KANSAS v MARSH

SUPREME COURT OF THE UNITED STATES
126 S. Ct. 2516
June 26, 2006
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OPINION: Justice Thomas/**Roberts**/Scalia/Kennedy/**Alito**...Kansas law provides that if a unanimous jury finds that aggravating circumstances are not outweighed by mitigating circumstances, the death penalty shall be imposed. We must decide whether this statute, which requires the imposition of the death penalty when the sentencing jury determines that aggravating evidence and mitigating evidence are in equipoise, violates the Constitution. We hold that it does not.

...Michael Lee Marsh II broke into the home of Marry Ane Pusch and lay in wait for her to return. When Marry Ane entered her home with her 19-month-old daughter, M. P., Marsh repeatedly shot Marry Ane, stabbed her, and slashed her throat. The home was set on fire with the toddler inside, and M. P. burned to death. The jury convicted Marsh of the capital murder of M. P., the first-degree premeditated murder of Marry Ane, aggravated arson, and aggravated burglary. The jury found beyond a reasonable doubt the existence of three aggravating circumstances, and that those circumstances were not outweighed by any mitigating circumstances. On the basis of those findings, the jury sentenced Marsh to death for the capital murder of M. P. The jury also sentenced Marsh to life imprisonment without possibility of parole for 40 years for the first-degree murder of Marry Ane, and consecutive sentences of 51 months' imprisonment for aggravated arson and 34 months' imprisonment for aggravated burglary.

On direct appeal, Marsh challenged §21-4624(e), which reads:

> "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 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."

...Marsh argued that §21-4624(e) establishes an unconstitutional presumption in favor of death because it directs imposition of the death penalty when aggravating and mitigating circumstances are in equipoise. The Kansas Supreme Court agreed...We...reverse...

Justice Alito and Chief Justice Roberts have arrived on the scene.

[O]ur decisions in *Furman*[1] and *Gregg*[2] establish that a state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime. So long as a state system satisfies these requirements, our precedents establish that a State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed...

In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here. "**We have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required**."...

Consonant with the individualized sentencing requirement, a Kansas jury is permitted to consider *any* evidence relating to *any* mitigating circumstance in determining the appropriate sentence for a capital defendant, so long as that evidence is relevant...

Jurors are then apprised of, but not limited to, the factors that the defendant contends are mitigating. They are then instructed that "each juror must consider every mitigating factor that he or she individually finds to exist."

...Contrary to Marsh's argument, §21-4624(e) does not create a general presumption in favor of the death penalty in the State of Kansas. Rather, the Kansas capital sentencing system is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction. If the State fails to meet its burden to demonstrate the existence of an aggravating circumstance(s) beyond a reasonable doubt, a sentence of life imprisonment must be imposed. If the State overcomes this

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[1]Case 8A-CUP-10 on this website.

[2]Case 8A-CUP-11 on this website.

hurdle, then it bears the additional burden of proving beyond a reasonable doubt that aggravating circumstances are not outweighed by mitigating circumstances. Significantly, although the defendant appropriately bears the burden of proffering mitigating circumstances -- a burden of production -- he never bears the burden of demonstrating that mitigating circumstances outweigh aggravating circumstances. Instead, the State always has the burden of demonstrating that mitigating evidence does not outweigh aggravating evidence. Absent the State's ability to meet that burden, the default is life imprisonment. Moreover, if the jury is unable to reach a unanimous decision -- in any respect -- a sentence of life must be imposed. This system does not create a presumption that death is the appropriate sentence for capital murder...

The dissent's general criticisms against the death penalty are ultimately a call for resolving all legal disputes in capital cases by adopting the outcome that makes the death penalty more difficult to impose...[T]he logical consequence of the dissent's argument is that the death penalty can only be just in a system that does not permit error. Because the criminal justice system does not operate perfectly, abolition of the death penalty is the only answer to the moral dilemma the dissent poses. **This Court, however, does not sit as a moral authority. Our precedents do not prohibit the States from authorizing the death penalty, even in our imperfect system. And those precedents do not empower this Court to chip away at the States' prerogatives to do so on the grounds the dissent invokes today.**

Unchip, unchip, unchip...

We hold that the Kansas capital sentencing system, which directs imposition of the death penalty when a jury finds that aggravating and mitigating circumstances are in equipoise, is constitutional. Accordingly, we reverse the judgment of the Kansas Supreme Court, and remand the case for further proceedings not inconsistent with this opinion.

CONCURRENCE: Justice Scalia...I must say a few words (indeed, more than a few) in response to [that part of] Justice Souter's dissent [that] contains the disclaimer that the dissenters are not (*yet*) ready to "generalize about the soundness of capital sentencing across the country"; **but that is in fact precisely what they do**. The dissent essentially argues that capital punishment is such an undesirable institution -- it results in the condemnation of such a large number of innocents -- that any legal rule which eliminates its pronouncement, including the one favored by the dissenters in the present case, should be embraced.

As a general rule, I do not think it appropriate for judges to heap either praise or censure upon a legislative measure that comes before them, lest it be thought that their validation, invalidation, or interpretation of it is driven by their desire to expand or constrict what they personally approve or disapprove **as a matter of policy**. In the present case, for example, people might leap to the conclusion that the dissenters' views on whether Kansas's equipoise rule is constitutional are determined by their personal disapproval of an institution that has been democratically adopted by 38 States and the United States. But of course that requires no leap; just a willingness to take the

dissenters at their word. For as I have described, the dissenters' very argument is that imposition of the death penalty should be minimized by invalidation of the equipoise rule because it is a bad, "risky," and "hazardous" idea. A broader conclusion that people should derive, however (and I would not consider this much of a leap either), is that the dissenters' encumbering of the death penalty in *other* cases, with unwarranted restrictions neither contained in the text of the Constitution nor reflected in two centuries of practice under it, will be the product of their policy views -- views not shared by the vast majority of the American people. The dissenters' proclamation of their policy agenda in the present case is especially striking because it is nailed to the door of the wrong church -- that is, set forth in a case litigating a rule that has nothing to do with the evaluation of guilt or innocence...But as the Court observes, guilt or innocence is logically disconnected to the challenge in *this* case to *sentencing* standards. The *only* time the equipoise provision is relevant is when the State has proved a defendant guilty of a capital crime.

There exists in some parts of the world sanctimonious criticism of America's death penalty, as somehow unworthy of a civilized society. (I say sanctimonious, because most of the countries to which these finger-waggers belong had the death penalty themselves until recently -- and indeed, many of them would still have it if the democratic will prevailed.) It is a certainty that the opinion of a near-majority of the United States Supreme Court to the effect that our system condemns many innocent defendants to death will be trumpeted abroad as vindication of these criticisms. For that reason, I...point out that the dissenting opinion has nothing substantial to support it.

It should be noted at the outset that the dissent does not discuss a single case -- not one -- in which it is clear that a person was executed for a crime he did not commit. If such an event had occurred in recent years, we would not have to hunt for it; the innocent's name would be shouted from the rooftops by the abolition lobby. The dissent makes much of the new-found capacity of DNA testing to establish innocence. But in every case of an **executed** defendant of which I am aware, that technology has ***confirmed* guilt**.

This happened, for instance, only a few months ago in the case of Roger Coleman. Coleman was convicted of the gruesome rape and murder of his sister-in-law, but he persuaded many that he was actually innocent and became the poster-child for the abolitionist lobby. Around the time of his eventual execution, "his picture was on the cover of Time magazine ('This Man Might Be Innocent. This Man Is Due to Die'). He was interviewed from death row on 'Larry King Live,' the 'Today' show, 'Primetime Live,' 'Good Morning America' and 'The Phil Donahue Show.'" Even one Justice of this Court, in an opinion filed shortly before the execution, cautioned that "Coleman has now produced substantial evidence that he may be innocent of the crime for which he was sentenced to die." Coleman ultimately failed a lie-detector test offered by the Governor of Virginia as a condition of a possible stay; he was executed on May 20, 1992.

In the years since then, Coleman's case became a rallying point for abolitionists, who hoped it would offer what they consider the "Holy Grail: proof from a test tube that an innocent person had been executed." But earlier this year, a DNA test ordered by a later Governor of Virginia proved that

Coleman was guilty...even though his defense team had "proved" his innocence and had even identified "the real killer" (with whom they eventually settled a defamation suit). And Coleman's case is not unique...Instead of identifying and discussing any particular case or cases of mistaken execution, the dissent simply cites a handful of studies that bemoan the alleged prevalence of wrongful death sentences...

Remarkably avoiding any claim of erroneous executions, the dissent focuses on the large numbers of *non*-executed "exonerees" paraded by various professors. It speaks as though exoneration came about through the operation of some outside force to correct the mistakes of our legal system, rather than *as a consequence of the functioning of our legal system.* Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success. Those devices are part and parcel of the multiple assurances that are applied before a death sentence is carried out.

Of course even in identifying exonerees, the dissent is willing to accept anybody's say-so...The dissent places significant weight, for instance, on the Illinois Report (compiled by the appointees of an **Illinois Governor** who had declared a moratorium upon the death penalty and who eventually commuted all death sentences in the State), which it claims shows that "false verdicts" are "remarkable in number." The dissent claims that this Report identifies 13 inmates released from death row **after they were determined to be innocent**. To take one of these cases, discussed by the dissent as an example of a judgment "as close to innocence as any judgments courts normally render," the defendant was twice convicted of murder. After his first trial, the Supreme Court of Illinois "reversed his conviction based upon certain evidentiary errors" and remanded his case for a new trial. The second jury convicted [him] again. The Supreme Court of Illinois again reversed the conviction because it found that the evidence was insufficient to establish guilt beyond a reasonable doubt...

This case alone suffices to refute the dissent's claim that the Illinois Report distinguishes between "exoneration of a convict because of actual innocence, and reversal of a judgment because of legal error affecting conviction or sentence but not inconsistent with guilt in fact." The broader point, however, is that it is utterly impossible to regard "exoneration" -- however casually defined -- as a failure of the capital justice system, rather than as a vindication of its effectiveness in releasing not only defendants who are innocent, but those whose guilt has not been established beyond a reasonable doubt.

Another of the dissent's leading authorities on exoneration of the innocent is Gross, Jacoby, Matheson, Montgomery, & Patil. The dissent quotes that study's self-congratulatory "criteria" of exoneration -- seemingly so rigorous that no one could doubt the study's reliability. But in fact that article, like the others cited, is notable not for its rigorous investigation and analysis, but for the fervor of its belief that the American justice system is condemning the innocent "in numbers," as the dissent puts it, "never imagined before the development of DNA tests." Among the article's list of 74 "exonerees" is Jay Smith of Pennsylvania. Smith -- a school principal -- earned three death sentences for slaying one of his teachers and her two young children. His retrial for triple murder was

barred on double jeopardy grounds because of prosecutorial misconduct during the first trial. But Smith could not leave well enough alone. He had the gall to sue, under 42 U.S.C. §1983, for false imprisonment. The Court of Appeals for the Third Circuit affirmed the jury verdict for the defendants, observing along the way that "our confidence in Smith's convictions is not diminished in the least. We remain firmly convinced of the integrity of those guilty verdicts."

Another "exonerated" murderer in the Gross study is Jeremy Sheets, convicted in Nebraska. His accomplice in the rape and murder of a girl had been secretly tape recorded; he "admitted that he drove the car used in the murder..., and implicated Sheets in the murder." The accomplice was arrested and eventually described the murder in greater detail, after which a plea agreement was arranged, conditioned on the accomplice's full cooperation. The resulting taped confession, which implicated Sheets, was "the crucial portion of the State's case." But the accomplice committed suicide in jail, depriving Sheets of the opportunity to cross-examine him. This, the Nebraska Supreme Court held, rendered the evidence inadmissible under the Sixth Amendment. After the central evidence was excluded, the State did not retry Sheets. Sheets brought a §1983 claim; the U.S. Court of Appeals for the Eighth Circuit affirmed the District Court's grant of summary judgment against him. Sheets also sought the $1,000 he had been required to pay to the Nebraska Victim's Compensation Fund; the State Attorney General -- far from concluding that Sheets had been "exonerated" and was entitled to the money -- refused to return it. The court action left open the possibility that Sheets could be retried, and the Attorney General did "not believe the reversal on the ground of improper admission of evidence...is a favorable disposition of charges."

...Of course, even with its distorted concept of what constitutes "exoneration," the claims of the Gross article are fairly modest: Between 1989 and 2003, the authors identify 340 "exonerations" *nationwide* -- not just for capital cases, mind you, nor even just for murder convictions, but for various felonies. Joshua Marquis, a district attorney in Oregon, recently responded to this article as follows:

> "Let's give the professor the benefit of the doubt: let's assume that he understated the number of innocents by roughly a factor of 10, that instead of 340 there were 4,000 people in prison who weren't involved in the crime in any way. During that same 15 years, there were more than **15 million felony convictions** across the country. That would make the error rate .027 percent -- or, to put it another way, **a success rate of 99.973 percent**."

The dissent's suggestion that capital defendants are *especially* liable to suffer from the lack of 100% perfection in our criminal justice system is implausible. Capital cases are given especially close scrutiny at every level, which is why in most cases many years elapse before the sentence is executed...The proof of the pudding, of course, is that as far as anyone can determine (and many are looking), ***none*** **of the cases included in the .027% error rate for American verdicts involved a capital defendant erroneously executed.**

Since 1976 there have been approximately a half million murders in the United States. In that time,

7,000 murderers have been sentenced to death; about 950 of them have been executed; and about 3,700 inmates are currently on death row. **As a consequence of the sensitivity of the criminal justice system to the due-process rights of defendants sentenced to death, almost two-thirds of all death sentences are overturned. "Virtually none" of these reversals, however, are attributable to a defendant's "actual innocence." Most are based on legal errors that have little or nothing to do with guilt. The studies cited by the dissent demonstrate nothing more**.

Like other human institutions, courts and juries are not perfect. One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly... But with regard to the punishment of death in the current American system, that possibility has been reduced to an insignificant minimum. This explains why those ideologically driven to ferret out and proclaim a mistaken modern execution have not a single verifiable case to point to, whereas it is easy as pie to identify plainly guilty murderers who have been set free. The American people have determined that the good to be derived from capital punishment -- in deterrence, and perhaps most of all in the meting out of **condign** justice for horrible crimes -- outweighs the risk of error. **It is no proper part of the business of this Court, or of its Justices, to second-guess that judgment, much less to impugn it before the world, and less still to frustrate it by imposing judicially invented obstacles to its execution...**

Condign – deserved.

DISSENT: Justice Souter/Stevens/Ginsburg/Breyer...[T]he period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests. We cannot face up to these facts and still hold that the guarantee of morally justifiable sentencing is hollow enough to allow maximizing death sentences, by requiring them when juries fail to find the worst degree of culpability: when, by a State's own standards and a State's own characterization, the case for death is "doubtful."

A few numbers from a growing literature will give a sense of the reality that must be addressed. When the Governor of Illinois imposed a moratorium on executions in 2000, 13 prisoners under death sentences had been released since 1977 after a number of them were shown to be innocent, as described in a report which used their examples to illustrate a theme common to all 13, of "relatively little solid evidence connecting the charged defendants to the crimes." During the same period, 12 condemned convicts had been executed. Subsequently the Governor determined that 4 more death row inmates were innocent. Illinois had thus wrongly convicted and condemned even more capital defendants than it had executed, but it may well not have been otherwise unique; one recent study reports that between 1989 and 2003, 74 American prisoners condemned to death were exonerated,...many of them cleared by DNA evidence. Another report states that "more than 110" death row prisoners have been released since 1973 upon findings that they were innocent of the crimes charged, and "hundreds of additional wrongful convictions in potentially capital cases have been documented over the past century." Most of these wrongful convictions and sentences resulted from eyewitness misidentification, false confession, and (most frequently) perjury and the total

shows that among all prosecutions homicide cases suffer an unusually high incidence of false conviction, probably owing to the combined difficulty of investigating without help from the victim, intense pressure to get convictions in homicide cases, and the corresponding incentive for the guilty to frame the innocent.

...While it is far too soon for any generalization about the soundness of capital sentencing across the country, the cautionary lesson of recent experience addresses the tie-breaking potential of the Kansas statute: the same risks of falsity that infect proof of guilt raise questions about sentences, when the circumstances of the crime are aggravating factors and bear on predictions of future dangerousness.

In the face of evidence of the hazards of capital prosecution, maintaining a sentencing system mandating death when the sentencer finds the evidence pro and con to be in equipoise is obtuse by any moral or social measure...[T]he Kansas law is unconstitutional.