

Casenote

***Kansas v. Marsh*: A Thumb on the Scale of Death?**

In *Kansas v. Marsh*,¹ the United States Supreme Court held that it is not unconstitutional for a state's death penalty statute to require a death sentence when a sentencing jury finds aggravating and mitigating factors to be in equipoise.² Extending its previous decision in *Walton v. Arizona*,³ the Court explicitly determined that this type of sentencing met the requirements of *Furman v. Georgia*⁴ and *Gregg v. Georgia*,⁵ holding that no other constraint is imposed by the Constitution.⁶ While the repercussions of this decision may not be widely felt, they do indicate the direction the Court is heading in death penalty jurisprudence.

I. FACTUAL BACKGROUND

Michael Lee Marsh II wanted to take a trip to Alaska. In order to obtain the money for the trip, Marsh devised a plan to hold his friend

1. 126 S. Ct. 2516 (2006).

2. *Id.* at 2520.

3. 497 U.S. 639 (1990), *overruled on other grounds by* Ring v. Arizona, 536 U.S. 584 (2002).

4. 408 U.S. 238 (1972).

5. 428 U.S. 153 (1976).

6. *Marsh*, 126 S. Ct. at 2522, 2524.

Eric Pusch's wife, Marry, and child, M.P., captive, threatening to hurt them unless Pusch gave Marsh the money. However, Marry arrived home with her nineteen-month-old baby girl earlier than Marsh had expected, and in a panic, he shot Marry several times, stabbed her, and slashed her throat. Marsh then set fire to the Pusch home, using an accelerant on Marry's body to start the fire. M.P. died in the fire. When the police questioned Marsh, he confessed to killing Marry, but alternately admitted and denied setting the fire.⁷

Marsh was charged with capital murder of M.P., first-degree murder of Marry, aggravated arson, and aggravated burglary.⁸ The jury convicted Marsh, finding three statutory aggravating factors to support a death sentence: "(1) Marsh knowingly or purposely killed or created a great risk of death to more than one person; (2) he committed the crime in order to avoid or prevent a lawful arrest or prosecution; and (3) he committed the crime in an especially heinous, atrocious or cruel manner."⁹ The jury further found that no mitigating factors existed to outweigh the aggravating factors and unanimously voted to impose the death penalty on Marsh. The trial judge found sufficient evidence to support the sentence. Marsh was also sentenced to eighty-five months imprisonment for his other crimes.¹⁰

Marsh appealed his sentence directly to the Kansas Supreme Court, facially challenging the wording of Kansas's death penalty statute, Kansas Statutes Annotated section 21-4624(e),¹¹ that called for a death sentence when aggravating factors and mitigating factors are found by a jury to be in equipoise:

If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 . . . exist[s] and, further, that the existence of such aggravating circumstances *is not outweighed* by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise the defendant shall be sentenced [as provided by law].¹²

The Kansas Supreme Court agreed with Marsh's argument that the statute created an unconstitutional presumption in favor of death because of its requirement of death when the aggravating and mitigating factors are equal.¹³ The United States Supreme Court granted certiora-

7. State v. Marsh, 102 P.3d 445, 452-53 (Kan. 2004).

8. *Id.* at 453.

9. *Id.*

10. *Id.*

11. KAN. STAT. ANN. § 21-4624(e) (1995).

12. *Id.* (emphasis added).

13. *Marsh*, 102 P.3d at 458.

ri to consider whether the requirement of the Kansas death penalty statute was unconstitutional.¹⁴

II. LEGAL BACKGROUND

A. *The Modern Era of Capital Punishment*

The way capital punishment is administered in this country was forever changed in 1972 when the Supreme Court decided *Furman v. Georgia*,¹⁵ abolishing the death penalty as it was currently being applied. The Court held the application of the death penalty to be “cruel and unusual” in violation of the Eighth and Fourteenth Amendments.¹⁶ The Court’s main issue with the death penalty was its arbitrary application, allowed by broad jury discretion. Justice Stewart, in his concurring opinion, went so far as to describe the death penalty as “wanton and . . . freakishly imposed.”¹⁷

After *Furman* was decided, the states bustled to enact death penalty legislation that would satisfy the Supreme Court’s qualms. In *Gregg v. Georgia*,¹⁸ in 1976, the Court allowed the states to reinstate the death penalty with new, less arbitrary statutes.¹⁹ The Court rejected the notion that the death penalty is unconstitutional per se because there are real goals that capital punishment serves: retribution and deterrence, and the reason the death penalty was abolished in *Furman*, its arbitrary application, could be remedied.²⁰ The Georgia statute that the Court approved in *Gregg* remedied the concerns of *Furman* by providing for bifurcated proceedings, in which guilt and sentencing would be decided separately by a jury.²¹ The statute also narrowed the class of defendants that was eligible for the death penalty by creating aggravating circumstances, one of which must be found by the jury to exist before the death penalty can be considered as a punishment.²² The statute therefore sufficiently limited the jury’s discretion in imposing a death sentence.²³

14. *Marsh*, 126 S. Ct. at 2521.

15. 408 U.S. 238, 239-40 (1972).

16. U.S. CONST. amend. VIII; U.S. CONST. amend. XIV; *Furman*, 408 U.S. at 239-40.

17. *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

18. 428 U.S. 153 (1976).

19. *Id.* at 207.

20. *Id.* at 155.

21. *Id.* at 191-92.

22. *Id.* at 165-66.

23. *See id.* at 207.

Decided the same day as *Gregg, Woodson v. North Carolina*²⁴ established another requirement in the new application of the death penalty. North Carolina tried to cope with the Court's aversion to the arbitrary application of the death penalty by making the death penalty mandatory for first-degree murder, thus eliminating jury discretion altogether.²⁵ The Court held that this was not an appropriate way of dealing with the constitutional violations that arise from too much jury discretion.²⁶ Juries must be guided in wielding their discretion, an issue that mandatory death penalty statutes neither address nor remedy.²⁷ Finally, and most pertinent to the present case, *Woodson* held the North Carolina statute unconstitutional on the basis that it did not allow for an individualized determination for each defendant facing the death penalty.²⁸ In essence, juries must consider any mitigating evidence of the circumstances of the offense and the character of the offender.²⁹ The Court came to this conclusion on the basis that "death is . . . different" from any other punishment that may be imposed, therefore an individualized determination is necessary to ensure that death is appropriate in each case in which it may be imposed.³⁰

B. Mitigating Factors

In 1978 in *Lockett v. Ohio*,³¹ a plurality of the Supreme Court held that under no circumstances may a jury be precluded from considering any relevant mitigating evidence.³² The plurality defined relevant mitigating evidence as those "aspect[s] 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."³³ The plurality cited its "death is different" philosophy in allowing so much latitude to capital defendants in presenting their cases at the sentencing phase.³⁴ The plurality reversed the defendant's death sentence because the sentencer was only allowed to consider three statutory mitigating factors in determining the sentence.³⁵ The plurality was unwilling to take the

24. 428 U.S. 280 (1976).

25. *Id.* at 285-86.

26. *Id.* at 302.

27. *Id.* at 303.

28. *Id.* at 303-04.

29. *Id.* at 304.

30. *Id.* at 305.

31. 438 U.S. 586 (1978).

32. *Id.* at 604.

33. *Id.*

34. *Id.* at 605.

35. *Id.* at 589.

risk that defendants may be executed where evidence exists that may justify a more lenient sentence.³⁶ The plurality's approach was accepted by a majority of the Court in *Eddings v. Oklahoma*,³⁷ four years later.³⁸ Further, the Court held that the sentencer must not only be *able* to consider mitigating evidence but must *actually* consider the evidence.³⁹

In 1983 in *Zant v. Stephens*,⁴⁰ the Court determined that some procedures must be left up to the states.⁴¹ Death penalty statutes must narrow the class of defendants eligible for the death penalty and allow each defendant an individualized determination based on the defendant's character and the circumstances of the crime.⁴² As long as a state's statute allows for the jury's individualized determination of a defendant's case, a state does not have to outline a specific procedure for weighing aggravating evidence against mitigating evidence.⁴³ The Court upheld the defendant's death sentence partly on the grounds that all mitigating factors were considered by the jury in imposing the sentence.⁴⁴

C. *Weighing Statutes*

As long as the death-eligible class of offenders is narrow and the jury is able to make an individualized determination of the defendant, states are authorized to structure their death penalty statutes in a variety of ways. One way of structuring a statute is to mandate the weighing of aggravating and mitigating factors. In *Blystone v. Pennsylvania*,⁴⁵ the Court held that the defendant did get an individualized determination.⁴⁶ The defendant challenged the Pennsylvania statute that required imposition of the death penalty if the jury found that aggravating factors outweighed mitigating factors.⁴⁷ The Court held that the statute was not a mandatory death penalty statute barred by *Woodson* because before imposing the death penalty, the statute first required a jury determination that the aggravating factors outweighed the

36. *Id.* at 605.

37. 455 U.S. 104 (1982).

38. *Id.* at 117.

39. *Id.* at 114-15.

40. 462 U.S. 862 (1983).

41. *See id.* at 879-80.

42. *Id.* at 878-79.

43. *Id.* at 884-85, 891.

44. *Id.* at 891.

45. 494 U.S. 299 (1990).

46. *Id.* at 305, 307-08.

47. *Id.* at 306.

mitigating factors.⁴⁸ If the jury determined that the aggravating factors did not outweigh the mitigating factors, there would be no death sentence.⁴⁹ The jury found one aggravating factor against the defendant and no mitigating factors. The aggravating factor narrowed the defendant into the class of those eligible for the death penalty, and the jury's instruction to consider "any 'matter concerning the character or record of the defendant, or the circumstances of his offense'" was sufficient to give him an individualized determination.⁵⁰

In the same term, the Court decided *Boyde v. California*,⁵¹ similarly holding that it was enough that the jury be instructed to consider all relevant mitigating evidence to satisfy a defendant's right to an individualized determination.⁵² In *Boyde* the defendant did proffer mitigating evidence on his own behalf, unlike in *Blystone*, but the Court allowed the jury's determination that Boyde's mitigating evidence did not outweigh the aggravating evidence against him.⁵³ The Court rejected the defendant's argument that the Constitution requires juries to be allowed to recommend a lesser sentence even when it finds aggravation outweighs mitigation.⁵⁴ Although many states have statutes that allow such discretion, the Court held that there is no requirement of "unfettered sentencing discretion in the jury."⁵⁵ The Court once again placed discretionary decisions like this in the hands of the state legislatures.⁵⁶

In yet another case from the 1990 term, *Walton v. Arizona*,⁵⁷ the Court continued its examination of statutes challenged as creating a presumption that death is the proper sentence. The Arizona statute provided that the court "shall" impose the death penalty if aggravating circumstances are found, and mitigating factors are found insufficient to call for leniency.⁵⁸ In conclusory language, the Court pointed to *Blystone* and *Boyde* as precedent that precluded holding Arizona's sentencing statute unconstitutional.⁵⁹ The Court concluded that the

48. *Id.* at 305.

49. *Id.* at 305, 307.

50. *Id.* at 307-08.

51. 494 U.S. 370 (1990).

52. *Id.* at 377.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. 497 U.S. 639 (1990), *overruled on other grounds by* Ring v. Arizona, 536 U.S. 584 (2002).

58. ARIZ. REV. STAT. ANN. § 13-703(E) (1989).

59. *Walton*, 497 U.S. at 651.

Arizona statute was no different from those in *Blystone* and *Boyde*, though not explaining why or how.⁶⁰ The Court continued this hands-off policy recently in *Kansas v. Marsh*.

III. COURT'S RATIONALE

In *Kansas v. Marsh*, the Supreme Court granted certiorari to consider whether a statute that imposes the death penalty where aggravating and mitigating factors weigh equally is constitutional.⁶¹ The Court concluded that it is constitutional.⁶²

A. *The Majority*

Justice Thomas's majority opinion concentrated on three main points in support of its holding: (1) that *stare decisis* directs the holding, citing *Walton v. Arizona*,⁶³ (2) that the Kansas statute adheres to *Furman v. Georgia*⁶⁴ and *Gregg v. Georgia*⁶⁵ by narrowing the class of defendants eligible for the death penalty, and also allowing the jury to consider all mitigating evidence, adhering to *Lockett v. Ohio*,⁶⁶ and (3) discounts the dissent's assertion of DNA's important role in exonerating defendants who were sentenced to death in doubtful cases.⁶⁷

The Court began its analysis by pointing out that this case is controlled by the Court's previous holding in *Walton*.⁶⁸ The Court cited its reasoning from *Blystone v. Pennsylvania*⁶⁹ and *Boyde v. California*,⁷⁰ that a statute that allows a jury to consider any mitigating evidence meets constitutional bounds.⁷¹ The Court denied that the question posed here was not also before the Court in *Walton*, stating that a failure to explicitly discuss times of "equipose" in *Walton* is not enough to distinguish the two cases.⁷² The Court further cited the dissent in *Walton* for support that the same issue had been previously before the Court, therefore, the majority in *Walton* must be followed.⁷³

60. *Id.* at 652.

61. 126 S. Ct. 2516, 2520 (2006).

62. *Id.*

63. 497 U.S. 639 (1990).

64. 408 U.S. 238 (1972).

65. 428 U.S. 153 (1976).

66. 438 U.S. 536 (1978).

67. *Marsh*, 126 S. Ct. at 2520-29.

68. *Id.* at 2522.

69. 494 U.S. 299 (1990).

70. 494 U.S. 370 (1990).

71. *Marsh*, 126 S. Ct. at 2523.

72. *Id.*

73. *Id.*

Further, the Court compared the Arizona statute from *Walton* and the Kansas statute at issue here.⁷⁴ The Court pointed out that both statutes have “been consistently construed to mean that the death penalty will be imposed upon a finding that aggravating circumstances are not outweighed by mitigating circumstances.”⁷⁵ Finally, the Court noted that the Kansas statute is more lenient than the Arizona statute previously held constitutional, at least in the allocation of burdens.⁷⁶ The Arizona statute allocated the defendant the burden of proving mitigating evidence sufficient to overcome any aggravating factors proven by the state, while the Kansas statute requires the state to overcome any mitigating factors produced by the defendant.⁷⁷

Second, the Court held that even without following *Walton*, the Constitution does not require holding the Kansas statute unconstitutional.⁷⁸ The Court held that the statute meets previously held requirements of the Eighth Amendment as described *Furman*, *Gregg*, and *Lockett*.⁷⁹ According to the Court, the first requirement that a statute must narrow the class of defendants eligible for the death penalty was indisputably met; the use of statutory aggravating factors achieves this.⁸⁰ The second requirement that relevant mitigating evidence be admitted and considered by the jury was the requirement at issue here. The Court pointed out that there is no constitutional requirement for how juries must weigh mitigating evidence.⁸¹ Citing *Boyde*, the Court noted that mandatory language of a statute does not preclude a jury from considering all of the relevant mitigating evidence.⁸²

The Court rejected Marsh’s argument that the Kansas statute creates a presumption in favor of imposing death.⁸³ The Court stated that the statute actually presumes that death is not the appropriate punishment because the state has the burden of proving first, the existence of aggravating factors to make the defendant eligible for death, and second,

74. *Id.* at 2524.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 2524-25.

80. *Id.* at 2525-26.

81. *Id.* at 2525 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988) (plurality opinion citing *Zant*, 462 U.S. at 875-76)).

82. *Id.* at 2427.

83. *Id.*

that any mitigating factors do not outweigh those aggravating factors.⁸⁴ If the state fails to meet its burden, death cannot be imposed.⁸⁵

The Court refused to accept Marsh's argument that juries may use a determination that aggravating and mitigating factors are equally balanced in order to avoid making a decision explicitly for or against a death sentence in doubtful cases.⁸⁶ The Court held that there can be no confusion because the Kansas jury instructions clearly inform the jury that a vote that factors are in equipoise is a vote for the imposition of the death penalty.⁸⁷ The Court followed the presumption that juries listen to and follow instructions.⁸⁸

Finally, the Court rejected the dissent's consideration of DNA exoneration of people on death row.⁸⁹ The majority held that any reflection on this issue was irrelevant to the constitutionality of Kansas's sentencing statute.⁹⁰ The majority rejected the dissent's view that the DNA issue should establish a rule making it harder to impose the death penalty in all cases.⁹¹ The majority accepted that the death penalty is not imposed perfectly in this country, stating that precedent allows capital punishment even when not imposed flawlessly.⁹²

B. Justice Stevens's Dissent

Writing his own dissent, Justice Stevens began by pointing out the problem with the majority following *Walton v. Arizona* as precedent.⁹³ Justice Stevens joined Justice Blackmun in his dissent in *Walton* and asserted in this case that it is consistent to also dissent.⁹⁴ According to Justice Stevens, Justice Blackmun bemoaned the plurality's opinion in *Walton* because he saw the consequences of their actions more clearly than the plurality.⁹⁵ The plurality in *Walton* would not conclude that Arizona's statute required imposition of the death penalty where aggravating and mitigating circumstances are equally balanced; therefore, the majority here could not depend on the plurality.⁹⁶ Next,

84. *Id.*

85. *Id.*

86. *Id.* at 2528.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 2539 (Stevens, J., dissenting).

94. *Id.*

95. *Id.*

96. *Id.*

Justice Stevens questioned the Supreme Court's grant of certiorari in this case because the decision will not directly affect any state except Kansas.⁹⁷ Justice Stevens cited the Court's decision in *California v. Ramos*,⁹⁸ in which the Court declined to overrule the California Supreme Court on a standard jury instruction regarding the Governor's authority to commute life sentences because "the wisdom of the decision to permit juror consideration of possible commutation is best left to the States."⁹⁹ Finally, Justice Stevens pointed out that prior to *Michigan v. Long*,¹⁰⁰ the Court rarely reviewed criminal cases in which states set aside the rulings of their own courts; Justice Stevens hoped to return to that mentality.¹⁰¹

C. Justice Souter's Dissent

Justice Souter also dissented, joined by Justice Stevens, Justice Ginsburg, and Justice Breyer. First, Justice Souter believed the imposition of the death penalty in situations where aggravating and mitigating circumstances are in equipoise would only occur in doubtful cases, and he believed that to be unconstitutional.¹⁰² Justice Souter agreed with Justice Stevens that stare decisis does not control this case and that Justice Blackmun's dissent in *Walton v. Arizona* was concerned with more than the plurality was willing to hold.¹⁰³

Justice Souter took serious exception to the majority's holding that as long as a jury considers any mitigating evidence, an individualized determination is made and the sentence is constitutional.¹⁰⁴ Justice Souter agreed that states have discretion in planning their sentencing systems but asserted that each system "must meet an ultimate test of constitutional reliability in producing 'a reasoned moral response to the defendant's background, character, and crime.'¹⁰⁵ Therefore, a sentencing system must "produce morally justifiable results."¹⁰⁶ Justice Souter criticized both the majority and the *Walton* plurality for simply equating Pennsylvania's and California's statutes in *Blystone* and

97. *Id.* at 2539-40.

98. 463 U.S. 992 (1983).

99. *Marsh*, 126 S. Ct. at 2540 (Stevens, J., dissenting) (quoting *Ramos*, 463 U.S. at 1014).

100. 463 U.S. 1032 (1983).

101. *Marsh*, 126 S. Ct. at 2541 (Stevens, J., dissenting).

102. *Id.* at 2541 (Souter, J., dissenting).

103. *Id.* at 2541 n.1.

104. *Id.* at 2544.

105. *Id.* at 2542 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

106. *Id.*

Boyd with that of Arizona and Kansas.¹⁰⁷ The difference, Justice Souter noted, is that Pennsylvania and California imposed death where the aggravating factors outweighed mitigating factors; therefore, in equipoise, Pennsylvania and California would impose life sentences.¹⁰⁸ According to Justice Souter, the majority's decision required less than a death sentence that is directly related to the individual defendant and circumstances of the crime as *Penry* requires.¹⁰⁹ Further, Justice Souter asserted that this decision places a "thumb on death's side of the scale."¹¹⁰ The death penalty will no longer be reserved for the "worst of the worst," those who are the most culpable.¹¹¹

Finally, Justice Souter cited to studies and articles that declare that the death penalty system in the United States has failed by sentencing innocent people to death.¹¹² Justice Souter pointed to Illinois's moratorium on executions in 2000, imposed after thirteen people on death row were shown to be innocent.¹¹³ Justice Souter admitted that it is early to criticize capital sentencing in this country, but the Court's policy that "death is different" should encourage the Court to be cautious in this case in upholding a tie-breaker that favors death.¹¹⁴

D. *The Concurrence: An Answer to the Dissents*

Justice Scalia's concurring opinion attacked the dissenting opinions on two points: (1) that the Supreme Court rightly accepted certiorari in this case and (2) that the dissent does not present evidence of any case where an innocent person was executed.¹¹⁵

First, Justice Scalia pointed out that if the Supreme Court refused to grant certiorari in all cases where the State is the petitioner, the Court would never review state courts' interpretations of federal law, and the Court's current docket would be greatly reduced.¹¹⁶ Next, Justice Scalia rejected the dissenters' argument that the Constitution only gave the Court the authority to hear cases that reject the "assertion of governing federal law" by stating that much of the Court's power was

107. *Id.*

108. *Id.*

109. *Id.* at 2542-43 (citing *Penry*, 492 U.S. at 319).

110. *Id.* (quoting *Socher v. Florida*, 504 U.S. 527, 532 (1992)).

111. *Id.* (citing *Roper v. Simmons*, 543 U.S. 551, 568 (2005); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

112. *Id.* at 2544-45.

113. *Id.*

114. *Id.* at 2545-46.

115. *Id.* at 2539-49 (Scalia, J., concurring).

116. *Id.* at 2530.

not originally authorized by the Constitution.¹¹⁷ Finally, Justice Scalia stated that the Court did have the authority to grant certiorari in this case because the Supreme Court has the authority to correct states' erroneous interpretations of federal law, especially the Constitution.¹¹⁸

Second, Justice Scalia took issue with Justice Souter's dissent and his assertion concerning DNA exonerations. Justice Scalia stated that DNA exoneration is an irrelevant issue because in this case, Marsh had already been convicted, so questions about his innocence have been disposed with.¹¹⁹ Justice Scalia pointed out that there is not a single case "in which it is clear that a person was executed for a crime he did not commit."¹²⁰ Justice Scalia attacked the 1987 article cited by the dissent, *Miscarriages of Justice in Potentially Capital Cases*,¹²¹ criticizing it as obsolete because it examined only old executions, the most recent being in 1984, 1964, and 1951.¹²² Justice Scalia claimed the study's conclusions were unconfirmed and pointed out that even the authors of the 1987 study admitted that.¹²³ Justice Scalia hailed the criminal justice system as the reason that exonerated defendants have been released from death row, stating that it was the system that found them innocent or exonerated.¹²⁴ He also pointed out that "exoneration" does not equate to innocence, insinuating that exonerated people who are not proven innocent do not deserve to be released.¹²⁵ After discussing several individual cases highlighting the horrifying circumstances of the murders, Justice Scalia asserted that the margin for error in executing is "reduced to an insignificant minimum."¹²⁶

IV. IMPLICATIONS

There are four implications that are initiated by *Kansas v. Marsh*. First, the decision illustrates the Court's current unwillingness to second guess state death penalty policies that meet the minimum *Furman-Gregg* standards. As this is among the first death penalty cases heard by the Court including the newest members, Chief Justice Roberts and Justice Alito, it marks the tone the Court will likely take in the future.

117. *Id.* at 2530 n.1.

118. *Id.* at 2531.

119. *Id.* at 2532.

120. *Id.* at 2533.

121. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

122. *Marsh*, 126 S. Ct. at 2534 (Scalia J., concurring).

123. *Id.*

124. *Id.* at 2535-36.

125. *See id.* at 2538-39.

126. *Id.* at 2539.

The Chief Justice seat has probably not changed very much. Chief Justice Roberts's conservative voting record as a member of the Court of Appeals for the District of Columbia shows that he will likely vote similarly to Chief Justice Rehnquist in upholding state death penalty practices. On the other hand, Justice Alito, replacing Justice O'Connor, one of the swing votes on the previous court, does not seem as likely to "fine-tune state procedures" as Justice O'Connor was, according to Kent Scheidegger of the Criminal Justice Legal Foundation.¹²⁷ For example, in *Richmond v. Lewis*,¹²⁸ Justice O'Connor wrote for the majority, reversing the Arizona Supreme Court's decision to uphold the defendant's death sentence where state appellate judges did not reweigh remaining factors after an invalidation of an unconstitutionally vague aggravating factor.¹²⁹ However, Justice O'Connor often voted to uphold state capital punishment policies. Justice Alito is expected to continue his practice from his position on the Court of Appeals for the Third District of upholding the death penalty.¹³⁰

Second, this decision shows a growing gap in how the death penalty is applied across the nation. There is already a disparity in the dispensation of capital sentences between weighing states and non-weighing states, where juries are authorized to be lenient for any reason. Allowing Kansas's unique statute to stand, the Court has blessed death sentences that will occur in equipoise cases in Kansas but not in other states. Therefore, a defendant's likelihood of receiving the death penalty depends on where he commits the crime. Critics of the death penalty will continue to point out that allowing the states great latitude in administering the death penalty will lead to greater arbitrariness in the process. Too much arbitrariness will lead to Eighth Amendment violations.

Third, as Justice Souter points out in his dissent, the Court has sanctioned a sentencing scheme that will allow and even increase the likelihood of a death sentence for offenders who are not the "worst of the worst." This decision could signal to state legislatures that an individualized determination to separate offenders who are most culpable is no longer required. Kansas's sentencing structure permits legislatures to

127. Tony Mauro, *U.S. Supreme Court 2005-2006 Term Review: Death Penalty Disquiet Echoes Earlier Time: Supreme Court Issues Batch of Conflicting Decisions*, 185 N.J.L.J. 287 (2006); see *Parker v. Dugger*, 498 U.S. 308 (1991); *Penry v. Lynaugh*, 492 U.S. 302 (1989).

128. 506 U.S. 40 (1992).

129. *Id.* at 52.

130. See *Flamer v. Delaware*, 68 F.3d 736 (3d Cir. 1995) (Justice Alito writing for the court, upholding death sentence even where an aggravating factor was held invalid by declaring Delaware's statute non-weighing).

get around the requirement outlined in *Roper v. Simmons*.¹³¹ *Roper* explained that reserving the death penalty for the most culpable is necessary in order to ensure that the field of death-eligible offenders is sufficiently narrowed and adequately applied based on each offender's individual characteristics.¹³² Without sufficient controls, we risk "placing a thumb on death's side of the scale."¹³³

Finally, Justice Souter's dissent, and even Justice Scalia's concurrence, signal a move toward giving DNA exoneration a more serious look. DNA has revolutionized the criminal justice system, allowing arguably undeniable proof of guilt or innocence in many cases. Innocence projects and foundations are being founded that are devoted to exonerating erroneously convicted individuals. Justice Souter's dissent and Justice Scalia's vehement concurrence respond to a shift in American attitudes, requiring more scientific, concrete evidence before convicting people, let alone sentencing them to death.

The concurrence and dissent in this case responded to an ongoing debate regarding DNA exoneration. This has been an issue for some time, and it has finally been addressed by the Court. In the winter of 2005, the Northwestern University School of Law held an entire symposium dedicated to innocence in capital sentencing. Advocates for both sides of the debate contributed. Samuel Gross, a law professor at the University of Michigan, argued that after having found 340 criminal defendants exonerated between 1989 and 2003, it is apparent that the system has broken down in determining guilt, let alone sentencing defendants to death.¹³⁴ One hundred twenty-three capital defendants have been exonerated since 1973.¹³⁵ Joshua Marquis, the district attorney of Clatsop County, Oregon, responded that Gross's failure rate in the criminal justice system is negligible.¹³⁶

Recently, the Brookings Institute¹³⁷ held a panel discussion of the future of the death penalty, and Justice Scalia's concurrence was discussed. Virginia E. Sloan, founder and president of Constitution

131. 543 U.S. at 568.

132. *Id.*

133. 126 S. Ct. at 2543 (Souter, J., dissenting) (quoting *Socher v. Florida*, 504 U.S. 527 532 (1992)).

134. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523-24 (2005).

135. DEATH PENALTY INFORMATION CENTER, THE INNOCENCE LIST (2006), <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110>.

136. Joshua Marquis, *The Innocent and the Shammed*, 40 PROSECUTOR 40, 40 (2006).

137. The Brookings Institution, A Brookings Judicial Issues Forum: What Should Be the Future of the Death Penalty? Sept. 5, 2006, http://www.brookings.edu/comm/events/20060905_deathpenalty.pdf (last visited Fed. 14, 2006).

Project, responded to Justice Scalia with examples of people who had been wrongly convicted and sentenced to death and called attention to the lack of resources in exonerating people who have already been executed because the resources necessarily have to be used to help those who are still alive.¹³⁸ Further, in 2003, then Illinois governor George Ryan commuted the sentences of all 167 prisoners on Illinois's death row following a two-year moratorium and the creation of a commission to examine the death penalty in Illinois.¹³⁹ Kent Scheidegger, in support of Justice Scalia, responded that innocent people who are sentenced to die are more likely to be exonerated than those sentenced to life in prison because the resources are channeled to those on death row¹⁴⁰—a problem in itself. The gravity of capital punishment necessitates sacrificing helping non-death defendants who may be innocent due to the shortage of resources. We do not know how many innocent people sit in prison because they have no one to help them. The debate continues on DNA and capital innocence, and the fact that a majority of the Court's Justices got involved in the debate signals that a more serious look at these issues and more critique of the capital guilt and sentencing procedures are forthcoming.

ELIZABETH BRANDENBURG

138. *Id.* at 39-40.

139. *See generally* ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT, REPORT (2002), <http://state.il.us/defender/report.pdf> (reporting the findings of Illinois Governor George Ryan's Commission on Capital Punishment).

140. The Brookings Institution, *supra* note 137, at 40-41.