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IN THE SUPREME COURT OF THE UNITED STATES

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OREGON, :
Petitioner, :
v. : No. 04-928
RANDY LEE GUZEK. :
- - - - - x

Washington, D.C.
Wednesday, December 7, 2005

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:09 a.m.

APPEARANCES:

MARY H. WILLIAMS, ESQ., Solicitor General, Salem,
Oregon; on behalf of the Petitioner.
KANNON K. SHANMUGAM, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.;
for United States, as amicus curiae, supporting the
Petitioner.
RICHARD L. WOLF, ESQ., Portland, Oregon; appointed by
this Court; on behalf of the Respondent.

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P R O C E E D I N G S

[10:09 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Oregon versus Guzek.

Ms. Williams.

ORAL ARGUMENT OF MARY H. WILLIAMS
ON BEHALF OF PETITIONER

MS. WILLIAMS: Mr. Chief Justice, and may it please the Court:

The eight amendment requires that a sentencing jury in a capital case must consider mitigation, which this Court consistently has defined as related to a defendant's background, character, or the circumstances of the offense. The Oregon Supreme Court in this case has broadly construed circumstances of the offense to include evidence that is inconsistent with the defendant's guilt. That holding is not constitutionally compelled and does not further the purpose of having the sentencing jury consider mitigation.

JUSTICE BREYER: Can you --

JUSTICE O'CONNOR: Is it --

JUSTICE BREYER: Can you --

JUSTICE O'CONNOR: -- possible that the Supreme Court of Oregon misapprehended some of the

1 facts in this case?

2 MS. WILLIAMS: Justice O'Connor, it is
3 possible that the Supreme Court was not aware that
4 defendant's mother had testified in the --

5 JUSTICE O'CONNOR: Right.

6 MS. WILLIAMS: -- guilt phase, and that's
7 because defendant did not raise that issue in the trial
8 court, did not move to have her alibi testimony
9 admitted under the State statute that would have caused
10 the Court to address her prior --

11 JUSTICE O'CONNOR: Do we --

12 MS. WILLIAMS: -- testimony.

13 JUSTICE O'CONNOR: -- need to vacate the
14 judgment and remand for that, or --

15 MS. WILLIAMS: No --

16 JUSTICE O'CONNOR: -- do we just go ahead and
17 --

18 MS. WILLIAMS: No, Justice O'Connor, I don't
19 believe that there needs to be any change in the
20 posture of the case in order -- in order for the Court
21 to address the Federal issue, and that's because the
22 significance of the Oregon Supreme Court ruling doesn't
23 turn on whether someone's testimony was admitted in the
24 guilt phase, or not.

25 JUSTICE O'CONNOR: Well, under Oregon law, is

1 it possible that some of the mother's testimony would
2 be otherwise admissible at the penalty stage?

3 MS. WILLIAMS: Under Oregon law, under the
4 majority's holding in this case and the way they dealt
5 with the grandfather's prior testimony, on remand
6 defendant could have the mother's transcript from the
7 guilt phase read, but what would be different about it
8 under the Oregon Supreme Court holding, and what we're
9 asking the Court to address, is what they can do with
10 that alibi testimony, no matter what form it comes in.

11 And that's the significant part of the Supreme Court
12 holding.

13 JUSTICE KENNEDY: Well, I -- may -- I want
14 you, perhaps, to elaborate on that, as well. And
15 perhaps the Respondent is the one to answer this
16 question. Do you understand that they, on remand, if
17 they prevail in this case, would want to introduce the
18 mother's live testimony?

19 MS. WILLIAMS: I am not sure. Under the --

20 JUSTICE KENNEDY: We're not sure --

21 MS. WILLIAMS: -- Oregon Supreme --

22 JUSTICE KENNEDY: -- all right.

23 MS. WILLIAMS: -- Court holding, they would
24 certainly be free to introduce her live testimony.

25 It's very clear from the Oregon Supreme Court decision

1 that any alibi evidence comes in, and that's not
2 limited to evidence that was presented in the guilt
3 phase, or even witnesses who had been in the guilt
4 phase. And -- but coming back to what the court's
5 holding focuses on is how that alibi evidence can be
6 used in the remanded proceeding. And not only does it
7 come in, and the primary statute on -- that they dealt
8 with for the grandfather's testimony is really a
9 statute that deals with admissibility of evidence --
10 prevents the parties from having to go through making
11 foundations and other showings in order to get evidence
12 admitted. But, under the Oregon Supreme Court holding,
13 defense counsel can argue, based on that evidence, that
14 the jury should consider the possibility that defendant
15 is innocent, as a mitigating factor in determining the
16 sentence.

17 JUSTICE BREYER: Well, can't you under --
18 look, first imagine that they don't want to introduce
19 one word from the mother's mouth that isn't already in
20 that transcript. Imagine that's the circumstance. If
21 that's the circumstance, then I should think there is
22 no doubt, under Oregon law, that those words in the
23 transcript are admissible. And I believe that under
24 Oregon law -- and I'm not certain -- that, an ordinary
25 case, a death-eligible person does have the right to

1 argue in the sentencing proceeding. Think back over
2 that trial jury and you will see that there are doubts
3 as to whether this man is guilty or not. Am I right --
4 am I right on the first part? Am I right on the second
5 part?

6 MS. WILLIAMS: Justice Breyer, you are
7 correct on the first part, but not on the second part,
8 and that's because Oregon Supreme Court unanimously has
9 construed Oregon's law on mitigation to say that what
10 the Oregon Legislature intended was to have as
11 mitigation only those pieces that are required by the
12 eighth amendment.

13 JUSTICE BREYER: All right. In other words,
14 prior to this case, in the State of Oregon, where there
15 was a death case -- maybe there weren't very many, but
16 where there was one, under Oregon law -- we have the
17 trial; immediately thereafter, the sentencing, and the
18 lawyer had no right to argue, under Oregon law. Think
19 back about your certainty as to whether this individual
20 is guilty.

21 MS. WILLIAMS: That would be correct, Your
22 Honor, that --

23 JUSTICE BREYER: Yes, all right.

24 MS. WILLIAMS: -- unless the eighth amendment
25 --

1 JUSTICE BREYER: And did the court say, here
2 -- the Oregon court, in this case -- one, You can
3 introduce evidence, which it seems to have been
4 mistaken about, about not being there, but that,
5 second, the Federal Constitution gives you the right to
6 argue the residual doubt?

7 MS. WILLIAMS: Yes, Your Honor. And that's
8 most clear, from the dissent, as characterizing the
9 question that the Court is addressing. And the Oregon
10 Supreme Court opinion is in the -- excuse me -- the
11 appendix to the cert petition. And at page 68
12 of the appendix from the dissent, Justice Gillette
13 writes, "The issue in this case is whether under the
14 emphasized wording of that statutorily required jury
15 instruction," referring to the mitigation question,
16 "defendant was entitled to have the jury consider the
17 evidence that he proffered. The majority says he was.
18 I disagree."

19 JUSTICE BREYER: Ah. "Consider the evidence"
20 is different from "making an argument about the
21 evidence." And what I didn't see in the -- Oregon's
22 majority opinion, is a statement that not only can this
23 evidence be introduced -- because, after all, in a
24 normal case, the jury's heard it --

25 MS. WILLIAMS: Yes.

1 JUSTICE BREYER: It's the same jury. But I
2 didn't see, anywhere, where they addressed the question
3 about what kind of argument the defense had the right
4 to make at the sentencing trial in respect to the
5 residual doubt that they might have from what they just
6 heard. Can you point, in that opinion, to where they
7 made that statement that you just said they made about
8 the argument?

9 MS. WILLIAMS: About the argument. Where I
10 read -- no, I cannot point to specific language in the
11 majority opinion that says "and defense counsel gets to
12 make an argument based on this, and the jury must
13 consider that." That comes from this Court's case law
14 of how mitigating evidence must be treated once it is -
15 -

16 JUSTICE KENNEDY: You want --

17 MS. WILLIAMS: -- required to be --

18 JUSTICE KENNEDY: You want us to hold that.
19 You want us to say that a defense counsel can be
20 admonished by the judge not to make the argument that,
21 "Ladies and gentlemen, this is the final penalty. My
22 client claims he's innocent. If, in 20 years, it turns
23 out that there is evidence exonerating him, it will be
24 too late. I want you to consider that and give him
25 life." You can't make that argument.

1 MS. WILLIAMS: Yes, Your Honor, I -- our
2 position is that the eighth amendment does not require
3 that as a mitigating factor, that that is not one of
4 the circumstances of the offense, certainly not -- it
5 doesn't go to the defendant's character or background.

6 JUSTICE SCALIA: Ms. Williams, I don't -- I
7 don't understand all of this discussion about what the
8 -- whether the State law would have produced the same
9 result, or not. We have never held, have we, that,
10 where a State Supreme Court opinion clearly rests on a
11 Federal ground, a Federal constitutional ground, we do
12 not have jurisdiction if there is a possible State
13 ground that would have left it -- led to the same
14 result? Have we ever held that?

15 MS. WILLIAMS: No, Justice Scalia. In fact -
16 -

17 JUSTICE SCALIA: And we've said just the
18 opposite, haven't we?

19 MS. WILLIAMS: Yes, Justice Scalia.

20 JUSTICE BREYER: Well, that isn't the thrust
21 of my question, of course. The thrust of my question
22 is that if, in fact, this evidence from the mother
23 comes in under State law, it comes in under State law,
24 because -- I have the cite; you know the --

25 MS. WILLIAMS: Yes.

1 JUSTICE BREYER: -- section I'm referring to.
2 If it comes in under State law, and they're not trying
3 to prove anything else, and the holding of the Oregon
4 Supreme Court is about what evidence is admissible, and
5 not about what arguments to be made, I don't see what
6 reason we would have to reach an issue that isn't in
7 the case.

8 MS. WILLIAMS: And, Justice Breyer, I think
9 the primary reason that the State is concerned with it
10 is because of the broad holding that the Oregon Supreme
11 Court has announced under -- about what eight amendment
12 requires. When you combine that with what this Court
13 has said about what that means when evidence is
14 mitigating evidence, then I think a necessary corollary
15 of the Oregon Supreme Court holding is that defense
16 counsel does get to make that argument, and that the
17 jury must --

18 CHIEF JUSTICE ROBERTS: But there's no --

19 MS. WILLIAMS: -- be permitted --

20 CHIEF JUSTICE ROBERTS: -- reason that the
21 defendant couldn't introduce other evidence in his
22 resentencing trial, is there?

23 MS. WILLIAMS: Under the --

24 CHIEF JUSTICE ROBERTS: I mean, if he has
25 other -- he says, "I have other witnesses that go to

1 the residual-doubt question," and I would -- you know,
2 on retrial, if he prevails here, presumably he would be
3 entitled to put in that evidence, as well.

4 MS. WILLIAMS: That's correct, Mr. Chief
5 Justice. The Oregon Supreme Court's conclusion is very
6 broad, that any alibi evidence comes in, and, as the
7 dissent notes, that it also would not be limited simply
8 to alibi evidence, but any evidence that is
9 inconsistent with the guilt verdict in this case that
10 would form a basis for arguing that doubt about the
11 defendant's guilt should be a factor that the jury
12 considers in responding to the mitigation question that
13 --

14 JUSTICE KENNEDY: Let me --

15 JUSTICE STEVENS: But what do we do with the
16 case --

17 JUSTICE KENNEDY: -- ask you --

18 JUSTICE STEVENS: -- if your opponent
19 acknowledges that -- or stipulates, in effect, that
20 he's not going to put anything in except what's already
21 in the transcript? Then do we have a case?

22 MS. WILLIAMS: I think you still have a case,
23 Justice Stevens --

24 JUSTICE STEVENS: Is it --

25 MS. WILLIAMS: -- because --

1 JUSTICE STEVENS: -- about the right to
2 argue? Is that what it is?

3 MS. WILLIAMS: It's about the right to argue
4 and what the jury is told to do with that. And it's
5 also that the State is going to have to live with this
6 decision in other capital cases, and other capital
7 defendants --

8 JUSTICE STEVENS: Yes. But our --

9 MS. WILLIAMS: -- may not be willing to --

10 JUSTICE STEVENS: -- jurisdiction is limited
11 to reviewing a final judgment in this case.

12 MS. WILLIAMS: Yes.

13 JUSTICE STEVENS: We can't give an advisory
14 opinion which would tell you what to do in other cases,
15 which -- if that's all it does.

16 MS. WILLIAMS: But I do not believe that a
17 party can force the Court into that position by
18 stipulating that, although the State Supreme Court
19 holding permits it --

20 JUSTICE STEVENS: But would they're --

21 MS. WILLIAMS: -- to do much more --

22 JUSTICE STEVENS: -- they would be giving up
23 the right that you claim you don't want them to have.

24 MS. WILLIAMS: But they would give it up in a
25 way that would basically lock the State into a box. We

1 couldn't get --

2 JUSTICE STEVENS: For other cases --

3 MS. WILLIAMS: -- review here, we couldn't
4 get --

5 JUSTICE STEVENS: -- but not for this case.

6 MS. WILLIAMS: -- review. Not for this case
7 --

8 JUSTICE STEVENS: Yes.

9 MS. WILLIAMS: -- that's correct.

10 JUSTICE STEVENS: That's why I'm concerned
11 that perhaps we're being confronted with a request for
12 an advisory opinion. I don't know. Maybe they haven't
13 categorically agreed to what -- they may be going --
14 willing to say that they aren't going to put anything
15 else in. I don't really know that yet.

16 MS. WILLIAMS: But I think their stipulation
17 would have to have two parts -- one, that they wouldn't
18 put anything else in that wasn't presented in the guilt
19 phase; and, two, that they wouldn't argue that, based
20 on that evidence, the jury should consider doubts about
21 the defendant's guilt in deciding what the appropriate
22 sentence is.

23 JUSTICE STEVENS: We may -- we may not have
24 held they have a constitutional right to make that
25 argument, but do you -- do you think that State --

1 that you did -- you don't think they could even make
2 the argument as a matter of State procedure or anything
3 at all?

4 MS. WILLIAMS: Not on the mitigation
5 question, Your Honor. And that's because of the way
6 the Oregon Supreme Court has construed the mitigation
7 question, and has construed it to mean that only that
8 which the eighth amendment requires is to be presented
9 to the jury. The Legislature adopted that provision in
10 response to this Court's mitigation case law, and
11 that's what they were intending to implement, and
12 nothing more than that. I think States are free to do
13 more, but Oregon has not, as a matter of how the Oregon
14 Supreme Court has --

15 JUSTICE BREYER: Well, why is --

16 MS. WILLIAMS: -- construed the statute --

17 JUSTICE BREYER: What about Oregon revised
18 stat 163.150? It says, "In a capital sentencing
19 proceeding, the court shall instruct the jury that all
20 evidence previously offered and received may be
21 considered for purposes of the sentencing hearing."
22 Now, that's Oregon law. It's long been there. What
23 possible reason could Oregon have for having that
24 provision, which is, "Jury, you shall consider all the
25 evidence you just heard at the guilt phase of the

1 trial"? What reason could that be? How is it supposed
2 to be relevant, "all evidence," unless it's relevant to
3 the question of whether there is doubt?

4 MS. WILLIAMS: Justice Breyer, I'd point you
5 to the -- an earlier part of that same section of the
6 statute that says, "Evidence may -- in the sentencing
7 proceeding, evidence may be presented as to any matter
8 that the court deems relevant to sentence." And their
9 --

10 JUSTICE BREYER: But that's a different
11 provision. I'm now thinking of the "normal case,"
12 where you hear the guilt phase, and now we're in the
13 sentencing phase, and it says here, under Oregon law,
14 "Judge, tell the jury that everything they previously
15 heard at the guilt phase they may consider for purposes
16 of what sentence they should impose." I just wonder
17 what that sentence is doing there in Oregon law, unless
18 the jury is supposed to think about whether this guy's
19 really -- "I'm completely certain he's guilty."

20 MS. WILLIAMS: There -- it does serve a
21 different purpose, Your Honor, and that is that -- when
22 you read the entire section, what it -- what it does
23 is, it says that, first of all, parties may present
24 additional evidence, if it's relevant. The -- they
25 cannot present repetitive, or cumulative, evidence that

1 had been presented earlier. And then, the court's
2 supposed to inform that jury that what had come in the
3 guilt phase may be considered in the penalty phase.
4 And so -- and we've had the --

5 JUSTICE SCALIA: I suppose that if that
6 provision weren't there, the court would have to
7 decide, item-of-evidence by item-of-evidence, which
8 pieces, that the jury has already heard, were relevant
9 to the penalty, and not to the guilt. Whereas, by just
10 allowing everything in, but just telling the jury, "You
11 only consider it insofar as it goes to the penalty, and
12 not to the guilt," we -- the court does not have to
13 enter into that item-by-item discrimination.

14 MS. WILLIAMS: Justice Scalia, what it does
15 is, it allows the jury to know that just because
16 something hasn't been re-presented to them in the
17 penalty phase, but came in, in the guilt phase, it's
18 open for their consideration.

19 JUSTICE GINSBURG: Without any clue --

20 MS. WILLIAMS: What it doesn't do --

21 JUSTICE GINSBURG: -- without any clue
22 whether there's a relevance test? I mean, here we're
23 talking about alibi evidence. If the determination of
24 guilt is final, then alibi is irrelevant at the penalty
25 stage. That's why I found that statute so puzzling,

1 that the jury doesn't have a clue. They're told,
2 "Everything from the guilt phase comes in, you can
3 consider," but it doesn't sort out, doesn't even tell
4 them, relevance.

5 MS. WILLIAMS: And, Justice Ginsburg, other
6 jury instructions will inform the jury how to use what
7 evidence. And this does not mean that evidence that
8 has been presented is relevant for any purpose that
9 anybody wants to put it to in the guilt phase.

10 JUSTICE SCALIA: That isn't the basis on
11 which the court decided this case, is it?

12 MS. WILLIAMS: No, sir.

13 JUSTICE SCALIA: What we're saying here is
14 that this is a possible basis on which the Oregon
15 Supreme Court might have decided this case. They did
16 not decide it on that case -- on that ground. They
17 decided that the jury has to be able to consider doubt,
18 not because of that provision of the statute, but
19 because of the eighth amendment. And --

20 MS. WILLIAMS: Yes, Your Honor.

21 JUSTICE SCALIA: And --

22 JUSTICE GINSBURG: No, I wasn't suggesting
23 anything other than what Justice Scalia said, but I was
24 just curious about this statute that tells the jury,
25 "You can consider everything," and gives them no

1 guidance, because some of it might be quite
2 inappropriate for them to consider.

3 MS. WILLIAMS: And the guidance does come
4 from the other instructions that tell the jury what the
5 specific questions are that they must answer in the
6 penalty phase, and what they take into account in
7 answering those questions.

8 JUSTICE SOUTER: But --

9 JUSTICE SCALIA: What has our constitutional
10 law regarding the requirement of allowing the jury to
11 consider all mitigating factors -- the requirement that
12 they have to be allowed to be take into account of that
13 -- what guidance has that provided? Has our
14 constitutional law said what constitutes a mitigating
15 factor?

16 MS. WILLIAMS: In -- it has. And I believe
17 that in Franklin versus Lynaugh, this Court came very
18 close to deciding this question, that residual doubt is
19 not one of those mitigating factors.

20 JUSTICE SCALIA: Apart from that, apart from
21 the fact of whether the person's guilty or not, have we
22 specified what factors the jury can take into account
23 by way of mitigation?

24 MS. WILLIAMS: There are some factors that
25 the Court has described as being required as

1 appropriate for mitigation. So, age, the mental state
2 of the individual, the --

3 JUSTICE SCALIA: Don't you think that if a
4 State listed specific factors that could be taken into
5 account, and no others, that there would be
6 considerable doubt whether this Court would allow such
7 a statute to stand?

8 MS. WILLIAMS: I think certainly with respect
9 to the background and character of the defendant, but
10 the question here would be a fairly limited restriction
11 to say that circumstances of the offense presume that
12 the offense has occurred and that the defendant is
13 guilty; and so, evidence inconsistent with that guilt
14 is not a circumstance of the offense.

15 And I'd like to reserve time for rebuttal.

16 CHIEF JUSTICE ROBERTS: Thank you, Ms.
17 Williams.

18 Mr. Shanmugam.

19 ORAL ARGUMENT OF KANNON K. SHANMUGAM
20 FOR UNITED STATES, AS AMICUS CURIAE,
21 SUPPORTING PETITIONER

22 MR. SHANMUGAM: Thank you, Mr. Chief Justice,
23 and may it please the Court:

24 It does not constitute cruel and unusual
25 punishment to prohibit a capital defendant from

1 relitigating his guilt at sentencing. Contrary to the
2 reasoning --

3 CHIEF JUSTICE ROBERTS: Do you have any view
4 on whether this question is properly before us, given
5 the Oregon statutes?

6 MR. SHANMUGAM: Mr. Chief Justice, our view
7 is that this Court certainly could reach the
8 constitutional question presented. And, indeed, there
9 are good reasons that this Court should.

10 The Oregon Supreme Court squarely confronted,
11 and resolved, the Federal constitutional question, and
12 it is ripe for this Court's review. It is true, as
13 Justice O'Connor suggested at the outset, that the
14 Oregon Supreme Court appears to have been laboring
15 under a factual misimpression -- namely, that
16 Respondent's mother did not testify at the initial
17 trial. That having been said, it appears to be clear
18 that Respondent was seeking -- and is still seeking,
19 even before this Court -- to introduce the live
20 testimony of his mother.

21 JUSTICE SOUTER: But --

22 MR. SHANMUGAM: And the --

23 JUSTICE SOUTER: But, based on what you have
24 just said, which was my understanding, too, assuming
25 the Oregon Supreme Court made the assumption that the

1 mother's testimony had not been admitted at prior
2 trial, the only thing that the Oregon Supreme Court was
3 ruling on was the admissibility of new testimony, and
4 the use to which new testimony could be put, right?

5 MR. SHANMUGAM: Well, that is correct,
6 Justice Souter.

7 JUSTICE SOUTER: So that if the --

8 MR. SHANMUGAM: I do think --

9 JUSTICE SOUTER: -- if the other side says,
10 "We totally give up any claim to introduce new
11 testimony," then don't we have a jurisdictional
12 problem?

13 MR. SHANMUGAM: Well, I think that we would
14 agree with the State of Oregon that a necessary
15 implication of the Oregon Supreme Court's holding,
16 albeit unstated, was that a defendant is
17 constitutionally entitled to argue residual doubt, as
18 well as to present evidence of residual doubt. Were
19 that not true, the failure to admit the evidence would,
20 in some sense, be harmless, since it is true, certainly
21 to some extent, that the mere presentation of the
22 evidence might lead to the jury taking it into account
23 even absent an argument or instruction to that effect.

24 But, as a practical matter, this Court has never
25 distinguished, in its consideration of mitigating

1 factors, between the presentation of argument or
2 evidence and obtaining --

3 JUSTICE SOUTER: Oh, we --

4 MR. SHANMUGAM: -- an instruction --

5 JUSTICE SOUTER: -- have not, but it's
6 possible for, it seems to me -- for all we know, it's
7 possible that Oregon could say, "Look, we have a
8 statute that says everything that was introduced at
9 trial may be considered. That may be a good thing or a
10 bad thing, but that's what our statute says, and they
11 may consider it. But when the question comes, What new
12 evidence may be admitted at the sentencing hearing --
13 the sentencing phase only, then we're going to restrict
14 that only to evidence which, in our view, is required
15 by the eighth amendment."

16 So, if that is, then -- we don't -- I don't
17 know whether the Oregon Supreme Court took that view,
18 or not. But if it did take that view, and, in this
19 case, the Respondents say, "We no longer want to
20 introduce any new evidence," then we would not have a
21 case left, it seems to me.

22 MR. SHANMUGAM: Well, I think that that is
23 true, to some extent, Justice Souter, but I do think
24 that -- at least with regard to the question of what
25 factors are relevant to the ultimate determination,

1 that is governed by a quite different statutory
2 provision. And the Oregon Supreme Court construed that
3 provision to limit the mitigating factors that the jury
4 can take into account to those that are mandated by the
5 eighth amendment.

6 JUSTICE KENNEDY: Well, on that --

7 MR. SHANMUGAM: And I would further note --

8 JUSTICE KENNEDY: -- on that substantive
9 point, it does seem -- I assume a Governor could take
10 this into account in clemency?

11 MR. SHANMUGAM: Yes, certainly.

12 JUSTICE KENNEDY: And I suppose the Governors
13 can do more than juries can. But, still, it seems odd
14 to me that a jury cannot consider that this is a close
15 case. It's been proven beyond a reasonable doubt, of
16 course. It goes at least to whether or not the
17 defendant is obdurate in not accepting guilt. He says,
18 "I didn't do it."

19 MR. SHANMUGAM: Well, acceptance of
20 responsibility may present different issues, but we
21 would submit that the fundamental problem with the
22 constitutional rule that the Oregon Supreme Court did
23 expressly adopt is that it would effectively allow
24 jurors, at their discretion, to apply what is a higher
25 standard of proof at capital sentencing than the

1 reasonable-doubt standard, which, after all, is the
2 standard that applies in all other criminal contexts.

3 JUSTICE KENNEDY: Well, no, the evidence goes
4 to explain why the defendant is taking the position
5 that he does. He said, "I wasn't there." Now, it's
6 true, the jury, in the guilt phase, found that he was -
7 -

8 MR. SHANMUGAM: Well, the jury did --

9 JUSTICE KENNEDY: -- at least it explains his
10 attitude, his demeanor, his refusal to accept
11 responsibility. There's a reason for that.

12 MR. SHANMUGAM: Well, the jury did determine,
13 at the guilt phase, that the defendant was guilty
14 beyond a reasonable doubt. And the fundamental point
15 of the reasonable-doubt standard is that it is the
16 highest standard of law -- of proof known to the law,
17 short of absolute certainty. And I think, turning to
18 this Court's case law in the mitigation area, this
19 Court has, time and time again, limited mitigating
20 evidence to evidence concerning the character or record
21 of the defendant and the circumstances of the offense.

22 And the reason for that, I think, is that the very
23 concept of mitigating evidence really does presuppose
24 that the defendant has committed the crime in the first
25 place. To put it another way, mitigating evidence is

1 evidence that suggests that a defendant who has
2 committed the crime is somehow less deserving of the
3 death penalty. And going back to --

4 JUSTICE KENNEDY: Well, it would follow from
5 that, that if a State wanted to exclude the defense
6 evidence on alibi from a sentencing jury's
7 consideration -- let's assume it's a new -- a new
8 sentencing jury -- they could do that.

9 MR. SHANMUGAM: Well, we believe that that
10 would be permissible. And I think, going back to the
11 joint opinion in Woodson versus North Carolina, which
12 was really where this constitutional requirement of
13 mitigation was first recognized, this Court did not
14 suggest in any way that, to the extent that
15 individualized consideration at sentencing is mandated,
16 a jury is entitled to consider any and all factors that
17 it might think is relevant. Instead, the Court really
18 recognized a category of mitigating factors that is
19 limited to factors that are traditionally taken into
20 account at sentencing -- namely, the character or
21 record of the defendant and the circumstances --

22 JUSTICE STEVENS: Of course, that's true --

23 MR. SHANMUGAM: -- of the offense.

24 JUSTICE STEVENS: -- with respect to putting
25 in new evidence. I understand your point. But there -

1 - as a realistic matter, do you think it's possible to
2 prevent a juror from deciding, "I thought it was really
3 a closer case than beyond a reasonable doubt; and so,
4 I'm a little hesitant about the death penalty"?
5 There's no way to prevent that --

6 MR. SHANMUGAM: I think --

7 JUSTICE STEVENS: -- from happening.

8 MR. SHANMUGAM: -- as a practical matter, it
9 may be very difficult to --

10 JUSTICE STEVENS: Yes.

11 MR. SHANMUGAM: -- prevent it. I'm not sure
12 that it is necessarily desirable for jurors to do that.

13 And there is some suggestion, in the empirical
14 evidence, that what actually goes on in the jury room
15 is that jurors with some level of doubt about a
16 defendant's guilt will actually negotiate with other
17 jurors to ensure that a defendant is convicted, but
18 ends up not being sentenced to death.

19 JUSTICE GINSBURG: But there's -- used on the
20 other side and as a policy model, the model penal code,
21 I think, says it's okay. It -- not really that it's
22 okay. It should be considered.

23 MR. SHANMUGAM: Justice Ginsburg, the model
24 penal code does say that. It was adopted, I think, in
25 1962. And I think that it is telling that, in the

1 years since 1962, since this Court recognized that the
2 death penalty was constitutional again in the 1970s, no
3 State has expressly adopted a statute that permits
4 consideration of residual doubt in --

5 JUSTICE SCALIA: When you --

6 JUSTICE GINSBURG: But there are a number of
7 States that do --

8 MR. SHANMUGAM: To be sure, there are courts
9 in several States -- I think we identified seven in our
10 brief --

11 JUSTICE GINSBURG: Your --

12 MR. SHANMUGAM: -- that have --

13 JUSTICE GINSBURG: -- position is --

14 MR. SHANMUGAM: -- recognized --

15 JUSTICE GINSBURG: -- that it's up to the
16 States, I take it, but it's not compelled by the eighth
17 amendment.

18 MR. SHANMUGAM: That's exactly right, Justice
19 Ginsburg, just as it would be up to the States, at
20 their discretion, to decide to simply adopt a higher
21 standard of proof across the board in capital cases. A
22 State could certainly decide to adopt an absolute-
23 certainty standard. But I think my point is simply
24 that no State has expressly permitted consideration of
25 residual doubts. Courts have construed statutes in

1 some States to permit it, typically because those State
2 statutes contain broad language either with regard to
3 the definition of "mitigating factors" or with regard
4 to the discretion the jury has in making the ultimate
5 sentencing determination.

6 JUSTICE SCALIA: So, you think -- you think
7 the Oregon Supreme Court might well come out that way,
8 if it wished, although not resting on the eighth
9 amendment?

10 MR. SHANMUGAM: Might come out that way with
11 regard to the right of a defendant to, say, argue
12 residual doubt?

13 JUSTICE SCALIA: Yes.

14 MR. SHANMUGAM: Well, there's no indication
15 of that on the face of the opinion. And I think that,
16 in some sense, it would be quite difficult for the
17 Oregon Supreme Court to do that, having construed the
18 statute that governs the determination that the jury
19 actually makes at sentencing, to limit the factors that
20 the jury can consider to those that this Court has
21 recognized are constitutionally mandated under the
22 eighth amendment. So, as a practical matter, I think
23 the Oregon Supreme Court's reasoning in this case
24 really forecloses that interpretation.

25 If the Court has no further questions, we

1 would ask that the Court vacate the decision --

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

4 Mr. Wolf.

5 ORAL ARGUMENT OF RICHARD L. WOLF

6 ON BEHALF OF RESPONDENT

7 MR. WOLF: Thank you. Mr. Chief Justice,

8 Associate Justices, may it please the Court:

9 Hopefully, I can simplify this matter for the
10 Court. As is set forth in our brief, and in our motion
11 that was recently filed, Mr. Guzek does disclaim any
12 reliance on the eighth amendment of the United States
13 Constitution as a basis for admitting, at his retrial -
14 -

15 CHIEF JUSTICE ROBERTS: Well, but that
16 doesn't matter. I mean, the question is what the
17 Oregon Supreme Court did, and it's quite clear that it
18 based its decision on the eighth amendment, not these
19 various provisions of Oregon evidence law.

20 MR. WOLF: Well, with all due respect, Mr.
21 Chief Justice, if Mr. Guzek does not intend to rely
22 upon the eighth amendment, I think that this would moot
23 the case and that the -- this Court could then vacate
24 that portion of the Oregon Supreme Court's opinion.

25 CHIEF JUSTICE ROBERTS: You argue in -- an

1 eighth amendment case in the Supreme Court, you win on
2 the eighth amendment, then you leave the courthouse and
3 say, "Well, I don't want it anymore," and you think
4 that moots the case?

5 MR. WOLF: Well --

6 CHIEF JUSTICE ROBERTS: It's still a
7 decision, binding in this case, giving you the right to
8 admit any evidence on residual doubt in the retrial.

9 MR. WOLF: Well, I respectfully disagree. In
10 -- because, in fact, we didn't really argue, in the
11 Oregon Supreme Court, that we were entitled,
12 necessarily, under the eighth amendment. Our argument
13 was primarily under the statute, that this statute says
14 any evidence which came in should be admitted in the
15 retrial.

16 CHIEF JUSTICE ROBERTS: But you don't
17 question, or doubt, that the State Supreme Court
18 decision was based on the eighth amendment.

19 MR. WOLF: That's correct.

20 CHIEF JUSTICE ROBERTS: Okay.

21 JUSTICE SCALIA: So, if we vacate it and the
22 case is remanded on that ground, I assume it's still
23 open for you to point out to the Oregon Supreme Court
24 that they were in error about the -- about the status
25 of the testimony that you tried to get in, and have it

1 admitted on that ground. Why isn't that the way to
2 handle the matter, rather than your --

3 MR. WOLF: That --

4 JUSTICE SCALIA: -- as you express it,
5 "mooting the case"?

6 MR. WOLF: Well, that -- we believe that we
7 are entitled to present it under State law, and we
8 think that is the resolution.

9 JUSTICE SCALIA: Of course, that -- there
10 would still remain -- whether you mooted the case, or
11 whether we vacated and then it was left to the Oregon
12 Supreme Court whether to let this evidence in -- there
13 would still remain the question of what kind of an
14 instruction the jury can be given regarding the
15 consideration of this evidence for purposes not of
16 determining whether a guilty person should not be given
17 the death penalty, but, rather, for purpose of
18 considering whether the guilt is clear enough. I mean,
19 that's -- that issue would still remain, wouldn't it?

20 MR. WOLF: Well, not necessarily. I --

21 JUSTICE SCALIA: Why wouldn't it?

22 MR. WOLF: Well, I think, under Oregon law,
23 we are entitled to put on -- well, first we have to
24 distinguish between these unitary juries and these
25 retrial juries, because, of course, the retrial jury

1 has not heard the evidence from the guilt/innocence
2 phase, from the original trial. And in the event that
3 a retrial jury is hearing -- they're hearing this
4 evidence for the first time, and the State should not
5 be permitted to just put on the evidence that they
6 think helps aggravate the case.

7 JUSTICE SCALIA: No, I understand, but what
8 are you -- what are you going to argue to that jury?
9 Are you going to argue to that jury, you know, that,
10 "Yes, my client has been convicted, but the evidence of
11 his guilt was really not all that clear, and you should
12 take that into" -- don't you want to make that argument?

13 MR. WOLF: Well, that's a potential argument.

14 JUSTICE SCALIA: And the Oregon Supreme Court
15 says you can make that argument, because the eighth
16 amendment requires you to be able to make that
17 argument.

18 MR. WOLF: But we think --

19 JUSTICE SCALIA: And what the State says is,
20 "No, the eighth amendment requires no such thing." So,
21 the issue hasn't gone away. It's still here. It's
22 here in this very case.

23 MR. WOLF: Well, we think we're entitled to
24 make it, under Oregon law, in a -- regardless of
25 whether we're entitled to make it under --

1 JUSTICE SCALIA: What the --

2 MR. WOLF: -- eighth amendment.

3 JUSTICE SCALIA: No, no, no. You're entitled
4 to get the evidence in, under Oregon law, but the
5 question of how that evidence can properly be used by
6 the jury has been decided by the Oregon Supreme Court
7 only on the basis of the eighth amendment, not on the
8 basis of any Oregon statute.

9 MR. WOLF: I disagree, Justice Scalia,
10 because the court has said that this evidence,
11 regardless -- with respect to the grandfather --
12 regardless of its substance, is to be admitted. And if
13 it's to be admitted, it is to be considered. The
14 statute with --

15 JUSTICE O'CONNOR: But considered --

16 MR. WOLF: -- which Justice Breyer --

17 JUSTICE O'CONNOR: -- for what? That's the
18 problem. I mean, here is someone who's been found
19 guilty beyond a reasonable doubt.

20 MR. WOLF: Correct.

21 JUSTICE O'CONNOR: And I don't see how it's
22 relevant to go in at sentencing and say, "Oh, but there
23 are all these doubts." I mean, by finding "beyond a
24 reasonable doubt," there isn't a reasonable doubt left.

25 MR. WOLF: The --

1 JUSTICE O'CONNOR: You -- I don't see how
2 that's open to argument. You can say, "Consider the
3 evidence that shows he's a good person underneath it
4 all," or, "There -- he has some moral values that ought
5 to be respected," or something like that, or, "He's
6 capable of doing good things." But I don't see how you
7 can argue doubt.

8 MR. WOLF: Well, first of all, we never did
9 argue doubt. The words "residual doubt" never occurred
10 in this -- in the trial court, they never appeared
11 before the Oregon Supreme Court. Lingering residual
12 doubt was never argued. But in the hypothetical case,
13 the defendant is entitled, and the statute instructs
14 the jury, to consider the evidence from both phases of
15 the trial for all -- for the sentencing purposes. And
16 the Oregon statute is sui generis in the sense that we
17 have a statute that has four questions the jury must
18 answer beyond a reasonable -- the first three must be
19 answered beyond a reasonable doubt. And these are
20 factual questions related to the crime. Did the
21 defendant act deliberately? So, in essence, what we
22 have is -- a case which is charged as an aggravated
23 murder does not make the defendant death-eligible at
24 that point. The defendant is not death-eligible until
25 he is first convicted of aggravated murder beyond a

1 reasonable doubt, and then, in the penalty phase, he is
2 found to have committed the act deliberately, he is
3 found to have -- the victim should not have -- did not
4 provoke him, and his response was unreasonable to that.

5 JUSTICE SCALIA: In the penalty phase.

6 MR. WOLF: Correct.

7 JUSTICE SCALIA: In the penalty phase?

8 MR. WOLF: It has not --

9 JUSTICE SCALIA: Hasn't that already been found
10 in the guilt phase?

11 MR. WOLF: No. No, Your Honor. Those are
12 penalty phase --

13 JUSTICE SCALIA: You --

14 MR. WOLF: -- questions.

15 JUSTICE SCALIA: You can be found guilty of
16 murder when you didn't intend to kill?

17 MR. WOLF: No, you must be found guilty of
18 intentional murder. But, in the penalty phase, the
19 very first question in our statute, which appears in
20 the appendix of the State's brief, is whether the
21 conducts of the defendant that caused the death of the
22 deceased was committed deliberately and with the
23 reasonable expectation that the death of the deceased,
24 or another, would result. So, it's additional mental
25 state, a factual determination, that goes beyond

1 whether you intentionally caused death. That--

2 JUSTICE SCALIA: That seems to be very strange,
3 because I think our cases require -- require that for
4 death eligibility, and --

5 MR. WOLF: Well, I don't disagree with you,
6 Your Honor, and -- however, our petition in this matter
7 was not granted. But the -- this -- that is the -- the
8 point is that our statute is very unique. I don't know
9 of any other --

10 JUSTICE STEVENS: I have two questions, if I
11 may. One -- of course, that wouldn't -- the alibi
12 evidence would already have been rejected, whether
13 there was deliberateness or not, so that would not
14 support putting in the alibi evidence. But the second
15 question I have -- I wanted to be sure we're clear on -
16 - do you intend, on the future hearing, to introduce
17 anything other than the transcript of the prior
18 proceeding? Do you intend to introduce live witnesses
19 under -- as you may, perhaps, be able to, under Oregon
20 law?

21 MR. WOLF: Well, first of all --

22 JUSTICE STEVENS: Because I got the
23 impression, from your motion to dismiss the writ as
24 improvidently granted, that you did not. But I don't
25 see anything unequivocally establishing that in the

1 record.

2 MR. WOLF: Well, we believe that we are
3 entitled to -- clearly, under the --

4 JUSTICE STEVENS: To --

5 MR. WOLF: -- statute, to --

6 JUSTICE STEVENS: To put in --

7 MR. WOLF: -- put on the live testimony of
8 the -- of the --

9 JUSTICE STEVENS: Oh, okay.

10 MR. WOLF: -- of the mother.

11 JUSTICE SOUTER: But is that --

12 MR. WOLF: The statute --

13 JUSTICE STEVENS: So, there definitely is a
14 case before us, then.

15 MR. WOLF: Well --

16 JUSTICE SOUTER: Well, do you intend to --

17 JUSTICE STEVENS: Then there was really no
18 basis for your motion to dismiss the writ as
19 improvidently granted, if that's true.

20 MR. WOLF: Well, perhaps not as improvidently
21 granted, but if there is -- if the evidence comes in,
22 under Oregon law, and we are disavowing any reliance on
23 the --

24 JUSTICE BREYER: But under --

25 MR. WOLF: -- eighth amendment --

1 JUSTICE BREYER: -- Oregon law, what is not
2 clear is -- you want to put the mother on the stand.

3 MR. WOLF: Right.

4 JUSTICE BREYER: Now, do you want to go into
5 anything at all that wasn't raised at the trial?

6 MR. WOLF: Well --

7 JUSTICE BREYER: I mean, that --

8 MR. WOLF: -- for us to go into anything that
9 wasn't raised in the original trial, that would have to
10 be otherwise relevant.

11 JUSTICE BREYER: That's right. So --

12 MR. WOLF: And so, for example, if --

13 JUSTICE BREYER: -- that's why I want to know
14 that. That's what's ambiguous.

15 MR. WOLF: -- if mom --

16 JUSTICE BREYER: Look, you only get to go
17 into something if it was not otherwise -- if it is
18 otherwise relevant; and, therefore, if you want to.
19 The reason they think it is relevant is because of a
20 constitutional holding of the Oregon Supreme Court.
21 So, if you want to go into something, we have to decide
22 whether it is, or is not, otherwise relevant. If you
23 want to ask the same thing, that's just a question of
24 whether you have to have a transcript or a live
25 witness. And I don't know that that's a question that

1 depends on their constitutional holding. So, I want to
2 know, Do you want to go into things that are not there
3 in the original trial, yes or no?

4 MR. WOLF: Well, no.

5 JUSTICE BREYER: Okay.

6 JUSTICE KENNEDY: I don't understand that
7 answer, in light of the previous discussion about the
8 deliberate -- deliberately.

9 MR. WOLF: Well, the deliberateness, Your
10 Honor -- to this --

11 JUSTICE KENNEDY: Did the Oregon courts take
12 the position that, in the sentencing phase, the
13 "deliberately" requirement must be judged just by what
14 was in -- introduced in the guilt phase?

15 MR. WOLF: No, it -- it's -- additional
16 evidence can be put on.

17 JUSTICE KENNEDY: But I thought that --

18 CHIEF JUSTICE ROBERTS: So you --

19 JUSTICE KENNEDY: -- you told us additional
20 evidence on deliberation can be put in the -- in the
21 sentencing phase. But then you're saying that you're
22 not going to do that.

23 MR. WOLF: Well, I guess it depends on the
24 nature of -- if it is to impeach the codefendant's
25 testimony, if that's deemed to be additional --

1 JUSTICE BREYER: All right. No, I'm not
2 saying that. I -- look, until this minute, you might
3 have been equivocal. You're quite right, I was leading
4 you.

5 [Laughter.]

6 JUSTICE BREYER: Now, that doesn't mean you
7 can't say yes or no. You can decide right now. So,
8 decide. And I'm -- I will be bound by the answer, as I
9 think we all are. And if your answer is, "Yes, I want
10 to go into otherwise relevant things," I'd like to know
11 that. And if the answer is no, I want to know that,
12 too.

13 MR. WOLF: Well --

14 JUSTICE SCALIA: I would pass, if I were you.

15 [Laughter.]

16 MR. WOLF: Well, I didn't --

17 JUSTICE BREYER: No, if you pass -- if you
18 pass, I will think you do. And as long as you do, I
19 think we have to decide whether it is, or is not,
20 otherwise relevant. I'm being totally open and honest
21 with you.

22 [Laughter.]

23 MR. WOLF: Well, as a matter of Oregon law,
24 we think we can -- we could put mom on, she could
25 testify verbatim from her original trial, and she could

1 be asked, or she could say, "And I love my son. Please
2 don't kill him."

3 JUSTICE BREYER: Now, I'm not being tricky
4 about it. I want to know if we have to go to the words
5 "otherwise relevant" in the Oregon statute --
6 "otherwise relevant," particularly in respect to this
7 question of residual doubt.

8 MR. WOLF: Well, the -- it -- I'd ask --

9 JUSTICE BREYER: I really would like an
10 answer, if possible.

11 MR. WOLF: Well, it -- the answer, Your
12 Honor, is, I'd ask the Court to look to page 3 of our
13 brief, where the statute is set forth, and look
14 carefully at the way that statute is worded, which
15 says, "Either party may recall any witness who
16 testified at the prior trial or sentencing proceeding
17 and may present additional relevant evidence."

18 JUSTICE BREYER: Right. And they said that
19 relevance is -- of residual doubt is relevant. And the
20 reason that it's relevant is because the Constitution
21 of the United States requires the jury to hear it.

22 MR. WOLF: No --

23 JUSTICE BREYER: That is what I am focusing
24 on, and I want to know if you want to go into
25 "otherwise relevant," for that reason.

1 MR. WOLF: Well, with all respect, the Oregon
2 Supreme Court did not say residual doubt was
3 admissible. And residual doubt was never argued to the
4 trial court, to the Oregon Supreme Court; and,
5 therefore, whether or not it can come in --

6 CHIEF JUSTICE ROBERTS: It said that your
7 alibi defense, that had been rejected by the prior
8 jury, was relevant under the eighth amendment.

9 MR. WOLF: It did say that.

10 CHIEF JUSTICE ROBERTS: Okay.

11 MR. WOLF: But it's relevant to this idea of
12 deliberation. For example, if the defendant -- the
13 codefendants have testified that the -- Mr. Guzek is
14 the mastermind of this, and that he helped plan this.
15 If the alibi goes to whether or not he was present for
16 all of those events that relate to this issue --

17 CHIEF JUSTICE ROBERTS: That --

18 MR. WOLF: -- of deliberation --

19 CHIEF JUSTICE ROBERTS: -- that brings up a
20 question I have. Particularly under the resentencing
21 provision, it looks like the sentencing trial is going
22 to be just a rerun of the guilt trial, because your
23 main evidence that you want to put in is alibi
24 evidence, "I didn't do it." So, you're going to say,
25 "Here's" -- the mother is going to say, "I -- he was at

1 home." And then, presumably, the State gets to put on
2 all of its witnesses, saying, "No, here are the people
3 who saw him do it," and blah, blah, blah. And so, it's
4 just the same trial all over again.

5 MR. WOLF: It could be. But it could be a
6 different trial, such as we would propose in this case
7 --

8 JUSTICE SCALIA: They used to have --

9 MR. WOLF: -- in the sense that --

10 JUSTICE SCALIA: -- two trials. I mean, you
11 know, that's the whole problem here. Your client has
12 been tried as to whether he committed the offense, and
13 found guilty, and now you --

14 MR. WOLF: Right.

15 JUSTICE SCALIA: -- now you want to
16 relitigate the same matter. I don't --

17 MR. WOLF: Not --

18 JUSTICE SCALIA: I don't --

19 MR. WOLF: -- not that the same matter.

20 JUSTICE SCALIA: And on the basis that the
21 Constitution requires you to be able to relitigate the
22 same matter two times in the same criminal proceeding,
23 that doesn't seem, to me, right.

24 MR. WOLF: Well, but the -- but the factual -
25 - there are factual determinations to be made in the

1 sentencing proceeding that are a continuation of the
2 original trial.

3 JUSTICE BREYER: Okay. So, let's go to the
4 constitutional --

5 MR. WOLF: Okay.

6 JUSTICE BREYER: -- issue. Now, let's
7 imagine we have a trial. And at the trial, we have a
8 lot of evidence about the alibi.

9 MR. WOLF: Right.

10 JUSTICE BREYER: And what the State Court
11 says, "This is our law. When a person is" -- now go to
12 the sentencing phase, the jury has heard it --

13 MR. WOLF: Right.

14 JUSTICE BREYER: Okay? So, they take it into
15 account. And, moreover, we tell them they have to
16 consider it.

17 MR. WOLF: Right.

18 JUSTICE BREYER: Okay? That's a State law.
19 Now, what happens when there's an appeal in the middle,
20 and now we go back just to the sentencing? Here's what
21 we do. We introduce the transcript. And, moreover, we
22 introduce some live witnesses to say what they said
23 before, but nothing else.

24 Now, you're saying there is a constitutional
25 right to present an additional witness on the matter

1 that has already been litigated to go into things that
2 were not there in the trial before.

3 MR. WOLF: Well, if --

4 JUSTICE BREYER: Now, my goodness, if you had
5 real evidence of an alibi, why didn't you put it in the
6 first time? And if, in fact, you -- it's not such good
7 evidence, and so forth, why does the State have to
8 waste its time to hear some more about the alibi that
9 you didn't put in the first time? I mean, you know,
10 that's what you're saying the Constitution protects.
11 I'm being a little skeptical. I want to know what your
12 answer is.

13 MR. WOLF: Well, we did put it in the first
14 time in this case, and we don't necessarily need to
15 rely on the eighth amendment, we believe, to put it in,
16 if --

17 JUSTICE BREYER: No, I'm agreeing with you --

18 MR. WOLF: Right.

19 JUSTICE BREYER: -- insofar as you have a
20 right to put in what you've put in the first time.

21 MR. WOLF: Right.

22 JUSTICE BREYER: I agree with you on that
23 one. But you said you wanted to do something else.
24 You wouldn't say, "We don't want to do something else."

25 You --

1 MR. WOLF: Well --

2 JUSTICE BREYER: -- want to do more.

3 MR. WOLF: If --

4 JUSTICE BREYER: And, in the "more" part,
5 where does the Constitution protect you? I'm willing
6 to, at least hypothetically, go with you on the
7 protection for what they already heard.

8 MR. WOLF: The Constitution protects us in
9 the sense that it allows us to rebut and respond and
10 reply to evidence offered by the State in aggravation
11 of a sentence of death. And if they're offering
12 evidence that he is -- he acted deliberately, we have a
13 right to respond to that. We don't have to sit there
14 with our hands tied behind our back.

15 JUSTICE GINSBURG: And your --

16 MR. WOLF: And --

17 JUSTICE GINSBURG: -- response is that he
18 wasn't there. It's one thing to say, "It was
19 intentional, but you didn't prove deliberate." The
20 other thing is to say, "He wasn't there. He didn't
21 commit the crime in the first place." Those are two
22 quite different things.

23 MR. WOLF: Well, but it's also a question of,
24 "How much of it was he there for?" -- as in Green. Was
25 he there when he -- was he there for the planning

1 stage? Because the jury is to consider all of the
2 evidence. So, if he --

3 JUSTICE SCALIA: I thought -- well, I guess
4 it -- I guess it depends on what you mean by an
5 "alibi." If all you mean by an "alibi" is that, for
6 part of the offense, he was somewhere -- I thought an
7 alibi meant, "I am not guilty, because I was not
8 there." That's what I thought an alibi was --

9 MR. WOLF: I think "alibi" means, "I was
10 somewhere else at the time of the offense." But if
11 what the jury --

12 JUSTICE O'CONNOR: But it sounds --

13 MR. WOLF: -- has considered --

14 JUSTICE O'CONNOR: -- like you're trying to
15 relitigate that question at the sentencing hearing.
16 And, certainly, the eighth amendment does not require
17 that.

18 MR. WOLF: No.

19 JUSTICE O'CONNOR: So, to the extent the
20 Oregon Supreme Court thought that, and rested its
21 holding on that, we ought to reject it out of hand.

22 MR. WOLF: Well, but our statute requires the
23 jury, in the sentencing phase, to make these additional
24 factual determinations about the offense.

25 JUSTICE O'CONNOR: Well, that's up to the

1 court, on remand, but it ought to be straightened out
2 that the eighth amendment does not require relitigation
3 of where the defendant was at the time of the murder.
4 That was the basis for the "beyond a reasonable doubt"
5 finding of guilt.

6 MR. WOLF: Of guilt, but not necessarily of
7 the -- but if the evidence of deliberation occurred at
8 other events in the chain of events, than the alibi is
9 relevant to the sentencing question the jury must
10 decide. It's also relevant to -- perhaps, to
11 provocation. So, there are factual determinations that
12 the sentencing jury has to make.

13 JUSTICE GINSBURG: Can you put it -- make it
14 concrete for this case? Because I don't see that there
15 would be -- I mean, if the action is intentional, and
16 the question was whether it was deliberate, what
17 planning here would have gone on in some different
18 timeframe?

19 MR. WOLF: Well, there was -- there was a
20 timeframe of -- there was evidence that they -- the
21 codefendants testified that the -- the three of them
22 planned to do another burglary of a different house,
23 and then -- the codefendants' timeframes are rather
24 fuzzy, but then they went back, at some point, to the
25 defendant's father -- house to obtain weapons, and then

1 went on to the ultimate victim's house. So, to the
2 extent that this deliberation includes events that
3 occurred before the actual homicide, it's relevant to
4 this deliberation question.

5 And, additionally, the --

6 JUSTICE GINSBURG: I still don't -- I still
7 don't understand. You say that there was -- there had
8 to be proof for conviction and guilt -- of guilt of
9 intentional conduct. And this is a simple story that's
10 told: they wanted to go to one house, too many lights
11 on in that house; they were frustrated, they wanted to
12 go someplace else, so they came upon the aunt and uncle
13 of the defendant's former girlfriend.

14 MR. WOLF: Well, it was a much longer
15 timeframe than that. There was testimony that they
16 went back to town, and went to the father's house and
17 obtained weapons before they went to the house where
18 the homicides occurred.

19 The other issue is that there has been
20 subsequent evidence, since the first trial. These
21 codefendants have recanted certain statements. They
22 have recanted --

23 CHIEF JUSTICE ROBERTS: You want to put that
24 in?

25 MR. WOLF: Yes. We believe that that's --

1 we're entitled to do that to rebut --

2 CHIEF JUSTICE ROBERTS: Any new -- any new
3 evidence relevant to alibi or degree of guilt.

4 MR. WOLF: Not to -- no, I wouldn't
5 characterize it as to alibi. Any evidence that goes to
6 the sentencing questions the jury must consider, to
7 deliberation, to --

8 CHIEF JUSTICE ROBERTS: And you -- and you
9 want to retain the right to put in whatever evidence is
10 relevant on those questions.

11 MR. WOLF: Absolutely.

12 CHIEF JUSTICE ROBERTS: Well, then what was
13 all the discussion about the mother's having -- then,
14 when you go back, you can put on anything, whether it
15 was presented before, or not, right? Because the
16 eighth amendment requires that, according to the Oregon
17 Supreme Court.

18 MR. WOLF: Well, whether it's required under
19 the eighth amendment, or not, is for you to decide,
20 obviously, but we think --

21 CHIEF JUSTICE ROBERTS: Okay.

22 MR. WOLF: -- that it's whether or not Oregon
23 law also requires it. And we believe, under Oregon
24 law, we're entitled to put this on, we're entitled to
25 rebut this. For example, Justice Kennedy was talking

1 about a scenario -- and, in this very case, the joint
2 appendix, at page 92, the prosecutor in this case --
3 this is an excerpt from the trial -- was trying to get
4 in evidence that the defendant was being manipulative.
5 And, at this point, the alibi evidence had been
6 excluded. And so, the fact that the defendant was not
7 taking responsibility, perhaps was being deemed as
8 manipulating people by trying to get them to come
9 forward to say, "I wasn't there," then alibi is
10 relevant to respond -- to rebut and respond to that
11 kind of an argument.

12 JUSTICE GINSBURG: Whatever Oregon law might
13 say, or not say, it appears that this Supreme -- Oregon
14 Supreme Court was acting under what it thought was the
15 compulsion of the eighth amendment. If it's wrong
16 about that, you can make your argument about what
17 Oregon law should be, without any eighth amendment
18 constraint.

19 MR. WOLF: Correct.

20 JUSTICE GINSBURG: But it does seem that this
21 court was operating on the assumption that the eighth
22 amendment required it to let in this alibi and other
23 evidence.

24 MR. WOLF: And we think -- we agree that the
25 Oregon Supreme Court went farther than it needed to in

1 this case in order to decide the issue, because, under
2 Oregon law, mom testified --

3 JUSTICE STEVENS: But, you know, we're being
4 asked to decide whether Oregon Supreme Court correctly
5 interpreted the Federal Constitution. And you seem to
6 be making most of your argument to the effect, "Well,
7 we don't really need that holding. We can prevail on
8 Oregon law."

9 MR. WOLF: Uh-huh.

10 JUSTICE STEVENS: But are you going to make
11 any argument in support of the decision made by the
12 Oregon Supreme Court?

13 MR. WOLF: No, not as long as the State of
14 Oregon agrees that this statute operates in an
15 evenhanded fashion. In other words, if they get to
16 recall witnesses who originally testified, or present
17 transcript testimony, then we should have the same
18 right.

19 JUSTICE O'CONNOR: Well, this is --

20 JUSTICE STEVENS: Well --

21 JUSTICE O'CONNOR: -- so odd. It -- almost
22 as though we should appoint some amicus here, Counsel,
23 to argue in support of the merits.

24 MR. WOLF: Well --

25 JUSTICE O'CONNOR: I mean, you don't seem to

1 be doing that.

2 MR. WOLF: Well, Your Honor, on the merits,
3 we --

4 JUSTICE O'CONNOR: It's very strange.

5 MR. WOLF: Well, we think that the -- that
6 the Oregon Supreme Court decision was correct in -- on
7 the -- on the eighth amendment. And we think it's --
8 but it's -- not necessarily for the reasons stated by
9 the Oregon Supreme Court. And the fact is that if the
10 Oregon Supreme Court held that we have a right to -- we
11 believe that we have a right to respond to any evidence
12 they offer on aggravation.

13 JUSTICE BREYER: What about -- what about --
14 for example, the single most important feature leading
15 juries to recommend against death, apparently, from the
16 studies, is their residual doubt. Every juror who
17 hears sentencing matters directly after a trial
18 automatically takes that into account. Therefore,
19 those who are resentenced and have a new jury should
20 have the same kind of right. Otherwise, it's cruel and
21 unusual.

22 Now, I made that argument. You didn't
23 make it. But it seems to me that there are several
24 arguments that you might make in favor of the Oregon
25 Supreme Court's approach if, at least, you concede that

1 it is up to Oregon to control, through its evidentiary
2 rules, whether a matter is relevant, what form it comes
3 in, et cetera.

4 MR. WOLF: Well, we think that if -- by
5 directing that the jury consider all evidence in both
6 phases of the trial, it must be relevant. Why else
7 would they instruct the jury to consider such evidence,
8 unless it was relevant to the sentencing questions
9 the jury must answer? And obviously I agree with you,
10 Justice Breyer, that if the -- if a defendant must run
11 the gamut of having -- we have to remember that the
12 first trial was set aside because it was defective in
13 some way. And it would be an anomalous result for the
14 resentencing jury to not be entitled to hear what the
15 first jury heard when the defendant had an
16 unconstitutional, or a defective, trial. So --

17 JUSTICE SOUTER: Mr. Wolf, in view of the
18 direction this discussion is going in, I want to go
19 back to something that I really think we all thought we
20 had passed but I would like to go back and get clear
21 on. My recollection is that you stated, in your answer
22 to Justice Stevens, that you currently maintain that
23 you have a right to recall the mother to the stand at
24 the -- at the sentencing proceeding.

25 My question, which is prompted by your motion

1 -- my question is, Is it your present intention to call
2 the mother to the stand, or is it your present
3 intention to use the mother's testimony, which we all -
4 - I understand to be admissible? Are you going to call
5 her, or not?

6 MR. WOLF: Well, we would intend to call her.

7 JUSTICE SOUTER: You do intend to call her.

8 MR. WOLF: Because we think it's important --

9 JUSTICE SOUTER: No, I'm not asking why. I
10 just want to know whether you are. And your
11 representation to me is that you do intend to call her
12 as a live witness as the -- at the resentencing.

13 MR. WOLF: Yes.

14 JUSTICE SOUTER: Okay.

15 MR. WOLF: And I'd like to answer the reason
16 for that, because we think the jury is entitled to see
17 her demeanor and gauge, based on how she testifies, how
18 believable she is. We think it's much -- we think it's
19 better for a jury to be able to see a live witness than
20 hear a cold transcript being read by surrogates.

21 And so, of course, in -- as we know, in -- if
22 she were to stray from what she testified at the
23 original trial, of course she would be impeached with,
24 "Well, you didn't testify about that the first time."
25 But the jury, we think, as the statute clearly

1 indicates, should allow witnesses who testified
2 originally to be recalled, unless, for some reason,
3 they're unavailable --

4 JUSTICE STEVENS: Mr. Wolf, I --

5 MR. WOLF: -- in which case --

6 JUSTICE STEVENS: -- I had misunderstood
7 something. There's going to be a new sentencing, but
8 there also is going to be a new trial, is there, on
9 the merits?

10 MR. WOLF: No. There --

11 JUSTICE STEVENS: Why -- because you
12 mentioned, earlier, about the defect in the trial.

13 MR. WOLF: The convictions -- well, the
14 defect was in the penalty phase.

15 JUSTICE STEVENS: Oh, okay.

16 MR. WOLF: And so, the convictions are
17 affirmed. The jury is going to be instructed, "The
18 defendant stands convicted, has been found convicted
19 beyond a reasonable doubt." It is to decide these four
20 questions: Did he act deliberately? Does he
21 constitute a future danger? And, to the extent the
22 Government puts on evidence that addresses those
23 concerns, we believe we have the right to respond to
24 that.

25 And also -- we also have to remember that the

1 -- that the alibi in this case was -- really was
2 offered as impeachment of the codefendants. The
3 codefendants are really the only evidence that links
4 the defendant to these crimes. And so, to the extent
5 that -- it's impeachment by contradiction. So, while
6 they may find that if the codefendants say, "He did A,
7 B, and C," and mom says, "No, he was with me," it
8 doesn't necessarily mean that he was with mom, only
9 that they should disbelieve the codefendants. And that
10 is a -- although it seems incongruous, that's standard
11 impeachment by contradiction. The jury is given an
12 instruction that they're to consider it for the limited
13 purpose of whether or not to believe the codefendants,
14 but not necessarily as substantive evidence of alibi.
15 And that happens in trials every day. So, we don't
16 think it's that unusual for the -- if the evidence
17 relates to the sentencing questions the jury must
18 consider, then it should come in.

19 So, the other point that I think is important
20 in this case is that the -- you know, the -- it's
21 really not unlike this -- cases that this Court has
22 held, Sumner versus Shuman, and Skipper. If the
23 Government puts on evidence --

24 I see my time is up.

25 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

1 Ms. Williams, you have 2 minutes remaining.

2 REBUTTAL ARGUMENT OF MARY H. WILLIAMS

3 ON BEHALF OF PETITIONER

4 JUSTICE SCALIA: General Williams, I have one
5 question. I'm not sure it goes to our eighth amendment
6 question before us, but I honestly don't understand
7 what your statute is all about. It says that after
8 having been convicted of aggravated murder --
9 aggravated murder -- the sentencing jury shall be
10 presented with the following questions. Number one,
11 whether the conduct of the defendant that caused the
12 death of the deceased was committed deliberately and
13 with the reasonable expectation that death of the
14 deceased, or another, would result. Don't you have to
15 find that in order to convict of aggravated murder?

16 MS. WILLIAMS: Justice Scalia, we copied from
17 Texas on those special issues. And so, in the
18 guilt phase, what you have to establish is the
19 defendant acted intentionally. And that's what's
20 required as far as a constitutional state of mind.
21 And the deliberateness question is sort of an
22 intentional-plus.

23 JUSTICE SCALIA: Plus, okay.

24 MS. WILLIAMS: It's from an additional --

25 JUSTICE SCALIA: -- I gotcha.

1 MS. WILLIAMS: -- finding, beyond
2 intentional, that the State has to then establish in
3 the penalty phase.

4 Two quick points. First, on how this
5 evidence was offered. It was not offered as
6 impeachment evidence. It was not offered under any
7 State statute. If you look in the joint appendix, the
8 second volume, at page 94 is the notice of intent to
9 rely on evidence of alibi as mitigating evidence. And
10 then there's an accompanying memo that follows. And,
11 also, at page 88 of the joint appendix, there's a
12 colloquy between defense counsel and the trial court,
13 where defense counsel says, "Your Honor, I made it
14 very clear that alibi is being offered as mitigation.
15 It goes to the circumstances of the crime. It's
16 mitigating evidence that someone is not there." And,
17 later, circumstances of the offense is part of the
18 fourth question, which, in Oregon, is the mitigation
19 question. If the --

20 JUSTICE BREYER: Is the 2:16 a.m. alarm clock
21 in the original trial, or not?

22 MS. WILLIAMS: The mother's testimony about
23 the time from --

24 JUSTICE BREYER: Yes.

25 MS. WILLIAMS: -- 2:10 a.m. to 4:20 is in the

1 guilt phase of the trial.

2 And again from the colloquy, "If you're not
3 there, that is certainly mitigating."

4 And let me just mention, in terms of the
5 timing of the alibi evidence, the grandfather's alibi
6 covered from 9 o'clock at night until 2 o'clock in the
7 morning; the mother's, from 2:10 in the morning til
8 4:20. The crimes occurred in the early morning hours.

9 And so, there isn't any way to parse this out and say
10 that the alibi testimony might have been relevant, in
11 some small piece, on deliberateness.

12 To the extent that the State puts on
13 additional evidence to establish deliberateness, of
14 course defendant can respond to that additional
15 evidence, but the State doesn't make the question of
16 whether the defendant was there wide open again in the
17 penalty phase.

18 CHIEF JUSTICE ROBERTS: Thank you, Ms.
19 Williams.

20 The case is submitted.

21 [Whereupon, at 11:08 a.m., the case in the
22 above-entitled matter was submitted.]

23

24

25