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

REPLY BRIEF FOR PETITIONER

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I. THE COURT HAS JURISDICTION TO REVIEW THE KANSAS SUPREME COURT'S DECISION.

Contrary to respondent's contentions, this Court has jurisdiction to review the Kansas Supreme Court's conclusion that Kansas' death-penalty regime violates the federal Constitution. As an initial matter, respondent continues to assert, as he did at the *certiorari* stage, that "the rule of *Illinois v. Gates*, 462 U.S. 213 (1986), forecloses jurisdiction because the State of Kansas did not present" the federal constitutional issue in the court below. Resp. Br. 17. This contention fails for the simple reason that "it is irrelevant to inquire how and when a federal question was raised in a court below when it appears that such question was actually considered and decided." *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914); *see Payton v. New York*, 445 U.S. 573, 582 n.19 (1980). Moreover, since the Court ordered briefing on other jurisdictional issues but not this one, it has presumably already rejected this argument. *United States v. Williams*, 504 U.S. 36, 40 (1992).

Respondent's additional arguments likewise fail to offer any other justifiable basis for precluding this Court's review.

A. The Decision Below Is Final.

As described in petitioner's opening brief, the decision below, in addition to declaring the Kansas death penalty statute unconstitutional on its face, reversed respondent's convictions and remanded for retrial because certain evidence was improperly excluded. Petr. Br. 2, n.2. The finality issue respondent raises is whether this remand for retrial renders the Kansas Supreme Court's decision invalidating the Kansas death penalty nonfinal. It does not.

The Kansas Supreme Court struck down the Kansas death penalty law as repugnant to the United States Constitution. This decision is binding on the parties and all lower courts in the State of Kansas. *State v. McQuillen*, 689 P.2d 822, 832 (Kan. 1984) (Herd, J., concurring) ("The decisions of the highest appellate court of a state are the law of that state just

as the decisions of the U.S. Supreme Court are the law of the land."). As such, on remand for new trial in this case, petitioner is barred from seeking a death sentence, or even impaneling a death qualified jury. Accordingly, no further opportunity for review in this Court is available to petitioner, regardless of the outcome below. If respondent is acquitted, double jeopardy and state law would foreclose any appeal by the prosecution. Petr. Br. 8. Alternatively, even if respondent is convicted of capital murder (albeit without a death-qualified jury or a valid death penalty statute), the State would have no opportunity to appeal as a matter of state law, as long as the sentence is within Kansas' statutory guidelines for the offense – which a life sentence would be. *Id*.

Because appeal from a conviction on retrial would be unavailable under state law, this case bears no resemblance to those cited by respondent, where the party seeking review would "be free to seek [this Court's] review once the state-court litigation comes to an end." Resp. Br. 19 (quoting *Jefferson v. City of Tarrant*, 522 U.S. 75, 83 (1997)). Petitioner's claim is not simply that the Kansas courts would not later review the merits of the present constitutional ruling based on "law of the case," *see id.*, it is that *no appeal would be available at all*, as a matter of state procedure, foreclosing any opportunity for review in this Court.

Complicating an otherwise straightforward issue, respondent argues that there is some unsettled rule of state procedure by which petitioner might be able to obtain further review of the constitutional issue in the state courts, and then subsequently seek review by this Court. While respondent concedes that this Court has jurisdiction under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), if "the State will be unable to obtain review of . . . the [Kansas Supreme Court's] holding eliminating death as a possibility for [him] if [he] is convicted of capital murder on retrial," Resp. Br. 21, he contends this somehow "depends upon an unsettled point of Kansas procedure" requiring certification

to the Kansas Supreme Court – although he does not specifically articulate what the certified question should be. *Id*. at 16.

However, certification is unnecessary and inappropriate here because there is nothing at all unsettled about petitioner's appellate rights under Kansas law. Respondent's argument that petitioner may, on remand, attempt to invoke before the trial court the very death penalty statute that has been struck down by the State's highest court, and then again seek review of that same statute through the allegedly unsettled appellate process of Kan. Stat. Ann. § 22-3602(b), is entirely fallacious. Pursuant to Kan. Stat. Ann. § 22-3602(b), the prosecution may take an appeal "in the following cases, and no others":

1. From an order dismissing a complaint, information or indictment;
2. from an order arresting judgment;
3. upon a question reserved by the prosecution; or
4. upon an order granting a new trial in any case involving a class A or B felony or for crimes committed on or after July 1, 1993, in any case involving an off-grid crime.

This statute affords the prosecution no possibility of review from a decision on remand. Subsections (b)(2) and (b)(4), which involve post-conviction orders, are obviously inapplicable, and respondent does not contend otherwise. Moreover, as petitioner explained (Petr. Br. 9 n.4), and as respondent does not dispute, the "question reserved" provision of subsection (b)(3) is also inapplicable. Appeals on a "question reserved" are permitted "to allow the prosecution to obtain review of a trial court's adverse ruling on a legal issue of statewide interest that is important to the correct and uniform administration of criminal justice." *State v. Tremble*, 109 P.3d 1188, 1190 (Kan. 2005). The purpose of this procedure is "to give the bench, bar, and

public the benefit of [the Kansas Supreme] court's opinion on questions of statewide interest, usually the interpretation of statutes." *State v. Chittenden*, 510 P.2d 152, 153 (Kan. 1973). The Kansas Supreme Court has "uniformly declined to entertain questions reserved, the resolution of which would not provide helpful precedent." *State v. Woodling*, 957 P.2d 398, 401 (Kan. 1998). Here, the Kansas Supreme Court has already ruled on the issue and the bench, bar, and public already have the benefit of the opinion of the State's highest court. Thus, Kan. Stat. Ann. § 22-3602(b)(3) provides no avenue for further review.

Respondent's sole argument (Resp. Br. 22) is that under subsection (b)(1), petitioner might be able to appeal the denial or striking of the notice of intent to seek the death penalty that the prosecution must file pursuant to Kan. Stat. Ann. § 21-4624(a).[1] Subsection (b)(1), however, only gives the prosecution the right to appeal a trial court's dismissal of a charging document – a complaint, information, or indictment. The terms "complaint", "information", and "indictment" are defined as a document charging the commission of a crime. Kan. Stat. Ann. § 22-2202(8), (11) & (12). A notice of intent to seek the death penalty does not charge the commission of a crime, and thus does not meet any of these definitions. Accordingly, the limited appellate right afforded the prosecution under Kan. Stat. Ann. § 22-3602(b)(1) is by its plain terms inapplicable to the federal issue in this case.

Further, under Kansas law, a determination by the Kansas Supreme Court that a statutory sentencing procedure is unconstitutional strips the state trial courts of any authority

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[1] Kan. Stat. Ann. § 21-4624(a) provides, "If a defendant is charged with capital murder, the county or district attorney shall file written notice if such attorney intends, upon conviction of the defendant, to request a separate sentencing proceeding to determine whether the defendant should be sentenced to death. Such notice shall be filed . . . not later than five days after the time of arraignment. . . ."

to entertain a sentence formerly authorized by the invalid procedure. *State v. Kessler*, 73 P.3d 761 (Kan. 2003). In *Kessler* the defendant challenged an "upward departure sentence" – one that was beyond the statutory maximum. *Id.* at 771-72. Before *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Kansas law allowed upward departure sentences based on judge-made rather than jury-made factual findings. Following *Apprendi*, the Kansas Supreme Court declared this procedure unconstitutional. *State v. Gould*, 23 P.3d 801 (Kan. 2001). Subsequently, Kessler was sentenced to an upward departure sentence by a jury according to an ad hoc procedure created by the trial court. 73 P.3d at 771. Although this procedure apparently conformed with *Apprendi*, the Kansas Supreme Court held that because it had declared the statute authorizing upward departures unconstitutional in *Gould*, there was no statutory authority to impose such a sentence regardless of the procedure used. *Id.* at 772.

Similarly, as a result of the decision below, there is at present no statutory authority in Kansas to seek or impose the death penalty. The death penalty simply does not exist anymore in Kansas. Respondent's argument that petitioner somehow can continue to seek a death sentence in the trial court and continue to seek state appellate review of the constitutional question presented here is simply groundless. The Kansas Supreme Court's ruling on the constitutionality of the State's death penalty law is without question a final decision that, unless reviewed and reversed by this Court, will bind the State in this and other prosecutions. Accordingly, this Court has jurisdiction to review the constitutional question presented under 28 U.S.C. § 1257.

B. The Decision Below Rests On The Federal Constitution and Not Upon Any Independent And Adequate State Ground.

The decision of the Kansas Supreme Court plainly rests on the United States Constitution. Contrary to respondent's

argument (Resp. Br. 22-27), it is not supported by an independent and adequate state ground. Respondent does not dispute that the lower court relied exclusively on federal law when it held the weighing equation of Kan. Stat. Ann. § 21-4624(e) unconstitutional. Rather, he argues that the federal constitutional issue was not the *primary focus* in the instant case. Resp. Br. 24. Respondent argues that the constitutional question was definitively decided previously in *State v. Kleypas*, 40 P.3d 139 (2001), and that in the present case, the lower court merely reiterated *Kleypas* making severability its primary focus. Resp. Br. 22-25. Respondent's argument is both factually erroneous and legally unpersuasive.

The lower court did not simply recognize the *Kleypas* holding as a predicate for its decision. Rather, it undertook a complete re-examination of *Kleypas*: "*After full reconsideration*, we . . . continue to adhere to the *Kleypas* majority's reasoning and holding that K.S.A. 21-4624(e) as written is unconstitutional under the Eighth and Fourteenth Amendment." Pet. App. 21a (emphasis added). The decision below then went a step further and, disagreeing with *Kleypas*, concluded that the statute could not be fairly construed to avoid the unconstitutional interpretation and thus held Kan. Stat. Ann. § 21-4624(e) facially unconstitutional under the Eighth and Fourteenth Amendments. Pet. App. 5a, 19a-21a. The decision below thus did far more than simply "follow" the previously announced constitutional holding of *Kleypas*.[2]

Indeed, respondent's contention that the lower court's decision merely recognized *Kleypas* and nothing more is disproved by his own comparison of the syllabi of the two

[2] Indeed, strictly speaking there *was* no constitutional *holding* of *Kleypas* – the holding was that the statute was to be construed in a certain way to avoid a perceived constitutional problem. *See* Pet. App. 88a.

cases.[3] Paragraph 45 of the *Kleypas* syllabus states, "K.S.A. 21-4624(e) *is not* unconstitutional on its face." Pet. App. 87a (emphasis added). Paragraph 25 of the syllabus in the opinion below states, "the statute *is* unconstitutional on its face." Pet. App. 5a (emphasis added). Clearly, the court below did more than just give *Kleypas* an approving nod. Had the lower court merely reaffirmed *Kleypas*, it would not have come to a different conclusion on the issue of the law's facial constitutionality.

Further, the claim that the lower court's analysis rejecting a saving construction is an adequate and independent state ground is nonsensical. This Court's jurisdiction fails only if the nonfederal ground is independent of the federal ground and adequate to support the judgment. *Harris v. Reed*, 489 U.S. 255, 260 (1989); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). "Where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, [the Court's] jurisdiction is plain." *Enter. Irrigation Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917). Likewise, "when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground," the Court assumes there are no such grounds. *Michigan v. Long*, 463 U.S. 1032, 1040, 1042 (1983); *see also Harris*, 489 U.S. at 260-61.

Under these standards, there is clearly no adequate and independent state ground here. The conclusion that, as a matter of statutory construction, a state statute cannot be construed to avoid a federal constitutional infirmity is entirely *dependent* on the predicate determination that the

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[3] Under Kansas law, the syllabus of the court is considered a statement of the law of the case and part of the binding decision of the court. *See* Kan. Stat. Ann. § 20-111; Kan. Stat. Ann. § 60-2106(b). *See also State v. Sims*, 862 P.2d 359, 364 (Kan. 1993); *Umbehr v. Bd. of Wabaunsee County Comm'rs*, 843 P.2d 176, 181 (Kan. 1992); *In re Estate of Anderson*, 865 P.2d 1037, 1042 (Kan. Ct. App. 1993); *In re Lett*, 640 P.2d 1294, 1300 (Kan Ct. App. 1982) (Abbott, P.J., concurring).

statute violates the United States Constitution. Thus, even if the primary focus of the lower court's decision had been severability, as respondent contends, such would not constitute an adequate state ground, *independent* of the underlying federal constitutional determination. This is not a case involving, say, alternative holdings based on a state statute and the federal constitution – a situation in which an AISG argument might have some force. Because the statutory decision on whether a saving construction is applicable cannot stand alone, it is neither independent of the federal question nor adequate to sustain the lower court's judgment. At the very least, it plainly is not "clear from the opinion" of the Kansas Supreme Court that the decision rests on an independent and adequate state ground. *Long*, 463 U.S. at 1041-42; *Harris*, 489 U.S. at 261.

Further, the lack of an adequate and independent state ground is unaffected by whether statutory construction, and not the underlying constitutional infirmity, was the "primary focus" of the lower court's decision. Resp. Br. 24. There is no rule requiring a federal issue to be the primary focus of a state court decision in order for this Court to have jurisdiction to review it. All that is necessary for the Court's jurisdiction is that the federal question was decided by the lower court. *Franks v. Delaware*, 438 U.S. 154, 161 (1978). Quite clearly, in the present case the lower court ruled that Kan. Stat. Ann. § 21-4624(e) was invalid on federal constitutional grounds.

Finally, the argument that petitioner "conceded" the constitutional question – which is just a reincarnation of respondent's misguided *Illinois v. Gates* argument, *see supra* at 1 – likewise fails to establish an independent and adequate state ground for the lower court's decision. Before the lower court, petitioner only conceded that the *Kleypas* court had found the weighing equation in Kan. Stat. Ann. § 21-4624(e) unconstitutional as applied, and that this ruling was controlling and required reversal of petitioner's death

sentence.[4] J.A., 40-44. While it is true that petitioner did not reassert the constitutional arguments it made in *Kleypas*, the Kansas Supreme Court nonetheless reconsidered those arguments (which were vigorously pressed by the dissenters below) and "after full reconsideration" held that it would continue to adhere to the constitutional analysis of *Kleypas*. That petitioner did not reassert its *Kleypas* arguments does not transform the lower court's decision to exhume the constitutional issue and reconsider it into a purely state law matter. The constitutional issue and the constitutional grounds upon which it was decided remain matters of federal constitutional law. Accordingly, jurisdiction is proper in this Court.

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[4] Before the lower court, petitioner found itself in essentially the same position as the government found itself in *United States v. Williams*, 504 U.S. 36 (1992). There, the United States had conceded before a federal appeals court that a particular prior decision of that court, in which the United States was a party, imposed certain responsibilities on federal prosecutors. On appeal to this Court, the United States asked for that precedent to be overruled. The opposing party challenged the Court's jurisdiction because the United States did not raise or contest the issue below. The Court rejected the latter argument which would:

> "impose, as an absolute condition to our granting certiorari upon an issue decided by a lower court, that a party demand overruling of a squarely applicable, recent [lower] court precedent, even though that precedent was established in a case to which the party itself was privy and over the party's vigorous objection, and even though no 'intervening developments in the law' had occurred."

504 U.S. at 44 (internal citations omitted). That, the Court said, "seems to us unreasonable." *Id.* While *Williams* involved jurisdiction over a question arising from a federal court of appeals, and not a claim of independent and adequate state grounds, requiring a party to seek the overruling of recent lower court precedent is equally "unreasonable" in this context. In any event, this is a much easier case than *Williams*, because here, unlike there, the decision below actually reconsidered the recently decided issue on its own initiative.

Respondent's logic is particularly nonsensical given that *Kleypas* itself presented petitioner no opportunity to seek review from this Court. Precisely because the Kansas Supreme Court "avoided" the perceived unconstitutional interpretation of the Kansas statute in *Kleypas* via statutory construction, petitioner could not seek the Court's review. *See, e.g.*, *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State."); *Cramp v. Bd. of Public Instruction*¸ 368 U.S. 278, 279-80 (1961). Thus, while petitioner disagreed with the lower court's determination in *Kleypas* that the Constitution requires the aggravators to outweigh the mitigators, petitioner could not challenge in this Court the lower court's *construction* of the statute to mean just that.

In the instant case, however, the lower court has reversed its earlier construction of the statute and declared that the statute is unconstitutional *in toto*. This has placed the federal constitutional question open for review by the Court, whereas the *Kleypas* court's construction of the statute shielded the issue from review. Yet, according to respondent, petitioner cannot invoke the Court's jurisdiction because the lower court's decision in this case was merely a "reiteration" of the *Kleypas* holding, and not an independent constitutional holding. If this logic were to prevail, petitioner would be forever precluded from obtaining this Court's review over the lower court's holding that Kan. Stat. Ann. 21-4624(e) is unconstitutional, not due to an independent and adequate ground of state law, but due to a type of procedural "bait and switch." Indeed, as already explained, petitioner cannot raise this issue in a subsequent case, *see supra* at 2-5, and now respondent argues that petitioner cannot raise the issue here either. Simply put, such an arbitrary "device to prevent review" is insufficient to constitute an independent and adequate state ground

precluding the Court's jurisdiction. *Enter. Irrigation*, 243 U.S. at 164.

In sum, there is no doubt that the lower court's decision was predicated on federal constitutional grounds. The lower court clearly and expressly indicated its reliance on federal constitutional provisions and precedent, and made no indication that it was relying on an adequate and independent state ground. Indeed, no adequate and independent state ground exists. The state ground alleged by respondent is so interwoven with the federal question as to be entirely dependent on its resolution. Quite simply, there is no possibility that the same judgment could be rendered by the lower court if this Court corrects the lower court's erroneous resolution of the federal question. *See Long*, 463 U.S. at 1042.

II. KANSAS' CAPITAL SENTENCING SYSTEM IS CONSTITUTIONAL.

A. Respondent's Arguments Are Based On Flawed Logic And Mischaracterization Of The Equipoise Issue Under Discussion.

The arguments of respondent and his supporting *amicus* are based on a fundamentally flawed premise: that a decision that the aggravating and mitigating circumstances are in equipoise is actually no decision at all about their relative weights and the appropriateness of the death penalty. Resp. Br. 28-38. Respondent and *amicus* seem to equate a finding of equipoise with a hung jury. From this flawed premise, they conclude that Kansas law mandates a death sentence when the jury is unable to reach a decision. This is, quite simply, incorrect.

Kansas law does not state that if a juror is unsure whether the death penalty is appropriate, the juror shall vote to impose the death penalty. Rather, Kansas law states that if the juror determines beyond a reasonable doubt that the mitigators do not outweigh the aggravators, he shall vote to

impose the death penalty. *See* J.A. 26-27. These are two very different propositions.

Contrary to respondent's characterization, a juror's determination that the aggravating and mitigating circumstances are in equipoise does not represent an inability to make a decision. Rather, that determination *is* a deliberate, reasoned decision. That determination does not reflect, as respondent suggests, a juror's inability to discern sufficient information about the defendant's individual characteristics and circumstances to make a sentencing judgment. In truth, it reflects the fact that the juror, after considering and weighing the aggravating and mitigating circumstances, has concluded that the State has proven beyond a reasonable doubt that the mitigating circumstances are insufficient to outweigh the wickedness of the crime. And while respondent may disagree with the jury's determination on this issue in his case, there is no doubt that this determination *is by definition a decision.*

Because jurors are instructed on the standards for imposing the death penalty under state law, they know when their decision will result in a death sentence, and when it will not. If a juror decides that that the mitigating circumstances outweigh the aggravating circumstances, he knows that his decision will result in a sentence other than death. Conversely, if he decides that the aggravators outweigh the mitigators, or that the aggravators and mitigators are in balance, he knows that the defendant will be sentenced to death. With all of this in mind, each juror decides whether death is the appropriate sentence.[5]

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[5] Respondent asserts that Kansas law does not require the jury to determine whether the death penalty is an appropriate sentence. Resp. Br. 32-33. However, that is the whole purpose of weighing the aggravating and mitigating circumstances – to determine if the death penalty is appropriate in the particular case. Further, the jury is not merely instructed to make a determination about the weights of the aggravating and mitigating circumstances, but also to return a sentencing verdict, either death or life imprisonment. J.A. 27.

In arguing that an equipoise determination represents an inability to decide and that Kansas' capital sentencing procedure will impose the death penalty in "doubtful cases," respondent and his *amicus* fail to appreciate the impact of the beyond a reasonable doubt standard on the weighing process. That standard "communicate[s] to the jurors the degree of certainty they must possess that any mitigating factors do not outweigh the proven statutory aggravating factors before arriving at the ultimate judgment that death is the appropriate penalty." *People v. Tenneson*, 788 P.2d 786, 794 (Col. 1990). The beyond a reasonable doubt standard insures the existence of the highest level of moral certainty in the jury's decision. *Id.; see also In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he reasonable doubt standard . . . 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'") (citation omitted); *Ford v. Strickland*, 696 F.2d 804, 876-883 (11th Cir. 1983) (Anderson, J., concurring in part and dissenting in part) (discussing application of reasonable doubt standard to capital sentencing and noting that reasonable doubt standard requires the fact finder to have "a high degree of confidence in the accuracy of the finding."); *Utah v. Wood*, 648 P.2d 71, 84 (Utah 1982) (observing that reasonable doubt standard "conveys to a decision maker a sense of the solemnity of the task and the necessity for a high degree of certitude, given the nature of the values to be weighed, in imposing the death sentence."). With the jury so instructed, there simply cannot be a "doubtful" death sentence under the Kansas capital sentencing system. Indeed, given the rigorous standard of proof, it is misleading to use the term "equipoise": if a juror believes the mitigating and aggravating evidence is in fact precisely equivalent, he likely could *not* conclude that the state had carried its burden to demonstrate that mitigating factors do not outweigh aggravtors *beyond a reasonable doubt*.

Respondent further mischaracterizes the issue by arguing that Kansas law requires a death sentence "when the jurors

are in equipoise regarding the balance of aggravating and mitigating circumstances." Resp. Br. 29. He describes this as "a posture which means they [the jury] are unable to reach any conclusions about the defendant." Resp. Br. 29. However, if the *jurors* are in equipoise—that is, evenly divided—or are otherwise unable to reach a conclusion, then the sentence under Kansas law will be life imprisonment. Kan. Stat. Ann. § 21-4624(e).

Respondent fails to recognize that a determination that the aggravating and mitigating circumstances are in equipoise is an individual determination of a particular juror, not a collective divide among the jurors. The "equipoise" issue here is not the jury members being evenly balanced, but a given juror's individual determination that the state has proved beyond a reasonable doubt that the aggravators are at least as great as the mitigators.[6]

Respondent continues his mischaracterization by repeatedly arguing that Kansas law mandates imposition of a death sentence even when the jury fails to make a collective decision that death is appropriate. Resp. Br. 29-32. He argues that the equipoise provision "invites the jury to relinquish its responsibility," and that it tells them "they need not persevere in deliberating until all of them come to agreement on the excruciating, controversial decision whether aggravation or mitigation is the weightier in a closely balanced case." Resp. Br. 31-32.

In truth, the law requires, and the jury is instructed, that the decision to impose the death sentence must be unanimous. Kan. Stat. Ann. § 21-4624(e); J.A. 27. While each juror will likely arrive at a slightly different conclusion as to the relative weights given to each aggravating and mitigating circumstance, the ultimate decision that the jury must reach—whether death is the appropriate sentence—

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[6] Each juror is instructed to consider the case and decide for himself. J.A. 26-27.

must be unanimous. If the jury cannot reach a collective, unanimous decision, the law requires, and they are instructed, that a sentence of life imprisonment will be imposed. Kan. Stat. Ann. § 21-4624(e); J.A. 28. Thus, respondent's argument that the "equipoise provision" invites a jury to "relinquish its responsibility," and tells them that "they need not persevere in deliberating," is simply incorrect.

A correct understanding of Kansas' capital sentencing system establishes that it fully meets the constitutional requirements set forth by this Court. As detailed in petitioner's opening brief:

- Kansas law narrows the class of death eligible defendants by limiting application of the death penalty to a specific class of homicides defined by the capital murder statute (Kan. Stat. Ann. § 21-3439);
- Kansas law further narrows the class of death eligible defendants through the use of statutorily defined aggravating circumstances (Kan. Stat. Ann. § 21-4625);
- Kansas law does not restrict the defendant's opportunity to present any relevant mitigating evidence, or the jury's consideration thereof (Kan. Stat. Ann. § 21-4624(c));
- Kansas law does not restrict, limit, or direct in any way the weight or effect the jury is to give to mitigating circumstances (*see* J.A. 24-27);
- Kansas law requires the prosecution to bear the burden of proving beyond a reasonable doubt the existence of one or more aggravating circumstances (Kan. Stat. Ann. § 21-4624(e));
- Kansas law further requires the prosecution to bear the burden of proving beyond a reasonable doubt that the aggravating circumstances are not outweighed by the

mitigating circumstances (Kan. Stat. Ann. § 21-4624(e));

- Kansas law requires that the jury must be unanimous in the decision to impose death (Kan. Stat. Ann. § 21-4624(e)).

Thus, Kansas' death penalty law conforms with constitutional requirements. Kansas' law narrows the class of death eligible defendants, while permitting the jury complete discretion to consider and give effect to any mitigating circumstances. *See Blystone v. Pennsylvania*, 494 U.S. 299, 308-09 (1990). Kansas' law provides clear and objective standards that give specific and detailed guidance to the sentencing jury, establishing a rationally reviewable process for imposing the death penalty. *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976). Further, Kansas' law neither lessens the prosecution's burden to prove every element of the offense charged, nor lessens the prosecution's burden of proving the existence of aggravating circumstances. It is, therefore, constitutional. *See Walton v. Arizona*, 497 U.S. 639, 650 (1990), *overruled on other grounds, Ring v. Arizona,* 536 U.S. 584 (2002).

Finally, it must be noted that no decision of the Court has ever held or implied that it is unconstitutional to impose the death penalty when the aggravating circumstances are not outweighed by the mitigating circumstances. Indeed, *Walton* approved such a weighing equation. The lower court in this case carved out a new rule of constitutional law that goes beyond the precepts of the Court's precedents. In seeking the affirmation of the lower court, respondent is asking the Court to overrule its earlier precedent in *Walton* and make a new rule of constitutional law. Such a drastic measure is simply unwarranted.

B. Respondent's Argument That The Court's Decision In *Walton v. Arizona* Did Not Address This Issue Is Without Merit.

Respondent erroneously contends that *Walton* has no bearing on the analysis here. Resp. Br. 42-45. In suggesting that the equipoise issue was not addressed in *Walton* and thus that the Court's decision should be ignored respondent simply fails to apprehend the extent of the Court's decision in *Walton.*

That the issue of equipoise was in play throughout *Walton* is demonstrated not only by Walton's own description of the potential for equipoise under Arizona's law, Brief of Petitioner at 34, 37-38, *Walton v. Arizona*, 497 U.S. 639 (1990), but by this Court's decision to grant certiorari to resolve the conflict between the Ninth Circuit and the Arizona Supreme Court, *Walton,* 497 U.S. at 647, and Justice Blackmun's recognition of the potential for evenly balanced mitigating and aggravating circumstances. *Id.* at 687-88. In fact, the equipoise issue was even addressed at oral argument. *See* Tr. Oral Arg. at 34. In these circumstances, while the *Walton* plurality opinion did not explicitly mention the equipoise issue, *Walton's* holding implicitly rejected any argument that the potential for equipoise contradicted the Eighth Amendment. *Clemons v. Mississipi*, 494 U.S. 738, 747 n.3 (1990).

Respondent's view of *Walton* undermines the Court's goal in granting certiorari in the first place—to resolve a conflict where the Ninth Circuit found Arizona's capital sentencing law to violate the Eighth Amendment in part "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 v. Ricketts*, 865 F.2d 1011, 1043 (9th Cir. 1988).

Respondent's understanding of *Walton* is simply wrong. The equipoise issue was decided against petitioner there and *Walton* controls in reversing the lower court's decision here.

C. Although Every State's Capital Sentencing Statute Is Unique, Kansas' Statute Does Not Stray From The Fundamental Precepts Underlying All Such Statutes.

Every capital sentencing law in the United States is structured and worded differently, and to that extent, all capital sentencing statutes are unique. All of these statutes, however, share the commonalities of guided discretion and individualized sentencing characteristics that are reflected in Kansas' capital sentencing law. Contrary to respondent's argument, Kansas' law is not an anomalous aberration among death penalty laws. To the contrary, it fits squarely within the acceptable constitutional spectrum of such laws.

In wording and function, Kansas' capital sentencing law is quite similar to those of its sister states. *See, e.g.*, Nev. Rev. Stat. § 175.554(3) (Michie Supp. 2003) ("The jury may impose a sentence of death only if it finds . . . there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found."); Fla. Stat. Ann. § 921.141(3)(b) (Supp. 2005) (requiring a finding that "[t]here are insufficient mitigating circumstances to outweigh the aggravating circumstances" to support a sentence of death.); Okl. St. Ann. § 701.11 (2002) ("Unless at least one of the statutory aggravating circumstances . . . is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed.").

As already set forth in petitioner's opening brief, Arizona's capital sentencing law, while worded differently, operates in functionally the same manner as the Kansas law. Petr. Br. 15-17. Idaho's law is likewise differently worded, but similar in function. Idaho Code § 19-2515(7)(a) (Michie Supp. 2005) ("If the jury finds that a statutory aggravating circumstance exists and no mitigating

circumstances exist which would make the imposition of the death penalty unjust, the defendant will be sentenced to death by the court."); *State v. Wood*, 967 P.2d 702, 718 (Idaho 1998) ("[O]nce a statutory aggravating circumstance is properly found, the court may impose the death penalty if the mitigating circumstances do not outweigh that aggravator.").

On the other hand, some states have adopted capital sentencing laws with different weighing equations. *See e.g.* Ohio Rev. Code Ann. § 2929.03(D)(2) (Baldwin 2005); Ind. Code § 35-50-2-9(1) (West 2004). And other states, including Texas, have chosen to adopt capital sentencing systems with no weighing equation whatsoever. Tex. Crim. P. Ann. § 37.071 (West 2005). Indeed, among all the states, Texas capital sentencing procedure is truly unique, yet this Court has found it to be constitutional. *Jurek v. Texas*, 428 U.S. 262 (1976), *holding limited by Penry v. Lynaugh*, 492 U.S. 302 (1989).

The fact that some states have adopted similar capital sentencing laws and others have adopted quite different laws is simply not constitutionally significant. "[T]he 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).

All told, respondent's efforts to paint Kansas' death penalty law as an anomaly sharply at odds with those of other states are not well founded. The truth is that Kansas' capital sentencing law lies well within the broad spectrum of such laws and meets all constitutional requirements. If the decision below is left to stand, it will mark a sharp departure from the Court's past Eighth Amendment jurisprudence, will put at risk a number of state's capital sentencing statutes, and will confine all state legislatures in their ability to craft capital sentencing statutes in the future.

CONCLUSION

For the foregoing reasons, and for those stated in petitioner's opening brief, the judgment of the Kansas Supreme Court should be reversed.

Respectfully submitted,

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