U.S. SUPREME COURT RULES KANSAS DEATH PENALTY IS CONSTITUTIONAL

Case Summary: *Kansas* v. *Marsh* – Judgment given 26th June 2006

Mark George*

Michael Marsh was convicted by a Kansas jury of a number of charges, including first degree murder and capital murder committed in 1996, and sentenced to death. On appeal the Kansas Supreme Court allowed his appeal on two grounds[1] and remanded the case for re-trial on the capital murder allegation.

The first ground was that the trial court misapplied the Kansas "third party evidence rule" and wrongly prevented Marsh from adducing evidence to show that another person had committed the murders. Marsh had wanted to call evidence that it was in fact the husband of the deceased ("P") who had killed her and their child. Before trial the State filed a motion *in limine* invoking the third party evidence rule, arguing that since they would be calling direct evidence to establish Marsh's guilt the rule prevented Marsh from relying on circumstantial evidence alone to rebut the State's evidence. The trial court upheld the State's argument.

On appeal the Kansas Supreme Court held that this amounted to reversible error. What Kansas law stated was that, "where the State relies on direct rather than circumstantial evidence for conviction, evidence offered by defendant to indicate a *possible motive* of someone other than the defendant to commit the crime is incompetent absent some other evidence to connect the third party with the crime" (emphasis added): *State* v. *Neff*.[2] In this case Marsh was not intending to rely upon mere motive but proffered circumstantial evidence that P was the real murderer. Accordingly the trial judge should have assessed the relevance of this evidence and the failure to do so amounted to error.

The Court also found other reasons why the judge's ruling was wrong.

The Court also found other reasons why the judge's ruling was wrong. First, the third party evidence rule should not have been applied to the capital murder charge since in truth the State's evidence was circumstantial rather than direct.[3] Secondly, regardless of the error in the judge's ruling on the State's motion *in limine*, since P gave evidence for the prosecution at the trial, this "opened the door" to the evidence connecting P to the crime.[4] The Court held that these errors "violated Marsh's fundamental right to a fair trial" and ordered a new trial on the capital murder charge.

So far this case turned only upon the correct interpretation of State law. However the other ground on which the defendant's appeal was allowed involved constitutional issues and it was this which ultimately led to the case coming before the U.S. Supreme Court. First however it is necessary to consider the decision of the Kansas Supreme Court on this issue.

At the penalty phase of Marsh's trial the jury was directed in accordance with K.S.A. 21-4624(e). This 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 and amendments thereto 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."

The jury in Marsh's case were directed that this statute meant that a tie must go to the State. In other words, in the event of what is called "equipoise", i.e. the jury finds that any

**Barrister, Garden Court North Chambers, Manchester.*

aggravating features are exactly balanced by any mitigating circumstances, the death penalty would be required.

After Marsh was sentenced to death the Kansas Supreme Court decided in the case of *State* v. *Kleypas*[5] that the so-called "weighing equation" was in breach of the Eighth and Fourteenth Amendments to the U.S. Constitution.[6] The Court had only avoided striking down the death penalty statute by reading its words as meaning the opposite of what it actually said and awarding a tie to the defence where life or death was at issue. By reason of this previous binding decision of the State Supreme Court the State conceded that Marsh's death sentence had to be vacated and the case remanded for further consideration of the appropriate penalty.

The Court also concluded that the attempt to prop up the death penalty statute in *Kleypas* was invalid and that they had to face the simple fact that the death penalty statute was unconstitutional on its face and required legislative reform. The Court held that the statute could not be saved by the application of such canons of statutory interpretation as "the rule of constitutional doubt" whereby it is the duty of the courts to uphold a statute if it reasonably can, or the doctrine of binding precedent known as *stare decisis*.

The decision of the Kansas Supreme Court therefore left the death penalty law in a crisis. Whilst no one has been executed in Kansas since the resumption of executions after 1976, there are currently eight persons on death row and capital trials are regularly conducted.[7] Not surprisingly, therefore, the State appealed against this ruling on the issue of the constitutionality of its death penalty statute.

Opponents of the death penalty have been waiting in trepidation for George Bush to get the chance to appoint new Justices to the Supreme Court.

This case provides an early opportunity to assess the balance of forces on death penalty issues since the replacement of Chief Justice Rehnquist, who died last year, by Chief Justice Roberts, and the replacement of Justice O'Connor, who retired, by Justice Alito. Opponents of the death penalty have been waiting in trepidation for George Bush to get the chance to appoint new Justices to the Supreme Court. Bush is a strong supporter of the death penalty. As Governor of Texas he oversaw a steady increase in executions during his tenure. Because Supreme Court Justices have tenure for life, his new appointments may well influence important decisions for several decades. No one expected these appointees to show any favours to death penalty defendants. So it proved in this case, where both joined the resident reactionaries, Justices Scalia and Thomas in the five-four majority judgment,[8] as did (more disappointingly) Justice Kennedy.[9]

In upholding the constitutionality of the Kansas death penalty statute 21-4624(e) the majority considered that they were bound by their decision in *Walton* v. *Arizona*[10] in which the Supreme Court had to resolve the conflict between two Arizona cases[11] as to whether the Arizona death penalty statute was constitutional. The Supreme Court in Walton held that the Arizona statute was constitutional, stating:

> "So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency."[12]

In the present case the Supreme Court's majority considered that the issue of whether a death penalty statute that required that a death sentence be imposed, where the mitigating circumstances did not outweigh the aggravating features, had been dealt with in *Walton*. The majority considered that although the term "equipoise" was not actually used in that case, the judgement in *Walton* clearly applied in such a situation. The Court felt reinforced in its conclusion by the fact that the Arizona and Kansas statutes are similar in important respects. The Court noted that the Arizona statute had been consistently interpreted as meaning that a death sentence would be imposed if the mitigating circumstances did not outweigh the aggravating circumstances and that both statutes required the State to prove the existence of aggravating features.

In these circumstances the Supreme Court declined to distinguish *Walton* and held that the

reasoning in that case required them to approve the Kansas death penalty statute, stating:

> "At bottom, in *Walton*, the Court held that a State death penalty statute may place the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances. *A fortiori*, Kansas' death penalty statute, consistent with the Constitution, may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including when the aggravating circumstances and mitigating circumstances are in equipoise."[13]

The Supreme Court also considered that even if *Walton* could be distinguished, "the general principles of our death penalty jurisprudence" would lead to the same conclusion. The landmark decisions in *Furman* v. *Georgia*[14] and *Gregg* v. *Georgia*[15] establish that a State capital sentencing system must rationally narrow the class of death eligible defendants and allow the jury to render a reasoned, individualized sentencing determination which includes giving proper weight to the mitigating evidence tendered by the defence. Providing the State system satisfies these requirements it will be constitutionally valid.

The Court went on to state that "mitigation evidence is a product of the requirement of individualized sentencing" and referred to the leading case of *Lockett* v. *Ohio*[16] which established that the sentencer must not be precluded from considering any matter put forward as potential mitigating evidence. Judged against these standards the Kansas death penalty statute satisfied the requirements of the federal Constitution.

Justice Souter wrote the opinion for the dissenters in which Justices Stevens, Ginsburg and Breyer joined. It is a powerful call for what Justice Souter describes as "a reasoned moral judgment" "in a period of new empirical argument about how 'death is different.' "[17]

He began his judgment by pointing out that in *Furman* v. *Georgia* in 1972 the Supreme Court explained that the Eighth Amendment's guarantee against cruel and unusual punishment barred the imposition of the death penalty under statutory schemes that produced "wanton and freakish results."[18] Instead the Constitution was held to require a system structured to produce reliable and rational sentencing. One necessary element in this system is that "capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"[19]

Justice Souter points out that one of the objects of structured sentencing as required in the aftermath of *Furman* was the elimination of the risk that a death sentence will be passed in spite of facts calling for a lesser sentence. This is why a statute that allows the death penalty to be imposed when the aggravating and mitigating circumstances are in equipoise fails to meet the Eighth Amendment requirement. As Justice Souter put it:

> "In Kansas, when a jury applies the State's own standards of relative culpability and cannot decide that a defendant is among the most culpable, the State law says that equivocal evidence is good enough and the defendant must die. A law that requires execution when the case for aggravation has failed to convince the sentencing jury is morally absurd, and the Court's holding that the Constitution tolerates this moral irrationality defies decades of precedent aimed at eliminating freakish capital sentencing in the United States."[20]

In Kansas, when a jury applies the State's own standards of relative culpability and cannot decide, the State law says that equivocal evidence is good enough and the defendant must die.

If the law as developed after the decision in *Furman* was a response to freakish and irrational sentencing before 1972, today's moral imperative is for "reasoned moral judgment" in the rising number of exonerations, particularly as the science of D.N.A. is applied to old convictions from a time before such evidence was available. Justice Souter quotes from the experience of the State of Illinois, where thirteen prisoners had been released since 1977 and a further four were exonerated after the Governor had been presented with evidence of their innocence, which meant that exonerations were running at a higher rate than executions in the same period. Justice Souter also referred to other studies on wrongful convictions[21] and pointed out that homicide cases suffer from an unusually high incidence of false convictions. He concludes thus:

> "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. And unless application of the Eighth Amendment no longer calls for reasoned moral judgment in substance as well as form, the Kansas law is unconstitutional."[22]

So what is the result of all this litigation? For Michael Marsh the news is good. At least he won't die. The trial court in Kansas which will have to retry him for the capital murder is bound by the decision of the State Supreme Court that the State death penalty statute is unconstitutional, which means that if he is reconvicted at least the State will not be able to seek the death penalty in his case. However, whilst the ruling of the U.S. Supreme Court as to the status of the state death penalty statute cannot affect Marsh personally, it does still mean that in future a capital defendant in Kansas may face the death penalty despite sufficient uncertainty on the part of the jury that they were only able to say that the aggravating features were as strong as the mitigation but no more. Readers of this *Journal* will share the dismay expressed by Justice Souter on behalf of the dissenters in this case that the ultimate penalty of death can be acceptable on such a flimsy basis.

[1] 278 Kan. 520, 102 P. 3d 445 (2004).
[2] 169 Kan 116, 218 P. 2d 248.
[3] *State* v. *Evans* 275 Kan. 95, 62 P. 3d 220 (2003).
[4] *State* v. *Bedford* 269 Kan. 315, 7 P.3d 224 (2000); *State* v. *McClanahan* 259 Kan. 86, 910 P.2d 193 (1996).
[5] 272 Kan. 894, 40 P. 3d139 (2001).
[6] The Eighth Amendment prohibits the infliction of "cruel and unusual punishment." The Fourteenth Amendment prohibits any State from depriving a person of "life, liberty, or property, without due process of law."
[7] According to Amnesty International there were fifty capital cases pending in eighteen counties in the first half of 2004. See www.k-state.edu/amnestyintl . Execution inactivity can be deceptive. In 2005 Connecticut executed its first person since 1976 and California has executed three in the past eighteeen months out of a total of thirteen since 1976 – see www.deathpenaltyinfo.org.
[8] The judgment of the Supreme Court is available at www.deathpenaltyinfo.org . Go to the link to the U.S. Supreme Court. Eventually it will be reported at 548 U.S.__(2006). In this article page references are to the Opinion of the judge being quoted.
[9] Justice Kennedy is a conservative who voted in favour of the execution of sixteen and seventeen year old in *Stanford* v. *Kentucky* 492 U.S. 361 (1989) but who has been involved in a number of more liberal judgments such as *Atkins* v. *Virginia* 536 U.S. 304 (2002) (execution of mentally retarded) and *Penry* v. *Johnson* 532 U.S. 782 (2001). In *Roper* v. *Simmons* 543 U.S. 551 he wrote the opinion of the majority which brought to an end the execution of those who were under eighteen at the time of their offence.
[10] 497 U.S. 639 (1990).
[11] *State* v. *Walton*, 159 Ariz. 571, 769 P 2d 1017 (1989) (*en banc*); *Adamson* v. *Ricketts*, 865 F 2d 1011, 1043-1044 (1988) (*en banc*).
[12] *Walton* v. *Arizona* 497 U.S. 639 (1990) at 650. Quoted by Justice Thomas at 6.
[13] Opinion of Justice Thomas at 9.
[14] 408 U.S. 238 (1972).
[15] 428 U.S. 153 (1976).
[16] 438 U.S. 586,604 (1978).
[17] 428 U.S. 188.
[18] 408 U.S. 238,309-310 (1972).
[19] Quoting *Atkins* v. *Virginia*, 536 U.S. 304, 319 (2002).
[20] Opinion of Justice Souter at 5.
[21] See 7-8 of his Opinion for details.
[22] Opinion at 9.