

THE HIGH COURT REMAINS AS DIVIDED AS EVER OVER THE DEATH PENALTY

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More than three decades ago, in *Furman v. Georgia*, a sharply divided Supreme Court struck down all existing capital punishment schemes because the results they generated were arbitrary, discriminatory, and unreasoned. No member of that Court remains on the Court today, and the Court has grown increasingly conservative ever since. Nevertheless, important questions concerning the administration of capital punishment continue to wrought deep divisions within the Court, for instance in determining whether racial bias influences the system, in determining the sufficiency of new evidence of innocence to justify review of a defaulted claim in *habeas corpus* proceedings, in determining a rule for addressing deadlocked penalty-phase deliberations, and in determining the availability of a new rule concerning consideration of mitigating evidence on *habeas* review.

During the past term, two new justices joined the Court in the same term for the first time since 1972, the year *Furman* was decided. The first capital case the Roberts Court addressed was *Kansas v. Marsh*. The issue presented was whether the Kansas legislature's command that a death sentence should be imposed whenever the jury could not conclude that aggravating factors outweighed mitigating factors produced arbitrary rather than reasoned sentences. If the outcome in *Marsh* is any indication of how the Court will deal with capital punishment in the future, it appears that the Roberts Court will divide as often and as sharply as did the Burger and Rehnquist Courts.

I.

When the Court granted *certiorari* to review the Kansas Supreme Court's decision in *Kansas v. Marsh*, no one predicted its eventual holding would shake the world. Kansas is a backwater in the capital punishment business: less than ten condemned inmates occupy death row there. The Kansas capital statute requires imposition of the death penalty whenever the jury cannot decide whether the state's case for the death penalty outweighs the defendant's case for a life sentence. The Kansas Supreme Court determined that this provision violates the Eighth Amendment because the statute "provides that in doubtful cases the jury must return a sentence of death" and a tie should not go to the executioner.

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Prior Supreme Court decisions have addressed the states' power to structure the jury's consideration of the sentencing evidence but did not address this issue specifically. Three 1990 decisions—each revealing a deeply-divided Court—provide the most pertinent guidance. Pennsylvania's capital statute mandates the death penalty when the aggravating circumstances, regardless of their strength or quality, outweighed the mitigating evidence. A five justice majority held that this scheme satisfied the Eighth Amendment in *Blystone v. Pennsylvania*. California's capital statute works similarly, requiring the jury to impose the death penalty where aggravation outweighs mitigation. In *Boyde v. California* another 5–4 majority approved this scheme and rejected the view that the sentencer must remain free to reject the death penalty even where the mitigating circumstances do not outweigh the aggravating ones. Arizona's capital statute is most similar to the Kansas law: it mandates the death penalty whenever the state has proven at least one aggravating circumstances, unless the mitigating evidence is sufficient to call for leniency. Over four dissents, the Court held that this scheme did not offend the Eighth Amendment in *Walton v. Arizona*. In each case, the majority declared that the states enjoyed considerable discretion in choosing how aggravating and mitigating evidence was to be weighed by the sentencer.

Before the Supreme Court, the State of Kansas argued that *Walton*, *Boyde*, and *Blystone* confirmed that the Kansas legislature had not erred in directing imposition of a death sentence when the jury was unable to decide if aggravation outweighed mitigation. But the Supreme Court soon found itself as divided as the Kansas Supreme Court, and as divided as it had been fifteen years earlier in *Walton*, *Boyde*, and *Blystone*.

Justice Thomas's majority opinion approved the Kansas statute, and claimed to break no new ground. His opinion asserts that "[t]his case is controlled by *Walton*" because the Court therein rejected the argument that Arizona's capital statute was unconstitutional "because the defendant 'must . . . bear the risk of non-persuasion that any mitigating circumstance will not outweigh the aggravating circumstance.'" Moreover, even if *Walton* did not settle this question, *Marsh* concludes that the Eighth Amendment requires only that states (1) rationally narrow the class of death-eligible offenders, and (2) permit the sentencer to "render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of the crime." Because there is no question that the Kansas statute fulfills both requirements, there is no Eighth Amendment violation when the statute requires a capital sentence if the evidence in aggravation and mitigation is at equipoise.

II.

While the *Marsh* holding is narrow and its impact *de minimus* outside of Kansas, the opinions in *Marsh* are very significant in a number of respects. They show that the Roberts Court is as sharply divided over the administration of capital punishment as were the Burger and Rehnquist Courts. The various opinions reveal wide differences on three significant fronts: (1) the

Court's role in monitoring the administration of capital punishment, (2) its Eighth Amendment jurisprudence concerning the states' power to control the jury's consideration of aggravating and mitigating evidence, and (3) the very integrity of the system that generates capital sentences. These are important questions that will not be resolved any time soon.

A. *When Should the Court Devote Itself To the
Administration of Capital Punishment?*

It is in Justice Scalia's concurring opinion and Justice Stevens's dissenting opinion that the debate as to the Court's role in reviewing capital cases is found.

Justice Stevens argues that the Court never should have taken this case. No law required that the Court review the case, and the Kansas Supreme Court's decision, even if wrong, was not binding upon any other state. Quoting an earlier dissent in *California v. Ramos*, he asserts that "[n]othing more than an interest in facilitating the imposition of the death penalty in [Kansas] justifies this Court's exercise of discretion to review the judgment" below.

Justice Stevens asserts that a decisive factor in determining whether to grant review is the "federal interest in ensuring that no person be convicted or sentenced in violation of the Federal Constitution – an interest entirely absent when the State is the petitioner." Thus Justice Stevens suggests that the Court should ordinarily use its limited resources to review only those cases where the lower courts have misapplied the law in favor of a capital conviction or sentence.

Justice Scalia forcefully disagrees. He argues that the Court possesses jurisdiction over state court adjudication of federal issues primarily "to ensure the integrity and uniformity of federal law." Whenever a state high court has struck down state law on federal constitutional grounds, and has done so by misconstruing federal law, "review by this Court, far from *undermining* state autonomy, is the only possible way to *vindicate* it." Rejecting Justice Stevens's view that the Court's primary responsibility is the vindication of a defendant's federal constitutional rights, Justice Scalia posits that "[i]t is to ensure that when courts speak in the name of the Federal Constitution, they disregard none of its guarantees" for either the defendant or the State.

In the future, how will the Court use its limited resources? Will it be primarily as Justice Stevens suggests—in cases where the lower courts have misapplied federal law to the detriment of an individual defendant, or as Justice Scalia prefers—to ensure the integrity and uniformity of federal law? If the Court's current docket is any indication of a future trend, it appears, for the time being, that neither view has prevailed. Two of the four capital cases currently on the docket are grants of state petitions that claim lower courts misapplied federal law to the state's detriment, and two are grants of petitioner applications.

B. *Does the Eighth Amendment Require Only Narrowing
& Consideration of Mitigation or Also A Process
That Leads To Reasonably Reliable Results?*

Justice Thomas's majority opinion and Justice Souter's dissenting opinion clearly sketch out very different views of the Eighth Amendment. In particular, the Justices sharply disagree on how the states may control the jury's assessment of whether the facts justify society's supreme sentence.

Justice Thomas asserts that the Eighth Amendment imposes few requirements that states must observe to utilize capital punishment, and otherwise leaves much of the sentencing procedure to the states. Reviewing the Court's post-*Furman* jurisprudence, he identifies three rules in *Marsh*. First, the state must "rationally narrow the class of death-eligible" offenders. Second, the state must provide a sentencing proceeding, distinct from the guilt phase, where the defendant is free to introduce, and the jury is free to consider, evidence concerning the "defendant's record, person characteristics, and the circumstances of his crime." Third, he concludes, "[s]o long as a state system satisfies these requirements, our precedents establish that a State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed."

The Kansas statute thus presents no significant Eighth Amendment issue, even though it *requires* the jury to impose the greater capital sentence when the state has failed to demonstrate that such a sentence is appropriate. In Justice Thomas's view, this rule is permissible because "[i]t does not interfere, in a constitutionally significant way, with a jury's ability to give independent weight to evidence offered in mitigation."

Justice Souter's dissenting opinion charges that the Court's precedents, while affording the states considerable discretion, nevertheless require a process that prohibits arbitrary results. He recalls that *Furman* struck down the former statutory schemes because those standardless systems "produced wanton and freakish results." The Court upheld subsequent statutes because they possessed standards designed to produce reliable, rational, and rationally reviewable death determinations. Thus, while the states possess "much leeway" in designing their sentencing schemes, a "system must meet an ultimate test of constitutional reliability" because the Eighth Amendment "demands both form and substance, both a system for decision and one geared to produce morally justifiable results."

Rejecting Kansas's argument that *Blystone*, *Boyde*, and *Walton* confirm the Kansas statute's constitutionality, Souter explains that the Eighth Amendment requires a state's scheme to "inform the jury's choice of sentence with evidence about the crime as actually committed and about the specific individual who committed it." Moreover, to ensure that only those whom the evidence plainly shows deserve death receive that sentence, Souter references *Spaziano v. Florida* and declares that "the essence of the sentencing authority's responsibility is to determine whether the response to

the crime and defendant ‘must be death.’” The Kansas statute plainly does not pass muster because:

The dispositive fact under the tie breaker is not the details of the crime or the unique identity of the individual defendant. The determining fact is not directly linked to a particular crime or particular criminal at all; the law operates merely on a jury’s finding of equipoise in the State’s own selected considerations for and against death. Nor does the tie breaker identify the worst of the worst, or even purport to reflect any evidentiary showing that death must be the reasoned moral response; it does the opposite. The statute produces a death sentence exactly when a sentencing impasse demonstrates as a matter of law that the jury does not see the evidence as showing the worst sort of crime committed by the worst sort of criminal, in a combination heinous enough to demand death.

This law, Souter submits, is “morally absurd” because it requires execution when the case for aggravation “has failed to convince the sentencing jury” that death is the proper sentence.

These opinions stake out vastly different views as to what the Eighth Amendment requires of the states. The majority is satisfied so long as two procedural protections are in place: the class of eligible offenders is adequately narrowed and the sentencer is permitted to consider a defendant’s background and character. The four dissenters believe these procedural elements are necessary but not sufficient: the states’ schemes cannot require a death sentence when the prosecution fails to show that the facts mandate it.

*C. Does the Growing Number of Exonerations Demonstrate Our
System Is Too Fallible to Reliably Impose Death
Only on The Worst of the Worst?*

Justice Souter’s dissent and Justice Scalia’s concurring opinion vigorously engage the issue of the fallibility of the system, and the lessons to be drawn from the growing number of exonerations. On this point, their views could not disagree more.

Justice Souter did not put his pen down after he declared that the majority’s approval of the Kansas statute “defies decades of precedent aimed at eliminating freakish capital sentencing.” In four concluding paragraphs, he raises an even more fundamental concern. He explains that the Court confronts circumstances much like those that presented themselves to the *Furman* Court. The *Furman* decision, he submits, was a “response to facts that could not be ignored, the kaleidoscope of the life and death verdicts that made no sense in fact or morality.”

There is a new body of facts, Justice Souter asserts, that “must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate.” They are the circumstances found in the exonerations “of convicts under death sentence, in numbers never imagined before the development of DNA tests.” Justice Souter notes that in 2000, in Illinois alone the state exonerated more inmates than it executed. Other

reputable studies show that more than 100 inmates condemned in the post-*Furman* era have since been exonerated. These studies further demonstrate many of the “wrongful convictions and sentences resulted from eyewitness misidentification, false confession, and (most frequently) perjury.” All of this leads Justice Souter to quote *Gregg v. Georgia* in declaring “[w]e are thus in a period of new empirical argument about how ‘death is different.’”

Justice Scalia could not disagree more. He charges that the facts do not support Justice Souter’s view that many innocents are being condemned to death. He notes that the dissent points to no case in which an executed prisoner has been exonerated. He examines several scholarly articles that assert that during the 20th century more than twenty executed prisoners were very likely innocent, but argues that the conclusions are unverified and that the most recent case dates from 1984. Looking at the lists of more current exonerations, Justice Scalia asserts that they vastly over-represent the number of truly innocent persons who were wrongly convicted. And because in each of those cases the system either cleared the individual or overturned the conviction, Justice Scalia argues these events are solid proof that the legal system is sufficiently reliable to identify and correct such error.

Thus, Justice Scalia declares, while our system is not perfect, the likelihood of executing an innocent person “has been reduced to an insignificant minimum.” Because the American people have determined that the benefits of capital punishment outweigh the risk of error, it is not the “proper part of the business of th[e] Court . . . to second guess that judgment.”

This final debate is truly significant. Justice Souter’s assessment of the lessons learned from the exoneration cases is that our system of justice generally, and the Court’s death penalty jurisprudence specifically, is far from adequate to protect the innocent and to assure reasoned and reliable capital sentences. Like Justice Goldberg’s dissent from denial of *certiorari* in *Rudolph v. Alabama*, which asked whether the death penalty was excessive punishment for crimes that did not result in the victim’s death, and which spawned the road to *Furman*, one has to wonder what the Court will do with arguments in the future that assert new constitutional rules are necessary to assure that the innocent, and those who do not deserve the death penalty, are adequately protected.

The rule of *Marsh* will have little impact upon our nation’s use of the death penalty. But the strong debate that runs throughout its opinions reveals a Court that disagrees sharply over some of the most fundamental questions that arise in its role in the administration of capital punishment.