1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - - - - - - - - - - - - - - - x

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 No. 14-452, Kansas

5 v. Gleason and the consolidated cases.

6 General Schmidt.

7 ORAL ARGUMENT OF GENERAL DEREK L. SCHMIDT

8 ON BEHALF OF THE PETITIONER

9 GENERAL SCHMIDT: Mr. Chief Justice, and may

10 it 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 GENERAL 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 is not required by the
3 Eighth Amendment. In fact, the Kansas --
4 JUSTICE SOTOMAYOR: So why can't we presume
5 it is required by the State law, not the Constitution?
6 I mean, as I am 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 GENERAL SCHMIDT: Well, I think not, Your
11 Honor. This decision -- these decisions were plainly
12 based on the Kansas Supreme Court's interpretation not
13 of State law but of the Eighth Amendment. And 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.
25 It 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. And in fact, in the Kansas v. Marsh case
4 --
5 JUSTICE SCALIA: Did the Kansas Supreme
6 Court read these cases?
7 GENERAL 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 GENERAL SCHMIDT: Justice Scalia, I, of
13 course, don't --
14 JUSTICE SCALIA: They don't like the death
15 penalty.
16 GENERAL SCHMIDT: -- know how to answer that
17 question. I can only say this decision, these
18 decisions, clearly are based on that court's
19 interpretation of the Eighth Amendment.
20 JUSTICE SOTOMAYOR: But that cannot be.
21 Already we know and the Kansas court knew that the
22 dissent pointed out that a burden for mitigating
23 circumstances of a preponderance of the evidence is
24 okay, so they cannot believe that no burden is required
25 by the Constitution. They know that there is no

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

1 Kansas Supreme Court to determine -- for them to
2 determine whether State law would require a different
3 result on this issue? I know there are some other
4 issues in the case, but on this issue or --
5 GENERAL SCHMIDT: Not on this issue, Your
6 Honor.
7 JUSTICE KENNEDY: -- or are we permitted
8 simply to reverse outright?
9 GENERAL SCHMIDT: I believe you're permitted
10 to reverse outright.
11 JUSTICE KENNEDY: And then on some on other
12 issues, I understand?
13 GENERAL SCHMIDT: Correct. We presume there
14 would be further proceedings below on other issues that
15 weren't decided on the case.
16 JUSTICE GINSBURG: Why couldn't -- why
17 couldn't the Kansas Supreme Court say on remand, thank
18 you for enlightening us about the Eighth Amendment, but
19 we still think that Kansas law, independent of any
20 Federal constitutional requirement, requires juries to
21 be told what the burden is? They could do that on
22 remand.
23 GENERAL SCHMIDT: Justice Ginsburg, that
24 would, of course, be an issue that we would argue on
25 remand if it were briefed. That's not what they did

1 here. And, in fact, if this Court does not correct the
2 Eighth Amendment error, I would respectfully submit we
3 will never get to that question on remand because the
4 Eighth Amendment, that court's interpretation of it,
5 will dispose of this case.
6 JUSTICE GINSBURG: What about the other.
7 Didn't they say something about inadmissible hearsay
8 having prejudice, cause prejudice in the Carr case.
9 GENERAL SCHMIDT: In the Carr case there was
10 an issue with respect to that, Justice Ginsburg. It is
11 not part of the questions that were presented or being
12 argued in front of this Court. It was, as you know, a
13 voluminous record with many, many issues discussed.
14 The Kansas Supreme Court's decision below
15 should be reversed by this Court because it made two
16 errors: First, the Kansas Supreme Court incorrectly
17 found in the Eighth Amendment what the dissent called a
18 per se requirement. They found that there was a
19 requirement in the Eighth Amendment for an affirmative
20 instruction that mitigation need not be proven beyond a
21 reasonable doubt.
22 JUSTICE BREYER: Is there -- to go back to
23 the question that Justice Ginsburg has asked, as we say,
24 this Court has never held that there is an absolute
25 requirement that you give the reasonable doubt -- don't

1 say it's no reasonable doubt in a mitigating case, just
2 as you said.
3 GENERAL SCHMIDT: Correct.
4 JUSTICE BREYER: We send it back because, as
5 you said they just -- if the law in the State is
6 different, they changed it. When they changed it, did
7 they apply the change retroactively?
8 GENERAL SCHMIDT: No, Your Honor.
9 And, in fact, this Court --
10 JUSTICE BREYER: What did they say?
11 GENERAL SCHMIDT: The patterned instructions
12 in Kansas that would applicable in a circumstance like
13 this on this subject have been changed prospectively.
14 And we now use them.
15 JUSTICE BREYER: But the Court's held it is
16 only prospective?
17 GENERAL SCHMIDT: I don't believe that's
18 been --
19 JUSTICE SCALIA: You -- how can you
20 retroactively give an instruction? Right?
21 JUSTICE BREYER: Well, you very simply say,
22 yes, we have a new trial, that's how. I mean, you
23 simply set a new sentencing hearing --
24 GENERAL SCHMIDT: But, Your Honor, of
25 course, there would be no need for a new trial if this

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

1 the patterned instructions made? Who made it?
2 GENERAL SCHMIDT: There is a patterned
3 instruction committee, Your Honor, that develops these
4 patterned instructions.
5 JUSTICE KAGAN: Is it approved by the
6 Supreme Court or is it divorced from the Supreme Court?
7 GENERAL SCHMIDT: I believe that is correct,
8 but I. I do not want to swear to that, Your Honor.
9 JUSTICE KAGAN: You believe it is correct,
10 that it is approved by the Court?
11 GENERAL SCHMIDT: I want to double-check on
12 that point, Your Honor.
13 JUSTICE KAGAN: Okay.
14 GENERAL SCHMIDT: Yes.
15 JUSTICE BREYER: My thinking is the
16 following so you'll understand why I ask this question:
17 It, I think, could be the case that you're right, that
18 this Court has never held that the Eighth Amendment
19 requires giving such an instruction.
20 Next question: Should it now hold it?
21 Well, the answer to that question could be this is not a
22 good case to decide that. Because it may be that the
23 Kansas court has held it as to the future and may apply
24 the future rule as to the nine people who are involved
25 in the past. Therefore, send it back.

1 What do you think of that reasoning.
2 GENERAL SCHMIDT: Well --
3 JUSTICE BREYER: Probably not much, but I'd
4 like to know your reasons.
5 GENERAL SCHMIDT: Respectfully, I -- I share
6 your conclusion on that point, Justice Breyer.
7 JUSTICE ALITO: Isn't it true,
8 General Schmidt, that it makes a big difference whether
9 this is done under the Federal Constitution or
10 understand Kansas law? And presumably the Kansas
11 Supreme Court understood that it had the capability of
12 basing its decision on Kansas law. But if it did that,
13 it would have to take responsibility for the decisions
14 in these cases, which involve some of the most
15 horrendous murders that I have seen in my 10 years here.
16 And we see practically every death penalty case that
17 comes up anywhere in the country. These have to rank
18 as among the worst. So it did not take responsibility
19 for that. It said it is the Eighth Amendment, and we
20 have to apply the Federal Constitution.
21 Now, it may be they will say, well, we are
22 going to say that Kansas law requires this but then it
23 is their responsibility, isn't that true?
24 GENERAL SCHMIDT: Justice Alito, I, of
25 course, won't speculate on what the Kansas court was --

1 might do. I --

2 JUSTICE ALITO: Well, I wasn't speculating

3 on why they did what they did, but the consequences of

4 basing it on the Federal Constitution -- one of the

5 consequences of basing it on the Federal Constitution is

6 that they do not have to take responsibility for it.

7 GENERAL SCHMIDT: I have no ability to

8 dispute that hot topic --

9 JUSTICE SCALIA: Do -- do you have retention

10 elections in Kansas?

11 GENERAL SCHMIDT: We do, Your Honor.

12 JUSTICE SCALIA: Yes. And the fact --

13 how -- how many people are there on death row in Kansas?

14 GENERAL SCHMIDT: There are currently nine

15 under sentence, with a tenth --

16 JUSTICE SCALIA: Which could suggest that --

17 that Kansans, unlike our Justice Breyer, do not think

18 the death penalty is unconstitutional and indeed very

19 much favor it, which might suggest that a retention

20 election that goes before such people would not come out

21 favorably for those justices who create Kansas law

22 that -- that would reverse these convictions.

23 I am just speculating, of course.

24 GENERAL SCHMIDT: Justice Scalia, all I can

25 say is that in these cases it is certainly apparent to

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

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

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

1 way, if I may, Justice Kagan: "You may further consider
2 as a mitigating circumstance any other aspect of the
3 defendant's character, background, or record, and any
4 other aspect of the offense which was presented" -- not
5 proven, presented -- "in either the guilty or penalty
6 phase which you find may serve as a basis for imposing a
7 sentence less than death.
8 And to Justice Kennedy's point, that's
9 clearly not a finding subject to some burden of proof.
10 It's an open-ended invitation to consider and weigh and
11 give effect to anything else these jurors think
12 appropriate in rendering a reasoned, moral judgment.
13 JUSTICE KAGAN: Didn't the Court --
14 JUSTICE KENNEDY: I'm reading that from
15 Gleason, and that's also in Carr?
16 GENERAL SCHMIDT: Yes, Your Honor. It's
17 Instruction 6 and 8 in Carr. It's similar language. It
18 may not be exactly identical, but it's substantively
19 identical.
20 JUSTICE SOTOMAYOR: Didn't the Kansas Court
21 say, yes, we have that, but the only burden of proof in
22 any of the instructions was in aggravating circumstances
23 and that the State bore that burden?
24 And it pointed to the fact that aggravating
25 and mitigating were mentioned in the same clause five or

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

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

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

1 to affirmatively inform the jury that mitigating
2 circumstances may not be proven beyond a reasonable
3 doubt. So there was silence on that point.
4 Next sentence: And the penalty phase
5 instructions as a whole exacerbated the error because
6 they referred only to the State's burden of beyond a
7 reasonable doubt, which, of course, will always be true
8 because it's constitutionally required that the jurors
9 be informed the State, the government bears that burden
10 beyond a reasonable doubt.
11 The Kansas Court then concluded in the next
12 sentence -- I won't read it because I've cited it before
13 -- but under these circumstances; in other words, when
14 there is an instruction that the State must prove beyond
15 a reasonable doubt and there is silence on the other
16 side, we conclude there is a reasonable likelihood that
17 -- the Boyde is violated -- I am summarizing, of course
18 -- is conclusory and nothing else.
19 In other words, it is back to that per se
20 application that was novel in the Kansas Supreme Court's
21 holding. They gave it the gloss of Boyde. They said
22 they were applying Boyde. But they misapplied this
23 Court's instruction from Boyde and instead merely said
24 here's our Boyde analysis.
25 There's a per se violation because there is

1 beyond a reasonable doubt instruction correctly for the
2 State and silence on the other side. No other
3 indication of juror misapplication or confusion.
4 Justice Scalia, back on the point that you
5 were raising, I would just say that it is -- perhaps
6 ironic is the correct word, but frustrating from the
7 standpoint of government in this case -- the State in
8 this case, that we bent over backwards to make clear to
9 these jurors the heavy burden borne by the State.
10 We did repeatedly tell them, in multiple
11 places, the State bears a burden to prove aggravation
12 beyond a reasonable doubt and to prove on the weighing
13 factor, and that the death penalty should be imposed.
14 The phrasing's in there; it's a normative phrase. It's
15 obviously not subject directly to a burden of proof.
16 And because we told them that repeatedly to
17 make clear how heavy the State's burden was, that now
18 has turned into an argument that we somehow misled the
19 jury.
20 JUSTICE SOTOMAYOR: Well, the prosecutor in
21 Carr did tell the jury, I'm going to create reasonable
22 doubt as to the defendants' mitigating evidence. So
23 that prosecutor didn't do what you said.
24 GENERAL SCHMIDT: Well, Justice Sotomayor,
25 the Carr records are very thick. And I would say on

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

1 relative merits of that which you have heard in this
2 courtroom."
3 And then went on at the secondary cite I
4 gave you to ask the jury in the Carr cases to render a
5 death verdict, and I quote, "Because you have looked and
6 listened to all the evidence, and the evidence warrants
7 that kind of punishment. Anything that would reduce
8 culpability has not been presented here."
9 I offer those as examples,
10 Justice Sotomayor, to make the point that it is, of
11 course, always possible, particularly when dealing with
12 the transcription of oral statements made during trial,
13 to find a phrase here or there that in hindsight perhaps
14 was inartfully crafted.
15 But the overall thrust of these
16 instructions, the arguments of counsel, the nature of
17 the evidence that was put on, to Justice Kennedy's
18 point, was these jurors were told to consider and weigh
19 everything. In fact, they were literally told that
20 phrase in Instruction 2, to consider and weigh
21 everything admitted into evidence that would weigh on
22 aggravation or mitigation. It was clear they were given
23 an open-ended instruction, and --
24 JUSTICE KAGAN: But General, if I can
25 understand your argument, you're saying not only that

1 that analysis would come out the State's way, but you're
2 saying this -- the lower court really never did that
3 analysis at all, right?
4 It didn't think that it was doing that
5 analysis. It didn't think that that analysis was
6 necessary because it thought that there was just a per
7 se rule that one had to give this instruction; is that
8 correct?
9 GENERAL SCHMIDT: No, Justice Kagan, that's
10 not. What I am saying is that the lower court correctly
11 identified Boyde as the proper analysis, said that was
12 what it was doing, but then wholly misapplied Boyde and,
13 instead, conjured this per se rule.
14 Their misapplication of this Court's
15 precedent in Boyde is what resulted in their incorrect
16 conclusion that the Eighth Amendment requires this sort
17 of per se instruction.
18 So it's not just that they didn't get what
19 they should have done and they did something different.
20 It's that they tried to do what they should have done
21 under this Court's precedent; they just did it wrong.
22 And that's why we asked --
23 JUSTICE KAGAN: I find that a little bit
24 confusing. It just -- it sounds like they just sort of
25 cited Boyde but failed to pay attention to anything

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

1 to reserve the balance of my time.

2 CHIEF JUSTICE ROBERTS: Thank you, General.

3 Mr. Green.

4 ORAL ARGUMENT OF JEFFREY T. GREEN

5 ON BEHALF OF THE RESPONDENTS IN

6 NOS. 140452 AND 14-449

7 MR. GREEN: Mr. Chief justice, and may it

8 please the Court:

9 I'd like to first address Justice

10 Sotomayor's questions, briefly.

11 Justice Sotomayor, you were correct, the

12 Kansas Supreme Court has three times addressed this

13 issue before, not two times. There was a case cited in

14 the submission that we made to the Court on Monday.

15 That submission was the objection to the jury

16 instructions offered by counsel for Jonathan Carr and

17 Reginald Carr.

18 In that -- in that objection to the -- or

19 excuse me -- the affirmative jury instructions offered

20 by those attorneys. In those affirmative instructions,

21 they explained that one of the reasons why they wanted

22 an instruction that the jury should be told no beyond a

23 reasonable doubt standard applies to mitigating

24 circumstances is a case called Harman, and that is

25 cited -- and, again, it is in our submission -- 254

1 Kansas 87 from 1993. Kansas --

2 JUSTICE GINSBURG: That is not true of the

3 Gleason case. There was no -- am I right, that there

4 was no objection to these instructions given on

5 mitigators in Gleason? You pointed out in your letter

6 there was in Carr.

7 MR. GREEN: That is correct, Your Honor.

8 That is correct. But I submit for this --

9 JUSTICE GINSBURG: And did you ask -- oh, it

10 was -- the Court in Gleason, was the sentencing court

11 asked to charge that mitigators need not be proved

12 beyond a reasonable doubt? Was there any request to

13 charge that was turned down?

14 MR. GREEN: No, there was not in Gleason,

15 Your Honor. But, again, these cases are consolidated

16 for this purpose, and my friend on the other side of the

17 podium here has conceded that these instructions are

18 identical for purposes of the Eighth Amendment analysis

19 that we are going to do. So we do have a preserved

20 objection, but it doesn't matter anyway. We would

21 submit, Justice Ginsburg, because Kansas has a no-waiver

22 rule for such failures to object in the Gleason case,

23 and in any event, the Kansas Supreme Court passed on it.

24 But I want to get back to what Kansas said

25 about -- in the Harman case. It said that the jury

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

1 the Court says the same thing. We are reiterating what
2 we said in Kleypas, and by the way, we think that
3 implicates Federal law.
4 CHIEF JUSTICE ROBERTS: I thought the whole
5 point in our decision in Michigan against Long was to
6 make it clear to State courts that we weren't going to
7 do this kind of thing. We weren't going to try to look,
8 well, how many Federal cites, how many State cites.
9 Unless it is clear that it is based solely on State law,
10 then we assume it's the Federal question and Federal
11 basis in that case. And I assume your friend was
12 correct about how many times the Eighth Amendment was
13 cited in the opinion.
14 MR. GREEN: I think that is probably true
15 with respect to this decision. I would call the Court's
16 attention to the Gleason pet ap 102, in which the core
17 statement of the Kansas Supreme Court there is an
18 interpretation of Kansas State law.
19 With respect to your question --
20 JUSTICE GINSBURG: It doesn't matter under
21 Michigan v. Long. It is debatable whether that is a
22 good rule or not, but it is the rule. It says if there
23 is any doubt, this Court will assume that the State
24 court was going on the Federal ground, not the State
25 ground.

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

1 reading of Kansas State law.

2 JUSTICE KENNEDY: But if this Court

3 determines that this instruction is not confusing as a

4 matter of Eighth Amendment law, that surely has a

5 significance -- I would think it would have a

6 significance on any remand proceedings that might take

7 place, plus -- and it has additional significance for

8 the other jurisdictions that use this -- and other

9 states that use this instruction. So surely we have

10 something significant and necessary to decide under the

11 Eighth Amendment.

12 MR. GREEN: Well, it may be that -- and that

13 is why my first alternative suggestion was that the

14 Court take a look at this. And maybe this is the case

15 that is bracketed with Michigan v. Long. There is

16 sufficient history of Kansas Supreme Court

17 interpretation of Kansas law that would allow the Court

18 to say, this is not a Michigan v. Long case. If a State

19 supreme court simply says, look, we have a decision

20 here. We think it is confusing. The history is it is

21 an interpretation of State law. And by the way, we have

22 support under Federal law that is -- that is not a

23 Michigan v. Long case.

24 CHIEF JUSTICE ROBERTS: Well, presumably the

25 Kansas Supreme Court is familiar with Michigan against

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

1 might have the opportunity in the first instance to sort
2 this out.
3 JUSTICE ALITO: In the ordinary case, let's
4 say, a State Supreme Court decides an issue. They make
5 no reference whatsoever to State law. They base it on
6 the Federal Constitution. It comes up here and we
7 reverse. We would not remand and say, well, you did not
8 say anything about State law, but it is possible that
9 you might want to find that the same rule applies under
10 State law. We wouldn't do it in that situation, would
11 we? In every case like that we would remand?
12 MR. GREEN: I do not know about every case,
13 but I can imagine that the Court would want to go back
14 and say, look, Federal law doesn't work this way, but
15 Kansas Supreme Court or State Supreme Court, if you
16 think it works another way, fine.
17 JUSTICE ALITO: Is that what we have done in
18 such cases? We remanded all of those to say, well, you
19 did not mention State law, but maybe you want to think
20 about State law.
21 MR. GREEN: I have not seen a case like
22 that. But to go to the Chief Justice's question,
23 Michigan v. Long was kind of the reverse of this case.
24 It wasn't using Eighth Amendment jurisprudence to
25 support or Federal jurisprudence to support to add

1 additional weight to the decision. It was the basis of
2 the decision.
3 JUSTICE ALITO: All right. If we assume for
4 the sake of argument that we wouldn't do that in every
5 case what you are proposing here is that we do it here
6 because there is sufficient uncertainty about the basis
7 for the decision, and then we are going to get into the
8 situation in all of these cases of deciding, is there
9 enough? While they cited some State cases, they
10 might -- we're going to have to be making these
11 decisions in every one of these cases.
12 MR. GREEN: Well, I would submit that this
13 would be such a case, especially given the history of --
14 of the Kansas Supreme Court's decisions on this issue
15 interpreting its own statue. But if I might, Your Honor
16 --
17 JUSTICE SOTOMAYOR: The other States that
18 have no mitigating burden, do you know how many of them
19 require an instruction just like this one?
20 MR. GREEN: Yes. We cited in our brief
21 at -- our Gleason brief, at pages, I think, 27 and 28,
22 Your Honor, that there are 24 States that expressly
23 require a statement to the jury about what the burden of
24 proof is with respect to mitigating circumstances. That
25 is out of 31 states remaining in the United States that

1 have the death penalty, Your Honor.

2 JUSTICE KAGAN: You're not saying that that

3 is required by the Eighth Amendment; is that right?

4 You're not advocating a per se rule that such

5 instructions are necessary?

6 MR. GREEN: No. That's right, Justice

7 Kagan. We are not advocating that kind of per se rule.

8 In fact, one could imagine a set of circumstances -- a

9 set of instructions that are silent with respect to

10 mitigation but nonetheless would pass muster under the

11 Eighth Amendment.

12 JUSTICE KAGAN: So could I -- could I talk

13 about the circumstances of this case?

14 MR. GREEN: Please.

15 JUSTICE KAGAN: Well, you have an

16 instruction here that is unfortunate in its

17 juxtaposition of the reasonable doubt standard and the

18 reference to mitigating circumstances. And, you know,

19 it is unfortunate, and I can see why they changed their

20 pattern instructions.

21 But we've said that the analysis is a

22 holistic one. We look at everything. You also have

23 this mercy instruction. You have a catch-all

24 instruction. You have, in both cases, arguments by the

25 prosecutors that indicate fairly clearly that this is

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

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

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

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

1 The next paragraph says --

2 JUSTICE KENNEDY: You put it in the red

3 brief. It is also in the petition for Writ of

4 Certiorari Appendix, the white appendix, Gleason 133,

5 page 133 of the white.

6 MR. GREEN: The second paragraph of

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

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

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

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

11 beyond the reasonable doubt standard when assessing both

12 aggravating and mitigating circumstances in parallel.

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

14 standard that the jury has been exposed to throughout

15 the trial.

16 JUSTICE GINSBURG: Your proposal is that the

17 floor was not telling them, mitigators don't have to be

18 shown beyond a reasonable doubt. But that still doesn't

19 tell the jury what the burden of proof is on mitigators.

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

21 to find beyond a reasonable doubt. Okay. So what do

22 you have to find in order to accept a mitigator?

23 MR. GREEN: It doesn't expressly say that

24 and -- Justice Ginsburg. That's the whole problem, is

25 that I -- I respectfully disagree with Justice Scalia.

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

1 Defendant --

2 JUSTICE SCALIA: Wait. It's not a matter --

3 we're asking the factual finding of whether the

4 mitigator existed, not weighing the mitigators against

5 the aggravators, a factual finding of whether a

6 mitigator existed, whether indeed this Defendant had a

7 troubled childhood or whatever else. What is the burden

8 that the juror has to sustain in order to come to that

9 judgment?

10 MR. GREEN: Well, consistent with -- with

11 Woodson and Lockett and that -- that entire line of

12 cases, that -- that -- the exact language is the jury

13 can't be precluded from considering any relevant

14 mitigating circumstances.

15 CHIEF JUSTICE ROBERTS: So anything --

16 anything that was presented to them. I think you said

17 earlier, burden of production.

18 MR. GREEN: Any -- any --

19 CHIEF JUSTICE ROBERTS: Well, that is what

20 the instruction said. When you're considering

21 mitigating circumstances you -- back on any aspect of

22 the offense which was presented in either the guilty or

23 penalty phase. If it was presented to the jury, they

24 should consider it. I do not --

25 MR. GREEN: Well, but that -- that

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

1 CHIEF JUSTICE ROBERTS: Mr. Katyal.

2 ORAL ARGUMENT OF NEAL K. KATYAL

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

4 MR. KATYAL: Thank you, Mr. Chief Justice,

5 and may it please the Court:

6 A man is being put to death under jury

7 instructions that are so confusing that there is a

8 reasonable likelihood that some juries would interpret

9 those instructions to bar consideration of the

10 mitigating circumstances and others would not. That

11 ambiguity and inequity is impermissible under the Eighth

12 Amendment.

13 Now, the State's answer is the instructions

14 allowed the jury in a catch-all provision to consider

15 everything as mitigating. That is irrelevant. There

16 are two fundamentally difference questions: The first

17 is the "what." What kinds of circumstances count as

18 mitigating? And second is the "how." How does a jury

19 determine if those circumstances exist in a given case,

20 so --

21 CHIEF JUSTICE ROBERTS: The circumstances --

22 the circumstances that count as -- as mitigating, 4(a)

23 of the -- the Gleason brief, any other aspect of the

24 defendant's character background or record and any other

25 aspect of the offense which was presented.

1 MR. KATYAL: Exactly, Mr. Chief Justice. We
2 agree that, for example, the jury was instructed that
3 Reginald Carr's child abuse, if it existed, could be a
4 mitigating factor. The question is: How is a jury to
5 determine whether Reginald Carr was abused in the first
6 place, as a child?
7 So the catch-all provision doesn't answer
8 that question.
9 Now, General Schmidt's answer is, well, look
10 at the language of instruction 2. And, Mr. Chief
11 Justice, I think you were referring to that. This is
12 what they say -- what he says in our reply brief of
13 page --
14 CHIEF JUSTICE ROBERTS: I'm sorry. I was
15 quoting from 7.
16 MR. KATYAL: Okay.
17 CHIEF JUSTICE ROBERTS: Maybe it is the same
18 as 2.
19 MR. KATYAL: In 7 -- in 7 -- in 7, I don't
20 see quite the same thing. But -- but I -- I think
21 our -- out general point here is that this Court has
22 said repeatedly in Abdul-Kabir and in Braverman that the
23 mere presentation of evidence is enough. The evidence
24 has to be given full effect as a mitigating
25 circumstance.

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

1 MR. GREEN: Well, let me just do it,
2 Mr. Chief Justice, with respect to the -- the
3 hypothetical that Justice Scalia said. If the hypo was
4 interest-free loans should be given to those found to
5 have good credit, found to have good credit, which
6 mirrors these instructions, and then the language used
7 found with a certain standard beyond a reasonable doubt,
8 or whatever, I think it is absolutely plausible that
9 people would read that instruction and say that applies
10 just as much to people without good credit. They would
11 apply the same standard. And that squares not just with
12 the experience in the States. At least 24 States are
13 using this, if -- if not every State. They cannot point
14 to a single State that says found to exist occurs in the
15 jury instructions nine times. It is not just the
16 absence of an affirmative instruction, it is that these
17 instructions are injecting confusion and uncertainty.
18 And the distinction here is that you can
19 have two men going to -- having committed virtually the
20 same crime with the same aggravating and mitigating
21 circumstances; one will be sentenced to death, one to
22 life, simply because of a legal interpretation of what
23 the jury instructions say. That is not --
24 JUSTICE ALITO: If were on a -- I am sorry.
25 Finish the sentence.

1 MR. KATYAL: I was just going to say, that
2 is not death for the worst offender, Mr. -- Justice
3 Alito, that is -- that is -- the death penalty to be
4 imposed for the worst interpretation of jury
5 instructions.
6 JUSTICE ALITO: If -- if I were on a jury
7 and I were told that the burden -- that mitigators do
8 not have to be proved beyond a reasonable doubt, I would
9 find that confusing because then I would ask what is
10 the -- the burden of proof on mitigators. And I don't
11 think there is any way, really, to answer that question.
12 So maybe this is a situation like trying to define
13 reasonable doubt where less is more. It is better not
14 to get into the question of burden of proof at all.
15 And let me -- just to finish this -- this
16 suggestion, and maybe it is misdirected, but you
17 mentioned the mitigator of -- of child abuse. What
18 would -- if there is any burden of proof, what would be
19 the fact as to which it would apply? The overall
20 category that this person had a bad childhood or that
21 the -- the individual was beaten by his mother or beaten
22 by his father or subjected to sexual abuse or was around
23 people who were using drugs? Unless you define what the
24 mitigators are, which cannot be done, I don't see how
25 you can apply any kind of burden of proof.

1 MR. KATYAL: Well, Justice Alito, I think
2 this Court has never said that if jury instructions are,
3 by silence, confusing, that that silence alone is enough
4 to rise to an Eighth Amendment violation. Here, our
5 point is that the instructions themselves injected the
6 confusion. And so I do not think this Court is going to
7 police every possible thing that the jury might thought
8 in their heads. The point is here they mentioned only
9 one standard, beyond a reasonable doubt. They mentioned
10 it nine times. And they said that the mitigating
11 circumstances had to be found to exist. If the jury
12 interpreted it this way, then this Court -- then the
13 Court would be blessing a jury instruction on beyond a
14 reasonable doubt for the first time ever in its history
15 that said that a jury, all 12 of them, might have
16 believed mitigating circumstances actually existed and
17 could not give it effect. That is what the effect of --
18 CHIEF JUSTICE ROBERTS: What burden of proof
19 do you think the jury applied with respect to the
20 showing of mercy?
21 MR. KATYAL: Well --
22 CHIEF JUSTICE ROBERTS: They were clearly
23 instructed that they can show mercy. So what -- they
24 did not say anything about the burden of proof.
25 MR. KATYAL: And, Mr. Chief Justice, they

1 were clearly instructed that mercy was a, quote, "a
2 mitigating factor."
3 And so they were then told nine times that
4 they had to find a mitigating factor.
5 CHIEF JUSTICE ROBERTS: So you think they
6 had -- they would have interpreted that I have to
7 determine whether to extend mercy beyond a reasonable
8 doubt?
9 MR. KATYAL: Absolutely, Your Honor. I
10 think this Court has said many times that we presume a
11 jury follows its instructions and this is a perfect
12 example of that --
13 CHIEF JUSTICE ROBERTS: I know. But you're
14 begging the question to say the instruction was this and
15 the jury did not follow it.
16 MR. KATYAL: I don't -- I don't think so,
17 Mr. Chief Justice. I think is a perfect example of how
18 mercy would be applied beyond a reasonable doubt. If
19 there was case for mercy after reading all of the
20 sentencing proceedings, it was that Reginald Carr had
21 been abused badly as a child. And that is why mercy
22 should have extended. We are -- we're talking about
23 death-qualified jurors here who already cannot extend
24 mercy just because death is on the line. There had to
25 be something additional. That something additional, in

1 the context of this case, was all about the child abuse
2 of Reginald Carr.
3 And, Justice Kagan, that is exactly what the
4 State, time and again, Joint Appendix pages 250 to 256,
5 said that -- that Reginald Carr did not meet his burden
6 of proof on.
7 And so this was front and center at the
8 mitigating phase of the trial. This was extremely
9 confusing, I think, to the jury. And, of course, this
10 Court's decision in Boyde has a far lower standard than
11 that. It's simply just was there something more than a
12 possibility, it doesn't even have to be 50 percent, that
13 the jury interpreted the instructions the wrong way.
14 JUSTICE SOTOMAYOR: Mr. Katyal, Kansas has
15 already answered this question, hasn't it? Its
16 requirement is that a jury be instructed both that
17 mitigation may not be proven beyond a reasonable doubt,
18 and, second, that the jury be told it has no -- that
19 there is no burden of proof.
20 MR. KATYAL: Exactly. And just like in
21 Maryland V. Mills, where this Court, under the Eighth
22 Amendment, looked to that, here it is significant that
23 not even Kansas is defending the rule that these jury
24 instructions left the jury with the impression of. I
25 mean, indeed I am not aware of a single State that does

1 so. There is no amici on the State's side say that this
2 is going to impose any sort of harm to them. The most
3 modest fix in the world. It can it be done not just
4 with an affirmative instruction, it can be done by must
5 striking out the words "found to exist" out of the jury
6 instructions.
7 CHIEF JUSTICE ROBERTS: What do you think
8 the jury -- if you -- are they supposed to consider
9 things they did not find to exist?
10 MR. KATYAL: Oh, no --
11 CHIEF JUSTICE ROBERTS: I think it is a bit
12 of a stretch to say found to exist implies -- implies a
13 particular standard of proof.
14 MR. KATYAL: I don't think so at all, Your
15 Honor. I think it's found to exist that's the most
16 natural way of reading it. And if there's any doubt,
17 just look at Instruction No. 1.
18 The first thing the jury was told -- this is
19 at petition appendix page 500 of the Reginald Carr
20 petition.
21 The laws of Kansas provide a separate
22 sentencing proceeding shall be conducted when a
23 Defendant has been found guilty of capital murder.
24 That's what they're told after hearing
25 months of testimony about whether or not the Carrs

1 committed the crime under what standard? The beyond a
2 reasonable doubt standard.
3 That was the only thing the jury was told,
4 time and again, both of the guilty phases, nine times in
5 the mitigating phase of this trial. It thinks -- it's
6 absolutely reasonable for a jury to have interpreted the
7 jury instructions to say that's the standard that
8 applies here.
9 And boy, if that's the standard that applied
10 in this case, that is unlike any proceeding in
11 Anglo-American jurisprudence to my knowledge.
12 JUSTICE ALITO: What does it mean to say
13 there's no burden of proof?
14 MR. KATYAL: Well, I think it means that --
15 that --
16 JUSTICE ALITO: Every juror decides
17 individually?
18 MR. KATYAL: I think that -- in Kansas I
19 think that's right. Now, of course you could have
20 minimum thresholds, evidence, and relevance, and so on,
21 as this Court in Tennard said.
22 This is the opposite. This is the highest
23 standard in all of law, beyond a reasonable doubt. It's
24 never been done. And these jury instructions did so.
25 And look, I understand that we could read

1 these facts and say these are horrific crimes, as you
2 said, Justice Alito. But so, too, Reginald Carr had a
3 horrific upbringing. And I think the jury was entitled,
4 and this Court's decision in Stringer says, that it is
5 -- when -- when the injection of an arbitrary factor is
6 put in and two juries could reach different results on
7 the same facts, that violates the Eighth Amendment.
8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Case 14-452 is -- oh, I'm sorry. You have
10 rebuttal time.
11 (Laughter.)
12 CHIEF JUSTICE ROBERTS: You have, in fact,
13 four minutes of it.
14 REBUTTAL ARGUMENT OF GENERAL DEREK L. SCHMIDT
15 ON BEHALF OF THE PETITIONER
16 GENERAL SCHMIDT: Mr. Chief Justice, I'm
17 anxious on the point. Thank you.
18 Two or three points as time allows,
19 Mr. Chief Justice:
20 First on Mr. Katyal's point that the issue
21 here is the how and not the what. I would come back to
22 the point that there was both a catch-all and a mercy
23 instruction here. And I would further point this Court
24 to what this Court has suggested in the past.
25 This Court has fairly consistently suggested

1 that the cure to a Lockett type of error, that there was
2 something presented that might not have been able to be
3 given effect, would be catch-all or mercy types of
4 instructions.
5 And I would refer you to pages 310 and 11 of
6 Penry 1 where it wasn't the Court but it was defense who
7 requested a mercy instruction that was not granted. And
8 as a result, the case wound up in front of this Court.
9 But also suggest that you look at page 803
10 on Penry 2 where this Court suggested --
11 Justice O'Connor writing -- that a catch-all instruction
12 well crafted would have been the cure for the error this
13 Court found in Penry 2.
14 A similar implication in page 242 in
15 Abdul-Kabir, and a similar implication in page 308 of
16 Blystone. So I think Kansas has done here precisely
17 what the Court has repeatedly suggested --
18 JUSTICE KENNEDY: What is the -- I know it's
19 your rebuttal. What's the catch-all instruction you
20 rely on?
21 GENERAL SCHMIDT: The catch-all instruction
22 is the last paragraph of Instruction No. 7.
23 JUSTICE KENNEDY: Of 7. Thank you.
24 GENERAL SCHMIDT: Yes. Correct. And the
25 mercy instruction is earlier. I believe it's the second

1 paragraph in Gleason.

2 Secondly, with respect to Justice Ginsburg's

3 observation that there -- a juror would have noticed

4 that there's a different between the use of finding with

5 respect to unanimity, or finding in another context

6 suggesting that this argument's not very persuasive,

7 that the mere use of the word "find" repeatedly somehow

8 created confusion, I think that's correct. And I think

9 there is other contrast in this record that shows it.

10 For example, with respect to the verdict

11 forms. In those cases where the beyond a reasonable

12 doubt language is included, finding is included with

13 respect to both aggravation and mitigation, but the

14 jurors were asked to check the box on what aggravators

15 they had found. They weren't asked to do anything like

16 that with respect to mitigators.

17 Now a lay juror, being asked to do one task

18 for one purpose and a different task for a different

19 purpose, is not likely to conclude that the two tasks

20 are in some way equivalent.

21 Likewise, to the point that was suggested

22 earlier, Mr. Katyal correctly points out that the mercy

23 instruction is described as a mitigating circumstance.

24 That's absolutely true, but it certainly doesn't follow

25 that the jury would have thought that they have to apply

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

1 was a 1993 case, barely after this Court --
2 JUSTICE BREYER: But then as a succession of
3 references back.
4 GENERAL SCHMIDT: No. But the point, Your
5 Honor, is that when the Kansas Supreme Court talked
6 about Harman, this Court only three years previously had
7 laid down the rule that governs this case.
8 It is now well developed what the Eighth
9 Amendment rule is. Harman doesn't say anything about
10 what this Court has been asked to decide.
11 And finally, I would urge the Court to end,
12 I suppose, where we began, which is there's Eighth
13 Amendment error here. And absent correction of that
14 Eighth Amendment error by this Court, it will be the
15 Eighth Amendment interpretation given by the Kansas
16 Supreme Court that disposes of this case, disposes of
17 the other similarly situated cases in Kansas --
18 JUSTICE BREYER: As we said this -- as we
19 said, just that. Four sentences you quote, they're
20 wrong.
21 Now, as to whether the -- the instruction in
22 content here was too confusing because of the placement
23 all the arguments you heard, they didn't really go into
24 that. Nor did they really go into the question of State
25 law. Nor did they get into the question of whether the

1 new State law is retroactive.

2 All those remain open on remand for the

3 parties to ask the Court to consider it, and if the

4 Court decides it's appropriate to raise it at that time,

5 to consider it. Is that satisfactory to you?

6 GENERAL SCHMIDT: No, Justice Breyer.

7 Obviously we'll deal with whatever State law questions

8 may arise subsequently. But this was --

9 JUSTICE BREYER: Not just State law, it's

10 the confusion. Sorry. Go ahead. Forget it.

11 I wanted to know if it's satisfactory. The

12 answer is no.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Case 14-452 is submitted, and we will hear

15 the second question in the other two cases in a moment.

16 (Whereupon, at 11:05 a.m., the case in the

17 above-entitled matter was submitted.)

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A

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