

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KANSAS, :

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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24 Kan.; on behalf of Petitioner.

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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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P R O C E E D I N G S

(11:07 a.m.)

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

On the severance question, Mr. McAllister.

ORAL ARGUMENT OF STEPHEN R. McALLISTER

ON BEHALF OF THE PETITIONER

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

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

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

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