

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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5 Respondent in No. 14-450.

6 JEFFREY T. GREEN, ESQ., Washington, D.C.; on behalf of
7 Respondent in No. 14-449.

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1 P R O C E E D I N G S

2 (11:07 a.m.)

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

5 On the severance question, Mr. McAllister.

6 ORAL ARGUMENT OF STEPHEN R. McALLISTER

7 ON BEHALF OF THE PETITIONER

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

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

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

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

1 The only way the Kansas Supreme Court gets
2 to an Eighth Amendment error in this case -- well,
3 really, there are two points. One, it relied upon
4 possible, and one instance not even, violations or
5 errors of State law to find a prejudice that -- that
6 rose to an Eighth Amendment level.

7 And two, it disregarded altogether, with
8 really no explanation, the long-standing foundational
9 principle that juries are presumed to follow their
10 instructions.

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

15 Well, that's not even an error of State law.
16 They said basically that's prejudicial. It might not
17 have come in if they had been tried separately, but in
18 fact, that evidence would be relevant to aggravator
19 No. 1, that the defendant killed multiple people. That
20 would haven been admissible evidence. And that -- that
21 just can't be an Eighth Amendment violation.

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

1 MR. McALLISTER: That's the third question
2 presented in the cert position on which the Court has
3 not taken any action yet, Your Honor.

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

8 MR. McALLISTER: Well, and we are certainly
9 hopeful that the Court will take another look at that
10 second question depending on its resolution of the two
11 questions that are in front of it today. But if it goes
12 back in that posture, yes, they would have another
13 ground.

14 JUSTICE KENNEDY: Would any evidence be
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 Reginald refers to as
20 "the corrupting influence." But even that arguably
21 would be relevant to the mercy consideration to show his
22 character, the nature of this person that is being
23 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 is -- 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, it would only be State law.

8 JUSTICE SOTOMAYOR: Could you tell me what
9 Constitutional standard you're asking us to apply? This
10 argument goes to harmless error, a serious position to
11 take, but even if there was error, no foul -- a foul but
12 no penalty. Okay? But what standard are we applying?
13 We are not applying the rule, or are we, or should we
14 apply the Rule 14 standard?

15 MR. McALLISTER: No, not for Eighth
16 Amendment purposes, Your Honor. Kansas would propose --
17 and I suspect the United States can propose something as
18 well. But it is a very high standard as an Eighth
19 Amendment matter. And we would say -- we would be
20 content to accept something like serious risk that a
21 defendant will not be able to receive individualized
22 sentencing. It is sort of molding the traditional
23 notions of joinder with the Eighth Amendment
24 consideration, because that seems to be the only Eighth
25 Amendment consideration here, is the individual --

1 JUSTICE SCALIA: Is it the Eighth Amendment
2 or is it due process?

3 MR. McALLISTER: Well, you could use a due
4 process standard, Justice Scalia, which we would also be
5 fine with. The question would really be, did joinder so
6 infect the process with unfairness that the proceedings
7 are fundamentally unfair.

8 JUSTICE SCALIA: That steams like a language
9 that is relevant rather than the cruel and unusual
10 punishments language.

11 MR. McALLISTER: Well, and that is exactly
12 what this Court said in *Romano v. Oklahoma*, a case in
13 which the defendant's other death sentence in a separate
14 case was admitted against the defendant in the
15 sentencing proceeding. That sentence later got
16 reversed. And the Oklahoma Court said the jury should
17 not have heard about his other sentence as a matter of
18 State law. That defendant *Romano* said it is an Eighth
19 Amendment violation, and it is a due process violation.
20 The Court said the Eighth Amendment does not have
21 anything to say about what is admissible really. That
22 is State evidentiary rules. It's not an Eighth
23 Amendment issue.

24 And the Court went on to address the due
25 process claim in *Romano*, applying that very standard.

1 And as we suggest that the Court should do here, one of
2 the things it pointed to specifically was jury
3 instructions that says these are the aggravating
4 circumstances you may consider. You may not consider
5 any others. The court said we presume the jury follows
6 its instructions. And nothing in the instructions gave
7 the jury here any way to give effect to that improperly
8 admitted evidence.

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

19 So in our view, the most the Kansas Supreme
20 Court could come up with is potential violation of State
21 law if, in fact, the evidence which is minimal in the
22 greater scheme of this proceeding that Reginald is a
23 corrupting influence on Jonathan. If that would not
24 have been admitted, that is really all the Kansas
25 Supreme Court is left with to hang its hat on in

1 finding -- in saying there is an Eighth Amendment
2 violation here.

3 JUSTICE KENNEDY: Can you tell me if you're
4 aware that in other states or perhaps even in Kansas in
5 other trials if it is a common practice to sever when
6 there -- for the penalty phase when there are multiple
7 defendants?

8 MR. McALLISTER: Justice Kennedy, I think in
9 the briefs -- I do not remember the exact page -- there
10 are two states that mandate severance. One is Ohio, and
11 that's, I think, Georgia and Mississippi.

12 JUSTICE KENNEDY: This is just for penalty
13 phase?

14 MR. McALLISTER: I think it is for the
15 entire proceeding. And in Ohio there is a presumption
16 in the favor of severance, but all the other states,
17 there is nothing that mandates or even, I think, creates
18 a presumption --

19 JUSTICE KENNEDY: It would be very difficult
20 for the trial judge to decide which should go first.

21 MR. McALLISTER: It would, and that is one
22 of the reasons -- I mean, not just judicial economy, but
23 in a sense overall fairness --

24 JUSTICE KENNEDY: Yes.

25 MR. McALLISTER: -- having them tried

1 together. And you do not have one defendant having an
2 opportunity to preview the evidence that the State may
3 present and the arguments that may be made. This Court
4 has recognized that potential tactical advantage in
5 other joinder cases. Of course, it has not had a
6 joinder capital case like this, but in other
7 circumstances that is a factor the Court has also
8 emphasized, the consistency of determinations with
9 respect to facts.

10 We are not saying the outcomes have to be
11 the same, but when the evidence is -- the mitigation
12 evidence is 99 percent overlapping. They were using the
13 same witnesses. Even their experts were co-authors.
14 They were testifying to the exact same things
15 essentially about each brother. All that overlapping
16 evidence, what this allows is a consistent determination
17 by the jury and evaluation of all that mitigating
18 evidence that leads to whatever outcome the jury
19 decides. But the jury was very clearly told to consider
20 each defendant individually. And that is what they got,
21 was individual consideration.

22 I would say -- also remember even if this
23 Court were to think there were some kind of error, which
24 Kansas simply does not see here, again, at most,
25 possibly an error of Kansas law, not an Eighth Amendment

1 violation, it would have to be harmless under any
2 standard, and Kansas would accept any standard that is
3 beyond a reasonable doubt certainly here. Given the
4 four uncontested aggravating circumstances --

5 JUSTICE BREYER: Well, you also have to
6 look -- you have it at the top of your head, maybe
7 forget if you do not. What I thought I would do is I
8 wanted to look to the aggravating circumstances, what
9 were they.

10 MR. McALLISTER: What were they.

11 JUSTICE BREYER: Let us call it, he was the
12 monster approach. Reginald was the monster and Jonathan
13 was the puppet. I want to look at the aggravators. I
14 also want to look at the mitigators that Reginald said
15 existed, and then see if this comparative monster, let
16 us call it, fits into any of them.

17 Do you know? Do you know the pages where
18 they are, just by chance?

19 MR. McALLISTER: Well, I think the -- in
20 terms of the -- yes, the aggravating circumstances are
21 set forth in the instructions, Justice Breyer, so --

22 JUSTICE BREYER: Okay. I know where they
23 are.

24 MR. McALLISTER: Instruction No. 5 for
25 Reginald and instruction No. 7 for Jonathan, and then

1 following each one, so I believe instruction No. 6 and
2 instruction No. 8. But the mitigating -- those are the
3 statutory mitigating circumstances. So what happens in
4 these cases is the jury is told, here are the statutory.
5 And we list all of them that are listed in the Kansas
6 statute. And then you can --

7 JUSTICE BREYER: What page do you list them?

8 MR. McALLISTER: So those are listed in
9 instruction No. 6 and instruction No. 8. It is all in
10 addition --

11 JUSTICE BREYER: If it is in, then I guess
12 what I have to do is go through this huge record on the
13 sentencing anyway and see do I really think that this
14 evidence that came in that the younger one thought the
15 older one was the monster, etc., did it really have an
16 effect? That's what I would have to do. I do not see
17 how I could avoid that if they are at all relevant.

18 MR. McALLISTER: Well, I would say, first of
19 all, if were you to do that, it would be quite clear.
20 The evidence is overwhelming. But furthermore, the
21 premise is not supported really by the record. They say
22 Jonathan's whole strategy was to paint Reginald as the
23 bad actor here. That is not really what happened.
24 What they both presented was lots of witnesses and
25 testimony about their childhood and their experiences

1 growing up, and they presented psychological experts to
2 talk about their mental condition. No expert said
3 Reginald had some kind of psychological control over
4 Jonathan. That testimony, to the extent it is there at
5 all comes, from their mother.

6 JUSTICE KAGAN: But what do you think about
7 a case, whether or not this is that case, in which it is
8 quite clear to a judge that each of two defendants is
9 just going to be pointing to the other person and
10 saying, that was the bad actor. He is why these
11 terrible crimes committed. And you know that -- you
12 know, each of them is going to be doing that. Should a
13 judge separate the penalty proceeding in that context?

14 MR. McALLISTER: Well, not necessarily. If
15 a high standard is met, then it will not be possible,
16 perhaps, to give individualized consideration to each in
17 an Eighth Amendment or a due process standard. It is
18 going to be so fundamentally unfair. You can meet that
19 very high standard then, but that has always been the
20 Court's approach. It is a case-by-case determination.
21 Even Zafiro, which is a joinder case --

22 JUSTICE KAGAN: Well, I guess I am asking
23 you: In what kind of factual circumstances you would
24 find that standard met?

25 MR. McALLISTER: Rarely, but I think it

1 would be -- certainly the Court has recognized in
2 Bruton, you have some sort of co-defendant confession --
3 I mean, confession situations. If there was something
4 that had not been used in the guilt phase, might be
5 relevant in the sentencing. That might be so
6 prejudicial. We have tried to think of other examples.
7 I might suggest something like one is claiming at that
8 point in time some kind of insanity, even though they
9 didn't succeed on that at trial. If there was something
10 really starkly contradictory in their presentations and
11 you were going to get a lot of evidence about one, that
12 really had nothing to do at all with the other.

13 But we do believe it's a high standard that
14 would rarely be satisfied, especially given the Court's
15 long-standing presumption that the jury follows its
16 instructions. And that is one thing I would point out
17 here is the complaints that each makes in this Court.
18 First of all, at least one of those complaints really
19 wasn't even made in the Kansas Supreme Court much less
20 the trial court, and that is the shackling of Reginald
21 and whether that might have prejudiced Jonathan. But
22 they -- there was no complaints during the sentencing
23 proceeding. This corrupting influence evidence is
24 relevant only for Jonathan's mitigation case, not with
25 respect to Reginald. Can we have a limiting

1 instruction? Reginald has anti-social personality
2 disorder. There was no request for any sort of limiting
3 that that -- that's not applicable to Jonathan.
4 Although, of course, the irony there is that Jonathan's
5 own expert all but diagnosed him as anti-social
6 personality. He said out of 26 risk factors that the
7 Department of Justice has recognized for violence and
8 sexual violence, Jonathan has 24 of them.

9 And both brothers talked about family
10 history of mental illness. Both brothers and their
11 experts talked about whether some of these things were
12 hereditary or genetic. This was really a case in which
13 it made very good sense to proceed with a joint
14 proceeding, because the evidence 99 percent was
15 overlapping, essentially. I mean, they were calling the
16 same witnesses, taking turns with those witnesses.
17 Judicial economy nor fairness, neither one would have
18 been served any better by separating this into two
19 proceedings.

20 And, in fact, I will conclude for now,
21 unless there are further questions, with this
22 observation that prior to trial, to the guilt phase, the
23 prosecution actually offered to have two juries sit
24 through this proceeding. Jonathan's attorney said he
25 would consider it, and Reginald's attorney rejected it.

1 So the State even tried to -- to agree to
2 some workable system, and it was declined. So unless
3 there are further questions, I will reserve the
4 remainder of my time.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 Ms. Kovner.

7 ORAL ARGUMENT OF RACHEL P. KOVNER
8 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
9 SUPPORTING PETITIONER

10 MS. KOVNER: Mr. Chief Justice, and may it
11 please the Court:

12 The Kansas Supreme Court erred when it found
13 that the State violated the Eighth Amendment by
14 conducting joint sentencing proceedings for the crimes
15 the Respondents committed together. Joint proceedings
16 can enhance accuracy and fairness as a long line of this
17 Court's cases hold. They provide a fuller evidentiary
18 record to juries that are assessing relative
19 culpability, and they prevent arbitrary disparities that
20 may arise when two juries reach inconsistent conclusions
21 about the common facts of a single crime.

22 CHIEF JUSTICE ROBERTS: Ms. Kovner, is there
23 any difference between the Federal Government's position
24 and the position of the State of Kansas on this
25 question?

1 MS. KOVNER: As to the standard, I think
2 there's a small difference. I think our proposal is
3 that the constitutional standard is whether evidence or
4 argument resulted in a denial of due process or the
5 deprivation of an individualized sentencing proceeding.
6 And that's slightly different from Kansas's standard,
7 because Kansas is proposing a rule that involves
8 analysis of risk, and we think that is part of the
9 statutory rule under Rule 14 as Justice Sotomayor
10 alluded to. It's also part of the statutory standard
11 that states "by and large are applying," but we think
12 the constitutional question is, just was this person
13 deprived of a fair trial by the evidence that came in?
14 And that's the constitutional question.

15 JUSTICE KAGAN: When you said it the first
16 time, you had "deprived of a fair trial" and then
17 something about "individualized sentencing"; is that
18 right? Is that supposed to indicate that this is
19 deriving both from the Due Process Clause and from the
20 Eighth Amendment?

21 MS. KOVNER: Well, the Eighth Amendment does
22 speak to this need for an individualized sentencing
23 determination. We would think that the Due Process
24 Clause also requires the proceedings be individualized.
25 But we would agree that if there were a situation where

1 there was a joint trial and because of the evidence
2 introduced by one, for instance, a jury simply could not
3 give individualized consideration to a second -- second
4 defendant, that would be a constitutional problem.

5 And to give an example of that -- I mean, I
6 think the example the Court suggests in *Zafiro* of that
7 is where there is aggravating evidence that pertains
8 only to one defendant but that that aggravating evidence
9 is just so prejudicial and so overpowering that the jury
10 couldn't really separate the two and would be inclined
11 to sort of judge the second one by association.

12 So that's the example the Court gives in
13 *Zafiro*, but it's not --

14 JUSTICE SCALIA: Don't you think
15 individualized consideration is required even in the
16 non-capital cases?

17 MS. KOVNER: Absolutely, Your Honor. So I
18 think --

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

21 MS. KOVNER: I think due process encompasses
22 that requirement of individualized consideration. Just
23 to address several of the points that came up during
24 Petitioner's argument, I think -- as to the question
25 that Justice Kagan asked about whether when defendants

1 are simply pointing the finger at each other, that would
2 necessitate severance. I think that's the question that
3 the Court addressed in Zafiro, where that was
4 essentially the claim the defendants were making, that
5 we're both going to point the finger at each other at
6 trial. And the Court said that doesn't necessitate
7 severance, that that may, in fact, increase the jury's
8 ability to reach an accurate verdict, to reach an
9 accurate assessment of relative culpability and enhance
10 fairness. So we don't think that that's a situation
11 that would require severance.

12 CHIEF JUSTICE ROBERTS: I -- I guess the
13 strongest evidence for Reginald is Tamika's testimony.
14 It's -- it's pretty prejudicial. She said, he's -- he's
15 the one who -- he said he's the one who shot.

16 MS. KOVNER: I don't think that that's
17 prejudicial evidence, certainly not any constitutional
18 problem with the admission of that evidence. I don't
19 think that even Reginald Carr is asserting that that
20 evidence couldn't have come in against him. Rather he
21 is asserting or the State below suggested -- the State
22 court below suggested that maybe that -- maybe the State
23 didn't know about that evidence, and maybe just as a
24 factual matter it wouldn't have come in.

25 But there's no constitutional unfairness

1 with evidence coming in on a co-defendant's case that's
2 harmful but accurate as to you. That's something the
3 Court said in -- in Zafiro. If it's accurate and
4 relevant evidence that comes in on a co-defendant's
5 case, there's no constitutional unfairness as to you.

6 I think Reginald's primary claim before this
7 Court is that there was a violation of State evidentiary
8 law because some of the other evidence, the evidence of
9 bad influence, might not have come in under the State
10 rule. I think this Court's cases are clear that a
11 violation of State evidentiary law is simply a matter of
12 State law. The State could decide that necessitates
13 reversal, but it's not a constitutional error. That's
14 what this Court said in Romano.

15 JUSTICE BREYER: It would depend on what is
16 was, wouldn't it? So I'm still asking the same
17 question. If the -- I take it that Reginald could not
18 have introduced evidence refuting these brothers' state
19 of mind that he was the monster. That is what you're
20 referring to by the "bad influence."

21 So the jury might have taken that evidence
22 into account in trying to decide whether Reginald, for
23 other reasons than in the statute, was a sympathetic
24 enough character not to provide the death penalty.
25 That's conceivable. But severance is very, very rare,

1 and joint trials are very common. And very common is
2 the claim on an appeal in any kind of a case that it
3 should -- it should have been severed.

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

11 MS. KOVNER: I want to go back -- I'd like
12 to answer the question and then go back to the premise,
13 because I am not sure I agree with the premise.

14 But as to whether any prejudice is a
15 problem, I think the best case is Zafiro. Zafiro talks
16 about the idea that what you need -- that joinder is
17 presumably going to enhance fairness and accuracy. And
18 what you need is substantial prejudice, even to have a
19 statutory problem, and even then we are going to presume
20 that a limiting instruction would be sufficient to cure
21 it.

22 So that would be our best case on that
23 point. But, Your Honor, I think the inquiry under the
24 Eighth Amendment has to be, would the Constitution have
25 prohibited this evidence from coming in as to Reginald

1 Carr? And we think the answer is no. Any evidence that
2 is relevant to an individual defendant --

3 JUSTICE BREYER: Well, normally in severance
4 cases, forgetting the death cases, seems to me the
5 argument has been, look, they never would have gotten
6 this piece of evidence in against my client. They
7 brought it in against the other client. Now, go look at
8 that evidence, and you'll see how much my prejudice --
9 of my client was prejudiced by that.

10 I do not know whether you call that due
11 process. Maybe you do. That is the kind of argument
12 which seems for a quantitative weighing. That is why I
13 asked the question.

14 MS. KOVNER: I think I would go back to
15 Zafiro, again, on that one, Your Honor, because I think
16 Zafiro establishes that when accurate evidence comes in
17 for a co-defendant that is relevant for a jury's
18 determination, that is not prejudice. That is
19 information that may enhance the accuracy of what the
20 jury --

21 JUSTICE SOTOMAYOR: Can you tell me why we
22 should apply the Zafiro standard, which was joint
23 trials, but this is joint sentencing where there is a
24 different -- why there should be exactly the same
25 standard applied?

1 MS. KOVNER: So we think Zafiro --

2 JUSTICE SOTOMAYOR: You need individualized
3 sentencing. So can't you say, or are not you required
4 to say, that something a little bit more than -- than
5 the efficiency of a joint trial has to compel -- has to
6 be considered?

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

15 And, similarly, that juries with more -- who
16 are confronted with two defendants together can avoid
17 the unwarranted disparities that may occur when juries
18 reach different results -- two different juries
19 considering the same facts reach different results on
20 those facts. And that's equally true at sentencing.

21 JUSTICE SOTOMAYOR: Sorry, but I'm not --

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

24 MS. KOVNER: That's -- that's what the
25 Kansas Supreme Court said here. And the result of that

1 is -- is going to be that two different juries
2 confronted with the very same aggravating circumstances
3 and largely parallel mitigation cases may simply weigh
4 factors like mercy differently.

5 JUSTICE SCALIA: But wouldn't -- wouldn't
6 the second jury have to know the facts relevant to
7 mitigation, as well as aggravation, I suppose, that came
8 out in the main trial?

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

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

18 MS. KOVNER: Well, in -- in the Federal
19 system, there are a number of ways you could do it.
20 Could you have two juries that hear both the guilt phase
21 and -- and the penalty phase? Could you have a second
22 jury impanelled only for the -- the penalty phase? But
23 then in a case like this, you would need to essentially
24 repeat all the trial evidence, including calling victims
25 again, because that -- because the State was relying on

1 its evidence from the trial phase, and that is generally
2 going to be the case.

3 JUSTICE KAGAN: I think I missed something
4 you said. But -- forgive me. But the constitutional
5 standard that you're proposing, is that a constitutional
6 standard for both the guilt phase and the sentencing
7 phase? And is it also for both non-capital and capital?
8 Are you drawing no distinctions among those four things?

9 MS. KOVNER: I think that's right, Your
10 Honor. I mean, that -- because we think that the due
11 process standard essentially subsumes the requirement of
12 individualized consideration. And, of course, due
13 process is applicable at the trial phase and at the
14 sentencing phase in capital and non-capital trials.

15 JUSTICE KAGAN: So it seems a little bit
16 counterintuitive to me, the idea that, you know, the
17 guilty phase of a very minor crime would have the exact
18 same standard applicable to it as the phase of a capital
19 crime and then as the sentencing phase of a capital
20 crime.

21 MS. KOVNER: If I may answer really briefly?
22 Your Honor, the reason we think that is the case is that
23 joint trials often enhance accuracy and fairness. So we
24 agree that accuracy and fairness considerations are at
25 their paramount in capital cases, but we do not think

1 that notates for a different standard in capital cases
2 because we think that the standard the -- the courts are
3 applying is one that will generally enhance those value.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Liu.

6 ORAL ARGUMENT OF FREDERICK LIU
7 ON BEHALF OF THE RESPONDENT IN NO. 14-450

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

10 I want to begin by emphasizing how narrow
11 our rule is. Justice Kagan asked the question involving
12 a -- a case where the two defendants pointed their
13 fingers at each other. We are not advocating a rule
14 that would require severance in any case where two
15 defendants point their fingers at -- at each other. We
16 are advocating a rule that this Court has recognized in
17 Zant, Stringer, in Sanders, that -- that an Eighth
18 Amendment violation occurs when the weighing process
19 itself is skewed. And the weighing --

20 JUSTICE BREYER: But are you saying the
21 severance rule is the same in non-capital as in capital
22 cases?

23 MR. LIU: The general severance rule, Your
24 Honor, is the same.

25 JUSTICE BREYER: And you just look for

1 prejudice?

2 MR. LIU: Exactly. The general rule is you
3 can't have severance when it would compromise someone's
4 constitutional rights. The right at issue here just
5 happens to be an Eighth Amendment right, but we are not
6 advocating an Eighth Amendment rule that would apply
7 beyond the capital context or even beyond the penalty
8 phase.

9 JUSTICE SOTOMAYOR: You know, if you
10 violated an individualized sentence, why would we apply
11 harmless error review? Meaning, it seems
12 counterintuitive. We are now becoming the sentencing
13 body. No?

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

15 JUSTICE SOTOMAYOR: Oh, so then we have to
16 do the -- in harmless error, we have to decide whether
17 the aggravators outweighed the mitigators, etc., so much
18 that none of the error could have affected that choice?

19 MR. LIU: Well, this Court, Your Honor,
20 exercised in Satterwhite how -- precisely how difficult
21 it would be to conduct a harmless error analysis in a
22 penalty phase, and that is precisely because there are
23 so many factors involved.

24 Sure. The crimes in the case were horrific,
25 but that is just one side of the scale in a harmless

1 error inquiry. There is the entire other side of the
2 balance, the mitigation side.

3 And so it is quite difficult for this Court,
4 on a cold record, to go through the harmless error
5 analysis.

6 JUSTICE SOTOMAYOR: I -- I --

7 JUSTICE SCALIA: We have to do it, though,
8 right? I mean, that is -- that is part of -- part of
9 our jurisprudence. So what -- what do you think are
10 the -- are -- are the factors that would suggest the
11 jury would have come out a different way had the rule
12 that you urge been adopted? What specifically? One is
13 the shackling of the -- of the co-defendant?

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

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

1 MR. LIU: Well, a few responses to that. To
2 begin with, I think Your -- Your Honor is understating
3 the evidence here. This wasn't just that Reginald was a
4 lousy big brother. It was that he did things to
5 Jonathan that turned Jonathan into the person who was
6 capable of committing and even leading these crimes. So
7 this wasn't just "lousy big brother" evidence, this was
8 evidence that Reginald himself was the source of -- of
9 what caused Jonathan to do the things he did.

10 But, Your Honor, I think it is also
11 important to keep in mind two separate parts of the
12 inquiry. There is the violation and the harmless error
13 analysis. And this Court said in *Stringer* that even a
14 thumb on the scales is enough to skew the weighing
15 process in violation of the Eighth Amendment.

16 CHIEF JUSTICE ROBERTS: But what -- what
17 evidence that shouldn't have been admitted wouldn't have
18 been admitted in the -- in the separate trial?

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

1 before the prosecution pursuit in this case all had to
2 do with the circumstances of the crime.

3 But this evidence had nothing to do with the
4 circumstances of what happened on December 15th, it had
5 to do with the defendant's character concerning
6 circumstances that occurred years, even decades, before
7 the crimes at issue.

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

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

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

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

22 But even moving beyond that, there is every
23 reason to believe that the jury viewed Jonathan as
24 overall more culpable than Reginald. After all, the
25 State never established who the shooter was. If the

1 jury believed that Jonathan was the shooter, the jury
2 could have believed that Jonathan was so culpable that
3 even with his evidence that he had been corrupted by
4 Reginald, it would have given a life sentence. I think
5 --

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

16 Then Reginald drove the victims one by one
17 to various ATMs to withdraw cash. Jonathan raped or
18 attempted to rape both women twice. And Reginald raped
19 Holly G., who later testified once, placing the three
20 men, still naked, in the trunk of one of their cars.
21 The cars drove all five to a soccer field, forced them
22 to kneel in the snow, and shot them execution-style in
23 the back of the head. One of them fortuitously was not
24 killed because -- I think it was a hair clip that she
25 was wearing deflected the bullet. And she is the one

1 who testified to all of this activity.

2 And you truly think -- oh, and they ran over
3 her too. After shooting her in the head, the car ran
4 over her. You truly think that this jury, but for the
5 fact that your client was a corruptor, would not have
6 imposed the death penalty?

7 MR. LIU: We do, Justice Scalia. In your
8 own opinion in last term in *Glossip*, you noted that the
9 egregiousness of an offense is just one factor in
10 determining whether a sentence is appropriate at the
11 penalty phase. And Reginald Carr submitted a
12 week-and-a-half full of mitigation evidence that
13 extenuated this offense. So I do not -- I think when
14 you take all of that 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 Kansas thinks
17 is quite an easy case. I think the scales of the
18 weighing process were much more evenly balanced than
19 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 is not a relevant factor, and
25 that is not my saying it. It is 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. So while I
4 completely appreciate that severance would require some
5 duplication of resources, that is precisely the sort of
6 benefit that this Court has said cannot trump the Eighth
7 Amendment.

8 JUSTICE BREYER: So if you're right, joinder
9 being among the most common kind of thing with gangs and
10 drugs and so forth, why won't the same argument be made
11 over and over preventing requiring severance in dozens
12 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 in
16 that would negative the relationship that would tend to
17 show that this particular individual wasn't actually
18 involved in this aspect of it, et cetera. That is why
19 my experience on the Courts, lower courts particularly,
20 leads me to think it is a very rarely accepted argument
21 severance.

22 MR. LIU: You're right, Justice Breyer.

23 JUSTICE BREYER: Because if it would, you
24 would find it very unusual to try people together,
25 which, in fact, is very usual. When you told me there

1 is no separate thing for the death cases, then I imagine
2 it would affect every criminal trial of gangs across the
3 country. And that is something that is concerning me,
4 and I am looking for an answer.

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

10 JUSTICE BREYER: That is what I am looking
11 for. Why is it you believe that if I were to decide in
12 favor of you for this case and find the sufficient
13 precedent to warrant severance here, I wouldn't at the
14 same time be throwing a huge monkey wrench into the
15 ordinary cases of gangs, drugs, et cetera, where joinder
16 is very common and reversal is very rare?

17 MR. LIU: Because the evidence here is
18 special in the sense that it fell beyond any existing
19 sentencing factor.

20 JUSTICE GINSBURG: Are you proposing just
21 separate sentencing hearings, or are you proposing
22 separate juries for each of the brothers?

23 MR. LIU: Well, the Kansas Supreme Court in
24 this case ordered as its remedy a new trial with two
25 juries. I do not think that is necessarily going to be

1 the required remedy in every case. There are different
2 ways, Justice Ginsburg, to solve the problems of
3 sentencing.

4 JUSTICE GINSBURG: Let us take this case.
5 If you had only one jury and Jonathan goes first, that
6 jury, when it gets to Reginald's case, is not going to
7 forget everything it heard in Jonathan's case.

8 MR. LIU: You're absolutely right, Justice
9 Ginsburg. I don't think a sequential solution with
10 Jonathan going first is going to work in this case
11 precisely because the jury won't -- you won't be able to
12 unring the bell of precisely the evidence we think is
13 prejudicial in this case. But that is not to say that a
14 sequential solution is not going to work in the mine run
15 of cases.

16 This case is special just because there is
17 some allegation that the prejudice ran both ways.

18 JUSTICE KENNEDY: But the minute you defend
19 the idea of two different juries, then you sacrifice the
20 desirability and the possibility of consistency.

21 MR. LIU: Well, Justice Kennedy, there are
22 many ways that States have developed to resolve the
23 problem of inconsistent verdicts among different juries.
24 One way is what the Georgia State has done, which is had
25 proportionality review. They asked the appellate courts

1 to look across many sentences to see if they are
2 inconsistent.

3 Another way -- the Federal government has a
4 solution to this, is that let one jury know how the
5 other jury sentenced the other defendant. That is
6 18 U.S.C. 3592(a)(4). And so there are ways to solve
7 the problem of inconsistent verdicts across juries.
8 What is --

9 CHIEF JUSTICE ROBERTS: That sounds pretty
10 prejudicial to me. If the second case, you say, oh, the
11 jury considered this and individual circumstances, you
12 know, these people acted together, and by the way, a
13 jury of your peers unanimously found beyond a reasonable
14 doubt that this guy should be sentenced to death, now do
15 whatever you want with this guy. That sounds pretty
16 prejudicial to me.

17 MR. LIU: Well, it is -- it is -- if you
18 think that is prejudicial, Mr. Chief Justice, then this
19 proceeding was quite prejudicial too because the jury
20 was asked to make that same exact comparison. But the
21 specific prejudice we are alleging here is unique to
22 these or at least quite restricted to the circumstances
23 of this case.

24 JUSTICE KAGAN: Mr. Liu, could you, just for
25 me, just tell me what is the specific prejudice you're

1 alleging here? In other words, tell me more than just,
2 oh, he was a corrupting influence. What evidence
3 particularly came in?

4 MR. LIU: Sure.

5 JUSTICE KAGAN: And why do you think it
6 might have mattered to the jury? Just give me your best
7 shot.

8 MR. LIU: Sure. Kansas said there was no
9 expert testimony on this, but that is wrong.
10 Dr. Cunningham at Joint Appendix pages 324 to 329
11 explained how Jonathan looked up to Reggie, and every
12 time they would get together they would do drugs heavily
13 together. That when -- that when they were ages 6 or 7,
14 Reginald prompted someone to have sex with Jonathan.
15 These are precisely the sort of evidence that shows that
16 however bad you think Jonathan is, Reginald is worse
17 because Reginald is the one who created the person
18 Jonathan is. It is in a sense making Reginald doubly
19 culpable for these offenses, that whatever you think
20 Jonathan did -- and yes, as Justice Scalia read, there
21 were some horrific things done -- well, Reginald should
22 be punished for not everything Reginald did, but also
23 everything Jonathan did.

24 So this is precisely the sort of evidence
25 that basically transfers all of Jonathan's actions to

1 Reginald. That is why it is so prejudicial when you get
2 in the jury room, because it skews the weighing process.
3 And skewing the weighing process is an error this Court
4 has recognized for 30 years. This is not something that
5 we came up special for this case. This Court has
6 recognized time and again that when a jury is told to
7 consider an improper element in the weighing process,
8 the weighing process is therefore skewed. And the only
9 thing that can cure that error is either harmless error
10 review or reviewing by the State court.

11 JUSTICE SCALIA: But it has to have been
12 harmless inasmuch as the person who was influenced by
13 your client also got the death penalty. How can you say
14 that what made the difference was the fact that your
15 client was a corrupting influence upon his younger
16 brother?

17 MR. LIU: Well, Justice Scalia, the State
18 never established the identity of the shooter, and that
19 is the key horrific act in this case. If the jury
20 believed Jonathan was the shooter, then the jury might
21 have given him the death penalty anyway regardless of
22 what Reginald did to him.

23 JUSTICE SCALIA: I doubt whether that is the
24 key. You really think that that is the only thing the
25 jury is going to be focused on, is who pulled the

1 trigger? My Lord.

2 MR. LIU: I do not think it is the only
3 thing. I do not think it is the only thing. But it is
4 certainly the main thing given that we are here on a
5 capital murder charge.

6 JUSTICE SOTOMAYOR: Do you think that on a
7 retrial they cannot use the sister to prove that
8 Reginald claimed he was the shooter?

9 MR. LIU: No. And I think that just
10 highlights exactly how narrow our rule is. That the
11 evidence that Temica said that Reginald told her that
12 Reginald was the shooter goes to the circumstances of
13 the crime. And that sort of finger pointing, who shot
14 who on the day of the crime, is going to fall
15 comfortably within an existing sentencing factor, and as
16 a result is not going to skew the weighing process.

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

19 MR. LIU: Absolutely.

20 JUSTICE SOTOMAYOR: Evidence.

21 MR. LIU: And for reasons I -- I gave to
22 Justice Kagan, that evidence was extremely prejudicial.
23 It skewed the weighing process because it transferred
24 Jonathan's culpability back on to Reginald's shoulders.

25 If I may, I'd just like to address a few

1 points raised by my friend from Kansas. He said the
2 instructions solve the problem. Well, none of the
3 instructions told the jury to consider this evidence
4 about the corrupting influence only as to Jonathan.

5 Now, on the contrary, the instructions --
6 Instruction No. 2 told the jury consider the evidence
7 applicable to each defendant. Well, this evidence was
8 equally applicable to Reginald as it was to Jonathan.
9 After all, it was Reginald -- Reginald's actions that
10 were at issue.

11 My friends also point to the instruction on
12 statutory aggravators. But that disregards an entire
13 swath of evidence that the jury heard that it could
14 consider against Reginald. This was evidence --
15 anti-mitigation evidence that the jury considered, could
16 have caused them to remove weight from the mitigation
17 side of the scale. And the instructions left the jury
18 completely free to consider this evidence in
19 anti-mitigation.

20 My friend also suggest that I'm here only
21 arguing an error of State law. Well, no less than the
22 Petitioners were in, Zant, Stringer, and -- and Sanders.

23 Each of those cases recognizes that a
24 skewing of the weighing process has to be based on State
25 law premises. That's why this Court in Zant went so far

1 as to certify a question to the Georgia Supreme Court.

2 Yes, it's true that to understand the effect
3 on the weighing process, you have to look at the State
4 law. But the mere admission of evidence isn't what
5 causes the violation here. It's the admission of the
6 evidence, followed by the fact the jury was required to
7 consider it. And it was required to consider it because
8 it was part and parcel of Jonathan's mitigating
9 evidence.

10 And this Court has said time and again that
11 a defendant has a constitutional right for the jury, not
12 only to consider but to listen to, a defendant's
13 mitigating evidence.

14 So by considering this evidence for
15 Jonathan, the jury necessarily considered it against
16 Reginald. After all, if you're told that Reginald had a
17 corrupting influence on Jonathan, you can't separate
18 that as something for Jonathan and something for
19 Reginald. It's equally applicable to both.

20 My friend also suggested that we -- we
21 rejected a two-jury solution before trial. Well, we
22 rejected that, not because of it wouldn't work to solve
23 any prejudice in the penalty phase, but because it
24 wouldn't work to solve any prejudice in the guilt phase.

25 And remember, the Kansas Supreme Court found

1 that it was actually error to keep the guilt phase
2 joined, so we were perfectly appropriate in objecting to
3 a two-jury solution at that phase of the trial.

4 JUSTICE GINSBURG: Can you explain that
5 again? I thought you -- you sought only a severance at
6 the sentencing phase.

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

8 JUSTICE GINSBURG: You sought severance
9 totally?

10 MR. LIU: Exactly. Prior to trial, on pages
11 25 and 26 of the Joint Appendix, we moved for severance
12 of the entire thing.

13 And if you look at those pages, you'll see
14 Jonathan's attorney, Jonathan's own attorney, saying
15 that if the penalty phase is joined, he is going to have
16 to present evidence that, quote, "there's no way the
17 State would be able to introduce if Reginald was sitting
18 here alone."

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

21 I see that my time is up.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Green.

24 ORAL ARGUMENT OF JEFFREY T. GREEN

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

1 MR. GREEN: Mr. Chief Justice, and may it
2 please the Court:

3 I'd like to first try and change the
4 narrative here with some illustrations about the
5 difference between the mitigation cases of both
6 defendants. That's easily seen in the testimony of the
7 experts.

8 Reginald Carr presented evidence from a
9 neuroscientist by the name of Dr. Waltersdorf that said
10 his client had been diagnosed a -- an incurable
11 sociopath.

12 Jonathan Carr's forensic psychologist,
13 clinical and forensic psychologist, got up and testified
14 that -- that Jonathan was sensitive, he was
15 affectionate, he had attempted suicide, and what he
16 really was, contrary to what Mr. McAllister represented
17 to you, was -- was depressed and schizophrenic.

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

22 Reginald says he didn't want to hear or he
23 thought it would be prejudicial if the jury heard
24 evidence from the -- from the -- from Jonathan's
25 witnesses about Reginald being a -- a corrupting

1 influence. On the other side, Jonathan doesn't want the
2 jury to hear from Reginald's expert.

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

5 Justice Waltersdorf's -- or excuse me --
6 Dr. Waltersdorf's testimony about incurable sociopathy
7 would not have been relevant or --

8 JUSTICE KAGAN: Maybe I'm missing something,
9 but if -- if your client's strategy was to make Reginald
10 as bad -- the bad actor in the case, why didn't that
11 evidence actually go hand and hand with your client's
12 strategy, which was to say it's all on Reginald?

13 MR. GREEN: One -- one would think that it
14 would in -- in a typical case, and it may be that some
15 jurors had inferred that way.

16 The problem was that -- that the fact that
17 the two brothers were sitting together allowed the
18 prosecutors to repeatedly paint them with the same
19 brush.

20 And -- and if we take a look, for example,
21 at JA 402, the prosecutor says to the jury in her
22 opening argument at the beginning of the penalty -- or
23 at the conclusion of the penalty phase, ladies and
24 gentlemen, they have the same eye color. They are now
25 wearing glasses, although their mother said Reginald

1 doesn't need them, they share some DNA.

2 JUSTICE BREYER: So this -- maybe you can,
3 in your experience, cure what's bothering me about the
4 case. It's nothing to do with the facts, or for this --
5 this concern, it has to do with -- with Zafiro.

6 MR. GREEN: Right.

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

9 And what the Court says is you can have the
10 joinder as long as there isn't a serious risk that the
11 joint trial would compromise. It doesn't say harmless
12 error. It says compromise a specific trial's right, or
13 prevent the jury from making a reliable judgment. That
14 doesn't talk about harmless error. Now, that's the
15 standard that's used in dozens and dozens and dozens of
16 cases.

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

20 Well, what have we done to that sentence,
21 and what have we done to the trials that are joint in
22 hundreds of cases that don't involve murder or death?
23 That is the legal problem that is worrying me. You will
24 either cure that worry or say I've made some elementary
25 mistake. It has nothing to do with your case. Say what

1 you want, but I want to hear what you think about it.

2 MR. GREEN: I don't -- I don't think you
3 made any mistake at all, Justice Breyer. In deed, I
4 think that -- that the State of Kansas and the Solicitor
5 General are offering nothing more than -- than the
6 Zafiro test in using slightly different language.

7 On page 15 --

8 JUSTICE BREYER: So we should not use the
9 words "harmless error." We should quote from Zafiro and
10 say could they make a reliable judgment? Now, that
11 sounds harder on you, because if all you have to show is
12 the error was harmful, it sounds like an easier task you
13 have than to show that the juror -- jury wasn't
14 reliable. Or are they the same thing in your opinion?

15 MR. GREEN: I think they're the same thing,
16 and I think that's a generalization, but we've -- we've
17 offered a test that actually specifies it a little bit
18 more, Justice Breyer.

19 In terms of saying that -- that the test
20 should be whether there is a reasonable risk -- and I
21 will explain the difference between reasonable and
22 serious in a minute -- but whether there was a
23 reasonable risk that there would be evidence introduced,
24 material, prejudicial evidence introduced that would --
25 that would -- in fact would not have been introduced in

1 a severed penalty-phase proceeding.

2 And to go back to Justice Kagan's question
3 about the intuitive difference between these two things,
4 they're between -- excuse me -- trials and -- and
5 penalty-phase proceedings, the answer is that's because
6 in a -- in a trial, the -- the relative culpability of
7 the defendants makes a big difference with respect to
8 who's a conspirator, who's not a conspirator, who's a
9 principal, who's an aider and abettor.

10 But when we turn to the penalty phase, the
11 inquiry changes. As Mr. Liu indicated, it changes from
12 exactly what happened to who this person is and whether
13 or not the jury wants to put this person to death.

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

19 MR. GREEN: Well, in --

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

25 MR. GREEN: Well, in this case,

1 respectfully, no, Mr. Chief Justice, because what the --
2 what the State basically said was we're relying on our
3 evidence from the -- from the trial phase -- or from the
4 guilt phase of this capital trial.

5 That's exactly what the prosecutor told the
6 jurors when they turned into the penalty phase. And all
7 that the prosecution did in the penalty phase was
8 cross-examine the defense witnesses.

9 CHIEF JUSTICE ROBERTS: Well, but that
10 cross-examination is important.

11 Were there any common defense witnesses?

12 MR. GREEN: There were family members.
13 So -- so it is true.

14 CHIEF JUSTICE ROBERTS: So at least it would
15 be -- it would be helpful for the second -- the person
16 who goes second to know, well, what did the prosecutor
17 talk -- how did the prosecutor attempt to cross-examine
18 that witness, because I am going to call the same
19 witness and her testimony is going to be a lot better
20 the second time around because you will know exactly
21 what the cross-examination questions are going to be.

22 MR. GREEN: That might happen. I -- it
23 could well be that that would be -- I would consider
24 that a -- a minor advantage, Your Honor. But that could
25 be handled by the judge in -- with protective orders,

1 with orders, with orders about -- rules against
2 witnesses and -- and folks in the courtroom, we'll have
3 another proceeding.

4 But I would submit -- and with then respect
5 to witnesses who might have been traumatized by these
6 events, that the -- you know, a trial court could easily
7 have a simultaneous penalty proceedings so that that
8 witness would only have to testify once. The defense
9 team on one side wouldn't get an advantage over the
10 other. There would be two juries in two different
11 courtrooms, same week, same days, the -- the witness can
12 go back and forth between courtrooms, and there is none
13 of the advantage --

14 JUSTICE ALITO: You would have -- the State
15 would have to put on, basically, its guilt phase again
16 at the penalty phase, right?

17 MR. GREEN: Yes. It would have to do that.
18 But I would imagine that -- that with respect to cases
19 like this, the defense attorneys are going to move right
20 into what counts as stipulations. We will read
21 testimony --

22 JUSTICE ALITO: Well, I am sure you'd like
23 to stipulate to all the facts that were proven at the
24 guilty phase, but I doubt that the State is going to
25 want to stipulate to those.

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

2 And, again, I think a trial judge could
3 easily handle that by expediting matters. And this is
4 what happens in a lot of the Federal trials. I would
5 refer the Court to the -- to the brief of the Promise of
6 Justice Initiative, which shows that when we have joint
7 trials, we get joint results. When we have severed
8 trials, we get severed routes. 25 for 25. Joint
9 trials, same result for the defendants.

10 Winston says we must have individualized
11 sentencing at the penalty phase, so I do not see why the
12 Zafiro test would not -- would -- would work for penalty
13 phase proceedings without some sort of change. There
14 has to be some recognition that -- that penalty phase
15 proceedings are different than -- than all the other
16 armed robbery, drug cases.

17 JUSTICE SOTOMAYOR: So how is that different
18 from what the government said?

19 MR. GREEN: I -- so I think we ought to
20 lower the risk standard. We ought to lower the risk
21 standard to a reasonable risk standard, not --and that
22 is what we propose in our brief at page 15. We should
23 lower the standard because that would recognize the
24 acute need for reliability and accuracy when it comes to
25 penalty phase proceedings and the decision whether

1 somebody is going to live or die.

2 JUSTICE GINSBURG: You said were you going
3 to make a distinction between serious and reasonable
4 earlier.

5 MR. GREEN: Right. So a serious risk may be
6 treated as a -- as a preponderance or a -- or a buff.
7 With respect to reasonable, we are at a -- we're at a --
8 a -- maybe a likelihood. Maybe that is -- maybe that is
9 perceived as 30 percent versus 55 percent or 60 percent,
10 something like that.

11 And indeed, this Court said in Boyde with
12 respect to reasonable likelihood, that is not a
13 preponderance standard.

14 If the Court has no further questions, we
15 would urge --

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Mr. McAllister, five minutes.

18 REBUTTAL ARGUMENT OF STEPHEN R. McALLISTER

19 ON BEHALF OF PETITIONER

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

22 I will try to be brief. The only Eighth
23 Amendment implication that this Court has recognized
24 that really applied to this case is I go back to the
25 Romano case where the Court said, the admission of

1 evidence that might or might not be in violation of
2 State law is not an Eighth Amendment concern. The only
3 time the Eighth -- Eighth Amendment comes into play is
4 when the evidence involved constitutionally protected
5 conduct. An example would be Dawson v. Delaware, where
6 they sought a capital sentence. He was a member of the
7 Aryan Brotherhood in prison, and had nothing to do with
8 an aggregating factor, that was
9 First-Amendment-protected activity. The Court said that
10 kind of thing could be an Eighth Amendment problem if
11 you used against the defendant.

12 Their cases -- I could be wrong, but I think
13 all of their cases, Zant, Stringer, the others that they
14 refer to skewing the weighing process, are not about
15 admission of evidence; they are about invalid
16 aggravating factors. So you've basically told the jury
17 there is something else, literally, on the scale, an
18 aggravating factor that later the State says, no, that
19 was not correct, that should not have been there. That
20 is distinguishable from this case.

21 I -- I agree completely with
22 Justice Scalia's point, add the dissenting justice made
23 it in the Kansas Supreme Court; if the evidence -- the
24 corrupting influence evidence was so prejudicial to
25 Reginald, why did Jonathan also get a death sentence?

1 And I would close by saying that we all
2 agree, I think, that the Constitution values accuracy
3 and fairness. But it also values finality. And each of
4 these individuals received an individualized sentence,
5 presented all the evidence they wanted to. The jury was
6 instructed to consider them individually. And if we
7 were to undue this now, it would be very different for
8 Kansas to go back. We'd be talking about having to redo
9 all of the guilt phase evidence. And, again, you get
10 into question-separate proceedings, traumatizing victims
11 yet again. None of that is necessary, because at the
12 end of the day they got a fundamentally fair proceeding
13 that gave each of them the sentence they deserved, and
14 the jury found warranted, both under the facts of this
15 case and the law of Kansas.

16 We would ask that you reverse the Kansas
17 Supreme Court on this point.

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

23 MR. McALLISTER: Yes. That is the third
24 question presented in the Petition, which my
25 understanding is that is something the Court could

1 reconsider. It is not denied. The Court granted
2 questions 1 and 3. The other question that we presented
3 was the only other ground that the Kansas Supreme Court
4 gave for reversal, that is a Confrontation Clause
5 violation in terms of some of the hearsay evidence
6 presented in the sentencing proceedings.

7 So if the Court were to reverse on these,
8 deny on that question, then the Kansas Supreme Court
9 could, in fact, rely on that ground. But our hope would
10 be that the Court would do something different than that
11 if you reverse on these two questions.

12 Unless there are further questions, thank
13 you.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 The cases are submitted.

16 (Whereupon, at 12:06 p.m., the case in the
17 above-entitled matter was submitted.)

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