No. _____

IN THE SUPREME COURT OF THE UNITED STATES

REGINALD DEXTER CARR, JR., *Petitioner*

VS.

STATE OF KANSAS, *Respondent.*

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

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PETITION FOR A WRIT OF CERTIORARI

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FORMER CAPITAL CASE

QUESTIONS PRESENTED

I. 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.

II. 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.

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PETITION FOR A WRIT OF CERTIORARI

Reginald Dexter Carr, Jr., respectfully petitions for a Writ of Certiorari to review the judgment of the Kansas Supreme Court.

OPINION BELOW

The opinion of the Kansas Supreme Court is reported at State v. Carr, 331 P.3d 544 (Kan. 2014), and reproduced at Appendix A.

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 Fifth Amendment to the United States Constitution provides in pertinent part, "No person … shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law…" U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides in pertinent part, "In 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 defence." 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.

Kan. Stat. Ann. § 22-3418 states in pertinent part:

"Whenever in the opinion of the court it is proper for the jurors to have a view of the place in which any material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. They may be accompanied by the defendant, his counsel, and the prosecuting attorney."

Kan. Stat. Ann. § 22-3204 states:

"When two or more defendants are jointly charged with any crime, the court may order a separate trial for any one defendant when requested by such defendant or by the prosecuting attorney."

STATEMENT OF THE CASE

Petitioner, Reginald Dexter Carr, Jr. was convicted of four counts of capital murder, one count of felony murder, and 49 other felonies. He was sentenced to death on each capital murder conviction, life with no parole for 20 years on the felony murder conviction, and 570 months imprisonment on the other felony convictions, consecutive to the life sentence. On direct appeal, the Kansas Supreme Court affirmed one capital murder conviction, the felony murder conviction, and 34 other felony convictions. The Court reversed his sentence of death.

Question One

The trial encompassed three separate criminal events. On the State's motion, over Reginald Carr's objection, the trial judge sent the jury on a tour of twenty different locations referenced in the State's evidence. This jury view occurred during the State's case-in-chief,

and lasted about two hours. Mr. Carr's request to be present for the jury view was denied. His attorneys' request to be present for the jury view was denied.

On appeal, Mr. Carr argued that a jury view is evidentiary, thus, his exclusion, and the exclusion of his attorneys, from the jury view, violated his constitutional right to be present at his criminal trial, derived from his Sixth Amendment right to confront witnesses, and his Fifth and Fourteenth Amendment due process rights to attend critical stages of a criminal proceeding, as well as his Sixth Amendment right to counsel. Mr. Carr urged the Kansas Supreme Court to overrule its previous decisions holding that a jury view is not a critical stage of a criminal trial at which the defendant, or counsel, have the right to be present. See, State v. Engelhardt, 119 P.3d 1148, 1157-1160 (2005).

The Kansas Supreme Court recognized the split in authorities regarding whether a jury view constitutes evidence and stated "We will for the time being continue to adhere to our precedent, the evident leaning of the United States Supreme Court when it said due process concerns were not implicated by the defendant's absence from the jury view in [Snyder v. Massachusetts, 291 U.S. 97 (1934)], and the continuing majority rule among other jurisdictions that a jury view is nonevidentiary and not a critical stage of the proceedings requiring the defendant's presence." Based on that rationale, the Court also found that counsel's presence was not constitutionally required at the view. Carr, 331 P.3d at 694.

Question Two

With regard to the capital crimes, Mr. Carr's defense was that those crimes were committed by his brother Jonathan Carr (the co-defendant) and another, uncharged individual. In support of this defense, Reginald Carr proposed to testify that he and his

brother parted ways in the early evening of December 14. He received three telephone calls from Jonathan Carr a few hours later. His brother was crying, distraught and asking for his help. Jonathan Carr said that his companion was Atrippin=@ and that he had shot some people. Reginald Carr went to his brother's aid. He saw and spoke with his brother's companion, and he helped the two men dispose of the property that they had stolen. His brother warned him that not only was the property stolen, but that people had been killed.

On the State's motion, the trial court determined, pretrial, that Mr. Carr would not be allowed to testify about his brother's companion. The trial court also ruled, at trial, that Mr. Carr would not be allowed to testify to any of the incriminating statements made by his brother. Mr. Carr then elected to not testify.

On appeal, Mr. Carr argued that the trial court had misapplied the Kansas third party evidence rule, and Kansas rules regarding hearsay, in excluding his evidence. He argued that the trial court's erroneous limitation of his testimony violated his Fourteenth Amendment right to present a defense and his Fifth, Sixth and Fourteenth Amendment rights to testify on his own behalf. Additionally, he argued that the trial court's ruling prevented him from testifying and that this constituted structural error. The Kansas Supreme Court agreed that the trial court misapplied the third-party evidence rule and erroneously excluded Mr. Carr's proposed testimony regarding his brother's companion. Id. at 677. The Court also agreed that the statements made to Mr. Carr by his brother were admissible as declarations against interest. Id. at 679.

The Court recognized that Mr. Carr's evidence was relevant and admissible, and "It was not merely integral to his defense; it was his defense." However, the Court declined to find that this constituted structural error and found that due to the "remarkable strength" of

the state's case, there was no reasonable possibility that the error contributed to the verdict; therefore the error was harmless under the constitutional harmless error standard. Id. at 682.

The Kansas Supreme Court also found error in the trial court's failure to sever Mr. Carr's trial from that of his brother. Id. at 618. However, the court found the error did not require reversal: "Although its path to R. Carr's convictions was made somewhat smoother and straighter by the judge's related guilt phase errors on severance and on third-party evidence and hearsay, the State presented compelling evidence of R. Carr's guilt, all of which would have been admissible in a severed trial." Id. at 620. Three members of the Court dissented, finding that the failure to sever the trials, standing alone, was compelling grounds for reversal of Mr. Carr's convictions and that cumulatively, with the other identified errors in the guilt phase, required reversal of all his convictions.

REASONS FOR GRANTING THE WRIT

Question One

The Fifth, Sixth and Fourteenth Amendments to the United States Constitution guarantee, to the criminal defendant, the rights of confrontation, the assistance of counsel, due process and the right to be present at critical stages of his or her trial. If a jury view is evidence, then the defendant has a right, under those amendments, to be personally present, and to the assistance of counsel, at the jury view. There is a split in authority, both in state courts of last resort, and in the federal circuits, on the question of whether a jury view constitutes evidence. This case presents this Court with the opportunity to resolve the conflict among jurisdictions, declare such views evidentiary and hold that the criminal defendant has a federal constitutional right to be present, and to the assistance of counsel, during a court-ordered jury view of locations and objects relevant to the prosecution.

Part of the conflict in the jurisdictions is based on this Court's holding in Snyder v. Massachusetts, 291 U.S. 97 (1934). The Kansas Supreme Court relied on Snyder in its decision. This case presents this Court with the opportunity to review Snyder and remedy the internal inconsistency in that opinion. Snyder recognizes that jurors, even if instructed to the contrary, will use information gathered during a jury view as evidence, but the five member majority of the Court then found that the defendant's presence at this evidentiary stage of the trial is not required by the Constitution. With this case, this Court can adopt the logically consistent position of the four-member minority and find that because a jury view is used as evidence, the Constitution safeguards the defendant's right to be present, and to the assistance of counsel at the view.

Question Two

The Fourteenth Amendment to the United States Constitution guarantees the criminal defendant the right to a meaningful opportunity to present a complete defense. That amendment, in conjunction with the Fifth and Sixth Amendments, protects the defendant's right to testify in his own defense. In this case, the Kansas Supreme Court determined that the trial court's erroneous evidentiary rulings prevented Mr. Carr from presenting his defense to the capital crimes in its entirety. The Court then found the error harmless, based on the strength of the State's case. This case presents this Court with the opportunity to declare that erroneous evidentiary rulings that leave a defendant without his defense, in its entirety, result in structural error, not amenable to harmless error review.

I

a. The Kansas Supreme Court's decision that a jury view is not evidentiary and that the defendant does not have the right to be present, or to the assistance of counsel at the view, conflicts with the decisions of several state courts of last resort.

Whether the observations made by a jury at a jury view are evidence, thus implicating a criminal defendant's rights to confrontation, due process and the assistance of counsel has not been determined by every state court of last resort. There is a split in authority among courts that have considered that question, and the decision of the Kansas Supreme Court is in conflict with decisions rendered by the Supreme Courts of California, Hawaii, Louisiana, Mississippi, Tennessee, Virginia, and West Virginia.

In People v. Bush, 10 P. 169 (Cal. 1886), the defendant was convicted of murder, following a jury trial at which the jury was escorted to several places referenced in the evidence. Id. at 170-171. The defendant contended that this jury view, conducted in his absence, violated his right under the state constitution "to appear and defend in person and with counsel." Id. at 172-173. The California Supreme Court found the view was evidence: "It is impossible that a jury could go and view such a place without receiving some evidence, through one of their senses, viz., that of sight." Id. at 173. Thus, the jury "received evidence in the absence of the judge, the defendant and his counsel." Id. The court found that the procedure violated the defendant's right to be present under state law and required reversal of his conviction. Id. at 175. Bush remains good law in California: "It has been established under California law for more than a century that when a trial court authorizes a jury to view the scene of an alleged crime during a criminal trial, the defendant and his or her counsel have a right to be present during the jury view…(citing Bush)…" People v. Garcia, 115 P.3d 1191, 1192 (Cal. 2005).

In State v. Pauline, 60 P.3d 306 (Hawai'i 2002), the defendant was convicted of murder, kidnapping and sexual assault. Id. at 310. During the trial, the jury was twice taken to the basement of the courthouse to view an automobile that was involved in the incidents. Neither the defendant, nor his attorneys, nor the state's attorney were present for the viewing. Id. at 313. The appellate court found that the view was evidentiary: "…we hold that in this jurisdiction, a view constitutes independent evidence." Id. at 325. The court then held, that because the jury view constitutes evidence, certain safeguards must be in place during a view, including the presence of counsel, the trial judge, and the defendant. Id. at 325-326. The court found the defendant had a state law right to be present at every stage of his trial, but that the error, in this case, was harmless. Id. at 329.

In State v. Pepper, 180 So. 640 (La. 1938), the defendant was convicted of manslaughter, following a jury trial. During deliberations, jurors asked to view the scene of the killing. They were taken to the scene, accompanied by the trial judge, the prosecutor and defense counsel. The defendant was not present for the viewing, and had not waived her presence. Id. at 641- 642. On appeal, the Lousiana Supreme Court referenced a previous decision that held that viewing the scene was the taking of evidence. Id. at 642. The court further found that the defendant's absence from the view required reversal because, citing state law, "it is well settled the minutes must show that the accused was present at every important stage of the trial for a felony…" Id. Pepper remains good law in Louisiana. State v. Matthis, 970 So.2d 505, 508-509 (La. 2007).

In Foster v. State, 12 So. 822 (Miss. 1893), the defendant was convicted of murder. During his trial, the jurors were taken to see the railway car in which the fatal incident occurred, and the defendant was not allowed to accompany them into the car. Id. In

determining whether the defendant had a right to be present, the Mississippi Supreme Court first rejected the argument that the impressions received at a view are not evidence, but merely serve to help the jury understand the testimony offered in court: "To say the jury cannot receive evidence by simply viewing the scene is to insult common sense." Id. at 823. The court then referenced the right of confrontation: "The constitutional right warranted to every person charged with crime, to be confronted by the witnesses against him, will require the production of all evidence from all witnesses, animate or inanimate, in his presence." The court found that "A trial conducted in part away from the place appointed for the holding of the court, in the absence of the judge and of the accused, is not that trial to which every man accused is constitutionally entitled." Id. at 824. The court reversed the defendant's conviction. Id. The court did not specify whether it was relying on the state or the federal constitutional right of confrontation. State law was amended to comply with this holding the following year, Bailey v. State, 112 So. 594, 594 (Miss. 1927), and the current Mississippi statute provides that a jury view must be had in the presence of the defendant. Miss. Code Ann. § 13-5-91.

In Watson v. State, 61 S.W.2d 476 (Tenn. 1933), the defendants were convicted of armed robbery. During a break in the trial, the jurors indicated they wanted to see the scene of the crime. The officers in charge of the jury took them to the scene and pointed out different aspects of the location. Id. The Tennessee Supreme Court found that the view was evidentiary: "The object of the jury in viewing the scene is to make clear the situation as to which they are uncertain or confused, and the information thus obtained certainly constitutes evidence." The court reversed both defendants' convictions on the grounds that the view violated their state constitutional right to be present during the entire trial. Id. at 477.

In Noell v. Commonwealth, 115 S.E. 679 (Va. 1923), the defendant was convicted of an assault on a 12 year old girl. Id. At the end of the evidence, while the court and counsel were preparing instructions, the jury requested to view the premises of the alleged assault. A court official took the jury to the location, neither the judge, nor attorneys for the defendant or the state, nor the defendant were present for the view. The jurors also made some experiments while they were at the scene. Id. at 680. The Supreme Court of Virginia found that "a view furnishes a distinctly additional source of proof…" Id. at 683 - 684. The court further held that because the view was evidentiary, not only did the defendant have the right to be present, that his presence could not be waived: "It has always been held in Virginia that whenever anything is to be done at the trial of a felony case which may affect the interests of the accused his presence is indispensable to his conviction - a jurisdictional requisite which he cannot waive." The court reversed his conviction. Id. at 685. The portion of Noell holding that the defendant could not waive his presence at a view was later overruled, but the same case reaffirmed that the defendant has the right to be present at a view. Jones v. Commonwealth, 317 S.E.2d 482, 483-484 (Va. 1984).

In State v. McCausland, 96 S.E. 938 (W.Va. 1918), the defendant was convicted of involuntary manslaughter. At the close of the state's evidence, the jury was taken to view the scene of the alleged offense. The judge, attorneys for both sides, and the defendant went with the jury to the scene. The defendant, believing the view was over, left the scene to pick up his mail, and while he was gone, there was a demonstration for the jury. Id. at 938 -939. The court held that the view was the taking of evidence, finding that there was no difference between things seen on a visit to the scene of the crime and objects proffered as exhibits in the courtroom. Id. at 939. The court found that conducting the view in the absence of the

defendant violated his right to be present at every stage of his trial, and noted that under previous decisions it was reversible error to introduce evidence to the jury in the absence of the defendant, and reversed his conviction. Id. at 939 -940, 941. The holding that a view supplies evidence remains good law. State v. Thomas, 374 S.E.2d 719, 722 (W.Va. 1988)("The view offered the jury additional significant evidence.").

The Supreme Court of New Hampshire has held that "information that a jury obtains from a view is evidence which it is authorized to use in reaching a verdict." State v. Gilbert, 429 A.2d 323, 326 - 327 (N.H. 1981), but has not ruled on whether the defendant has a right to attend a jury view. The Supreme Court of Michigan decided that the jury view was part of the trial at which the defendant had the right to be present, without determining whether the view constituted evidence. People v. Mallory, 365 N.W.2d 673, 682 (Mich. 1984).

On the other hand, Kansas is not alone in holding that jurors do not receive evidence during a view and therefore, the defendant's presence is not necessary. States with similar holdings from their courts of last resort are: Georgia - Jordan v. State, 276 S.E.2d 224, 239 (Ga. 1981)(a scene view is not evidence and can be conducted without the presence of the defendant); Indiana - Stephenson v. State, 742 N.E.2d 463, 493 - 494 (Ind., 2001)(a view is not evidence therefore view in absence of defendant and his counsel did not violate defendant's confrontation rights); Maine - State v. Fernald, 248 A.2d 754, 758 (Me. 1968)(the purpose of a view is not to receive evidence, it is not a part of the trial and does not require the defendant's presence); Pennsylvania - Commonwealth v. Darcy, 66 A.2d 663, 669 - 670 (Pa. 1949)(knowledge acquired by jurors when they visit scene of crime is not evidence, defendant's rights not violated by visit to scene in his absence); Utah - State v. Mortensen, 73 P. 562, 571 (Utah 1903)(view is not taking evidence, nor is the presence of

the defendant essential); Washington - State v. Perkins, 204 P.2d 207, 238 (Wash. 1949) (view by jury not a part of the trial, nor is it taking of evidence, so state law not violated when defendant not present for view).

The Florida Supreme Court, in McCollum v. State, 74 So.2d 74, 76 (Fla. 1954) acknowledged that other jurisdictions consider a view evidentiary but found, following Snyder, that a view is not a part of the trial and therefore the presence of the accused is not necessary. The Supreme Court of Massachusetts made a similar holding in Commonwealth v. Gomes, 944 N.E.2d 1007, 1012 (Mass. 2011)("Although what is seen on the view may be used by the jury in reaching their verdict, in a 'strict and narrow sense a view may be thought not to be evidence.' … A view is not part of the trial, and a defendant is therefore not constitutionally entitled to attend.").

The foregoing cases demonstrate that there is a longstanding split of authority on the question of the evidentiary status of a jury view. That question necessarily implicates a defendant's right to be present, and to have the assistance of counsel at all critical stages of his or her trial. Therefore, this Court should exercise its discretion to grant the Writ in this case and resolve this conflict.

b. The Kansas Supreme Court's decision that a view is not evidentiary conflicts with controlling precedent in several federal circuits. Further, there is a conflict among the circuits on this question.

In the First, Sixth, Tenth, Eleventh and District of Columbia Circuits, a jury view is considered evidence.

In United States v. Gray, 199 F.3d 547 (1st Cir. 1999), the defendant was charged with bank robbery. The district court allowed the jury to view the robber's escape route, but denied the defendant's request for an instruction that the jury consider the view as evidence,

instructing the jurors instead that the view was simply to provide them with points of reference and context for the evidence in the case. Id. at 548. On appeal, the First Circuit Court of Appeals acknowledged its previous holding in Clemente v. Carnicon-Puerto Rico Management Associates, 52 F.3d 383 (1st Cir.1995), that " 'the rule in this circuit is that a view does not itself constitute or generate evidence,' … reflecting the widely adopted position that a view is permitted in the discretion of the trial judge 'only to assist the trier of fact in understanding and evaluating the evidence' introduced in court." Gray, at 548. The court then found that it was "unrealistic to exclude a view from the status of evidence in every circumstance," and removed the previous "blanket prohibition" on considering a view evidence. Id. Issues regarding the defendant's right to be present or to the assistance of counsel at a view were not before the court in Gray, and the court found that the instructional error was harmless. Id.

In United States v. Walls, 443 F.2d 1220 (6th Cir. 1971), the defendant was tried to a judge on narcotics charges. The trial judge visited the scene of the alleged offense without allowing the defendant, or his attorney to attend the view. Id. at 1221. The Sixth Circuit Court of Appeals reversed, stating:

> Some courts have characterized information derived from a view of the scene as evidence. Others have treated a view merely as a procedure whereby the factfinder is enabled to better understand the evidence adduced at trial. This division of authority persists despite the statements of eminent scholars that a view constitutes the taking of evidence. 4 J. Wigmore, Evidence, §§ 1150-1151, 1163-69 (3d ed. 1940); C. McCormick, Evidence, § 183 (1954). However, it can at least be stated that, however a view is characterized, 'its inevitable effect is that of evidence. * * *' Snyder v. Massachusetts, 291 U.S. 97, 121 (1934). Accordingly, it was reversible error for the court to deny appellant and his attorney the opportunity to attend the view to insure against the intrusion of prejudicial error.

The court found that its decision was not contrary to this Court's holding in

Snyder, because it was not reaching any constitutional questions; rather, it was exercising its supervisory authority over the district courts of its circuit. Id. at 1223, fn 3. See also, Price Brothers Company v. Philadelphia Gear Corporation, 649 F.2d 416, 419 (6th Cir. 1981)("…where the fact finder's observations upon a view are used as evidence to determine the facts, then the procedural safeguards of a trial, including the rules of evidence and the participation of the parties must apply.")

Lillie v. United States, 953 F.2d 1188 (10th Cir. 1992) was a civil action, tried to the court. The plaintiff sued for injuries suffered from a fall on the steps of a post office. Id. at 1189. The trial judge found in favor of the government, and told the parties that he had visited the scene of the accident. Neither party had notice that the judge was going to make the visit and counsel did not accompany him to the scene. Id. The Tenth Circuit Court of Appeals found that the view constituted evidence:

> We acknowledge that jurisdictions vary as to whether a view is treated as evidence or simply as an aid to help the trier of fact understand the evidence. However, we believe such a distinction is only semantic, because any kind of presentation to the jury or the judge to help the fact finder determine what the truth is and assimilate and understand the evidence is itself evidence.

Id. at 1190.

The court stated that "a view should always be considered evidence," and found that the view was conducted improperly in this case (in the absence of counsel) and therefore considered the evidence to have been erroneously admitted, and reversed the district court because it could not find that the erroneous admission of the evidence was harmless. Id. at 1192.

Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003) concerned the Ten Commandments monument installed by the Chief Justice of the Alabama Supreme Court in the rotunda of the Alabama State Judicial Building. The district court found that the

monument violated the Establishment Clause of the First Amendment and ordered it removed. Id. at 1284. Before the trial began, at the request of the Chief Justice's attorney, the trial judge visited the monument, in the company of attorneys for both sides. Id. at 1288. On appeal, the Chief Justice argued that it was error for the trial court to find facts based upon his visit to the monument. He argued that the only purpose for the visit was to provide the court with a context in which to assess the evidence admitted in the courtroom. Id. at 1289. The Eleventh Circuit Court of Appeals disagreed:

> To the extent the Chief Justice is arguing that factfinders should never find facts from what they observe at a view but should only use what they see to put into context the facts they hear in the courtroom, we agree with the Tenth Circuit that "such a distinction is only semantic, because any kind of presentation to the jury or the judge to help the fact finder determine what the truth is and assimilate and understand the evidence is itself evidence." … Just as pictures of the monument and the rotunda that were submitted as exhibits are evidence, so too is what the judge saw when he viewed the actual monument and its setting.

Id. at 1289-1290.

In Barron v. United States, 818 A.2d 987 (D.C. 2003), the defendant was convicted of several crimes relating to a drive-by shooting. Id. at 988 -989. During deliberations, the jury requested, and the court allowed, over defense objection, a view of the car involved in the offenses. Id. at 989 -990. The trial court took the position that viewing the car would be the same as viewing the scene of an offense and that it was not evidence. The D.C. Circuit Court of Appeals noted that "[t]he court's characterization of a jury view as non-evidence is consistent with the perspective that many courts have historically used to justify jury views without introducing the object of the view as evidence." Id. at 990. The court disagreed with this position:

> Evidence is defined as "something ... that tends to prove or disprove the existence of an alleged fact," BLACK'S LAW DICTIONARY 576 (7th Ed.1999). It is difficult to conceive of a circumstance when a jury view would not meet this definition of evidence.

Id. at 991 -992.

The trial court did not allow argument regarding the evidence after the view and the appellate court found error in allowing the jury to view a significant piece of evidence without giving the parties an opportunity to present argument regarding the significance of the evidence, and reversed the defendant's convictions. Id. at 992.

In two circuits, the Second and Seventh, a jury view is not considered evidence. In Schonfeld v. United States, 277 F. 934, 938 (2nd Cir. 1921), the court stated, "As stated by the trial judge, the view was permitted for the purpose of enabling the jury to understand the evidence. It did not constitute the taking of testimony. It is the presentation of evidence that requires the presence of a judge, jury, and defendant." In Devin v. DeTella, 101 F.3d 1206, 1208 (7th Cir. 1996), the Seventh Circuit found that because this Court held in Snyder, that the defendant does not have the right to be present for a jury view, the view is not evidence.

This conflict in authority among the federal circuits, implicating a defendant's right to be present, and to have the assistance of counsel at all critical stages of his or her trial, warrants the exercise of this Court's discretion to grant the Writ and resolve this conflict.

c. It is fundamentally unfair for a criminal defendant to be convicted based on evidence that neither he, nor his counsel, has seen. This Court should reverse the Kansas Supreme Court as well as its previous decision in Snyder v. Massachusetts and hold that, because a jury view is evidentiary, it is a critical stage of the criminal trial, at which the defendant has the right to be present, and to the assistance of counsel.

In Snyder, the defendant was convicted of murder and attempted robbery. 291 U.S. at 102. During the trial, on the prosecution's motion, the jury was taken to view the gas station where the offenses occurred. The judge, the court reporter, the prosecutor and counsel for the defense all attended the view with the jury, but the defendant's request to view the scene with the jury was denied. Id. at 103. At the location, both the prosecutor, and counsel for the

defense pointed out features of the scene that they wished the jury to observe. Id. at 103-104. During instructions, the judge told the jury that the view, along with the testimony given by witnesses, and the exhibits, comprised the evidence in the case. Id. at 104.

The issue before the Court was whether a view in the involuntary absence of the defendant was a denial of due process under the Fourteenth Amendment. Id. at 104-105. Writing for the five-member majority, Justice Cardozo first assumed that the defendant has a Fourteenth Amendment right to be personally present whenever his presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Id. at 105-106. The Court then found that a bare inspection of the premises or location, where nothing was said or done to direct the attention of the jury to one feature or another does not require, under the Fourteenth Amendment, the presence of the defendant, as "There is nothing [the defendant] could do if he were there, and almost nothing he could gain." Id. at 108. The Court stated that the Fourteenth Amendment does not require the presence of the defendant where his presence would be useless. Id. at 106. Instead, "So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." Id. at 107-108.

The Court acknowledged that the criminal defendant must be present at trial when evidence is offered, in order to consult with counsel and to confront his accusers. Id. at 114. The Court acknowledged that knowledge derived from the inspection of the scene may be characterized as evidence and that the inevitable effect of the view is evidence, no matter what label the judge gives it. This would seem to indicate that the defendant would indeed

have the right to be present at the view. But the Court then resolved that dilemma by declaring that the view is not a part of a trial. Id. at 113-114, 121.

Four Justices dissented. Writing for the dissent, Justice Roberts started with the proposition that it is a fundamental rule of fairness, guaranteed by the Fourteenth Amendment, that a defendant be present through his trial. Id. at 131. He stated that the privilege is not solely for the purpose of cross-examining witnesses, but also that he may "in person, see, hear, and know all that is placed before the tribunal having power by its finding to deprive him of liberty or life." Id. at 132.

Justice Roberts pointed out that a defendant cannot cross examine his own witnesses, nor can he cross-examine documents or physical exhibits (maps, photographs, clothing, weapons). If a defendant can be excluded from the view he reasoned, then he could be excluded when that type of evidence was offered as well. Id. at 132-133. He concluded:

> If, then, a view of the premises where crime is alleged to have been committed is a part of the process of submission of data to the triers of fact, upon which judgment is to be founded; if the knowledge thereby gained is to play its part with oral testimony and written evidence in striking the balance between the state and the prisoner, it is a part of the trial. If this is true, the Constitution secures the accused's presence.

Id. at 134.

As noted, the majority in Snyder acknowledged that knowledge derived from a jury view can be characterized as evidence and that the inevitable effect of the view is evidence, no matter what label the judge gives it. Id. at 113-114, 121. The decision of the Kansas Supreme Court ignores the "inevitable" evidentiary effect of the view by adhering to "the rule that 'a view itself is not evidence; like a demonstrative aid, its purpose is only to assist the trier of fact in understanding and evaluating the evidence.'" Carr, 331 P.3d at 691. Other jurisdictions that deny the defendant's presence, as a matter of right, at the jury view, have used similar reasoning. See, Schonfeld, 227 F. at 938; Stephenson ,742 N.E.2d at 493 - 494.

In these jurisdictions, the belief is that the jurors will not use information gathered at a jury view in their fact-finding simply because they've been told that it is not evidence.

The First Circuit noted in Gray, 199 F.3d 548-549, the position that a jury view is not evidentiary has lost favor among legal scholars:

> Indeed, most of the usual commentators on matters of evidence either question the rationale for excluding views from evidentiary status, observe that that position has lost favor, or both. *See McCormick on Evidence* § 216, at 29 (the "preferable" position is that a view is "evidence like any other"); 22 Charles Alan Wright & Kenneth W. Graham Jr., *Federal Practice and Procedure* § 5176, at 141 (1978) ("The notion that a view is not 'evidence' has been discredited by the writers, and explicitly rejected by one modern code.") (citations omitted); 2 Joseph McLaughlin, ed., *Weinstein's Federal Evidence* § 403.07[4] (2d ed. 1999) ("[T]he modern position is that the view does provide independent evidence."); 4 John Henry Wigmore, *Wigmore on Evidence* § 1168, at 391, 388 (1972) (referring to the "unsound theory" that a view "does not involve the consideration of evidence by the jury" and noting that "it has in most jurisdictions been repudiated"). *Cf.* John M. Maguire, *Cases and Materials on Evidence* 141 (1973) (noting that courts are divided on the question but not taking a position).
>
> Perhaps the most compelling and pragmatic observation is that the distinction between non-evidence that aids a jury's understanding and traditional, independent evidence is "lost on a jury," *see* 2 *Weinstein's Federal Evidence* § 403.07[4]. We agree that it is unlikely that jurors, confronted with testimonial evidence at odds with what they have seen, "will apply the metaphysical distinction suggested and ignore the evidence of their own senses," *McCormick on Evidence* § 216, at 29.

199 F.3d 549.

As previously noted, in Lillie, the Tenth Circuit found the distinction between evidence and "an aid to help the trier of fact understand the evidence" was only semantic as any presentation to help the trier of fact determine the truth and assimilate and understand the evidence is itself evidence. 953 F.2d at 1190.

The Supreme Court of Mississippi stated bluntly in Foster, "To say the jury cannot receive evidence by simply viewing the scene is to insult common sense. The most convincing evidence is made by the sense of sight. The juror, on the view, sees, and thinks he knows what he sees, with all the conclusions flowing therefrom." 12 So. at 823.

In Barron, the D.C. Circuit stated that "jurors are unlikely to assign less importance to jury views than to other types of evidence merely because they are instructed that the view is not evidence," and noted, "In fact it has been suggested that jurors will assign even more importance to a jury view than to other evidence because 'it is an even more direct and satisfactory source of proof.' WIGMORE ON EVIDENCE § 1168." 818 A.2d at 991, fn.3.

All these authorities support this Court's observation in Snyder, that impressions formed and information gathered during a jury view are inevitably treated as evidence during jury deliberations. Even if jurors can make the distinction between evidence and an aid to the interpretation of evidence introduced in the courtroom, if it is used in determining facts, then it is evidence.

The Due Process Clause and the Confrontation Clause of the Sixth Amendment, as applied to the States through the Fourteenth Amendment, guarantee to a criminal defendant the right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings. Tennessee v. Lane, 541 U.S. 509, 523 (2004); Kentucky v. Stincer, 482 U.S. 730, 745 (1987). This Court stated in Rushen v. Spain, 464 U.S. 114, 130 (1983), "If a defendant were denied access to the courtroom while the prosecutor was examining his accusers, the constitutional error would taint the verdict no matter how firmly we might be convinced that the defendant's absence did not affect the outcome of the trial."

In this case, the prosecution conducted no "examination" during the view. However, the fact that a view cannot be subjected to cross-examination does not remove it from the realm of evidence that the defendant has the right to see. Much of the evidence in a criminal case – weapons, clothing, audio recordings of 911 calls, DVDs of security camera footage - cannot be questioned or subjected to cross-examination. It has never been suggested these

types of exhibits could be displayed to the jury in the defendant's absence. Nor has it been suggested that the defendant could be prevented from ever seeing them, as was Mr. Carr in this case. Indeed, this Court stated, in Crawford v. Washington 541 U.S. 36 (2004): "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind. *Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony*…" Id. at 50-51 (emphasis added).

While Crawford concerned testimonial hearsay, a jury view from which the defendant, and his counsel are barred, is much like *ex parte* evidence. The Fourth Circuit followed this reasoning in finding that the defendant in a criminal case had the right, under the Confrontation Clause, to see documentary evidence that the Government used in his prosecution: "…we think the criminal defendant's right to confront witnesses necessarily encompasses his right to also see any documentary evidence that such witnesses offer at trial as evidence to support a conviction…" United States v. Abu Ali, 528 F.3d 210, 245 (4th Cir. 2008). If the defendant has the right to see a photograph of the crime scene that is presented to the jury, surely he has the right to see the actual scene that is presented to the jury. As this Court stated in Hamdan v. Rumsfeld, 548 U.S. 557, 635 (2006) "…the Government suggests no circumstances in which it would be 'fair' to convict the accused based on evidence he has not seen or heard."

Mr. Carr was in custody. Because of the trial court's ruling he never had the opportunity to see the evidence presented to the jury during this portion of his trial. Not only would his presence have contributed to the fairness of the procedure, it was essential to the fairness of the procedure. The jury in this case considered evidence that Mr. Carr was prohibited from seeing, in determining his guilt. The defendant cannot defend against evidence that he has not seen.

If a view is indeed evidence, then a fair and just hearing is thwarted when conducted outside the presence of the defendant. Justice requires that the defendant see the evidence against him that is presented to the jury, whether or not he can challenge, illuminate, explain or disprove that evidence.

d. In the alternative, this case can be distinguished from Snyder, because the Petitioner was also denied his right to the assistance of counsel at the jury view.

The Kansas Supreme Court also rejected Mr. Carr's claim that his Sixth Amendment right to the assistance of counsel was violated by the exclusion of his attorneys from the jury view. See, Gideon v. Wainwright, 372 U.S. 335 (1963)(Sixth Amendment right to counsel is made obligatory upon the States through the Due Process Clause of the Fourteenth Amendment).

Even if this Court should find that Mr. Carr did not have a right to be present at the jury view, the absence of counsel from the jury view is an alternate ground for reversal. In analyzing a similar claim, the Fourth Circuit noted, AThe absence of counsel from a jury view is a virtually nonexistent issue in the history of federal jurisprudence presumably because trial judges, mindful of the Sixth Amendment, normally permit defense counsel to attend." Arnold v. Evatt, 113 F.3d 1352, 1359 (4th Cir. 1997).

The initiation of adversary judicial proceedings marks the commencement of the prosecution and the time when the right to counsel attaches. Kirby v. Illinois, 406 U.S. 682, 688-690 (1972). Upon attachment of the right, the defendant is entitled to counsel at any critical stage of his or her trial. United States v. Cronic, 466 U.S. 648, 659 (1984).

In Arnold, the court found that counsel=s absence from the jury view was a violation of the defendant=s Sixth Amendment right to counsel and noted that Snyder does not provide support for the argument that the defendant did not have the right to counsel at the jury view:

> ...*Snyder* is not a holding about the right of defense counsel to be present at a jury view. In fact, **it can be inferred that the presence of defense counsel at the jury view was one of the reasons why the exclusion of the defendant did not amount to a constitutional violation.** In addition, over the past forty years the Court has determined that a right to counsel exists during any Acritical stage@ of a defendant=s criminal proceeding. ...
>
> A jury view presents the danger of potential substantial prejudice to a defendant. The jury could be influenced by the words or actions of officers showing the scene, by the way in which the scene is exhibited, or by the condition of the scene at the time of the view. Depriving defense counsel of access to all of the information received by the jury might diminish the effectiveness of his advocacy. Given the inapposite holding of *Snyder* and more recent Supreme Court precedent, we assume for the purpose of argument that the absence of Arnold=s counsel at the jury view amounted to constitutional error under the Sixth Amendment.

Id. at 1359-1360. (emphasis added).

Arnold was decided by the Fourth Circuit after this Court denied certiorari. Justice Brennan and Justice Marshall dissented from the denial. They noted that the Supreme Court of South Carolina relied on Snyder when affirming the Petitioners' convictions. The dissenting Justices found Snyder "inapposite" because Snyder involved the defendant's right to be present, the defendant's attorney was present for the view, and the court reporter was present to make a record of the view. Arnold v. South Carolina, 467 U.S. 1265, 1266-1267 (1984). The dissenters stated:

> It is doubtful, then, whether the trial court's actions in this case would even have satisfied the standards prevailing at the time of Snyder, over 50 years ago. Far more doubtful is whether the trial court's neglectful failures can satisfy present constitutional standards. **By excluding petitioners' attorneys from the jury inspection, the trial court violated petitioners' right to counsel at every critical stage of the proceedings against them**.

Id. at 1266 - 1267 (emphasis added).

A critical stage of the trial is one that "…h[olds] significant consequences for the accused," Bell v. Cone, 535 U.S. 685, 696 (2002), and "where substantial rights of a criminal accused may be affected." Mempa v. Rhay, 389 U.S. 128, 134 (1967).

Because jurors may base their factual determinations on what they see during a view, this stage holds significant consequences for the defendant, and his substantial rights may be affected, especially if prejudicial, non-admissible information is introduced during the view. This can easily happen if the jurors, or the bailiff, fail to follow the court's instructions during the view, if substantial and misleading changes have occurred at the site, or if the jurors view the wrong locations. If defense counsel and the defendant are absent from the view, they lose the chance to prevent or correct any problems that may occur during the view, and may never even discover them. This is a particular problem in this case, where the trial judge did not attend the view either. Additionally, evidence gathered at the view may provide questions for the cross-examination of the state's witnesses.

In United States v. Roy, 761 F.3d 1285, 1286 - 1287 (11th Cir. 2014) the court reversed the defendant's convictions under this Court's decision in Cronic, because evidence was introduced at this trial while his attorney was absent from the courtroom. Defense counsel was six minutes late following a lunchtime recess in the trial, and during that time the prosecution offered the testimony of a computer expert, regarding certain files found on the defendant's computer. Id. at 1287 - 1288. Because the testimony offered during counsel's absence directly inculpated the defendant, providing a basis for conviction, id. at

1290, the court found that this constituted a critical stage of the trial. The court stated, "The absence of counsel during the presentation of inculpatory evidence used by the government to convict the defendant eliminates the opportunity to decide whether to lodge an objection and how to frame the objection, as well as the ability to conduct cross-examination." Id. at 1291. In United States v. Russell, 205 F.3d 768 (5th Cir. 2000), counsel was absent during two days of trial in which the prosecution introduced testimony implicating the defendant's co-defendants and co-conspirators. The court found that the defendant had been deprived of his right to counsel during a critical stage of trial because the prosecution had previously introduced evidence linking the defendant with his co-defendants in the conspiracy. The court reversed without requiring that the defendant show prejudice: "For Russell to be without counsel as the probability of his guilt increased during the government's presentation of evidence against his co-conspirators is unacceptable…. Under Cronic, no specific showing of prejudice is necessary and Russell's conviction must be reversed." Id. at 772.

In Green v. Arn, 809 F.2d 1257 (6th Cir. 1987)(*vacated on other grounds,* 484 U.S. 806 (1987), *reinstated,* 839 F.2d 300 (1988) the petitioner's attorney was absent during the afternoon of the first day of her trial, a period during which her co-defendant's lawyer cross-examined the prosecution's first witness. Id. at 1259. The appellate court reversed the defendant's conviction, finding that the absence of counsel during the taking of evidence was prejudicial per se and that a harmless error analysis was inappropriate: "It is difficult to perceive a more critical stage of a trial than the taking of evidence on the defendant's guilt." Id. at 1262.

Whatever justification may be advanced for the exclusion of the defendant from a jury view, the same reasoning cannot be offered for the exclusion of defendant's counsel. Counsel's presence is not necessary solely for the cross-examination of witnesses. It is also necessary to insure that prejudicial, irrelevant or misleading matters are not placed before the jury. If problems arise or misconduct occurs during a view from which counsel has been excluded, the opportunity to avoid prejudice has been lost. Worse, if prejudicial error occurs during the view from which counsel has been excluded, it may never come to light. This Court should grant the Writ to secure the defendant's Sixth and Fourteenth Amendment right to the assistance of counsel at this stage of the proceedings.

II

The trial court's erroneous exclusion of the Petitioner's entire defense constituted structural error, requiring reversal. In the alternative, the erroneous exclusion of the Petitioner's entire defense was not harmless.

As previously stated, in its decision, the Kansas Supreme Court found that the testimony that was erroneously excluded in this case constituted the Petitioner's entire defense. Nevertheless, relying on Crane v. Kentucky, 476 U.S. 683 (1986), the Court found that the error was subject to harmless error review. Crane does not control in this case. In Crane, the trial court erroneously excluded evidence regarding the circumstances of the juvenile defendant's confession and the evidence that was excluded came in through other witnesses. Under those circumstances, this Court found, and the parties agreed, that the issue was subject to a harmless error analysis. Id. at 691. This case can be distinguished in two ways. First, the evidence that the trial court erroneously barred in this case did not come in, in any other way. Mr. Carr was the only person who heard his brother's incriminating statements, and the only person who saw his brother's companion in possession of property

stolen from the victims of the capital crimes. Second, in Crane, the trial court's erroneous ruling did not deprive the defendant of his entire defense.

This case is much closer factually to Chambers v. Mississippi, 410 U.S. 284 (1973), a case in which the harmlessness of the exclusion of the defendant's evidence was not even considered. Chambers involved the fatal shooting of a police officer, in the midst of a large, unruly crowd. The petitioner, Chambers, was in the crowd and he was wounded when the officer, before dying, returned fire. Id. at 285-286. Chambers was arrested at the hospital and charged with murder. Id. at 286-287. Another man, McDonald, was in the crowd that night, and he confessed to several people that he was the shooter. He later recanted his statements. Id. at 287. At trial, Chambers attempted to introduce McDonald's confessions, but this evidence was excluded as hearsay. Id. at 289.

This Court found that the statements were admissible as statements against penal interest, even though state law recognized no such hearsay exception. Id. at 299-301. Stating, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," and finding that the hearsay statements were "critical" to Chamber's defense, this Court found that the hearsay rule should not be applied mechanistically to defeat the ends of justice. Id. at 302. This Court concluded:

> …the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process… we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.

Id. at 302-303.

The facts in this case are quite similar. Mr. Carr would have testified to his brother's statements, implicating his brother and his brother's companion in the capital crimes. Mr. Carr would have testified that he personally observed his brother, and the other man, in possession of the property stolen from the victims of the capital crimes. The Kansas

Supreme Court found error in the exclusion of this evidence, and, with regard to his brother's statements, found they were admissible, as in Chambers, as admissions against penal interest. The primary difference between the evidence proffered in Chambers, and in this case, is that the witness recounting the statements would have been the defendant, Mr. Carr. The other difference is that the defendant in Chambers was allowed to present some evidence in support of his defense, and in this case, as the Supreme Court noted, the trial court erroneously excluded Mr. Carr's entire defense. As in Chambers, Mr. Carr was denied his right to a fair trial.

Under the Due Process Clause of the Fourteenth Amendment, criminal defendants must be afforded a meaningful opportunity to present a complete defense. California v. Trombetta, 467 U.S. 479, 485 (1984). The Compulsory Process Clause of the Sixth Amendment, the Fifth Amendment's guarantee of against compelled testimony and the Due Process Clause of the Fourteenth Amendment all protect the defendant's right to testify on his own behalf. Rock v. Arkansas, 483 U.S. 44, 52 (1987). The trial court's erroneous rulings prevented the Petitioner from exercising these rights, and as the Kansas Supreme Court noted, prevented him from presenting any defense at all. Although the defense stated that Mr. Carr's decision to not testify was voluntary, stripped of all references to his brother's accomplice and his brother's incriminating statements, Mr. Carr's testimony would have been meaningless, confusing and even incriminatory. In this way, Mr. Carr's situation is quite similar to that of the defendant in Rock v. Arkansas, where the defendant=s testimony was limited to matters she recalled prior to being hypnotized. This Court noted that the application of the rule against post-hypnosis testimony had Aa significant adverse

effect on petitioner=s ability to testify.@ Id. at 57. Likewise the trial court=s ruling had a significant adverse effect on Mr. Carr's ability to testify.

In State v. Hampton, 818 So.2d 720 (La. 2002) the Louisiana Supreme Court held the denial of the defendant=s right to testify to be a structural error, not amenable to a harmless error analysis. Id. at 729. Adopting language from Rock, (Athe most important witness for the defense in many cases is the defendant himself@ 483 U.S. 52) the court found that the defendant=s right to testify is among those constitutional protections without which a criminal trial is Astructurally flawed.@ Id. This Court should hold likewise and find that the court=s erroneous decision significantly limiting Mr. Carr's right to testify is a structural error which requires reversal. (For contrary holdings see Quarels v. Commonwealth, 142 S.W.3d 73, 82 (Ky. 2004).)

The erroneous exclusion of Mr. Carr's entire defense constitutes structural error, the type of fundamental constitutional error that "def[ies] analysis by 'harmless error' standards," and require automatic reversal. Arizona v. Fulminante, 499 U.S. 279, 309 (1991). "The touchstone of structural error is fundamental unfairness and unreliability." United States v. Gonzalez-Lopez, 548 U.S. 140, 159 (2006). A criminal trial at which the defendant is prevented from offering any defense at all, because of the trial court's erroneous evidentiary rulings, is fundamentally unfair. And the result is unreliable, because this error forces the jury to evaluate the prosecution's evidence under the false assumption that there is no alternative version of events, that there is no explanation, other than the prosecution's explanation, of the evidence against the Petitioner.

In the alternative, the error in this case does not meet the standard for constitutional harmless error – the state cannot prove, beyond a reasonable doubt that the error did not

affect the outcome of the trial, in light of the entire record. Chapman v. California, 386 U.S. 18, 22 (1967). The evidence connecting Mr. Carr to the capital crimes can be summarized as the surviving victim's identification of Mr. Carr as one of the intruders; the presence of blood from one of the victims on his clothing; his appearance near the crime scene shortly after the crimes; and his possession of a great deal of the stolen property. Mr. Carr's defense was that he became involved with the capital crimes after the fact, and only did so because his brother enlisted his aid. Mr. Carr could not present his defense without telling the jury what he observed when he met his brother, and what his brother told him about his participation, as well as the participation of his companion in the crimes. Mr. Carr was able to challenge the eyewitness through cross-examination. He could not, however, explain the presence of the victim's blood on his clothing, his possession of the stolen property, and his presence near the crime scene, without telling the jury that he agreed, at his brother's request, to help dispose of the stolen property. If believed, Mr. Carr's testimony would have resulted in his acquittal of the capital crimes and the crimes associated with them. The only way that it can be determined that the wrongful exclusion of this evidence had no likelihood of changing the result of the trial is by finding that the jury would not have believed his testimony. This determination cannot be made without development of that testimony, on direct examination, and cross-examination.

Finally, this constitutional error cannot be deemed harmless beyond a reasonable doubt when considered cumulatively with the trial court's erroneous refusal to sever Mr. Carr's trial from that of his co-defendant. Three Justices dissented from the majority decision that all guilt-phase errors were individually, and collectively harmless, and would have reversed the guilt phase based on cumulative error. Writing for herself, Justice Luckert

and Justice Johnson, Justice Beier noted that a majority of the Court had identified 11 errors in the guilt phase. She identified two errors which, standing alone, required reversal of all the Petitioner's convictions: one of them being the refusal to sever the trials, because of the defendants' mutually antagonistic defenses. Carr, 331 P.3d at 739-741.

Both Reginald and Jonathan Carr warned the trial court that their defenses were mutually antagonistic. Reginald Carr notified the court that his defense was based on his own testimony (that was erroneously excluded) that the capital crimes were committed by Jonathan Carr and another person. Jonathan Carr told the trial court he would be acting as a Asecond prosecutor@ against Reginald Carr in both the guilt and penalty phases.

During the trial, Jonathan Carr did not challenge the evidence against him or contest his guilt of the capital crimes. Instead, he attempted to show that Reginald Carr was guilty of those crimes as well. He emphasized that property stolen from the victims of the capital crimes was found in Reginald Carr's possession, he attempted to establish that there was only one shooter in the capital incident and then he argued that Reginald Carr was the shooter. His closing argument was almost exclusively devoted to advocating that the jury find Reginald Carr guilty, arguing that the identifications of Reginald Carr in the non-capital incidents were reliable, then arguing that, with regard to the capital crimes, Reginald Carr was the shooter, and that the murder weapon belonged to Reginald Carr. He urged the jury to accept the eye-witness identification of the survivor in the capital incident, he argued that Reginald Carr's possession of some of the victims' property and his appearance at the crime scene soon after the killings, established his guilt, and argued that Reginald Carr had no alibi. As noted, Reginald Carr's explanation for this evidence was erroneously excluded by

the trial court. Finally, at the conclusion of his argument, Jonathan Carr essentially admitted his guilt in the capital crimes, but blamed Reginald Carr for his participation.

Mr. Carr and his co-defendant had antagonistic defenses that were mutually exclusive and irreconcilable. The acceptance of one brother=s defense precluded the acquittal of the other. Jonathan Carr=s defense strategy was to concede his guilt in the capital offenses, but to portray Reginald Carr as the leader, and himself as the follower. Acceptance of this defense required that the jury find Reginald Carr guilty. Reginald Carr's defense, with regard to those crimes, was that Jonathan Carr and another person committed them, then later engaged his assistance. Acceptance of Reginald Carr=s defense required that the jury find Jonathan Carr guilty. Trying the brothers together pitted one against the other: Jonathan Carr attempted to convict Reginald Carr to support his theory of defense, and Reginald Carr returned the favor.

Requiring Reginald Carr to stand trial with his brother Jonathan Carr, who was advocating his guilt at every opportunity, eased the prosecution=s job of proving his guilt beyond a reasonable doubt substantially. DNA and eyewitness evidence established convincingly that Jonathan Carr was guilty of the capital crimes. Jonathan Carr, with overwhelming evidence of his guilt in the capital crimes arrayed against him, did not try to contest it. Instead, he asserted, through counsel, that Reginald Carr was more guilty. The jurors might well have been convinced of Reginald Carr=s guilt, not because of the evidence presented by the State, but because Jonathan Carr, who they knew beyond a reasonable doubt participated in the capital crimes, claimed that Reginald Carr instigated them.

For the foregoing reasons, Mr. Carr requests this Court grant the Writ and declare that when a trial court's erroneous evidentiary rulings deprive a criminal defendant of his

entire defense, the error is structural and requires reversal. In the alternative, Mr. Carr requests this Court find that in this case, this error, separately or combined with error in failure to sever his trial from that of his co-defendant, cannot be declared harmless beyond a reasonable doubt, and requires reversal of his conviction of capital murder, and the other felonies associated with the capital offense.

CONCLUSION

Reginald Carr respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX