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 RESPONDENT

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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. Does this Court have jurisdiction to review the judgment of the Kansas Supreme Court under 28 U.S.C. § 1257 where the petitioner failed to present to the Kansas Supreme Court below – and where it explicitly withdrew from contention in that court – the federal constitutional issue that is the sole ground on which it seeks this Court's review?

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

4. When a state capital sentencing statute makes the choice of a death or life sentence depend upon weighing aggravating circumstances against mitigating circumstances, does it violate the Eighth and Fourteenth Amendments for the statute to mandate a death sentence when the jurors are in equipoise and cannot reach an individualized determination whether aggravation or mitigation predominates?

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STATEMENT OF THE CASE

I.

On June 17, 1996, Marry Ane Pusch was shot and stabbed to death in her home. Her body was doused with charcoal lighter fluid and set on fire. Her 19-month-old daughter, M.P., suffered severe burns in the ensuing fire. M.P. survived the fire but later died in the hospital. Pet. App. at 7a-8a.

Michael Marsh was charged with the capital murder of M.P. The charging papers alleged that he killed M.P. "intentionally and with premeditation" and that "the intentional and premeditated killing of [M.P.], and Marry Ane Pusch, . . . was part of the same act or transaction or two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct." Record on Appeal, Supreme Court of Kansas, No. 98-81135-S, Vol. 11 at 1085.[1] Mr. Marsh was charged separately with the non-capital first degree premeditated murder of Marry Ane, aggravated arson, and aggravated burglary. Record, Vol. 11 at 1084-1085.

The State filed a pretrial motion *in limine* to prohibit Mr. Marsh from introducing any circumstantial evidence that Eric Pusch, Marry Ane's husband and M.P.'s father, was involved in the crimes. The motion contended that a state-law rule relating to the admissibility of proof of third-party culpability required exclusion of Mr. Marsh's evidence because of his confession that he had shot Marry Ane Pusch. Record, Vol. 10 at 937, 969-971.

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[1] Citations to the Record on Appeal will hereafter appear as "Record, Vol. ___ at ___."

In response to the motion *in limine*, Mr. Marsh proffered substantial evidence connecting Eric Pusch to the crimes and establishing that Pusch had a motive and opportunity to commit them. Record, Vol. 92 at 1-362. The proffered evidence was consistent with Mr. Marsh's confession, in which he admitted shooting Marry Ane but denied stabbing her and denied setting the fire. Record, Vol. 81 at 42, 46, 51, 75, 77; Record, Vol. 82 at 52; Record, Vol. 90 at 10, 14, 19, 27, 29. Mr. Marsh's statements were corroborated by the State's own forensic evidence, which showed that, while both Marry Ane's and M.P.'s clothing tested positive for medium petroleum vapors consistent with lighter fluid, no trace of the substance was found on the clothing and shoes Mr. Marsh wore on the night in question. In addition, DNA analysis revealed that, though Marry Ane's blood was found on one of Mr. Marsh's shoes, so also was the blood of Eric Pusch. Pet. App. at 8a-9a.

When questioned about the blood, Pusch had no explanation for it. Pusch, who claimed he was at his job as a Pizza Hut delivery man at the pertinent times, also had no explanation for a 29-minute gap in his pizza deliveries, which would have allowed him to return home within the time period when his wife was killed and the house was set on fire. Record, Vol. 92 at 138-142, 149-163.

The trial court adopted the State's interpretation of the rule excluding evidence of third-party culpability and refused to allow Mr. Marsh to present such evidence. Record, Vol. 65 at 33-38. Even when Eric Pusch was called by the State to testify against Mr. Marsh, the trial court rejected Marsh's argument that the State had thereby opened the door to his proffered evidence. Record, Vol. 43 at 100-101, 118-121; Record, Vol. 45 at 12-17. Mr. Marsh

was convicted as charged and sentenced to death. Pet. App. at 9a-10a.

On direct appeal, the Kansas Supreme Court reversed Mr. Marsh's convictions of capital murder and aggravated arson and ordered a new trial. It held that the trial court had denied Mr. Marsh a fair trial by excluding his evidence that Eric Pusch was involved in the crimes. Pet. App. at 11a-17a.

The Kansas Supreme Court gave several reasons for holding that the trial court had erred in excluding the evidence implicating Eric Pusch. Pet. App. at 11a-15a. These included the inapplicability of the state-law exclusionary rule to the charges of capital murder and aggravated arson (because the State's own evidence of those crimes was circumstantial), Pet. App. at 15a, and the constitutional requirements of due process and confrontation (which came into play when Pusch testified against Mr. Marsh at trial), Pet. App. at 15a-16a. Applying constitutional harmless-error analysis, the Kansas Supreme Court was "not prepared to say beyond a reasonable doubt that the district court's error had little, if any, likelihood of altering the jury's determination that Marsh committed capital murder." Pet. App. at 17a.

II.

While Mr. Marsh's case was pending on direct appeal, the Kansas Supreme Court issued its decision in *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001), Pet. App. at 79a-142a. The briefing schedule in Mr. Marsh's appeal had been stayed by the court pending the decision in *Kleypas*, with which Mr. Marsh's case had several common issues. J.A. at 30-33. One of those issues was a challenge to the

constitutionality of the equipoise formula in KAN. STAT. ANN. § 21-4624(e).[2]

In *Kleypas*, the Kansas Supreme Court declared § 21-4624(e) unconstitutional as written, under the Eighth and Fourteenth Amendments. Pet. App. at 87a-88a, 96a-115a. After an exhaustive analysis of the constitutional claim in light of this Court's caselaw relating to capital sentencing, the *Kleypas* court held:

> "We see no way that the weighing equation in [§] 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. We conclude [§] 21-4624(e) as applied in this case is unconstitutional." (Pet. App. at 115a.)

In reaching this conclusion, the *Kleypas* court carefully considered whether *Walton v. Arizona*, 497 U.S. 639 (1990), resolved the constitutional claim with respect to the Kansas statute. The issue had been extensively briefed by both parties, as well as an *amicus*. J.A. at 59-107 (*Kleypas* briefing). The court examined the plain language of the Kansas statute and found it distinguishable from the Arizona statute at issue in *Walton*:

> "The obvious distinction is the language used in each statute. The Arizona statute does not call for a weighing formula in which the mitigating circumstances must outweigh the aggravating circumstances, the very essence of the issue before

[2] Mr. Marsh's constitutional challenge to the equipoise formula had been denied in the trial court. J.A. at 21. At the trial level, the State of Kansas argued that the formula was constitutional under *Walton v. Arizona*, 497 U.S. 639 (1990). J.A. at 8-13.

> this court. Such a weighing equation results in mandating a death sentence where the jury finds equipoise as to the mitigating and aggravating circumstances." (Pet. App. at 102a-103a.)

Although the *Kleypas* court found the Kansas statute unconstitutional as written, it held that the provisions authorizing a sentence of death could be saved "by simply invalidating the weighing equation" and construing the statute to read, "[I]f the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances . . . exists and, further, that such aggravating circumstance or circumstances outweigh any mitigating circumstances found to exist, the defendant shall be sentenced to death[.]" Pet. App. at 119a. The court thus ordered the *Kleypas* case remanded for a new penalty trial under the judicially reconstructed sentencing formula. *Id*.[3]

Mr. Marsh filed his appellate brief in the Kansas Supreme Court a few months after the *Kleypas* decision. He argued that, at the very least, his death sentence must be set aside and his case remanded for a new penalty trial pursuant to the *Kleypas* holding that the statutory equipoise formula was unconstitutional as written. However, he also argued that the disposition in *Kleypas* was contrary to the disposition required by Kansas statutory law (KAN. STAT. ANN. § 21-4629), which entitled him to be resentenced to life imprisonment if a provision of the

[3] Mr. Kleypas' motion for rehearing on the judicial reconstruction issue was denied. The State filed no request for rehearing, nor did it respond to Kleypas' motion. Kleypas' petition for *certiorari* arguing that state law created a due process liberty interest in a life sentence once the statutory equipoise formula was held unconstitutional, was denied. *Kleypas v. Kansas*, 537 U.S. 834 (2002). No response or cross-petition for *certiorari* was filed by the State.

state's death penalty law was held unconstitutional. In addition, he argued that, under well-established rules of statutory construction and Kansas separation-of-powers doctrine, the *Kleypas* court was wrong in reconstructing the statutory weighing formula after declaring it unconstitutional. Accordingly, Mr. Marsh argued, the portion of the *Kleypas* decision that saved the statute through judicial reconstruction should be overruled. J.A. at 34-38.

In its brief on appeal filed nearly one year later, the State abandoned its earlier arguments in *Kleypas* and at the trial-court level in *Marsh* that the Kansas equipoise formula was constitutional under *Walton v. Arizona*. Instead, the State specifically conceded that the formula as written was unconstitutional:

> "In *Kleypas*, *supra*, this Court found the application of the weighing equation in [§] 21-4624(e) with respect to aggravating and mitigating factors to be unconstitutional when such application could result in the imposition of a death sentence when the aggravators and mitigators were found to be in equipoise. 40 P.3d at 232. Because Defendant's death sentence was imposed as a result of the same unconstitutional application of [§] 21-4624(e) as occurred in *Kleypas*, the State concedes that his sentence must be set aside and his case remanded for resentencing in accordance with the *Kleypas* decision. 40 P.3d at 234." (J.A. at 40.)

The State of Kansas went on to argue that state law did not prohibit reimposition of the death penalty on remand, and that the *Kleypas* court's reconstruction of the statute to require that aggravating circumstances outweigh mitigating circumstances was within the court's lawful

authority and did not violate Kansas' separation-of-powers doctrine. J.A. at 41-44.

In its decision in Mr. Marsh's case, the Kansas Supreme Court explained that it had held in *Kleypas* that the statutory equipoise formula was unconstitutional as written under the Eighth and Fourteenth Amendments, but "we avoided striking the statute down as unconstitutional on its face . . . by construing it to mean the opposite of what it said, *i.e.*, to require aggravating circumstances to outweigh mitigating circumstances." Pet. App. at 18a. The Kansas Supreme Court then described the issue it was presented with in this case:

> "Here, Marsh correctly notes, and the State concedes, that *Kleypas* requires us to vacate Marsh's death sentence and remand for reconsideration of the death penalty under proper instructions on the weighing equation. Marsh makes the further argument, however, that [§] 21-4624(e) is unconstitutional on its face and that the portion of our *Kleypas* decision that saved the statute through judicial construction must be overruled." (Pet. App. at 19a.)

The Kansas Supreme Court's majority opinion began by reciting the relevant portions of the *Kleypas* decision which "succinctly summarized" why the statutory weighing equation "as written did not comport with the Eighth and Fourteenth Amendments." Pet. App. at 19a-20a. "After full reconsideration," the majority rejected an invitation from two of the dissenters to "revisit" the constitutionality of the statute as written, stating that the court would "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 Amendments." Pet. App. at 20a-21a.

The Kansas Supreme Court went on to conclude in the present case that, in reconstructing the statutory equipoise formula to mean the opposite of what it said, the *Kleypas* court had misapplied the constitutional avoidance doctrine, because that doctrine "is applied appropriately *only* when a statute is ambiguous, vague, or overbroad" and "[t]he court's function is to interpret legislation, not rewrite it." Pet. App. at 24a. The error in *Kleypas*, the court found, was that the *Kleypas* majority had failed to apply the fundamental rule of statutory construction set forth in its own precedent – that "'when a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a statute so as to add something not readily found in the statute,'" Pet. App. at 21a-22a – before moving to the canons that support the avoidance doctrine, Pet. App. at 24a. The court observed that one of the dissenters in *Kleypas* had stressed this very point in arguing that, by adopting language "exactly the opposite of what the legislature stated," the *Kleypas* majority had invaded the province of the legislature. Pet. App. at 25a (*Marsh* decision); Pet. App. at 120a-121a (*Kleypas* decision) (Davis, J., dissenting). The court agreed with that reasoning, and concluded below that "[t]he appropriate, limited judicial response to the problem identified for the first time in *Kleypas* was to hold K.S.A. 21-4624(e) unconstitutional on its face and let the legislature take such further action as it deemed proper." Pet. App. at 26a. That conclusion, the court held, required it "to overrule that portion of *Kleypas* upholding the statute through application of the avoidance doctrine." Pet. App. at 28a. The court further held that

principles of *stare decisis* did not prevent it overruling *Kleypas* because the *Kleypas* court's application of the avoidance doctrine was not "fully vetted" and its rewriting of the statute "was not only clearly erroneous; as a constitutional adjudication, it encroached upon the power of the legislature." Pet. App. at 28a-31a.

Following the Kansas Supreme Court's decision in Mr. Marsh's case, the State of Kansas filed a motion for rehearing. The sole argument in the motion was that § 21-4624(e) could be "saved" by severing the unconstitutional equipoise provision from the remainder of the statute. By striking "three words and a suffix," the State argued, the statute would read to require that aggravating circumstances outweigh mitigating circumstances before a death sentence can be imposed. J.A. at 45-55. Mr. Marsh replied that the State's argument called for the same rewriting of the plain and unambiguous statutory language that had required the court to overrule the part of *Kleypas* purporting to save the statute through judicial reconstruction. J.A. at 56-58. The Kansas Supreme Court denied the State's motion. Pet. App. at 78a.

SUMMARY OF ARGUMENT

The State's contention that the decision below is a final judgment under 28 U.S.C. § 1257 depends upon its assertion that it will have no right of appeal if it is precluded from seeking a death sentence against Mr. Marsh on remand. Kansas law regarding the State's appeal rights is unclear. To clarify it, this Court would have to certify a question of state procedure to the Kansas Supreme Court.

However, recourse to a certified question would be improvident because this Court lacks jurisdiction in any event. A sufficient bar to its jurisdiction is that the decision of the Kansas Supreme Court in Mr. Marsh's case rests upon an adequate and independent state ground. It is clear that that court in *Marsh* decided only the state-law issue of the severability of KAN. STAT. ANN. § 21-4624(e) and not the issue of the federal constitutionality of § 21-4624(e), which had been resolved definitively in the earlier *Kleypas* case. In Mr. Marsh's case, both the parties and the Kansas Supreme Court treated the federal unconstitutionality of § 21-4624(e) as having been settled by the *Kleypas* decision. The Kansas Supreme Court's reiteration of the *Kleypas* holding in the *Marsh* opinion as a prelude to severability analysis does not constitute the decision of a federal question.

On the merits, the Kansas Supreme Court was correct in holding (in *Kleypas*) that the unique Kansas equipoise provision violates the Eighth Amendment because it absolves sentencing juries from the obligation to make a collective, reliable sentencing decision based upon the individual characteristics of the defendant and the particular circumstances of his or her offense. When a jury is in equipoise regarding the aggravating and the mitigating features of a case, it is by definition unable to reach any conclusions about the defendant "as [a] uniquely individual human being[]" that would distinguish him or her from any of the other "members of a faceless, undifferentiated mass" of death-eligible defendants. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). A statutory jury instruction to return a death verdict on such a basis flouts the Eighth Amendment requirement of individualized capital sentencing.

Walton v. Arizona does not speak to this issue, because the Arizona statute involved in *Walton* did not mandate death by equipoise. The Kansas statute is currently unique in requiring a death sentence when jurors are unable to say one way or the other whether the defendant deserves death. There have been a few statutes like it in the past, but every court that has ever considered a statutory provision capable of such a construction has voided or avoided it.

ARGUMENT

I. This Court Lacks Jurisdiction of the Case Purportedly Presented by the State's Petition for *Certiorari*.

In granting *certiorari*, the Court directed the parties to address two jurisdictional questions: (A) "Does this Court have jurisdiction to review the judgment of the Kansas Supreme Court under 28 U.S.C. Sec. 1257, as construed by *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)?" and (B) "Was the Kansas Supreme Court's judgment adequately supported by a ground independent of federal law?"

Respondent believes that the answer to the first question depends upon an unsettled point of Kansas procedure. To decide the question, this Court would need the guidance of the Kansas Supreme Court. It could obtain such guidance by certifying a question to that court. See the following section I.A.

However, certification would be a wasteful expenditure of this Court's resources and those of the Kansas Supreme Court, because this Court lacks jurisdiction of

the case purportedly framed by the State's petition for *certiorari* for two reasons that do not depend on the answer to its question (A). First, the answer to the Court's question (B) is that the decision of the Kansas Supreme Court does rest upon an adequate and independent state-law ground. See section I.B below. Second, as Respondent Marsh noted in his Brief in Opposition to Petition for a Writ of Certiorari previously filed, the rule of *Illinois v. Gates*, 462 U.S. 213 (1986), forecloses jurisdiction because the State of Kansas did not present to the Kansas Supreme Court in Mr. Marsh's case the question which it is asking this Court to decide in Mr. Marsh's case. Mr. Marsh respectfully refers the Court to his Brief in Opposition and to the Reply Brief for Petitioner (at the *certiorari* stage) for the parties' briefing of the latter point.

(The State's merits brief takes the position that the Court "has 'necessarily considered and rejected'" the *Gates* bar to its jurisdiction because it "granted *certiorari*" after studying the BIO. The State cites *United States v. Williams*, 506 U.S. 36, 40 (1992), for this proposition. See Pet. Br. at 6 n.3. Of course, in *Williams* the Court granted *certiorari* without reserving any questions about its jurisdiction, see 502 U.S. 905 (1991), and thus indicated that it had already resolved all such questions, whereas here the Court has expressly carried jurisdictional issues with the case. The present form of *cert.* grant does not "'necessarily'" indicate rejection of any objections to the Court's jurisdiction, and only the Court itself can know whether, in specifying two such possible objections for future briefing, it was indicating (1) that it had actually decided the *Gates* question or (2) that it saw no need for redundant briefing of that question in the light of the BIO and Petitioner's Reply Brief. Respondent Marsh would not

presume to instruct the Court on the state of its own deliberations but will rely upon the briefing already submitted with respect to *Gates* and be prepared to address whatever jurisdictional issues the Court wishes to hear discussed in oral argument.)

A. Whether the Decision of the Kansas Supreme Court below Is Final for Purposes of Giving this Court Jurisdiction under 28 U.S.C. § 1257 Depends upon the Answer to a Question of State Procedure that Should Be Certified to the Kansas Supreme Court if this Court's Jurisdiction Were Otherwise Well Founded.

This Court has jurisdiction under 28 U.S.C. § 1257(a) only if the decision of the Kansas Supreme Court below constitutes a final judgment. "Applied in the context of a criminal prosecution, finality is normally defined by the imposition of . . . sentence." *Flynt v. Ohio*, 451 U.S. 619, 620 (1981). And "[s]ince its establishment, it has been a marked characteristic of the federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance." *Radio Station WOW, Inc., v. Johnson*, 326 U.S. 120, 123 (1945). However, as this Court's question to the parties regarding *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), suggests, there are exceptions to the latter rule, and *Cox* provides a compendium of them, grouped into four categories.

Of the four categories, only one is potentially relevant in the present case. The State invokes only that one. See Pet. Br. at 8. It is *Cox Broadcasting*'s third category, having to do with "those situations where the federal claim has been finally decided, with further proceedings on the

merits yet to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting*, 420 U.S. at 481.

In dealing with this third category it is important to remember that *Cox Broadcasting*'s language describing the category is not a complete inventory of the elements necessary to bring a case within it. The mere fact that "later review of the federal issue cannot be had" does not suffice. What is necessary is that later review of the federal issue cannot be had *at the instance of a party who will continue to be injured in some judicially cognizable way by the adverse decision* which the party is asking this Court to review. If the "further proceedings on the merits" ahead will leave the party *uninjured* in the outcome, "whatever the ultimate outcome of the case," then the case is not within the third *Cox Broadcasting* category. Nor is it within Article III of the Constitution. It is, quite simply, a request for an advisory opinion.[4]

In *Jefferson v. City of Tarrant*, 522 U.S. 75, 83 (1997), for example, the petitioners sued an Alabama municipality for damages for their decedent's death, pleading two state-law claims, wrongful death and the common-law tort of outrage, and a federal claim under 42 U.S.C. § 1983. This Court initially granted *certiorari* to review the Alabama Supreme Court's pretrial determination that the State's wrongful death statute governed potential recovery under §1983 – a determination that would preclude any recovery

[4] See *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947): "As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite." (Footnotes omitted.)

of damages by the Jefferson plaintiffs. However, upon full consideration, the Court dismissed *certiorari* on the ground that the Alabama Supreme Court's judgment was not final for purposes of 28 U.S.C. § 1257 because, "[r]esolution of the state-law claims [by a finding in favor of the city on the facts at the trial yet to come] could effectively moot the federal-law question raised here." 522 U.S. at 83. The Court explained that "[i]f the city prevails on . . . [its] account of the facts, then any §1983 claim will necessarily fail, however incorrect the Alabama Supreme Court's ruling, for the City will have established that its actions did not cause Mrs. Jefferson's death." *Id*. Although such a disposition at trial would leave the Jefferson plaintiffs unable to seek later review of the federal issue, it would also leave them uninjured by the Alabama Supreme Court's decision of the issue. On the other hand:

> "If the Alabama Supreme Court's decision on the federal claim ultimately makes a difference to the Jeffersons – in particular, if they prevail on their state claims but recover less than they might have under federal law, or if their state claims fail for reasons that do not also dispose of their federal claims – they will be free to seek our review once the state-court litigation comes to an end. Even if the Alabama Supreme Court adheres to its interlocutory ruling as 'law of the case,' that determination will in no way limit our ability to review the issue on final judgment." (*Id*. at 82-83.)

Accord: *O'Dell v. Espinoza*, 456 U.S. 430 (1982); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981).

The Court reasoned similarly in *Florida v. Thomas*, 532 U.S. 774 (2001). There, a state trial court had suppressed prosecution evidence on the ground that it was the product of a federally unconstitutional police search, rejecting the prosecutor's theory that the search was valid under the automobile-search rule of *New York v. Belton*, 453 U.S. 454 (1981). The Florida Supreme Court upheld the trial court's *Belton* ruling but remanded for a determination whether the search was valid on a different theory – one based upon the search-incident-to-arrest rule of *Chimel v. California*, 395 U.S. 752 (1969). This Court granted review on the *Belton* issue and then dismissed the case on the ground that the Florida Supreme Court's judgment was not final:

> "If the State prevails on remand and the evidence is admitted under *Chimel*, then the *Belton* issue will be moot, and the State cannot seek review of it. But if the State loses, and the evidence is suppressed, Florida law allows the State to appeal, as long as it does so prior to trial." (532 U.S. at 780.)

The *Thomas* Court distinguished *New York v. Quarles*, 467 U.S. 649 (1984), in which a pretrial ruling of New York's highest court ordering the suppression of evidence on federal Fourth Amendment grounds was held final. In *Quarles*, the Court had found that:

> "'should the State convict respondent at trial, its claim that certain evidence was wrongfully suppressed will be moot. Should respondent be acquitted at trial, the State will be precluded from pressing its federal claim again on appeal.'" (532 U.S. at 779, quoting 467 U.S. at 651 n. 1.)

Quarles is the prototype of the line of cases on which the State of Kansas here relies to argue that the Kansas Supreme Court's decision below is final within 28 U.S.C. § 1257: *California v. Stewart*, 384 U.S. 436, 498 n.71 (1966) (involving suppression of a confession); *South Dakota v. Neville*, 459 U.S. 553, 555 (1983) (same); *Quarles* (involving suppression of a confession and a handgun); *Florida v. Meyers*, 466 U.S. 380 (1984) (involving suppression of physical evidence). See Pet. Br. 10-11. In all of these cases, as in *Jefferson*, *O'Dell*, *San Diego Gas & Electric* and *Thomas*, the Court projected two possible future developments of a case on remand by a state appellate court – one which would moot the federal issue and one in which the state appellate court's decision of the federal issue would adversely affect the party who was asking this Court to review it. It was not the inability of that party to secure later review of the issue *in the event of mootness* which brought the *Quarles* line of cases within *Cox Broadcasting*'s third category. Mootness-caused inability-to-secure-later-review was common to *both* the line of cases held non-final under § 1257 and the line of cases held final. The difference between the lines was that in the cases held final, the federal issue would not be susceptible to review *on the contingency under which the state appellate court's decision of the issue would adversely affect the party who was asking this Court to review it.* Specifically, in the evidence-suppression cases, the prosecution would be required "to go to trial without the suppressed evidence," *Thomas*, 532 U.S. 779, and might lose a conviction *for that reason*, in which event it would not be able to appeal.

In the present case of Mr. Marsh, the Kansas Supreme Court (1) reversed his conviction for improper exclusion of

exculpatory evidence and awarded him a new trial on the issue of guilt or innocence (and degree of murder), and (2) held that he could not be sentenced to death if convicted of capital murder. We have just seen that the State's inability to obtain review of the holding numbered (2) in the event that Mr. Marsh is acquitted of capital murder on retrial does not make the Kansas Supreme Court's decision a final judgment, because the holding numbered (2) does not exclude any prosecution evidence or have any other legally cognizable adverse effect on the prosecution's case *at the guilt-or-innocence stage of the trial*. If the Kansas Supreme Court's decision is a final judgment within the third *Cox Broadcasting* category, it must be because the State will be unable to obtain review of the holding numbered (2) – the holding eliminating death as a possible penalty for Mr. Marsh – if Mr. Marsh is *convicted* of capital murder on retrial.

Will the State be able to obtain review on this contingency? Its brief asserts that it will not (Pet. Br. at 7, 8-9) but fails to document that assertion as a matter of Kansas law. Counsel for respondent Marsh have researched the question under Kansas law and have found no answer. Presumably, the way in which the State apprehends that it will be barred from seeking a death sentence against Mr. Marsh on retrial is that, when the parties return to the trial court, that court will remove the death penalty from the case by some ruling it is bound to make in obedience to the decision of the Kansas Supreme Court below – by, for example, striking the death penalty notice that the prosecution filed against Mr. Marsh under KAN. STAT. ANN. § 21-4624(a). As this Court knows, a similar ruling by a federal district court would be appealable under the Criminal Appeals Act (18 U.S.C. § 3731). *United States v. Bass*, 536

U.S. 862 (2002). Kansas has a parallel statute (KAN. STAT. ANN. § 22-3602(b)(1)), which has never been relevantly construed. Therefore, the only way in which this Court could determine whether it has jurisdiction in Mr. Marsh's case consistently with the restriction of 18 U.S.C. § 1257 and the Court's precedents would be to certify to the Kansas Supreme Court the controlling state-law question whether, indeed, the State could obtain review of a trial-court decision removing the death penalty from the case on remand. The Kansas Supreme Court has jurisdiction to answer such a certified question under KAN. STAT. ANN. § 60-3201.

B. In any Event, this Court Lacks Jurisdiction Because the Decision below Rests upon an Adequate, Independent State-Law Ground.

Respondent respectfully suggests it would be improvident to waste this Court's time and that of the Kansas Supreme Court by resorting to the certified-question procedure just mentioned. For wholly different reasons than non-finality, this Court is without jurisdiction. One sufficient obstacle to its jurisdiction is that the decision of the Kansas Supreme Court in Mr. Marsh's case rests upon an adequate and independent state-law ground.

"This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. See, *e.g.*, *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 . . . (1935). . . . " *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). "[A]n adequate and independent state procedural disposition strips this Court of certiorari jurisdiction to review a state court's judgment. . . ." *Dretke v. Haley*, 541 U.S. 386, 392 (2004);

see, *e.g.*, *Murdock v. Memphis*, 20 Wall. (87 U.S.) 590 (1874); *Loftus v. Illinois*, 334 U.S. 804, 805 (1948); *cf. Adams v. Robertson*, 520 U.S. 83 (1997).

The Court has found that "[i]t is not always easy . . . to apply the independent and adequate state ground doctrine." *Coleman*, 501 U.S. at 732. Examples of situations presenting difficult problems of interpretation are state-court opinions which "discuss federal questions at length and mention a state law basis for decision only briefly" and opinions "purporting to apply state constitutional law . . . [that] derive principles by reference to federal constitutional decisions from this Court." *Id.* To deal with such situations, the Court has created the rule of *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983), which presumes that a state-court decision that "fairly appears to rest primarily on federal law, or to be interwoven with the federal law" does constitute a reviewable decision of a federal-law issue unless "the adequacy and independence of any possible state law ground is . . . clear from the face of the opinion." See also *Harris v. Reed*, 489 U.S. 255, 263-266 (1989). Consonantly with its purpose to "reach the correct result most of the time" (*Coleman*, 501 U.S. at 737), the *Long-Harris* "facially-clear" rule applies only when "the relevant state court decision . . . fairly appear[s] to rest primarily on federal law or to be interwoven with such law," *Coleman*, 501 U.S. at 740; and see *Ylst v. Nunnemaker*, 501 U.S. 797, 802-804 (1991).

In the present case, the selfsame circumstances simultaneously satisfy the *Long-Harris* "facially-clear" rule and make the application of that rule unnecessary in the first place under *Coleman* and *Ylst*. The opinion of the Kansas Supreme Court below is exquisitely articulate and

crystal clear about exactly what it does and does not decide. It says explicitly that:

(1) The question of the federal constitutionality of Kansas's equipoise provision, § 21-4624(e), was decided in the case of *State v. Kleypas*, which was handed down before the Kansas Supreme Court considered *State v. Marsh*. Pet. App. at 18a.

(2) In *State v. Marsh*, the unconstitutionality of § 21-4624(e) was accepted by both the State and Mr. Marsh, and was no longer in contest. Pet. App. at 19a.

(3) The only issue relating to § 21-4624(e) which was contested or decided in the *Marsh* appeal was whether that section was severable from the remainder of Kansas's death-penalty statute. Pet. App. at 19a.

(4) Three dissenting Justices in *Marsh* sought to have the Court revisit the issue of the constitutionality of § 21-4624(e) as written, but, after full reconsideration, the *Marsh* majority continued to adhere to the decision in *Kleypas* insofar as the federal constitutionality of § 21-4624(e) was concerned. Pet. App. at 19a-21a.

(5) The *Marsh* majority did, however, revisit the portion of the decision in *Kleypas* that had insulated the Kansas death-penalty statute as a whole from invalidation by severing the equipoise provision of § 21-4624(e). Pet. App. at 21a.

(6) The *Marsh* majority relied on state-law intent-of-the-legislature and separation-of-powers concepts to overrule that portion of

Kleypas, and it accordingly held § 21-4624(e) inseparable and the entire statute invalid. Pet. App. at 21a-28a.

(7) Finally, the *Marsh* majority examined and rejected the argument that the doctrine of *stare decisis* forbade it to overrule that portion of *Kleypas*. Pet. App. at 28a-31a.

If anything further needed to be said to clarify that the Kansas Supreme Court in *State v. Marsh* decided only the state-law issue of the severability of § 21-4624(e) and not the issue of the federal constitutionality of § 21-4624(e) which had been resolved definitively in *State v. Kleypas*, the Kansas Supreme Court said it in the syllabi of the two cases. In Kansas, syllabi are written by the court and state the points of law that are determined by the court. KAN. STAT. ANN. § 20-203. The relevant paragraphs of the *Kleypas* syllabus read:

> "43. In a capital case, the fundamental respect for humanity underlying the Eighth Amendment to the United States Constitution requires that the sentencer be able to consider the character and record of the individual defendant and the circumstances of the particular offenses as a constitutional, indispensable part of the process of imposing the death penalty.
>
> "44. In a capital case, the defendant must not only be allowed to present mitigating circumstances, but the sentencer must also be able to consider and give effect to the mitigating circumstances in imposing the death sentence.
>
> "45. K.S.A. 21-4624(e) is not unconstitutional on its face, but it impermissibly mandates the death penalty where the jury finds that the mitigating and aggravating circumstances are in

> equipoise. As such, it denies what the Eighth Amendment requires: that the jury is to give effect to the mitigating circumstances that it finds exist." (Pet. App. at 87a-88a.)

By contrast, the relevant paragraphs of the *Marsh* syllabus read:

> "18. It is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained. The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. When a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be. Stated another way, when a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a statute so as to add something not readily found in the statute.
>
> ". . . . . .
>
> "21. The courts' power to employ the avoidance doctrine to construe away a statute's constitutional infirmity is limited. The judiciary may not rewrite language enacted by the legislature. Rather, the doctrine applies only when a statute is ambiguous, vague, or overbroad.
>
> ". . . . . .
>
> "25. K.S.A. 21-4624(e) is unambiguous. Its express language was clearly intended to mandate the imposition of a death sentence when the existence of aggravating circumstances was not outweighed by any mitigating circumstances. The

> legislature chose this language over alternative wording recommended by the attorney general to avoid constitutional infirmity. *As a result*, the statute is unconstitutional on its face under the Eighth and Fourteenth Amendments.
>
> "26. The avoidance doctrine cannot be appropriately applied to save K.S.A. 21-4624(e). Any holding to the contrary in *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001), is overruled." (Pet. App. at 3a-6a; emphasis added.)

It understates the matter to say that the primary focus of the Kansas Supreme Court's decision in *Marsh* is the severability of K.S.A. 21-4624(e) – which is "only a state-law question"[5] – not the federal constitutionality of K.S.A. 21-4624(e) – which is the sole issue that the State of Kansas and its *amici* are urging this Court to decide. Except for a single passage in the Kansas Supreme Court opinion, the severability of K.S.A. 21-4624(e) is the *exclusive* focus of the Kansas Supreme Court's *Marsh* opinion. The single passage constituting the exception is the one in which the *Marsh* majority – in responding to arguments made by dissenting Justices and not to any contention by the State of Kansas that the constitutional invalidation of K.S.A. 21-4624(e) in *State v. Kleypas* was wrong or should be overruled – says that "[a]fter full reconsideration," it "continue[s] to adhere to the *Kleypas* majority's reasoning and holding that K.S.A. 21-4624(e) is unconstitutional under the Eighth and Fourteenth Amendments" (Pet. App. at 21a). But this passage merely reiterates the

[5] *City of New Orleans v. Dukes*, 427 U.S. 297, 302 (1976). See, *e.g.*, *Dorchy v. Kansas*, 264 U.S. 286, 325 (1924), *followed in Bell v. Maryland*, 378 U.S. 226, 239-241 (1964).

Kleypas holding and declines the dissenters' invitations to "revisit the constitutionality of K.S.A. 21-4624(e)" (Pet. App. at 20a). And this Court has long held that such a reiteration does not constitute the decision of a federal question, making it subject to review here, because "the fact that in . . . [a state supreme court] opinion the construction and [federal constitutional] validity of the statute were treated as settled by the ruling in the earlier case . . . and were restated by way of explanation of . . . [an issue in] the present case, fall short of showing that there was any real contest at any stage of this case upon the point." *Morrison v. Watson*, 154 U.S. 111, 115 (1894), *approved in Illinois v. Gates*, 462 U.S. 213, 222 (1983). Moreover, since the Kansas Supreme Court noted that "the State concedes . . . that *Kleypas* requires us to vacate Marsh's death sentence and remand for reconsideration of the death penalty under proper instructions" (Pet. App. at 19a), any reconsideration of *Kleypas* that the *Marsh* majority might have undertaken would be, at most, an alternative ground of decision incapable of supporting this Court's jurisdiction.[6] *Radio Station WOW, Inc.*, 326 U.S. at 128-129.

Article III of the Constitution and 28 U.S.C. § 1257 confer jurisdiction on this Court to hear cases and controversies in which a state's highest court has decided a contested question of the federal constitutionality of a

[6] In Kansas, a litigant is not permitted to change its position, first conceding a point and then contesting it, as the litigation goes along. See, *e.g.*, *Harmon v. James*, 69 P.2d 690, at 690 (Kan. 1937); *Rose v. Helstrom*, 277 P.2d 633, 634 (Kan. 1954); *Manhattan Bible College v. Stritesky*, 387 P.2d 225, 226 (Kan. 1963); *Popp v. Popp*, 461 P.2d 816, 817 (Kan. 1969); *State v. Murphy*, 91 P.3d 1232, 1233 (Kan. 2004); *State v. Reed*, 77 P.3d 153, 154 (Kan. Ct. App. 2003).

state statute.[7] *State v. Kleypas* was such a case. *State v. Marsh* is not. In *State v. Marsh* the Kansas Supreme Court discussed the federal constitutional invalidation of KAN. STAT. ANN. § 21-4624(e) in *Kleypas* only as the predicate for an extended, intensive analysis of state-law issues of severability and *stare decisis*. The decision of the latter issues in Mr. Marsh's case are adequate, independent grounds for the Kansas court's holding that the federal constitutional premise laid in *Kleypas* (the unconstitutionality of § 21-4624(e)) required the state-law consequence declared in *Marsh* (striking the statute as a whole so as to return the subject to the legislature). Therefore, this Court lacks jurisdiction.

[7] See, *e.g.*, *Webb v. Webb*, 451 U.S. 493, 498-502 (1981) and cases cited.

II. The Kansas Capital-Sentencing Formula that Forces a Jury to Return a Sentence of Death when Aggravating and Mitigating Factors are in Equipoise Fails to Distinguish Rationally Between Individuals for whom Death is an Appropriate Punishment and Those for Whom it is Not, and Thus Creates a Risk of Unreliability in Capital Sentencing that Is Forbidden by the Eighth Amendment.

A. At the Selection Stage of the Capital-Sentencing Process, The Eighth Amendment Requires a State to Assure that the Jurors Will Reach a Reliable, Responsible, Collective Judgment as to Whether Death is the Appropriate Punishment in Light of the Unique Characteristics of the Individual Defendant and the Particular Circumstances of the Crime.

The Eighth Amendment rules regulating state capital-sentencing procedures derive indirectly from *Furman v. Georgia*, 408 U.S. 238 (1972), and directly from the 1976 decisions – *Gregg v. Georgia*, 428 U.S. 153, and companion cases – approving some forms of procedure and disapproving others.[8] The essence of those rules, as the Court has repeatedly taught, is that "[i]f a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom

[8] The *amicus* brief of the States of Arizona *et al*. covertly invites the Court to overrule the entire body of contemporary Eighth Amendment law (pp. 10-18). We will not address that invitation, confident that if the Court were to consider such a radical proposal – particularly in a case in which no party has argued anything of the sort – it would call for briefing on the issue.

death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida*, 468 U.S. 447, 460 (1984).

In applying that precept, the Court's "capital punishment cases under the Eighth Amendment address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision." *Tuilaepa v. California*, 512 U.S. 967, 971 (1994). The parties in the present case have no real disagreement about the rules governing the eligibility decision.[9] However, the State of Kansas and its *amici* base their arguments upon a fundamental misconception of the Eighth Amendment rules governing the selection decision – the rules embodying "the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases," *Stringer v. Black*, 503 U.S. 222, 230 (1992). This misconception needs to be addressed at the outset.

The State asserts that the Kansas statute satisfies the requirement of individualized sentencing determinations "because it places no restriction, other than relevancy, on the admission of any evidence relating to any mitigating circumstances." Pet. Br. at 22. The premise of its argument is that "once the class of death eligible defendants is appropriately narrowed [at the eligibility-decision stage], . . . all that the Constitution requires . . . [is] that the sentencer be allowed to consider any relevant evidence." *Id*. at 22. This is also the core of the constitutional arguments

[9] A terse summary of these rules is found in *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980), paraphrased at Pet. Br. 20: a capital-sentencing statute must "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' "

by the State's *amici*. See Brief of the States of Arizona *et al*. at 7 (reducing the Eighth Amendment individualization requirement to a rule that "a sentencer must be allowed to consider, and give effect to, any mitigating evidence"); Brief of the Criminal Justice Legal Foundation at 14-15 (same). Such a *reductio* of the Eighth Amendment individualization requirement is simply incorrect. To understand how wrong it is – and why – "[i]t is important to examine once again the establishment of the individualized capital-sentencing doctrine in this Court's opinions issued in 1976 and the [subsequent] development of that doctrine." *Sumner v. Shuman*, 483 U.S. 66, 73 (1987).

The individualization doctrine is rooted in the perception that "[b]ecause of . . . [the] qualitative difference [between death and lesser punishments], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Justices Stewart, Powell and Stevens).[10] To avoid "disproportionality of death as a penalty for . . . [the defendant's] own conduct . . . [, t]he focus must be on his culpability,[11] . . . for we insist on

[10] *Accord*: *e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 601 (1978) (plurality opinion of Chief Justice Burger) (the *Woodson* plurality insisted upon individualized consideration of the offender and the offense "in order to ensure the reliability, under Eighth Amendment standards, of the determination that 'death is the appropriate punishment in a specific case' " [quoting *Woodson*, 428 U.S. at 305]); *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985) (quoting the same passage).

[11] The point that the selection decision in capital cases must *focus* on the defendant's individual, personal culpability is no innovation of *Enmund*. Earlier, the Court had upheld Florida's capital-sentencing procedure in a plurality opinion observing that the "trial court's sentencing discretion is guided and channeled by a system that focuses

(Continued on following page)

'individualized consideration as a constitutional requirement in imposing the death sentence,' *Lockett v. Ohio*, 438 U.S. 586, 605 . . . (1978) . . . , which means that we must focus on 'relevant facets of the character and record of the individual offender.' *Woodson v. North Carolina*, 428 U.S. . . . [at] 304." *Enmund v. Florida*, 458 U.S. 782, 798 (1982). The Court has never departed from this root principle.[12]

"The constitutional mandate of individualized determinations in capital-sentencing proceedings . . . had a significant impact on . . . [the Court's] decisions in cases where the sentencing authority's consideration of mitigating circumstances had been restrained in some manner." *Sumner*, 483 U.S. at 75. In those cases, it generated a corollary doctrine "that in order to give meaning to the individualized-sentencing requirement in capital cases, the sentencing authority must be permitted to consider 'as a mitigating factor, any aspect of a defendant's character

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on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed." *Proffit v. Florida*, 428 U.S. 242, 251-252 (1976) (opinion of Justices Stewart, Powell and Stevens). And Texas's capital-sentencing statute had been upheld in a plurality opinion which was careful to note that "the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." *Jurek v. Texas*, 428 U.S. 262, 273-274 (1976) (opinion of Justices Stewart, Powell and Stevens).

[12] See, *e.g.*, *Roper v. Simmons*, 125 S. Ct. 1183, 1197 (2005) ("[a] central feature of death penalty sentencing is a particular assessment of the circumstances of the crime and the characteristics of the offender"); *Deck v. Missouri*, 125 S.Ct. 2007, 2014 (2005) (referring to the selection decision as a " 'unique, individualized judgment regarding the punishment that a particular defendant deserves' " [quoting Justice Rehnquist's concurring opinion in *Zant v. Stephens*, 462 U.S. 862, 900 (1983)]).

or record and any of the circumstances of the offense.'" *Sumner*, 483 U.S. at 75-76, quoting *Lockett*, 438 U.S. at 601. But the individualization requirement has never been *limited* to that corollary doctrine or held *satisfied* simply because a State permits its sentencing juries to consider evidence in mitigation before voting for life or death. The reason *why* "[t]he selection decision . . . must be expansive enough to accommodate relevant mitigating evidence [is] so as to assure *an assessment of the defendant's culpability*." *Tuilaepa*, 512 U.S. at 973 (emphasis added). Not only must the selection decision in capital cases be reached through a process that assures "an adequate basis on which to determine whether the death sentence is the appropriate sanction in any particular case," *Sumner*, 483 U.S. at 78; the process must also assure that the sentencer actually makes that ultimate determination. "What is important at the selection stage is an individualized determination on the basis of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983). *Accord*: *Tuilaepa*, 512 U.S. at 972. "For it is only when the jury is given a 'vehicle for expressing its "reasoned moral response" to . . . [mitigating and other case-specific] evidence in rendering its sentencing decision,' . . . [13] that we can be sure that the jury 'has treated the defendant as a "uniquely individual human being" and has made a reliable determination that death is the appropriate sentence,'"[14] *Penry v. Johnson*, 532 U.S. 782, 797 (2001).

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[13] The internal quotation is from *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (*Penry I*).

[14] The internal quotation is from *Penry I*, 492 U.S. at 319, quoting *Woodson*, 428 U.S. at 305.

In short, it is wrong to read this Court's precedents as holding "that the mere mention of 'mitigating circumstances' to a capital sentencing jury satisfies the Eighth Amendment. Nor . . . [do those precedents] stand for the proposition that it is constitutionally sufficient to inform the jury that it may 'consider' mitigating circumstances in deciding the appropriate sentence." *Id*. To the contrary, the Court has repeatedly "held that 'it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence.'" *Tennard v. Dretke*, 542 U.S. 274, ___, 124 S. Ct. 2562, 2566 (2004). This is so because "[t]he sentencer, whether judge or jury, has a constitutional obligation to evaluate the unique circumstances of the individual defendant," to determine the "appropriate punishment to be imposed on an individual." *Spaziano*, 468 U.S. at 460.

When the sentencer is a jury, "[t]he capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant." *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987). The insistence on "collective judgment" reflects the idea that "a capital sentencing jury representative of a criminal defendant's community assures a '"diffused impartiality,"' *Taylor v. Louisiana*, 419 U.S. 522, 530 . . . (1975) . . . , in the jury's task of 'express[ing] the conscience of the community on the ultimate question of life or death,' *Witherspoon v. Illinois*, 391 U.S. 510, 519 . . . (1968)." *McCleskey v. Kemp*, 481 U.S. at 310. It also reflects the more basic "recognition that 'the inestimable privilege of trial by jury . . . is a vital principle, underlying the whole administration of criminal justice,' *Ex parte Milligan*, 4 Wall. 2, 123 . . . (1866). See *Duncan v.*

Louisiana, 391 U.S. 145, 155 . . . (1968)." *McCleskey v. Kemp*, 481 U.S. at 309-310. In capital sentencing proceedings as in other jury trials, this vital principle includes the idea that jurors must reason together and reach a communal decision reflecting their unanimous agreement on the facts and values at issue. The Court has "long been of the view that '[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.' *Allen v. United States*, 164 U.S. 492 . . . (1896)." *Jones v. United States*, 527 U.S. 373, 382 (1999).

Thus, the Eighth Amendment requirement which a State must meet at the selection stage of a capital sentencing trial by a jury is not – as the State of Kansas and its *amici* would have it – simply that the State's procedures must allow the jurors to consider evidence in mitigation. Rather, the State's procedures must assure that the jurors will reach a reliable,[15] responsible,[16] "collective judgment on the unique characteristics of a particular criminal defendant"[17] and decide "whether the death sentence is the appropriate sanction,"[18] after deliberating together about the defendant's unique characteristics (including those

[15] See, *e.g.*, *Woodson*, 428 U.S. at 305; *Gardner v. Florida*, 430 U.S. 349 (1977).

[16] See *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

[17] *McCleskey v. Kemp*, 481 U.S. at 311.

[18] *Sumner*, 483 U.S. at 78; and see *Graham v. Collins*, 506 U.S. 461, 468 (1993) ("States must confer on the sentencer sufficient discretion to take account of the 'character and record of the individual offender and the circumstances of the particular offense' to ensure that 'death is the appropriate punishment in a specific case' " [quoting *Woodson*, 428 U.S. at 305]).

proved in mitigation)[19] and the specific facts of the crime of which s/he stands convicted.[20]

B. The Equipoise Provision of the Kansas Capital-Sentencing Procedure Fails to Meet This Requirement.

The purpose of the Eighth Amendment rules just described is to assure that capital sentencers will make a reliable individualized sentencing decision. In derogation of those rules, the Kansas statutory provision which the Kansas Supreme Court held unconstitutional (in *Kleypas*) relieves sentencing juries from the need to make such a decision and allows death sentences to be imposed when the jurors are unable to reach any collective judgment about the defendant's individual culpability that would single him or her out from the whole class of death-eligible defendants. Indeed, this Kansas provision encourages prosecutors to prevail on juries to impose death sentences without coming to agreement about the degree of the defendant's individual culpability or whether it warrants the punishment of death.

Kansas has chosen to adopt a two-stage process like that described in *Tuilaepa*. Under the capital-sentencing formula set forth in § 21-4624(e), the jury is instructed that it must first find the existence of at least one aggravating circumstance. If one or more aggravating circumstances are found, the jury must then weigh the

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[19] See, *e.g.*, *Lockett*, 438 U.S. at 604; *Eddings v. Oklahoma*, 455 U.S. 104, 109-114 (1982).

[20] See, *e.g.*, *Zant v. Stephens*, 462 U.S. at 879; *Tuilaepa*, 512 U.S. at 972; *Romano v. Oklahoma*, 512 U.S. 1, 7 (1994).

aggravating circumstances against any mitigating circumstances in making the decision between life and death. At this point, however, the jury is further instructed that it "shall" impose death if it finds beyond a reasonable doubt that the aggravating circumstances are "not outweighed by" the mitigating circumstances. As authoritatively construed by the Kansas Supreme Court, this means that the jury is required to return a death sentence even when jurors are in equipoise regarding the balance of aggravating and mitigating circumstances.

The upshot is that a Kansas capital sentencing jury is effectively marched all the way up the hill to the verge of the ultimate decision required by this Court's Eighth Amendment precedents, and is then permitted to march back down and impose a death sentence without ever having made that decision. Although the jury has rendered no judgment regarding the relative weights of the mitigating circumstances favoring a life sentence and the aggravating circumstances favoring death, it must impose death. If the jurors are in equipoise – a posture which means they are unable to reach any conclusions about the defendant "as [a] uniquely individual human being[ ]" that would distinguish him or her from any of the other "members of a faceless, undifferentiated mass" of death-eligible defendants (*Woodson*, 428 U.S. at 304) – they are told that they must "subject[ ] [him or her] to the blind infliction of the penalty of death," *id*., without persevering in efforts to reach a consensus as to whether the particular facts of his or her case *are* distinguishably deserving of death. Thus, § 21-4624(e) cuts off the final collective decision that assures a reliable sentencing determination at the selection stage: whether, taking account of the "relevant facets of the character and record of the individual offender or

the circumstances of the particular offense," death is an appropriate punishment in a specific case. *Woodson*, 428 U.S. at 304.[21]

A Kansas jury may have before it all the information regarding individual characteristics and circumstances that the defendant has proffered as a basis for a life sentence. But if the jurors cannot say whether the mitigating circumstances shown by that evidence are or are not greater than the aggravating circumstances, Kansas' equipoise formula obliges the jury to impose a sentence of death. This is a death sentence rendered without the jury's having made a collective *decision* that the individual circumstances of the defendant's case mark it as more deserving of death than any other generic death-eligible conviction.

Undoubtedly, the jury has decided that the defendant is within the pool of cases which require "individualized sentencing determinations," *Stringer v. Black*, 503 U.S. at 230, because they all meet the minimum standards for death-eligibility. But a Kansas jury needs decide no more than that – it does not need to *make* the "individualized sentencing determination[]" which is constitutionally required – in order to sentence the defendant to die. *Equipoise* says only "we can't tell enough about the defendant's individual characteristics and circumstances to make that judgment." A death sentence returned under § 21-4624(e) by a jury in equipoise therefore expresses nothing about an individual defendant's "personal responsibility and moral

[21] It was precisely this aspect of the capital-sentencing decision that the Kansas Supreme Court focused on when it declared the statutory equipoise formula in § 21-4624(e) unconstitutional in *Kleypas*. See Pet. App. at 109a-115a.

guilt" (*Enmund*, 458 U.S. at 801) *except that s/he is somewhere within the class of death-eligible murder convicts.* The State argues that Kansas' equipoise formula assures that "similar results will be obtained under similar circumstances." Pet. Br. at 31. But as this Court's Eighth Amendment decisions teach, "a consistency produced by ignoring individual differences is a false consistency." *Eddings*, 455 U.S. at 104.

The Kansas equipoise provision not only works to absolve the jury from making an individualized assessment of the defendant's personal culpability in determining whether death is an appropriate punishment, but also invites the jury to relinquish its responsibility for making that determination. Under the equipoise formula, prosecutors can and do urge jurors that it is legally obligatory for them to return a death verdict if they cannot decide whether aggravation outweighs mitigation or *vice versa*. In the *Kleypas* case, for example, during closing argument at the penalty trial, the prosecutor emphasized to the jury that it must impose death even if the aggravating and mitigating circumstances were equally balanced. J.A. at 61 (*Kleypas* briefing). In Mr. Marsh's penalty trial, the prosecutor told the jury in closing argument that it could not consider mitigating circumstances unless they outweighed the aggravating circumstances "because the law has told you, and the Judge has told you that the law says that if the aggravating circumstances are not outweighed by mitigating circumstances, you shall return a verdict of death." Record, Vol. 54 at 54-55. The Kansas Supreme Court has reviewed prosecutorial-argument transcripts of this sort; its decision (in the *Kleypas* case) invalidating Kansas' equipoise provision reflects its local knowledge of Kansas prosecutors and Kansas juries; it knows how the

provision has played and is likely to play in Kansas trials. Its application of an unexceptionable federal constitutional principle – the Eighth Amendment command of responsible individualized capital sentencing determination – to these Kansas conditions is entitled to respect. See *Reitman v. Mulkey*, 387 U.S. 369, 373-376 (1967).

And that application accords with the realities of capital trials. In capital-sentencing proceedings, "the jury . . . must make the difficult, individualized judgment as to whether the defendant deserves the sentence of death." *Turner v. Murray*, 476 U.S. 28, 34 (1986) (plurality opinion). Because that judgment is a difficult one, jurors are all too likely to seize upon the legal comfort offered by an equipoise instruction from the court and by the prosecutor's equipoise argument telling them that 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. This kind of instruction and argument assuring jurors that they will have done their job if they return a death verdict after concluding only that the decision is too close and hard to call have the inescapable effect of relieving the jury of the need to reach collective judgment on the issue that the Eighth Amendment makes central to the capital-sentencing decision: whether death is the appropriate punishment on the unique, individual facts of the particular defendant's case. They thus create an unacceptable "risk that the death penalty will be

imposed in spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S. at 605.[22]

The State and its *amici* offer several defenses of the Kansas equipoise provision:

First, the State distorts Kansas law by asserting that, under § 21-4624(e) and the jury instruction based on the statute, "the State 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*." Pet. Br. at 17 (citing J.A. at 26, Instr. No. 5) (emphasis added). Neither the Kansas statute nor the jury instruction calls for any final step requiring the jury to determine, after weighing aggravating and mitigating circumstances, whether death is an appropriate sentence. Not only is a jury in Kansas never asked to make that determination, but when the jury is compelled by law to return a death sentence in a situation of equipoise, the jury *cannot* make a determination whether death is an appropriate sentence for the individual offender.

Second, the State and its *amici* argue that it will be rare for a capital jury to find itself in equipoise. Pet. Br. at 33; Brief of the States of Arizona *et al.* at 20 n. 4; Brief of Criminal Justice Legal Foundation at 19. In *McKoy v. North Carolina*, 494 U.S. 433 (1990), both the majority opinion and the concurring opinion of Justice Kennedy found the North Carolina capital-sentencing procedure problematic because of the arbitrary results it would

[22] This Court understands full well that equipoise is no basis for making a responsible, reliable decision. See *O'Neal v. McAninch*, 513 U.S. 432, 440, 442 (1995).

produce in certain situations that a deliberating capital jury might encounter. *Id*. at 439-440, 453-454. Those situations were no more likely than that a Kansas jury will find itself in equipoise regarding the balance of aggravating and mitigating circumstances.[23] Yet the North Carolina statute was invalidated because of the *risk* of unconstitutional results. Such *risks*, though not large numerically, have always been regarded as intolerable in capital cases. See, *e.g.*, *Andres v. United States*, 333 U.S. 740, 752 (1948); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion of Chief Justice Burger); *Beck v. Alabama*, 447 U.S. 625, 637-643 (1980); *Eddings v. Oklahoma*, 455 U.S. 104, 119 (concurring opinion of Justice O'Connor). We cannot ever know whether any particular death sentence imposed under the Kansas equipoise formula actually resulted from a situation of equipoise. But we also cannot know that a particular Kansas jury did *not* decree death by equipoise. One thing is clear: no one can say for sure that an individual defendant who receives a death

[23] The reasoning of the State and its *amici* here seems to be: (1) in a world in which the equipoise instruction was not given, it is intuitively plausible that the situation of equipoise will be rare; (2) the equipoise instruction will affect the result only in cases in which the situation of equipoise would occur in that world; so, (3) the equipoise instruction will affect very few cases. This oddly purblind logic assumes that the giving of the instruction will not increase the number of cases in which equipoise occurs. And *that* assumption is *not* intuitively plausible – indeed, it is unworldly – inasmuch as the equipoise instruction affords juries an easy out from the difficult, stressful, contentious work of reconciling divergent views and reaching a yes-or-no decision in close cases. The quantitative logic of the State and its *amici* also ignores that qualitatively the cases most at risk are not "the most extreme of crimes," *Gregg*, 428 U.S. at 187 – but those in which aggravation and mitigation are most evenly balanced.

sentence under the Kansas formula was actually found by the jury to deserve that punishment.

Finally, the State and its *amici* argue that the Kansas equipoise formula satisfies the individualization requirement because it does not restrict the admission of relevant mitigating evidence and, under this Court's precedents (*e.g.*, *Boyde v. California*, 494 U.S. 370, 377 (1990); *Blystone v. Pennsylvania*, 494 U.S. 299 (1990); *Johnson v. Texas*, 509 U.S. 350, 353-355 (1993)), the States are free to structure as they will the way in which a capital sentencing jury considers mitigating circumstances. See Pet. Br. at 23; Brief of the States of Arizona *et al.* at 18; Brief of Criminal Justice Legal Foundation at 14-15. But this case is not about *structuring* decisionmaking; it is about *terminating* decisionmaking. The equipoise provision at issue here does not regulate *how* a Kansas jury is to consider mitigating evidence (see *Johnson*, 509 U.S. at 372-373[24]); rather, it tells the jurors that if they find themselves in equipoise *after they have finished considering* aggravating and mitigating evidence in the manner structured by state law, *they must impose a death sentence without making the ultimate collective sentencing judgment required by this Court's Eighth Amendment jurisprudence* – whether or not death is an appropriate punishment for this individual defendant who committed this specific crime.

[24] There "'is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision.'" The internal quotation is from *Saffle v. Parks*, 494 U.S. 484, 490 (1990).

C. The State's Contention that *Walton v. Arizona* Speaks to the Issue Now before the Court is Ill-Founded.

The State claims that the equipoise issue is controlled by this Court's decision in *Walton v. Arizona*, 497 U.S. 639 (1990). See Pet. Br. at 14. In *State v. Kleypas* – the case in which the parties joined issue on the federal constitutionality of § 21-4624(e) – the Kansas Supreme Court engaged in a detailed comparison of the Kansas statutory language with the Arizona statute at issue in *Walton*, both as written and as analyzed by this Court. It found the two statutes distinguishable because, unlike the Kansas statute, the Arizona statute did not mandate a death sentence when the jury finds itself in equipoise between the mitigating and aggravating circumstances. Pet. App. at 102a-103a (*Kleypas* opinion).

Walton involved the Arizona statutory capital-sentencing formula, which mandates 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 (quoting ARIZ. REV. STAT. ANN. § 13-703(E) (1989)). This Court held in *Walton* that its decisions in *Boyde* and *Blystone* precluded Walton's claim that the Arizona statute created an unconstitutional presumption of death. *Walton*, 497 U.S. at 651-652.

The State concedes that the term "equipoise" appears nowhere in the plurality opinion of the Court in *Walton*. Pet. Br. at 18. There is good reason for the omission. The statutes at issue in both *Boyde* and *Blystone* required the jury to impose death only when aggravating circumstances outweighed mitigating circumstances; they did not involve an equipoise issue. See *Boyde*, 494 U.S. at 374 (the jury

was instructed in accordance with the California death penalty statute that it "shall impose" a death sentence if it concludes that the aggravating circumstances outweigh the mitigating circumstances); *Blystone*, 494 U.S. at 302 (involving a Pennsylvania statute mandating death if the jury finds that aggravating circumstances outweigh mitigating circumstances).[25] In *Walton* itself, the Arizona statute was interpreted both by the Arizona Supreme Court and by the State of Arizona before this Court as mandating a death sentence only when aggravating circumstances outweighed mitigating circumstances. See *State v. Walton*, 769 P.2d 1017, 1030 (Ariz. 1989) (holding "our statute provides constitutionally acceptable standards

[25] In *Walton*, this Court granted *certiorari* to resolve a conflict between the Arizona Supreme Court's decision there and the Ninth Circuit's decision in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988). *Adamson* interpreted the Arizona statute as removing the judge's discretion by requiring a death sentence "if the defendant fails to establish mitigating circumstances by the requisite evidentiary standard, which *outweigh* the aggravating circumstances." *Id*. at 1042. In concluding that the Arizona statute created an unconstitutional presumption of death, the Ninth Circuit stated that "[t]his is because in situations where the mitigating and aggravating circumstances are in balance, or where the mitigating circumstances give the court reservation but still fall below the weight of the aggravating circumstances, the statute bars the court from imposing a sentence less than death." *Id*. at 1043.

While the Ninth Circuit's phrase "in balance" may have alluded to a situation of equipoise, such an interpretation contradicted Arizona law. The Ninth Circuit in *Adamson* did not elaborate on the point, and the remainder of the sentence, quoted above, suggests that the court was more concerned with the mandatory nature of the sentencing formula than with the relative balance of aggravating and mitigating circumstances. Both *Adamson* and the Arizona Supreme Court's decision in *Walton* were handed down before this Court's decisions in *Boyde* and *Blystone*. In reviewing *Walton* after those cases, there is no reason to believe this Court focused on *Adamson*'s description of the Arizona statute.

for deciding whether aggravating circumstances outweigh mitigating factors"); Respondent's Brief on the Merits, *Walton v. Arizona*, at 28-33.[26] In fact, at the selection stage, the Arizona statute at issue in *Walton* does not mandate a death sentence if the sentencer finds that aggravating and mitigating circumstances are in equipoise. It mandates a death sentence only if the court finds "no mitigating circumstances sufficiently substantial to call for leniency." Unlike the Kansas equipoise provision, the Arizona statute performs the requisite function of individualized sentencing at the selection stage, because the "sufficiently substantial to call for leniency" language instructs the sentencer to spare the defendant's life if it finds enough reason to do so in the facts of the case, regardless of the relative weight of the aggravating and mitigating circumstances. See *State v. Trostle*, 951 P.2d 869, 888 (Ariz. 1997); *State v. Valencia*, 645 P.2d 239, 241 (Ariz. 1982). Under Arizona law, the determination of what is or is not "sufficiently substantial" is left to the sentencer's discretion, allowing the sentencer to make a considered determination – based on the unique circumstances of the individual defendant – whether death is an appropriate punishment in a specific case. Moreover, Arizona law

[26] While the Arizona Supreme Court has at times spoken of the "sufficiently substantial to call for leniency" language in terms of mitigating circumstances outweighing aggravating circumstances, see, *e.g.*, *State v. Gretzler*, 659 P.2d 1, 13 (Ariz. 1983) (citing examples of prior cases where mitigating circumstances "did not outweigh", "did not excuse", "were not sufficiently substantial to outweigh", or "were found insufficiently substantial to outweigh" aggravating circumstances), no Arizona court has ever interpreted the Arizona statute to require a death sentence when aggravating and mitigating circumstances are in equipoise. In *Gretzler* itself, the court analyzed the Arizona statute as requiring a death sentence "[w]here one or more statutory aggravating circumstances is found, and no mitigation exists." *Id*.

explicitly requires that any doubt about whether a death sentence should be imposed is to be resolved in favor of a life sentence. *Trostle*, 951 P.2d at 888; *State v. Marlow*, 786 P.2d 395, 402 (Ariz. 1989); *State v. Rockwell*, 775 P.2d 1069, 1080 (Ariz. 1989); *Valencia*, 645 P.2d at 241.

D. The Kansas Statutory Provision at Issue Here Is Unique; A Holding that It Is Unconstitutional Threatens No Other State's Capital-Sentencing Laws; To the Contrary, Courts in Other States Have Uniformly Avoided Giving Their Statutes Effects Like Those that the State of Kansas and its *Amici* Are Asking this Court to Approve.

Kansas is unique among death penalty States in mandating a death sentence when aggravating and mitigating circumstances are in equipoise. The State of Montana, for example, has a statutory death-sentencing formula identical to Arizona's. See MONT. CODE ANN. § 46-18-305 (2003) (requiring a death sentence if the court "finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency"). The Montana Supreme Court, in a post-*Walton* case, squarely considered an issue of equipoise under the "sufficiently substantial to call for leniency" language and held that the formula "does not require the death sentence to be imposed if the aggravating and mitigating factors are of equal weight." *State v. Smith*, 863 P.2d 1000, 1012 (Mont. 1993).[27]

[27] The *Smith* case was cited by the Kansas Supreme Court in *Kleypas*, in finding that Kansas' statutory language was materially different than that of the Arizona statute in *Walton*. Pet. App. at 104a.

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In Colorado, a death-sentencing formula like Kansas' – one mandating death when aggravating and mitigating circumstances are in equipoise – was invalidated on state constitutional grounds in *People v. Young*, 814 P.2d 834, 839 (Colo. 1991).[28] The statutory formula at issue in *Young* had eliminated an additional step, contained in the previous version of the same statute, which required the jury, if it found that "any mitigating factors do not outweigh the proven statutory aggravating factors", to go on and decide "whether the defendant should be sentenced to death or to life imprisonment." *Id*. at 840. Following the *Young* decision, the Colorado legislature restored the final step to the death-sentencing formula, requiring the sentencer to determine, after weighing aggravating and mitigating circumstances, "whether the defendant should be sentenced to death or life imprisonment." See COLO. REV. STAT. § 18-1.3-1201(2)(c) (2004).

In fact, every court that has considered a statutory provision mandating death in a situation of equipoise has invalidated the formula or found a ground for refusing to apply it. See *Hulsey v. Sargent*, 868 F.Supp. 1090, 1103 (E.D. Ark. 1993) (finding an Arkansas statute unconstitutional; "the Eighth and Fourteenth Amendments with their requirements of individualized sentencing and full consideration of evidence in mitigation appear to require

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The holding on the equipoise issue in *Smith* was reaffirmed on appeal after remand. *State v. Smith*, 931 P.2d 1272, 1278 (Mont. 1996), *cert. denied*, 522 U.S. 965 (1997).

[28] As the Kansas Supreme Court pointed out in *Kleypas*, the Montana Supreme Court in the *Smith* case, note 27 *supra*, declined to apply the Colorado Supreme Court's reasoning in *Young* because the Montana statute, unlike Colorado's, did not require a death sentence in a situation of equipoise. Pet. App. at 104a-105a.

relief"); *People v. Young*, *supra*, 814 P.2d at 845; *State v. Biegenwald*, 106 N.J. 13, 62, 65, 524 A.2d 130, 156, 157 (N.J. 1987) (saying that "[i]n no proceeding is it more imperative to be assured that the outcome is fair than in these cases"; finding it "difficult to believe that the Legislature thought it fundamentally fair that a defendant be executed *except* where the mitigating factors *outweigh* the aggravating"; concluding that "the concept of executing . . . [the defendant] where the explanations for his misconduct (the mitigating factors) were equally as significant as the culpable aspects of that misconduct (the aggravating factors) is foreign to what the Legislature would certainly intend"; and invoking considerations of "fundamental fairness" to conform New Jersey's 1982 statute, which in terms required death when aggravating and mitigating circumstances were in equipoise, to the provisions of a 1985 amendment requiring that aggravating factors must outweigh any mitigating factors in order for a death sentence to be imposed). Arkansas, like Colorado and New Jersey, has now amended its capital sentencing statute to eliminate the unconstitutional equipoise provision. *See* ARK. STAT. ANN. § 5-4-603(a) (2005) (in order to impose a death sentence, the jury must find that "aggravating circumstances outweigh beyond a reasonable doubt mitigating circumstances found to exist").[29]

[29] Alabama and Tennessee also require a finding that aggravating circumstances outweigh mitigating circumstances in order to support a death sentence. ALA. CODE 1975 § 13A-5-46 (2005); TENN. CODE ANN. § 39-13-204(g)(1) (2005). Tennessee, along with Colorado, Arkansas and New Jersey, has abandoned an earlier formula containing a mandatory death-by-equipoise provision. See *Bell v. Cone*, 535 U.S. 685, 690-691 (2002) (citing the "then-applicable Tennessee law . . . [under which] a death sentence was required if the jury found unanimously that the State proved beyond a reasonable doubt the existence of at least one

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As the *Hulsey* court pointed out in striking down the mandatory death-by-equipoise provision in Arkansas, there is a critical difference between a provision mandating a death sentence when aggravating and mitigating circumstances are equally balanced, and one that contains a similarly-worded formula but also includes a provision akin to Colorado's, calling upon the jury in the final analysis to make an individualized determination whether to impose life imprisonment or death. *Hulsey*, 868 F.Supp. at 1102 (citing *Smith v. Armontrout*, 888 F.2d 530 (8th Cir. 1989)).[30] Thus, in statutes constructed along the general lines of Kansas', the commonplace inclusion of a Colorado-type provision or its

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statutory aggravating circumstance that was not outweighed by any mitigating circumstance").

Statutes in Washington and Illinois, employing language substantially similar to that in the Arizona statute, have been interpreted as creating a "presumption of leniency." See *Campbell v. Kincheloe*, 829 F.2d 1453, 1465-1466 (9th Cir. 1987); *Campbell v. Wood*, 18 F.3d 662, 674-675 (9th Cir. 1994). In *Silagy v. Peters*, 905 F.2d 986, 1000 (7th Cir. 1990), the Illinois statute, requiring death if mitigation is not "sufficient to preclude" the death penalty, was interpreted as allowing the imposition of a death sentence only after the sentencer determines that the aggravating circumstances outweigh the mitigating circumstances.

Similarly, in *State v. Sivak*, 901 P.2d 494, 499 (Idaho 1995), the Idaho Supreme Court held that, under the then-existing Idaho statute, the trial court had "complied with the statutory requirement of finding the existence of one statutory aggravating factor that outweighs all of the mitigating evidence."

[30] In *Armontrout*, the Eighth Circuit found no constitutional error in a Missouri jury instruction that required jurors to determine whether sufficient mitigating circumstances existed that outweighed aggravating circumstances. The court concluded that the instruction described findings which would compel a life sentence but did not say that death must be the verdict if those findings were not made. Rather, the instruction told "the jury it does not have to return a verdict of death, whatever it thinks about the existence or weight of aggravating or mitigating circumstances." 888 F.2d at 545.

equivalent obviates the federal constitutional problem posed by the Kansas equipoise formula. See, *e.g.*, COLO. REV. STAT. § 18-1.3-1201(2) (2004); FLA. STAT. § 921.141(2) (2005); MISS. CODE ANN. § 99-19-101(2)(c), (3)(c) (2005); NEV. REV. STAT. § 175.554(2) (2004); N.C. GEN. STAT. § 15A-2000(b) (2004).

Only Kansas still decrees death by equipoise. Such a procedure is sharply at odds with the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). But this is not because – as the straw-man argument the State attributes to the Kansas Supreme Court supposedly runs – "'a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.'" Pet. Br. at 21, quoting *Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988). It is because the Eighth Amendment requires a State to provide *some* procedure which assures that a sentencing jury will make a reliable, collective judgment that death is the appropriate punishment for the particular defendant who committed the specific crime in the individual case at bar; and this requirement is not met when jurors are told to return a death verdict if they are in equipoise regarding the balance of aggravating and mitigating circumstances – a situation which means, by definition, that the jury has been unable to reach any affirmative conclusions about the defendant "as [a] uniquely individual human being[]" which would single him or her out from the "faceless, undifferentiated mass" of death-eligible defendants. *Woodson*, 428 U.S. at 304. Consequently, a verdict of death returned under § 21-4624(e) fails to perform the constitutionally necessary function of deciding, at the ultimate selection stage of the capital sentencing process, whether

an individual defendant eligible for the death penalty actually deserves that punishment. *Tuilaepa*, 512 U.S. at 972.

CONCLUSION

The State's petition for *certiorari* should be dismissed for lack of jurisdiction. If the Court concludes it has jurisdiction, the decision below should be affirmed.

Respectfully submitted,

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