SUPREME COURT OF THE UNITED STATES

No. 04–1170

KANSAS, PETITIONER *v.* MICHAEL LEE MARSH, II

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

[June 26, 2006]

JUSTICE STEVENS, dissenting.

Having joined Justice Blackmun's dissent from the plurality's opinion in *Walton* v. *Arizona,* 497 U. S. 639, 649–652 (1990), I necessarily also subscribe to the views expressed by JUSTICE SOUTER today. I write separately for two reasons: to explain why agreement with Justice Blackmun's dissent is fully consistent with refusing to read *Walton* as "control[ling]," but see *ante,* at 5 (opinion of the Court), and to explain why the grant of certiorari in this case was a misuse of our discretion.

Under Justice Blackmun's understanding of Arizona law, *Walton* did present exactly the same issue before us today. The Arizona statute at issue required the judge to impose death upon finding aggravating factors if "'there are no mitigating circumstances sufficiently substantial to call for leniency.'" 497 U. S., at 644 (quoting Ariz. Rev. Stat. Ann. §13–703(E) (West 1989)). In Justice Blackmun's view, Arizona case law indicated "that a defendant's mitigating evidence will be deemed 'sufficiently substantial to call for leniency' only if the mitigating factors 'outweigh' those in aggravation." 497 U. S., at 687. Accordingly, Justice Blackmun believed that we confronted the constitutionality of a statute that mandated death when the scales were evenly balanced. *Ibid.*

But Justice Blackmun never concluded that the plurality similarly read Arizona case law as "requir[ing] a capital sentence in a case where aggravating and mitigating

circumstances are evenly balanced." *Id.,* at 688. To the contrary, he observed that "the plurality does not even acknowledge that this is the dispositive question." *Ibid.* Because Justice Blackmun did not read the plurality opinion as confronting the problem of equipoise that he believed Arizona law to present, my join of his dissent is consistent with my conclusion that *stare decisis* does not bind us today. As JUSTICE SOUTER explains, *post*, at 2, n. 1, the *Walton* plurality painstakingly avoided an express endorsement of a rule that allows a prosecutor to argue, and allows a judge to instruct the jury, that if the scales are evenly balanced when the choice is between life and death, the law requires the more severe penalty.

There is a further difference between this case and *Walton*—one that should have kept us from granting certiorari in the first place. In *Walton*, the defendant petitioned for certiorari, and our grant enabled us to consider whether the Arizona Supreme Court had adequately protected his rights under the Federal Constitution. In this case, by contrast, the State of Kansas petitioned us to review a ruling of its own Supreme Court on the grounds that the Kansas court had granted more protection to a Kansas litigant than the Federal Constitution required. A policy of judicial restraint would allow the highest court of the State to be the final decisionmaker in a case of this kind. See *Brigham City* v. *Stuart*, 547 U. S. __, __ (2006) (STEVENS, J., concurring) (slip op., at 3).

There is a remarkable similarity between the decision to grant certiorari in this case and our comparable decision in *California* v. *Ramos,* 463 U. S. 992 (1983). In *Ramos,* we reviewed a decision of the California Supreme Court that had invalidated a standard jury instruction concerning the Governor's power to commute life without parole sentences—an instruction that was unique to California. By a vote of 5 to 4, the Court reversed the judgment of the state court, concluding—somewhat ironically—that "the

wisdom of the decision to permit juror consideration of possible commutation is best left to the States." *Id.,* at 1014.

In response I asked, as I do again today, "what harm would have been done to the administration of justice by state courts if the [Kansas] court had been left undisturbed in its determination[?]" *Id.,* at 1030. "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." *Ibid.* "No matter how trivial the impact of the instruction may be, it is fundamentally wrong for the presiding judge at the trial—who should personify the evenhanded administration of justice—to tell the jury, indirectly to be sure, that doubt concerning the proper penalty should be resolved in favor of [death]." *Ibid.*

As in *Ramos,* in this case "no rule of law commanded the Court to grant certiorari." *Id.,* at 1031. Furthermore, "[n]o other State would have been required to follow the [Kansas] precedent if it had been permitted to stand. Nothing more than an interest in facilitating the imposition of the death penalty in [Kansas] justified this Court's exercise of its discretion to review the judgment of the [Kansas] Supreme Court." *Ibid.* And "[t]hat interest, in my opinion, is not sufficient to warrant this Court's review of the validity of a jury instruction when the wisdom of giving that instruction is plainly a matter that is best left to the States." *Ibid.**

---

*JUSTICE SCALIA takes issue with my approach, suggesting that the federal interests vindicated by our review are equally weighty whether the state court found for the defendant or for the State. *Ante*, at 2–5 (concurring opinion). In so doing, he overlooks the separate federal interest in ensuring that no person be convicted or sentenced in violation of the Federal Constitution—an interest entirely absent when the State is the petitioner. It is appropriate—and certainly impartial, but

We decided *Ramos* on the same day as *Michigan* v. *Long,* 463 U. S. 1032 (1983). Prior to that time, "we had virtually no interest" in criminal cases where States sought to set aside the rulings of their own courts. *Id.,* at 1069 (STEVENS, J., dissenting). Although in recent years the trend has been otherwise, I continue to hope "that a future Court will recognize the error of this allocation of resources," *id.,* at 1070, and return to our older and better practice of restraint.

---

see *ante*, at 4–5—to take this difference in federal interests into account in considering whether to grant a petition for writ of certiorari.

JUSTICE SCALIA also fails to explain why there is such an urgent need "to ensure the integrity and uniformity of federal law." *Ante*, at 2. If this perceived need is a "primary basis for the Constitution's allowing us to be accorded jurisdiction to review state-court decisions," *ibid.* (citing Art. III, §2, cls. 1 and 2), then one would think that the First Judiciary Act would have given us jurisdiction to review all decisions based on the Federal Constitution coming out of state courts. But it did not. Unconcerned about JUSTICE SCALIA's "crazy quilt," *ante*, at 4, the First Congress only provided us with jurisdiction over such cases "where [there] is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, *and the decision is in favour of such their validity*." Act of Sept. 24, 1789, §25, 1 Stat. 85 (emphasis added). Not until 1914 did we have jurisdiction over decisions from state courts which arguably overprotected federal constitutional rights at the expense of state laws. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790; see also *Delaware* v. *Van Arsdall,* 475 U. S. 673, 694–697 (1986) (STEVENS, J., dissenting). Even then, our review was only by writ of certiorari, whereas until 1988 defendants had a right to *appeal* to us in cases in which state courts had upheld the validity of state statutes challenged on federal constitutional grounds. See 28 U. S. C. §1257 (1982 ed.). In other words, during the entire period between 1789 and 1988, the laws enacted by Congress placed greater weight on the vindication of federal rights than on the interest in the uniformity of federal law.