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Carrie L. Flores

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Comment

THE "TIE" GOES TO THE STATE IN KANSAS V. MARSH: A SMALL VICTORY FOR PROPONENTS OF THE DEATH PENALTY*¹

I. INTRODUCTION

The issue at the heart of capital punishment jurisprudence is whether imposing the death penalty violates the Eighth and Fourteenth Amendment prohibitions against cruel and unusual punishment.² Over the last twenty-five years, the United States Supreme Court has approved the use of the death penalty as an acceptable means of punishing criminals for certain violent crimes, but it has set forth requirements which a state's sentencing statute must meet to pass constitutional muster.³ For example, the statute must rationally reduce

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¹ See *State v. Marsh*, 102 P.3d 445, 457-58 (Kan. 2004) (finding that the weighing equation in Kansas's death sentencing statute was unconstitutional because when the balance of aggravating and mitigating circumstances weigh equally, according to the statute, the "tie" goes to the State and the death penalty must be imposed; and conversely, holding that "fundamental fairness requires that a 'tie goes to the defendant' when life or death is at issue."), *rev'd*, 126 S. Ct. 2516 (2006).

² See U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law[]"); U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Public opinion in the United States concerning support for the death penalty has fluctuated over time. Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501, 501 (2005). For example, it fell in the 1960s, rose with the increase of violent crime in the 1980s, and fell again in 2000. Marquis, *supra*, at 501, 503. Significantly, though, there has been a long history of Americans accepting the death penalty as punishment for the crime of murder. See *Gregg v. Georgia*, 428 U.S. 153, 176 (1976). Furthermore, over the last quarter of a century, public support for the death penalty has been strong, ranging from sixty-five to eighty-five percent, indicating that a majority of people have long-favored it. Marquis, *supra*, at 519.

³ See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (holding that because our criminal justice system is unavoidably susceptible to error, imposing the uniquely irreversible punishment by death requires utmost scrutiny to ensure that it is not cruel and unusual punishment in violation of the Eighth Amendment); *Gregg*, 428 U.S. at 189 (finding that "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."); *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (noting that the death penalty is different in nature than any other punishment in our criminal justice system and that because of the finality of a death sentence, there exists an extraordinary need for reliability in the conclusion that death is the appropriate punishment in a specific case); Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 121, 146 (1988) (acknowledging, though actually advocating for capital punishment, that using the death penalty "entails some risk that an innocent person will be executed.").

the class of death-eligible defendants and allow for an individualized sentencing determination based on the defendant's personal features, criminal record, and the circumstances of the crime.⁴ The Court's precedent further establishes that a state enjoys discretion in imposing the death penalty in a reasonable manner and in deciding how to weigh aggravating and mitigating factors surrounding the crime.⁵ Arguably, though, the Court's decisions preceding *Kansas v. Marsh* concerning the weighing of aggravating and mitigating circumstances did not address all possible questions regarding permissible statutory language.⁶ Thus, the Court granted certiorari in *Marsh* to determine whether Kansas's capital sentencing statute, which mandates that the death penalty be imposed when aggravating and mitigating factors are in "equipose," violates constitutional bans against cruel and unusual punishment.⁷

⁴ See *Gregg*, 428 U.S. at 189 (holding that when determining sentences, "justice generally requires" that the character and propensities of the offender and the circumstances of the offense be considered); *Furman*, 408 U.S. at 310 (Stewart, J., concurring) (noting that capital sentencing processes must take particularized mitigating factors into account to avoid "freakishly" imposing death sentences). See generally *Furman*, 408 U.S. 238 (per curiam) (holding that the death penalty must not automatically be imposed upon all death-eligible defendants who commit a specific crime).

⁵ *Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988) (plurality opinion) (citing *Zant v. Stephens*, 462 U.S. 862, 875-76 (1983)).

⁶ See, e.g., *Walton v. Arizona*, 497 U.S. 639, 651-52 (1990) (upholding the constitutionality of a statute that mandates imposing the death penalty when one or more aggravating circumstances are present and mitigating circumstances do not outweigh aggravating circumstances); *Boyd v. California*, 494 U.S. 370, 374 (1990) (upholding the constitutionality of a statute that mandates imposing the death penalty when aggravating circumstances outweigh mitigating circumstances); *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990) (upholding the constitutionality of a statute that mandates imposing the death penalty when aggravating circumstances exist and no mitigating circumstances are present). But see *State v. Marsh*, 102 P.3d at 457-58 (evaluating the constitutionality of Kansas's sentencing statute, which mandates imposing the death sentence when mitigating circumstances do not outweigh aggravating circumstances - seemingly the same statutory language that the Supreme Court reviewed in *Walton* fourteen years earlier - and ruling that the statute violated the Eighth and Fourteenth Amendments). The Kansas Supreme Court noted that "a majority of the United States Supreme Court has never squarely addressed or decided the facial constitutionality of the equipose provision before us" and explained that "[t]his remains true, no matter how . . . courts have interpreted the ruling in *Walton*. The Arizona statute at issue in that case was worded differently; and, . . . Justice White's plurality decision neither used the word 'equipose' nor specifically referred to situations in which aggravators and mitigators are in balance." *Id.* at 459.

⁷ *Kansas v. Marsh*, 126 S. Ct. 2516, *2521 (2006). The Court employs the term "equipose" to refer to a jury's conclusion that the balance of aggravating and mitigating circumstances weigh equally. *Id.* at *2523.

In *Marsh*, the Court held that Kansas's statute was constitutional.⁸ This Comment first introduces the significant facts present in *Marsh*.⁹ Second, this Comment discusses the legal background of capital sentencing jurisprudence, emphasizing the Court's previous decisions involving the weighing of aggravating and mitigating factors.¹⁰ Finally, this Comment presents the Court's holding in *Marsh*, arguing the appropriateness of the majority opinion and discussing the ruling's significance in view of future death penalty cases.¹¹

II. STATEMENT OF THE FACTS IN *KANSAS V. MARSH*

One evening in June of 1996 when Marry Pusch ("Pusch") returned to her home with her nineteen-month-old daughter, M. P., Michael Marsh ("Marsh") shot Pusch in the head multiple times, stabbed her in the heart repeatedly, and slashed her throat.¹² Then, Marsh applied accelerant to Pusch's body and set fire to her house.¹³ He fled the scene, abandoning M. P., and the fire ultimately killed M. P.¹⁴ The jury at the district level convicted Marsh of the capital murder of M. P. and found that three aggravating circumstances existed, which were not outweighed by any mitigating circumstances.¹⁵ Therefore, the jury sentenced Marsh to death.¹⁶

⁸ *Id.* at *2520. The Court also addressed two other issues in *Marsh*: whether it had jurisdiction to review the Kansas Supreme Court's decision and whether adequate state grounds existed to support the Kansas Supreme Court's judgment. *Id.* at *2521-22. It answered the first question in the affirmative and the second in the negative; thus, the Court had jurisdiction to hear the case, and the constitutional issue was properly before the Court. *Id.*

⁹ *See infra* Part II.

¹⁰ *See infra* Part III.

¹¹ *See infra* Part IV.

¹² *State v. Marsh*, 102 P.3d 445, 452-53 (Kan. 2004), *rev'd*, 126 S. Ct. 2516 (2006). When detectives interviewed him, Marsh admitted that he had broken into Pusch's house ahead of time and that he had shot her; however, he indicated that his reason for being at the house was merely because he needed money for a trip to Alaska. *Id.* He told police that he had planned to surprise Pusch when she returned home, tie up Pusch and her infant, and hold them as hostages in exchange for ransom money from Pusch's husband. *Id.* He alleged that his plan went "awry" because Pusch entered the house earlier than he had expected, causing him to panic and shoot her. *Id.* at 453.

¹³ *Id.* at 452-54.

¹⁴ *Id.* The fire caused severe burns to more than seventy-five percent of M. P.'s body and, while Marsh tried to argue that M. P.'s burns did not proximately cause her death, two medical experts - the treating physician and the coroner - testified that the burns and the resulting internal organ failure of M. P. caused her death. *Id.*

¹⁵ *Id.* at 453. The three aggravating factors were: "(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

On appeal, Marsh argued that Kansas's capital sentencing statute is facially unconstitutional because it requires imposition of the death penalty in situations when aggravating and mitigating circumstances are in equipoise.¹⁷ The Kansas Supreme Court agreed and reversed and remanded Marsh's capital murder conviction for a new trial.¹⁸ The Supreme Court granted certiorari to consider the constitutionality of Kansas's sentencing statute which mandates that the death penalty be imposed when the balance of aggravating and mitigating circumstances weigh equally.¹⁹

III. LEGAL BACKGROUND OF *KANSAS V. MARSH*

Historically, one of the most passionately debated issues concerning capital punishment is whether imposing the death penalty is a constitutional means of punishing criminals for certain crimes.²⁰ The Constitution, though, actually supports the claim that capital punishment was accepted by the Framers.²¹ Furthermore, for at least two centuries, American courts have accepted capital punishment.²²

In 1972, in *Furman v. Georgia*, the Supreme Court called attention to the unique nature and finality of the death penalty and held that it must only be imposed according to carefully drafted procedures that minimize

in an especially heinous, atrocious or cruel manner." *Id.* The mitigating evidence consisted only of character witnesses. *Id.* at 465. The jury also convicted Marsh of the first-degree premeditated murder of Pusch, aggravated burglary, and aggravated arson. *Id.* at 453, 466.

¹⁶ *Id.* at 453. The jury unanimously agreed to a death sentence for the murder of M. P. *Id.* In addition, it sentenced Marsh to life imprisonment for forty years without the possibility of parole for the murder of Pusch and consecutive sentences totaling eighty-five months for the arson and burglary convictions. *Id.*

¹⁷ *Id.* at 458. Marsh contested that the statute's language prevents a jury from exercising discretion and expressing a "reasoned and moral response" to mitigating circumstances, thus violating the Eighth and Fourteenth Amendments. *Id.*

¹⁸ *Id.* at 466. The court also reversed and remanded Marsh's aggravated arson conviction but affirmed Marsh's burglary and premeditated murder convictions and sentences. *Id.*

¹⁹ *Kansas v. Marsh*, 126 S. Ct. 2516, *2520 (2006).

²⁰ See *Gregg v. Georgia*, 428 U.S. 153, 168-87 (1976) (noting that the courts have long-discussed whether imposing the death penalty constitutes cruel and unusual punishment and discussing why capital punishment is not fundamentally unconstitutional); *Furman v. Georgia*, 408 U.S. 238, 316-28 (1972) (Marshall, J., concurring) (reviewing the history of prohibiting cruel and unusual punishment).

²¹ See *Gregg*, 428 U.S. at 177 (indicating that capital punishment was widely accepted when the Eighth Amendment was ratified).

²² See *Furman*, 408 U.S. at 333 (Marshall, J., concurring) ("Capital punishment has been used to penalize various forms of conduct by members of society since the beginnings of civilization.").

the risk of unjustly imposing punishment by death.²³ Four years after *Furman*, more than thirty-five states had revised their death penalty statutes in an attempt to meet the goals set forth in *Furman*.²⁴ In 1976, the Supreme Court began its present practice of approving capital sentencing statutes that meet the *Furman* goals.²⁵

Since 1976, the Supreme Court has continued to evaluate state sentencing statutes to determine whether they contain the necessary provisions to comply with the Constitution's prohibitions against cruel

²³ See *id.* at 313 (White, J., concurring) (discussing capital punishment and explaining that "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not" and arguing for increased consistency). See generally *Furman*, 408 U.S. 238 (per curiam) (finding that imposing the death penalty according to Georgia's sentencing statute constituted cruel and unusual punishment because the statute gave the jury unrestrained discretion to decide whether to impose the death penalty).

²⁴ See, e.g., *Gregg*, 428 U.S. at 179-80. See Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 89 (1987) (stating that capital sentencing procedures were significantly revised after *Furman*); Markman & Cassell, *supra* note 3, at 121, 146 (indicating that since the aftermath of *Furman*, many states have enacted laws that afford capital defendants increased protection against erroneous imposition of the death penalty); Rob Warden, *Illinois Death Penalty Reform: How It Happened, What It Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381, 386 (2005) (noting that in response to *Furman*, thirty-eight state legislatures have passed new capital sentencing laws with revised procedures that more appropriately address the problems discussed in *Furman* and safeguard against cruel and unusual punishment by bifurcating the trial and sentencing phases and by providing additional guidance to assist those charged with determining the sentencing of a death-eligible defendant). The thirty-seven states that currently have death penalty laws are "Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming." Warden, *supra*, at 386 n.27.

²⁵ See, e.g., *Gregg*, 428 U.S. at 168-69 (addressing the question left unresolved by *Furman* concerning whether punishment by death for the crime of murder is always "cruel and unusual[.]" the Court held that "punishment of death does not *invariably* violate the Constitution" and upheld Georgia's revised sentencing statute) (emphasis added); *Jurek v. Texas*, 428 U.S. 262, 268, 276-77 (1976) (upholding Texas's revised capital sentencing statute because it (1) required at least one aggravating factor to exist before a death sentence could be imposed, (2) permitted the sentencing authority to consider mitigating factors relating to the individual defendant, and (3) provided for prompt judicial review of a death sentence by a court with statewide jurisdiction). *But see, e.g., Roberts v. Louisiana*, 428 U.S. 325, 331 (1976) (striking down Louisiana's mandatory capital sentencing statute because it fails to give the jury an opportunity to consider mitigating circumstances surrounding the commission of the murder); *Woodson v. North Carolina*, 428 U.S. 280, 296-97, 301 (1976) (striking down North Carolina's capital sentencing statute because it automatically applies the death penalty to everyone convicted of first degree murder and does not permit the jury to determine the character and records of the individual defendants who are convicted) (citing *Williams v. New York*, 337 U.S. 241, 247 (1949)).

and unusual punishment.²⁶ The Supreme Court has heard several cases involving aggravating and mitigating factors and has acknowledged a state constitutional right to impose the death penalty; however, arguably, uncertainty still existed as to whether a state could statutorily mandate imposing the death penalty where the balance of aggravating and mitigating circumstances are in equipoise.²⁷ Therefore, in 2006, the Court granted certiorari in *Marsh* to evaluate and determine the constitutionality of Kansas's sentencing statute, which requires imposition of the death penalty if aggravating and mitigating circumstances weigh equally.²⁸

IV. ANALYSIS OF THE DECISION IN *KANSAS V. MARSH*

A. *The Kansas v. Marsh Decision*

In a 5-4 decision, the Supreme Court upheld Kansas's capital sentencing statute and determined that it did not violate the Eighth and

²⁶ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 555, 560 (2005) (holding that imposing the death penalty on juvenile persons under the age of eighteen is unconstitutional); *Atkins v. Virginia*, 536 U.S. 304, 318-20, 321 (2002) (holding that imposing the death penalty on persons who are mentally retarded is unconstitutional); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 487 (2005) (noting that Justice Kennedy, writing for the majority in *Roper*, cited international practices "as evidence of 'the overwhelming weight of international opinion against the juvenile death penalty.'").

²⁷ See *supra* note 6 and accompanying text (discussing *Walton*, *Boyde*, and *Blystone*, in which the Court upheld sentencing statutes involving weighing of aggravating and mitigating circumstances and setting forth the argument in *Marsh*, in which the petitioner asserted that the Court had never specifically ruled on the constitutionality of a statute that mandates the death penalty when the balance of aggravating and mitigating circumstances is in equipoise); *Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988) (plurality opinion) ("[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.") (citing *Zant v. Stephens*, 462 U.S. 862, 875-76 (1983)). But see *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)) (Burger, C. J., plurality) ("The sentencer . . . [cannot] 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.") (emphasis in original); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (ruling that precluding testimony by the petitioner concerning "his good behavior" during the time he was in jail pending trial was unconstitutional because the jury should have been able to consider the testimony as a potentially mitigating factor) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982)) (noting that a sentencing statute must permit the jury to evaluate mitigating factors).

²⁸ *Kansas v. Marsh*, 126 S. Ct. 2516, *2521 (2006). Though the challenged statute was enacted in 1994, no one has actually been executed in Kansas since 1965 (before *Furman v. Georgia*). David Klepper, *Court Actions Have Mixed Impact in Two States: Death Penalty Restored in Kansas*, KAN. CITY STAR, June 27, 2006, at A1.

Fourteenth Amendment bans against cruel and unusual punishment.²⁹ The Court first held that its decision in *Walton v. Arizona* required approval of Kansas's statute.³⁰ Second, the Court explained that its general death penalty jurisprudence further supported the determination that Kansas's statute was constitutional.³¹ Finally, the Court argued that the dissent's contention concerning the advent of DNA evidence was wholly irrelevant to the narrow question before the Court.³² These three central holdings are examined in turn.

Writing for the majority, Justice Thomas, joined by four members of the Court, first discussed *Walton*.³³ Walton had argued that Arizona's sentencing statute was unconstitutional because it mandated imposition of the death penalty if mitigating circumstances did not outweigh aggravating circumstances.³⁴ The Court, however, held that a sentencing statute could require a defendant to prove that mitigating circumstances outweigh aggravating circumstances; additionally, it emphasized that a critical factor is that the sentencing authority must be permitted to consider any mitigating evidence.³⁵ Justice Thomas concluded that *Walton* controlled the issue presented in *Marsh* and, based on *Walton*, Kansas's statute was constitutional because it did not prevent the sentencing authority from considering mitigating evidence.³⁶

²⁹ *Marsh*, 126 S. Ct. at *2520 (2006).

³⁰ *Id.* at *2520. See *Walton v. Arizona*, 497 U.S. 639, 651-52 (1990) (holding that Arizona's death penalty statute, which placed the burden on the defendant to prove that mitigating circumstances outweighed aggravating circumstances, was constitutional).

³¹ *Marsh*, 126 S. Ct. at *2524. In his concurring opinion, though, Justice Scalia states that while he agrees that a review of the capital sentencing jurisprudence leads to a determination that Kansas's statute is constitutional, he believes that *Walton* so clearly controls the issue in *Marsh* that the jurisprudence discussion is unnecessary. *Id.* at *2530 (Scalia, J., concurring).

³² *Id.* at *2528.

³³ *Id.* at *2520. Roberts, C. J., and Scalia, Kennedy, and Alito, JJ., joined the majority opinion, and Scalia, J., wrote a fairly lengthy concurring opinion; Stevens, J., penned a dissenting opinion, and Souter, J., wrote a dissenting opinion which was joined by Stevens, Ginsburg, and Breyer, JJ. *Id.* at *2529, 2539.

³⁴ *Id.* at *2522-24.

³⁵ *Id.* *Marsh* claimed that *Walton* did not specifically address the equipoise issue and, in fact, *Marsh* accurately asserted that the actual term "equipoise" did not appear in *Walton*'s majority opinion. *Id.* at *2523. Therefore, *Marsh* alleged that *Walton* could not control the issue concerning the constitutionality of Kansas's sentencing statute which requires that the death penalty be applied in the event of equipoise. *Id.*

³⁶ *Id.* The Court pointedly noted that the dissenting opinion in *Walton* unmistakably established that the equipoise issue was indeed presented to the Court and resolved. *Id.* (quoting *Walton*, 497 U.S. 639, 687-88 (1990)) (Blackmun, J., dissenting) ("If the mitigating and aggravating circumstances are in equipoise, the [Arizona] statute requires that the trial judge impose capital punishment."). *Id.*

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To further support the holding that Kansas's sentencing statute is constitutional, Justice Thomas next reviewed the Court's general death penalty jurisprudence, discussing numerous cases decided over a thirty year span beginning with *Furman*.³⁷ The Court determined that Kansas's statute was constitutional because it rationally reduced the class of death-eligible defendants and permitted a sentencing authority to perform an individualized sentencing determination and to consider mitigating circumstances.³⁸

Finally, Justice Thomas criticized the dissent's assertion that the developments in the field of DNA testing somehow affected the issue as to the constitutionality of Kansas's death sentencing statute.³⁹ Justice

³⁷ *Id.* at *2524-28 (citing *Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988) (plurality opinion) (in turn citing *Zant v. Stephens*, 462 U.S. 862, 875-76 (1983))) (indicating that as long as a death sentencing statute logically narrows the class of death-eligible defendants and allows a sentencing authority to perform an individualized sentencing determination, a state may exercise discretion in imposing the death penalty in a reasonable manner and in deciding how to weigh the aggravating and mitigating circumstances of the crime); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion of Burger, C. J.) (holding that a sentencing statute must allow the jury an opportunity to consider mitigating evidence). *See supra* note 4 and accompanying text (discussing the requirements for individualized sentencing noted in *Gregg* and *Furman*).

³⁸ *Marsh*, 126 S. Ct. at *2525-26 (finding that "Kansas'[s] procedure narrows the universe of death-eligible defendants" and indicating that "[u]nder Kansas law, imposition of the death penalty is an *option* only after a defendant is convicted of capital murder") . "The system in Kansas provides the type of 'guided discretion' we have sanctioned in *Walton*, *Boyde*, and *Blystone*." *Id.* at *2526 (internal citation omitted). For example, in *Boyde*, *Boyde* contested the sentencing statute at issue, arguing that because it mandated imposing the death penalty in the event aggravating circumstances outweighed mitigating circumstances, it precluded individualized sentencing. *Id.* at *2526-27. Nonetheless, the *Boyde* Court held that the mandatory provision of the statute did not prevent the sentencing authority from considering any mitigating circumstances, thus making the statute constitutional. *Id.* at *2526-27 (citing *Boyde v. California*, 494 U.S. 370, 374 (1990)).

³⁹ *See id.* at *2528-29. The dissenting opinion states, "Today, a new body of fact must be accounted for in deciding what . . . the Eighth Amendment . . . should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests." *Marsh*, 126 S. Ct. at *2544 (Souter, J., dissenting). *But see id.* at *2533 (Scalia, J., concurring) (indicating that Souter's dissent irresponsibly and incorrectly characterizes as significant the impact that DNA testing has had with regard to the exoneration of death-eligible defendants). Scalia notes that the dissent cannot point to "a single verifiable case" in which a defendant was erroneously executed and discusses numerous problems with the studies that the dissent cites, criticizing the dissent for accepting "anybody's say-so." *Id.* at *2529-39 (citing Markman & Cassell, *supra* note 3, at 121, 131) (reviewing numerous problems in several of the cases that are cited in the study that is relied upon by the dissent). Scalia expresses disappointment that the dissent cites such questionable studies and that, as a result, those baseless studies will appear in the United States Reports. *Id.* at *2529-39. *See also* Markman

Thomas indicated that the dissenting view was irrelevant because it exceeded the scope of the issue presented.⁴⁰ In other words, in determining the constitutionality of Kansas's death sentencing statute, the majority felt it was not necessary to argue in favor of or in opposition to the death penalty.⁴¹

B. Appraisal of the Kansas v. Marsh Decision

The Court in *Marsh* reached the correct result.⁴² Kansas's death penalty statute does not raise a presumption in favor of death because it (1) does not prevent the jury from considering any mitigating factors, (2) sets forth that the imposition of the death penalty is merely an "option" after a defendant is convicted beyond a reasonable doubt of a capital offense, and (3) requires that at least one aggravating factor be present in order for the mandatory death penalty to be imposed.⁴³ Therefore,

& Cassell, *supra* note 3, at 150 ("There is, in short, no persuasive evidence that any innocent person has been put to death in more than twenty-five years.").

⁴⁰ *Marsh*, 126 S. Ct. at *2528 (majority opinion). Additionally, Justice Scalia's concurrence sharply criticizes Justice Souter's dissenting opinion. *Id.* at *2531-39 (Scalia, J., concurring). He starts with, "[a]s 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, . . ." and continues, "[t]he 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." *Id.* at *2532. He leads up to a strong finish by noting that "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." *Id.* at *2539. He wraps up with "[i]t 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." *Id.*

⁴¹ *Marsh*, 126 S. Ct. at *2528-29 (majority opinion). While it was not at issue in this case, the validity of the death penalty is still largely debated. *See, e.g., Marsh*, 126 S. Ct. at *2541-46 (Souter, J., dissenting) (rejecting the death penalty generally); Hugo Adam Bedau & Michael L. Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988) (arguing in support of their 1987 study, which discussed problems with imposing the death penalty and was heavily criticized by Markman & Cassell, *supra* note 3, at 121); Bedau & Radelet, *supra* note 24, at 90 (arguing that imposing the death penalty is an inappropriate way of punishing even those persons who are convicted of the crime of murder).

⁴² Based on *Walton v. Arizona*, the Court properly decided *Marsh*. *See supra* note 36, at *2522-24 (reviewing that *Walton* squarely dealt with a statute that required the imposition of the death penalty when aggravating and mitigating circumstances are in equipoise, and thus, in line with *stare decisis*, its ruling controls *Marsh*); *Boyde*, 494 U.S. at 374 (1990) (noting that statutory language requiring mandatory imposition of the death penalty in the event of equipoise did not preclude the sentencing authority from considering mitigating circumstances; thus, the statute was constitutional).

⁴³ *See Marsh*, 126 S. Ct. at *2526-27 (citing *Boyde*, 494 U.S. 370, 377 (1990); *Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990) (emphasis omitted)). The Court's decisions in *Boyde*

Kansas's sentencing system does not remove the jury's discretion, but merely supports the jury's "guided discretion[.]"⁴⁴ The Constitution requires that a sentencing authority have discretion when determining whether capital punishment is appropriate in a particular case, but it does not require that such discretion be unfettered.⁴⁵ Thus, the Court's ruling in *Marsh* was appropriate and squarely supported by death penalty jurisprudence.

C. *Anticipated Consequences of the Kansas v. Marsh Decision*

The makeup of the Court played a significant role in *Marsh*.⁴⁶ Over the years, the Court had been evenly split on death penalty issues and, preceding *Marsh*, uncertainty grew as to whether Justice O'Connor would support capital punishment.⁴⁷ Because Justice Alito replaced

and *Blystone* did not turn on the predominance of aggravating over mitigating circumstances but, instead, the key factor was that the jury was able to consider any relevant mitigating factors. *Id.* at *2526-27. Similarly, a key factor in deciding *Marsh* was that the statute allowed the jury to consider mitigating circumstances. *But see id.* at *2542-44 (Souter, J., dissenting) (arguing that a law with a mandatory provision "requir[ing] execution when the case for aggravation has failed to convince the sentencing jury is morally absurd[]" and produces the "wanton and freakish results[]" that *Furman v. Georgia* and its progeny have declared unconstitutional). In contrast, Justice Thomas points out that while the statute's mandatory provision could appear to create a presumption of death if read in isolation, the provision should be evaluated within the context of the full capital sentencing statute as well as Kansas's entire capital punishment system. *Id.* at *2527 n.6 (majority opinion) (noting that a capital sentencing statute must be reviewed within the context of the capital punishment system).

⁴⁴ *See id.* at *2526. *Contra Marsh*, 126 S. Ct. at *2540 (Stevens, J., dissenting) ("If it were true that this instruction may make the difference between life and death in a case in which the scales are otherwise evenly balanced, that is a reason why the instruction should not be given-not a reason for giving it."). In his dissenting opinion in *Marsh*, Justice Stevens further argues that in a situation in which the aggravating and mitigating factors weigh equally (i.e. equipoise), a situation which he classifies as one in which the jury has "doubt" as to whether the death penalty is appropriate, it is "fundamentally wrong" for a jury to choose the death penalty. *Id.*

⁴⁵ *See id.* at *2523 (majority opinion) (citing *Walton v. Arizona*, 497 U.S. 639, 652 (1990)) (indicating that states retain authority to determine the manner in which a sentencing authority will consider mitigating circumstances).

⁴⁶ *See* Stephen Henderson, *Ruling in Kan. May Show Shift by Court on Death Penalty*, PHILA. INQUIRER, June 27, 2006, at A06 (suggesting that Chief Justice Roberts and Justice Alito provided the "pivotal votes" in *Marsh*, and Justice Alito's vote was "decisive"); Klepper, *supra* note 28, at A1 (indicating that in response to a question asked by the media, *Marsh*'s public defender said that the holding "very much depended on the makeup of the court.").

⁴⁷ *See* Henderson, *supra* note 46, at A06 (suggesting that Justice O'Connor's "doubts about capital punishment had grown in recent years.").

Justice O'Connor, his vote in *Marsh* was critical to the 5-4 outcome.⁴⁸ The ruling, indicating that the Court is likely to demonstrate support for the death penalty in future cases, is disappointing for death penalty abolitionists.⁴⁹ Nonetheless, opponents of capital punishment note the narrowness of the Court's holding and assert that it will not significantly impact future death penalty jurisprudence.⁵⁰

V. CONCLUSION

In this country, where the death penalty has long been favored by a majority of Americans as a means of punishing violent criminals for committing murder, *Marsh* represents a small victory for death penalty advocates. Its holding may seem trivial on its face, but it is significant because it marks a shift of increased deference to the states by the United States Supreme Court concerning the imposition of the death penalty. Based on *Marsh*, states will now have an easier time imposing the death penalty as long as a state rationally reduces the class of death-eligible defendants and allows for an individualized sentencing determination based on the circumstances of the crime. *Marsh* reaffirms that as long as it acts in a reasonable manner, a state enjoys discretion in imposing the death penalty and in deciding how the jury should weigh aggravating and mitigating factors surrounding the crime. *Marsh* sends a strong message both to criminals convicted of murder, like Mr. Michael Marsh,

⁴⁸ See *id.* (forecasting that *Marsh* indicates that the Court's two "new justices will tip the balance away from tighter restrictions on capital punishment"); Klepper, *supra* note 28, at A1 (mentioning that Justice Alito's vote was critical and indicating that the public defender who represented Marsh said that Justice Alito definitely "broke the tie.").

⁴⁹ See Henderson, *supra* note 46, at A06 (suggesting that *Marsh*'s ruling is a "blow" to those who oppose the death penalty because it suggests how the "new court" may vote on larger capital punishment questions).

⁵⁰ See Klepper, *supra* note 28, at A1 (arguing that *Marsh* "won't do much to settle the thorny question of capital punishment[.]" mentioning that the holding is not likely to have much affect on substantive death penalty issues because of its narrow and technical scope, and indicating that the opposite ruling would have had more of an impact on future death penalty cases). But see Henderson, *supra* note 46, at A06 (discussing that it is likely that the ruling will be telltale of how the current Court will "split" on future death penalty issues). Additionally, death penalty abolitionists hope that someday DNA testing will prove that capital punishment is evil because of its risk of erroneously executing innocent people. James Dao, *DNA Ties Man Executed in '92 to the Murder He Denied*, N.Y. TIMES, Jan. 13, 2006, at A14. In a recent case in 2006, Governor Warner ordered DNA testing to determine the guilt or innocence of a former death row prisoner who was executed in 1992. *Id.* To the dismay of those against the death penalty, the DNA testing actually confirmed the executed prisoner's guilt. *Id.* Still, those who oppose the death penalty hope that similar testing will prove the innocence of future death row inmates. *Id.* They hope that other governors will follow Governor Warner's lead and order similar DNA tests for other current or former death row inmates. *Id.*

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who shot Ms. Marry Pusch in the head multiple times and then burned her infant child to death, and to death penalty abolitionists. The current Court will likely continue to ensure that states have authority to expand the reach of the death penalty and protect the citizens of this country from heinous and evil murder.

Carrie L. Flores, SPHR⁵¹

⁵¹ J.D. Candidate, Valparaiso University School of Law (2009); M.A., Human Resources Management, Rollins College (2000); B.A., Speech Communication, Indiana University Bloomington (1997); B.A., Criminal Justice, Indiana University Bloomington (1997). I am forever grateful to my parents for teaching me that I could accomplish anything through hard work and a positive attitude. I owe a special thank you to my father, who, through years of teaching, has significantly shaped my writing style. I also thank my loving husband for continually encouraging me to follow my dreams and for supporting me throughout this hectic law school experience.