

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KANSAS, :

4 Petitioner :

5 v. : No. 04-1170

6 MICHAEL LEE MARSH, II. :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, December 7, 2005

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

13 APPEARANCES:

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

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

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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

1 to it.

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

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

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

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

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

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

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

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

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

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

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

1 defendant to death.

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

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

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

11 MR. KLINE: That is correct, Justice Scalia.

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

14 MR. KLINE: That certainly is, and --

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

22 MR. KLINE: That is correct.

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

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

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

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

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

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

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

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

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

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

23 Furthermore, the jurors are --

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

1 know. We ought to get that fixed.

2 (Laughter.)

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

9 MR. KLINE: That is correct, and --

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

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

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

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

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

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

16 MR. KLINE: That is correct.

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

23 MR. KLINE: Mr. Chief Justice --

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

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

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

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

18 MR. KLINE: That is correct.

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

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

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

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

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

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

25 MR. KLINE: That is correct, Justice

1 O'Connor.

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

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

7 JUSTICE O'CONNOR: Over a dissent.

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

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

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

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

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

25 JUSTICE STEVENS: Of course, that means they

1 comply with Lockett.

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

12 Do you ask us to reexamine those cases?

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

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

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

1 State does not meet that burden --

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

6 MR. KLINE: This Court has held that it does.

7 And Kansas has a very narrow death penalty in the
8 definition of capital murder and also the specified
9 aggravators that the State must prove.

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

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

17 JUSTICE STEVENS: The answer is yes.

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

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

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

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

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

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

22 MR. KLINE: Well, the --

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

1 MR. KLINE: Justice Stevens, you are correct.

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

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

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

1 Now, one thing I would like to --

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

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

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

21 JUSTICE O'CONNOR: But there was another
22 ground.

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

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

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

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

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

21 MR. KLINE: It is, Your Honor.

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

25 MR. KLINE: That would be incorrect, Justice

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

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

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

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

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

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

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

8 JUSTICE STEVENS: Well, that wouldn't be true
9 if you amended the statute though, would it? If you -- if
10 they amended the statute to take the 50/50 problem out
11 of it, which wouldn't seem to me all that difficult,
12 you could still impose the death penalty on these other
13 12 people who haven't been tried.

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

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

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

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

24 (Laughter.)

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

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

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

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

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

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

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

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

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

1 and additionally, the jury was specifically instructed
2 to consider and give weight -- I'm sorry. It's pages
3 24 and 25 -- specifically instructed to give weight to
4 all of that evidence. Pages 24 and 25. I am referring
5 to instruction number 4. And you will see the
6 delineation beginning on page 25 of all the mitigating
7 evidence that was admitted as relevant in this case.

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

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

19 (Laughter.)

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

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

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

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

8 CHIEF JUSTICE ROBERTS: Thank you, General.

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

10 ORAL ARGUMENT OF REBECCA E. WOODMAN

11 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

1 outweigh mitigators, or vice versa.

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

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

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

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

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

1 outweighed the aggravators.

2 MS. WOODMAN: But the jury is specifically
3 instructed under this formula that they have a third
4 option, and that is where they can't make a decision,
5 whether aggravators outweigh mitigators, or vice versa
6 --

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

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

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

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

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

1 saying it is appropriate. They're saying it is
2 appropriate. We have the people put in the box. The
3 box is are they in a situation that is different from
4 the average murderer. Yes. And they're making the
5 determination that although they're in that box, that
6 morally they're no different. Morally they're the same
7 --

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

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

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

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

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

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

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

12 Then --

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

21 MS. WOODMAN: Well --

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

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

4 MS. WOODMAN: Well --

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

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

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

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

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

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

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

14 MS. WOODMAN: They are in the brief.

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

18 MS. WOODMAN: Yes.

19 JUSTICE GINSBURG: If the aggravators are not
20 outweighed by the mitigators, you shall impose the
21 death penalty, not that you may, not that you can, but
22 that you shall impose the death penalty. This is the
23 duty you were sworn to uphold. Shows command. It
24 means must. That's -- is that the type of instruction
25 --

1 MS. WOODMAN: That's correct.

2 JUSTICE GINSBURG: -- the type of argument?

3 MS. WOODMAN: That's correct, and then in Mr.
4 Marsh's case, which is part of the record in this case
5 -- and I've cited to the record for that argument,
6 which is at -- I apologize. It's at volume 54 at pages
7 54 and 55 of the record of the Kansas Supreme Court in
8 the Marsh case. And in that case, the prosecutorial
9 arguments told the jury that they can't even consider
10 mitigating evidence unless they find that mitigating
11 circumstances outweigh aggravating circumstances
12 because the law has told you and the judge has told you
13 that the law says that if the aggravating circumstances
14 are not outweighed by mitigating circumstances, you
15 shall return a verdict of death.

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

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

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

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

1 instructions in capital cases.

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

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

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

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

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

1 JUSTICE SCALIA: If the State is --

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

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

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

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

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

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

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

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

13 MS. WOODMAN: The defendant.

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

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

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

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

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

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

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

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

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

22 Next question: what happens?

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

1 JUSTICE BREYER: Oh, I agree with you.

2 That's not the problem.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 MS. WOODMAN: I think that they --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Now, I do understand that the Court has taken

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 JUSTICE KENNEDY: And made a reasoned
2 judgment about it.

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

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

10 MS. WOODMAN: They're taking a --

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

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

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

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

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

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

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

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

17 JUSTICE SCALIA: I like that.

18 (Laughter.)

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

1 altered if one of those horses was dead.

2 (Laughter.)

3 MS. WOODMAN: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, Ms.

5 Woodman.

6 General Kline, you have 4 minutes remaining.

7 REBUTTAL ARGUMENT OF PHILL KLINE

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

25 The juror can state that they have a

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

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

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

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

21 MR. KLINE: That is correct, Justice Stevens.

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

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

1 able to engage in a reasoned moral choice.

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

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

14 MR. KLINE: I think the moral --

15 JUSTICE BREYER: What is the reason?

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

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

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

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you, General
9 Kline.

10 The case is submitted.

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