1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KANSAS, :

4 Petitioner : No. 14-452

5 v. :

6 SIDNEY J. GLEASON. :

7 - - - - - - - - - - - - - - - - - - - x

8 and

9 - - - - - - - - - - - - - - - - - - - x

10 KANSAS, :

11 Petitioner : No. 14-449

12 v. :

13 JONATHAN D. CARR. :

14 - - - - - - - - - - - - - - - - - - - x

15 and

16 - - - - - - - - - - - - - - - - - - - x

17 KANSAS, :

18 Petitioner : No. 14-450

19 v. :

20 REGINALD DEXTER CARR, JR. :

21 - - - - - - - - - - - - - - - - - - - x

22

23 Washington, D.C.

24 Wednesday, October 7, 2015

25

1 The above-entitled matter came on for oral
2 argument before the Supreme Court of the United States
3 at 10:05 a.m.
4 APPEARANCES:
5 GEN. DEREK L. SCHMIDT, ESQ., Attorney General, Topeka,
6 Kan.; on behalf of Petitioner.
7 JEFFREY T. GREEN, ESQ., Washington, D.C.; on behalf of
8 Respondents in Nos. 14-452 and 14-459.
9 NEAL K. KATYAL, ESQ., Washington, D.C.; on behalf of
10 Respondent in No. 14-450.
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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear

4 argument first this morning in Case 14-452, Kansas v.

5 Gleason and the consolidated cases.

6 General Schmidt.

7 ORAL ARGUMENT OF DEREK L. SCHMIDT

8 ON BEHALF OF THE PETITIONER

9 MR. SCHMIDT: Mr. Chief Justice, and may it

10 please the Court:

11 These sentences do not offend the Eighth

12 Amendment. Each of these jurors was able to give

13 meaningful effect to anything and everything they heard

14 and presented in mitigation. The verdicts reflect the

15 reasoned moral response of these jurors to the

16 aggravated brutality of these crimes, the weak claims

17 for mitigation, and the individual assessment of each

18 Respondent's moral culpability.

19 JUSTICE GINSBURG: Do you agree -- do you

20 agree, whatever the Eighth Amendment does not require,

21 that it would be better practice for the trial judge to

22 tell the jury what the burden is on mitigators, just to

23 ward off any possibility of confusion?

24 MR. SCHMIDT: And, in fact, Justice

25 Ginsburg, that now happens in Kansas. Subsequent to

1 this case, the State made a decision to alter its
2 pattern instructions, but that'd not required by the
3 Eighth Amendment. In fact, the Kansas --
4 JUSTICE SOTOMAYOR: So why can't we presume
5 it's required by the State law, not the Constitution? I
6 mean, as I'm reading the decision below, the court is
7 saying that the principles of the Eighth Amendment give
8 voice to or support for the use of this burden and
9 Kansas is commanding it.
10 MR. SCHMIDT: Well, I think not, Your Honor.
11 This decision -- these decisions were plainly based on
12 the Kansas Supreme Court's interpretation not of State
13 law, but of the Eighth Amendment. And I -- I would
14 point out a couple of reasons I believe that conclusion
15 is inescapable.
16 First, the court's conclusion, which is
17 indicated at page 103 in our application, the summary of
18 what it did, the court indicated very plainly that it
19 was talking about mitigating evidence as required by the
20 Eighth Amendment with no reference to State law or State
21 practice whatsoever.
22 Second, this argument has been presented
23 previously when Kansas has been before this Court. This
24 Court rejected a similar argument in Kansas v. Marsh; it
25 rejected a similar argument in Kansas v. Cheever two

1 terms ago. It presumably rejected or at least not
2 embraced the similar argument made at the cert stage in
3 these cases.
4 And in fact, in the Kansas v. Marsh case --
5 JUSTICE SCALIA: Did the Kansas Supreme
6 Court read these cases?
7 MR. SCHMIDT: Perhaps I ought not answer
8 that, Justice Scalia, but --
9 JUSTICE SCALIA: How can you explain it
10 if -- if indeed our prior cases are so clear on the
11 point?
12 MR. SCHMIDT: Justice Scalia, I, of course,
13 don't --
14 JUSTICE SCALIA: They don't like the death
15 penalty.
16 MR. SCHMIDT: -- know how to answer that
17 question. I can only say that this decision -- these
18 decisions clearly are based on that court's
19 interpretation of the Eighth Amendment.
20 JUSTICE SOTOMAYOR: But that can't be.
21 Already we know and the Kansas court knew the dissent
22 pointed out that a burden for mitigating circumstances
23 of a preponderance of the evidence is okay, so they
24 can't believe that no burden is required by the
25 Constitution. They know that there is no requirement

1 because the cases mentioned by you and Justice Scalia
2 say that. So it has to be their view of State law.
3 MR. SCHMIDT: No, Your Honor, I believe it's
4 error, and that's why we're in front of this Court. And
5 if there's any question about that --
6 JUSTICE SCALIA: I -- I suppose the issue is
7 not what they believe, but what they said.
8 MR. SCHMIDT: They did in fact --
9 JUSTICE SCALIA: I mean, we -- we -- we
10 don't psychoanalyze the lower courts; we -- we look at
11 what they said. And if they said that it's the Eighth
12 Amendment, it's the Eighth Amendment.
13 MR. SCHMIDT: In the 10 pages of the
14 majority opinion on this subject in the Gleason case,
15 Your Honor, there are 8 references to the Eighth
16 Amendment; in the dissent slightly fewer pages in total,
17 but 18 references to the Eighth Amendment. And in the
18 Gleason decision, it's in our reply at page 8, the
19 Kansas Supreme Court rejected the notion that the
20 subject matter at issue here wasn't required by the
21 Eighth Amendment, instead, wrote both recommended
22 statements from the prior case, the one at issue.
23 JUSTICE KENNEDY: If you prevail here on
24 your position, is it necessary for us to remand to the
25 Kansas Supreme Court to determine -- for them to

1 determine whether State law would require a different
2 result on this issue? I know there are some other
3 issues in the case, but on this issue or --
4 MR. SCHMIDT: Not on this issue, Your Honor.
5 JUSTICE KENNEDY: -- or are we permitted
6 simply to reverse outright?
7 MR. SCHMIDT: I believe you're permitted to
8 reverse outright.
9 JUSTICE KENNEDY: Certainly remand on some
10 on other issues, I understand.
11 MR. SCHMIDT: Correct. We presume there
12 would be further proceedings below on other issues that
13 weren't decided in the case.
14 JUSTICE GINSBURG: Why couldn't -- why
15 couldn't the Kansas Supreme Court say on remand, thank
16 you for enlightening us about the Eighth Amendment, but
17 we still think that Kansas law, independent of any
18 Federal constitutional requirement, requires juries to
19 be told what the burden is? They could do that on
20 remand.
21 MR. SCHMIDT: Justice Ginsburg, that would,
22 of course, be an issue that we would argue on remand if
23 it were briefed. That's not what they did here. And,
24 in fact, if this Court does not correct the Eighth
25 Amendment error, I would respectfully submit we'll never

1 get to that question on remand because the Eighth
2 Amendment, that court's interpretation of it, will
3 dispose of this case.
4 JUSTICE GINSBURG: What about the other?
5 Didn't they say something about inadmissible hearsay
6 having prejudice -- cause prejudice in the Carr case?
7 MR. SCHMIDT: In the Carr case, there was an
8 issue with respect to that, Justice Ginsburg. It is not
9 part of the questions that were presented or being
10 argued in front of this Court. It was, as you know, a
11 voluminous record with many, many issues discussed.
12 The Kansas Supreme Court's decision below
13 should be reversed by this Court because it made two
14 errors. First, the Kansas Supreme Court incorrectly
15 found in the Eighth Amendment what the dissent called a
16 per se requirement. They found that there was a
17 requirement in the Eighth Amendment for an affirmative
18 instruction that mitigation need not be proven beyond a
19 reasonable doubt.
20 JUSTICE BREYER: Is there -- to go back to
21 the question that Justice Ginsburg has asked, as we say,
22 this Court has never held that there is an absolute
23 requirement that you give the reasonable doubt -- don't
24 say it's no reasonable doubt in a mitigating case, just
25 what you said.

1 MR. SCHMIDT: Correct.

2 JUSTICE BREYER: We send it back because, as

3 you said, they just -- if the law in the State is

4 different, they've changed it. When they changed it,

5 did they apply the change retroactively?

6 MR. SCHMIDT: No, Your Honor.

7 And, in fact, if this Court --

8 JUSTICE BREYER: What did they say?

9 MR. SCHMIDT: The pattern instructions in

10 Kansas that would be applicable in a circumstance like

11 this on this subject have been changed prospectively.

12 And we now use them.

13 JUSTICE BREYER: But that court's held it's

14 only prospective?

15 MR. SCHMIDT: I don't believe that's been --

16 JUSTICE SCALIA: You -- how can you

17 retroactively give an instruction? Right?

18 JUSTICE BREYER: Well, you very simply say,

19 yes, have a new trial, that's how. I mean, you simply

20 set a new sentencing hearing --

21 MR. SCHMIDT: But, Your Honor, of course,

22 there would be no need for a new trial if this Court

23 will correct the Eighth Amendment error, which is what

24 we're trying for --

25 JUSTICE BREYER: There would be a need if

1 Kansas law, as is now revealed by their pattern
2 instructions, suggests that you do have to give the
3 instruction that's -- that the -- that the defendant
4 wants, and you'd have to have a new sentencing
5 proceeding, wouldn't you?
6 MR. SCHMIDT: No, Your Honor, not --
7 JUSTICE BREYER: Why not?
8 MR. SCHMIDT: Not unless that instruction
9 were to apply retroactively in the case --
10 JUSTICE BREYER: Yes --
11 MR. SCHMIDT: -- and that question, of
12 course, is not presented.
13 In fact, there are currently 9 persons under
14 sentence of death in Kansas and this issue, this Eighth
15 Amendment issue, as our court has expressed it, is
16 present in 6 of them. So two-thirds of the death
17 penalty cases in our State are negatively affected in
18 the event this Court were to decline to correct the
19 Eighth Amendment error and allow the Kansas court to
20 continue to misapply the Eighth Amendment in the manner
21 that it's done.
22 JUSTICE KAGAN: How -- how was the change to
23 the pattern instructions made? Who made it?
24 MR. SCHMIDT: There's a pattern instruction
25 committee, Your Honor, that develops these pattern

1 instructions.

2 JUSTICE KAGAN: Is it approved by the

3 Supreme Court or is it divorced from the Supreme Court?

4 MR. SCHMIDT: I believe that's correct, but

5 I -- I don't want to swear to that, Your Honor.

6 JUSTICE KAGAN: You believe it's correct,

7 that it is approved by the Court.

8 MR. SCHMIDT: I want to double-check on that

9 point, Your Honor.

10 JUSTICE KAGAN: Okay.

11 MR. SCHMIDT: Yes.

12 JUSTICE BREYER: My thinking is the

13 following, so you'll understand why I ask this question.

14 It, I think, could be the case that you're right, that

15 this Court has never held that the Eighth Amendment

16 requires giving such an instruction.

17 Next question: Should it now hold it?

18 Well, the answer to that question could be this is not a

19 good case to decide that. Because it may be that the

20 Kansas court has held it as to the future and may apply

21 the future rule as to the 9 people who are involved in

22 the past. Therefore, send it back.

23 What do you think of that reasoning?

24 MR. SCHMIDT: Well --

25 JUSTICE BREYER: Probably not much, but I'd

1 like to know your reasons.

2 (Laughter.)

3 MR. SCHMIDT: Respectfully, I -- I share

4 your conclusion on that point, Justice Breyer.

5 JUSTICE ALITO: Isn't it true, General

6 Schmidt, that it makes a big difference whether this is

7 done under the Federal Constitution or under Kansas law?

8 And presumably, the Kansas Supreme Court understood that

9 it had the capability of basing its decision on Kansas

10 law. But if -- if it did that, it would have to take

11 responsibility for the decisions in these cases, which

12 involve some of the most horrendous murders that I have

13 seen in my 10 years here. And we see practically every

14 death penalty case that comes up anywhere in the

15 country. These have to rank as among the worst. So it

16 didn't take responsibility for that. It said it's the

17 Eighth Amendment, and we have to apply the Federal

18 Constitution.

19 Now, it may be they will say, well, we're

20 going to say that Kansas law requires this, but then

21 it's their responsibility; isn't that true?

22 MR. SCHMIDT: Justice Alito, I, of course,

23 won't speculate on what the Kansas court was -- might

24 do. I --

25 JUSTICE ALITO: Well, I wasn't speculating

1 on why they did what they did, but the consequences of
2 basing it on the Federal Constitution. One of the
3 consequences of basing it on the Federal Constitution is
4 that they don't have to take responsibility for it.
5 MR. SCHMIDT: I have no ability to dispute
6 that --
7 JUSTICE SCALIA: Do -- do you have retention
8 elections in Kansas?
9 MR. SCHMIDT: We do, Your Honor.
10 JUSTICE SCALIA: Yes. And the fact --
11 how -- how many people are there on death row in Kansas?
12 MR. SCHMIDT: There are currently 9 under
13 sentence, with a tenth --
14 JUSTICE SCALIA: Which would suggest that --
15 that Kansans, unlike our Justice Breyer, do not think
16 the death penalty is unconstitutional and indeed very
17 much favor it, which might suggest that a retention
18 election that goes before such people would not come out
19 favorably for those justices who create Kansas law
20 that -- that would reverse these convictions.
21 I'm just speculating, of course.
22 MR. SCHMIDT: Justice Scalia, all I can say
23 is that in these cases, it's certainly apparent to us,
24 and I think to any fair reading, that the Kansas court
25 relied on the Federal Eighth Amendment in making these

1 decisions, and absent correction of those occurred by
2 this Court will continue to do so.
3 JUSTICE SOTOMAYOR: What is this Court
4 supposed to do when it's told its own lower courts three
5 times before this case, or two, you must give this
6 instruction? What -- what -- what's the Court supposed
7 to do?
8 MR. SCHMIDT: Are you asking about what the
9 Kansas Supreme Court is supposed to do in that case,
10 Your Honor?
11 JUSTICE SOTOMAYOR: Yes. Whether the
12 Constitution requires it or not, it has said the better
13 practice is to give this instruction.
14 What's a court supposed to do? Say,
15 willy-nilly, my lower courts can disagree with me and
16 not do it?
17 MR. SCHMIDT: Justice Sotomayor, no. And I
18 would leave it to the Kansas court under Kansas law and
19 practice. It is, of course, the supreme court of the
20 State to determine what the appropriate step would be
21 under State law. But what the Kansas court is not
22 supposed to do in that circumstance is pivot to the
23 Eighth Amendment and make a Federal decision that is
24 incorrect under this Court's practices.
25 JUSTICE KENNEDY: Right. And it can't --

1 and it can't, by doing so, immunize itself from -- from
2 review in this Court. And that's Michigan v. Long,
3 which -- which -- which I don't know if were cited in
4 the brief, but Michigan v. Long, to Justice Alito's
5 point, made it very clear that a -- a State court can't
6 hide behind a -- a Federal law and -- and -- and be
7 immune because there might be a State law to predicate.
8 We have to see what they wrote. And this -- I assume
9 that Kansas would pride itself on -- on being cited in
10 other jurisdictions. And if it's wrong and it uses a
11 Federal calculus that's incorrect, it's -- it's this
12 Court's duty to reverse.
13 MR. SCHMIDT: Yes, Justice Kennedy, I
14 certainly agree. And to that last point on other
15 jurisdictions, we've identified, and they're in our
16 briefs, at least 5 states that we believe are similarly
17 situated, where they actually impose no burden, but
18 don't require an affirmative instruction.
19 And we believe, notwithstanding the
20 back-and-forth in the briefs, that the Uniform Code of
21 Military Justice looks much more like the Kansas system
22 on this point than on what the Kansas Supreme Court says
23 is constitutionally required.
24 JUSTICE KENNEDY: I suppose -- I suppose
25 that it is true that if you're a juror and you're

1 considering whether or not to grant mercy, that's not
2 something that's easily subject to a burden-of-proof
3 analysis one way or the other. If a juror thinks I have
4 sympathy for this person or I want to grant mercy,
5 that -- that's not really the -- the kind of fact like
6 you're -- you're 18 or you're 21 or your father did or
7 didn't abandon you that can be proven in -- with a
8 burden of proof of any sort.
9 MR. SCHMIDT: Certainly correct,
10 Justice Kennedy. And, of course, a mercy instruction
11 was given in each of these cases. And in addition,
12 separate and apart from the mercy instruction issue,
13 this Court has in the past looked at what you've called
14 catch-all instructions, like the Factor K instructions
15 from California, has looked on them favorably. And in
16 these cases there was a catch-all instruction given as
17 well. It's an instruction 7 on Gleason 6 and 8 with
18 respect to the Carr cases. So there was both a
19 belt-and-suspenders alternate option.
20 JUSTICE KAGAN: Sorry. What does that mean,
21 a "catch-all instruction"?
22 MR. SCHMIDT: It's the language in -- it's
23 the last paragraph of Section 7. It reads this way, if
24 I may, Justice Kagan: "You may further consider as a
25 mitigating circumstance any other aspect of the

1 defendant's character, background, or record, and any
2 other aspect of the offense which was presented" -- not
3 proven, presented -- "in either the guilt or penalty
4 phase which you find may serve as a basis for imposing a
5 sentence less than death.
6 And to Justice Kennedy's point, that's
7 clearly not a finding subject to some burden of proof.
8 It's an open-ended invitation to consider and weigh and
9 give effect to anything else these jurors think
10 appropriate in rendering a reasoned, moral judgment.
11 JUSTICE KAGAN: Didn't the Court --
12 JUSTICE KENNEDY: I'm reading that from
13 Gleason, and that's also in Carr?
14 MR. SCHMIDT: Yes, Your Honor. It's
15 Instruction 6 and 8 in Carr. Similar language. It may
16 not be exactly identical, but it's substantively
17 identical.
18 JUSTICE SOTOMAYOR: Didn't the Kansas Court
19 say, yes, we have that, but the only burden of proof in
20 any of the instructions was in aggravating circumstances
21 and that the State bore that burden?
22 And it pointed to the fact that aggravating
23 and mitigating were mentioned in the same clause 5 or 6
24 times with no explanation of what the burden was for
25 mitigating. The Kansas Court thought that the jurors

1 could be confused or would be confused by what burden of
2 proof was needed.
3 MR. SCHMIDT: Justice Sotomayor, and that's
4 the second reason we would respectfully ask this Court
5 to reverse the Kansas Court, in addition to the
6 bright-line per se rule.
7 The Kansas Court reported it said it was
8 applying this Court's instruction from Boyde v.
9 California to test whether or not the Eighth Amendment
10 is offended by instructions that are alleged to be
11 ambiguous or confusing, which I think is what's
12 happening there.
13 The Kansas Court said it was applying Boyde,
14 but then it went on to conduct no actual Boyde analysis
15 other than what Your Honor points to, which is simply
16 the State said repeatedly, in both cases, that there is
17 a burden of proof beyond a reasonable doubt that the
18 State must prove with respect to aggravators, and also
19 with respect to the weighing factor.
20 And the mere silence on the other side
21 somehow led the Kansas Court to conclude that Boyde was
22 violated because jurors would have inferred what was
23 imposed on the State must also have been imposed on the
24 Respondent. I just don't think that follows either
25 logic or natural language.

1 JUSTICE SOTOMAYOR: I -- I think what
2 they're saying is that some jurors would be confused.
3 And certainly, there have been jury -- jury studies to
4 indicate that jurors are often confused, generally,
5 about burdens of proof.
6 MR. SCHMIDT: Justice Sotomayor, I certainly
7 agree that is what they seem to be saying, but the test
8 this Court has adopted and replied repeatedly since
9 Boyde is not that there is some speculative possibility
10 in a hypothetical circumstance somebody might have been
11 confused. It is there is a showing, that there is a
12 reasonable likelihood that these jurors applied their
13 instructions in a way that prevented them from
14 considering constitutionally relevant mitigation
15 evidence. There's no showing of it.
16 JUSTICE SCALIA: It is such common sense
17 that there is a maxim of interpretation that invokes it.
18 When -- when somebody says interest-free loans for
19 people with good credit, it implies that there are not
20 interest-free loans for people who don't have good
21 credit. Inclusio unius, exclusio alterius.
22 And if one says there are aggravating
23 factors and mitigating factors, and you must prove the
24 aggravating factors beyond a reasonable doubt, the
25 normal understanding is you don't have to prove it

1 beyond a reasonable doubt for the mitigating factors.
2 That's such -- such common reasoning that --
3 that any juror who doesn't follow it is -- is certainly
4 not the typical juror, and not the person for whom the
5 jury instructions have to be devised.
6 JUSTICE SOTOMAYOR: Well, the jury
7 instructions don't have to be devised necessarily for
8 the Court. They should be understandable to jurors.
9 And I doubt very much that any juror has heard of that
10 maxim.
11 But putting that aside, the Kansas Court,
12 which has much more experience than we do with trial
13 court decisions, has determined that confusion exists or
14 can exist. Why isn't that enough for us?
15 MR. SCHMIDT: Your Honor, I would point you
16 back again to the concluding paragraph, because I think
17 it illustrates my response that -- there's suggestion of
18 the response throughout the record, but it illustrates
19 it well.
20 Again, back on page 103 of the Gleason
21 appendix, this is what our court said: "The district
22 court's instruction on mitigating circumstances failed
23 to affirmatively inform the jury that mitigating
24 circumstances need not be proven beyond a reasonable
25 doubt." So there was silence on that point.

1 Next sentence: "And the penalty phrase" --
2 "phase instructions as a whole exacerbated the error
3 because they referred only to the State's burden of
4 beyond a reasonable doubt," which, of course, will
5 always be true because it's constitutionally required
6 that the jurors be informed the State, the government
7 bears that burden beyond a reasonable doubt.
8 The Kansas Court then concluded in the next
9 sentence -- I won't read it because I've cited it before
10 -- but under these circumstances, in other words, when
11 there is an instruction that the State must prove beyond
12 a reasonable doubt and there is silence on the other
13 side, we conclude there is a reasonable likelihood that
14 -- the Boyde is violated -- I'm summarizing, of
15 course -- it is conclusory and nothing else.
16 In other words, it is back to that per se
17 application that was novel in the Kansas Supreme Court's
18 holding. They gave it the gloss of Boyde. They said
19 they were applying Boyde. But they misapplied this
20 Court's instruction from Boyde and instead merely said
21 here's our Boyde analysis. There's a per se violation
22 because there is a beyond-a-reasonable-doubt instruction
23 correctly for the State and silence on the other side.
24 No other indication of juror misapplication or
25 confusion.

1 Justice Scalia, back on the point that you
2 were raising. I would just say that it is -- perhaps
3 ironic is the correct word, but frustrating from the
4 standpoint of the government in this case -- the State
5 in this case, that we bent over backwards to make clear
6 to these jurors the heavy burden borne by the State.
7 We did repeatedly tell them, at multiple
8 places, the State bears a burden to prove aggravation
9 beyond a reasonable doubt and to prove on the weighing
10 factor, and that the death penalty should be imposed.
11 The phrasing's in there; it's a normative phrase. It's
12 obviously not subject directly to a burden of proof.
13 And because we told them that repeatedly to
14 make clear how heavy the State's burden was, that now
15 has turned into an argument that we somehow misled the
16 jury.
17 JUSTICE SOTOMAYOR: Well, the prosecutor in
18 Carr did tell the jury, I'm going to create reasonable
19 doubt as to the defendants' mitigating evidence. So
20 that prosecutor didn't do what you said.
21 MR. SCHMIDT: Well, Justice Sotomayor, the
22 Carr records are very thick. And I would say on
23 Gleason, I think it's bright line, very clear. We
24 conceded the existence of all but two of those
25 mitigating factors that were asserted in Gleason. And

1 the other two merely asked was anything produced; was
2 there any evidence on that, which this Court has said at
3 least since Marsh is permissible. So I think Gleason is
4 a clean example on behalf of the State.
5 Carr, I'd admit, is a much longer record.
6 It has a lot more back and forth in it. You had expert
7 testimony and some back and forth on that.
8 But even in the Carr case, this Court has
9 instructed since Boyde, and has done so repeatedly, that
10 in determining whether or not there's a reasonable
11 likelihood of unconstitutional juror confusion, if the
12 jurors thought they couldn't consider something, you
13 look at the context of the entire trial.
14 And if you looked at the overall
15 instructions that were given in the Carr case, you'll
16 also see that the Carr prosecutors -- and I'd refer the
17 Court to pages 392 and 393 of the Joint Appendix, as
18 well as 442 and 443 of the same -- the prosecutor told
19 the Carr juries that the jury's task is, quote, "to
20 research and to analyze and to distribute the
21 information and to weigh it and measure it and turn it
22 upside down and look at it backwards and to have a
23 healthy discussion about the relative merits of that
24 which you have heard in this courtroom."
25 And then went on at the secondary cite I

1 gave you to ask the jury in the Carr cases to render a
2 death verdict, and I quote, "Because you have looked and
3 listened to all the evidence, and the evidence warrants
4 that kind of punishment. Anything that would reduce
5 culpability has not been presented here."
6 I offer those as examples,
7 Justice Sotomayor, to make the point that it is, of
8 course, always possible, particularly when dealing with
9 the transcription of oral statements made during trial,
10 to find a phrase here or there that, in hindsight,
11 perhaps was inartfully crafted.
12 But the overall thrust of these
13 instructions, the arguments of counsel, the nature of
14 the evidence that was put on, to Justice Kennedy's
15 point, was these jurors were told to consider and weigh
16 everything. In fact, they were literally told that
17 phrase in Instruction 2, to consider and weigh
18 everything admitted into evidence that would weigh on
19 aggravation or mitigation. It was clear they were given
20 an open-ended instruction, and --
21 JUSTICE KAGAN: But General, if I can
22 understand your argument, you're saying not only that
23 that analysis would come out the State's way, but you're
24 saying this -- the lower court really never did that
25 analysis at all, right?

1 It didn't think that it was doing that
2 analysis. It didn't think that that analysis was
3 necessary because it thought that there was just a per
4 se rule that one had to give this instruction; is that
5 correct?
6 MR. SCHMIDT: No, Justice Kagan, that's not.
7 What I'm saying is that the lower court correctly
8 identified Boyde as the proper analysis, said that was
9 what it was doing, but then wholly misapplied Boyde and,
10 instead, conjured this per se rule.
11 Their misapplication of this Court's
12 precedent in Boyde is what resulted in their incorrect
13 conclusion that the Eighth Amendment requires this sort
14 of per se instruction.
15 So it's not just that they didn't get to
16 what they should have done and they did something
17 different. It's that they tried to do what they should
18 have done under this Court's precedent; they just did it
19 wrong. And that's why we asked --
20 JUSTICE KAGAN: I find that a little bit
21 confusing. It just -- it sounds like they just sort of
22 cited Boyde but failed to pay attention to anything
23 Boyde said about what the analysis ought to be and
24 instead substituted their own analysis, which was a per
25 se rule deriving from the Eighth Amendment.

1 MR. SCHMIDT: Well, except, Your Honor, to
2 your point about citing Boyde, they did more than cite
3 Boyde. They also recited some of the concepts from
4 Boyde. I mean, for example, the Court said -- and I
5 believe I already mentioned this passage to you -- our
6 court said that they looked at the context of the trial,
7 which is something that Boyde says must be done in a
8 proper Boyde analysis. But in their conclusion, the
9 prosecutor's statements made matters worse,
10 notwithstanding the fact it was already discussed with,
11 Justice Sotomayor. I just don't believe that is a fair
12 conclusion or an accurate conclusion.
13 JUSTICE SOTOMAYOR: What a -- what a
14 wonderful system we've created. We give -- even when a
15 State court is wrong in convicting somebody, so long as
16 they're reasonably wrong, we uphold them. And when
17 they're wrong on a legal conclusion applying our test,
18 we jump in and reverse them, right?
19 MR. SCHMIDT: Justice Sotomayor, all I can
20 say is on this case, our court was wrong under the
21 Eighth Amendment. We would ask for reversal.
22 Mr. Chief Justice, with permission, I'd like
23 to reserve the balance of my time.
24 CHIEF JUSTICE ROBERTS: Thank you, General.
25 Mr. Green.

1 ORAL ARGUMENT OF JEFFREY T. GREEN
2 ON BEHALF OF THE RESPONDENTS IN
3 NOS. 14-452 AND 14-449
4 MR. GREEN: Mr. Chief Justice, and may it
5 please the Court:
6 I'd like to first address Justice
7 Sotomayor's questions, briefly.
8 Justice Sotomayor, you were correct, the
9 Kansas Supreme Court has 3 times addressed this issue
10 before, not 2 times. There was a case cited in the
11 submission that we made to the Court on Monday. That
12 submission was the objection to the jury instructions
13 offered by counsel for Jonathan Carr and Reginald Carr.
14 In that -- in that objection to the -- or
15 excuse me -- the affirmative jury instructions offered
16 by those attorneys. In those affirmative instructions,
17 they explained that one of the reasons why they wanted
18 an instruction that the jury should be told no beyond a
19 reasonable doubt standard applies to mitigating
20 circumstances is -- is a case called Harman, and that is
21 cited at-- and, again, it's in our submission -- 254
22 Kansas 87 from 1993. Kansas --
23 JUSTICE GINSBURG: Is that true of the
24 Gleason case? There was no -- am I right, that there
25 was no objection to these instructions given on

1 mitigators in Gleason? You pointed out in your letter
2 there was in Carr.
3 MR. GREEN: That's correct, Your Honor.
4 That's correct. But I submit for this --
5 JUSTICE GINSBURG: And did you -- did you
6 ask -- oh, it was the court in Gleason. Was the
7 sentencing court asked to charge that mitigators need
8 not be proved beyond a reasonable doubt? Was there any
9 request to charge that was turned down?
10 MR. GREEN: No, there was not in Gleason,
11 Your Honor. But, again, these cases are consolidated
12 for this purpose. And my friend on the other side of
13 the podium here has conceded that these instructions are
14 identical for purposes of the Eighth Amendment analysis
15 that -- that we're going to do. So we do have a
16 preserved objection, but it doesn't matter anyway. We
17 would submit, Justice Ginsburg, because Kansas has a
18 no-waiver rule for such failures to object in the
19 Gleason case, and in any event, the Kansas Supreme Court
20 passed on it.
21 But I want to get back to what Kansas said
22 about -- in the Harman case. It said that the jury
23 instructions were -- and these are the same jury
24 instructions here in a mandatory minimum case. Kansas
25 has a bifurcated proceeding in mandatory minimum cases.

1 These same jury instructions were confusing, and for
2 precisely the reason that we have here.
3 Then we have the Kleypas case that comes
4 later. In the Kleypas case, the courts -- the Kansas
5 Supreme Court's -- Kansas Supreme Court's analysis is
6 exactly this: The instruction is okay on the unanimity
7 principle for Mills and McKoy purposes. So it's okay.
8 It's okay. But for purposes of understanding how
9 mitigation evidence is to work, it's confusing. No
10 citation to Federal authority. None whatsoever. And so
11 they say there should be an instruction given to every
12 penalty phase juror in Kansas -- jury in Kansas, and
13 that is, first, let's have the non-unanimity
14 instruction, then let's have the instruction that says
15 no beyond a reasonable doubt.
16 JUSTICE SCALIA: I don't understand the
17 point you're getting to. What -- what is your point?
18 That this was -- this decision was based on State law?
19 MR. GREEN: Yes, Your Honor, that it was
20 based on State law.
21 And, in fact, if you go to Scott, the next
22 decision in the proceeding, Your Honor -- Your Honor
23 invited us to look at the cases. If you go to Scott,
24 the court says the same thing. We're reiterating what
25 we said in Kleypas, and by the way, we think that

1 implicates Federal law.

2 CHIEF JUSTICE ROBERTS: I thought the whole

3 point of our decision in Michigan v. Long was to make it

4 clear to State courts that we weren't going to do this

5 kind of thing. We weren't going to try to look, well,

6 how many Federal cites, how many State cites. Unless

7 it's clear that it's based solely on State law, then we

8 assume it's the Federal question and Federal basis in

9 that case. And -- and I assume your friend was correct

10 about how many times the Eighth Amendment was -- was

11 cited in the opinion.

12 MR. GREEN: I think that's probably true

13 with respect to this decision. I would call the Court's

14 attention to -- to the Gleason Pet. App. 102, in which

15 the -- the core statement of the Kansas Supreme Court

16 there is an interpretation of Kansas State law.

17 With respect to your question --

18 JUSTICE GINSBURG: It doesn't matter under

19 Michigan v. Long. It's debatable whether that's a good

20 rule or not, but it is the rule. It says if there's any

21 doubt, this Court will assume that the State court was

22 going on the Federal ground, not the State ground.

23 MR. GREEN: I understand that, Your Honor,

24 and I would submit that, if you look at the history of

25 this jury instruction rule that the Kansas Supreme Court

1 has announced, which originally -- or which ultimately
2 was enshrined in the Kansas pattern jury instructions,
3 that does rely solely on State law and solely on the
4 Kansas Supreme Court's decision or interpretation of its
5 own State law, but -- please.
6 JUSTICE KENNEDY: Well, I was just going to
7 add, are you asking us to dismiss the case because
8 there's an adequate and independent State ground?
9 MR. GREEN: I am asking you, first, to issue
10 an opinion that would say the origins of this rule are
11 not Eighth Amendment. They're in fact Kansas State law,
12 the Kansas Supreme Court's interpretation of its own
13 statute. And second, the Court might consider dismissal
14 of the case.
15 But to answer your earlier question to my
16 friend on the other side of the podium, Justice Kennedy,
17 it would be difficult to imagine a circumstance in which
18 this Court wouldn't say, well, you were wrong, Kansas,
19 about the Eighth Amendment here, and therefore we're
20 going to remand so you can resolve this issue about
21 whether or not this is in fact a Kansas Supreme Court
22 reading of the Kansas State law.
23 JUSTICE KENNEDY: But if -- if -- if this
24 Court determines that this instruction is not confusing
25 as a matter of Eighth Amendment law, that surely has a

1 significance -- I would think it would have a
2 significance on any remand proceedings that might take
3 place. And plus -- and it has additional significance
4 for the other jurisdictions that use this -- and other
5 States that use this instruction. So surely we have
6 something significant and necessary to decide under the
7 Eighth Amendment.
8 MR. GREEN: Well, it may be that -- and that
9 is why my first alternative suggestion was that the
10 Court take a look at -- at this. And maybe this is the
11 case that's bracketed with Michigan v. Long. There's a
12 sufficient history of Kansas Supreme Court
13 interpretation of Kansas law that would allow the Court
14 to say this isn't a Michigan v. Long case. If a State
15 supreme court simply says, look, we have a decision
16 here. We think it's confusing. The history is it's an
17 interpretation of State law. And by the way, we have
18 support under Federal law that's -- that is not a
19 Michigan v. Long case.
20 CHIEF JUSTICE ROBERTS: Well, presumably,
21 the Kansas Supreme Court is familiar with Michigan v.
22 Long, as we are, and they're on notice that if they
23 start putting the Federal authorities mentioning the
24 Eighth Amendment 8 times, that the court is going to
25 look at it as a decision based on Federal law.

1 The whole point of Michigan v. Long was
2 that -- so that we wouldn't have to do what we've been
3 doing for the last 10 minutes, which is to debate
4 whether a decision that mentions both State and Federal
5 law is based on State or Federal law.
6 MR. GREEN: Well, I won't -- I won't waste
7 more time --
8 JUSTICE SCALIA: Of course, you know, if
9 they didn't read our Eighth Amendment cases, maybe they
10 also didn't read Michigan v. Long. I mean, that's
11 entirely understandable.
12 MR. GREEN: I'm going to -- I'm going to
13 demonstrate to you in a minute that they did read your
14 Eighth Amendment cases and that they got it right,
15 Justice Scalia.
16 JUSTICE ALITO: But would it not be true
17 that the Kansas issue -- the Kansas law issue could be
18 raised in a State collateral proceeding? Why is a
19 remand necessary?
20 MR. GREEN: Well, in part because if it's a
21 Kansas collateral proceeding, the presumption of
22 legality and finality would attach on direct review.
23 This case is still on direct review. And so I would
24 submit, Justice Alito, that the Kansas Supreme Court
25 ought to have the opportunity in the first instance to

1 sort this out.

2 JUSTICE ALITO: In the ordinary case, let's

3 say a State Supreme Court decides an issue. They make

4 no -- they make no reference whatsoever to State law.

5 They based it on the Federal Constitution. It comes up

6 here; we reverse. We would not remand and say, well,

7 you didn't say anything about State law, but it's

8 possible that you might want to find that the same rule

9 applies under State law. We wouldn't do it in that

10 situation, would we? In every case like that we would

11 remand?

12 MR. GREEN: I don't know about every case,

13 but I can imagine that the Court would want to go back

14 and say, well, look, Federal law doesn't work this way,

15 but it -- but, you know, Kansas Supreme Court or State

16 supreme court, if you think it works another way, fine.

17 JUSTICE ALITO: Well, is that what we have

18 done in such cases? We've remanded all of those for

19 them to say, well, you didn't mention State law, but

20 maybe you want to think about State law?

21 MR. GREEN: I haven't seen a case like that.

22 But to go to the Chief Justice's question, Michigan v.

23 Long was -- was kind of the reverse of this case. It

24 wasn't using Eighth Amendment jurisprudence to support

25 or Federal jurisprudence to support to add additional

1 weight to the decision. It was the basis of the
2 decision.
3 JUSTICE ALITO: All right. If we assume for
4 the sake of argument that we would not do that in every
5 case, then what you are proposing is that we do it here
6 because you think there's a sufficient -- there's
7 sufficient uncertainty about the basis for the decision.
8 And then we're going to add that into the situation in
9 all of these cases of deciding, is there enough? Well,
10 they cited some State cases, they might -- we're going
11 to have to be making these decisions in every one of
12 these cases.
13 MR. GREEN: Well, I would submit that this
14 would be such a case, especially given the history of --
15 of the Kansas Supreme Court's decisions on this issue
16 interpreting its own statue.
17 But if I might, Your Honor --
18 JUSTICE SOTOMAYOR: The other States that
19 have no mitigating burden, do you know how many of them
20 require an instruction just like this one?
21 MR. GREEN: Yes. We cited in our brief
22 at -- our Gleason brief at pages, I think, 27 and 28,
23 Your Honor, that -- that there are 24 States that
24 expressly require a statement to the jury about what the
25 burden of proof is with respect to mitigating

1 circumstances. That is out of 31 states remaining in
2 the United States that have the death penalty, Your
3 Honor.
4 JUSTICE KAGAN: You're not saying that
5 that's required by the Eighth Amendment; is that right?
6 You're not advocating a per se rule that such
7 instructions are necessary.
8 MR. GREEN: No. That's right, Justice
9 Kagan. We're not -- we're not advocating that kind of
10 per se rule. In fact, one could imagine a set of
11 circumstances -- a set of instructions that are silent
12 with respect to mitigation, but nonetheless would pass
13 muster under the Eighth Amendment.
14 JUSTICE KAGAN: So could I -- could I talk
15 about the circumstances of this case?
16 MR. GREEN: Please.
17 JUSTICE KAGAN: Which is, you know, you have
18 an instruction here that is unfortunate in its
19 juxtaposition of the reasonable doubt standard and the
20 reference to mitigating circumstances. And, you know,
21 it is unfortunate, and I can see why they changed their
22 pattern instructions.
23 But -- but we've said that the analysis is a
24 holistic one. We look at everything. You also have
25 this mercy instruction. You have a catch-all

1 instruction. You have, in both cases, arguments by the
2 prosecutors that indicate fairly clearly that this is
3 really all up to the jurors in Gleason. It says,
4 "Mitigating circumstances are every juror's individual
5 choice." In -- in Carr, the prosecutor says, "Anything
6 in fairness may be considered as extenuating."
7 So I guess the question is, even if this is
8 a really unfortunate wording in the reasonable
9 doubt/mitigating circumstances juxtaposition, why
10 doesn't all of this other stuff indicate that no juror
11 was likely to be confused?
12 MR. GREEN: Because the unfortunate wording
13 that Your Honor refers to is repeated throughout these
14 instructions. Please let me demonstrate here. With --
15 with respect to the findings of -- findings of
16 aggravating circumstances, every time the Court is told
17 that it must find aggravating circumstances beyond a
18 reasonable doubt, the same sentence says, "And any
19 mitigating circumstances found to exist."
20 There is repeated parallelism in these -- in
21 these instructions with respect to the use of the verbs.
22 Let's go to Justice Scalia's point earlier with respect
23 to what a reasonable juror would have known. The
24 juror -- if you look at Instruction No. 1, Instruction
25 No. 1 says that -- reminds the jury that the --

1 JUSTICE KENNEDY: Which -- which case? In
2 which case, Gleason?
3 MR. GREEN: Yes. I'm sorry, Your Honor.
4 This would be in our Gleason app, Appendix 1(a).
5 Instruction No. 1 says that when a Defendant -- excuse
6 me. "The laws of Kansas provide that a separate
7 sentencing proceeding shall be conducted when a
8 Defendant has been found guilty."
9 Now, the verb "find" or "finding" appears 7
10 times in the -- throughout the instructions saying that
11 the jury must find mitigating circumstances. Three
12 times in the instructions, at crucial points in -- in
13 Instruction No. 10, which I'll ask us to look at in a
14 minute, and Instruction No. 12, which is the verdict,
15 the jury is referred to -- or the jury is asked to make
16 findings with respect to aggravating circumstances. So
17 it's the same exercise throughout.
18 JUSTICE GINSBURG: But the jury was also
19 aware that there was a big difference between
20 aggravators and mitigators. They were told they had to
21 be unanimous on the -- on the aggravators. But on
22 mitigators, each jury -- each juror was to make the
23 determination for herself and, moreover, that the same
24 mitigator need not be found by all the jurors. So
25 the -- the aggravators, unanimous, they all have to

1 agree on the aggravated. Mitigator, one could say this
2 one, the other could say that one, and that would be
3 okay.
4 MR. GREEN: Well, I might agree with that,
5 Your Honor, except for the jury was expressly told in
6 Instruction No. 7 that -- that with respect to
7 mitigators, it didn't have to be unanimous. However,
8 the jury -- the instructions went on. It continued to
9 draw parallels with respect to the burden of proof
10 between finding mitigators and finding aggravators.
11 JUSTICE SCALIA: Don't you -- don't you
12 think it's -- it's sort of hard to contemplate each
13 juror -- each juror's ability to find mitigators on his
14 or her own without regard to whether others find the
15 same mitigator? Isn't that somewhat incompatible
16 with -- with the juror's belief that the juror had to
17 find it beyond a reasonable doubt? My goodness, if it's
18 beyond a reasonable doubt, you would think every other
19 juror would find the same mitigator, and they were
20 expressly told that they don't have to find the same
21 mitigator.
22 MR. GREEN: Beyond a reasonable doubt is the
23 only -- the only standard that the jury is offered, Your
24 Honor. It's the only one that they know. It's the one
25 that they've sat through the guilt phase with. It's now

1 the one that they're trying to apply in the sentencing
2 phase, executing a moral -- pardon the pun -- executing
3 a moral judgment as to whether a defendant should live
4 or die.
5 So with respect to what jurors might say to
6 one another in the jury room, one can imagine a
7 situation where one juror says, mercy, I'm not -- you
8 know, maybe there should be mercy. Another -- another
9 juror says to that juror, well, I didn't -- I didn't see
10 enough evidence for that. I mean, are you certain mercy
11 should be applied here? No. You know, you have to be
12 certain that mercy applies here.
13 I don't think that's a farfetched notion at
14 all, especially when you look at an instruction like No.
15 10, which is on page 5A of the Joint Appendix. And
16 Instruction 10 draws an express parallel and uses the
17 verb "to find," Your Honor. "If you find unanimously
18 beyond a reasonable doubt that one or more aggravating
19 circumstances exist and that they are not outweighed by
20 any mitigating circumstances found to exist, then you
21 shall impose a sentence of death."
22 Let's jump down to the next paragraph. The
23 next paragraph says, "However" --
24 JUSTICE SCALIA: Where are you quoting from?
25 MR. GREEN: I'm sorry. Page 5A of the

1 Gleason Appendix --

2 JUSTICE SCALIA: Oh, the Gleason.

3 MR. GREEN: -- red -- red brief. My

4 apologies, Your Honor.

5 The next paragraph says --

6 JUSTICE KENNEDY: You put it in the red

7 brief. It's also in the petition for writ of certiorari

8 appendix, the white appendix. Gleason 133, page 133 of

9 the white.

10 MR. GREEN: The second paragraph of

11 Instruction No. 10 says, "However, if one or more juries

12 is not" -- "jurors is not persuaded beyond a reasonable

13 doubt on the burden of proof in the paragraph above."

14 So, again, the jury is called to look at the

15 beyond the reasonable doubt standard when assessing both

16 aggravating and mitigating circumstances in parallel.

17 And, again, this is the only -- this is the only

18 standard that the jury has been exposed to throughout

19 the trial.

20 JUSTICE GINSBURG: Your proposal is that --

21 is that the floor was not telling them, mitigators don't

22 have to be shown beyond a reasonable doubt. But that

23 still doesn't tell the jury what the burden of proof is

24 on mitigators.

25 Why are you urging beyond -- you don't have

1 to find beyond a reasonable doubt. Okay. So what do
2 you have to find in order to accept a mitigator?
3 MR. GREEN: It doesn't expressly say that
4 and -- Justice Ginsburg. That's the whole problem, is
5 that I -- I respectfully disagree with Justice Scalia.
6 A lawyer might look at these instructions and say, aha,
7 the fact that there is an absence or a silence with
8 respect to what the burden of proof is as to mitigating
9 instructions creates a negative implication.
10 JUSTICE ALITO: Well, I have the same
11 question. Suppose the jury is instructed you --
12 mitigators do not have to be proved beyond a reasonable
13 doubt. And then the jury sends a question, well, what
14 is the burden of proof on mitigators? How should the
15 trial judge answer that?
16 MR. GREEN: In Kansas, the answer is, it's a
17 burden of production and a burden of production only.
18 And all that means is --
19 JUSTICE KENNEDY: We're asking under the
20 Eighth Amendment -- or at least that's my interest --
21 under the Eighth Amendment, what is required in response
22 to Justice Alito's question? I didn't mean to
23 interrupt.
24 MR. GREEN: Well, it may be just the
25 negative, that there is no -- that there is no burden

1 of -- there is no burden of proof, and each of you as
2 individual jurors should consider all of the evidence.
3 I mean, it's about weighing and -- and maybe the judge
4 could say to the jury, you should -- you should consider
5 and you should weigh all of the evidence that the
6 defendant --
7 JUSTICE SCALIA: Wait. It's not a matter --
8 we're asking the factual finding of whether the
9 mitigator existed, not weighing the mitigators against
10 the aggravators, the factual finding of whether the
11 mitigator existed, whether indeed this defendant had a
12 troubled childhood or whatever else. What is the burden
13 that the juror has to sustain in order to come to that
14 judgment?
15 MR. GREEN: Well, consistent with -- with
16 Woodson and Lockett and that -- that entire line of
17 cases, that -- that -- the exact language is, is the
18 jury can't be precluded from considering any relevant
19 mitigating circumstances.
20 CHIEF JUSTICE ROBERTS: So anything --
21 anything that was presented to them. I think you said
22 earlier burden of production.
23 MR. GREEN: Any -- any --
24 CHIEF JUSTICE ROBERTS: Well, that's what
25 the instruction said. When you're considering

1 mitigating circumstance, you -- back on any aspect of
2 the offense which was presented in either the guilt or
3 penalty phase. If it was presented to the jury, they
4 should consider it. I don't --
5 MR. GREEN: Well, but that -- that
6 doesn't -- I mean, that doesn't speak to the burden of
7 proof. It -- and it does relate to both aggravating and
8 mitigating circumstances.
9 CHIEF JUSTICE ROBERTS: Well, it says they
10 have to consider anything that was presented, not things
11 they found beyond a reasonable doubt. If it was
12 presented, they need -- they can consider it.
13 MR. GREEN: If the -- if the instruction
14 said that alone, then the instructions might be okay.
15 And that's precisely why we're answering Justice Kagan's
16 question that we're not saying that the Eighth Amendment
17 commands that juries be instructed --
18 CHIEF JUSTICE ROBERTS: So the instruction
19 said something that you think is okay, and consider
20 evidence that's presented. But you say, well, we have
21 to draw a negative inference from what it said about
22 aggravating circumstances to outweigh what would have
23 been an acceptable instruction on its own.
24 MR. GREEN: I -- I'm saying that -- that
25 consistent drawing of parallels between the two without

1 stating exactly what the burden of proof is with respect
2 to mitigating circumstance creates a reasonable
3 likelihood that there would be confusion.
4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 MR. GREEN: Thank you.
6 CHIEF JUSTICE ROBERTS: Mr. Katyal.
7 ORAL ARGUMENT OF NEAL K. KATYAL
8 ON BEHALF OF THE RESPONDENT IN CASE NO. 14-450
9 MR. KATYAL: Thank you, Mr. Chief Justice,
10 and may it please the Court:
11 A man is being put to death under jury
12 instructions that are so confusing that there is a
13 reasonable likelihood that some juries would interpret
14 those instructions to bar consideration of the
15 mitigating evidence and others would not. That
16 ambiguity and inequity is impermissible under the Eighth
17 Amendment.
18 Now, the State's answer is the instructions
19 allowed the jury in a catch-all provision to consider
20 everything as mitigating. That's irrelevant. There are
21 two fundamentally different questions. The first is the
22 "what." What kinds of circumstances count as
23 mitigating? And second is the "how." How does a jury
24 determine if those circumstances exist in a given case.
25 So --

1 CHIEF JUSTICE ROBERTS: The circumstances --
2 the circumstances that count as -- as mitigating, 4(a)
3 of the -- the Gleason brief, "any other aspect of the
4 defendant's character, background or record, and any
5 other aspect of the offense which was presented."
6 MR. KATYAL: Exactly, Mr. Chief Justice. We
7 agree that, for example, the jury was instructed that
8 Reginald Carr's child abuse, if it existed, could be a
9 mitigating factor. The question is: How was a jury to
10 determine whether Reginald Carr was abused in the first
11 place as a child?
12 So the catch-all provision doesn't answer
13 that question.
14 Now, General Schmidt's answer is, well, look
15 at the language of instruction 2. And, Mr. Chief
16 Justice, I think you were referring to that. This is
17 what they say -- what he says in their reply brief at
18 page --
19 CHIEF JUSTICE ROBERTS: I'm sorry. I was
20 quoting from 7.
21 MR. KATYAL: Okay.
22 CHIEF JUSTICE ROBERTS: Maybe it's the same
23 as 2.
24 MR. KATYAL: In 7 -- in 7 -- in 7, I don't
25 see quite the same thing. But -- but I -- I think

1 our -- out general point here is that this Court has
2 said repeatedly in Abdul-Kabir and in Braverman that the
3 mere presentation of evidence is enough. The evidence
4 has to be given full effect as a mitigating
5 circumstance.
6 And I understand that different people can
7 look at this -- these set of instructions as a whole and
8 come up with different ways of interpreting them. But
9 this Court's decision in Boyde says as long as there is
10 a reasonable likelihood that a jury could read them in a
11 confusing way and bar the consideration of mitigating
12 evidence, that is enough.
13 Now, Justice Scalia, you said, well, that
14 doesn't square with common sense. What about an example
15 like, quote, "interest-free loans for people with good
16 credit"?
17 Now, our argument is not simply that the
18 jury instruction said beyond a reasonable doubt, though
19 they did 9 times. It's that they coupled the beyond a
20 reasonable doubt with the language found to exist, that
21 mitigating circumstances must be found to exist 9 times.
22 And so, Justice Scalia --
23 CHIEF JUSTICE ROBERTS: So you say
24 something -- if you're considering whether to retire,
25 you said you should be absolutely sure you have enough

1 money to live on and you ought to think about whether
2 you're going to be bored.
3 MR. KATYAL: Well --
4 CHIEF JUSTICE ROBERTS: You wouldn't think
5 you had to be absolutely sure you were going to be
6 bored.
7 MR. GREEN: Well, let me just do it,
8 Mr. Chief Justice, with respect to the -- the
9 hypothetical that Justice Scalia said. If -- if the
10 hypo was interest-free loans should be given to those
11 found to have good credit, found to have good credit,
12 which mirrors these instructions, and then the language
13 used found with a certain standard beyond a reasonable
14 doubt, or whatever, I think it's absolutely plausible
15 that people would read that instruction and say that
16 applies just as much to people without good credit.
17 They'd apply the same standard. And that squares not
18 just with the experience in the States. At least 24
19 States are using this, if -- if not every State. They
20 can't point to a single State that says found to exist
21 occurs in the jury instructions 9 times. It's not just
22 the absence of an affirmative instruction, it's that
23 these instructions are injecting confusion and
24 uncertainty.
25 And the distinction here is that you can

1 have two men going to -- having committed virtually the
2 same crime with the same aggravating and mitigating
3 circumstances; one will be sentenced to death, one to
4 life, simply because of a legal interpretation of what
5 the jury instructions say. That is not --
6 JUSTICE ALITO: If were on a -- I'm sorry.
7 Finish the sentence.
8 MR. KATYAL: I was just going to say, that
9 is not death for the worst offender, Mr. -- Justice
10 Alito, that's -- that's -- that's the death penalty to
11 be imposed for the worst interpretation of jury
12 instructions.
13 JUSTICE ALITO: If -- if I were on a jury
14 and I were told that the burden -- that mitigators do
15 not have to be proved beyond a reasonable doubt, I would
16 find that confusing because then I would ask what is
17 the -- the burden of proof on mitigators? And I don't
18 think there's any way, really, to answer that question.
19 So maybe this is a situation like trying to define
20 reasonable doubt where less is more. It's better not to
21 get into the question of burden of proof at all.
22 And let me -- just to finish this -- this
23 suggestion, and maybe it's misdirected, but you
24 mentioned the mitigator of -- of child abuse. What
25 would -- if there is any burden of proof, what would be

1 the fact as to which it would apply? The overall
2 category that this person had a bad childhood or that
3 the -- the individual was beaten by his mother or beaten
4 by his father or subjected to sexual abuse or was around
5 people who were using drugs? Unless you define what the
6 mitigators are, which can't be done, I don't see how you
7 can apply any kind of burden of proof.
8 MR. KATYAL: Well, Justice Alito, I think
9 this Court has never said that if jury instructions are,
10 by silence, confusing, that that silence alone is enough
11 to rise to an Eighth Amendment violation. Here, our
12 point is that the instructions themselves injected the
13 confusion. And so I don't think this Court is going to
14 police every possible thing that the jury might thought
15 in their heads. The point is here they mentioned only
16 one standard, beyond a reasonable doubt. They mentioned
17 it 9 times. And they said that the mitigating
18 circumstances had to be found to exist.
19 If the jury interpreted it this way, then
20 this Court -- then the Court would be blessing a jury
21 instruction on beyond a reasonable doubt for the first
22 time ever in its history that said that a jury, all 12
23 of them, might have believed mitigating circumstances
24 actually existed and could not give it effect. That is
25 what the effect of --

1 CHIEF JUSTICE ROBERTS: What -- what burden
2 of proof do you think the jury applied with respect to
3 the showing of mercy?
4 MR. KATYAL: Well --
5 CHIEF JUSTICE ROBERTS: They were clearly
6 instructed that they can show mercy. So what -- they
7 didn't say anything about the burden of proof.
8 MR. KATYAL: And Mr. Chief Justice, they
9 were clearly instructed that mercy was a, quote, "a
10 mitigating factor." And so they were then told 9 times
11 that they had to find a mitigating factor.
12 CHIEF JUSTICE ROBERTS: So you think they
13 had -- they would have interpreted that I have to
14 determine whether to extend mercy beyond a reasonable
15 doubt?
16 MR. KATYAL: Absolutely, Your Honor. I
17 think this Court has said many times that we presume a
18 jury follows its instructions, and this is a perfect
19 example of that --
20 CHIEF JUSTICE ROBERTS: I know. But
21 you're -- you're begging the question to say the
22 instruction was this and the jury didn't follow it.
23 MR. KATYAL: I don't -- I don't think so,
24 Mr. Chief Justice. I think this is a perfect example of
25 how mercy would have been applied beyond a reasonable

1 doubt. If there was case for mercy after reading all of
2 the -- all the sentencing proceedings, it was that
3 Reginald Carr had been abused badly as a child. And
4 that's why mercy should have extended. We are -- we're
5 talking about death-qualified jurors here who already
6 can't extend mercy just simply because death is on the
7 line. There had to be something additional. That
8 something additional, in the context of this case, was
9 all about the child abuse of Reginald Carr.
10 And, Justice Kagan, that's exactly what the
11 State, time and again, Joint Appendix pages 250 to 256,
12 said that -- that Reginald Carr did not meet his burden
13 of proof on. And so this was front and center at the
14 mitigating phase of the trial. This was extremely
15 confusing, I think, to a jury. And, of course, this
16 Court's decision in Boyde has a far lower standard than
17 that. It's simply just was there something more than a
18 possibility, it doesn't even have to be 50 percent, that
19 the jury interpreted the instructions the wrong way.
20 JUSTICE SOTOMAYOR: Mr. Katyal, Kansas has
21 already answered this question, hasn't it? Its
22 requirement is that a jury be instructed both that
23 mitigation need not be proven beyond a reasonable doubt,
24 and, second, that the jury be told it has no -- that
25 there is no burden of proof.

1 MR. KATYAL: Exactly. And just like in
2 Maryland v. Mills where this Court, under the Eighth
3 Amendment, looked to that, here it's significant that
4 not even Kansas is defending the rule that these jury
5 instructions left the jury with the impression of. I
6 mean, indeed, I'm not aware of a single State that does
7 so. There's no amici on the State's side saying that
8 this is going to impose any sort of harm to them. This
9 is the most modest fix in the world. It could be done
10 not just with an affirmative instruction, it could be
11 done by just striking out the words "found to exist" out
12 of the jury instructions.
13 CHIEF JUSTICE ROBERTS: What do you think
14 the jury -- if you -- are they supposed to consider
15 things they didn't find to exist?
16 MR. KATYAL: Oh, no.
17 CHIEF JUSTICE ROBERTS: I think it's a bit
18 of a stretch to say found to exist implies a particular
19 standard of proof.
20 MR. KATYAL: I don't think so at all, Your
21 Honor. I think found to exist, that's the most natural
22 way of reading it. And if there's any doubt, just look
23 at Instruction No. 1. The first thing the jury was told
24 -- this is at Petition Appendix page 500 of the Reginald
25 Carr petition. "The laws of Kansas provide a separate

1 sentencing proceeding shall be conducted when a
2 defendant has been found guilty of capital murder."
3 That's what they're told after hearing
4 months of testimony about whether or not the Carrs
5 committed the crime under what standard? The
6 beyond-a-reasonable-doubt standard.
7 That was the only thing the jury was told,
8 time and again, both at the guilt phases, the 9 times in
9 the mitigating phase of this trial. It thinks -- it's
10 absolutely reasonable for a jury to have interpreted the
11 jury instructions to say that's the standard that
12 applies here.
13 And boy, if that's the standard that applied
14 in this case, that is unlike any proceeding in
15 Anglo-American jurisprudence to my knowledge.
16 JUSTICE ALITO: What does it mean to say
17 there's no burden of proof?
18 MR. KATYAL: Well, I think it means that --
19 that --
20 JUSTICE ALITO: Every juror decides
21 individually?
22 MR. KATYAL: I think that -- in Kansas, I
23 think that's right. Now, of course you could have
24 minimum thresholds, evidence, and relevance, and so on,
25 as this Court's decision in Tennard said.

1 This is the opposite. This is the highest
2 standard in all of law, beyond a reasonable doubt. It's
3 never been done. And these jury instructions did so.
4 And look, I understand that we could read
5 these facts and say these are horrific crimes, as you
6 said, Justice Alito. But so, too, Reginald Carr had a
7 horrific upbringing. And I think the jury was entitled,
8 and this Court's decision in Stringer says, that it is
9 -- when -- when the injection of an arbitrary factor is
10 put in and two juries could reach different results on
11 the same facts, that violates the Eighth Amendment.
12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Case 14-452 is -- oh, I'm sorry. You have
14 rebuttal time.
15 (Laughter.)
16 CHIEF JUSTICE ROBERTS: You have, in fact,
17 four minutes of it.
18 REBUTTAL ARGUMENT OF DEREK L. SCHMIDT
19 ON BEHALF OF THE PETITIONER
20 MR. SCHMIDT: Mr. Chief Justice, I'm anxious
21 on the point. Thank you.
22 Two or three points as time allows,
23 Mr. Chief Justice.
24 First on Mr. Katyal's point that the issue
25 here is the how and not the what. I would come back to

1 the point that there was both a catch-all and a mercy
2 instruction here. And I would further point this Court
3 to what this Court has suggested in the past.
4 This Court has fairly consistently suggested
5 that the cure to a Lockett type of error, that there was
6 something presented that might not have been able to be
7 given effect, would be catch-all or mercy types of
8 instructions.
9 And I would refer you to pages 310 and 11 of
10 Penry 1 where it wasn't the Court, but it was defense
11 who requested a mercy instruction that was not granted.
12 And as a result, the case wound up in front of this
13 Court.
14 But also suggest that you look at page 803
15 on Penry 2 where this Court suggested --
16 Justice O'Connor writing -- that a catch-all instruction
17 well crafted would have been the cure for the error this
18 Court found in Penry 2.
19 A similar implication at page 242 in
20 Abdul-Kabir, and a similar implication in page 308 of
21 Blystone. So I think Kansas has done here precisely
22 what the Court has repeatedly suggested --
23 JUSTICE KENNEDY: What is the -- I know it's
24 your rebuttal. What's the catch-all instruction you
25 rely on?

1 MR. SCHMIDT: The catch-all instruction is
2 the last paragraph of Instruction No. 7.
3 JUSTICE KENNEDY: Of 7. Of 7. Thank you.
4 MR. SCHMIDT: Yes. Correct. And the mercy
5 instruction is earlier. I believe it's the second
6 paragraph in Gleason.
7 Secondly, with respect to Justice Ginsburg's
8 observation that there -- a juror would have noticed
9 that there's a different between the use of finding with
10 respect to unanimity, or finding in another context,
11 suggesting that this argument's not very persuasive,
12 that the mere use of the word "find" repeatedly somehow
13 created confusion, I think that's correct. And I think
14 there's other contrast in this record that shows it.
15 For example, with respect to the verdict
16 forms. In those cases where the beyond a reasonable
17 doubt language is included, finding is included with
18 respect to both aggravation and mitigation, but the
19 jurors were asked to check the box on what aggravators
20 they had found. They weren't asked to do anything like
21 that with respect to mitigators.
22 Now, a lay juror, being asked to do one task
23 for one purpose and a different task for a different
24 purpose, is not likely to conclude that the two tasks
25 are in some way equivalent.

1 Likewise, to the point that was suggested
2 earlier, Mr. Katyal correctly points out that the mercy
3 instruction is described as a mitigating circumstance.
4 That's absolutely true, but it certainly doesn't follow
5 that the jury would have thought that they have to apply
6 some burden of proof to mercy. It's an act of grace.
7 That's the entire point of mercy. And that further
8 suggests that it wasn't reasonable to conclude that
9 reading these words "find" time and again somehow led
10 them to an equivocal -- an equivalent understanding of
11 how they ought to be used.
12 Third, with respect to the Kleypas decision,
13 I am well on it, but this is back to the point that was
14 referenced by Mr. Green on the Kansas Supreme Court's
15 referencing of Kansas case law. I would merely point
16 this Court to what this Court itself said in rejecting
17 precisely the same argument in the Marsh case -- it's at
18 page 169 -- where the Court ultimately concluded Kleypas
19 itself -- State law case -- Kleypas itself rested on
20 Federal law. And the same is true here.
21 The Kansas --
22 JUSTICE BREYER: Harman didn't.
23 MR. SCHMIDT: I'm sorry?
24 JUSTICE BREYER: Harman didn't.
25 MR. SCHMIDT: That's correct. Harman was

1 not a death penalty case. It was a pre-death penalty
2 case --
3 JUSTICE BREYER: No, no. But they say just
4 what they said here.
5 MR. SCHMIDT: And beyond that, Harman was a
6 1993 case, barely after this Court --
7 JUSTICE BREYER: But then as a succession of
8 references back.
9 MR. SCHMIDT: No. But the point, Your
10 Honor, is that when the Kansas Supreme Court talked
11 about Harman, this Court only three years previously had
12 laid down the rule that governs this case.
13 It is now well developed what the Eighth
14 Amendment rule is. Harman doesn't say anything about
15 what this Court has been asked to decide.
16 And finally, I would urge the Court to end,
17 I suppose, where we began, which is there's Eighth
18 Amendment error here. And absent correction of that
19 Eighth Amendment error by this Court, it will be the
20 Eighth Amendment interpretation given by the Kansas
21 Supreme Court that disposes of this case, disposes of
22 the other similarly situated cases in Kansas --
23 JUSTICE BREYER: As we said this -- so as we
24 said, just that. Four sentences you quote, they're
25 wrong.

1 Now, as to whether the -- the instruction in
2 content here was too confusing because of the placement
3 all the arguments you heard, they didn't really go into
4 that. Nor did they really go into the question of State
5 law. Nor did they get into the question of whether the
6 new State law is retroactive.
7 All those remain open on remand for the
8 parties to ask the Court to consider it, and if the
9 Court decides it's appropriate to raise it at that time,
10 to consider it. Is that satisfactory to you?
11 MR. SCHMIDT: No, Justice Breyer.
12 Obviously, we'll deal with whatever State law questions
13 may arise subsequently. But this was --
14 JUSTICE BREYER: Not just State law, it's
15 the confusion. Sorry. Go ahead. Forget it.
16 I wanted to know if it's satisfactory. The
17 answer is no.
18 CHIEF JUSTICE ROBERTS: Thank you, counsel.
19 Case 14-452 is submitted, and we will hear
20 the second question in the other two cases in a moment.
21 (Whereupon, at 11:05 a.m., the case in the
22 above-entitled matter was submitted.)
23
24
25

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