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IN THE SUPREME COURT OF THE UNITED STATES

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KANSAS, :
Petitioner, :
v. : No. 04-1170
MICHAEL LEE MARSH, II. :
- - - - - x

Washington, D.C.

Tuesday, April 25, 2006

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 1:00 p.m.

APPEARANCES:

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

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

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P R O C E E D I N G S

[1:00 p.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument next in 04-1170, Kansas versus Marsh.

General Kline.

ORAL ARGUMENT OF PHILL KLINE

ON BEHALF OF PETITIONER

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

This Court has never held that a specific method of weighing aggravating and mitigating evidence is required, yet in its individualized sentencing line of cases this Court has consistently said that all the Eighth Amendment requires is that a juror consider and give effect to all relevant mitigating evidence. In pages 23 through 28 of your appendix, you will find the Kansas jury instructions and Kansas law clearly, on four occasions, instruct individual jurors that they must individually consider all mitigating evidence that they find. Furthermore, the jurors are instructed in five different methods in which they can give that mitigating evidence the effect of a life sentence, and only one manner in which, acting unanimously and after the State has met the highest burden allowed by law in three separate measurements, beyond a reasonable doubt

1 demonstrated that the death sentence is appropriate.

2 Specifically, instruction number 4, paragraph
3 2 on page 24 of the joint appendix, will show the
4 jurors are instructed that mercy, in and of itself, is
5 a mitigating piece of evidence, and later, in the
6 instruction that lays out the mitigating evidence
7 presented in this specific case, they are told, in
8 paragraph 18 on page 26 of your joint appendix, that
9 mercy, by itself, can be sufficient to warrant a
10 sentence other than death.

11 JUSTICE SCALIA: I -- I'm sorry, what
12 instruction is that?

13 MR. KLINE: Justice Scalia, you will find it
14 -- first of all, mercy is referred to in paragraph --
15 in instruction number 4 --

16 JUSTICE SCALIA: I got --

17 MR. KLINE: -- paragraph 2 -- okay.

18 JUSTICE SCALIA: -- that one. It's the other
19 one. It was instruction number --

20 MR. KLINE: The instruction, again, is number
21 4 in paragraph 18 on page --

22 JUSTICE SCALIA: I gotcha.

23 MR. KLINE: -- 26.

24 JUSTICE SCALIA: All the way at the end of 4,
25 okay.

1 MR. KLINE: You will see the instruction for
2 mercy again.

3 JUSTICE KENNEDY: Well, you began by saying
4 that there's three different measures, I think -- I
5 think was the word you used. And the State, I take it,
6 must prove, beyond a reasonable doubt, (a) that it was
7 an aggravated -- or, (a) that it was an aggravated
8 murder, (b) that there was another crime involved --

9 MR. KLINE: Justice --

10 JUSTICE KENNEDY: -- sort of --

11 MR. KLINE: -- Kennedy --

12 JUSTICE KENNEDY: -- if you could just walk
13 me through that.

14 MR. KLINE: Certainly. First of all, the
15 State has to prove, beyond a reasonable doubt, with
16 jury unanimity, that the defendant is guilty of capital
17 murder. And Kansas has one of the most narrow death-
18 penalty statutes in the Nation. And then, past that
19 time, we then engage in a sentencing --

20 JUSTICE KENNEDY: And --

21 MR. KLINE: -- phase 5.

22 JUSTICE KENNEDY: -- capital murder includes,
23 in this case --

24 MR. KLINE: Capital murder includes, in this
25 case, that the homicide involved more than one person

1 in a single act.

2 JUSTICE KENNEDY: Involved more than one
3 person. Then, second?

4 MR. KLINE: Then we go to the sentencing
5 phase, in which the State has to prove one of eight
6 statutorily defined aggravating factors beyond a
7 reasonable doubt with jury unanimity. There were three
8 specific aggravating factors that were found by the
9 jury in this instance. And then, the defendant
10 introduces all mitigating evidence, and the standard of
11 introduction is relevancy. But, unlike the Walton
12 case, which has a functionally identical provision that
13 is at issue here, the State maintains the burden,
14 while, in Walton, the burden was provided to the
15 defendant to demonstrate that the mitigating factors
16 were so substantial to call for leniency.

17 JUSTICE KENNEDY: You had to prove, beyond a
18 reasonable doubt, the mitigating factors do not
19 outweigh the aggravating factors that have already been
20 established.

21 MR. KLINE: That is correct. And that is
22 found in instruction number 10. And as we go through
23 this process, you see that the Kansas death-penalty law
24 has a default to life in virtually every stage of the
25 prosecution of the case. And then, instruction number

1 10 is a determination by the legislature consistent
2 with this Court's precedent, because we have narrowed
3 the class of defendants who are eligible for death,
4 consistent with Furman and the concern for guided
5 discretion. And then, we have allowed the introduction
6 and consideration of all mitigating evidence. The
7 juror is then told how to give the effect that they
8 desire, after the reasoned moral decision, to that
9 mitigating evidence. As defense counsel for Mr. Marsh,
10 in the transcript of the sentencing phase, on page 66,
11 volume 4 -- it is not in your joint appendix, but it is
12 part of the record before the Court -- stated to the
13 jury in closing, "The practical fact is that each of
14 you will decide whether or not you believe death is the
15 appropriate sentence. And if you decide that death is
16 not the appropriate sentence, you have decided that the
17 mitigators outweigh the aggravators."

18 What instruction number 10, which is before
19 you today, which states that the State must prove
20 beyond a reasonable doubt that the mitigators do not
21 outweigh the aggravating factors, is, is guidance to
22 the jury on how they can give the --

23 JUSTICE STEVENS: May I just ask --

24 MR. KLINE: -- effect --

25 JUSTICE STEVENS: -- this question and kind

1 of cut through -- is it a correct interpretation of the
2 instructions, as a whole, to say, in effect, "If you
3 find the aggravating and mitigating circumstances are
4 equally balanced, you shall impose the death sentence"?

5 MR. KLINE: If a juror finds -- that is
6 correct, Justice Stevens -- if the juror's decided
7 conclusion and reasoned moral judgment is that the
8 mitigating factors and the aggravating factors are in
9 balance, and finds that beyond a reasonable doubt,
10 instruction number 10 clearly indicates that death is
11 the appropriate sentence. So, it --

12 JUSTICE SOUTER: The difficulty I have is in
13 the phrase that you have mentioned in the course of
14 your argument a couple of times referring to the
15 "reasoned moral response." And the difficulty I have
16 in squaring "reasoned moral response" with the
17 construction that the Kansas Court and we all agree is
18 the proper construction of the -- of the -- of the
19 equipoise kind of provision, is this. Kansas has a
20 right, as I understand it, to define what it regards as
21 the aggravating circumstances, those that support a
22 death verdict. And Kansas has done so. Kansas is also
23 saying that if a jury cannot find that the aggravators,
24 as we've defined them, outweigh the mitigators -- i.e.,
25 if the jury is in equipoise -- the result must be

1 death, anyway. And that does not seem to be a reasoned
2 moral response. I'm assuming that a reasoned moral
3 response would be: the death penalty should be imposed
4 because the aggravators do outweigh -- i.e., it's not
5 equipoise -- the aggravators are heavier. And because
6 Kansas is saying, "Even though they're not, death is
7 the result, anyway," it doesn't seem like a reasoned
8 moral response. What is your answer to that?

9 MR. KLINE: Justice Souter, of course the
10 State believes that it is. It is, first of all,
11 consistent with this Court's precedent as what is
12 required --

13 JUSTICE SOUTER: Well, that's the issue.

14 MR. KLINE: And in the -- in the Walton case,
15 this Court found that a functionally identical
16 provision in Arizona, even though the burden remained
17 on the defendant, was appropriate after the State had
18 met the requirements of guided discretion, as well as
19 the individualized sentencing requirement, in setting
20 about a -- proving that, "This defendant is more
21 deserving of death than anybody else convicted of the
22 same crime."

23 JUSTICE SOUTER: But here we have, it seems
24 to me, to be a stark finding that it has not been
25 proven. That is what "equipoise" means. If

1 aggravators are the basis for a death sentence, the
2 equipoise finding is, "Aggravators don't predominate.
3 We cannot make that conclusion. We're right on the
4 fence." And it seems to me that to call that a
5 reasoned moral response -- "We're on the fence, but
6 execute anyway" -- seems a total inconsistency.

7 MR. KLINE: The State maintains, Justice
8 Souter, that the decision that the mitigating factors
9 do not outweigh the aggravating factors is a decision,
10 and it is a --

11 JUSTICE SOUTER: But it's a decision that
12 says, "We don't know what should be done." If
13 aggravators define the basis for execution, and
14 mitigators define the basis for life, the equipoise
15 verdict says, in so many words, "We don't know which is
16 more important." And Kansas says, when the jury comes
17 back and says, "We don't know," that the result should
18 be death. And that is what seems to me inconsistent
19 with the notion of a reasoned moral response.

20 MR. KLINE: The distinction, Justice Souter,
21 that I believe, from your analogy, is that the Kansas
22 Legislature has said they do know, and that death is
23 appropriate once a defendant has been found guilty of
24 capital murder, in a very narrow definition. And then,
25 once the --

1 JUSTICE SCALIA: It seems to me it sounds
2 different if you put it differently. Surely, it's a
3 reasoned moral response to say, "We have found these
4 horrible aggravating factors in this murder. It's not
5 even your usual murder. There are these terrible
6 aggravating factors. Three of them, we found. And we
7 further find that there is no mitigating evidence to
8 outweigh those aggravating factors." That seems to me
9 a perfectly valid moral response.

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

11 JUSTICE SOUTER: But that is not our case, is
12 it? Because our case is not, "We don't find that the
13 mitigators outweigh." Our case is, "We find the
14 mitigators are of equal weight." That's why you get to
15 equipoise. It's not a question of the failure of
16 mitigators to predominate.

17 JUSTICE SCALIA: No.

18 JUSTICE SOUTER: It is the sufficiency of
19 mitigators to equal in weight. And that's what poses
20 the problem, it seems to me.

21 JUSTICE SCALIA: But it seems to me that to
22 be equal in weight is not to predominate. And that's
23 all the jury is saying --

24 MR. KLINE: I would agree, Justice Scalia --

25 JUSTICE SCALIA: -- if there's nothing to

1 outweigh the aggravating factors.

2 JUSTICE SOUTER: Of course it is not to
3 predominate, but it is something more precise than
4 merely not predominating. It is a fact, in effect,
5 that you don't know, if all you know is that they don't
6 predominate. The fact that you know, here, is that
7 they equal, and --

8 CHIEF JUSTICE ROBERTS: Do we know that as a
9 fact?

10 MR. KLINE: Justice Roberts, I believe that
11 there are a couple of things which might help
12 illuminate a little bit more what the jury faces in
13 this instance. First of all, the statement --

14 CHIEF JUSTICE ROBERTS: Do we have a return
15 of a verdict saying, "We find these factors in
16 equipoise"?

17 MR. KLINE: There is a verdict form that
18 requires the jury, with unanimity, if the sentence is
19 death, to indicate that the State has met the burden
20 beyond a reasonable doubt of demonstrating --

21 CHIEF JUSTICE ROBERTS: So, what we have is a
22 situation where this is a theoretical possibility under
23 the statute.

24 MR. KLINE: Correct.

25 CHIEF JUSTICE ROBERTS: Not a situation where

1 this is what the jury has said.

2 MR. KLINE: The jury does not find in that
3 fashion.

4 JUSTICE SOUTER: That's right. We don't --
5 we don't know whether that was the case here or not.

6 MR. KLINE: How --

7 JUSTICE SOUTER: As I understand it, our
8 question is, if a jury could return the death verdict
9 in the equipoise situation, as the Kansas Supreme Court
10 has defined it, is that -- is that statute allowing for
11 that possibility constitutional? Isn't that --

12 MR. KLINE: That is the issue, just --

13 JUSTICE SOUTER: Yes.

14 MR. KLINE: -- as it was in Walton, which had
15 --

16 JUSTICE SOUTER: Yes.

17 MR. KLINE: -- a functionally identical
18 provision that required that the defendant demonstrate
19 that there were mitigating factors substantial enough
20 to call for leniency, which --

21 CHIEF JUSTICE ROBERTS: We're not talking,
22 just -- we're not talking about a numerical equipoise.
23 I -- there's three aggravators and three mitigators,
24 in equipoise. And the -- presumably, the individual
25 jurors can give what weight they think is appropriate

1 to the mitigating factors. They can find all three
2 aggravators met, and say, "Well, I still think, under
3 factor 18, that mercy ought to outweigh death."

4 MR. KLINE: That is correct, Justice Roberts.
5 And, in fact, they are informed that it is not a
6 numerical equation.

7 JUSTICE GINSBURG: But is it -- is it like in
8 a -- in a -- take a civil case where the judge gives
9 the standard charge about, "Imagine two plates and a
10 scale, and if they are in equipoise, then you find
11 against the party who has the burden of proof" -- if we
12 make that comparison, then it's pretty clear that the
13 burden of proof is on the defendant if the answer is --
14 to the equipoise question is, "Then you must come in
15 with a death verdict."

16 MR. KLINE: Justice Ginsburg, unlike in
17 Arizona, there is a specific instruction to the jury
18 that they must decide beyond a reasonable doubt that
19 the mitigating factors do not outweigh the aggravating
20 factors before the death sentence is imposed. And it
21 is analogous to instructing the jury on how to give the
22 effect they desire to the mitigating and aggravating
23 factors that have been presented. I would possibly
24 agree that we would have a constitutional issue if it
25 was similar to instructing a jury, "You either mark

1 blue or red on the jury verdict form, and we will not
2 tell you the effect of that decision." However, this
3 instruction clearly lets them know that a decision
4 beyond a reasonable doubt that the State has met its
5 burden, that the mitigators do not outweigh the
6 aggravating factors, that the effect is death. And --

7 JUSTICE ALITO: Is there a difference in the
8 moral burden on the jurors, or the psychological burden
9 on the jurors, in the situation where they have to find
10 that the aggravators outweigh the mitigators, and,
11 therefore, make an affirmative finding that leads to
12 the sentence of death, as opposed to the situation
13 where they can say, "We can't decide, under the
14 applicable burden of proof, which side is weightier,"
15 and, therefore, they allow a default rule to dictate
16 what the sentence is going to be?

17 MR. KLINE: Justice Alito, I do not believe
18 that that is what occurs, because, indecision, under
19 Kansas law, is clearly indicative of a life sentence.
20 In fact, if the jury does not, with unanimity, come
21 together and make an affirmative decision, and indicate
22 such on the verdict form within a reasonable time, they
23 are told and instructed, "the judge shall dismiss the
24 jury." And the State's --

25 JUSTICE ALITO: No, but if they find -- if

1 they agree, beyond a reasonable doubt, that the
2 aggravators and the mitigators are in equipoise, then
3 they allow the default rule to dictate the sentence of
4 death. Isn't that right?

5 MR. KLINE: That is correct, at some point.
6 I wouldn't term it a "default rule" in every statutory
7 scheme involving the death penalty. There is a point
8 in time when the jury is informed that the result of
9 their deliberations is a death sentence. So, you can
10 call something a default rule in virtually any State.
11 And, in fact, relying on the Walton decision, many
12 States have functionally identical statutes to Kansas,
13 and courts have interpreted the Walton decision as
14 resolving this issue. In *Adamson v. Lewis*, the Ninth
15 Circuit said that the issue of the potential, the
16 hypothetical, of equipoise was resolved in Walton.
17 Furthermore, the Idaho -- the Seventh Circuit, relating
18 to the Idaho scheme relating to the death penalty,
19 found that this Court resolved the issue in Walton, as
20 did the Illinois Court. So, there have been several
21 findings based on Walton. And, in fact, the Kansas
22 Legislature enacted this death penalty statute soon
23 after Walton --

24 JUSTICE STEVENS: General Kline, can I ask
25 you this question? Supposing the law was that you're

1 supposed to be instructed that, "Unless the mitigating
2 factors substantially outweigh the aggravating factors,
3 the sentence shall be death." Would that be
4 permissible?

5 MR. KLINE: Justice Stevens, as you're aware,
6 that's the Blackmun dissent in Walton, in the
7 hypothetical that he posed with his concern about
8 Walton. I believe that there could come a point in
9 time, based on the instruction, that the jury was not
10 able to give full effect to the mitigating evidence
11 that they desired.

12 JUSTICE STEVENS: Well, what about my
13 hypothetical?

14 MR. KLINE: That's -- that there -- it would
15 approach a time, possibly, where --

16 JUSTICE STEVENS: Would it --

17 MR. KLINE: -- this Court would find --

18 JUSTICE STEVENS: Would it be constitutional
19 or unconstitutional?

20 MR. KLINE: This Court, under --

21 JUSTICE STEVENS: In your view.

22 MR. KLINE: On my view? It would approach a
23 problem with this Court's --

24 JUSTICE STEVENS: I know it approaches the
25 problem. I'm wondering if it gets there.

1 [Laughter.]

2 MR. KLINE: I'd defer to the wisdom of this
3 Court.

4 [Laughter.]

5 JUSTICE BREYER: Leaving law out of it, which I'd
6 like to do, just for the sake of argument, imagine
7 you're a juror, and this is a totally contrived
8 situation, which I think we're deciding -- I don't know
9 if there's ever been such a situation -- but you're a
10 juror, and you're told the following by a fellow juror,
11 "The reason that we have these aggravating
12 circumstances, which are hard to understand here, is,
13 we want to be sure this fellow is, morally speaking,
14 somewhat more deserving of death, than the average."

15 And then he says, "And the reason that we
16 have these mitigating circumstances here is because
17 every one of them means that he's somewhat less moral --
18 he's not as morally undeserving, cuts the other way, it
19 reduces -- it makes him less deserving of death,
20 morally speaking."

21 Now, you're the juror, how do you feel about
22 this?"

23 And you say, "They're absolutely in balance,
24 absolutely in balance. For every fact here on the
25 aggravating side that puts me thinking, morally

1 speaking, he's more deserving of death, there is a
2 mitigating factor which makes me think, morally
3 speaking, he's less deserving of death. So, I'm in
4 perfect balance."

5 And your fellow juror says, "Now, will you
6 please give me, then, one moral reason why he should be
7 executed?"

8 And what's your answer?

9 MR. KLINE: My answer would be that the law
10 clearly provides that if that is the finding --

11 JUSTICE BREYER: No, but if the law says,
12 "You have to be able to give, morally speaking, reason
13 -- you have to reason your way towards the moral
14 conclusion that he's deserving of death" -- that's why
15 I tried to take the law out of it. I don't want you to
16 be a lawyer. I want you to be a juror. And I want you
17 to give a moral reason --

18 MR. KLINE: The moral reason would be --

19 JUSTICE BREYER: -- why, when this is in
20 equipoise, he is more deserving of death than the
21 average.

22 MR. KLINE: Justice Breyer, I would say that
23 the moral reason is, "I know the effect of that
24 deliberation, and I know that, if I make that finding,
25 that the death sentence will be warranted."

1 JUSTICE SCALIA: Well, and of course --

2 JUSTICE BREYER: Well --

3 JUSTICE SCALIA: -- the jury doesn't have a
4 free-falling moral judgment to make. It accepts the
5 judgment of the majority of the people in Kansas that
6 certain aggravators, and only those aggravators, shall
7 be counted against the defendant --

8 MR. KLINE: And --

9 JUSTICE SCALIA: -- and that all of them
10 shall be -- even if the juror himself does not believe,
11 morally, that this particular aggravator ought to be
12 there. So, it's not as though our law says that
13 somehow the jury has to -- each juror has to be able to
14 make, like Solomon, his own moral judgment on this
15 fellow. And one of the things that the -- that the
16 Kansas law prescribes is that when they're in
17 equipoise, the people of Kansas think that the
18 aggravators that they have specified are serious enough
19 that unless there is something to overcome them, the
20 death penalty is appropriate. That seems to me a moral
21 judgment within the limited range of moral judgment
22 that the jury is accorded.

23 MR. KLINE: That is correct, Justice Scalia.
24 And the concern about unfettered moral judgment of a
25 jury calls into question the original purpose for

1 Furman. And so, there is guided discretion --

2 CHIEF JUSTICE ROBERTS: Of course, they have
3 unfettered discretion with respect to the mitigating
4 factors, don't they? Under --

5 MR. KLINE: That is correct.

6 CHIEF JUSTICE ROBERTS: -- under factor 18,
7 any other circumstance which they find serves as a
8 basis for a sentence other than death.

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

10 JUSTICE KENNEDY: And I take it --

11 MR. KLINE: -- Mr. Chief Justice.

12 JUSTICE KENNEDY: -- the moral answer is
13 also, "He stands before us with the scales already
14 tipped. He stands before us having been shown, beyond
15 a reasonable doubt, to have committed aggravated
16 murder. He has the obligation to show us why he should
17 be excused from that penalty. He has not done so. We
18 can take anything that he came -- brought to our
19 attention, and we can say that this outweighs." It
20 does not.

21 MR. KLINE: And, Justice Kennedy, that is the
22 decision in the holding in Walton. And --

23 JUSTICE SOUTER: Is that the law in Kansas?
24 I mean, I thought -- correct me if I'm wrong, because I
25 may have made a wrong assumption here -- I thought the

1 finding of guilt to an aggravated murder is the preface
2 to a determination as to whether aggravators or
3 mitigators predominate. And, based upon that
4 determination, there will be a decision as to whether
5 the sentence should be death or life.

6 MR. KLINE: The first determination that a
7 jury engages in is whether the defendant has been
8 proven, beyond a reasonable doubt, guilty of capital
9 murder --

10 JUSTICE SOUTER: Right.

11 MR. KLINE: -- which is defined in a very
12 narrow statute. Kansas --

13 JUSTICE SOUTER: And, at that point, we don't
14 have any way of knowing, I take it, whether the penalty
15 should be life or death.

16 MR. KLINE: Then we have -- you're correct.

17 JUSTICE SOUTER: Okay.

18 MR. KLINE: And then we have a separate
19 sentencing phase in which the State first bears the
20 burden of demonstrating one -- eight -- of eight
21 aggravating factors is present. And that burden is
22 beyond a reasonable doubt --

23 JUSTICE SOUTER: Okay. But --

24 MR. KLINE: -- with jury unanimity.

25 JUSTICE SOUTER: But --

1 MR. KLINE: And --

2 JUSTICE SOUTER: -- what I'm -- what I'm --
3 what I'm getting at is, I don't -- I -- as I understand
4 the Kansas scheme, the determination of guilt, to
5 aggravated murder, does not create a presumption in
6 favor of the death penalty.

7 MR. KLINE: No, the --

8 JUSTICE SOUTER: Okay.

9 MR. KLINE: -- that is correct. That is
10 correct. There are several steps.

11 JUSTICE SCALIA: It depends on what you mean
12 by a "presumption." It certainly -- it certainly says
13 that unless you find something that outweighs this, the
14 death penalty is the proper penalty.

15 MR. KLINE: Justice Scalia --

16 JUSTICE SCALIA: The burden is on the jury to
17 find something to outweigh it. And, in the absence of
18 a finding of something that outweighs it, when these
19 aggravators are found, the death penalty is the proper
20 penalty.

21 MR. KLINE: Justice Scalia, that is correct.
22 Once the State has met the burden of proving that one
23 of the eight statutory aggravators is present --

24 JUSTICE SOUTER: Right. But the fact of --
25 let me -- I think we've got a terminological problem --

1 the fact that there has been a finding of guilt of
2 aggravated murder is not tantamount, as I understand
3 it, to a finding that aggravating factors to be
4 considered at the penalty phase have also been found.
5 Is that --

6 MR. KLINE: That is --

7 JUSTICE SOUTER: -- correct?

8 MR. KLINE: -- correct.

9 JUSTICE SOUTER: Okay.

10 MR. KLINE: There is a separate burden there
11 --

12 JUSTICE SOUTER: Okay.

13 MR. KLINE: -- Justice Souter. And as it
14 relates to the "give effect" language, the cases that
15 this Court has considered regarding that are
16 dramatically different. In those cases, such as the
17 Penry cases and other cases, the concern was, the jury
18 was affirmatively instructed that they could not use
19 evidence that was introduced and relevant in a manner
20 which would lead to mitigation, such as the defendant's
21 youthfulness. And the special instruction in Texas
22 said that they could only utilize that evidence to
23 determine whether there was a likelihood of re-offense.
24 And this Court reasoned that it is possible to look at
25 youthfulness as mitigating factor which diminishes the

1 moral culpability of the defendant. There is no claim
2 in this case that the jurors were unable to take the
3 mitigating evidence and give it whatever effect they
4 desired in mitigation. In fact, they are instructed
5 that they must individually consider all such evidence.
6 And then they are instructed to make their decision
7 based upon what effect that they would give it.

8 JUSTICE SCALIA: Can --

9 MR. KLINE: So --

10 JUSTICE SCALIA: Can I ask you a question
11 that goes to your response to Justice Souter's last
12 question? As I understand the scheme, maybe my
13 understanding is wrong, once they have found the
14 existence of those aggravating factors that justify the
15 death penalty, and then you move into the penalty phase
16 for them to decide whether, in fact, the death penalty
17 would be imposed, it's not up to them to -- they can't
18 eliminate one of those aggravating factors that has
19 been found. They have to take into account all of the
20 aggravating factors that have been found. Isn't that
21 right?

22 MR. KLINE: That's correct, Justice Scalia.
23 I think the confusion is the use of the term
24 "aggravated murder," which would be not quite correct
25 under Kansas law. There is a statutory requirement of

1 a finding of guilt of capital murder, and that is in
2 very narrow circumstances. Kansas has one of the most
3 narrow death penalties in the Nation. Then once that
4 guilt is determined, we then move to the phase where
5 the State must prove an aggravating factor in addition
6 to having proved that the defendant is guilty of
7 capital murder.

8 Once that is achieved, then the
9 jurors are instructed to give way to a consideration to
10 all aggravating factors that they find, with unanimity,
11 to exist, and to consider all mitigating evidence which
12 they find, individually, to exist, with the only burden
13 on the defendant being relevancy for introduction. And
14 then, they are instructed to consider whether the State
15 has proven, beyond a reasonable doubt, that the
16 mitigating factors do not outweigh the aggravating
17 factors.

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

20 CHIEF JUSTICE ROBERTS: Thank you, General
21 Kline.

22 Ms. Woodman.

23 ORAL ARGUMENT OF REBECCA E. WOODMAN

24 ON BEHALF OF RESPONDENT

25 MS. WOODMAN: Mr. Chief Justice, and may it

1 please the Court:

2 Since the argument of the attorney general
3 was addressed exclusively to the question of the
4 constitutionality of the Kansas statute, I will devote
5 all of my argument to that subject, as well, although I
6 am sure that the Court, in deliberations, will be
7 considering the several jurisdictional issues which
8 were briefed and argued earlier in the term. And if
9 there are no questions on those jurisdictional issues,
10 I will proceed to the merits.

11 To pick up on some of the things that were
12 said during Attorney General Kline's argument, the
13 Eighth Amendment requires reliability in the
14 determination that death is an appropriate sentence.
15 And at the selection stage, the question is whether the
16 jury has made a reliable, collective, responsible
17 decision based upon the unique circumstances of the
18 individual defendant that death is an appropriate
19 sentence and that this defendant is particularly
20 culpable in a way that distinguishes him from the mass
21 of death-eligible defendants. And the problem with the
22 equipoise provision here, which the State agrees can
23 occur under the Kansas statute, is that we don't know
24 from a death verdict pronounced by a jury in Kansas
25 whether the jury did decree death by equipoise or not.

1 Death sentences must be rationally reviewable. And
2 when we look at the -- at a death sentence that's been
3 pronounced in Kansas, we can't determine whether the
4 jury decreed death by equipoise.

5 JUSTICE KENNEDY: We are confident that the
6 jury found aggravating factors. We know that.

7 MS. WOODMAN: Yes.

8 JUSTICE KENNEDY: And we know --

9 MS. WOODMAN: Yes, and I agree --

10 JUSTICE KENNEDY: -- that they found them
11 beyond a reasonable doubt.

12 MS. WOODMAN: Yes. The jury did find an
13 aggravating factor beyond --

14 JUSTICE KENNEDY: And we know --

15 MS. WOODMAN: -- a reasonable --

16 JUSTICE KENNEDY: -- we --

17 MS. WOODMAN: -- doubt.

18 JUSTICE KENNEDY: -- and we know that they
19 found that the defendant had not shown that mitigating
20 factors outweighed those aggravating factors.

21 MS. WOODMAN: That's right. But the Kansas
22 Supreme Court, in the Kleypas case, examined the Kansas
23 statute -- which, by the way, is unique to Kansas; no
24 other State in the country has a statute like this, and
25 this will affect no State outside of Kansas -- they

1 examined this statute in great detail, and they --

2 JUSTICE SCALIA: You disagree from your --
3 with your friend on the other side on that point.

4 MS. WOODMAN: Whether it's unique?

5 JUSTICE SCALIA: How can we check on that?
6 No, he said that a number of other State statutes would
7 be affected by our coming out the way you would like
8 us, on this.

9 MS. WOODMAN: I don't see how, because --

10 JUSTICE SCALIA: Because he said --

11 MS. WOODMAN: -- Kansas --

12 JUSTICE SCALIA: -- he said it would change
13 Walton, and that would impair those other State
14 statutes.

15 MS. WOODMAN: As we argue in our brief,
16 Walton simply did not speak to this --

17 JUSTICE SCALIA: Yes.

18 MS. WOODMAN: -- issue. And, in fact, the
19 Arizona Supreme Court, in Walton, interpreted the
20 Arizona statute to require that aggravators outweigh
21 mitigators.

22 JUSTICE SCALIA: I didn't mean to
23 interrupt your argument, but presumably the attorney
24 general will tell us, in his rebuttal.

25 MS. WOODMAN: Sure. And the Montana statute,

1 which reads precisely the way Arizona's is, they've
2 decided the equipoise issue and said that the language
3 of that statute does not mandate death by equipoise.
4 So, those statutes are distinguishable, and there's
5 simply no other State that has a statute which mandates
6 death by equipoise.

7 In any event, the Kansas Supreme Court did
8 interpret the statute to contain a mandatory death-by-
9 equipoise provision, which the State's question
10 presented assumes is the case. And the court, familiar
11 with the way the statute has operated, and is likely to
12 operate it in Kansas, found that equipoise can happen,
13 and that it risks unreliability in capital sentencing
14 in a way that's forbidden by the Eighth Amendment. And
15 I think one of the problems here is that the
16 terminology of "weighing" conveys a false impression of
17 predefined weights. And the attorney general conceded
18 that that's not how juries consider the balancing of
19 aggravating and mitigating circumstances. And we agree
20 with that. And that's why it is wrong to view this as
21 principally a burden-of-proof issue. It's not. The
22 issue, at the selection stage -- the State certainly
23 has the burden to prove an aggravating circumstance
24 beyond a reasonable doubt, but, at the selection stage,
25 the issue is not meeting some particular burden of

1 proof, it's whether the jury has made a reliable,
2 responsible, collective decision that this unique
3 defendant deserves the death penalty that distinguishes
4 him --

5 JUSTICE KENNEDY: It seems to me that --

6 MS. WOODMAN: -- from other death-eligible --

7 JUSTICE KENNEDY: -- that that --

8 MS. WOODMAN: -- defendants.

9 JUSTICE KENNEDY: -- that that hurts you
10 somewhat. If you want to give us this visual metaphor
11 of a scale, or a football field, where you move it
12 beyond the 50-yardline, whatever visual metaphor you
13 want, and you weigh, you balance where the scales of
14 justice balances, it seems to me that that's a stronger
15 case than saying the jurors can establish their
16 aggravation, then they can take any mitigating factor
17 they want, for any reason, and apply it. And they
18 can't do that, because the defendant hasn't shown it.
19 It seems to me that that's -- that that's a weaker
20 argument than if you had this balancing mechanism that
21 was our controlling metaphor.

22 MS. WOODMAN: Well, let's look at the way
23 that equipoise can happen under the Kansas statute --
24 and I think Justice Alito alluded to it -- that if the
25 jurors can't decide between aggravated and mitigating

1 circumstances, the sentence is death. The statute
2 decrees death, and --

3 JUSTICE KENNEDY: They've already decided
4 aggravating circumstances, you can't say they can't decide it.
5 They've already decided aggravating circumstances.

6 MS. WOODMAN: They've decided --

7 JUSTICE KENNEDY: And what they're deciding
8 is that there's no mitigating circumstances to outweigh
9 it.

10 MS. WOODMAN: What they've decided is that,
11 in looking at aggravating and mitigating circumstances
12 together, they can't determine, one way or the other,
13 whether aggravators outweigh mitigators or mitigators --

14 CHIEF JUSTICE ROBERTS: But --

15 MS. WOODMAN: -- outweigh aggravators.

16 CHIEF JUSTICE ROBERTS: But how realistic is
17 that as a possibility when you're talking about
18 abstract concepts as mitigating factors, like how much
19 mercy should be shown? I mean, do you really think
20 there's any juror who's going to say, "All right, I'm
21 giving -- I've found the aggravating circumstance that
22 he killed two people, and I've found the aggravating
23 circumstance that it was particularly heinous to slash
24 the throat and leave the toddler to burn. But I also
25 think that mercy ought to be shown. But, you know, it

1 just happens to come up to exactly the level of the
2 aggravating circumstances. So, I'm stuck. I don't
3 know what to do." I don't think that's the way jurors
4 would react. They either think that the need to show
5 mercy or, the one before that, that he's a talented
6 artist, outweighs the fact of the aggravating
7 circumstances, or it doesn't. I just think it's an
8 unrealistic supposition. And there's nothing in the
9 statute -- they don't get an equipoise instruction.
10 So, how -- I mean, is there any reason to think that
11 jurors do come to that balance between such inchoate
12 concepts in the first place?

13 MS. WOODMAN: Yes. I think it can occur in
14 close cases. And, after all, those are the only cases
15 where equipoise would even be relevant. And let me
16 give you an example. Suppose there's a woman who wants
17 to donate a million dollars to Yale Law School, and, as
18 part of that donation, she's going to -- she has --

19 JUSTICE SCALIA: Is that an aggravating
20 circumstance?

21 [Laughter.]

22 MS. WOODMAN: Well, bear with me for a
23 minute, Your Honor. She has to choose a portrait of
24 her beloved husband to hang in the law school. These
25 portraits were taken at different times, they have

1 different qualities, different features. And she has
2 to choose one. And this decision proves
3 extraordinarily difficult for her to make. And she
4 compares the relative qualities of the two portraits.
5 They're both good. She loved her husband. And she
6 simply cannot choose between the two. And so, she does
7 one of two things. One is that she just can't bear to
8 debate with herself anymore about which one is the
9 better-quality portrait; and so, she becomes agnostic
10 about it and says, "I give up. Pick one." And so, she
11 picks one. The other is that the decision is simply
12 too difficult for her to make; and so, she abdicates
13 that decision and says, "Let the dean pick."

14 And you can analogize that to the ways in
15 which this statute can operate. And the jury can
16 arrive at equipoise by becoming agnostic about the
17 decision on whether -- on the balance between
18 aggravating/mitigating --

19 CHIEF JUSTICE ROBERTS: I think your --

20 MS. WOODMAN: -- circumstances.

21 CHIEF JUSTICE ROBERTS: I think your analogy
22 took away what I would have regarded as the basis for
23 my question. I think it may well be true that people
24 have difficulty deciding between two portraits. I'm
25 not sure people come to the sense that someone who's

1 guilty of allowing a 19-month-old to burn to death and
2 slashing the throat of her mother thinks it's equally
3 balanced when they're inclined to show mercy, for
4 whatever reason. It seems to me they either make a
5 determination that the circumstances of his upbringing,
6 emotional instability outweigh the responsibility for
7 what they had found to be aggravating factors, or they
8 determine that the aggravating factors outweigh the
9 fact that they may show mercy for other basis. I just
10 -- I can see thinking two portraits are
11 indistinguishable. I just don't see a juror
12 functioning and saying, "I just can't decide whether to
13 show mercy or to convict for death." And they're
14 equally balanced. I understand the idea they may
15 debate it with the other jurors, but, to come and say,
16 "You know, I just can't decide," it seems to me that
17 the -- particularly since they can put as much weight
18 into the mitigating factors as they want -- they can
19 say, "I want to show a lot of mercy," they can say, "I
20 want to show a little bit of mercy" -- but to say that,
21 "I want to show just enough mercy that is exactly
22 balanced," I don't understand that.

23 MS. WOODMAN: Well, you see, individual
24 jurors, in the course of deliberations -- this is a
25 qualitative judgment, after all, and individual jurors,

1 in the course of deliberations, might be leaning one
2 way or the other at different times during
3 deliberations. But what this equipoise provision does
4 is that it allows the jurors to compromise on equipoise
5 when they simply cannot deliberate anymore, or if they
6 simply just want to avoid making the hard decision.

7 JUSTICE ALITO: Would it be constitutional if
8 the Kansas statute said that, "The jury must find, by a
9 preponderance, that the aggravating factors outweigh
10 the mitigating factors"?

11 MS. WOODMAN: Yes.

12 JUSTICE ALITO: And wouldn't a defendant be
13 better off under the current Kansas statute than under
14 a statute like that, where, under the current statute,
15 the jury has to find, beyond a reasonable doubt, that
16 the aggravating factors and the mitigating factors are
17 at least in equipoise?

18 MS. WOODMAN: Well, the jury does have to
19 find equipoise beyond a reasonable doubt. But the fact
20 remains that the jury is making that decision of
21 equipoise, which requires the death sentence, without
22 having made the individualized sentencing determination
23 required at the selection stage under the Eighth
24 Amendment. And that's the problem with the equipoise
25 provision, because it allows the jury to avoid making

1 that decision, which is --

2 JUSTICE ALITO: Well, I mean --

3 MS. WOODMAN: -- required.

4 JUSTICE ALITO: -- suppose the jury thinks
5 that the aggravating factors outweigh the mitigating
6 factors 51-49. Now, under the first statute that I
7 hypothesized, that would result in a verdict of death,
8 would it not? What would the result be under the --
9 under the current Kansas statute, where the aggravators
10 have to be shown, beyond a reasonable doubt, to
11 outweigh the mitigators?

12 MS. WOODMAN: Well, I think if the statute
13 requires that the aggravators outweigh mitigators, this
14 Court has upheld that formula. That is a decision that
15 the jury has made. And the legislature can make that
16 decision. And so, when you look -- that's why I'm
17 trying to -- I mean, the State agrees that this is not
18 a quantitative determination. And I will grant you, if
19 the jury is -- if it were a quantitative determination,
20 which is totally unrealistic, and we agree with the
21 State's reasoning on that -- then if the jury is
22 precisely exactly equivalent, 50-50, on aggravating and
23 mitigating circumstances, that might be said to
24 constitute a decision. But, as even the State argues,
25 that's not how jury deliberations work. And under this

1 equipoise provision, the jury can decree death without
2 having made the individualized sentencing decision
3 required at the selection stage. And it's because, on
4 the one hand, if the decision is too close to call, the
5 equipoise provision allows the jurors to simply give up
6 and settle on equipoise as a group. This is a group
7 decision, after all. They have to be unanimous on the
8 question of whether aggravators --

9 JUSTICE STEVENS: May I ask you --

10 MS. WOODMAN: -- are not --

11 JUSTICE STEVENS: -- this question?

12 MS. WOODMAN: -- outweighed by mitigators.

13 JUSTICE STEVENS: Suppose the jurors are
14 deadlocked, six to six, and you're not -- you don't
15 know, maybe some are a little stronger there, but
16 there's a deadlock. And what if the judge told them,
17 "Well, in the event of a deadlock, you resolve it by
18 flipping a coin." Would that be constitutional?

19 MS. WOODMAN: Absolutely not, because they're
20 not making the decision that's required at the
21 selection stage.

22 And to follow up on something that General
23 Kline said during his argument, that the provision is
24 for a hung jury, there's no provision for a hung jury
25 in the event the jury finds itself in equipoise. The

1 only provision for a hung jury, under the Kansas
2 statute, is if the jury is unable to reach a verdict.
3 But equipoise, does not prevent a death verdict. In
4 fact, the statute requires a death verdict if the
5 jurors are in equipoise.

6 CHIEF JUSTICE ROBERTS: But the verdict that
7 the jury returns is a verdict of death. They do not
8 return a verdict saying, "We're in equipoise," and then
9 the death sentence is imposed by operation of law. The
10 verdict imposed is, "We do not find -- we find these
11 aggravating circumstances. We find they're not
12 outweighed. And, therefore, we sentence the defendant
13 to death."

14 MS. WOODMAN: Well, a determination of
15 equipoise -- the jury has to find equipoise beyond a
16 reasonable doubt, and that, necessarily, means that the
17 aggravators are not outweighed by mitigators.

18 JUSTICE SCALIA: No, but --

19 MS. WOODMAN: That's how this statute was
20 interpreted by the Kansas Supreme Court.

21 JUSTICE SCALIA: Yes, but I think -- I think
22 the Chief Justice's point is that you're -- you're
23 really not being accurate when you say, "The jurors can
24 thereby avoid the difficult choice." They don't avoid
25 the difficult choice. They're fully aware, under this

1 statutory scheme, that if they don't find that the
2 mitigators outweigh, they are condemning this person to
3 death. That's the moral choice they're faced with.
4 And when they come in with that verdict, they know what
5 they're doing. And I consider that a moral -- a moral
6 judgment on their part.

7 MS. WOODMAN: Well, the jury certainly knows
8 that they are imposing a death sentence. But what this
9 instruction and the prosecutorial arguments given in
10 the cases tell them is that they can fulfill their
11 responsibilities as jurors without coming to a final
12 judgment about whether aggravators outweigh mitigators,
13 or vice versa.

14 JUSTICE SCALIA: And you think that a juror
15 who believes that this person shouldn't be -- shouldn't
16 be sent to death -- that is to say, who believes that
17 the mitigators outweigh the aggravators -- would join a
18 jury verdict which produces the result that he's
19 sentenced to death, right? I think that is so unlikely
20 --

21 MS. WOODMAN: But in --

22 JUSTICE SCALIA: -- that he's going to say,
23 "Well, I -- you know, I think he shouldn't go to death,
24 but the aggravators and mitigators are absolutely
25 evenly balanced, so I guess I've got to send him to

1 death," I don't think any juror's going to do that.

2 MS. WOODMAN: But the fact that this is a
3 group decision leads to even a greater risk of
4 abdication of --

5 JUSTICE SCALIA: It takes only one --

6 MS. WOODMAN: -- that decision.

7 JUSTICE SCALIA: It takes only one to
8 disagree.

9 MS. WOODMAN: But it's a group decision, and
10 jurors are encouraged and forced to compromise to come
11 to a verdict. And in close cases, with jurors leaning
12 slightly one way or another, they, being forced to come
13 to a consensus, are even more likely to compromise on
14 equipoise, rather than engage in the draining task of
15 persuading each person leaning one way or the other to
16 come together.

17 JUSTICE SOUTER: But regardless of the
18 likelihood of that situation in any given case -- and I
19 happen to agree with Justice Scalia; I mean, I don't
20 think the likelihood of that in a given case is great --
21 we're, nonetheless, I think, faced with the fact that
22 the Supreme Court of Kansas says, "That can happen."

23 MS. WOODMAN: Absolutely.

24 JUSTICE SOUTER: "And if it does happen, the
25 result is death." And I think we've --

1 MS. WOODMAN: That's right.

2 JUSTICE SOUTER: -- we've got to take that as
3 a given. I mean --

4 MS. WOODMAN: That's right.

5 JUSTICE SOUTER: -- do you see any way out of
6 it? I --

7 MS. WOODMAN: That's right. This Court is
8 bound by the Kansas Supreme Court's interpretation of
9 the statute. And what's happening here is, when the
10 jurors do settle on equipoise, in whatever way they
11 settle on equipoise, the fact of the matter that -- is
12 that in either of -- either of the two cases I've --
13 well, either in -- in three cases I've described, the
14 jurors are following their instructions, and, in either
15 of these situations, the defendant is being sentenced
16 to death only as a death-eligible defendant, because
17 that's the only constitutionally required decision
18 that's actually been made by the jury in that
19 situation. And to go back to Justice Breyer's
20 hypothetical about the box from the last argument, the
21 legislature has determined that the individuals will be
22 separated out as a result of equipoise, but there is
23 nothing about that situation, them being in that box,
24 that separates them from any other generic death-
25 eligible defendant. And that's the problem with this

1 equipoise provision. And, yes, the Kansas Supreme
2 Court found that it can happen. This Court is bound by
3 that interpretation. The State concedes that. And,
4 therefore --

5 JUSTICE STEVENS: You mentioned the --

6 MS. WOODMAN: The --

7 JUSTICE STEVENS: -- Kansas Legislature. Has
8 there been any suggestion the statute ought to be
9 amended to get rid of this silly little problem?

10 MS. WOODMAN: Yes.

11 JUSTICE STEVENS: I don't mean to call it --

12 MS. WOODMAN: Yes.

13 JUSTICE STEVENS: -- silly little problem,
14 but --

15 MS. WOODMAN: Yes, and I think --

16 JUSTICE STEVENS: -- the very narrow --

17 MS. WOODMAN: -- the Legislature is going to
18 take that up again. And there's simply no consequence
19 to anyone else by affirming the Kansas Supreme Court's
20 decision in this case. The Legislature is going to
21 take the matter up again. There's no question about
22 that.

23 JUSTICE BREYER: Is there --

24 CHIEF JUSTICE ROBERTS: So, how is it --

25 JUSTICE BREYER: -- anything --

1 CHIEF JUSTICE ROBERTS: -- how is it -- is
2 there any question about how it's going to come out
3 when they take it up again?

4 [Laughter.]

5 MS. WOODMAN: Well, I wouldn't want to
6 speculate on that. There are going to be arguments on
7 both sides, certainly.

8 JUSTICE SCALIA: What if they still conclude,
9 as they did before, that when these aggravating factors
10 are found, unless there is mitigation to overcome them,
11 it is the judgment of the people of Kansas that this
12 person is deserving of death? What if they come to
13 that conclusion again? You want us to tell them, "No,
14 the people of Kansas cannot come to that, what seems to
15 me, quite rational decision"?

16 MS. WOODMAN: Well, but there is no moral
17 judgment, as has been stated here. There's no moral
18 judgment. The State can -- the Legislature can
19 determine that death is an appropriate sentence. The
20 Legislature -- this Court upheld a legislative
21 determination, when aggravators outweigh mitigators, in
22 Blystone, that --

23 JUSTICE SCALIA: It's so silly to say that
24 Kansas can circumscribe the moral judgment of the -- of
25 the jury by saying, "You can take into account 18

1 aggravators, or else only two aggravators." That is a
2 -- you know, a significant control on their moral
3 judgment. But then to say that Kansas cannot
4 circumscribe their moral judgment to the very limited
5 degree of saying, "Unless you find that the mitigators
6 outweigh the aggravators, the proper response is the
7 death penalty."

8 MS. WOODMAN: But you cannot divorce the
9 weighing process enacted by the legislature from the
10 individualized sentencing decision required under the
11 Eighth Amendment at the selection stage. And the
12 equipoise --

13 JUSTICE SOUTER: But I --

14 MS. WOODMAN: -- provision.

15 JUSTICE SOUTER: If I -- if I may interrupt
16 you, I -- your point, I take it, is, the jurors have
17 got to make this decision, not the Legislature of
18 Kansas.

19 MS. WOODMAN: That's right.

20 JUSTICE SOUTER: Okay.

21 MS. WOODMAN: And if the Legislature --

22 JUSTICE KENNEDY: But haven't the jurors made
23 the decision that, "We have looked at all of the moral
24 arguments that he has presented. Each of one of the --
25 of us has individually weighed them. Each one of us

1 know that if we have any moral reason not to impose the
2 death penalty, we can do it. And we make the moral
3 judgment that we cannot make that determination."

4 MS. WOODMAN: But the --

5 JUSTICE KENNEDY: Moral judgment, from
6 beginning to end.

7 MS. WOODMAN: This statute allows a third
8 option of equipoise, which allows a jury to impose
9 death without making that judgment.

10 JUSTICE BREYER: Okay, well, what do you say
11 to --

12 JUSTICE KENNEDY: No, but that's -- your term
13 is "equipoise." You say the jury has done nothing --

14 MS. WOODMAN: The Kansas Supreme Court's --

15 JUSTICE KENNEDY: -- you say the jury has
16 done nothing. What the jury has done is, it's weighed
17 all the evidence with great care, and it's said that,
18 "Beyond a reasonable doubt, the mitigating
19 circumstances do not overcome." That is a moral
20 judgment.

21 MS. WOODMAN: But the --

22 JUSTICE KENNEDY: And you label it
23 "equipoise."

24 MS. WOODMAN: The other possibilities are
25 that the jury has found that, "We can't decide whether

1 aggravators outweigh mitigators, or vice versa. And
2 the statute tells -- the instructions tell us to impose
3 death."

4 JUSTICE SOUTER: But I think Justice Kennedy
5 is saying, when they make that determination, "We can't
6 tell whether one outweighs the other," that they are
7 making a moral judgment there. And what's your --
8 what's your answer to that?

9 MS. WOODMAN: That is --

10 JUSTICE SOUTER: He's saying they are making
11 a moral judgment.

12 MS. WOODMAN: That is not a moral --

13 JUSTICE SOUTER: And they know what its
14 consequence is.

15 MS. WOODMAN: That is not a moral judgment,
16 because it says nothing about the personal culpability
17 --

18 JUSTICE SOUTER: In other words you're --

19 MS. WOODMAN: -- of the --

20 JUSTICE SOUTER: -- saying moral --

21 MS. WOODMAN: -- defendants.

22 JUSTICE SOUTER: -- judgment has got to be an
23 either/or judgment, not a "we can't figure it out"
24 judgment.

25 MS. WOODMAN: Absolutely.

1 JUSTICE SOUTER: Okay.

2 JUSTICE BREYER: But the difficulty, I think,
3 in the case is, it's artificial. I think it is. We're
4 in an artificial situation, and we're imagining those
5 12 jurors saying they're in equipoise between
6 mitigating and aggravating. We don't know. They --
7 even. All right. Now, you could look at this as
8 saying, "You have to have a reason for thinking these
9 people are -- this person is morally worse than the
10 average." And then we imagine some fungible commodity,
11 like moral badness units. And for every one we go up
12 on the aggravating side, we go down on the mitigating
13 side, so we're back to zero. And then, some people,
14 like you, are looking at this and saying, "See, you're
15 at zero. You went up, you went down, so they're no
16 worse than the average." But other people can look at
17 it and say, "We'll tell you about -- one thing about
18 this individual. This is an individual who did do the
19 aggravating things, and he has counterbalancing
20 mitigating things, and that's good enough to separate
21 him out, morally speaking, from somebody who doesn't.

22 Now, my problem is, you either look at it the
23 one way or you look at the other way, and you -- and
24 I'm trying to find a reasoned -- if you -- can -- do
25 you want to add anything?

1 MS. WOODMAN: Well, I mean, the Kansas
2 Supreme Court determined that equipoise can happen.
3 And in the situations that I've described, there is a
4 real risk under this statute that the jury can either
5 become agnostic and just pick, and the statute requires
6 them to pick death, or the jury, encouraged by
7 prosecutorial arguments to abdicate the decision, do
8 abdicate, simply cop out and impose death, because it
9 allows them to avoid making the tough choice. And I
10 think those are very real possibilities under this
11 statute. The statute requires death in those
12 situations, and it's the risk that this procedure poses
13 that presents the problem. And this Court has always
14 held that these kinds of risks of unconstitutional
15 results are intolerable in capital cases. And we
16 simply cannot look at a death sentence in Kansas and
17 say, with any reliability at all, that this jury did
18 not decree death by equipoise, that this jury made the
19 reliable sentencing judgment required under the Eighth
20 Amendment at the selection stage. We just can't say
21 that under this statute.

22 JUSTICE KENNEDY: You think that under this
23 instruction, a Kansas juror could say, "You know, I'm
24 not interested in deliberating more. I'm not going to
25 participate"? That's what you're want -- that's what

1 you want us to believe, right, based on this argument?

2 I -- that's just -- any juror -- any jury can ignore
3 its instructions. There's nothing I can do about that.

4 MS. WOODMAN: Well, they're not --

5 JUSTICE KENNEDY: Here, they are instructed
6 to consider every mitigating circumstance that's
7 presented and determine whether or not that should be a
8 factor in their decision.

9 MS. WOODMAN: They're not -- they're not
10 ignoring their instructions at all. They're following
11 their instructions if they arrive at equipoise. And
12 the instructions and the prosecutorial arguments tell
13 them to impose death. The prosecutorial --

14 JUSTICE KENNEDY: Well --

15 MS. WOODMAN: -- arguments are --

16 JUSTICE KENNEDY: Well, but you're suggesting
17 that they kind of --

18 MS. WOODMAN: -- perfectly in line.

19 JUSTICE KENNEDY: -- that they can tune out.

20 MS. WOODMAN: It's not that they're tuning
21 out. They take their jobs very seriously. But what
22 they are encouraged to believe by the instructions and
23 the prosecutorial arguments is that they will fulfill
24 their responsibilities as jurors without coming to a
25 final judgment on whether aggravators outweigh

1 mitigators or vice versa. And it's the risk that they
2 will do that, that makes this statute unconstitutional.
3 And the Kansas Supreme Court determined that there is
4 such a risk of equipoise under this statute that it
5 cannot comply with the Eighth Amendment.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, Ms.
8 Woodman.

9 General Kline, you have 4 minutes remaining.

10 REBUTTAL ARGUMENT OF PHILL KLINE

11 ON BEHALF OF PETITIONER

12 MR. KLINE: Thank you, Mr. Chief Justice.

13 First, referring to Justice Scalia's question
14 as it relates to other States that are affected, in the
15 joint appendix, pages 98 through 107, you have a
16 summary, and, additionally, in the amici brief that was
17 filed by several States, on page 23, it identifies
18 Arizona, Florida, Nevada, North Carolina, Oklahoma, and
19 Missouri as having similar provisions. And,
20 additionally, the cases that have relied on Walton to
21 determine that the equipoise issue has been resolved
22 are the Eleventh Circuit, in Jones v. Dugger, the
23 Arizona Supreme Court. And in State v. Gretzler, they
24 found that the provision provided for equipoise, as
25 well as in Idaho, in State v. Hoffman.

1 As it relates to a juror somehow imposing
2 death when they are undecided, I would direct you to
3 page 26 of the joint appendix, at instruction number 9,
4 which reads, "The Defendant is entitled to the
5 individual opinion of each juror. Each of you must
6 consider the evidence for the purpose of reaching a
7 verdict. Each of you must decide the case for
8 yourself."

9 Furthermore, the jury is instructed, in
10 instruction number 12 in the second paragraph on page
11 28 of the joint appendix, that, "In order to reach a
12 verdict in the case, your decision must be unanimous.
13 And then, after reasonable deliberation, if you are
14 unable to reach a unanimous verdict, you shall notify
15 the Court, and the result is a life sentence."

16 Kansas law is very clear that death is only
17 appropriate in the singular instance in which a jury
18 has found beyond a reasonable doubt with unanimity that
19 the defendant is guilty of capital murder, that an
20 aggravating factor exists, and then that the mitigating
21 factors do not outweigh the aggravating factors.

22 It was in 1994 that the Kansas Legislature
23 passed the death penalty in Kansas, a few years after
24 the Walton decision. And I was there for the debate,
25 as a legislator. It was a compelling moment, not just

1 because of the result, but the solemnity and
2 seriousness of the debate in which they were seeking to
3 define, through their reasoned moral judgment, what
4 justice demands in instances such as this.

5 And recognizing this Court as the final
6 arbiter of the meaning of the Eighth Amendment, you
7 will see, through pages 23 through 28 of your appendix,
8 your words mirrored back to you. The Legislature has
9 respected your judgment and made the reasoned moral
10 decision that death is appropriate in the instances --

11 JUSTICE ALITO: Was there a particular --

12 MR. KLINE: -- that we are discussing.

13 JUSTICE ALITO: -- was there a reason why
14 they provided that, in the case of equipoise, the
15 sentence would be death? Or is that just a quirk of
16 the way the provision was written?

17 MR. KLINE: In the debate, all of these
18 decisions were discussed through committee as well as
19 on the legislative floor. And the belief was, in these
20 various aggravated and narrow circumstances, that the
21 State believes death is appropriate. And if we
22 followed the individualized sentencing line of these
23 cases and allowed a jury to consider all of the
24 mitigating evidence that is relevant, that the State
25 could make that decision.

1 Thank you, Mr. Chief Justice.

2 CHIEF JUSTICE ROBERTS: Thank you, General
3 Kline.

4 The case is submitted.

5 [Whereupon, at 1:54 p.m., the case in the
6 above-entitled matter was submitted.]

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