Court did, before overruling the Kleypas severability decision, which is a matter of State law, was to reiterate that holding, and mere reiteration, as this Court knows from the Morrison v. Watson case, approved in Illinois v. Gates, that is not the decision of a Federal question.

JUSTICE SOUTER: If you're -- if you're right, I take it, we would not have jurisdiction to review a Federal ground that was raised by a State court, even though it had not been raised by the parties. If they get -- you know, they get the opinion from the court and there's a big surprise -- the -- the State court decided to go off on -- on a Federal ground, which had not been pressed -- I take it on your view we would not have jurisdiction to review that.

MS. WOODMAN: I don't believe the Court would, and I think that's what the Court's original jurisdictional rules were intended to be.

Now, I do understand that the Court has taken

jurisdiction over such issues, and it's usually --

CHIEF JUSTICE ROBERTS: Well, that's because the -- the formula is that the issue has to either have been raised or decided.

MS. WOODMAN: Well, the only issue that I could find that says that -- that really enforces that rule is the Cohen v. Cowles Media case. And if you look at the provenance of that decision, that's the only case where the Court actually considered a question for the first time in -- in this Court. And what happened in that case is that the Federal issue that was presented to this Court was actually discussed at oral argument. It wasn't raised by either of the parties in their briefs in the State court, but it was discussed at oral argument. And the Court decided a first amendment issue on the basis of that discussion at oral argument. And so this Court took jurisdiction and stated that as long as it's been passed upon, it's not necessary that it was pressed upon.

And the decision, which the Court relied on in that case is, if I'm remembering it correctly, was a decision involving a Federal question which was raised too late to comply with the procedural requirements in State court. And so it's really not the case that this Court routinely takes cases where the issue was not

pressed by the parties in the State courts. And that's the situation we have in this case.

CHIEF JUSTICE ROBERTS: But I don't -- I don't -- excuse me. I don't understand how that makes any sense. If you had an -- a -- a case that's litigated entirely on State law grounds and in the State supreme court opinion, they announce we are sua sponte deciding this on the basis of the Federal Constitution and you, State, lose, your argument is that State is just out of luck. They can't seek review of that decision?

MS. WOODMAN: I think where the issue is decided sua sponte and affects the parties in that case, then maybe.

But that didn't happen here. What happened here was that the court merely reiterated a holding from 4 years ago, and the State law severability decision, which was the issue in contest in this case and the issue that was decided in this case, the matter of State law, and it was sufficient to support the judgment of the Kansas Supreme Court.

And really, what -- what the State is trying to do here is to -- I mean, these issues were decided in the Kleypas case, and if we were here on the Kleypas case, there wouldn't be any argument as to whether the

Kansas Supreme Court's decision rested on an adequate and independent State law ground because the Federal issue was clearly decided and it was interwoven with the State law determination. But that's not the case here.

JUSTICE SCALIA: Kleypas didn't hold that the whole statute was bad. Kleypas gave a savings construction of the statute, as I recall.

MS. WOODMAN: Yes, they did. But the State is misconstruing their decision by saying they didn't decide the constitutional question in Kleypas. It was merely construction of the statute to avoid the constitutional issue and therefore --

JUSTICE KENNEDY: Well, but in the case before us, the court -- the Kansas court said -- I think it's 24 or 25 of the -- of the headnote -- we are reconsidering the issue.

MS. WOODMAN: The -- that language in the court's opinion was, after full reconsideration, we're declining to revisit the issue at the dissenter's invitation. We're declining that invitation to revisit the issue.

And there's no question that the court discussed it and thought about it, and the dissenters were clearly inviting them --

JUSTICE KENNEDY: And made a reasoned judgment about it.

MS. WOODMAN: But they didn't reopen the issue. They said there's nothing new here. We don't need to reopen this decision, and --

JUSTICE KENNEDY: Well, they reopened it to the extent as Justice Scalia has indicated, but they now take a different view of the validity of the State statute.

MS. WOODMAN: They're taking a --

JUSTICE KENNEDY: That's -- that's a decision following a reason, and the reason is a Federal reason.

MS. WOODMAN: Well, no, because the -- what they were saying was that the appropriate remedy in Kleypas was to return the subject to the legislature because the statute was ambiguous and the court had no authority, under separation of powers grounds and under State law statutory interpretation grounds, to construe this statute to mean the opposite of what it said. And that's the decision that they overruled in this case, and that's a State law decision.

JUSTICE SCALIA: So -- so the State can get mouse-trapped in this way. In -- in the first case, it doesn't take the case up because not too much has been lost, and then in the second case, the court says, oh,

by the way, everything has been lost. And you say that we can't review that because -- because the -- the State didn't -- didn't challenge Kleypas at the time.

MS. WOODMAN: Or challenge that decision in this case.

JUSTICE SCALIA: Well, but that decision in this -- they had no reason to challenge it until the State decided to -- to change it.

MS. WOODMAN: But if they wanted to raise the issue, they could have raised it in either case, and we wouldn't have this problem here. But they didn't raise it, and that presents a jurisdictional problem for this Court.

What they're trying to do in this case is yoke a live horse to a dead one to form a plowing team, and it doesn't work.

JUSTICE SCALIA: I like that.

(Laughter.)

MS. WOODMAN: I looked -- as a matter of fact, I looked at our Kansas State seal because it has a plowing -- a horse-drawn plow on it, and I looked at it again this morning before I came in here because I couldn't remember whether it was one horse or two, and it's two horses. And I was thinking about how the meaning of that State seal would be fundamentally

altered if one of those horses was dead.

(Laughter.)

MS. WOODMAN: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Ms. Woodman.

General Kline, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF PHILL KLINE

ON BEHALF OF THE PETITIONER

MR. KLINE: Thank you, Mr. Chief Justice, and may it please the Court:

The State is here on a final court decision wrongfully -- the State supreme court wrongfully interpreting this Court's eighth amendment jurisprudence. And just as Justice Souter and the Chief Justice's hypotheticals, as it relates to this case, were articulated, it is actually true that in this case the State was not aware that this issue would be raised again and only conceded -- and waiver is truly not an issue because a lower court did not rely upon it. And we have some confusion between the terms here. It only conceded that Kleypas, a decision by the Kansas Supreme Court, was the law of the case in another case subsequently reaching the Kansas Supreme Court. And the Kansas Supreme Court, on its own motion, engaged in a full reconsideration and the

respondent in their brief argues that the primary reliance of the court was not on eighth amendment jurisprudence but other grounds.

There is no requirement for jurisdiction under 28-1257 that the primary reliance be on a Federal issue. There is a requirement to deny jurisdiction that there be an independent and adequate State ground on which the decision would rest regardless of the outcome of the Federal issue. Clearly that's not the case here.

JUSTICE STEVENS: Wouldn't they have come out the same way if they never mentioned the Federal issue?

MR. KLINE: This case come out -- no, it would not because the Kleypas court found that the Kansas -- or the Kansas death penalty was constitutional as construed. And the Kansas court in this case found it unconstitutional on its face. And there is a significant difference, and the court raised the issue again.

I would like to point out to the Court that there are five ways that a juror can, after their reasoned moral decision, give effect to the belief that the mitigating evidence does not warrant the death penalty.

The juror can state that they have a

reasonable doubt as to whether the State has met its burden of proving that the mitigating factors do not outweigh the aggravating factors.

The juror can simply delay. Kansas law has a defect -- default for life in its sentence or in its structure, and I would encourage you to read on page 28 of your appendix instruction number 12 in which the jury is told that if, after a reasonable time, you are unable to make a decision -- in other words, in a doubtful case -- the judge is required by law to dismiss the jury and sentence the defendant to life. And so there is a default for life, and that is another way that a juror can give effect to their reasoned moral decision that death is not appropriate.

The juror can give effect to their reasoned moral decision that is not appropriate by determining that the mitigating factors outweigh the aggravating factors. And the juror under instruction number 5 --

JUSTICE STEVENS: But it cannot do that by determining that they're in equipoise.

MR. KLINE: That is correct, Justice Stevens.

JUSTICE STEVENS: Which is the very issue your -- your petition presents us with.

MR. KLINE: It is, but the juror does know what the effect of that decision is and, therefore, is

able to engage in a reasoned moral choice.

What truly happens -- and -- and Justice Breyer alluded to it, I believe, as it relates to this hypothetical about weighing molecules -- is that a juror essentially steps back and decides what is the appropriate sentence --

JUSTICE BREYER: No, do it. Do it. Make the reasoned moral choice. And the facts are that we have, because of the balancing, molecules or not -- we have by the balancing made a determination that anything for the bad that distinguishes this person from the ordinary is -- is equally balanced by the good. Now, make the moral choice.

MR. KLINE: I think the moral --

JUSTICE BREYER: What is the reason?

MR. KLINE: I think the moral decision, Justice Breyer, is determined in all the variables of the introduction of the evidence, and as this Court has required under the eighth amendment, that it allow the jury to consider and give effect to all mitigating evidence relevant. And that's in Kansas law.

I would state this in closing, and that is that the Kansas legislature reenacted the death penalty for the first time since this Court struck it down in Furman in the spring of 1994. And in doing so, it gave

great deference to this Court's role as final arbiter of the meaning of the Constitution. And if you read the instructions and the law that is provided to you in this case, you will see this Court's words mirrored back to you in the scheme of the Kansas law as it relates to the death penalty.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, General Kline.

The case is submitted.

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