No. 14-6810

IN THE
SUPREME COURT OF THE UNITED STATES

REGINALD DEXTER CARR,
Petitioner,

v.

KANSAS,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Kansas

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a jury view is evidentiary, and thus a critical stage of a criminal prosecution, requiring the presence of the defendant, and the assistance of counsel, under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, a question as to which state courts of last resort, as well as the federal circuits, are in conflict.

2. Whether, when a trial court's erroneous evidentiary rulings result in the complete exclusion of the accused's defense, the error can ever be declared harmless. Or, in the alternative, whether the error in this case required reversal, alone or in combination with the trial court's erroneous refusal to sever the Petitioner's trial from that of his co-defendant.

LIST OF PARTIES

All parties to these proceedings are listed in the caption of the case.

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OPINION BELOW

The decision of the Kansas Supreme Court is reported, *State v. Carr*, 331 P.3d 544 (Kan. 2014).

STATEMENT OF JURISDICTION

The Kansas Supreme Court decided this case July 25, 2014. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." U.S. Const. amend VI.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . ." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Petitioner Reginald Carr was convicted of multiple capital murders, numerous sexual offenses, and many other serious crimes. He and his brother, Jonathan, had gone on a crime spree unlike any ever seen before in Kansas, including perhaps the most heinous and inhuman multiple murders in the State's history. Although the Kansas Supreme Court affirmed one capital murder conviction against each brother, that court reversed their death sentences. The State has filed petitions for writ of certiorari seeking review of three constitutional issues relevant to the brothers' death sentences.[1] A concise summary of the sordid and heinous facts of their crimes can be found therein.

[1] See *Kansas v. Reginald Carr*, No. 14 - 450; *Kansas v. Jonathan Carr*, No. 14 - 449.

ARGUMENT

In his petition, Reginald Carr raises two issues that relate only to the guilt phase of his trial, but neither issue warrants this Court's review. The first issue—whether Carr and his attorney had a federal constitutional right to attend a "jury view" of the crime scenes—implicates no split of authority on an issue of federal law and was resolved by this Court decades ago against the position Carr asserts. The second question—whether harmless error analysis was properly applied to the exclusion of Carr's dubious, and likely perjurious, testimony placing the blame for his crimes on an unknown, unidentified third party in order to present his "defense" —involves no issue warranting this Court's review. Therefore, Kansas respectfully requests that the Court deny the petition.

I. The First Question Presented Was Settled In *Snyder v. Massachusetts*, 291 U.S. 97 (1934), And There Is No Split Of Authority On Any Issue Of Federal Law.

Carr first complains that neither he nor his attorney were present when the jury in this case was taken on a "jury view" of the multiple crime scenes involved in the Carr brothers' crime spree. The Kansas Supreme Court, however, correctly recognized that this Court long ago established that a "jury view" is not "evidence" the presentation of which requires the defendant's or his attorney's presence, citing *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

A. There is no split of authority under federal law on the question whether Carr had a constitutional right to attend the jury view.

Carr makes a facile argument that there is a split of authority on this question while failing to acknowledge that the vast majority of the cases to which he points involve solely state law grounds, not federal constitutional holdings, and the handful of federal cases he cites do not contradict *Snyder*. See Pet. 7 – 11 (citing several state court decisions plainly relying solely on state law grounds, as is evident even by Carr's description of these cases, and many of which predate this Court's ruling in *Snyder*).

Even when Carr turns to what he claims is a federal circuit split on the issue, the petition makes a hash of things, and fails by its own description of the cases it cites to demonstrate any conflict on an issue of *federal constitutional* law. Indeed, Carr acknowledges that the First, Second and Seventh Circuits recognize that a "jury view" is not "evidence," see Pet. 13 (quoting *Clemente v. Carnicon-Puerto Rico Management Associations*, 52 F. 3d 383 (1st Cir. 1995), as asserting that very proposition) and Pet. 16 (citing Second and Seventh Circuit cases to the same effect). That leaves cases Carr cites from the D.C., Sixth, Tenth and Eleventh Circuits for the alleged split, but none create a split.

In fact, there is no "DC Circuit" case at all, because the case Carr cites is actually a decision of the District of Columbia Court of Appeals, effectively the District's "supreme court" for local law, not the U.S. Court of Appeals for

the D.C. Circuit. See Pet. 15. Moreover, the D.C. Court of Appeals decision is readily distinguishable. In *Barron v. United States*, 818 A.2d 987 (D.C. Ct. App. 2003), the issue was not whether defendant or counsel could attend the jury view (no counsel, including the prosecution, attended) but, instead, whether the parties should have been permitted to discuss and argue the significance of the view to the jury, when the view took place after the close of the evidence. *Id.* at 992.

The other three cases cited are at least federal Circuit decisions, but all are readily distinguishable from this case and *Snyder*. First, as Carr admits, in *United States v. Walls*, 443 F.2d 1220, 1223 n.3 (6th Cir. 1971), the Sixth Circuit explicitly stated that it was not making a federal *constitutional* ruling; instead that court purported to be exercising "supervisory authority" over the district courts in its Circuit. Second, both *Lillie v. United States*, 953 F.2d 1188 (10th Cir. 1992), and *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), are *civil* cases, not criminal prosecutions. Furthermore, in *Lillie*, the judge made a visit to the scene of the accident without even informing the parties until after he had done so. In *Glassroth*, both sides accompanied the judge on the "view" (it was a bench trial, not a jury trial) and the argument on appeal had nothing to do with the issue Carr is presenting.

B. The question whether Carr had a constitutional right to have his attorney attend the "jury view" does not warrant review.

Carr's fallback argument is that he was denied his Sixth Amendment right to counsel because his attorney was not permitted to attend the jury view. The Kansas Supreme Court dispensed with that claim on the same ground on which it dispensed with his alleged constitutional right to attend.

Carr relies primarily on cases so readily distinguishable from this one as to be utterly unhelpful. Indeed, all but one of the cases he cites involve situations where a defendant's attorney was *absent from the courtroom* during portions of the prosecution of the defendant. See Pet. 24-25. The only case even arguably relevant to the question presented here is *Arnold v. Evatt*, 113 F.3d 1352 (4th Cir. 1997), *cert. denied*, 522 U.S. 1058 (1998), but, as Carr himself alludes to in the petition, the Court denied certiorari in that case on direct appeal when the very same issue as presented here was raised. See Pet. 23 (citing *Arnold v. South Carolina*, 467 U.S. 1265 (1984), denying certiorari). Furthermore, in a subsequent federal habeas proceeding, the Fourth Circuit "assume[d] for the purpose of argument that the absence of [] counsel at the jury view amounted to constitutional error," 113 F.3d at 1360, but held that any such error was harmless. *Id.* at 1361. This Court denied review of the case a second time. *Arnold v. Moore*, 522 U.S. 1058 (1998).

There is no issue here meriting the Court's plenary review. As Justice Cardozo put it for the Court in *Snyder v. Massachusetts*:

> There is danger that the criminal law will be brought into contempt—that discredit will touch even the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free.

291 U.S. at 122.

II. The Second Question Presented Involves Only The Factbound Application Of Settled Law And, In Any Event, The Courts Should Not Countenance Reginald Carr's Effort To Commit Perjury.

As with his first question presented, in his second question Carr attempts to suggest a split of authority where one does not exist – the application of harmless error analysis to the type of constitutional error found by the Kansas Supreme Court is well-settled. Carr then alternatively asks the Court to delve into the facts of the case and conduct an independent evaluation of whether the exclusion of his dubious and likely perjurious testimony was harmless in the face of overwhelming evidence of his guilt. Neither of Carr's arguments on this question are persuasive, and this Court should not grant review.

A. There is no controversy or split of authority regarding application of harmless error analysis to errors implicating a defendant's right to present a defense.

Certiorari is not warranted on the second question presented by Carr because there is no controversy or split of authority regarding the application of harmless error analysis to due process violations implicating a criminal defendant's right to present a defense. This Court long has recognized that

"most constitutional errors can be harmless." *Neder v. United States*, 527 U.S. 1, 8 (1999). Specifically, in *Crane v. Kentucky*, 476 U.S. 683, 691 (1986), the Court held that the erroneous exclusion of evidence that impaired a defendant's right to present a defense "is subject to harmless error analysis."

Since *Crane* (and even before in some cases), both state and federal courts consistently have applied harmless error analysis in this context. *E.g. United States v. Herbst*, 668 F.3d 580, 585-86 (8th Cir. 2012) (applying harmless error analysis to alleged violation of the right to present a defense); *United States v. Pineda-Doval*, 614 F.3d 1019, 1033-34 (9th Cir. 2009) (same); *Fleming v. Metrish*, 556 F.3d 520, 536 (6th Cir. 2009) (applying harmless error analysis to alleged denial of habeas petitioner's right to present a defense in state court proceedings); *United States v. Skelton*, 514 F.3d 433, 438 (5th Cir. 2008) (noting claims of violation of a defendant's right to present a defense are subject to harmless error review); *State v. Cope*, 137 So.3d 151, 169 (La. Ct. App. 2014) (observing that a violation of the right to present a defense "is also subject to a harmless error analysis."); *People v. Thompson*, 111 A.D.3d 56, 67 (N.Y. App. Div. 2013) (applying harmless error analysis to error implicating defendant's right to present a defense); *People v. Hartsch*, 232 P.3d 663 (Cal. 2010) (noting that even if trial court's exclusion of third-party evidence violated the defendant's right to present a defense, the error was harmless in light of the evidence); *State v. Jones*, 230 P.3d 576, 582 (Wash. 2010) (applying harmless error analysis to erroneous exclusion of

evidence implicating defendant's right to present a defense); *State v. Kramer*, 720 N.W.2d 459, 465-66 (Wis. Ct. App. 2006) ("[E]ven assuming the court violated [the defendant's] right to present a defense, such error was harmless."); *State v. Berwald*, 186 S.W.3d 349, 361 n.4 (Mo. Ct. App. 2005) ("[W]hen a properly preserved error is so serious that it rises to the magnitude of a federal or state constitutional violation, including ... right to present a defense ... 'the judgment of guilt can be affirmed only if it is shown [by the State] that the error was harmless beyond a reasonable doubt.'"); *Gore v. State*, 119 P.3d 1268, 1277 (Okla. Crim. App. 2005) (finding error in excluding third-party evidence implicating defendant's right to present a defense was subject to harmless error analysis); *State v. Richardson*, 670 N.W.2d 267 (Minn. 2003) ("If a trial court's evidentiary ruling ... reaches the level of a constitutional error, such as denying the defendant the right to present a defense, our standard of review is whether the exclusion of evidence was 'harmless beyond a reasonable doubt.'"); *State v. Coltherst*, 820 A.2d 1024, 1048 (Conn. 2001) ("If the improper exclusion of evidence implicates a defendant's constitutional right to present a defense, 'the burden falls on the state to demonstrate that the error was harmless beyond a reasonable doubt.'"); *Newman v. United States*, 705 A.2d 246, 258 (D.C. 1997) ("Because [the defendant's] proffer of extrinsic evidence both to impeach ... and to show a reasonable possibility that someone else committed the crime implicated both 'the right of confrontation and the right to present a defense' [citation

omitted] we are satisfied that the constitutional harmless error standard applies here."); *People v. Ingram*, 415 N.E.2d 569, 574 (Ill. App. Ct. 1980) ("To the extent that the exclusion of the testimony may have denied due process by denying [the defendant] the right to present a defense, we find that in view of all the other evidence of guilt that it was harmless beyond a reasonable doubt.").

Thus, the Kansas Supreme Court's application of harmless error analysis in this case is utterly unremarkable and entirely consistent with a vast sea of precedent. Kansas is not aware of, and Carr has not identified, *any* case from *any* jurisdiction holding to the contrary.

The cases Carr cites as purportedly supporting his position are simply inapposite. In *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973), the Court did hold that the combination of the exclusion of certain evidence and restrictions on cross-examination under Mississippi's antiquated "voucher" rule was reversible error. What the Court did *not* hold, however, was that this constituted structural error as Carr suggests. While the Court did not conduct a harmless error analysis, that does not equate to a holding that harmless error analysis is categorically inappropriate for such errors; instead the Court viewed the error in *Chambers* as sufficiently serious under the facts to warrant reversal: "In reaching this judgment, we establish no new principles of constitutional law. ... Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived

[the defendant] of a fair trial." 410 U.S. at 302-03. Moreover, because *Chambers* pre-dates the specific holding in *Crane* by more than a decade, *Crane* is the persuasive precedent on the applicability of harmless error analysis.

Likewise, *Rock v. Arkansas,* 483 U.S. 44 (1987), provides no support for Carr's argument. In *Rock*, the Court invalidated Arkansas' *per se* rule excluding all post-hypnosis testimony on the grounds that it impermissibly infringed on a defendant's right to testify, *id.*; the Court did *not* hold that exclusion of such testimony was structural error. Instead, the Court explicitly recognized that "[t]he State ... may be able to show that testimony in a particular case is so unreliable that exclusion is justified." *Id.* at 61. The Court noted several factors that corroborated the post-hypnosis testimony in *Rock* and said, "[t]hose circumstances present an argument for admissibility of petitioner's testimony ... an argument that must be considered by the trial court." *Id.* at 62.

Finally, *State v. Hampton,* 818 So.2d 720 (La. 2002), involved a quite different issue. In *Hampton,* the defendant's counsel prevented the defendant from testifying when he clearly wished to testify, erroneously telling the defendant that counsel controlled the decision whether the defendant would testify. 818 So.2d at 726, 729. Here, no one prevented Carr from testifying; he readily admits that his decision not to testify was voluntary. Pet. 28. While the trial court's ruling may have curtailed some of Carr's possible testimony

(in particular about the mysterious, unknown and apparently unknowable alleged third perpetrator), that ruling hardly denied Carr the right to testify about his alleged lack of involvement in the crimes, although it may have denied him the ability to commit perjury about the fictional third participant.

Further, the Louisiana Supreme Court's reading of *Rock, supra*, is overly broad and likely incorrect. The *Hampton* decision ignores the *Rock* Court's statement that the State could, under certain circumstances, justify the exclusions of post-hypnosis testimony – something that could not be possible if the error in *Rock* was structural. *See also Johnson v. Cain*, 712 F.3d 227, 232 n.3 (5th Cir. 2013) (questioning *Hampton's* structural error analysis based on *Rock* and noting federal courts treat same issue as amenable to harmless error analysis); *see also Ortega v. O'Leary,* 843 F.2d 258, 262 (7th Cir. 1988) (noting that harmless error analysis applies to denial of right to testify).

Ultimately, this Court has recognized that "commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal," and that structural error occurs "[o]nly in rare cases." *Washington v. Recuenco*, 548 U.S. 212, 218 (2006) (citing *Neder, supra*). Indeed, this Court has said "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Neder*, 527 U.S. at 8 (citing *Rose v. Clark*, 478 U.S. 570, 579 (1986)). Thus, in *Crane*,

the Court held that the erroneous exclusion of evidence that impaired the defendant's right to present a defense "is subject to harmless error analysis." 476 U.S. at 691.

Lower courts uniformly have followed *Crane* and applied harmless error analysis to such errors, just as the Kansas Supreme Court did here. The Kansas Supreme Court's treatment of this particular issue is completely in step with all other courts, including this Court. There is no reason for this Court to grant certiorari on this settled question.

B. In light of the overwhelming evidence of Carr's guilt, the Kansas Supreme Court correctly held that any error was harmless.

As set forth in the Kansas Supreme Court's decision, the evidence of Reginald Carr's guilt in this case was utterly overwhelming. The combination of eyewitness identification by the surviving victim, the presence of victim DNA evidence on Carr's underwear, other strong circumstantial evidence, Reginald's connection to the murder weapon, and Reginald's possession of a large number of the victims' belongings when he was arrested all point to one inexorable conclusion: Reginald Carr was a principal, not an after-the-fact aider and abettor, but a full participant in these horrific crimes. The Kansas Supreme Court's holding that any error in the exclusion of Carr's proffered "unknown third-party" evidence was harmless beyond a reasonable doubt was really the *only* conclusion that any rational jurist could reach. There is

no need for this Court to review that factbound and amply supported determination.

The Kansas Supreme Court summarized the evidence of Reginald Carr's guilt as follows:

> [Holly G.'s] identification of Reginald, both immediately following the attack and at trial, as one of the two black males responsible for the crimes perpetrated against her and her friends. [Holly G.'s] identification was buttressed by multiple scientific sources, including the mitochondrial DNA analysis, which revealed that of the four hairs collected from the Birchwood scene and submitted for analysis only two were of African–American lineage and defendant could not be excluded as the donor of either one; the nuclear DNA test results, which demonstrated defendant also could not be excluded as the donor of the DNA evidence recovered from [Holly G.'s] inner thigh and which *identified the blood on defendant's* shirt and *underwear as that of [Heather M.]*; and the medical evidence, which demonstrated that a few short months after the attack [Holly G.] developed the *same sexually transmitted disease that defendant carried.*
>
> Additional evidence to support the identification included footwear impressions taken from a Voicestream box and tarp at the Birchwood residence and determined to match the size, shape, and character of the 'B–Boots' Reginald wore. A cigar-type ash, ... matched the diameter of the cigar recovered from Reginald's coat pocket. Both pieces of evidence supported [Holly G.'s] assertion that Reginald played an active role in the commission of the offenses.
>
> Further, the court heard evidence that *it was Reginald who was in possession of a vast majority of the property taken* from the Birchwood residence, given that it was recovered from both the apartment where he was staying and his Plymouth vehicle. That property included a big screen TV, various electronics, bedding, luggage, a vast amount of clothing, and numerous personal items belonging to each victim—including checkbooks, wallets, credit cards, drivers' licenses, sets of keys, gas cards, watches, and day planners—as well as numerous ATM receipts and just under $1000.00 in cash, a particularly notable fact given that

> Reginald was unemployed. Moreover, Reginald was stopped by law enforcement officers after driving by the Birchwood residence at approximately 4:00 a.m. on the morning of the killings.
>
> Finally, at the time of the proffer the court was aware of the evidence that highlighted *Reginald's link to the Lorcin handgun used in the commission of the murders* and that, despite his efforts to dispose of the gun, it was ultimately recovered and tested, revealing that each bullet and cartridge was fired from that gun.

State v. Carr, 331 P.3d 544, 682 (Kan. 2014) (emphasis added).

Carr's proffer of some mysterious, unidentified and apparently unidentifiable perpetrator, whose existence was not corroborated by *any* physical, circumstantial, or eyewitness evidence (other than Carr's own likely perjurious testimony), lacked even a shred of credibility. It requires no unreasonable speculation or imagination to determine how the jury would have received Carr's story; indeed, his story is so fanciful and completely unsupported by even an iota of actual evidence that it smacks of fabrication. Carr has a right to present a defense, but he does not have a right to commit perjury with impunity. *LaChance v. Erickson*, 522 U.S. 262, 266 (1998) ("It is well established that a criminal defendant's right to testify does not include the right to commit perjury."); *Nix v. Whiteside*, 475 U.S. 157, 173 (1986) ("Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*."); *Harris v. New York*, 401 U.S. 222, 225 (1971) ("Every criminal defendant is privileged to testify in his

own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury.").

Perhaps most damning to Reginald was the DNA evidence of one of the victims (Heather M.) found not just on his clothing but *on his underwear*. If he only assisted his brother with the stolen property after the rapes and murders had been committed, how did he end up with a victim's DNA on his underwear? Especially in December when it was cold and snowy, and he was wearing winter clothing? In light of such damning evidence, Carr's proffer that his only participation in the crimes was to help his brother gather stolen property after the rapes and murders had been committed simply defies human credulity. Rather, the *only* explanation for the presence of a victim's blood and DNA on Reginald's underwear is that he participated in the rapes and murders. Adding to this the compelling eyewitness testimony of the surviving victim, Holly G., as well as the mountain of circumstantial evidence of Carr's guilt, the Kansas Supreme Court correctly concluded that the strength of the State's case was "remarkable" and the court was correctly "persuaded beyond a reasonable doubt that there was no impact on the trial's outcome from the exclusion of [Carr's] proffered testimony." 331 P.3d at 682.

In light of the overwhelming evidence, no rational person could conclude anything other than that any error in the exclusion of Carr's likely perjurious testimony had no impact on the verdict. In any event, there is no issue here that merits this Court's review.

CONCLUSION

For the foregoing reasons, the State of Kansas respectfully requests that the Court deny the petition.

Respectfully submitted,

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November 2014