

SENATE RESOLUTION No. 1820

A RESOLUTION requesting the United States supreme court to grant certiorari and reverse the Kansas supreme court's ruling in *State v. Marsh*.

WHEREAS, The current Kansas death penalty law was enacted in 1994 and was challenged in *State v. Kleypas*, 272 Kan. 894, decided by the Kansas supreme court December 28, 2001; and

WHEREAS, The Kansas supreme court unanimously affirmed Kleypas' conviction but set aside his death sentence because of a faulty jury verdict form; and

WHEREAS, The *Kleypas* court split 4-3 on a constitutional challenge to the death penalty statute based on the manner in which jurors were instructed to weigh aggravating and mitigating circumstances when deciding whether to impose a death sentence, but all seven Kansas justices in the *Kleypas* court found the Kansas death penalty law to be constitutional, either on its face or as construed; and

WHEREAS, The *Kleypas* majority, consisting of Justices Tyler C. Lockett, Donald L. Allegrucci, Fred N. Six, and Edward Larson, did not invalidate the Kansas death penalty statute, but held that the so-called "weighing equation," as applied, was unconstitutional: "Our decision does not require that we invalidate K.S.A. 21-4624 or the death penalty itself. We do not find K.S.A. 21-4624(e) to be unconstitutional on its face, but rather, we find that the weighing equation impermissibly mandates the death penalty when the jury finds that the mitigating and aggravating circumstances are in equipoise."; and

WHEREAS, The *Kleypas* dissent, written by Justice Davis and joined by Chief Justice McFarland and Justice Abbott, did not invalidate the Kansas death penalty statute because "the weighing equation was constitutional as written." The dissent further noted that the United States supreme court has held that as long as the weighing equation does not preclude the jury from considering relevant mitigating evidence, the specific method of balancing the aggravating and mitigating factors may be left up to the state; and

WHEREAS, In reaching the decision, the court reasoned that the Kansas legislature intended to enact a constitutional death penalty law and thus concluded that K.S.A. 21-4624(e) is not void on its face, but only in its application. The majority held that by requiring the "tie" to go to the defendant, the intent of the legislature may be carried out in a constitutional manner: "By simply invalidating the weighing equation and construing K.S.A. 21-4624(e) to provide that if the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 exists and, further, that such aggravating circumstance or circumstances outweigh any mitigating circumstance found to exist, the defendant shall be sentenced to death, the intent of the legislature is carried out in a constitutional manner. So construed, we hold that K.S.A. 21-4624 does not violate the eighth amendment prohibition against cruel and unusual punishment," the court concluded; and

WHEREAS, The *Kleypas* court held that the wording of a verdict form was confusing, misleading and inconsistent with Kansas law and improperly implied to a jury that the jury, in order to spare Kleypas' life, was required to be unanimous in its decisions against death. To cure that infirmity, the court provided substitute language for verdict forms to be used in all death penalty cases in Kansas. The revised verdict form, consistent with Kansas law, makes it clear that a single juror may block a death verdict; and

WHEREAS, After the *Kleypas* case was decided, both the senate judiciary committee and the house judiciary committee conducted hearings regarding the *Kleypas* decision and the Kansas death penalty law. In addition to hearings during the 2002 legislative session, the matter was studied further during interim committee hearings in the autumn of 2004. The focus of the hearings was to determine what legislative response, if any, was needed to ensure the constitutionality of the Kansas death penalty law in light of the *Kleypas* decision; and

WHEREAS, Based on testimony received during those hearings, the legislature relied on the *Kleypas* court's decision and concluded that no amendment to statute was necessary because the *Kleypas* court has upheld the constitutionality of the death penalty statute and had cured the

apparent flaw in the weighing equation by revising future jury instructions; and

WHEREAS, Only three years after deciding the *Kleypas* case the Kansas supreme court decided *State v. Marsh*, opinion number 81,135, on December 17, 2004; and

WHEREAS, In *Marsh*, the supreme court ruled 4-3 that the Kansas death penalty statute is unconstitutional because of its inclusion of the “weighing equation” - the same defect that the supreme court purported to cure with the prospective change in jury instructions it ordered in *Kleypas*; and

WHEREAS, In *Marsh*, the majority agrees with the four justices who decided in 2001’s *State v. Kleypas* that the statute as written violated the eighth and fourteenth amendments but, unlike in *Kleypas*, the *Marsh* majority proceeded to invalidate the entire statute rather than severing the weighing equation provision from the remainder of the statute and allowing a change in jury instructions to cure the flaw; and

WHEREAS, The three justices who dissented in *Marsh* (Justice Davis, Chief Justice McFarland and Justice Nuss) continue to believe the death penalty statute, as written, is constitutional: “There seems to be a general feeling among the majority that the weighing equation which mandates death in the highly unlikely event that the jury finds the aggravating and mitigating factors to be exactly equal in weight is somehow ‘unfair.’ While it is certainly within the province of this court to interpret the eighth amendment, we cannot do so in a vacuum. We cannot simply rely on our inchoate feelings, but instead have a duty to examine, analyze, and apply the United States supreme court’s jurisprudence on the matter.”; and

WHEREAS, The *Marsh* majority states that the United States supreme court has never directly addressed the issue of the weighing equation presented in *Kleypas* and again in *Marsh*; and

WHEREAS, Chief Justice McFarland says in her separate dissent that legally the Court should follow the *Kleypas* precedent: “In *Kleypas*, in a 4 to 3 decision, all seven justices agreed the Kansas death penalty law was constitutional, either as construed in a very minor respect (majority) or as written (dissent). To now strike down the Kansas death penalty law, is, in my opinion, wholly inappropriate and unjustified.”; and

WHEREAS, Justice Nuss also writes separately and says the United States supreme court has already implicitly approved of the death penalty sentencing scheme adopted in Kansas. In his opinion, an Arizona weighing equation “functionally identical” to the Kansas equation was approved by the United States supreme court in its 1990 *Walton v. Arizona* decision, and *Walton* therefore controls the result in *Marsh*; and

WHEREAS, It may be beyond the power of the legislature to amend the Kansas statute retroactively in order to apply a clearly constitutional death penalty law to the seven persons now on death row. Only a decision by the United States supreme court to overturn the Kansas supreme court’s decision in *Marsh* is likely to result in the continued application of the death penalty law to those persons already sentenced to death; and

WHEREAS, The State of Kansas finds itself in this predicament not because of any change in the death penalty law but because of a change in the composition of the Kansas supreme court between the *Kleypas* and *Marsh* decisions; and

WHEREAS, Manifest injustice will result if the United States supreme court declines to review the *Marsh* case on appeal; and

WHEREAS, We believe that the Kansas death penalty law meets the requirements of the Kansas constitution and the United States constitution: Now, therefore,

Be it resolved by the Senate of the State of Kansas: That, based on the evidence presented, we do hereby acknowledge and affirm that the opinion of the Kansas senate is that the Kansas death penalty law as written is constitutional and that if any single provision of that law is found to be unconstitutional that provision should be severed from the rest and other provisions of the statute upheld; and

Be it further resolved: That, the Kansas supreme court and the United States supreme court should be informed that the Kansas legislature relied on the Kansas supreme court’s decision in *State v. Kleypas* in deciding

SENATE RESOLUTION No. 1820—page 3

not to amend the Kansas death penalty law to alter the weighing equation provisions during hearings in 2002 and 2004; and

Be it further resolved: That, the Kansas senate respectfully requests that United States supreme court grant certiorari to hear the *Marsh* case and find Kansas death penalty law constitutional as written or, in the alternative, as applied through the cure imposed by the Kansas supreme court in the *Kleypas* decision.

Senate Resolution No. 1820 was sponsored by Committee on Judiciary.

I hereby certify that the above RESOLUTION originated in the SENATE, and was adopted by that body

President of the Senate.

Secretary of the Senate.