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4 Petitioner : No. 14-449

5 v. :

6 JONATHAN D. CARR. :

7 - - - - - x

8 and

9 - - - - - x

10 KANSAS, :

11 Petitioner : No. 14-450

12 v. :

13 REGINALD DEXTER CARR, JR. :

14 - - - - - x

15

16 Washington, D.C.

17 Wednesday, October 7, 2015

18

19 The above-entitled matter came on for oral
20 argument before the Supreme Court of the United States
21 at 11:07 a.m.

22 APPEARANCES:

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5 Respondent in No. 14-450.

6 JEFFREY T. GREEN, ESQ., Washington, D.C.; on behalf of
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1 P R O C E E D I N G S

2 (11:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case No. 14-449.

5 On the severance question, Mr. McAllister.

6 ORAL ARGUMENT OF STEPHEN R. McALLISTER

7 ON BEHALF OF THE PETITIONER

8 MR. McALLISTER: Mr. Chief Justice, and may
9 it please the Court:

10 The joint sentencing proceeding in these
11 cases did not violate the Eighth Amendment because each
12 defendant received the individualized sentencing
13 determination to which he was entitled.

14 Each presented all of the mitigating
15 evidence he chose to produce. The jury instructions
16 explicitly told the jury to consider each defendant
17 individually. In fact, there were several separate
18 instructions, some that related only to one defendant or
19 only to another defendant.

20 Each -- the jury for each defendant then had
21 to complete a specific verdict form, and this jury had
22 already proven its ability to distinguish between these
23 two defendants when it convicted one of some counts in
24 the original guilt phase, of which it acquitted the
25 other.

1 The only way the Kansas Supreme Court gets
2 to an Eighth Amendment error in this case -- well,
3 really, there are two points. One, it relied upon
4 possible, and one instance not even, violations or
5 errors of State law to find a prejudice that -- that
6 rose to an Eighth Amendment level. And two, it
7 disregarded altogether, with really no explanation, the
8 long-standing foundational principle that juries are
9 presumed to follow their instructions.

10 The two State law errors, arguably, that --
11 the Kansas Supreme Court found, one was the admission of
12 evidence of the sister who made the comment about
13 Reginald may have told me he shot those people.

14 Well, that's not even an error of State law.
15 They said basically that's prejudicial. It might not
16 have come in if they had been tried separately, but in
17 fact, that evidence would be relevant to aggravator
18 number 1, that the defendant killed multiple people.
19 That would have been admissible evidence and that --
20 that just can't be an Eighth Amendment violation.

21 JUSTICE GINSBURG: But the Kansas -- the
22 Kansas Court found independent of the severance question
23 that there was constitutional error in the admission of
24 hearsay.

25 MR. McALLISTER: That's the third question

1 presented in the cert position on which the Court has
2 not taken any action yet, Your Honor.

3 JUSTICE GINSBURG: Yes. But when it goes
4 back to Kansas, they can still say thank you for telling
5 us about severance, but we have this other ground that
6 leads to the same bottom line.

7 MR. McALLISTER: Well, and we are certainly
8 hopeful that the Court will take another look at that
9 second question depending on its resolution of the two
10 questions that are in front of it today.

11 JUSTICE KENNEDY: But would --

12 MR. McALLISTER: But if it goes back in that
13 posture, yes, they would have another ground.

14 JUSTICE KENNEDY: Was -- was any evidence
15 introduced with respect to one of the defendants that
16 could not have been introduced against the other had
17 there been severance?

18 MR. McALLISTER: The only arguable evidence
19 really, Justice Kennedy, is what -- what Reginald refers
20 to as the corrupting influence. But even that,
21 arguably, would be relevant to the mercy consideration
22 to show his character, the nature of this person that is
23 being sentenced.

24 And that was the notion that his mother
25 testified that sometimes -- of course, Jonathan looked

1 up to his big brother, and maybe sometimes Reginald was
2 a bad influence on him. But that's -- that was really
3 the extent of that evidence. And that might have come
4 in as a rebuttal to a mercy argument.

5 The Kansas Supreme Court did not really
6 definitively say that was even State law error, but even
7 if you assumed it was --

8 JUSTICE SOTOMAYOR: Could you tell me --

9 MR. McALLISTER: -- it would only be State
10 law.

11 JUSTICE SOTOMAYOR: -- what the
12 constitutional standard you're asking us to apply? I --
13 this argument goes to harmless error; a serious position
14 to take, that even if there was error, no foul -- a foul
15 but no penalty. Okay?

16 But what standard are we applying? We are
17 not applying the rule -- or are we or should we apply
18 the Rule 14 standard?

19 MR. McALLISTER: No, not -- not for Eighth
20 Amendment purposes, Your Honor. Kansas would propose --
21 and I suspect the United States can propose something as
22 well, but it's a very high standard as an Eighth
23 Amendment matter. And we would say -- we would be
24 content to accept something like it's a serious risk
25 that a defendant will not be able to receive

1 individualized sentencing. It is sort of molding the
2 traditional notions of joinder with the Eighth Amendment
3 consideration, because that seems to be the only Eighth
4 Amendment consideration here, is the individualized
5 sentencing.

6 JUSTICE SCALIA: Is it the Eighth Amendment
7 or is it due process?

8 MR. McALLISTER: Well, you could use a due
9 process standard, Justice Scalia, which we would also be
10 fine with. The question would really be, did joinder so
11 infect the process with unfairness that the proceedings
12 are fundamentally unfair.

13 JUSTICE SCALIA: That seems like a -- a
14 language that is relevant rather than the cruel and
15 unusual punishments language.

16 MR. McALLISTER: Well, and that's exactly
17 what this Court said in *Romano v. Oklahoma*, a case in
18 which the defendant's other death sentence in a separate
19 case was admitted against the defendant in the
20 sentencing proceeding. That sentence later got
21 reversed, and the Oklahoma court said the jury should
22 not have heard about his other sentence as a matter of
23 State law. That defendant *Romano* said it is an Eighth
24 Amendment violation, and it's a due process violation.
25 The Court said the Eighth Amendment doesn't have

1 anything to say about what's admissible really. That is
2 State evidentiary rules, that's not an Eighth Amendment
3 issue.

4 And the Court went on to address the due
5 process claim in Romano, applying that very standard.
6 And as we suggest the Court should do here, one of the
7 things it pointed to specifically was jury instructions
8 that said these are the aggravating circumstances you
9 may consider, you may not consider any others. The
10 court said we presume the jury follows its instructions,
11 and nothing in the instructions gave the jury here any
12 way to give effect to that improperly admitted evidence.

13 And that's true here to the extent Reginald
14 Carr argues some of this evidence was really used as a
15 nonstatutory aggravating circumstance. By statute,
16 Kansas does not allow anything other than statutory
17 aggravating circumstances. In the instructions -- No. 5
18 I think for Reginald, No. 7 for Jonathan -- very
19 explicitly and clearly say, here are the four
20 aggravating circumstances the State has alleged. And
21 then the next paragraph, you may not consider anything
22 else as an aggravating circumstance.

23 So in our view, the most the Kansas Supreme
24 Court could come up with is potential violation of State
25 law if, in fact, the evidence which is minimal in the

1 greater scheme of this proceeding that Reginald was a
2 corrupting influence on Jonathan, if that would not have
3 been admitted, that's really all the Kansas Supreme
4 Court is left with to hang its hat on in finding -- in
5 saying there is an Eighth Amendment violation here.

6 JUSTICE KENNEDY: Can you tell me if you're
7 aware, in other States or perhaps even in Kansas in
8 other trials, is it a common practice to sever when
9 there -- for the penalty phase when there are multiple
10 defendants?

11 MR. McALLISTER: Justice Kennedy, I think in
12 the briefs -- I do not remember the exact page -- there
13 are two States that mandate severance -- one, Ohio --
14 and that's, I think, Georgia and Mississippi.

15 JUSTICE KENNEDY: This is just for penalty
16 phase?

17 MR. McALLISTER: I think it's for the entire
18 proceeding. And then Ohio, there is a presumption in
19 the favor of severance, but all the other States, there
20 is nothing that mandates or even, I think, creates a
21 presumption of --

22 JUSTICE KENNEDY: It seems it would be very
23 difficult for the trial judge to decide which should go
24 first.

25 MR. McALLISTER: It would, and that's one of

1 the reasons -- I mean, not just judicial economy but, in
2 a sense, overall fairness --

3 JUSTICE KENNEDY: Yes.

4 MR. McALLISTER: -- having them tried
5 together and you don't have one defendant having an
6 opportunity to preview the evidence that the State may
7 present and the arguments that may be made. This Court
8 has recognized that potential tactical advantage in
9 other joinder cases. Of course, it has not had a
10 joinder capital case like this, but in other
11 circumstances that's a factor.

12 The Court has also emphasized the
13 consistency of determinations with respect to facts. We
14 are not saying the outcomes have to be the same, but
15 when the evidence, the mitigation evidence is 99 percent
16 overlapping -- they were using the same witnesses, even
17 their experts were co-authors. They were testifying to
18 the exact same things essentially about each brother.

19 All that overlapping evidence, what this
20 allows is a consistent determination by the jury and
21 evaluation of all that mitigating evidence that leads to
22 whatever outcome the jury decides. But the jury was
23 very clearly told to consider each defendant
24 individually. And that's what they got, was individual
25 consideration.

1 I would say also, remember, even if this
2 Court were to think there were some kind of error which
3 Kansas simply does not see here -- again, at most,
4 possibly an error of Kansas law, not an Eighth Amendment
5 violation -- it would have to be harmless under any
6 standard, and Kansas would accept any standard that is
7 beyond a reasonable doubt certainly here. Given the
8 four uncontested aggravating circumstances --

9 JUSTICE BREYER: Well, you'd also have to
10 look -- you have it at the top of your head, maybe
11 forget if you don't, but what I thought I would do is I
12 wanted to look to the aggravating circumstances, what
13 were they.

14 MR. McALLISTER: What were they.

15 JUSTICE BREYER: Let's call it "he was the
16 monster" approach. Reginald was the monster and
17 Jonathan was the puppet or whatever. I want to look at
18 the aggravators. I also want to look at the mitigators
19 that Reginald said existed, and then see if this
20 comparative monster, let's call it, fits into any of
21 them.

22 Do you know? Do you know the pages where
23 they are, just by chance?

24 MR. McALLISTER: Well, I think the -- in
25 terms of the -- yes, the aggravating circumstances are

1 set forth in the instructions, Justice Breyer, so --

2 JUSTICE BREYER: Okay. I know where they
3 are.

4 MR. McALLISTER: Yeah, Instruction No. 5 for
5 Reginald and Instruction No. 7 for Jonathan, and then
6 following each one, so I believe Instruction No. 6 and
7 Instruction No. 8.

8 But the mitigating -- those are the
9 statutory mitigating circumstances. So what happens in
10 these cases is the jury is told, here are the statutory.
11 And we list all of them that are listed in the Kansas
12 statute. And then you can --

13 JUSTICE BREYER: On what page do you list
14 them?

15 MR. McALLISTER: Well, so those are listed
16 in Instruction No. 6 and Instruction No. 8. It's all in
17 the petition --

18 JUSTICE BREYER: If, in fact, this gets in,
19 then I guess what I have to do is go through this huge
20 record on the sentencing anyway and see do I really
21 think that this evidence that came in that the younger
22 one thought the older one was the monster, et cetera,
23 did it really have an effect?

24 MR. McALLISTER: Well --

25 JUSTICE BREYER: Is that what I would have

1 to do? I don't see how I could avoid that if they are
2 at all relevant.

3 MR. McALLISTER: Well, I would say, first of
4 all, if were you to do that, it would be quite clear.
5 The evidence is overwhelming.

6 But furthermore, the premise is not
7 supported really by the record. They say Jonathan's
8 whole strategy was to paint Reginald as the bad actor
9 here. That's not really what happened. What they both
10 presented was lots of witnesses and testimony about
11 their -- their childhood and their experiences growing
12 up, and they presented psychological experts to talk
13 about their mental condition. No expert said Reginald
14 had some kind of psychological control over Jonathan.
15 That -- that testimony, to the extent it's there at all,
16 comes from their mother.

17 JUSTICE KAGAN: But what do you think about
18 a case, whether or not this is that case, in which it is
19 quite clear to a judge that each of two defendants is
20 just going to be pointing to the other person and
21 saying, that was the bad actor. He is why these
22 terrible crimes committed. And you know that -- you
23 know, each of them is going to be doing that.

24 Should a judge separate the penalty
25 proceeding in that context?

1 MR. McALLISTER: Well, not necessarily. If
2 the high standard is met that it will not be possible,
3 perhaps, to give individualized consideration to each in
4 an Eighth Amendment or a due process standard is going
5 to be so fundamentally unfair, if you can meet that very
6 high standard, then -- but that's always been the
7 Court's approach. It is a case-by-case determination.
8 Even Zafiro, which is a joinder case --

9 JUSTICE KAGAN: Well, I guess I am asking
10 you in what kind of factual circumstances you would find
11 that standard met?

12 MR. McALLISTER: Rarely, but I think it
13 would be -- certainly the Court has recognized in
14 Bruton, you have some sort of co-defendant confession --
15 I mean, confession situations, if there was something
16 that had not been used in the guilt phase, might be
17 relevant in the sentencing. That might be so
18 prejudicial.

19 We have tried to think of other examples. I
20 might suggest something like one is claiming at that
21 point in time some kind of insanity, even though they
22 didn't succeed on that at trial. If there was something
23 really starkly contradictory in their presentations and
24 you were going to get a lot of evidence about one that
25 really had nothing to do at all with the other.

1 But we do believe it's a high standard that
2 would rarely be satisfied, especially given the Court's
3 long-standing presumption that the jury follows its
4 instructions. And that's one thing I would point out
5 here, the complaints that each makes in this Court.
6 First of all, at least one of those complaints really
7 wasn't even made in the Kansas Supreme Court, much less
8 the trial court, and that's the shackling of Reginald
9 and whether that might have prejudiced Jonathan.

10 But they -- there was no complaints during
11 the sentencing proceeding. This corrupting influence
12 evidence is relevant only for Jonathan's mitigation
13 case, not with respect to Reginald; can we have a
14 limiting instruction? Reginald has anti-social
15 personality disorder; there was no request for any sort
16 of limiting that that -- that's not applicable to
17 Jonathan. Although, of course, the irony there is that
18 Jonathan's own expert all but diagnosed him as
19 anti-social personality. He said out of 26 risk factors
20 that the Department of Justice has recognized for
21 violence and sexual violence, Jonathan has 24 of them.

22 And both brothers talked about family
23 history of mental illness. Both brothers and their
24 experts talked about whether some of these things were
25 hereditary or genetic. This was really a case in which

1 it made very good sense to proceed with a joint
2 proceeding, because the evidence, 99 percent was
3 overlapping, essentially. I mean, they were calling the
4 same witnesses, taking turns with those witnesses.
5 Judicial economy nor fairness, neither one would have
6 been served any better by separating this into two
7 proceedings.

8 And, in fact, I will conclude for now,
9 unless there are further questions, with this
10 observation, that prior to trial, to the guilt phase,
11 the prosecution actually offered to have two juries sit
12 through this proceeding. Jonathan's attorney said he
13 would consider it, and Reginald's attorney rejected it.

14 So the State even tried to -- to agree to
15 some workable system and -- and it was declined.

16 So unless there are further questions, I
17 will reserve the remainder of my time.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Ms. Kovner.

20 ORAL ARGUMENT OF RACHEL P. KOVNER

21 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

22 SUPPORTING PETITIONER

23 MS. KOVNER: Mr. Chief Justice, and may it
24 please the Court:

25 The Kansas Supreme Court erred when it found

1 that the State violated the Eighth Amendment by
2 conducting joint sentencing proceedings for the crimes
3 the Respondents committed together. Joint proceedings
4 can enhance accuracy and fairness, as a long line of
5 this Court's cases hold. They provide a fuller
6 evidentiary record to juries that are assessing relative
7 culpability, and they prevent arbitrary disparities that
8 may arise when two juries reach inconsistent conclusions
9 about the common facts of a single crime.

10 CHIEF JUSTICE ROBERTS: Ms. Kovner, is there
11 any difference between the Federal government's position
12 and the position of the State of Kansas on this
13 question?

14 MS. KOVNER: As to the standard, I think
15 there's a small difference. I think our proposal is
16 that the constitutional standard is whether evidence or
17 argument resulted in a denial of due process or the
18 deprivation of an individualized sentencing proceeding.

19 And that's slightly different from Kansas's
20 standard, because Kansas is proposing a rule that
21 involves analysis of risk, and we think that is part of
22 the statutory rule under Rule 14, as Justice Sotomayor
23 alluded to. It's also part of the statutory standard
24 that states "by and large are applying," but we think
25 the constitutional question is just, was this person

1 deprived of a fair trial by the evidence that came in?
2 And that's the constitutional question.

3 JUSTICE KAGAN: When you said it the first
4 time, you had "deprived of a fair trial" and then
5 something about individualized sentencing; is that
6 right? Is that supposed to indicate that this is
7 deriving both from the Due Process Clause and from the
8 Eighth Amendment?

9 MS. KOVNER: Well, the Eighth Amendment does
10 speak to this need for an individualized sentencing
11 determination. We would think that the Due Process
12 Clause also requires that proceedings be individualized.
13 But we would agree that if there were a situation where
14 there was a joint trial and because of the evidence
15 introduced by one, for instance, a jury simply could not
16 give individualized consideration to a second -- second
17 defendant, that would be a constitutional problem.

18 And to give an example of that -- I mean, I
19 think the example the Court suggests in *Zafiro* of that
20 is where there is aggravating evidence that pertains
21 only to one defendant, but that that aggravating
22 evidence is just so prejudicial and so overpowering that
23 the jury couldn't really separate the two and would be
24 inclined to sort of judge the second one by association.

25 So I think that's the example the Court

1 gives in Zafiro. But it's not --

2 JUSTICE SCALIA: Don't you think
3 individualized consideration is required even in the
4 non-capital cases?

5 MS. KOVNER: Absolutely, Your Honor. So I
6 think --

7 JUSTICE SCALIA: It's really a due process
8 consideration, isn't it?

9 MS. KOVNER: I think due process encompasses
10 that requirement of individualized consideration.

11 Just to address several of the points that
12 came up during Petitioner's argument, I think -- as to
13 the question that Justice Kagan asked about whether,
14 when defendants are simply pointing the finger at each
15 other, that would necessitate severance. I think that's
16 the question that the Court addressed in Zafiro, where
17 that was essentially the claim the defendants were
18 making, that we're both going to point the finger at
19 each other at trial. And the Court said that doesn't
20 necessitate severance; that that may, in fact, increase
21 the jury's ability to reach an accurate verdict, to
22 reach an accurate assessment of relative culpability,
23 and enhance fairness. So we don't think that that's a
24 situation that would require severance.

25 CHIEF JUSTICE ROBERTS: I -- I guess the

1 strongest evidence for Reginald is Temica's testimony.
2 It's -- it's pretty prejudicial. She said he's -- he's
3 the one who -- he said he's the one who shot.

4 MS. KOVNER: I don't think that that's
5 prejudicial evidence, certainly not any constitutional
6 problem with the admission of that evidence. I don't
7 think that even Reginald Carr is asserting that that
8 evidence couldn't have come in against him. Rather he
9 is asserting or the State below suggested -- the State
10 court below suggested maybe that -- maybe the State
11 didn't know about that evidence, and maybe just as a
12 factual matter it wouldn't have come in.

13 But there's no constitutional unfairness
14 with evidence coming in on a co-defendant's case that's
15 harmful but accurate as to you. That's something the
16 Court said in -- in Zafiro. If it's accurate and
17 relevant evidence that comes in on a co-defendant's
18 case, there's no constitutional unfairness as to you.

19 I think Reginald's primary claim before this
20 Court is that there was a violation of State evidentiary
21 law because some of the other evidence, the evidence of
22 bad influence, might not have come in under the State
23 rules. I think this Court's cases are clear that a
24 violation of State evidentiary law is simply a matter of
25 State law. The State could decide that necessitates

1 reversal, but it's not a constitutional error. That's
2 what this Court said in Romano.

3 JUSTICE BREYER: It would depend on what is
4 was, wouldn't it? I mean, so I'm still asking the same
5 question. If the -- I take it that Reginald could not
6 have introduced evidence refuting these brothers' state
7 of mind that he was the monster. That's what you're
8 referring to by the bad influence.

9 So the jury might have taken that evidence
10 into account in trying to decide whether Reginald, for
11 other reasons than in the statute, was a sympathetic
12 enough character not to provide the death penalty.
13 That's conceivable.

14 But severance is very, very rare, and joint
15 trials are very common. And very common is the claim on
16 an appeal in any kind of a case that it shouldn't -- it
17 should have been severed.

18 So do you have cases that you can think of
19 that would be good precedent for you where a court,
20 including particularly this Court, said, of course there
21 might be a little prejudice here, some, but it's not
22 enough to warrant severance? Because I think what I
23 have to do is read the record on this point, and then I
24 need something to compare it with.

25 MS. KOVNER: Well, I want to go back -- I'd

1 like to answer the question and then go back to the
2 premise --

3 JUSTICE BREYER: Yes.

4 MS. KOVNER: -- because I am not sure I
5 agree with the premise.

6 But as to whether any prejudice is a
7 problem, I think the best case for us is Zafiro. Zafiro
8 talks about the idea that what you need -- that joinder
9 is presumably going to enhance fairness and accuracy.
10 And what you need is substantial prejudice, even to have
11 a statutory problem, and then -- even then we are going
12 to presume that a limiting instruction would be
13 sufficient to cure it.

14 So that would be our best case on that
15 point.

16 But, Your Honor, I think the inquiry under
17 the Eighth Amendment has to be would the Constitution
18 have prohibited this evidence from coming in as to
19 Reginald Carr. And we think the answer is no. Any
20 evidence that's relevant to an individual defendant --

21 JUSTICE BREYER: Well, normally in severance
22 cases, forgetting the death cases, seems to me the
23 argument has been, look, they never would have gotten
24 this piece of evidence in against my client. They
25 brought it in against the other client. Now, go look at

1 that evidence and you'll see how much my prejudice --
2 that my client was prejudiced by that.

3 I do not know whether you call that due
4 process. Maybe you do. But that's the kind of argument
5 which seems for a quantitative weighing. That's why I
6 asked the question.

7 MS. KOVNER: I think I would go back to
8 Zafiro again on that one, Your Honor, because I think
9 Zafiro establishes that when accurate evidence comes in
10 through a co-defendant that is relative -- that's
11 relevant to the jury's determination, that's not
12 prejudice. That's information that may enhance the
13 accuracy of what the jury --

14 JUSTICE SOTOMAYOR: Can you tell me why we
15 should apply the Zafiro standard, which was joint
16 trials, but this is joint sentencing where there is a
17 different -- why there should be exactly the same
18 standard applied?

19 MS. KOVNER: So we think Zafiro --

20 JUSTICE SOTOMAYOR: Do you need
21 individualized sentencing? So can't you say, or aren't
22 you required to say that something a little bit more
23 than -- than the efficiency of a joint trial has to
24 compel --

25 MS. KOVNER: Yes, Your Honor.

1 JUSTICE SOTOMAYOR: -- has to be considered?

2 MS. KOVNER: Yes, Your Honor. We agree that
3 sentencings may involve special considerations. What we
4 think Zafiro establishes is that generally when more
5 relevant information is placed before a jury, that's not
6 prejudice to a defendant, that's not unfair, and that
7 juries with more information are likely to make more
8 accurate decisions, and we think that's equally true at
9 sentencing.

10 And, similarly, that juries with more -- who
11 are confronted with two defendants together can avoid
12 the unwarranted disparities that may occur when juries
13 reach different results -- two different juries
14 considering the same facts reach different results on
15 those facts. And that's equally true at sentencing.

16 JUSTICE KAGAN: Sorry, but I'm not --

17 JUSTICE SCALIA: You -- you would need
18 two -- two separate juries, wouldn't you? I mean --

19 MS. KOVNER: That's -- that's what the
20 Kansas Supreme Court said here. And the result of that
21 is -- is going to be that two different juries
22 confronted with the very same aggravating circumstances
23 in largely parallel mitigation cases may simply weigh
24 factors like mercy differently.

25 JUSTICE SCALIA: But wouldn't -- wouldn't

1 the second jury have to know the facts relevant to
2 mitigation, as well as aggravation, I suppose, that came
3 out in the main trial?

4 MS. KOVNER: It's -- it's certainly
5 possible, Your Honor, that if there was a second jury,
6 the government could simply introduce, for instance, the
7 evidence of Reginald Carr's statement to his sister at
8 the second trial. So you're introducing this disparity
9 that Justice Kennedy alluded to between the defendant
10 who goes first and the defendant who goes second.

11 JUSTICE ALITO: Well, would this second jury
12 have been present for the -- for the guilt phase?

13 MS. KOVNER: Well, in -- in the Federal
14 system, there are a number of ways you could do it.
15 Could you have two juries that hear both the guilt phase
16 and -- and the penalty phase. You could have a second
17 jury impanelled only for the -- the penalty phase. But
18 then in a case like this, you would need to essentially
19 repeat all the trial evidence, including calling victims
20 again, because that -- because the State was relying on
21 its evidence from the trial phase, and that is
22 generally, we submit, going to be the case.

23 JUSTICE KAGAN: I think I missed something
24 you said, but -- forgive me. But the constitutional
25 standard that you're proposing, is that a constitutional

1 standard for both the guilt phase and the sentencing
2 phase? And is it also for both non-capital and capital?
3 Are you drawing no distinctions among those four things?

4 MS. KOVNER: I think that's right, Your
5 Honor. I mean, that -- because we think that the due
6 process standard essentially subsumes the requirement of
7 individualized consideration, and, of course, due
8 process is applicable at the trial phase and at the
9 sentencing phase in capital and non-capital trials.

10 JUSTICE KAGAN: So it seems a little bit
11 counterintuitive to me, the idea that, you know, the
12 guilt phase in a very minor crime would have the exact
13 same standard applicable to it as the guilt phase of a
14 capital crime and then as the sentencing phase of a
15 capital crime.

16 MS. KOVNER: If I may answer really briefly?
17 Your Honor, we think the reason that's the case is that
18 joint trials often enhance accuracy and fairness. So we
19 agree that accuracy and fairness considerations are at
20 their paramount in capital cases, but we do not think
21 that militates for a different standard in capital cases
22 because we think that the standard that the courts are
23 applying is one that's going to generally enhance those
24 values.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Liu.

2 ORAL ARGUMENT OF FREDERICK LIU

3 ON BEHALF OF THE RESPONDENT IN NO. 14-450

4 MR. LIU: Mr. Chief Justice, and may please
5 the Court:

6 I want to begin by emphasizing how narrow
7 our rule is. Justice Kagan asked the question involving
8 a -- a case where the two defendants pointed their
9 fingers at each other. We are not advocating a rule
10 that would require severance in any case where two
11 defendants point their fingers at -- at each other.

12 We are advocating a rule that this Court has
13 recognized in Zant, Stringer, in Sanders, that -- that
14 an Eighth Amendment violation occurs when the weighing
15 process itself is skewed. And the weighing --

16 JUSTICE BREYER: But are you saying the
17 severance rule is the same in non-capital as in capital
18 cases?

19 MR. LIU: The general severance rule, Your
20 Honor, is the same.

21 JUSTICE BREYER: And you just look for
22 prejudice?

23 MR. LIU: Exactly. The general rule is you
24 can't have severance when it would compromise someone's
25 constitutional rights. The right at issue here just

1 happens to be an Eighth Amendment right, but we are not
2 advocating an Eighth Amendment rule that would apply
3 beyond the capital context or even beyond the penalty
4 phase. That's --

5 JUSTICE SOTOMAYOR: You know, if you
6 violated an individualized sentence, why would we apply
7 harmless error review? Meaning, it seems
8 counterintuitive. We are now becoming the sentencing --
9 the sentencing body. No?

10 MR. LIU: Absolutely. And I think --

11 JUSTICE SOTOMAYOR: Oh, so then we have to
12 do the -- in harmless error, we have to decide whether
13 the aggravators outweighed the mitigators, et cetera, so
14 much that none of the error could have affected that
15 choice?

16 MR. LIU: Well, this Court, Your Honor,
17 recognized in Satterwhite precisely how difficult it
18 would be to conduct a harmless error analysis in a
19 penalty phase, and that's precisely because there are so
20 many factors involved.

21 Sure, the crimes in the case were horrific,
22 but that's just one side of the scale in a harmless
23 error inquiry. There is an entire other side of the
24 balance, the mitigation side. And so it is quite
25 difficult for this Court, on a cold record, to go

1 through the harmless error analysis.

2 JUSTICE SOTOMAYOR: I -- I --

3 JUSTICE SCALIA: We have to do it, though,
4 right? I mean, that's -- that's part of -- part of our
5 jurisprudence.

6 So what -- what do you think are the --
7 are -- are the factors that would suggest the jury would
8 have come out a different way had the rule that you urge
9 been adopted? What -- what specifically? One is the
10 shackling of the -- of the co-defendant?

11 MR. LIU: Well, we are not representing
12 Reginald Carr. We're not basing our claim around the
13 shackling. Our -- our claim revolves around the
14 evidence that Jonathan presented that Reginald had a
15 corrupting influence on him while they were growing up.
16 And that evidence, as the Kansas Supreme Court itself
17 held at Petition Appendix 411, falls beyond the rubric
18 of any valid sentencing factor.

19 JUSTICE KAGAN: But, Mr. Liu, I mean, given
20 the kind of evidence that was presented in this case,
21 the idea that somebody was a lousy big brother seems
22 pretty small on -- in the -- in the scale of things.

23 MR. LIU: Well, a few responses to that. To
24 begin with, I think Your -- Your Honor is understating
25 the evidence here. This wasn't just that Reginald was a

1 lousy big brother. It was that he did things to
2 Jonathan that turned Jonathan into the person who was
3 capable of committing and even leading these crimes. So
4 this wasn't just "lousy big brother" evidence, this was
5 evidence that Reginald himself was the source of what
6 caused Jonathan to do the things he did.

7 But, Your Honor, I think it's also important
8 to keep in mind two separate parts of the inquiry; there
9 is the violation and the harmless error analysis. And
10 this Court said in Stringer that even a thumb on the
11 scales is enough to skew the weighing process in
12 violation of the Eighth Amendment.

13 CHIEF JUSTICE ROBERTS: But what -- what
14 evidence that shouldn't have been admitted wouldn't have
15 been admitted in the -- in the separate trial?

16 MR. LIU: Well, all this evidence, Mr. Chief
17 Justice, that says Reginald was a corrupting influence
18 on his brother, that wouldn't have come in in a separate
19 trial for two reasons: Number one, as the Kansas
20 Supreme Court held at Petition Appendix 411, that
21 evidence was improper, nonstatutory, aggravating
22 evidence, which is to say, all the aggravating factors
23 before the prosecution pursuit in this case all had to
24 do with the circumstances of the crime.

25 But this evidence had nothing to do with the

1 circumstances of what happened on December 15th, it had
2 to do with the defendant's character concerning
3 circumstances that occurred years, even decades, before
4 the crimes at issue.

5 JUSTICE SCALIA: Now, wait a minute.
6 You're -- you're representing the brother who was
7 the alleged corrupting influence, right?

8 MR. LIU: That's right, the corruptor.

9 JUSTICE SCALIA: The corruptor was
10 sentenced, by the same jury, to death. So how could it
11 possibly be that without the corrupting action of your
12 client, the jury would have sentenced your client to
13 life even though the corruptee was sentenced to death?
14 That doesn't seem to me at all likely.

15 MR. LIU: Well, to begin -- begin with, I
16 don't think Jonathan Carr's sentence is a proper
17 baseline to use. As my friend will argue in a few
18 minute, his own sentence was prejudiced by severance.

19 But even moving beyond that, there is every
20 reason to believe that the jury viewed Jonathan as
21 overall more culpable than Reginald. After all, the
22 State never established who the shooter was here. If
23 the jury believed that Jonathan was the shooter, the
24 jury could have believed that Jonathan was so culpable
25 that even with his evidence that he had been corrupted

1 by Reginald, it would have given a life sentence. I
2 think --

3 JUSTICE SCALIA: Let me -- let me put the
4 crime to you. You tell me which of these descriptions
5 of the -- of the crime are -- are incorrect. These two
6 men broke into a house in which there were three men and
7 two women. They ordered the five to remove their
8 clothes, forced them into a closet. Over the course of
9 three hours, they demanded that the two women perform
10 various sexual acts on one another. They demanded at
11 gunpoint that each of the three men have sexual
12 intercourse with both women.

13 Then Reginald drove the victims one by one
14 to various ATMs to withdraw cash. Jonathan raped or
15 attempted to rape both women twice, and Reginald raped
16 Holly G., who later testified, once. Placing the three
17 men, still naked, in the trunk of one of their cars, the
18 cars drove all five to a soccer field, forced them to
19 kneel in the snow, and shot them execution-style in the
20 back of the head.

21 One of them, fortuitously, was not killed
22 because -- I think it was a hair clip that she was
23 wearing deflected the bullet. And she is the one who
24 testified to all of this activity.

25 And you truly think -- oh, and they ran over

1 her too. After shooting her in the head, the car ran
2 over her.

3 You truly think that this jury, but for the
4 fact that your client was a corruptor, would not have
5 imposed the death penalty?

6 MR. LIU: We do, Justice Scalia. In your
7 own opinion in last term in *Glossip*, you noted that the
8 egregiousness of an offense is just one factor in
9 determining whether a sentence is appropriate at the
10 penalty phase. And Reginald Carr submitted a week and a
11 half full of mitigation evidence that extenuated this
12 offense.

13 So I don't -- I think when you -- when you
14 take all that all into account and consider the fact
15 that this wasn't an easy case for the jury -- the jury,
16 after all, deliberated a full day on what the -- what
17 Kansas thinks is quite an easy case.

18 I think the -- the scales of the weighing
19 process were much more evenly balanced than that.

20 JUSTICE ALITO: Do you think that the desire
21 to spare Holly from having to testify more than once is
22 a relevant factor here? And if so, how could that be --
23 how do you -- how would you propose to accommodate them?

24 MR. LIU: It's not a relevant factor and
25 that's not my saying it, it's this Court saying it.

1 This Court in Zafiro and Bruton has said that the
2 benefits of joinder, while they may exist, cannot come
3 at the price of constitutional rights.

4 So while I -- I completely appreciate that
5 severance would require some duplication of resources,
6 that's precisely the sort of benefit that this Court has
7 said cannot trump the Eighth Amendment.

8 JUSTICE BREYER: So if you're right, joinder
9 being among the most common kind of thing that gangs and
10 drugs and so forth, why won't the same argument be made
11 over and over preventing -- requiring severance in
12 dozens and dozens, perhaps hundreds of cases where the
13 government tries people together? Because they will say
14 there are different relationships among members of the
15 gang. Those relationships -- some evidence would come
16 in that would negative the relationship that would tend
17 to show that this particular individual wasn't actually
18 involved in this aspect of it, et cetera.

19 That's why my experience on the Courts,
20 lower courts particularly, leads me to think it's a very
21 rarely accepted argument, severance.

22 MR. LIU: Well, you're right, Justice
23 Breyer --

24 JUSTICE BREYER: And that's why I'm
25 interested in -- I mean, because if it were, you'd find

1 it very unusual to try people together, which, in fact,
2 is very usual. And so when you told me there is no
3 separate thing for the death cases, then I imagine it
4 would affect every criminal trial of gangs throughout
5 the country.

6 MR. LIU: Well, I think --

7 JUSTICE BREYER: And that is something
8 that's concerning me and I am looking for an answer.

9 MR. LIU: You're absolutely right, Justice
10 Breyer, that under our rule, the circumstances of each
11 case are relevant. But I think what's also important
12 is -- is that some -- the circumstances of some cases
13 might not get rise for severance.

14 JUSTICE BREYER: That's what I'm looking
15 for. Why is it you believe that if I were to decide in
16 your favor on this case and find the sufficient
17 prejudice to warrant severance here, I wouldn't at the
18 same time be throwing a huge monkey wrench --

19 MR. LIU: Right.

20 JUSTICE BREYER: -- into the ordinary cases
21 of gangs, drugs, et cetera, where joinder is very common
22 and reversal is very rare.

23 MR. LIU: Because the evidence here is
24 special in the sense that it fell beyond any existing
25 sentencing factor.

1 JUSTICE GINSBURG: Are you proposing just
2 separate sentencing hearings, or are you proposing
3 separate juries for each of the brothers?

4 MR. LIU: Well, the Kansas Supreme Court in
5 this case ordered as its remedy a new trial with two
6 juries, but I don't think that is necessarily going to
7 be the required remedy in every case. There are
8 different ways, Justice Ginsburg, to solve the problems
9 of sentencing.

10 JUSTICE GINSBURG: Let's take this case. If
11 you had only one jury and Jonathan goes first, that
12 jury, when it gets to Reginald's case, is not going to
13 forget everything it heard in Jonathan's case.

14 MR. LIU: You're absolutely right, Justice
15 Ginsburg. I don't think a sequential solution with
16 Jonathan going first is going to work in this case
17 precisely because the jury won't -- you won't be able to
18 unring the bell of the -- precisely the evidence we
19 think is prejudicial in this case. But that's not to
20 say that a sequential solution isn't going to work in
21 the mine run of cases.

22 This case is special just because there --
23 there is some allegation that the prejudice ran both
24 ways.

25 JUSTICE KENNEDY: But the minute -- but the

1 minute you defend the idea of two different juries, then
2 you sacrifice the desirability and the possibility of
3 consistency.

4 MR. LIU: Well, Justice Kennedy, there are
5 many ways that States have developed to resolve the
6 problem of inconsistent verdicts among different juries.
7 One way is what the Georgia State has done, which is had
8 proportionality review. They ask the appellate courts
9 to look across many sentences to see if they are
10 inconsistent.

11 Another way the Federal government has a
12 solution to this, is that let one jury know how the
13 other jury sentenced the other defendant. That's
14 18 U.S.C. 3592(a)(4). And so there are ways to solve
15 the problem of inconsistent verdicts across juries. But
16 what's --

17 CHIEF JUSTICE ROBERTS: That sounds -- that
18 sounds pretty prejudicial to me. If the second case,
19 you say, oh, the jury considered this and individual
20 circumstances, you know, these people act together, and
21 by the way, a jury of your peers unanimously found
22 beyond a reasonable doubt that this guy should be
23 sentenced to death; now do whatever you want with this
24 guy. That sounds pretty prejudicial to me.

25 MR. LIU: Well, it's -- it's -- if you think

1 that is prejudicial, Mr. Chief Justice, then this
2 proceeding was quite prejudicial too because the jury
3 was asked to make that same exact comparison.

4 But the specific prejudice we are alleging
5 here is -- is unique to these or at least quite -- quite
6 restricted to the circumstances of this case.

7 JUSTICE KAGAN: Mr. Liu, could you, for me,
8 just tell me what is the specific prejudice you're
9 alleging here? In other words, tell me more than just,
10 oh, he was a corrupting influence. What evidence
11 particularly came in --

12 MR. LIU: Sure.

13 JUSTICE KAGAN: -- and why do you think it
14 might have mattered to the jury? Just give me your,
15 like, best shot.

16 MR. LIU: Sure. Well, Kansas said there was
17 no expert testimony on this, but that's wrong.
18 Dr. Cunningham, at Joint Appendix pages 324 to 329,
19 explained how Jonathan looked up to Reggie, and every
20 time they would get together they would do drugs heavily
21 together, that when -- that when they were ages 6 or 7,
22 Reginald prompted someone to have sex with Jonathan.
23 These are precisely the sort of evidence that shows that
24 however bad you think Jonathan is, Reginald is worse
25 because Reginald is the one who created the person

1 Jonathan is.

2 It's in a sense making Reginald doubly
3 culpable for these offenses; that, well, whatever you
4 think Jonathan did -- and yes, as Justice Scalia read,
5 there were some horrific things done -- well, Reginald
6 should be punished for not only everything Reginald did,
7 but also everything Jonathan did.

8 So this is precisely the sort of evidence
9 that basically transfers all of Jonathan's actions to
10 Reginald. And that's why it's so prejudicial when you
11 get in the jury room, it's because it -- it skews the
12 weighing process.

13 And a skewing of the weighing process is an
14 error this Court has recognized for 30 years. This
15 isn't something that we -- we came up special for this
16 case. This Court has recognized time and again that
17 when a jury is told to consider an improper element in
18 the weighing process, the weighing process is therefore
19 skewed. And the only thing that can cure that error is
20 either harmless error review or --

21 JUSTICE SCALIA: But it --

22 MR. LIU: -- reweighing by the State court.

23 JUSTICE SCALIA: But it has to have been
24 harmless inasmuch as the person who was influenced by
25 your client also got the death penalty. How can you say

1 that what made the difference was the fact that your
2 client was a corrupting influence upon his younger
3 brother?

4 MR. LIU: Well, Justice Scalia, the State
5 never established the identity of the shooter, and that
6 is the key horrific act in this case. If the jury
7 believed Jonathan was the shooter, then the jury might
8 have given him the death penalty anyway regardless of
9 what Reginald did to him.

10 JUSTICE SCALIA: I doubt whether that is the
11 key. You really think that that's the only thing the
12 jury is going to be focused on, is who pulled the
13 trigger? My Lord.

14 MR. LIU: I don't think it's the only -- I
15 don't think it's the only thing, but it's certainly the
16 main thing given that we are here on a capital murder
17 charge.

18 JUSTICE SOTOMAYOR: Do you think that on a
19 retrial they cannot use the sister to prove that
20 Reginald claimed he was the shooter?

21 MR. LIU: No. And I think that just
22 highlights exactly how narrow our rule is. That the
23 evidence that Temica said that Reginald told her that
24 Reginald was the shooter goes to the circumstances of
25 the crime. And that sort of finger pointing, who shot

1 who on the day of the crime, is going to fall
2 comfortably within an existing sentencing factor, and as
3 a result, is not going to skew the weighing process.

4 JUSTICE SOTOMAYOR: So the only issue you
5 think was prejudicial was that he was a corruptor?

6 MR. LIU: Absolutely.

7 JUSTICE SOTOMAYOR: The evidence.

8 MR. LIU: And for reasons I -- I gave to
9 Justice Kagan, that evidence was extremely prejudicial.
10 It skewed the weighing process because it transferred
11 Jonathan's culpability back onto Reginald's shoulders.

12 If I may, I'd just like to address a few
13 points raised by my friend from Kansas. He said the
14 instructions solve the problem. Well, none of the
15 instructions told the jury to consider this evidence
16 about the corrupting influence only as to Jonathan.

17 Now, on the contrary, the instructions --
18 Instruction No. 2 told the jury consider the evidence
19 applicable to each defendant. Well, this evidence was
20 equally applicable to Reginald as it was to Jonathan.
21 After all, it was Reginald -- Reginald's actions that
22 were at issue.

23 My friends also point to the instruction on
24 statutory aggravators. But that disregards an entire
25 swath of evidence that the jury heard that it could

1 consider against Reginald. This was evidence,
2 anti-mitigation evidence that the jury considered, could
3 have caused them to remove weight from the mitigation
4 side of the scale. And the instructions left the jury
5 completely free to consider this evidence in
6 anti-mitigation.

7 My friends also suggest that I'm here only
8 arguing an error of State law. Well, no less than the
9 Petitioners were in Zant, Stringer, and -- and Sanders.
10 Each of those cases recognizes that a skewing of the
11 weighing process has to be based on State law premises.
12 That's why this Court in Zant went so far as to certify
13 a question to the Georgia Supreme Court.

14 Yes, it's true that to understand the effect
15 on the weighing process, you have to look at the State
16 law. But the mere admission of evidence isn't what
17 causes the violation here. It's the admission of the
18 evidence, followed by the fact the jury was required to
19 consider it. And it was required to consider it because
20 it was part and parcel of Jonathan's mitigating
21 evidence.

22 And this Court has said time and again that
23 a defendant has a constitutional right for the jury, not
24 only to consider but to listen to a defendant's
25 mitigating evidence. So by considering this evidence

1 for Jonathan, the jury necessarily considered it against
2 Reginald. After all, if you're told that Reginald had a
3 corrupting influence on Jonathan, you can't separate
4 that as something for Jonathan and something for
5 Reginald. It's equally applicable to both.

6 My friend also suggested that we -- we
7 rejected a two-jury solution before trial. Well, we
8 rejected that, not because of it wouldn't work to solve
9 any prejudice in the penalty phase, but because it
10 wouldn't work to solve any prejudice in the guilt phase.

11 And remember, the Kansas Supreme Court found
12 that it was actually error to keep the guilt phase
13 joined, so we were perfectly appropriate in objecting to
14 a two-jury solution at that phase of the trial.

15 JUSTICE GINSBURG: Can you explain that
16 again? I thought you -- you sought only a severance at
17 the sentencing phase.

18 MR. LIU: No. That's not -- that's not --

19 JUSTICE GINSBURG: You sought severance
20 totally?

21 MR. LIU: Exactly. Prior to trial, on pages
22 25 and 26 of the Joint Appendix, we moved for severance
23 of the entire thing.

24 And if you look at those pages, you'll see
25 Jonathan's attorney, Jonathan's own attorney, saying

1 that if the penalty phase is joined, he is going to have
2 to present evidence that, quote, "there's no way the
3 State would be able to introduce if Reginald was sitting
4 here alone."

5 Well, his attorney was exactly right.
6 That's exactly what happened many months later.

7 I see that my time is up.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. Green.

10 ORAL ARGUMENT OF JEFFREY T. GREEN

11 ON BEHALF OF THE RESPONDENT IN NO. 14-449

12 MR. GREEN: Mr. Chief Justice, and may it
13 please the Court:

14 I'd like to first try and change the
15 narrative here with some illustrations about the
16 difference between the mitigation cases of both
17 defendants. That's easily seen in the testimony of the
18 experts.

19 Reginald Carr presented evidence from a
20 neuroscientist by the name of Dr. Woltersdorf that said
21 his client had been diagnosed a -- an incurable
22 sociopath.

23 Jonathan Carr's forensic psychologist,
24 clinical and forensic psychologist, got up and testified
25 that -- that Jonathan was sensitive, he was

1 affectionate, he had attempted suicide, and what he
2 really was, contrary to what Mr. McAllister represented
3 to you, was -- was depressed and schizophrenic.

4 That is -- that is a unique illustration of
5 exactly how different these two defendants were in their
6 presentation, and why, again, a sequential penalty
7 phase, even if they had been separate, wouldn't work.

8 Reginald says he didn't want to hear or he
9 thought it would be prejudicial if the jury heard
10 evidence from the -- from the -- from Jonathan's
11 witnesses about Reginald being a -- a corrupting
12 influence. On the other side, Jonathan doesn't want the
13 jury to hear from Reginald's expert.

14 And to answer your question, Justice Kagan,
15 that's the evidence that would not have been introduced.

16 Justice Woltersdorf's -- or excuse me --
17 Dr. Woltersdorf's testimony about incurable sociopathy
18 would not have been relevant or admissible --

19 JUSTICE KAGAN: Maybe I'm missing something,
20 but if -- if your client's strategy was to make Reginald
21 as bad -- the bad actor in the case, why didn't that
22 evidence actually go hand in hand with your client's
23 strategy, which was to say it's all on Reginald?

24 MR. GREEN: One -- one would think that it
25 would in -- in a typical case, and it may be that some

1 jurors had inferred that way.

2 The problem was that -- that the fact that
3 the two brothers were sitting together allowed the
4 prosecutors to repeatedly paint them with the same
5 brush.

6 And -- and if we take a look, for example,
7 at JA 402, the prosecutor says to the jury in her
8 opening argument at the beginning of the penalty -- or
9 at the conclusion of the penalty phase, ladies and
10 gentlemen, they have the same eye color. They are now
11 wearing glasses, although their mother said Reginald
12 doesn't need them, they share some DNA.

13 JUSTICE BREYER: So this -- maybe you can,
14 in your experience, cure what's bothering me about the
15 case. It's nothing to do with the facts, or for this --
16 this concern. It has to do with -- with Zafiro.

17 MR. GREEN: Right.

18 JUSTICE BREYER: And that's the ordinary
19 case of joint trials, right?

20 And what the Court says is you can have the
21 joinder as long as there isn't a serious risk that the
22 joint trial would compromise -- it doesn't say harmless
23 error, it says compromise -- a specific trial right, or
24 prevent the jury from making a reliable judgment. That
25 doesn't talk about harmless error.

1 Now, that's the standard that's used in
2 dozens and dozens and dozens of cases.

3 Or if, in this case, we start talking about
4 harmless error, and that you can't have the joint
5 proceeding if there is error that is not harmless.

6 Well, what have we done to that sentence? And what have
7 we done to the trials that are joint in hundreds of
8 cases that don't involve murder or death?

9 That is the legal problem that is worrying
10 me. And you will either cure that worry or say I've
11 made some elementary mistake. It has nothing to do with
12 your case. Say what you want, but I want to hear what
13 you think about it.

14 MR. GREEN: I don't -- I don't think you've
15 made any mistake at all, Justice Breyer. Indeed, I
16 think that -- that the State of Kansas and the Solicitor
17 General are offering nothing more than -- than the
18 Zafiro test and using slightly different language.

19 On page 15 of our --

20 JUSTICE BREYER: So we should not use the
21 words "harmless error." We should quote from Zafiro and
22 say could they make a reliable judgment? Now, that
23 sounds harder on you, because if all you have to show is
24 the error was harmful, it sounds like an easier task you
25 have than to show that the juror -- jury wasn't

1 reliable. Or are they the same thing in your opinion?

2 MR. GREEN: Well, let me -- I think they're
3 the same thing and I think that's a generalization, but
4 we've -- we've offered a test that actually specifies it
5 a little bit more, Justice Breyer.

6 In terms of saying that -- that the test
7 should be whether there is a reasonable risk -- and I
8 will explain the difference between reasonable and
9 serious in a minute -- but whether there was a
10 reasonable risk that there would be evidence introduced,
11 material, prejudicial evidence introduced that would --
12 that would, in fact, not have been introduced in a
13 severed penalty-phase proceeding.

14 And to go back to Justice Kagan's question
15 about the intuitive difference between these two things,
16 they're between -- excuse me -- trials and -- and
17 penalty-phase proceedings, the answer is that's because
18 in a -- in a trial, the -- the relative culpability of
19 the defendants makes a big difference with respect to
20 who's a conspirator, who's not a conspirator, who's a
21 principal, who's an aider and abettor.

22 But when we turn to the penalty phase, the
23 inquiry changes, as Mr. Liu indicated -- it changes from
24 exactly what happened to who this person is and whether
25 or not the jury wants to put this person to death.

1 CHIEF JUSTICE ROBERTS: Who -- who -- if you
2 have separate proceedings, who -- who gets to go second?
3 Because obviously that person will have a significant
4 advantage since they'll see all of the evidence
5 presented in the -- in the other proceeding.

6 MR. GREEN: Well, in --

7 CHIEF JUSTICE ROBERTS: And most of the
8 evidence here was overlapping, so that at least you'll
9 have -- you'll be able to see what the State thought
10 about that evidence. You have sort of a dry run if
11 you're the second person.

12 MR. GREEN: Well, in this case,
13 respectfully, no, Mr. Chief Justice, because what the --
14 what the State basically said was we're relying on our
15 evidence from the -- from the trial phase -- or from the
16 guilt phase of this capital trial.

17 That's exactly what the prosecutor told the
18 jurors when they turned in to the penalty phase, and all
19 that the prosecution did in the penalty phase was
20 cross-examine the defense witnesses.

21 CHIEF JUSTICE ROBERTS: Well, but that
22 cross-examination is important.

23 Were there any common defense witnesses?

24 MR. GREEN: There were family members.

25 So -- so it is true --

1 CHIEF JUSTICE ROBERTS: So at least it would
2 be -- it would be helpful for the second -- the person
3 who goes second to know, well, what did the prosecutor
4 talk -- how did the prosecutor attempt to cross-examine
5 that witness, because I am going to call the same
6 witness, and her testimony is going to be a lot better
7 the second time around because you will know exactly
8 what the cross-examination questions are going to be.

9 MR. GREEN: That might happen. I -- it --
10 it could well be that that would be -- I would consider
11 that a -- a minor advantage, Your Honor. But that could
12 be handled by the judge in -- with protective orders,
13 with orders about -- rules against witnesses and -- and
14 folks in the courtroom who will have another proceeding.

15 But I would submit -- and then with respect
16 to witnesses who might have been traumatized by these
17 events, that -- the -- you know, a trial court could
18 easily have a simultaneous penalty proceedings so that
19 that witness would only have to testify once. The
20 defense team on one side wouldn't get an advantage over
21 the other. There would be two juries in two different
22 courtrooms, same week, same days, the -- the witness can
23 go back and forth between courtrooms, and there is none
24 of the advantage --

25 JUSTICE ALITO: You would have -- the State

1 would have to put on, basically, its guilt phase case
2 again at the penalty phase, right?

3 MR. GREEN: Yes, it would have to do that,
4 but I would imagine that -- that with respect to cases
5 like this, the defense attorneys are going to move right
6 into what counts as stipulations; we will read
7 testimony --

8 JUSTICE ALITO: Well, I am sure you'd like
9 to stipulate to all the facts that were proven at the
10 guilt phase, but I doubt that the State is going to want
11 to stipulate to those.

12 MR. GREEN: And the State might do that.

13 And again, I think a trial judge could
14 easily handle that by expediting matters. And this is
15 what happens in a lot of the Federal trials. I would
16 refer the Court to the -- to the brief of the Promise of
17 Justice Initiative which shows that when we have joint
18 trials, we get joint results. When we have severed
19 trials, we get severed results. 25 for 25, joint
20 trials, same result for the defendants.

21 Woodson says we must have individualized
22 sentencing at the penalty phase, so I do not see why the
23 Zafiro test would not -- would -- would work for penalty
24 phase proceedings without some sort of change. There
25 has to be some recognition that -- that penalty phase

1 proceedings are different than -- than all the other
2 armed robbery, drug cases.

3 JUSTICE SOTOMAYOR: So how is that different
4 from what the government said?

5 MR. GREEN: I -- so I think we ought to
6 lower the risk standard. We ought to lower the risk
7 standard to a reasonable risk standard, not -- and
8 that's what we propose in our brief at page 15. We
9 should lower the standard because that would recognize
10 the acute need for reliability and accuracy when it
11 comes to penalty phase proceedings and the decision
12 whether somebody is going to live or die.

13 JUSTICE GINSBURG: You said you were going
14 to make a distinction between serious and reasonable
15 earlier.

16 MR. GREEN: Right. So a serious risk may be
17 treated as a -- as a preponderance or a -- or above.
18 With respect to reasonable, we're at a -- we're at a --
19 a -- maybe a likelihood. Maybe that's -- maybe that's
20 perceived as 30 percent versus 55 percent or 60 percent,
21 something like that.

22 And indeed, this Court said in *Boyde*, with
23 respect to reasonable likelihood, that is not a
24 preponderance standard.

25 If the Court has no further questions, we

1 would urge --

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. McAllister, five minutes.

4 REBUTTAL ARGUMENT OF STEPHEN R. McALLISTER

5 ON BEHALF OF PETITIONER

6 MR. McALLISTER: Mr. Chief Justice, and may
7 it please the Court:

8 I will try to be brief. The only Eighth
9 Amendment implication that this Court has recognized
10 that really applies to this case is I go back to the
11 Romano case where the Court said the admission of
12 evidence that might or might not be in violation of
13 State law is not an Eighth Amendment concern. The only
14 time the Eighth -- Eighth Amendment comes into play is
15 when the evidence is -- involves constitutionally
16 protected conduct.

17 An example would be Dawson v. Delaware,
18 where they sought a capital sentence. He was a member
19 of the Aryan Brotherhood in prison. It had nothing to
20 do with an aggregating factor. That was First
21 Amendment-protected activity. The Court said that kind
22 of thing could be an Eighth Amendment problem if you use
23 it against the defendant.

24 Their cases -- I could be wrong, but I think
25 all of their cases, Zant, Stringer, the others that they

1 refer to skewing the weighing process, are not about
2 admission of evidence, they are about invalid
3 aggravating factors. So you've basically told the jury
4 there is something else, literally, on the scale, an
5 aggravating factor that later the State says, no, that
6 was -- that was not correct, that should not have been
7 there. That's distinguishable from this case.

8 I -- I agree completely with
9 Justice Scalia's point, and the dissenting justice made
10 it in the Kansas Supreme Court: If the evidence -- the
11 corrupting influence evidence was so prejudicial to
12 Reginald, why did Jonathan also get a death sentence?

13 And I would close by saying that we all
14 agree, I think, that the Constitution values accuracy
15 and fairness. But it also values finality. And each of
16 these individuals received an individualized sentence,
17 presented all the evidence they wanted to. The jury was
18 instructed to consider them individually. And if we
19 were to undo this now, it would be very difficult for
20 Kansas to go back. We'd be talking about having to redo
21 all of the guilt phase evidence. And, again, you get
22 into questions, separate proceedings, traumatizing
23 victims yet again. None of that is necessary, because
24 at the end of the day they got a fundamentally fair
25 proceeding that gave each of them the sentence they

1 deserved and the jury found warranted, both under the
2 facts of this case and the law of Kansas.

3 We would ask that you reverse the Kansas
4 Supreme Court on this point.

5 JUSTICE SOTOMAYOR: Mr. McAllister, I am
6 sorry, but even if we do this and say that the
7 sentencings didn't need to be severed, didn't the Kansas
8 court hold on another ground that they were entitled to
9 a new trial?

10 MR. McALLISTER: Yes. So that's the third
11 question presented in the Petition, which my
12 understanding is that is something the Court could
13 reconsider. It's not denied. The Court granted
14 Questions 1 and 3.

15 The other question that we presented was the
16 only other ground that the Kansas Supreme Court gave for
17 reversal, that's a Confrontation Clause violation in
18 terms of some of the hearsay evidence presented in the
19 sentencing proceedings.

20 So if the Court were to reverse on these,
21 deny on that question, then the Kansas Supreme Court
22 could, in fact, rely on that ground. But our hope would
23 be that the Court would do something different than that
24 if you reverse on these two questions.

25 Unless there are further questions, thank

1 you.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 The cases are submitted.

4 (Whereupon, at 12:06 p.m., the cases in the
5 above-entitled matters were submitted.)

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