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No. 14-452

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

SIDNEY J. GLEASON,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR RESPONDENT SIDNEY J. GLEASON

JEFFREY T. GREEN
TOBIAS S. LOSS-EATON
BRIAN CORMAN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIV.
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

SARAH ELLEN JOHNSON *
MERYL CARVER-ALLMOND
CAPITAL APPELLATE
DEFENDER OFFICE
700 Jackson, Suite 903
Topeka, KS 66603
sjohnson@sbids.org
(785) 368-6587

Counsel for Respondent

* Counsel of Record

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CAPITAL CASE

QUESTION PRESENTED

Whether jury instructions that repeatedly emphasize the jury's obligation to make findings as to both aggravating and mitigating circumstances, repeatedly instruct that the jury must "weigh" those circumstances, and repeatedly identify the evidentiary standard for aggravating circumstances as "beyond a reasonable doubt" while remaining wholly silent as to the defendant's burden of proof regarding mitigation evidence, are reasonably likely to confuse the jury and prompt it to disregard relevant mitigation evidence in violation of the Eighth Amendment.

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INTRODUCTION

The narrow question presented is whether the penalty phase jury in this case, deciding between life and death, had to be instructed as to the applicable burden of proof for mitigation evidence. Respondent Sidney J. Gleason does not assert that trial courts must give such instructions in each and every capital sentencing proceeding. Instead, such instructions must be given where there exists a reasonable likelihood of confusion because those same jurors are repeatedly instructed that they are to weigh aggravating evidence against mitigating evidence and that they must make findings as to both aggravating and mitigating evidence, but the only burden of proof mentioned with respect to *both* findings is "beyond a reasonable doubt."

The instructions to Mr. Gleason's penalty phase jury were silent as to his burden of proof for mitigating evidence. This created a substantial risk that those jurors reached the common-sense conclusion that 'like must be compared with like' in the weighing process and thus dismissed mitigating facts that the defense had not proved to the same degree as the prosecution had proved the aggravating circumstances. And the prosecutor's closing arguments exacerbated that risk by repeatedly challenging the defense's proof of mitigating factors, asking the jury whether the defense had in fact proffered evidence proving several of the mitigating factors or whether, on the basis of the evidence presented, a mitigating circumstance could be found to exist.

Petitioner Kansas attacks a straw man in its brief. Mr. Gleason's position is emphatically not that "the Eighth Amendment . . . require[s] capital sentencing juries to be instructed that mitigating circumstances need not be proven by any particular standard." Pet'r

Br. 23 (capitalizations omitted). Nor was this the reasoning or holding of the Kansas Supreme Court. Instead, Mr. Gleason relies upon this Court's precedents holding that jurors must be able to give meaningful effect to a defendant's mitigation evidence. Thus, jury instructions that prevent them from doing so—expressly or through misleading ambiguity—are unacceptable. And where a particular set of jury instructions is flawed to a degree that arbitrariness or capriciousness may result, even from the jury's careful attention to its instructions, resentencing is necessary to ensure that a sentence of death is founded upon unassailable grounds.[1]

STATEMENT OF THE CASE

1. *Background*.

In view of the narrow question presented, Mr. Gleason sees no purpose in burdening the Court with a counterstatement of the facts. Mr. Gleason will discuss the relevant facts as he presents his arguments. An exhaustive account of the underlying facts can be found in Mr. Gleason's opening brief before the Kansas Supreme Court (No. 06-97296-S) at 3-42.

2. *The Penalty Phase Instructions*.

The penalty phase instructions were just thirteen in number and they are reproduced in the Appendix to this brief. See App. 1a-7a. Those instructions were remarkably consistent in obligating the jury to make findings regarding mitigating evidence, and ut-

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[1] The question presented here is also present in *Kansas* v. *Jonathan D. Carr*, Docket No. 14-449 (filed Aug. 3, 2015). Jonathan respectfully joins (and has incorporated) all of the arguments presented herein. *See* Brief for Respondent Jonathan D. Carr at 44-46.

terly silent as to what the applicable evidentiary burden, if any, would be.

Six of the thirteen instructions expressly refer to a process of making findings with respect to mitigating circumstances, and four of those instructions use the same phrase: "mitigating circumstance[s] found to exist." (Instruction Nos. 7, 8, 10 & 12) See App. 3a-5a. The two others (Instruction Nos. 1 & 9) refer to mitigating facts "shown" or "found" to exist, or to facts as you "find" them. See App. 1a, 5a. Instruction No. 7 uses this construction as well. *Id.* at 3a-4a. The one instruction (Instruction No. 6) that is solely devoted to defining aggravating circumstances and to specifying those alleged against Mr. Gleason makes no mention of the evidentiary burden at all. *Id.* at 2a-3a.

Yet each of the three instructions on the weighing process that *does* specify the use of a "beyond a reasonable doubt" evidentiary standard for aggravating circumstances mentions, in the very same sentence, the process of finding mitigating circumstances as well. See App. 4a-6a (Instruction Nos. 8, 10, 12); see also Pet. App. 137 (Verdict Form). Instruction No. 8, for example, is the critical instruction concerning the burden of proof and states, *in toto*:

> The State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstance found to exist.

App. 4a-5a.

The next instruction describes weighing, but makes no attempt at any distinction between aggravators and mitigators: "[i]n making the determination whether aggravating circumstances exist that are not

outweighed by any mitigating circumstances found to exist," the jury's decision should not be determined simply "by the number of aggravating or mitigating circumstances shown to exist." App. 5a (Instruction No. 9).

The instruction that defines "mitigating circumstances" and specifies those offered by Mr. Gleason (Instruction No. 7), contains no statement about the applicable burden of proof. See App. 3a-4a. While the instruction does caution that "[t]he same mitigating circumstances do not need to be found by all members of the jury in order to be considered by an individual juror," it continues to emphasize the fact-finding process: "[e]ach of you must consider every mitigating circumstance *found to exist*." *Id.* at 4a (emphasis added).

Instruction No. 10 again restates the evidentiary burden for finding aggravating circumstances in the weighing process against mitigating circumstances also found to exist, but makes no distinction between the fact-finding exercises: "[i]f you find unanimously beyond a reasonable doubt that one or more of the aggravating circumstances exist and that they are not outweighed by any mitigating circumstances found to exist, then you shall impose a sentence of death." App. 5a. The first option specified in Instruction No. 12 (imposing a death sentence) is worded in the same fashion, *id.* at 6a, as is the verdict form itself. Pet. App. 137.

3. *The Closing Arguments*.

The prosecutor's closing argument in Mr. Gleason's case only served to exacerbate the risk that jurors would consider aggravating circumstances and mitigating circumstances in parallel and under the same standard of proof. For example, in addressing Mr.

Gleason's proffered mitigating circumstances as set forth in Instruction No. 7, the prosecutor stated: "[t]he defense contends some of these are mitigating. Okay. Now, this is what they contend. The question for you is do they exist? *Was there evidence to prove them?*" Pet. App. 147 (emphasis added).

With respect to some of the specific mitigating facts, the prosecutor again challenged whether the defense had brought forth proof, or sufficient proof. "Did you hear any evidence that [Mr. Gleason] somehow impaired his ability to follow society's laws . . .?" Pet. App. 148. With respect to a term of imprisonment being sufficient to protect the public, the prosecutor queried the jury: "[c]an you find that one to exist based upon the evidence? Did you hear any evidence of that?" *Id.* Even the prosecutor's description of the weighing process did nothing more than entrench the ambiguity of the jury instructions themselves: "[a]nd here's how you do it. The State has to prove that—the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances found to exist." *Id.* at 150.

4. *The Kansas Supreme Court's Decision.*

The Kansas Supreme Court began with its prior decisions in *State* v. *Kleypas*, 40 P.3d 139 (Kan. 2001), and *State* v. *Scott*, 183 P.3d 801 (Kan. 2008). Those opinions interpreted the State's capital sentencing statute, Kan. Stat. Ann. § 21-4624(e), to require sentencing juries to be instructed that "mitigating circumstances need only be proven to the satisfaction of the individual juror and not beyond a reasonable doubt." Pet. App. 96-97. The Kansas court recognized that this Court's precedents "should not be interpreted as creating any constitutional requirements as to how or whether a capital jury should be instructed on

the burden of proof for mitigating circumstances." *Id.* at 100 (citing *Walton* v. *Arizona*, 497 U.S. 639, 649-51 (1990)). But the Kansas court noted, as had this Court, that the Kansas capital sentencing statute was more favorable than Arizona's in the *Walton* case because a Kansas defendant bears no burden with respect to proving mitigating evidence. *Id.* at 100-01 (citing *Kansas* v. *Marsh*, 548 U.S. 163, 173 (2006)). The Kansas court explained that the explicit burden-of-proof instruction required by *Kleypas* and *Scott* "preserves the statute's favorable distinction" as noted in *Marsh*. A failure to give the instruction is therefore inconsistent with the statute, and also "implicate[s]" the Eighth Amendment's protections. *Id.* at 102.

The Kansas Supreme Court further concluded that, taking the jury instructions in Mr. Gleason's case as a whole, the instructional error had been "exacerbated" rather than mitigated. Pet. App. 102. That is because the instructions repeatedly emphasized the "beyond a reasonable doubt" standard for aggravating circumstances, but "never informed or explained to the jury that no particular burden of proof applied to mitigating circumstances." *Id.* Thus, Mr. "Gleason's jury was left to speculate as to the correct burden of proof for mitigating circumstances and reasonable jurors might have believed they could not consider mitigating circumstances not proven beyond a reasonable doubt." *Id.*

"Because K.S.A. 21-4624 expressly burdens the State with proving the existence of aggravating circumstances beyond a reasonable doubt," the Kansas Court explained, "but places no evidentiary burden regarding the existence of mitigating circumstances on the defendant beyond the burden of production, we reiterate our holding in *Kleypas* and *Scott* that capi-

tal juries in Kansas must be informed that mitigating circumstances need not be proven beyond a reasonable doubt." Pet. App. 102.

SUMMARY OF ARGUMENT

1. Capital punishment is unlike any other form of criminal sanction. Because of the death penalty's unique nature, the Eighth Amendment imposes certain procedural requirements on capital sentencing trials that are aimed at protecting two crucial values.

First, because an execution is irrevocable, the Constitution demands a high degree of confidence that death is the appropriate penalty in a given case. *Mills* v. *Maryland*, 486 U.S. 367, 383-84 (1988). Arbitrariness, confusion, and inconsistency in the imposition of a capital sentence cannot be tolerated. *Beck* v. *Alabama*, 447 U.S. 625, 643 (1980).

Second, the death penalty's difference in kind from other forms of punishment "underscores the need for individualized consideration as a constitutional requirement." *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978) (plurality). Only when a sentencing jury has considered all relevant evidence bearing on why a death sentence should *not* be imposed can society be confident that the jury has made a reliable determination that death is the appropriate punishment. *Penry* v. *Lynaugh* (*Penry I*), 492 U.S. 302, 319 (1989), *abrogated on other grounds by Atkins* v. *Virginia*, 536 U.S. 304 (2002).

This Court has given effect to these principles by holding that a sentencing jury may "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Mills*, 486

U.S. at 374 (citation omitted). This requirement is violated by jury instructions that preclude consideration of relevant mitigating evidence. That includes jury instructions that, although susceptible to a permissible construction, create a reasonable likelihood that the jury will believe it is precluded from giving effect to mitigating evidence offered by the defendant. See *Boyde* v. *California*, 494 U.S. 370, 379-80 (1990); *Mills*, 486 U.S. at 384.

2. The jury instructions in this case flunk that test. In Kansas, no burden of proof applies to the defendant's mitigation evidence; the jury can consider and weigh any and all mitigating evidence the defendant introduces. Pet. App. 102. But the instructions in this case were totally silent on that point. Instead, they repeatedly emphasized the "beyond a reasonable doubt" standard that applies to the State—including when discussing how the jurors should find and weigh both aggravating *and* mitigating circumstances. By repeating only one burden of proof while instructing the jury to make findings as to both sets of factors, the instructions created a reasonable likelihood that the jurors would conclude that the evidence had to support mitigating circumstances to the same degree as aggravating circumstances before the jury could consider them in the weighing process. The instructions exacerbated this problem by suggesting, in, other ways that mitigating circumstances and aggravating circumstances should be evaluated the same way, and implying that mitigating circumstances must meet *some* threshold of proof before they can be considered. Read as a whole, the instructions were reasonably likely, at a minimum, to preclude the jury from giving effect to relevant mitigating evidence.

3. Nothing in the presentation of evidence or the parties' arguments served to alleviate these prob-

lems. Setting aside the fact that these other considerations cannot trump the language of the instructions themselves, the prosecutor's arguments merely bolstered the perception that the jury could not consider Mr. Gleason's proposed mitigating circumstances unless there was sufficient "evidence to prove them." Pet. App. 147. Indeed, the prosecutor directly challenged Mr. Gleason's ability to "prove" some of his mitigators. Likewise, the mere fact that mitigation evidence was introduced without objection establishes nothing, because the problem here is whether the jury understood that such evidence need not be "prove[d]" against any particular standard before it could be weighed against the aggravating circumstances.

4. Contrary to the State's dire predictions, affirming the Kansas Supreme Court's judgment in this case would not threaten the integrity of existing death sentences and capital punishment regimes. Most American jurisdictions, including the federal courts, already affirmatively instruct juries on the defendant's burden of proof to show mitigating circumstances. Those jurisdictions will not be affected by the Court's ruling in this case. In any event, affirmance does not require a novel constitutional rule, as the State contends, but merely a straightforward application of this Court's decisions in *Boyde* and *Mills* to the specific instructions at issue here. Other jury instructions that do not mention the defendant's burden of proof may pass constitutional muster if they do not share the problematic features of the instructions in this case.

5. In the alternative, the Court should decline to reach the merits of the Eighth Amendment issue because the judgment below rests on an adequate and independent state ground. The Kansas Supreme

Court's decision was based on its prior cases holding that state law requires an affirmative jury instruction on the defendant's burden of proof. Despite the fact that this trial took place five years after the Kansas Court's initial decision in *Kleypas*, the trial court in this case failed to give that instruction. Vacatur was therefore justified as a matter of state law.

To be sure, the Kansas Supreme Court concluded (correctly) that the Eighth Amendment was also "implicated" by the trial court's failure to give the required instruction, but state law provides an adequate and independent basis for the result reached below. Reviewing that judgment will not change the outcome on remand—resulting in an advisory opinion—and will also interfere with the People of Kansas' right to afford criminal defendants different or greater protections than the federal Constitution may require.

ARGUMENT

I. THE JURY INSTRUCTIONS CREATED A REASONABLE LIKELIHOOD THAT JURORS WOULD NOT GIVE EFFECT TO MITIGATING CIRCUMSTANCES.

A. Capital Sentencing Juries Must Be Able To Consider And Give Effect To All Relevant Mitigating Evidence.

Jury instructions that are reasonably likely to prevent the jury from considering or giving effect to all relevant mitigating evidence violate the Eighth Amendment. This rule stems from the unique nature of capital punishment, which requires both scrupulous adherence to procedural requirements and an individualized assessment of the defendant's crime, characteristics, and culpability.

1. A "sentence of death differs in kind from any sentence of imprisonment, no matter how long." *Rummel* v. *Estelle*, 445 U.S. 263, 272 (1980). "From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action." *Gardner* v. *Florida*, 430 U.S. 349, 357-58 (1977) (plurality). Capital sentencing therefore requires a higher degree of confidence in the integrity of the process and a far lower tolerance for confusion or error than is acceptable in other contexts. See *California* v. *Ramos*, 463 U.S. 992, 998-99 (1983); *Ake* v. *Oklahoma*, 470 U.S. 68, 87 (1985). "The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case." *Mills,* 486 U.S. at 383-84; see also *Ford* v. *Wainwright*, 477 U.S. 399, 411 (1986) (plurality) ("[i]n capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different."). Rules and practices that "introduce a level of uncertainty and unreliability . . . cannot be tolerated in a capital case." *Beck*, 447 U.S. at 643.

2. In addition, the death penalty's difference in kind from other forms of punishment "underscores the need for individualized consideration as a constitutional requirement." *Lockett*, 438 U.S. at 605. "The need for treating each defendant in a capital case with the degree of respect due the uniqueness of the

individual is far more important than in noncapital cases." *Id.* Accordingly, a "jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Blystone* v. *Pennsylvania*, 494 U.S. 299, 304 (1990) (citation omitted). "Only then can we be sure that the sentencer has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate sentence." *Penry I*, 492 U.S. at 319 (alteration in original). As a result, "[t]he Constitution *requires* States to allow consideration of mitigating evidence in capital cases. Any barrier to such consideration must therefore fall." *McKoy* v. *North Carolina*, 494 U.S. 433, 442 (1990).

However, "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer." *Penry I*, 492 U.S. at 319. "The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Id.* Thus, "in a capital case 'the sentencer [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death,'" and, as a corollary to that principle, cannot be "precluded from considering any relevant mitigating evidence." *Mills*, 486 U.S. at 374-75 (emphasis omitted) (citation omitted); see *State* v. *Marsh*, 548 U.S. 163, 171 (2006) ("[a]s a requirement of individualized sentencing, a jury must have the opportunity to consider all evidence relevant to mitigation . . ."). And "it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, by the sentencing court, or by an evidentiary ruling." *Mills*, 486 U.S. at 375 (citations omitted); see,

e.g., *Skipper* v. *South Carolina*, 476 U.S. 1, 4-8 (1986) (vacating death sentence where defendant was prevented from putting on testimony relevant to mitigation).

It is further established that this requirement is violated by jury instructions that preclude the jury from considering or giving effect to relevant mitigating evidence. *E.g.*, *Penry I*, 492 U.S. at 320 (vacating death sentence where the "jury was never instructed that it could consider the evidence offered by Penry as *mitigating* evidence and that it could give mitigating effect to that evidence in imposing sentence"). This proscription includes jury instructions that, although susceptible to a permissible construction, are reasonably likely to be applied by the jurors in a way that prevents them from giving effect to mitigating evidence offered by the defendant. See, *e.g.*, *Mills*, 486 U.S. at 384 (vacating death sentence where there was "a substantial probability that reasonable jurors . . . well may have [erroneously] thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance").

Where an ambiguous jury instruction may have had this effect, "the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380. Under this standard, the mere "possibility" of such confusion does not violate the Eighth Amendment, but "a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction." *Id.*; *accord Johnson* v. *Texas*, 509 U.S. 350, 367 (1993). In conducting this inquiry, the Court "do[es] not engage in a technical parsing of this lan-

guage of the instructions, but instead approach[es] the instructions in the same way that the jury would," with a "commonsense" view. *Johnson*, 509 U.S. at 367; see, *e.g.*, *Penry* v. *Johnson* (*Penry II*), 532 U.S. 782, 800 (2001) (confusing and contradictory instructions created a reasonable likelihood that the jury did not give effect to mitigating evidence); *Smith* v. *Texas*, 543 U.S. 37, 48 (2004) (per curiam) (same).

3. The State reads *Boyde* as creating a three-factor test, under which the actual language of the jury instructions stands on equal footing with the evidence presented by the parties and the arguments of counsel. See Pet'r Br. 30. This reinterpretation is misguided. It is true that the *Boyde* court considered not only the language of the challenged instructions, but also the "context of the proceedings," 494 U.S. at 383, which included a review of the evidence and the parties' arguments. But, when asking whether the jury "has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence," *id.* at 380, the instructions themselves are the natural and proper focal point of the inquiry, see *id.* at 381–83 (looking to "context" only to confirm the result of the Court's analysis of the challenged instruction "standing alone"); *Mills*, 486 U.S. at 375–76 ("The critical question . . . is whether [the erroneous understanding] is one a reasonable jury could have drawn from the instructions given by the trial judge . . ."). This is true both because juries are generally (although not always) presumed to follow their instructions, see *Penry II*, 532 U.S. at 799; *Francis* v. *Franklin*, 471 U.S. 307, 324 n.9 (1985); *Bruton* v. *United States*, 391 U.S. 123, 135 (1968), and because the Court cannot determine the likely effect of an *ambiguous* instruction without first ascer-

taining how the jury would have understood the instruction itself.

In any event, even if the State's reading of *Boyde* were correct, neither counsel's arguments nor the evidence presented by the parties helps the State here. As explained below, the instructions themselves were fundamentally misleading, and the prosecutor's arguments simply made things worse.

B. It Is Reasonably Likely That The Jurors In This Case Applied The Instructions In A Way That Prevented Them From Giving Effect To All Relevant Mitigating Evidence.

The instructions given in this case created at least a reasonable likelihood that some or all of the jurors understood that Mr. Gleason had to establish his mitigating factors beyond a reasonable doubt before they could be weighed against the aggravating factors. In particular, the instructions' repeated emphasis on the "beyond a reasonable doubt" standard while instructing the jury to make findings as to both aggravating *and* mitigating circumstances, combined with their total silence on Mr. Gleason's burden of proof regarding mitigation evidence, created a reasonable likelihood that the jury would disregard relevant mitigating evidence for failing to meet that demanding standard. And other features of the instructions exacerbated this problem.

1. There is no dispute that the jury instructions in this case failed to inform the jurors that, under Kansas law, mitigating circumstances need not be proved beyond a reasonable doubt, let alone that the defendant bears "no evidentiary burden" at all as to mitigating circumstances. Pet. App. 102. By itself, that failure might be constitutionally problematic, but the in-

structions here went beyond mere silence. They repeatedly instructed the jurors that both "aggravating circumstances" and "mitigating circumstances" must be "found," and in the same breath gave them only one standard to apply: "beyond a reasonable doubt." Indeed, that was the only standard of proof that was mentioned anywhere in the instructions. The instructions also indicated in various places and various ways that the two types of circumstances were to be evaluated in parallel. This was more than sufficient to create a reasonable likelihood of juror confusion about the burden of proof for mitigating circumstances.

Reading the relevant instructions in sequence demonstrates this likely confusion. First, Instruction No. 6 defines the term "aggravating circumstances" and lists the four aggravators that the State argued were established by the evidence. This instruction mentions no burden of proof. App. 2a-3a.

Next, Instruction No. 7 addresses mitigating circumstances. The instruction first provides that "mitigating circumstances" are "those which in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, even though they do not justify or excuse the offense." App. 3a. This definition, of course, makes no mention of any burden of proof. But Instruction No. 7 goes on to use the phrase "beyond a reasonable doubt" not once, but twice. See *id.* at 3a ("The appropriateness of exercising mercy can itself be a mitigating factor in determining whether the State has proved beyond a reasonable doubt that the death penalty should be imposed. . . . Mitigating circumstances are to be determined by each individual juror when deciding whether the State has proved beyond a reasonable doubt

that the death penalty should be imposed."). The presence of this phrase *in the instruction on mitigating factors*, along with its absence from the instruction describing the aggravating factors, was likely to prompt the jury to associate the "beyond a reasonable doubt" standard with mitigating circumstances.

Instruction No. 7 then lists the nine mitigators proposed by Mr. Gleason and notes that the jury can "consider" other mitigators as well. App. 3a-4a. Finally, it instructs: "[e]ach of you must consider every mitigating circumstance found to exist." *Id.* at 4a. The State emphasizes that this instruction permits the jury to "consider" any and all mitigation evidence. Pet'r Br. 33-34. However, when the instructions are read as a whole, it is clear that they do not use the word "consider" to mean "weigh." On the contrary, the very first instruction tells the jury to "*consider aggravating or mitigating circumstances* relevant to the question of the sentence." App. 1a (emphasis added). In context, then, the jury would have understood this instruction to mean no more than that it could test any and all *potentially* mitigating evidence against the applicable standard of proof, just as the instruction to "consider aggravating . . . circumstances" required it to do. *Id.*

Likewise, the phrase "found to exist," App. 4a, necessarily implies that the jury must apply some standard to determine whether or not any given mitigator can be "found." And the only standard identified in this instruction (or any other) is "beyond a reasonable doubt." The natural inference is that the instructions do not mention a separate standard for mitigation evidence not because *no* standard applies, but because the *same* standard applies.

The following instructions further confuse matters. Instruction Nos. 8-11 consistently discuss both ag-

gravating and mitigating circumstances alongside the "beyond a reasonable doubt" standard while instructing the jury to weigh the two sets of circumstances against each other. See App. 4a-6a. These instructions not only repeatedly emphasize the "beyond a reasonable doubt" standard without identifying the standard that applies to mitigating evidence, they also explicitly tie the "beyond a reasonable doubt" standard to the consideration of mitigating evidence by requiring the jury to find "beyond a reasonable doubt" that aggravators "are not outweighed" by mitigators: "[i]f you find unanimously beyond a reasonable doubt that one or more aggravating circumstances exist and that they are not outweighed by any mitigating circumstances found to exist, then you shall impose a sentence of death." *Id.* at 5a (Instruction No. 10). And these instructions again refer to "aggravating or mitigating circumstances that are shown to exist," without once clarifying that very different standards dictate whether the two types of factors have been "shown to exist." *Id.* (Instruction No. 9).

By telling the jury that both sets of factors must be "found" or "shown" before they can be balanced against each other, and by providing only one standard of proof in describing both sets of factors, these instructions indicate to the jury that it must assess the factors using the same standard of proof—the only standard that has been provided—in order to include evidence on both sides of the scale.

Reading the instructions as a whole does nothing to minimize this risk, as nowhere in the instructions is the jury told that it need not find mitigating circumstances beyond a reasonable doubt. Instead, the jury instructions elsewhere appear to treat aggravating and mitigating circumstances identically. As noted,

for example, Instruction No. 1 informs the jury that both sets of circumstances should be considered in parallel. App. 1a. The command that the jury "shall consider" both types of circumstances gives no hint that they are subject to radically different burdens of proof.[2]

Viewed in the commonsense manner that this Court's precedents dictate, *e.g.*, *Johnson*, 509 U.S. at 367, these instructions create at least a reasonable likelihood of juror confusion and error. In all, the instructions refer to the "beyond a reasonable doubt" standard seven times, without once mentioning the standard that applies to mitigating circumstances. Thus, the only burden of proof mentioned with regard to the demonstration and weighing of both aggravating *and* mitigating circumstances is "beyond a reasonable doubt." Having been told both that aggravators must be proved beyond a reasonable doubt and that such aggravators must be proved beyond a reasonable doubt to outweigh mitigating factors—and having been told nothing else about the burden of proof for mitigating circumstances—reasonable jurors likely would infer that 'like should be treated as like' and so mitigating circumstances must be assessed according to the same threshold.[3]

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[2] Of course, it is not "constitutionally sufficient to inform the jury [merely] that it may 'consider' mitigating circumstances in deciding the appropriate sentence." *Penry II*, 532 U.S. at 797.

[3] *Smith* v. *Spisak*, 558 U.S. 139 (2010), on which the State relies, *see* Pet'r Br. 36, is readily distinguishable. *Smith* is an AEDPA case; the question there was simply whether the state court's application of *Mills* to decide a question about juror unanimity regarding mitigating factors was "contrary to, or . . . an unreasonable application of, clearly established Federal law." 558 U.S. at 143 (quoting 28 U.S.C. § 2254(d)(1)). Moreover, *Boyde* makes clear that the specific jury instructions at issue

Finally, as in *Mills*, "[o]ne additional bit of evidence about the natural interpretation of the [instructions] has become available." 486 U.S. at 381. The Kansas model jury instructions have now been revised to incorporate the instruction called for by the Kansas Supreme Court in *Kleypas*, *Scott*, and this case. See Pet. App. 98 ("Notably, the current PIK instruction on mitigating circumstances . . . incorporates both of *Kleypas*' recommended statements and correctly instructs the jury that '[m]itigating circumstances need not be proved beyond a reasonable doubt.'"). Although the Court cannot "infer too much" from these revisions, it can and should "infer from these changes at least *some* concern . . . that juries could misunderstand the previous instructions as to . . . the consideration of mitigating evidence by individual jurors." *Mills*, 486 U.S. at 382.

2. Contrary to the State's arguments, these grave deficiencies cannot be overcome by either the arguments of counsel or the fact that mitigating evidence was introduced without challenge. See Pet'r Br. 38–42. Those considerations are not "factors" that *Boyde* places on par with the language of the actual jury instructions. See, *supra*, at 14–15. And even if they were, they exacerbated rather than alleviated the constitutional infirmities of the jury instructions in this case.

First, the State is wrong to claim that the closing arguments must have clarified the jurors' confusion. The State points to the prosecutor's statements in closing that the jury "should consider and weigh *eve-*

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must be considered in context; the fact that another case did not find cognizable error (under the deferential AEDPA standard) based on the silence of the instructions at issue on unanimity establishes nothing about the effect of the silence of the instructions in this case on the burden of proof.

rything admitted into evidence . . . that bears on the aggravating or mitigating circumstances," and that the jurors should "put whatever weight [they] want on the mitigating circumstances individually or collectively or however [they] want to do it in [their] own individual minds." Pet'r Br. 40-41. These statements do nothing to clarify the standard of proof against which mitigating evidence must be tested. Indeed, by telling the jurors to "consider and weigh *everything* . . . that bears on" both aggravating *and* mitigating circumstances, the prosecutor again indicated to the jury that the two types of factors were to be evaluated in the same way. (This was also just a repetition of Instruction No. 2, see App. 1a.) And the prosecutor's latter statement merely suggests that the jurors can give a particular mitigating factor whatever weight they feel appropriate—*after* they have "found [it] to exist."

The prosecutor's argument on this point should be read in its full context. The prosecutor argued:

> The State has to prove . . . beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances found to exist. So you got the aggravating circumstances. You got the mitigating circumstances. Individually, you put whatever weight you want on the mitigating circumstances individually or collectively or however you want to do it in your own individual minds and then ask yourself the question are any of those . . . mitigating circumstances alleged by the defense, do any of those . . . outweigh the aggravators, because they have to outweigh them.

Pet. App. 150-51.

In context, the prosecutor's argument provides no more clarification than the jury instructions themselves, because he skips a step: how the jury is to go about finding *which* mitigating circumstances exist. Instead, just like the instructions, the prosecutor discusses aggravating and mitigating circumstances and the "beyond a reasonable doubt" standard in the same breath. The prosecutor then provides the same basic instruction as do Jury Instructions 8 through 11: take the aggravators and the mitigators, and weigh them against each other. The prosecutor at no point said that mitigating factors need not be found beyond a reasonable doubt.

The prosecutor's remaining statements were not just unhelpful, but affirmatively misleading. The State makes much of the fact that the language of the instruction on mitigation (Instruction No. 7, App. 3a-4a) "said nothing about considering only mitigation which was 'proven.'" Pet'r Br. 20. The same, however, cannot be said for the prosecutor's arguments, which repeatedly emphasized that mitigating circumstances had to be proved before they could be considered: "[t]he defense contends some of these [circumstances] are mitigating. Okay. Now, this is what they contend. The question for you is *do they exist? Was there evidence to prove them?*" Pet. App. 147 (emphasis added). In every-day usage, and certainly in a courtroom, the word "prove" carries a connotation of certainty, and thus comports with the rigorous "beyond a reasonable doubt" standard.[4] Consequently, even more so than the phrases "found to exist" or "shown to exist" in the instructions, this argument strongly suggested that the jury must assess whether suffi-

[4] *See, e.g.,* Oxford English Dictionary (3d ed. 2007) ("1. *trans.* To establish as true; *to make certain*; to demonstrate the truth of by evidence . . ." (emphasis added)).

cient evidence was introduced to prove definitively the asserted mitigating factors—and the only available standard to make that determination was "beyond a reasonable doubt." Certainly, asking whether "there [was] evidence to prove them" does not even hint at the *correct* standard, under which each juror can consider any mitigator that the defense has proffered.

The State also points to the statements of both the prosecutor and defense counsel that "mitigators do not have to be proven unanimously" and suggests that this somehow clears up any confusion with respect to the proper burden of proof for those factors. Pet'r Br. 40-41. But the clarification that the jurors need not find a mitigating factor unanimously does nothing to lessen the reasonable likelihood that the jurors will believe they must find that each mitigating factor, individually, has been proven beyond a reasonable doubt before it can be included in the subsequent weighing process.

Further, as the State admits, the prosecution *did* challenge Mr. Gleason's attempt to establish certain mitigating circumstances (although it does not admit the full scope of that challenge). See Pet'r Br. 39. The prosecutor emphasized Mr. Gleason's supposed failure of proof as to his inability to appreciate the nature of his actions:

> The first [mitigating factor is that] the capacity of Sidney Gleason to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Did you hear any evidence about that? Did you hear any evidence that he had somehow impaired his ability to follow society's laws or to —that he was somehow had some mental problem that he couldn't conform his conduct to our

> laws? Did you hear any evidence of that alleged mitigating factor? Did you?

Pet. App. 148. Similarly, as to the ability of a term of imprisonment to protect the public, the prosecutor asked: "[c]an you find that one to exist based upon the evidence? Did you hear any evidence of that?" *Id.* There is no way to understand these arguments other than as a direct challenge to Mr. Gleason's evidentiary showing, which necessarily implicates the burden of proof against which that showing must be measured.

Finally, unlike in *Boyde*, the unchallenged introduction of mitigation evidence, by itself, cannot help assuage this concern. There, "the introduction without objection of volumes of mitigating evidence" bolstered the Court's conclusion that the jurors would not have applied the challenged instructions in a way that required them to simply ignore all of that evidence. See 494 U.S. at 383-84. But here, that same fact establishes nothing, because the question in this case is not whether the jury thought it could even *consider* the mitigating evidence that was introduced, but rather what burden of proof that evidence was to be measured against. As noted above, the jury was instructed that it "should consider . . . everything admitted into evidence . . . that bears on either an aggravating or a mitigating circumstance." App. 1a. Thus, the jury may well have understood from the fact that mitigation evidence was presented without objection that it did not have to ignore that evidence outright, but the other jury instructions made it reasonably likely that the jurors tested that evidence against the highest burden of proof known to the legal system. See *Addington* v. *Texas*, 441 U.S. 418, 423-24 (1979) (noting the rigor of the "beyond a reasonable doubt" standard). Nor, unlike in *Boyde*, could

anyone reasonably contend that Mr. Gleason presented "volumes" of mitigating evidence. Thus, the mere introduction of mitigation evidence proves nothing.

* * *

The State does not dispute that the erroneous application of the "beyond a reasonable doubt" standard creates a reasonable likelihood that the jury would not give effect to relevant mitigation evidence. Nor could it. "[T]he standard of proof is a crucial component of legal process," *Santosky* v. *Kramer*, 455 U.S. 745, 785 (1982), and the "beyond a reasonable doubt" standard is "designed to exclude as nearly as possible" a judgment based on insufficient proof, *Addington*, 441 U.S. at 423-24, by "impress[ing] on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue," *In re Winship*, 397 U.S. 358, 364 (1970) (citation omitted). The vast gulf between "utmost certainty," *id.*, and *no burden of proof at all* is more than sufficient to prevent a jury from giving effect to relevant mitigation evidence, and the State does not suggest otherwise. And that constitutional problem is compounded where the instructions' ambiguity means that some juries will apply the higher standard, and some the lower. See *Mills*, 486 U.S. at 383-84.

3. The problems detailed above are not the sort of "technical hairsplitting" that the Court cautioned against in *Boyde*. 494 U.S. at 381. On the contrary, they are amply supported by empirical research on jury confusion regarding mitigation evidence, and especially the applicable burden of proof. Moreover, the judgment below is consistent with the practice of a clear majority of other jurisdictions, including both civilian and military federal courts, which already instruct juries as to the defendant's burden of proof on

mitigating factors. Given that a jury's task "can be of great difficulty even when instructions [on the burden of proof] are altogether clear," jurors should not be left to guess at the meaning of instructions that are "malleable" or "obscure," *Victor* v. *Nebraska*, 511 U.S. 1, 23 (1994) (Kennedy, J., concurring), much less affirmatively misleading.

For more than two decades, scholars have documented that jurors' "lack of understanding of the standards of proof applicable to mitigating circumstances . . . hamper the decisionmaking process." Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1, 9 (1993). For example, in South Carolina (as in Kansas) mitigating evidence need not meet any particular standard of proof, but (unlike in Kansas) the state courts had not adopted instructions saying so. *Id.* at 10. Research related to South Carolina capital juries reveals that "jurors do not infer the correct legal standard" in the face of silence from the trial judge. *Id.* Instead, fully *half* of the jurors "incorrectly believe that a mitigating factor must be proven beyond a reasonable doubt," and "[l]ess than a third of jurors understand that mitigating factors need only be proved to the juror's personal satisfaction." *Id.* at 11. The problem is not merely the instructions' silence; it is also the "general prominence" of "the traditional criminal law standard of proof"—beyond a reasonable doubt. *Id.* at 10-11.

Other research supports these conclusions. See Ursula Bentele & William J. Bowers, *How Jurors Decide On Death: Guilt Is Overwhelming; Aggravation Requires Death; And Mitigation Is No Excuse*, 66 Brook. L. Rev. 1011, 1045 (2001) ("Jurors in some of the cases also seemed to find that the evidence offered did not adequately prove the mitigating facts, perhaps

because of common misperceptions about the burden of proof on such evidence."); James Frank & Brandon K. Applegate, *Assessing Juror Understanding of Capital-Sentencing Instructions*, 44 Crime & Delinquency 412 (1998) (finding that jurors were more likely to misunderstand mitigation factors than aggravating factors). Interviews with former jurors have revealed significant confusion regarding their instructions, the language used to define their role, and the parameters guiding their capital sentencing decisions. See John Robert Barner, *Life Or Death Decision Making: Qualitative Analysis Of Death Penalty Jurors*, 13 Qualitative Social Work 842 (2013). Taken together, this research, the ambiguous and misleading jury instructions, and the prosecutor's closing arguments show that the Kansas Supreme Court's concerns in this case were well-founded.

It should be unsurprising, then, that the clear majority of other jurisdictions do provide affirmative instructions on the burden of proof for mitigating circumstances. Of the thirty-one states that have the death penalty, at least twenty-four explicitly announce the defendant's burden of proof for mitigating factors via statute or case law,[5] and most of those call for an express instruction on this point, often both identifying the defendant's burden and distinguishing it from the prosecution's greater burden to prove ag-

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[5] *See* Colo. Rev. Stat. § 18-1.3-1201(d) (no burden of proof); *Weeks* v. *State*, 653 A.2d 266, 271–72 (Del. 1995) (preponderance); *Bivins* v. *State*, 642 N.E.2d 928, 949–50 (Ind. 1994) (preponderance); *Delo* v. *Lashley*, 507 U.S. 272, 276–77 (1993) (per curiam) (Missouri; no burden); N.H. Rev. Stat. § 630:5.III (preponderance); *State* v. *Rhines*, 548 N.W.2d 415, 437 (S.D. 1996) (no burden); *State* v. *Lafferty*, 20 P.3d 342, 376 (Utah 2001) (no burden); *Olsen* v. *State*, 67 P.3d 536, 589 (Wyo. 2003) (preponderance).

gravating factors. See, *e.g.*, Fla. Standard Jury Instr. (Criminal) 7.11 (2015) ("A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. A mitigating circumstance need only be proved by the greater weight of the evidence, which means evidence that more likely than not tends to prove the existence of a mitigating circumstance. If you determine by the greater weight of the evidence that a mitigating circumstance exists, you may consider it established and give that evidence such weight as you determine it should receive . . .").[6]

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[6] *See also* Order Amending Ala. Pattern Jury Instrs., App'x (Ala. Sup. Ct. Nov. 9, 2007) ("The defendant does not bear a burden of proof in this regard. All the defendant must do is simply present the evidence."); Ariz. Jury Instrs., – Criminal, Capital Case 2.6 (2014) ("The defendant bears the burden of proving the existence of any mitigating circumstance . . . by a preponderance of the evidence. . . . [T]he defendant need not prove its existence beyond a reasonable doubt . . . ."); 1-10 Ark. Model Jury Instructions – Criminal, AMCI 2d 1008 (2014) ("Unlike an aggravating circumstance, you are not required to be convinced of the existence of a mitigating circumstance beyond a reasonable doubt. A mitigating circumstance is shown if you believe from the evidence that it probably exists."); *Stinski* v. *State*, 691 S.E.2d 854, 873 (Ga. 2010) (approving pattern instructions explaining "that no particular burden of proof rests on the defendant to show mitigating circumstances"); Idaho Criminal Jury Instructions – ICJI 1718, Jury Deliberations (2010) ("The existence of mitigating circumstances need not be proven beyond a reasonable doubt."); *State* v. *Langley*, 711 So.2d 651, 675 (La. 1998) (approving instruction: "[t]he law does not provide for a burden of proof with respect to mitigating circumstances."); N.C.P.I – Criminal 150.11, Death Penalty – Peremtory Instruction – Statutory Mitigating Circumstance(s) (1991) ("The defendant has the burden of establishing this mitigating circumstance by the preponderance of the evidence …."); Ohio Jury Instructions – Criminal, 2-CR 503 OJI CR 503.011 (2014) ("The defendant does not have any burden of proof."); Okla. Jury Instructions – Criminal, OUJI-CR § 4-78 (2009) ("mitigating circumstances do not have to be proved beyond a

Likewise, the federal courts explicitly instruct juries on the defendant's burden to prove mitigating circumstances, and expressly "describe [to the jury] how this burden differs from the government's." Molly Treadway Johnson & Laural L. Hooper, *Resource Guide For Managing Capital Cases, Volume 1: Federal Death Penalty Trials* 58 (2001). The federal death penalty statute requires the defendant to establish mitigators "by a preponderance of the information." 18 U.S.C. § 3593(c). As the State concedes, Pet'r Br. 37 n.4, federal jury instructions implementing this provision include explicit instruction on the defendant's burden of proof. For example, Judge Sand's authoritative compilation of model instructions offers this example:

> There are some important distinctions that I want to highlight for you with respect to the proof of mitigating factors. *The Defendant has the burden of proving any mitigating factors.* However, there is a *different* standard of proof as to mitigating factors. The Defendant is *not re-*

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reasonable doubt in order for you to consider them"); Or. Unif. Criminal Jury Instr., Or. UCrJI No. 1322 (2014) ("[t]here is no burden of proof for mitigating circumstances"); Pa. Suggested Criminal Jury Instrs., Pa. SSJI (Crim) 15.2502F (2014) ("the defendant only has to prove [a mitigating circumstance] by a preponderance of the evidence, that is, by the greater weight of the evidence"); *State* v. *Hicks*, 499 S.E.2d 209, 215 (S.C. 1998) (instruction read: "*it is not necessary that you find beyond a reasonable doubt any mitigating circumstances existed*"); Tenn. Pattern Jury Instrs. – Criminal, T.P.I. Criminal 7.04(a) (2014) ("The defendant does not have the burden of proving a mitigating circumstance."); Texas Criminal Jury Charges § 6:390 (2014) ("No burden of proof exists for either the State or defendant to prove or disprove mitigation."); 11 Wash. Prac., Pattern Jury Instrs. Criminal 31.05 (3d ed.) (2008) ("The defendant does not have to prove the existence of any mitigating circumstances or the sufficiency of any mitigating circumstances.").

> *quired to prove beyond a reasonable doubt* the existence of a mitigating factor; he need only establish its existence by a *preponderance of the evidence*. That is to say, you need only be convinced that it is more likely true than not true in order to find that the mitigating factor exists.

Leonard B. Sand et al., Modern Federal Jury Instructions 9A-8 (emphases added).[7] And federal courts instructing capital sentencing juries in recent years have uniformly provided express instructions regarding the defendant's burden.[8]

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[7] *See also* Fed. Judicial Ctr., *Benchbook for U.S. District Court Judges* 120 (6th ed. 2013) ("A mitigating factor should be taken as true if it has been established by a preponderance of the evidence. *Distinguish between the reasonable doubt and preponderance tests*." (emphasis added)); Criminal Pattern Jury Instr. Comm. of the United States Court of Appeals for the Tenth Circuit, *Criminal Pattern Jury Instructions* 364 (2011 ed.) ("[T]he defense is under no obligation to establish the existence of any mitigating factors . . . . The defendant need only prove these mitigating factors by a preponderance of the evidence . . . ."); Judicial Comm. on Model Jury Instrs. for the Eighth Circuit, *Manual of Model Criminal Jury Instructions For The District Courts Of The Eighth Circuit* 776 (2014 ed.) ("It is the defendant's burden to establish any mitigating factors, by a preponderance of the evidence. To prove something by the preponderance of the evidence is to prove that it is more likely true than not true.").

[8] Since 2009, federal juries have sentenced fourteen people to death. Of the twelve for whom transcripts or filed instructions are electronically accessible, every one has had the benefit of an express instruction regarding the burden for mitigators. *See* Penalty Phase Verdict Sheet at 16, *United States* v. *Tsarnaev*, No. 13-cr-10200 (D. Mass. May 13, 2015), ECF No. 1417; Trial Tr. Vol. 17 at 2253:11–2254:9, *United States* v. *Torrez*, No. 11-cr-115 (E.D. Va. Dec. 8, 2014), ECF No. 450; Penalty Phase Jury Instructions at 8, 21, *United States* v. *Coonce*, No. 10-cr-03029 (W.D. Mo. May 30, 2014), ECF No. 807; Sentencing Hr'g Tr. at 16:19–17:15, *United States* v. *Lewis*, No. 07-cr-550 (E.D. Pa. June 3, 2013), ECF No. 1428; Trial Tr. Vol. XXII at 4470:16–

The same practice governs—contrary to the State's claims, see Pet'r Br. 37—in capital courts martial in the military justice system. It is true that the defendant in a military capital case has no burden to prove mitigation. See R.C.M. 1004(b). It is also true, as the State contends, that the Rules for Courts Martial do not expressly require informing the members of the panel that the defendant need not prove mitigating circumstances beyond a reasonable doubt. But the Rules achieve the same result: by requiring the military judge to "instruct the members that they *must* consider *all* evidence in extenuation and mitigation before they may adjudge death." *Id.* (emphases added). And the model instructions in the Military Judges' Benchbook do just that, directing the members to consider *all* applicable mitigating circumstances. See Dep't of the Army, *Military Judges' Benchbook* 1189 (2014) ("[Y]ou should consider the following extenuating and mitigating circumstances: [listing all applicable circumstances]"). Because members "*must* consider *all*" mitigating evidence in any event, they need not make any findings at all with respect to mitigation. See *United States* v. *Curtis*, 32 M.J. 252, 268 (C.M.A. 1991) (noting that by eliminating any requirement to find mitigating factors, Rule 1004 "avoids the problem posed in" *Mills*, *i.e.*, that jurors might believe they were required to agree on the existence of particular circumstances).

4472:5, *United States* v. *Aquart*, No. 06-cr-160 (D. Conn. May 11, 2012), ECF No. 1160; Eligibility/Sentencing Phase Tr. at 89:4–9, *United States* v. *Ayala*, No. 08-cr-134 (W.D.N.C. Jan. 30, 2011), ECF No. 1347; Trial Tr. Vol. 8 at 1507:16–25, *United States* v. *Snarr,* No. 9-cr-15 (E.D. Tex. Oct 6, 2010), ECF No. 411; Trial Tr. Vol. 4 at 761:5–762:5, *United States* v. *Ebron*, No. 08-cr-36 (E.D. Tex. Sept. 2, 2009), ECF No. 256; Penalty Phase Tr. at 7914:17–7915:11, *United States* v. *Varela*, No. 06-cr-80171 (S.D. Fla. Mar. 17, 2009), ECF No. 818.

This broadly-employed practice reflects a consensus that jurors should not be left to speculate as to the burden of proof for mitigating circumstances. As this case demonstrates, that is especially true when the instructions repeatedly emphasize only one burden of proof and do so in a way that suggests aggravating and mitigating circumstances should be evaluated the same way.

4. The State urges that a victory for Mr. Gleason here will call into question the capital sentences of numerous other defendants, and open the sentencing regimes of other states to constitutional attack. See Pet. App. 14, 30; Pet'r Br. 34-38. Not so.

First, as described above, see, *supra*, at 27-31, many other jurisdictions already instruct on the burden of proof for mitigating circumstances. There is no way for the Court's ruling in this case to impact the sentences of defendants sentenced in those jurisdictions.

Second, contrary to the State's assertions, *e.g.,* Pet'r Br. 23, the Kansas court did not adopt, and affirmance does not require, a rule that the Eighth Amendment always requires an affirmative instruction on the burden for mitigating circumstances. On the contrary, the issue here is a narrow one: whether *these* jury instructions, as given in *this* case, created a reasonable likelihood that *this* jury thought it was barred from giving effect to relevant mitigating evidence. Resolving this question requires nothing more than a straightforward application of *Boyde* and *Mills*. A different set of jury instructions that is silent on the burden for mitigating evidence, but that does not share the specific problematic features of the

instructions in this case, may pass constitutional muster.[9]

In turn, it is irrelevant that the Eighth Amendment gives the States some discretion to adopt a specific burden of proof (or lack thereof) for mitigating evidence. See Pet'r Br. 24 (citing *Marsh*, 548 U.S. at 171). What matters here is that, through their legislature, the people of Kansas' have chosen not to require capital defendants to meet any particular burden of proof. Having done so, Kansas cannot adopt jury instructions that, through opacity and ambiguity, arbitrarily deny some defendants (but not others) the benefit of that decision. Indeed, the State concedes that an affirmative instruction on the burden of proof would "be required . . . where the instructions as a whole otherwise would . . . create a reasonable likelihood that the jury would understand the instructions to prevent it from considering mitigating circumstances." Pet'r Br. 25. That is precisely what happened here. As a result, "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey* v. *Georgia*, 446 U.S. 420, 433 (1980).

II. THE DECISION BELOW RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

In the alternative, the Court should decline to reach the merits of the Eighth Amendment issue and instead hold that the decision below rests on an ade-

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[9] Further, the Court's ruling in this case—insofar as it announces a new rule at all—may well be deemed procedural rather than substantive, and therefore would not be retroactive. *Cf. Schriro* v. *Summerlin*, 542 U.S. 348, 353 (2004). Thus, there is even less force to the State's dire predictions of disruption.

quate and independent state ground (or, barring that, dismiss the writ of certiorari as improvidently granted). The driving force behind the Kansas Supreme Court's decision in this case was the enforcement of its command in *Kleypas*, 40 P.3d 139, reiterated in *Scott*, 183 P.3d, that "any instruction dealing with the consideration of mitigating circumstances should state [that] they need to be proved only to the satisfaction of the individual juror in the juror's sentencing decision and not beyond a reasonable doubt." *Kleypas*, 40 P.3d at 268. Although the court below said that this issue also "implicate[s]" the Eighth Amendment's protections, Pet. App. 102, the decision independently rests on the state court's understanding of the Kansas capital punishment statute, which would dictate the same result on remand. Thus, there is an adequate and independent state ground for the decision. In the interests of respecting the State's sovereignty and avoiding an advisory opinion, the Court should decline to reach the merits of this case.

1. The Kansas Supreme Court first considered this issue in *Kleypas*. There, the defendant argued (among other things) that the instructions in his case "prevented the jury from considering any mitigating circumstance that the jury did not unanimously find existed," in violation of *Mills* and *McKoy*. See 40 P.3d at 266–67. The court disagreed; it held that part of the challenged instruction was impermissible because it allowed the imposition of the death penalty where aggravators and mitigators were in equipoise,[10] but found the instruction relating to juror unanimity to be "a correct statement of law [that] satisfies the *Mills* and *McKoy* requirements." *Id.* at 268.

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[10] This holding was reversed in *Marsh*, 548 U.S. at 173.

The *Kleypas* court separately declared, however, that "any instruction dealing with the consideration of mitigating circumstances should state . . . they need to be proved only to the satisfaction of the individual juror in the juror's sentencing decision and not beyond a reasonable doubt." *Id.* This holding simply reflects the allocation of burdens in the State's capital punishment statute, which requires the jury to find "beyond a reasonable doubt that one or more . . . aggravating circumstances . . . exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist." Kan. Stat. Ann. § 21-6617(e).

Seven years later, the Kansas high court reiterated this holding in *Scott*, which again considered a claim regarding juror unanimity as to mitigating circumstances. See 183 P.3d at 836–38. After finding the challenged instruction improper on unanimity grounds under *Mills* and *Boyde*, the court *again* cautioned that any instruction dealing with mitigating circumstances should provide that "they need to be proved only to the satisfaction of the individual juror in the juror's sentencing decision and not beyond a reasonable doubt." *Id.* at 837 (quoting *Kleypas*, 40 P.3d at 268). As in *Kleypas*, this statement was not part of the court's federal constitutional holding, which related only to juror unanimity rather than the applicable burden of proof. See *id.* Instead, it was based upon the Court's construction of the State's statutory scheme and the court's precedent.

Here, the Kansas court merely applied these two prior rulings. It discussed *Kleypas* and *Scott*, noting that the State's model jury instructions were "inexplicably" not amended to include the burden-of-proof instruction required by those cases. Pet. App. 96.

And, "despite th[e] court's repeated recognition of the required content of penalty-phase mitigating circumstances instructions," the trial court in this case erroneously used this deficient model instruction. *Id.* at 99.

The court acknowledged that this Court "has explained that its Eighth Amendment jurisprudence on capital sentencing should not be interpreted as creating any constitutional requirements as to how or whether a capital jury should be instructed on the burden of proof for mitigating circumstances." Pet. App. 100 (citing *Walton* v. *Arizona*, 497 U.S. 639, 649-51 (1990)). Thus, the court's analysis was not predicated on the Eighth Amendment but rather on the "critical" fact that (as recognized in *Kleypas* and *Scott*) Kansas's death penalty statute favors defendants by imposing no burden of proof for mitigating circumstances. *Id.* The court held that the jury instructions in this case were improper because they failed to comport with that statutory allocation of burdens:

> Because K.S.A. 21-4624 expressly burdens the State with proving the existence of aggravating circumstances beyond a reasonable doubt but places no evidentiary burden regarding the existence of mitigating circumstances on the defendant beyond the burden of production, we reiterate our holding in *Kleypas* and *Scott* that capital juries in Kansas must be informed that mitigating circumstances need not be proven beyond a reasonable doubt. Because the instruction given in this case failed to do so, it was erroneous.

Pet. App. 102.

2. Two separate considerations militate against reaching the merits here. *First*, "where the judgment

of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [this Court's] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Michigan* v. *Long*, 463 U.S. 1032, 1038 n.4 (1983) (citation omitted). The court below merely applied its prior cases construing the State's death penalty statute to require a particular jury instruction. See Pet. App. 99-102. That holding, based on a state statute and prior state court decisions, is neither "interwoven with" nor dependent on federal law. See *Long*, 463 U.S. at 1040-41.

A comparison to *Long* is instructive. There, the state court merely cited the state constitution twice (once in a footnote); otherwise, the court "relied *exclusively* on its understanding of . . . federal cases. Not a single state case was cited to support the state court's holding . . . ." *Id.* at 1037 n.3, 1043. Here, by contrast, the court below relied squarely and expressly on *Kleypas* and *Scott*. There can be no question that the Kansas Supreme Court's decision was based on the State's death penalty statute as construed in those cases. And the Kansas court expressly *disclaimed* that it was adopting the very federal constitutional rule the State now claims it embraced. See Pet. App. 100-101 (discussing *Walton*, 497 U.S. at 649-51).

It is true that, having resolved the issue on state law grounds, the court also discussed this Court's Eighth Amendment precedents and considered whether the instructions in this case posed a constitutional problem. See Pet. App. 94-95, 102-03. But the mere mention, or even lengthy discussion, of federal law in a state court opinion does not mean the case was not resolved on state law grounds. Cf. *Coleman* v. *Thompson*, 501 U.S. 722, 732 (1991)

("State court opinions will, at times, discuss federal questions at length and mention a state law basis for decision only briefly."); *Herb* v. *Pitcairn*, 324 U.S. 117, 127 (1945) (noting that state courts often discuss state and federal law in tandem "because it is not necessary to their functions to make a sharp separation of the two").

Here, the court's Eighth Amendment analysis was at most an alternative holding. See Pet. App. 101 (explaining that the instruction required in *Kleypas* "*both* preserves the statute's favorable distinction *and* protects a capital defendant's Eighth Amendment right to individualized sentencing" (emphasis added)). And this Court has made clear that, "[b]y its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law." *Harris* v. *Reed*, 489 U.S. 255, 264 n.10 (1989). Thus, "a state court need not fear reaching the merits of a federal claim in an *alternative* holding." *Id.* That would remain true even if the Kansas court were wrong about the constitutional question here; as this Court has long held, where the state law issues "actually decided by the State court … are sufficient to maintain the judgment of that court, notwithstanding the error in deciding the Federal question," the Court "would not be justified in reversing the judgment of the State court." *Murdock* v. *City of Memphis*, 87 U.S. 590, 635 (1874).

Because the decision below was amply supported by state law grounds, a reversal by this Court on federal grounds will not change the result. Under Kansas law, even if no federal constitutional right is implicated, an erroneous jury instruction requires reversal unless the "Kansas court [is] persuaded that there is

no reasonable probability that the error" affected the verdict. *State* v. *Ward*, 256 P.3d 801, 818 (Kan. 2011); see *State* v. *Bolze-Sann*, No. 105, 297, 2015 WL 3814861, at *10 (Kan. June 19, 2015); cf. *State* v. *Smith-Parker*, 340 P.3d 485, 506-07 (Kan. 2014) (instruction misstating jury's obligation to convict if elements of the crime were proven beyond a reasonable doubt was erroneous). In the Kansas Supreme Court's view, the instructions given in this case were inconsistent with the State's death penalty statute, as explicated in its prior decisions. Pet App. 95-102. Its construction of that statute is not a novel one for the Kansas court; it is firmly entrenched. See *id.* Thus, the same result can and will obtain on remand, making any decision from this Court purely advisory. See *Long*, 463 U.S. at 1042 ("[I]f the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."). "When this Court reviews a state court decision on direct review pursuant to 28 U.S.C. § 1257, it is reviewing the *judgment*; if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do." *Coleman*, 501 U.S. at 730.

Second, this alternative ground for affirmance is reinforced here by interests of comity and federalism. Cf. *Kelly* v. *Robinson*, 479 U.S. 36, 49 (1986) (noting "the States' interest in administering their criminal justice systems free from federal interference"); *Juidice* v. *Vail*, 430 U.S. 327, 335-36 (1977) (similar). Kansas, like every other State, has the right to afford its criminal defendants more robust protections than are strictly required by the federal Constitution or adopted by other States. See *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975) (noting that "a State is free as a matter of its own law to impose greater restrictions

… than those this Court holds to be necessary upon federal constitutional standards").

Kansas has chosen to do so in this context. Cf. *Marsh*, 548 U.S. at 173 (unlike Arizona's death penalty statute, "the Kansas statute requires the State to bear the burden of proving to the jury, beyond a reasonable doubt, that aggravators are not outweighed by mitigators and that a sentence of death is therefore appropriate; it places no additional evidentiary burden on the capital defendant. This distinction operates in favor of Kansas capital defendants."). The Court should not interfere with the State Supreme Court's interpretation and application of the State capital punishment statute, which is based on the State's choice to strike a particular balance between the prosecution's goals in pursuing capital punishment and the defendant's interests. Cf. *Bond* v. *United States*, 131 S. Ct. 2355, 2366 (2011) ("Impermissible interference with state sovereignty is not within the enumerated powers of the National Government, and action that exceeds the National Government's enumerated powers undermines the sovereign interests of States." (citation omitted)).

CONCLUSION

For the foregoing reasons, the judgment of the Kansas Supreme Court should be affirmed.

Respectfully submitted,

JEFFREY T. GREEN
TOBIAS S. LOSS-EATON
BRIAN CORMAN
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIV.
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

SARAH ELLEN JOHNSON *
MERYL CARVER-ALLMOND
CAPITAL APPELLATE
DEFENDER OFFICE
700 Jackson, Suite 903
Topeka, KS 66603
sjohnson@sbids.org
(785) 368-6587

Counsel for Respondent

August 3, 2015 * Counsel of Record

APPENDIX

[Dated April 21, 2006]

INSTRUCTION NO. 1

The laws of Kansas provide that a separate sentencing proceeding shall be conducted when a defendant has been found guilty of capital murder to determine whether the defendant shall be sentenced to death. At the hearing, the trial jury shall consider aggravating or mitigating circumstances relevant to the question of the sentence.

It is my duty to instruct you in the law that applies to this sentencing proceeding, and it is your duty to consider and follow all of the instructions. You must decide the question of the sentence by applying these instructions to the facts as you find them.

INSTRUCTION NO. 2

In your determination of sentence, you should consider and weigh everything admitted into evidence during the guilt phase or the penalty phase of this trial that bears on either an aggravating or a mitigating circumstance. This includes testimony of witnesses, admissions or stipulations of the parties, and any admitted exhibits. You must disregard any testimony or exhibit which I did not admit into evidence.

INSTRUCTION NO. 3

At times during the trial, I have ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.

INSTRUCTION NO. 4

Statements, arguments and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded.

INSTRUCTION NO. 5

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.

INSTRUCTION NO. 6

Aggravating circumstances are those which increase the guilt or enormity of the crime or add to its injurious consequences, but which are above or beyond the elements of the crime itself.

The State of Kansas contends that the following aggravating circumstances are shown from the evidence:

1. That Sidney Gleason was previously convicted of a felony in which Sidney Gleason inflicted great bodily harm or disfigurement on another; and

2. That Sidney Gleason knowingly or purposely killed or created a great risk of death to more than one person; and

3. That Sidney Gleason committed the crime in order to avoid or prevent a lawful arrest or prosecution; and

4. That the victim was killed while engaging in, or

because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.

In your determination of sentence, you may consider only those aggravating circumstances set forth in this instruction.

INSTRUCTION NO. 7

Mitigating circumstances are those which in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, even though they do not justify or excuse the offense.

The appropriateness of exercising mercy can itself be a mitigating factor in determining whether the State has proved beyond a reasonable doubt that the death penalty should be imposed.

The determination of what are mitigating circumstances is for you as jurors to decide under the facts and circumstances of the case. Mitigating circumstances are to be determined by each individual juror when deciding whether the State has proved beyond a reasonable doubt that the death penalty should be imposed. The same mitigating circumstances do not need to be found by all members of the jury in order to be considered by an individual juror in arriving at his or her sentencing decision.

Sidney Gleason contends that mitigating circumstances include, but are not limited to, the following:

1. The capacity of Sidney Gleason to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

2. The age of Sidney Gleason at the time of the crime.

3. A term of imprisonment is sufficient to defend and protect the people's safety from Sidney Gleason.

4. Crimes related to this case include significant participation and planning on the part of Damian Thompson.

5. Damian Thompson has received a life sentence that will make him eligible for parole in less than 23 years.

6. Sidney Gleason's mother, Irene Gleason, was sent to prison when he was a young boy.

7. All three of Irene Gleason's sons are in custody.

8. When living with Betty Cornelius, Sidney Gleason was an obedient child and an excellent student.

9. His mother, his brothers, and Aunt Betty love Sidney Gleason.

You may further consider as a mitigating circumstance any other aspect of the defendant's character, background or record, and any other aspect of the offense which was presented in either the guilt or penalty phase which you find may serve as a basis for imposing a sentence less than death. Each of you must consider every mitigating circumstance found to exist.

INSTRUCTION NO. 8

The State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by

any mitigating circumstances found to exist.

INSTRUCTION NO. 9

In making the determination whether aggravating circumstances exist that are not outweighed by any mitigating circumstances found to exist, you should keep in mind that your decision should not be determined by the number of aggravating or mitigating circumstances that are shown to exist.

INSTRUCTION NO. 10

If you find unanimously beyond a reasonable doubt that one or more aggravating circumstances exist and that they are not outweighed by any mitigating circumstances found to exist, then you shall impose a sentence of death. If you sentence Sidney Gleason to death, you must designate upon the appropriate verdict form with particularity the aggravating circumstances which you unanimously found beyond a reasonable doubt.

However, if one or more jurors is not persuaded beyond a reasonable doubt on the burden of proof in the paragraph above, then you should sign the appropriate alternative verdict form indicating the jury is unable to reach a unanimous verdict sentencing Sidney Gleason to death. In that event, Sidney Gleason will not be sentenced to death but will be sentenced by the court as otherwise provided by law.

INSTRUCTION NO. 11

If, at the conclusion of your deliberations, the jury finds that the mitigating circumstances outweigh the aggravating circumstances, then the Court will sen-

tence Sidney Gleason pursuant to the Kansas Sentencing Guidelines Act as follows:

Count One — Capital murder: Life imprisonment with parole eligibility of 25 years or 50 years;

Count Two — Murder in the first degree: Imprisonment for life with parole eligibility of 25 years or 50 years;

Count Three — Aggravated kidnapping: 258 to 285 months imprisonment;

Count Four — Aggravated robbery: 55 to 61 months imprisonment; and

Count Five — Criminal possession of firearm: 7 to 9 months imprisonment.

All of the sentences may be imposed to run concurrently or consecutively with each other within the discretion of the Court.

INSTRUCTION NO. 12

At the conclusion of your deliberations, you shall sign the verdict form upon which you agree.

You have been provided verdict forms which provide the following alternative verdicts:

A. Finding unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances found to exist, and sentencing Sidney Gleason to death;

OR

B. Stating that the jury is unable to reach a unanimous verdict sentencing Sidney Gleason to death.

INSTRUCTION NO. 13

When you retire to the jury room you will first select one of your members as Presiding Juror. The person selected will preside over your deliberations, will speak for the jury in Court, and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

Your agreement upon a verdict sentencing Sidney Gleason to death must be unanimous.

/s/ Hannelore Kitts
HANNELORE KITTS
District Judge, Div II, Twentieth Judicial District

4-21-06
Date