NO. 04-1170

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

MICHAEL LEE MARSH, II,

Respondent.

On Writ of Certiorari
to the Supreme Court of the State of Kansas

BRIEF FOR PETITIONER

THEODORE B. OLSON
MARK A. PERRY
MATTHEW D. MCGILL
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave. N.W.
Washington, D.C. 20036
(202) 955-8500

CHAD A. READLER
MARY BETH YOUNG
Jones Day
325 John H. McConnell Blvd.
Suite 600
Columbus, Ohio 43215
(614) 469-3939

PHILL KLINE
Attorney General of Kansas
NOLA TEDESCO FOULSTON
District Attorney
18th Judicial District
of Kansas
JARED S. MAAG
Deputy Attorney General
(*Counsel of Record*)
KRISTAFER AILSLIEGER
Assistant Attorney General
120 S.W. 10th Avenue, 2nd Flr.
Topeka, Kansas 66612-1597
(785) 296-2215

Counsel for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED

1. Does this Court have jurisdiction to review the judgment of the Kansas Supreme Court under 28 U.S.C. § 1257, as construed by *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)?

2. Was the Kansas Supreme Court's judgment adequately supported by a ground independent of federal law?

3. Does it violate the Constitution for a state capital-sentencing statute to provide for the imposition of the death penalty when the sentencing jury determines that the mitigating and aggravating evidence is in equipoise?

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OPINION BELOW

The opinion of the Kansas Supreme Court (Pet. App. 1a-77a) is reported at 102 P.3d 445 (Kan. 2004).

JURISDICTION

The opinion of the lower court was delivered on December 17, 2004. Petitioner's motion for rehearing (J.A. 45-55) was denied on February 2, 2005. Pet. App. 78a. The petition for writ of certiorari was filed on March 2, 2005 and granted on May 31, 2005. J.A. 108. The jurisdiction of the Court rests on 28 U.S.C. § 1257(a). *See infra* § I of the Argument.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV.

Section 1257 of Title 28 of the United States Code provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution . . . ." 28 U.S.C. § 1257.

Section 21-4624(e) of Kansas Statutes Annotated provides that "[i]f, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in [Kan. Stat. Ann. §] 21-4625 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any

mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced as provided by law." Kan. Stat. Ann. § 21-4624(e).[1]

STATEMENT

Respondent Michael Lee Marsh II was convicted by a jury in Sedgwick County, Kansas, of capital murder, first-degree premeditated murder, aggravated arson, and aggravated burglary. Pet. App. 9a. The convictions stem from the 1996 murders of Marry Ane Pusch and her nineteen-month-old daughter, M.P. On the evening of June 17, 1996, respondent broke into the Pusch home and waited in a closet for Marry to return home. Shortly after Marry and M.P. entered the house, respondent came out of the closet, repeatedly shot Marry, stabbed her, and slashed her throat. The house was set on fire, and the toddler, M.P., was left to burn to death. *Id.* at 7a-8a.

Respondent was sentenced to death for the capital murder of M.P., life imprisonment with no possibility of parole for 40 years for the first-degree murder of Marry, and consecutive sentences of 51 months for aggravated arson and 34 months for aggravated burglary. *Id.* at 9a-10a.[2]

During sentencing, the judge gave the jury 12 instructions. J.A. 22-28. Pertinent instructions included a listing of those

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[1] In 2004 the Kansas Legislature amended Kan. Stat. Ann. § 21-4624(e) by replacing "as provided by law" with "to life without the possibility of parole."

[2] In the trial court, petitioner maintained that respondent set the house on fire and left M.P. to burn to death, and the jury convicted respondent for those acts. After finding sufficient evidence to support all of respondent's convictions, the Kansas Supreme Court nevertheless reversed respondent's convictions for capital murder and aggravated arson on the grounds that certain evidence was improperly excluded. Pet. App. 11a-17a. While respondent is subject to retrial for capital murder, his eligibility for a sentence of death depends upon the Court's decision on the merits of this case.

aggravating circumstances relied upon by petitioner (J.A. 24, Inst. No. 3), a listing of those mitigating circumstances argued by respondent (J.A. 24-25, Inst. No. 4), and a description of the burden placed upon petitioner. J.A. 26, Inst. No. 5. This latter instruction stated that "[t]he State has the burden to prove to you beyond a reasonable doubt that there are one or more aggravating circumstances [and that if the State does so it] must then prove beyond a reasonable doubt that they are not outweighed by any mitigating circumstances." *Id.* The jury found beyond a reasonable doubt the existence of all three aggravating circumstances asserted by petitioner and that they were not outweighed by any mitigating circumstances. On the basis of these findings, a unanimous jury sentenced respondent to death. J.A. 29.

Respondent pursued his direct appeal to the Kansas Supreme Court. In a 4-3 decision, the lower court held that the Kansas death penalty statute, Kan. Stat. Ann. § 21-4624(e), was unconstitutional on its face. The majority concluded that the statutory weighing equation violated the Eighth and Fourteenth Amendments to the United States Constitution because it provided that a capital defendant "shall be sentenced to death" if the jury determines that the aggravating circumstances are "not outweighed by any mitigating circumstances." Pet. App. 17a-31a. Concluding that this weighing equation effectively directed the imposition of the death penalty if the jury determined that the aggravating and mitigating circumstances were of equal weight, the majority held that such a possibility required the court to invalidate the entire statute on federal constitutional grounds. *Id.* at 19a-20a.

The Kansas Supreme Court found its constitutional footing by looking to its earlier decision in *State v. Kleypas*, 40 P.3d 139, 223-32 (Kan. 2001), *cert. denied*, 537 U.S. 834 (2002) (relevant portions of the lower court's decision in *Kleypas* are included at Pet. App. 79a-142a). In *Kleypas*, the lower court held that Kansas' statutory weighing equation

failed to comport with this Court's Eighth Amendment jurisprudence. Rejecting the argument that this Court approved such a weighing equation in *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled on other grounds, Ring v. Arizona*, 536 U.S. 584 (2002), the Kansas Supreme Court held in *Kleypas* that the Kansas statutory weighing equation "denies what the Eighth Amendment requires: that the jury is to give effect to the mitigating circumstances it finds exist." Pet. App. at 98a-115a.

Rather than invalidating the entire death penalty statute, the *Kleypas* court construed the statute in a way to uphold its constitutionality. To that end, the court ordered that the law could not be applied in a manner in which the death penalty could be imposed when the aggravators and mitigators were in equipoise, and directed sentencing juries be instructed that in order to impose the death penalty, the aggravators must outweigh the mitigators. *Id.* at 115a-119a. In the instant case, the lower court reversed the *Kleypas* court's construction of the statute, and held the statute unconstitutional on its face. *Id*. at 18a-31a.

The majority's decision drew vigorous dissents. *Id.* at 35a-53a (Davis, J., dissenting); 54a-69a (Nuss, J., dissenting); 69a-77a (McFarland, C.J., dissenting). The three dissenting justices agreed that Kansas' death penalty statute was constitutional as written, finding serious flaws with the majority's reading of the Constitution and this Court's precedent. *Id.* The dissenters noted that in *Walton* the Court found no constitutional flaw in the Arizona death penalty statute at issue there, one that is effectively the same as the Kansas statute. *Id.* at 45a-48a (Davis, J., dissenting); 54a-64a (Nuss, J., dissenting). *Walton*, in the dissenters' view, rejected the majority's rationale, *id.*, as did subsequent cases from the Ninth Circuit and the supreme courts of Arizona and Idaho. *Id.* at 48a-50a (Davis, J., dissenting); 64a-69a (Nuss, J., dissenting).

The Kansas Supreme Court, absent discussion, denied petitioner's request for rehearing or modification. Pet. App. 78a.

SUMMARY OF ARGUMENT

The Kansas Supreme Court's conclusion that the Kansas death penalty statute violates the Eighth and Fourteenth Amendments to the United States Constitution is a final decision under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), and a final judgment within the meaning of 28 U.S.C. § 1257. Although further state court proceedings are necessary in light of the Kansas Supreme Court's remand on evidentiary issues, those proceedings will not affect the federal issue, and review of the federal issue would be impossible following those proceedings. *See Cox*, 420 U.S. at 481.

Nor are there any adequate and independent state grounds precluding review. In declaring Kan. Stat. Ann. § 21-4624(e) facially invalid, the lower court based its decision squarely on this Court's Eighth Amendment jurisprudence *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

As to the merits, the lower court's decision is critically flawed in its determination that *Walton v. Arizona*, 497 U.S. 639 (1990) does not control the outcome. When a nearly identical statute was before the Court in *Walton*, the Court held that requiring a defendant to prove mitigating circumstances sufficiently substantial to call for leniency did not offend the Eighth Amendment. *Id.* at 650. The equipoise concern, which was raised by the *Walton* petitioner in his merits brief and was of no constitutional concern to the Court, *see id.* at 687-88 (Blackmun, J., dissenting), was decided in favor of Arizona.

Even apart from the controlling aspects of *Walton*, Kansas' sentencing procedure does not violate the Eighth Amendment. This Court's post-*Furman v. Georgia*, 408 U.S. 238 (1972) jurisprudence, which provides a framework

for guiding and channeling a sentencing jury's discretion, has not restricted the process by which the aggravating and mitigating circumstances may be weighed. Unquestionably, that mechanism has been left to the states.

In accordance with the Eighth and Fourteenth Amendments and the Court's precedent, Kansas' law both narrows the class of potentially death eligible defendants and places no restrictions, other than relevancy, on the admission of mitigating evidence. The State's capital sentencing equation neither mandates death nor restricts a juror's ability to give full effect to the mitigating circumstances presented by the defendant.

Having satisfied these constitutional requisites, there is nothing in the Eighth Amendment or this Court's decisions interpreting it that prevents Kansas from imposing the death penalty if an aggravating circumstance is found and is not affirmatively outweighed by mitigating evidence. Accordingly, the decision below should be reversed.

ARGUMENT

I. THE COURT HAS JURISDICTION TO REVIEW THE STATE COURT'S FEDERAL CONSTITUTIONAL ERROR.[3]

In the order granting certiorari, the Court added two procedural questions to the substantive question of constitutional law presented in the petition: *First*, is the decision below unreviewable under 28 U.S.C. § 1257 because it is not "final?" *Second*, does the decision below rest on an independent and adequate state ground? Both

[3] The contention that the Court lacks jurisdiction because petitioner did not raise the constitutional issue below was raised by respondent in his opposition to the petition for certiorari and addressed by petitioner in its reply brief. Because the Court granted certiorari and did not order the parties to address that issue in their merits briefing, the Court has "necessarily considered and rejected" respondent's contention. *See United States v. Williams*, 504 U.S. 36, 40 (1992).

questions should be answered in the negative. Although further state proceedings remain, the Eighth Amendment issue can be reviewed only at this time, thereby warranting the exercise of § 1257 jurisdiction by the Court. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975). Additionally, as the decision below expressly rests on the Eighth Amendment, no independent and adequate state ground exists to preclude this Court from deciding the substantive federal question. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

A. The Decision Below Is "Final" Within The Meaning Of 28 U.S.C. § 1257.

The Court has jurisdiction to review the decision of the lower court because the federal question at issue has been finally decided and, regardless of the outcome of subsequent state proceedings, later review of the federal question cannot be had. Although respondent must be retried on the charges of capital murder and aggravated arson, the determination by the lower court that Kansas' death penalty statute is facially unconstitutional is final and binding on the lower state courts, and if not now addressed by the Court, petitioner will be precluded from seeking further review. Simply put, the decision by the lower court on the instant federal question has entirely eliminated the death penalty in Kansas, and petitioner therefore cannot pursue the death penalty or seek further review of its constitutionality in any future proceedings. Indeed, at this time petitioner cannot even seek to impanel a death-qualified jury for respondent's retrial.

Since the Judiciary Act of 1789, the Court has had jurisdiction to review the "[f]inal judgments or decrees" of state courts of last resort questioning the validity of state statutes under the Federal Constitution. 28 U.S.C. § 1257; *see Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1815). The Court has long adhered to a pragmatic approach to "finality" under § 1257, recognizing that in some circumstances a state court judgment may be sufficiently

final to support the Court's jurisdiction to review a federal question even if further proceedings remain pending in the state courts. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

Cox Broadcasting articulated the framework for determining when § 1257 authorizes a party to invoke the Court's jurisdiction to review cases "in which the highest court of a State has finally determined the federal issue present in [that] particular case, but in which there are further proceedings in the lower state courts to come." 420 U.S. at 477. "At least four categories" of cases meet these criteria, *id.* at 477, and of the four *Cox Broadcasting* categories, the third is relevant here. Included in the third category are "those situations where the federal claim has been finally decided, with further proceedings on the merits in state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." 420 U.S. at 481. This case fits squarely within this third category.

In addition to declaring the Kansas death penalty statute unconstitutional, the lower court vacated respondent's underlying conviction for capital murder on evidentiary grounds. Pet. App. 11a-17a. At the upcoming retrial ordered by the lower court (*id.* at 17a), respondent could be acquitted of the capital offense, in which case federal double jeopardy and state law would prevent the State from appealing the conviction. *See State v. Crozier*, 587 P.2d 331, 335-36 (Kan. 1978); *State v. Gustin*, 510 P.2d 1290, 1293-94 (Kan. 1973). Alternatively, respondent could again be convicted of capital murder, but he could not be sentenced to death (indeed, the state could not even seat a death-qualified jury) because, under the decision below, there was no valid death penalty statute on the books at the time the crimes were committed. *See Miller v. Jackson*, 199 P.2d 513, 514 (Kan. 1948) ("[A] void statute is tantamount to no statute."); *State v. Carr*, 98 P.2d 393, 396 (Kan. 1940) ("[I]f the statute

is bad, the accusation under it is not good.") (citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939))). If respondent were sentenced within Kansas' statutory guidelines – and a life sentence would be within the guidelines for this offense – the State would have no opportunity to appeal as a matter of state law. Kan. Stat. Ann. §§ 21-4701 & 22-3602.[4] Thus, the State will be unable to raise the constitutional issue in future proceedings regardless of whether respondent is acquitted or convicted of capital murder. Accordingly, immediate review is warranted under *Cox Broadcasting*.

The Court's other decisions point to the same conclusion. For example, in *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973), the Court was asked to address the Supreme Court of North Dakota's holding that the state pharmacy board's denial of the plaintiff's application for a pharmacy permit was invalid because the permit was denied as a result of a state statute that violated federal due process. The state supreme court's remand order required the pharmacy board to review the application without reference to the challenged statute – "sans the constitutional issue," in the words of the state court. *Id.* at 159. Against that backdrop, the Court treated the state court's judgment as final, agreeing that there was no

[4] Kan. Stat. Ann. § 22-3602(b) provides four possible avenues for the State to appeal as a matter of right. Of the four, at most only § 22-3602(b)(3), which allows the State to appeal "upon a question reserved by the prosecution," is even arguably applicable in this setting. Because questions reserved are permitted only for addressing issues that aid in the correct and uniform administration of criminal law, however, the Kansas Supreme Court would not entertain a question reserved simply to demonstrate errors of a trial court in rulings adverse to the State. Questions reserved, moreover, presuppose that the case has concluded but that an answer to an issue of statewide importance is necessary for proper disposition in future cases. *State v. Roderick*, 911 P.2d 159, 161-62 (Kan. 1996). In short, questions reserved are for those issues of state concern that remain unresolved by the State's highest court. The present issue has been resolved by the Kansas Supreme Court, thus preventing petitioner from availing itself of this avenue.

way that the licensing authority could preserve the constitutional question on remand. *Id.* at 162-63. Kansas finds itself in the same situation because it cannot seek the death penalty on remand in light of the lower court's constitutional decision, nor can it preserve the issue for future review.

The Court's pragmatic approach to finality is particularly appropriate in criminal procedure cases like this one, where the petitioner is unable to secure the Court's review of a federal issue regardless of the outcome of contemplated future proceedings. In such cases, pending proceedings in the state courts – including a full trial on the merits – do not prevent the Court from exercising jurisdiction.

Cox Broadcasting, for example, explained that *California v. Stewart*, 384 U.S. 436 (1966), a criminal procedure case, "*epitomizes* this [third] category." 420 U.S. at 481 (emphasis added). In the state proceedings in *Stewart*, the California Supreme Court vacated the defendant's conviction on Fourth Amendment grounds and remanded the case for a new trial. When the State appealed to this Court, the respondent contested jurisdiction on finality grounds, noting that a new trial was upcoming. The Court determined that the state court's Fourth Amendment holding was final for the purposes of § 1257 because the trial would result either in acquittal or conviction without the suspect evidence. Either way, the state courts would have no opportunity to address the federal issue on remand; the decision was thus "final" for jurisdictional purposes. *Stewart*, 384 U.S. at 499 n.71.

The Court has followed this reasoning in a series of other criminal procedure cases, including *New York v. Quarles*, 467 U.S. 649 (1984), where the Court treated a decision by New York's highest state court on an interlocutory suppression issue as final, despite the fact that the defendant had yet to be tried in state court. Because the state court held that certain evidence had to be excluded on constitutional grounds, if the State won at a future trial, the federal

constitutional issue would have become moot; if, on the other hand, the State lost, it would be precluded from pressing the issue on appeal. *Id.* at 651 n.1. The challenged suppression ruling was therefore "final" within the meaning of § 1257. *Id.*

Likewise, in *Florida v. Meyers*, 466 U.S. 380 (1984) and *South Dakota v. Neville*, 459 U.S. 553 (1983), the Court deemed the respective state courts' federal constitutional decisions to be final despite the fact that additional state court proceedings remained. In each case, the Court determined that the state court's constitutional decision was final for jurisdictional purposes because the constitutional issue would not survive remand, regardless of the outcome. *Meyers*, 466 U.S. at 381 n.a1 (Fourth Amendment ruling by lower court final and thus reviewable); *Neville*, 459 U.S. at 558 n.6 (Fifth Amendment ruling by lower court final and thus reviewable). Here, with petitioner in the identical situation, the result should be the same.

Petitioner's inability to seek review of the federal issue in the future distinguishes this case from those that the Court has held to fall outside the third *Cox Broadcasting* category. *See, e.g.*, *Pierce County v. Guillen*, 537 U.S. 129, 142 n.5 (2003); *Florida v. Thomas*, 532 U.S. 774, 779-80 (2001); *Jefferson v. City of Tarrant*, 522 U.S. 75, 82-83 (1997); *O'Dell v. Espinoza*, 456 U.S. 430 (1982). In each of those cases, the petitioners had the option under state law to seek further review of the federal question at some stage of the remaining proceedings. Kansas does not enjoy such an opportunity.

The lower court has issued a final ruling based on its interpretation of the Federal Constitution, coupled with a remand for retrial. Neither the trial nor any other remaining appellate proceedings, however, would provide opportunities for petitioner to raise the federal issue, for the lower courts to address it, or for the Court to review it. In short, the decision below is the last word of Kansas' highest court, *Market*

Street R. Co. v. Railroad Comm'n of Cal., 324 U.S. 548, 551 (1945), and is "final" for the purposes of § 1257.

B. The Decision Below Is Not Supported By Independent And Adequate State Grounds.

The lower court rested its decision to strike the Kansas death penalty statute on federal constitutional grounds, adopting the language from *State v. Kleypas*, 40 P.3d 139 (Kan. 2001), *cert. denied*, 537 U.S. 834 (2002), that "[w]e see no way that the weighing equation in [Kan. Stat. Ann. §] 21-4624(e), which provides that in doubtful cases the jury must return a sentence of death, is permissible *under the Eighth and Fourteenth Amendments*." Pet. App. 20a (emphasis added); *see also id.* at 35a (Davis, J., dissenting) ("The majority holds that the Kansas death penalty [statute] is unconstitutional on its face under the Eighth Amendment to the United States Constitution."). In so doing, the majority followed *Kleypas*, which likewise invoked the Eighth and Fourteenth Amendments.[5] *See Marsh*, Pet. App. 21a ("After full reconsideration, we . . . continue to adhere to the *Kleypas* majority's reasoning and holding that [Kan. Stat. Ann. §] 21-4624(e) as written is unconstitutional under the Eighth and Fourteenth Amendments.").

Notwithstanding the lower court's express and unequivocal invocation of the Federal Constitution in invalidating the death penalty statute, respondent claims that

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[5] In *Kleypas*, appellant submitted that Kan. Stat. Ann. § 21-4624(e) was unconstitutional under the Eighth and Fourteenth Amendments to the Federal Constitution as well as Sections Nine and Eighteen of the Kansas Constitution. J.A. 60. After acknowledging that appellant was asserting violations of both constitutions (Pet. App. 96a), the court nevertheless rested its decision on federal grounds. Pet. App. 115a. That the lower court in *Kleypas* based its decision on Eighth Amendment principles as articulated by this Court's precedents is of no surprise as the lower court, in an earlier passage, reaffirmed its position that it will not interpret the Kansas Constitution in a manner different from that of the United States Constitution. *Kleypas*, 40 P.3d at 252.

the Constitution somehow was not "drawn into question" by the decision below within the meaning of § 1257. Br. in Opp. 17-19. *Cox Broadcasting* disposes of this contention as well. Indeed, the Kansas Supreme Court relied on provisions of the Federal Constitution to a much greater degree than did the Georgia court in *Cox Broadcasting*. Rather than merely referencing a provision of the Federal Constitution as the Georgia court did, the Kansas court explicitly rested its holding on the Eighth and Fourteenth Amendments. Pet. App. 18a-21a. The Federal Constitution, in other words, was clearly drawn into question for the purposes of § 1257. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1984) (noting that federal law is sufficiently drawn into question if the federal question "had been either raised or squarely considered and resolved in state court").

Any other reading of the Kansas Supreme Court's decision would mark a significant departure in that court's historical constitutional jurisprudence. As the lower court has made clear, the Kansas Constitution "has never extended greater protection to our citizens beyond the federal guarantees." *State v. Spain*, 4 P.3d 621, 625 (Kan. 2000). And where a state court interprets state and federal constitutional protections to be identical, no adequate and independent state ground exists to support the state court's decision. *Fitzgerald v. Racing Assoc. of Central Iowa*, 539 U.S. 103, 106 (2003); *Pennsylvania v. Muniz*, 496 U.S. 582, 588 n.4 (1990). In such circumstances, the state court's decision "rest[s] upon federal grounds sufficient to support this Court's jurisdiction." *Fitzgerald*, 539 U.S. at 106.

Because the decision below rests exclusively on federal grounds, the Court need not scour state law in search of a potential state ground that could preclude its jurisdiction. *See Long*, 463 U.S. at 1040-41 ("[W]hen the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case

the way it did because it believed that federal law required it to do so."); *see also Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) (That the state court "might have, but did not, invoke state law does not foreclose jurisdiction [in this Court]."); *California v. Ramos*, 463 U.S. 992, 997-98 n.7 (1983). Here, where it is clear that the state court rested its decision solely on federal grounds, the Court has jurisdiction to review the lower court's erroneous determination that the state death penalty statute violated the Federal Constitution.

II. KANSAS' CAPITAL SENTENCING SYSTEM, WHICH DIRECTS THAT THE DEATH PENALTY SHALL BE IMPOSED UPON THOSE CONVICTED OF CAPITAL MURDER WHEN THE AGGRAVATING CIRCUMSTANCES ARE NOT OUTWEIGHED BY THE MITIGATING CIRCUMSTANCES, IS CONSTITUTIONAL.

A. In *Walton v. Arizona*, The Court Found No Constitutional Infirmity In The Weighing Equation Of Arizona's Capital Sentencing Law – Which Is Functionally The Same As The Weighing Equation In Kan. Stat. Ann. § 21-4624(e).

The Court has already considered the very issue now before it, and reached a conclusion opposite that of the lower court. In *Walton v. Arizona*, the Court granted certiorari to resolve a conflict between the Arizona Supreme Court, which upheld Arizona's death penalty statute, and the Ninth Circuit, which found the statute unconstitutional. 497 U.S. at 647. In *Adamson v. Ricketts*, 865 F.2d 1011, 1044 (9th Cir. 1988), the Ninth Circuit held that the Arizona statute was unconstitutional because, among other reasons, it provided for the imposition of the death penalty if the defendant failed to establish that mitigating circumstances outweighed any aggravating circumstances. According to the Ninth Circuit, such a weighing system violated the

Eighth Amendment "because in situations where the mitigating and aggravating circumstances are in balance . . . the statute bars the court from imposing a sentence less than death." *Id.*

The *Walton* Court rejected that conclusion, holding that such a weighing equation does not violate the Constitution:

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.

497 U.S. at 650. The Court further noted that, so long as the sentencer is not precluded from considering relevant mitigating evidence and the statute does not automatically impose death upon conviction for certain types of murder, "there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence" in capital cases. *Id.* at 652 (quoting *Boyde v. California*, 494 U.S. 370, 377 (1990)).

The Kansas Supreme Court, however, declined to follow *Walton* on the grounds that (1) the Kansas and Arizona statutes are "distinguishable" because "[t]he Arizona statute does not call for a weighing formula in which the mitigating circumstances must outweigh the aggravating circumstances," and (2) "the issue of equipoise was not raised or decided in *Walton*." Pet. App. 102a-103a. Neither ground withstands scrutiny.

The Arizona law at issue in *Walton* directed that in a capital case, the sentencing court "shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated . . . and that there are no mitigating circumstances sufficiently substantial to call for

leniency." 497 U.S. at 644. The Arizona Supreme Court, both before and after *Walton*, has consistently construed Arizona's capital sentencing law to mean that the death penalty shall be imposed unless the aggravating circumstances are outweighed by the mitigating circumstances. *State v. Ysea*, 956 P.2d 499, 502 (Ariz. 1998) ("If the judge finds one or more of the aggravating factors listed in § 13-703(F), the defendant is death eligible, and if the aggravating factors are not outweighed by mitigating factors listed in § 13-703(G), the resulting sentence is death."); *State v. Gretzler*, 659 P.2d 1, 14 (Ariz. 1983) (citing cases wherein mitigators were insufficient to outweigh aggravating circumstances). Likewise, the Ninth Circuit has interpreted Arizona's capital sentencing law in the same manner. *Adamson*, 865 F.2d at 1041-43.

Under the Arizona capital sentencing statute, the burden of proving the existence of aggravating circumstances was on the prosecution and the burden of proving mitigating circumstances was on the defendant. Thus, once the prosecution had proven the existence of at least one or more aggravating circumstances, the burden was then placed upon the defendant to prove sufficient mitigating circumstances to overcome such aggravating circumstance(s) and convince the sentencing court that a sentence other than death was warranted. Ariz. Rev. Stat. § 13-703; *Adamson*, 865 F.2d at 1026.

Kan. Stat. Ann. § 21-4624(e) operates in essentially the same manner, although it puts a slightly greater burden on the State. Section 21-4624(e) directs that following a capital conviction, once the prosecution has proven beyond a reasonable doubt the existence of one or more statutorily enumerated aggravating circumstances, a death sentence shall be imposed unless the sentencing jury determines that the aggravating circumstances are outweighed by any mitigating circumstances found to exist. Thus, as with the Arizona law upheld in *Walton*, in Kansas once the

prosecution meets its burden of proving the existence of one or more aggravating circumstances, the defendant then bears the burden of presenting mitigating circumstances. The only difference is that, unlike the Arizona law, in Kansas once the defendant has presented mitigating evidence, the defendant does not bear the burden of convincing the sentencer that a sentence other than death is warranted. Rather, the State then must carry the burden of convincing the sentencer, beyond a reasonable doubt, that the aggravators are not outweighed by the mitigators and that a sentence of death is appropriate. J.A. 26, Inst. No. 5. While this difference puts a greater burden on the State of Kansas, it does not alter the fact that the sentencing systems in both statutes, although worded differently, are functionally the same.

Walton held that it is constitutional to place the burden on a defendant to prove that mitigators outweigh aggravators. Certainly, then, it is constitutional to impose a death penalty where the *State* has proved, beyond a reasonable doubt, that mitigators do not outweigh aggravators.

The Kansas Supreme Court's second ground for declining to follow *Walton* fares no better. Contrary to the lower court's belief, the central issue of this case – whether it is constitutional to impose the death sentence when the sentencer finds that the aggravating and mitigating circumstances are equally balanced – was plainly presented and considered by the *Walton* Court. Among other grounds, the petitioner in *Walton* challenged the Arizona statute because "the defendant must not only establish the existence of a mitigating circumstance, but also must bear the risk of nonpersuasion that any mitigating circumstances will not outweigh the aggravating circumstance(s)" and "in situations where the mitigating and aggravating circumstances are in balance … the statute bars the court from imposing a sentence less than death." Brief of Petitioner at 34, 37-38, *Walton v. Arizona,* 497 U.S. 639 (1990). Moreover, as noted, among the reasons the Ninth Circuit held Arizona's

statute unconstitutional in *Adamson* was "because in situations where the mitigating and aggravating circumstances are in balance . . . the statute bars the court from imposing a sentence less than death." 865 F.2d at 1043.

The *Walton* Court explicitly stated that certiorari was granted in that case because the Ninth Circuit in *Adamson* found Arizona's death penalty unconstitutional for the same reasons submitted by Walton. 497 U.S. at 647. Thus, while it is true that the *Walton* Court did not use the term "equipoise," there can be no doubt that the Court considered the issue and (in Parts III and IV of its opinion) rejected the argument that imposing the death penalty in an "equipoise" situation is unconstitutional, as the *Walton* dissent unhesitatingly acknowledged. *Id*. at 687-88 (Blackmun, J., dissenting). In upholding the statute, the *Walton* Court necessarily rejected the Ninth Circuit's reasoning and accordingly rejected the very rationale relied upon by the Kansas Supreme Court in holding Kansas' capital sentencing system unconstitutional. *See Clemons v. Mississippi*, 494 U.S. 738, 747 n.3 (1990) (the Court implicitly rejected a particular argument briefed by respondent in *Zant v. Stephens*, 462 U.S. 862 (1983), and raised by the dissent in *Barclay v. Florida*, 463 U.S. 939 (1983), by refusing to address the argument in its majority opinions).

With this in mind, reading the *Walton* decision as the lower court did is nonsensical in terms of what the Court sought to accomplish in *Walton*. The Court stated: "Because the United States Court of Appeals for the Ninth Circuit has held the Arizona death penalty statute to be unconstitutional for the reasons submitted by Walton in this case . . . we granted certiorari to resolve the conflict…." 497 U.S. at 647 (internal citations omitted). If the Court did not reject the Ninth Circuit's holding that the Arizona capital sentencing statute is unconstitutional "because in situations where the mitigating and aggravating circumstances are in

balance … the statute bars the court from imposing a sentence less than death," *Adamson*, 865 F.3d at 1043, then the conflict remained unresolved. But that was not the outcome of *Walton*. Rather, the Court rejected the argument that this created an unconstitutional presumption in favor of death and upheld Arizona's death penalty statute as interpreted by the Arizona Supreme Court.

Thus, in *Walton*, the Court considered the very issue now before it and squarely ruled that a capital sentencing statute may, consistent with the Constitution, impose the death penalty when the aggravating circumstances are not outweighed by the mitigating circumstances.[6] The decision of the lower court in this case contradicts the *Walton* holding and must be reversed.

B. The Kansas Capital Sentencing System Meets The Constitutional Requirements Set Forth In The Court's Post-*Furman* Death Penalty Jurisprudence.

Even if this were an issue of first impression, as claimed by the lower court (Pet. App. 21a), Kansas' death penalty law meets constitutional requirements because it establishes rational criteria for narrowing the class of death eligible defendants and it does not limit in any way the sentencing jury's consideration of relevant mitigating circumstances that could cause it to decline to impose the death penalty. *See Blystone v. Pennsylvania*, 494 U.S. 299, 308-09 (1990). For these reasons, the Kansas capital sentencing system satisfies

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[6] Since *Walton*, various courts around the country have declared their understanding that *Walton* so held, including the Eleventh Circuit, *see Jones v. Dugger*, 928 F.2d 1020, 1029 (11th Cir. 1991), the Ninth Circuit, *see Adamson v. Lewis*, 955 F.2d 614, 619 (9th Cir. 1992), and *Richmond v. Lewis*, 948 F.2d 1473, 1481-83 (9th Cir. 1992), the Supreme Court of Arizona, *see State v. Gulbrandson*, 906 P.2d 579, 605 (Ariz. 1995), and *State v. Greenway*, 823 P.2d 22, 27 (Ariz. 1991), and the Supreme Court of Idaho, *see State v. Hoffman*, 851 P.2d 934, 942-43 (Idaho 1993).

the constitutional requirements set out in the Court's death penalty jurisprudence since its landmark decision in *Furman v. Georgia*, 408 U.S. 238 (1972).

For over 30 years, the holding in *Furman* has represented the constitutional standard against which state capital sentencing systems are measured. In *Furman*, the Court held that death sentences imposed under state statutes that gave the sentencer complete discretion to impose the death penalty violated the Eighth Amendment's prohibition against cruel and unusual punishment. *See id.* at 239-40. Today, *Furman* "has come to stand for the principle that a sentencer's discretion to return a death sentence must be constrained by specific standards, so that the death penalty is not inflicted in a random and capricious fashion." *Walton*, 497 U.S. at 657 (Scalia, J., concurring).

Subsequent decisions have further refined and guided capital sentencing laws. For example, following *Furman*, the Court, in *Gregg v. Georgia*, 428 U.S. 153, 189 (1976), held that states must channel and limit the discretion of sentencers in capital cases "so as to minimize the risk of wholly arbitrary and capricious action." At the same time, sentencers must still be allowed to consider all relevant aspects of the character and record of the individual offender and the circumstances of the particular offense. *See Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976). One approved method for satisfying these competing goals in a capital sentencing system is the type employed by Kansas in which the aggravating and mitigating circumstances are established by evidence and then weighed against each other. *See Proffitt v. Florida*, 428 U.S. 242, 257-58 (1976).

While the Court has required the states to provide clear and objective standards for guiding and channeling the sentencer's discretion, *see, e.g.*, *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980), the actual method and formula for weighing aggravating and mitigating circumstances in

capital sentencing has traditionally been left to the states. Because "the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances," *Zant v. Stephens*, 462 U.S. 862, 890 (1983), the Court has "never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." *Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988).

States thus enjoy "a constitutionally permissible range of discretion in imposing the death penalty." *Blystone*, 494 U.S. at 308-09. To implement a valid capital sentencing system, a state must adhere to two guiding constitutional principles:

> First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold…. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty.

Id. (quoting *McKleskey v. Kemp*, 481 U.S. 279, 305-06 (1987)).

Plainly, the Kansas capital sentencing system satisfies these constitutional requirements by narrowing the scope of death eligible defendants in two respects. Initially, for the death penalty to be considered as a possibility, a defendant must be convicted of capital murder. Under Kansas law, the charge of capital murder differs from the charge of first degree premeditated murder in that one or more specific elements beyond intentional premeditated murder must be proven. Kan. Stat. Ann. § 21-3439.[7] Then, following a

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[7] These additional elements include: (1) the killing occurred during the commission of kidnapping or aggravated kidnapping with intent to ransom, (2) a contract killing, (3) a killing committed while incarcerated,

capital murder conviction, a defendant becomes eligible for the death penalty only if the State proves beyond a reasonable doubt the existence of one or more specifically enumerated aggravating circumstances. Kan. Stat. Ann. §§ 21-4624(e) and 21-4625.[8] Collectively, these statutory requirements narrow the class of potentially death eligible defendants by limiting it to only a small subset of murderers who have not only committed intentional premeditated murders, but committed them in a particularly nefarious fashion, and then further narrows this small group by limiting actual death eligibility to those capital murderers who committed their crime under particularly aggravated circumstances. Kansas' law clearly meets the constitutional requirements of narrowing the threshold of death eligible defendants.

The Kansas capital sentencing system satisfies the second constitutional requirement because it places no restriction, other than relevancy, on the admission of any evidence relating to any mitigating circumstances. Kan. Stat. Ann. § 21-4624(c). As a result, the jury is not restricted in any way

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(4) the killing of the victim of rape, sodomy, or aggravated sodomy during the commission of or subsequent to such crime, (5) the killing of a law enforcement officer, (6) killing of more than one person, and (7) the killing of a child during the commission of kidnapping or aggravated kidnapping with intent to commit a sex offense. Kan. Stat. Ann. § 21-3439.

[8] The aggravating circumstances are limited to the following: (1) the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm or death, (2) the defendant knowingly killed or created a great risk of death to more than one person, (3) the defendant committed the murder for pecuniary gain, (4) the defendant authorized or hired someone else to commit the murder, (5) the defendant committed the murder to avoid arrest or prosecution, (6) the defendant committed the murder in an especially heinous, atrocious, or cruel manner, (7) the defendant committed the murder while serving a prison sentence for a felony conviction, and (8) the victim was killed because he was, or was going to be, a witness in a criminal proceeding. Kan. Stat. Ann. § 21-4625.

from considering, and giving effect to, any and all mitigating evidence presented. The jury is able to conduct an individualized determination of whether the death penalty is appropriate based on the character and record of the defendant and the circumstances of the crime. *Tuilaepa v. California*, 512 U.S. 967, 972 (1994).

Beyond these two requirements, the Court has not limited the procedures by which States may impose the death penalty. *Blystone*, 494 U.S. at 309 ("Within the constitutional limits defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished."). The Court has never required that the states adopt a particular type of weighing system, nor has it directed a particular manner in which sentencing juries must consider aggravating and mitigating evidence.

Indeed, in *Zant*, the Court stated, "the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances." 462 U.S. at 890. This was reiterated in *Harris v. Alabama*, 513 U.S. 504, 512 (1995), where the Court reaffirmed, "[w]e have rejected the notion that 'a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required'" (quoting *Franklin*, 487 U.S. at 179). Requiring a State to apply a specific weighing equation directed by the Supreme Court "would offend . . . established principles and place within constitutional ambit micromanagement tasks that properly rest within the State's discretion to administer its criminal justice system." *Id.*

Not long after *Harris*, the Court reaffirmed that in the capital sentencing context, "[a] state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998). The Court again noted, "we have never gone

further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence. And indeed, our decisions suggest that complete jury discretion is constitutionally permissible." *Id.* (citing *Tuilaepa*, 512 U.S. at 978-79).

The Court's holdings consistently emphasize that once the class of death eligible defendants is appropriately narrowed, the risk of cruel and unusual punishment is diminished and all that the Constitution requires in addition is an individualized determination of the appropriate penalty. *Tuilaepa*, 512 U.S. at 982-83 (Stevens & Ginsburg, JJ., concurring). The right to an individualized determination is not infringed by the way in which the jury is directed to balance the aggravating and mitigating circumstances. Indeed, because it is not even constitutionally necessary to define particular evidence as aggravating or mitigating, *id.* at 983-84 (Stevens & Ginsburg, JJ., concurring), it is equally unnecessary to require a certain weighing calculus in the sentencing system. Other than the constitutional requirement that the sentencer be allowed to consider any relevant evidence, the weighing equation is controlled by state law, not the Eighth Amendment. *Blystone*, 494 U.S. at 309.

Thus, "the state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence." *Buchanan*, 522 U.S. at 276. The Kansas capital sentencing system does not preclude the jury from considering and giving effect to any mitigating evidence but merely channels the jury's discretion by directing when the jury shall, based on its assessment of the mitigating and aggravating circumstances, find that the death penalty is the appropriate sentence. This is in accordance with constitutional requirements.

In sum, the Kansas capital sentencing system clearly narrows the class of persons eligible for the death penalty, and it allows the sentencing jury to consider any relevant

mitigating circumstance. Kan. Stat. Ann. § 21-4624(c). The weighing equation does not prevent an individualized determination of whether the death penalty is appropriate, and does not require a juror to vote for the death penalty unless he or she decides, upon the completion of the weighing process, that death is the appropriate penalty in light of all the circumstances. Accordingly, the Kansas capital sentencing system meets the constitutional requirements that have been set forth by this Court, and the lower court erred in finding it unconstitutional.

C. The Kansas Capital Sentencing System Does Not Create A Presumption In Favor Of Death.

The Kansas capital sentencing system begins with a presumption that life in prison is the appropriate sentence for capital murder and never directs mandatory imposition of the death penalty. Arguments to the contrary are both factually and legally without merit. In accordance with the reasoning set forth in *Walton*, *Boyde*, and *Blystone*, Kan. Stat. Ann. § 21-4624(e) is not impermissibly mandatory and is therefore constitutional.

Without question, the Kansas capital sentencing system begins with a presumption that life in prison – not death – is the appropriate sentence for capital murder. Indeed, Kan. Stat. Ann. § 21-4706(c) states that, except as otherwise provided in the statutory system for holding a separate sentencing hearing, the sentence for the crime of capital murder shall be imprisonment for life.

The death penalty becomes a *possibility* only if the State, after a capital conviction, goes forward with a separate sentencing hearing in accordance with § 21-4624. At the sentencing proceeding, the State bears the burden of proving beyond a reasonable doubt the existence of at least one statutory aggravating circumstance. Kan. Stat. Ann. § 21-4624(c) & (e). If the State fails in its burden, the sentence is life imprisonment. If, on the other hand, the State succeeds,

it then bears the burden of proving beyond a reasonable doubt that the aggravating circumstances are not outweighed by the mitigating circumstances. J.A. 26, Inst. No. 5. Should the State fail here, the sentence is again life imprisonment. Moreover, if the jury is unable to reach a unanimous decision, the sentence is life imprisonment. Kan. Stat. Ann. § 21-4624(c).

In many ways, the capital sentencing proceeding is analogous to a criminal trial, where the defendant begins with a presumption of innocence and the State must prove the elements of the crime beyond a reasonable doubt to obtain a guilty verdict. In a capital sentencing hearing, the defendant begins with the presumption that he will receive life imprisonment, and the State must prove the existence of one or more aggravating factors beyond a reasonable doubt before the defendant is eligible for a death sentence. And even if the State proves aggravating circumstances beyond a reasonable doubt, the death penalty is not automatic or mandatory. The jury is still given the option of returning a life sentence after considering all relevant mitigating evidence. Thus, if any one member of the jury has a reasonable doubt that aggravating circumstances exist or that the aggravating circumstances are not outweighed by the mitigating circumstances, the sentence will be life imprisonment. This is hardly indicative of a presumption in favor of death.

Further demonstrating that the Kansas system does not presume death is the fact that the burden remains upon the State to prove that the aggravating circumstances are not outweighed by the mitigating circumstances. The defendant, never bearing the burden of proving that the mitigating circumstances outweigh the aggravating circumstances, simply has the obligation of presenting the mitigating evidence. Indeed, because the State bears the burden of proving that the aggravators are not outweighed by the mitigators, the Kansas capital sentencing system embodies

an initial presumption that the mitigating circumstances outweigh the aggravating circumstances (and thus the appropriate sentence is life imprisonment). Only after the State overcomes this presumption is the death penalty deemed appropriate.

At the heart of the presumption of death challenge to Kan. Stat. Ann. § 21-4624(e) is the language that "the defendant shall be sentenced to death" when the jury determines the aggravating circumstances are not outweighed by the mitigating circumstances. Opponents of the law argue that this language imposes a mandatory death sentence when the aggravating and mitigating circumstances are in equipoise, and thus effectively establishes a presumption in favor of death. *See*, *e.g.*, J.A. 64, 73, 90.

This argument not only fails to acknowledge the significance of Kansas' burden of proof, but it also fails to come to terms with the Court's precedents. Those decisions make clear that so long as eligibility for the death sentence is properly narrowed and full consideration of mitigating evidence is allowed, States may channel a sentencing jury's discretion by establishing the circumstances that result in a sentence of death. The Kansas provision stating that the defendant "shall be sentenced to death" if the State proves beyond a reasonable doubt that aggravators are not outweighed by mitigators is no more impermissibly "mandatory" than the challenged statutes upheld in *Walton*, *Boyde*, and *Blystone*.

In *Blystone*, the defendant argued that Pennsylvania's death penalty "was unconstitutional because it mandated a sentence of death based on the outcome of the weighing process." 494 U.S. at 302. Blystone had been convicted of murder with an aggravating circumstance, and the jury found no mitigating circumstances existed. *Id.* The statute at issue directed that, under such circumstances, "[t]he verdict must be a sentence of death." *Id.* Blystone argued that this requirement rendered his sentencing proceeding "unreliable"

and Pennsylvania's death penalty unconstitutional because the mandatory feature "precluded the jury from considering whether the severity of his aggravating circumstance warranted the death sentence." *Id.* at 306; c*f.* J.A. 88-89 (Amicus Brief of Cornell Death Penalty Project, *State v. Kleypas*, 40 P.3d 139 (Kan. 2001) ("§ 21-4624(e) makes judgments of death in Kansas unreliable . . . . A death sentence imposed pursuant to § 21-4624(e) cannot with any confidence be said to reflect the jury's 'reasoned *moral* response to the defendant's background, character, and crime.' [citations omitted] Instead, it will often represent nothing more than the operation of a presumption in favor of death.")).

Rejecting *Blystone*'s arguments, the Court explained that "the presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by a jury." *Blystone*, 494 U.S. at 306-07. "The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." *Id.* at 307.

Allegations that the Kansas statute is impermissibly mandatory or creates an impermissible presumption in favor of the death penalty are equally unavailing. As was the case with the state statute in *Blystone*, under § 21-4624(e) it is the outcome of the weighing process that determines whether a sentence of death is warranted. And while Kansas' weighing formula may differ in some degree from the formulas of other weighing states, *see, e.g.*, Idaho Code § 19-2515(7)(a) (imposing a sentence of death when "the jury finds that a statutory aggravating circumstance exists and no mitigating circumstances exist which would make the imposition of the death penalty unjust"); Ohio Rev. Code § 2929.03(D)(2) (allowing a sentence of death only where the "aggravating circumstances . . . outweigh the mitigating factors"), it

remains true that there is no constitutional requirement for a particular weighing formula. *See Franklin*, 487 U.S. at 179; *Zant*, 462 U.S. at 890. Once the aggravating circumstances are established, there is no constitutional requirement that they be weighed any further at all, so long as the jury is allowed to consider all relevant mitigating evidence. *Blystone*, 494 U.S. at 306-07. Section 21-4624(e) clearly allows for such consideration and simply channels the jury's discretion in a constitutional manner to ensure effectiveness and consistency. *See Boyde*, 494 U.S. at 377.

In *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990), the Seventh Circuit took a dim view of a similar presumption of death argument as part of a challenge to the constitutionality of Illinois' death penalty provision. The statute at issue there provided that "[i]f the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death." *Id.* at 998. In rejecting the presumption of death argument, the court of appeals explained that such language provided the guidance necessary to ensure fair and consistent application of the death penalty:

> A statutory scheme which calls for a particular body, such as the sentencing authority under [Illinois' death penalty statute], to weigh various factors must guide that body as to the results which follow from a determination that one set of factors outweighs the other. If no such guidance were given, the weighing process itself would be rendered ineffective as a means of arriving at similar results in similar situations. For example, if a jury were asked to weigh various mitigating and aggravating circumstances in a particular defendant's case, but were not given any guidance as to the sentence which must be imposed based upon the balance they strike between those competing considerations, there would be no means of preventing a jury from imposing a death sentence even in those situations in which the mitigating circumstances

> outweighed the aggravating circumstances. Certainly, such a statutory scheme would run afoul of the eighth amendment's guarantee that the death penalty not be imposed in an 'arbitrary or capricious' manner. By providing for a certain result based on the balance struck by the jury between the aggravating and mitigating circumstances, [Illinois' death penalty statute] does not impose a burden of persuasion on the defendant. *Rather, it serves to ensure that similar results will be achieved in similar circumstances while, at the same time, allowing the jury to consider the individual characteristics of the defendant and the particularized nature of the crime.*

Id. at 999 (emphasis added).

Recognizing that "the sentencing determination is 'a process of balancing intangibles, not of proving facts,'" *id.* at 998 (quoting *People v. Bean*, 560 N.E.2d 258, 292 (Ill. 1990)), and that "at this point in the hearing the prosecution has already proven beyond a reasonable doubt that a statutory aggravating factor exists making the defendant eligible for the death penalty," *id.*, the *Silagy* court found no constitutional infirmity in Illinois' law. Rather, it held that the weighing instructions "in a constitutional way guide[] the jury . . . in determining under what circumstances the death penalty should be imposed." *Id.*

The same can be said for Kansas' sentencing law. Before any weighing occurs under § 21-4624(e), the fact finder has already determined beyond a reasonable doubt that the defendant is guilty of capital murder and, further, that aggravating circumstance(s) exist. Once those predicates are in place, § 21-4624(e) guides the jury's discretion in determining when the death penalty should be imposed. The "shall impose" language simply ensures that capital sentencing in Kansas is applied in a fair and consistent manner. While the jury is never precluded from considering and giving effect to mitigating circumstances, its discretion as to what sentence to impose after it has weighed the

circumstances is carefully directed so that similar results are obtained in similar circumstances. In this way, Kansas' capital sentencing system avoids the arbitrary and seemingly random imposition of the death penalty that caused the Court concern in *Furman*.

D. The Kansas Capital Sentencing System Does Not Mandate A Sentence Of Death When The Jury Is Unable To Determine That Death Is The Appropriate Sentence.

Kan. Stat. Ann. § 21-4624(e) directs a sentencing jury to choose between two sentencing options – death or life imprisonment. *See also* J.A. 27, Inst. Nos. 10 and 11. A decision that death is the appropriate sentence must be unanimous. Kan. Stat. Ann. § 21-4624(e); *see also* J.A. 27, Inst. No. 10. Anything other than a unanimous decision in favor of death results in a sentence of life imprisonment. Kan. Stat. Ann. §§ 21-4624(e) and 21-4706(c); *see also* J.A. 28, Inst. No. 12.

Despite the heavy presumption in favor of life imprisonment, respondent and others argue that the Kansas capital sentencing system is constitutionally flawed because its weighing equation "requires a capital jury to return a death sentence not only when it decides that the defendant deserves death … but also when it does not decide that death is the deserved punishment." J.A. 88-89 (*Amicus* Brief of Cornell Death Penalty Project, *State v. Kleypas*, 40 P.3d 139 (Kan. 2001); *see also* J.A. 62 (Brief of Appellant, *State v. Kleypas*, 40 P.3d 139 (Kan. 2001)). This argument ignores the plain language of the statute and jury instructions and relies on the flawed premise that when a jury decides that the aggravating and mitigating circumstances are in equipoise, and thus imposes the death penalty, the jury has failed to make a decision. To the contrary, in such a case the jury *has* made a decision; it has unanimously decided that the death penalty is the appropriate sentence.

The idea that a determination that the aggravating and mitigating circumstances are in balance represents juror confusion or inability to decide between life and death is simply illogical. Saying that the aggravators and mitigators weigh equally is not the same as saying one cannot decide between a life sentence and death. Finding the aggravators and mitigators in equipoise is a reasoned conclusion and represents an affirmative determination that death is the appropriate sentence.

The picture painted by respondent of befuddled jurors struggling to decide which weighs more and ultimately throwing up their hands and saying, "We can't decide, so we have to impose death," is pure fancy. It ignores the clear instructions given to jurors and unfairly presumes juror confusion. The statute and jury instructions make clear that if jurors cannot reach a decision, then life imprisonment shall be the sentence. The jury instructions are very specific about when the death penalty can be imposed, and it is presumed that juries follow their instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). The suggestion that confused jurors, unable to reach a decision, would ignore their clear instructions and unanimously impose a death sentence, the most consequential penalty in our legal system, is not only preposterous, but it is also an unflattering commentary on the abilities of those citizens who carry out their duty of jury service.

The flaw in this argument is that it confuses the weighing equation with the ultimate decision that must be made. Respondent sees three possibilities: the aggravators outweigh the mitigators, the mitigators outweigh the aggravators, or the aggravators and mitigators are in equipoise. He then concludes that the third possibility represents an inability to make a decision. Such analysis misses the point: the weighing process is merely a means to reach a decision. The ultimate decision remains life or death. A determination that the mitigators outweigh the aggravators leads to a decision

that life in prison is the appropriate sentence. A determination that the aggravators outweigh the mitigators, or that they are in balance, leads to a decision that death is the appropriate sentence. A complete inability to reach a decision, however, results in the presumed sentence of life imprisonment.

It cannot be stressed enough that "the ultimate choice in capital sentencing … is a unitary one – the choice between death and imprisonment," *Walton*, 497 U.S. at 656 (Scalia, J., concurring), and jurors in a capital sentencing proceeding understand that reality. They know that their final decision is either death or life imprisonment. They deliberate and decide one way or the other. The weighing process itself is simply a means to that end. It is an entirely subjective process, dealing with unquantifiable intangibles. Aggravators and mitigators cannot actually be weighed – the term "weigh" as used in capital sentencing simply means to consider and subjectively evaluate. Each juror makes an individualized determination of the relative moral weights to attribute to each aggravating and mitigating circumstance. After this individual consideration and evaluation, a juror makes a subjective, qualitative rather than quantitative, determination for death or life. In the final analysis, the aggravating circumstances are either so bad that the defendant deserves death, or the mitigating circumstances are so compelling that the defendant deserves to be spared. On this ultimate decision, there is no possibility of a tie.

With this in mind, the notion that the entire jury could find itself at the tipping point is at most a philosophical abstraction. If even one juror believes that the mitigators outweigh the aggravators, a death sentence will not be imposed. Therefore, when a Kansas jury returns a death penalty, there can be no doubt that it represents the jury's reasoned, unanimous conclusion that death is the appropriate sentence.

For these reasons, the Kansas capital sentencing system satisfies all constitutional requirements. The statute does not mandate the death penalty when the jury is unable to unanimously decide that such a sentence is appropriate. In the unusual event that a juror was to conclude that the aggravating and mitigating circumstances were in equipoise, such would represent not an inability to decide, but a reasoned conclusion after full consideration of the mitigating circumstances that death is warranted. The Constitution does not demand more.

E. The Kansas Capital Sentencing System Allows A Sentencing Jury To Give Full Effect To All Mitigating Circumstances.

The plain statutory language of Kan. Stat. Ann. 21-4624(e) authorizes a sentencing jury to consider and give effect to all mitigating circumstances. The lower court, however, held that Kansas' capital sentencing system somehow precludes jurors from giving full effect to the mitigating circumstances. *See Kleypas*, Pet. App. 114a. This conclusion is illogical. For a juror to come to *any* conclusion regarding whether the aggravating circumstances weigh more than, less than, or equal to the mitigating circumstances, the juror must have considered and given full effect to both sets of circumstances, as subjectively weighed in that juror's mind.

To be sure, "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the death penalty." *Blystone*, 494 U.S. at 309. However, channeling the jury's discretion *after* it has considered and weighed all mitigating circumstances, as Kan. Stat. Ann. § 21-4624(e) does, is not the same as limiting the jury's ability to consider and give effect to relevant mitigating circumstances. Guiding the jury's discretion after consideration of all relevant circumstances is constitutionally permissible. *Boyde*, 494 U.S. at 377. The weighing equation embodied in Kan. Stat. Ann. § 21-4624(e)

does not in any way interfere with the jury's consideration of mitigating evidence and therefore does not run afoul of the Constitution. *Id.*

The defendant in *Blystone* unsuccessfully asserted the same argument. Blystone argued that because the statute in question mandated the death penalty when aggravating circumstances were proven and no mitigating circumstances existed, it "unconstitutionally limited the jury's consideration of unenumerated mitigating circumstances." 494 U.S. at 306. The Court, however, held that because the jury was instructed that it could consider any mitigating circumstances, the fact that the jury was directed to impose the death penalty upon finding no mitigating circumstances was not unconstitutional. Nothing prevented the jury from considering and giving full effect to any mitigating circumstances.

Likewise, Kan. Stat. Ann. § 21-4624(e) does not limit the jury's consideration of mitigating circumstances. Each juror is free to consider any and all mitigating circumstances and to give them whatever weight and effect the juror subjectively determines is appropriate. If the jurors individually and collectively determine that the mitigating circumstances do not outweigh the aggravating circumstances, the jurors have not failed to give full effect to the mitigators – they have only failed to give them the effect desired by the defendant.

In truth, nothing in Kan. Stat. Ann. § 21-4624(e) prevents the jury from declining to impose the death penalty on the basis of any mitigating evidence presented. Equally true, if the jury chooses to impose the death sentence, it does not mean that they have not been allowed to give the mitigating circumstances their full effect; it simply means that the jury has considered the full effect of the mitigators and concluded that, in spite of them, death is the appropriate sentence.

CONCLUSION

The judgment of the lower court declaring Kan. Stat. Ann. § 21-4624(e) unconstitutional on its face should be reversed and the case remanded accordingly.

Respectfully submitted,

THEODORE B. OLSON
MARK A. PERRY
MATTHEW D. MCGILL
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave. N.W.
Washington, D.C. 20036
(202) 955-8500

CHAD A. READLER
MARY BETH YOUNG
Jones Day
325 John H. McConnell Blvd.
Suite 600
Columbus, Ohio 43215
(614) 469-3939

PHILL KLINE
Attorney General of Kansas
NOLA TEDESCO FOULSTON
District Attorney
18th Judicial District
of Kansas
JARED S. MAAG
Deputy Attorney General
(*Counsel of Record*)
KRISTAFER AILSLIEGER
Assistant Attorney General
120 S.W. 10th Avenue, 2nd Flr.
Topeka, Kansas 66612-1597
(785) 296-2215

Counsel for Petitioner

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