No. 14-450

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS - PETITIONER

VS.

REGINALD DEXTER CARR, JR. - RESPONDENT

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

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BRIEF IN OPPOSITION

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CAPITAL CASE

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BRIEF IN OPPOSITION

Respondent, Reginald Dexter Carr, Jr. respectfully requests that this Court deny the Petition for a Writ of Certiorari.

STATUTES INVOLVED

This is a supplement to the Petitioner's section on Constitutional and Statutory Provisions involved:

K.S.A. § 21-4624 provides in relevant part:

> (c) In the sentencing proceeding, evidence may be presented concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto and any mitigating circumstances. Any such evidence which the court deems to have probative value may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements.

and

> (e) If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625, and amendments thereto, exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced to life without the possibility of parole.

K.S.A. § 22-3204 provides:

> 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 the prosecuting attorney.

STATEMENT OF THE CASE

The Respondent disagrees with Petitioner's claim that the Kansas Supreme Court reversed Respondent's death sentence on the grounds that his Sixth Amendment right to Confrontation was violated by the admission of hearsay in the sentencing phase. Although the Court found that the right of confrontation would apply to bar testimonial hearsay in penalty

phase proceedings, the Court made no determination regarding the evidence challenged in this case, or whether its admission required reversal. State v. Carr, 331 P.3d 544, 723-724 (Kan. 2014).

The Respondent is in general agreement with the Petitioner regarding the evidence adduced at trial. However, the jury did not hear Respondent's defense to the capital crimes due to the trial court's erroneous evidentiary rulings. As the Kansas Supreme Court noted in its opinion, Respondent's planned defense to the capital crimes was that they were committed by his co-defendant, and another individual, and that he was not present when they committed the crimes. After the fact, the Respondent agreed to help them hide the stolen property, and took possession of some of that property. In support of that defense, the Respondent was prepared to testify as to incriminating statements that his co-defendant made to him, as well as his observations of his co-defendant, and the other man, on the night of the crimes, after their commission, in possession of the property stolen from the capital victims. Carr, 331 P.3d at 667-668. The trial judge excluded this evidence, finding that admission of the Respondent's observations regarding his co-defendant's companion would violate Kansas' third-party evidence rule, and that the co-defendant's incriminating statements were inadmissible hearsay. Id. at 673. The Kansas Supreme Court found error in the trial court's exclusion of this evidence. Id. at 677, 679. The Court noted:

> We have already determined that R. Carr's proffered evidence was relevant and admissible. It was not merely integral to his defense; it was his defense. Rock v. Arkansas, 483 U.S. 44, 52 (1987) (defendant's testimony may be indispensable). The State has not argued, and we do not divine, how either the third-party evidence rule, as understood and applied by Judge Clark, or the judge's refusal to apply the hearsay exception for declarations against interest was supported by a legitimate interest sufficient to overcome R. Carr's right to present his defense.

Id. at 681.

However, the Court then deemed the error harmless. Id. at 682. This ruling is one of the subjects of the Respondent's Petition for a Writ of Certiorari, No. 14-6810, pages 26-33.

REASONS WHY THE PETITION SHOULD BE DENIED

Question Number I

a. There is no Eighth Amendment controversy in this case. The Kansas Supreme Court's holding is based on the particular provisions of Kansas law, and requires that juries be properly instructed under that law.

The Petitioner argues to this Court that Certiorari is appropriate because the Kansas Supreme Court found that the Eighth Amendment requires an affirmative instruction to penalty phase jurors that mitigating circumstances need not be proven beyond a reasonable doubt in order to be weighed against aggravating circumstances. The Court made no such finding and Petitioner misreads the decision in State v. Gleason, 329 P.3d 1102 (Kan. 2014), the case relied on by the Court in finding error in this case. Conspicuously absent from Petitioner's argument is the Kansas Supreme Court's discussion of, and reliance on, the relevant Kansas statute, K.S.A. § 21-4624(e) [now re-codified and in effect as K.S.A. § 21-6617(e)] in the Gleason decision.

In Gleason, the Kansas Supreme Court discussed the Eighth Amendment requirement that a sentencer not be precluded from considering relevant mitigating evidence, 329 P.3d at 1147, but did not base its decision on the Eighth Amendment. The Court specifically acknowledged this Court's statement in Walton v. Arizona, 497 U.S. 639, 649-651(1990) *overruled on other grounds,* Ring v. Arizona, 536 U.S. 584 (2002), that the Eighth Amendment does not create any constitutional requirements as to how or whether a capital jury should be instructed on the burden of proof for mitigating circumstances. Gleason, 329 P.3d at 1147. The Court then focused on the particular requirements of Kansas law, distinguishing the Kansas statute from the statute in question in Walton:

> Kansas' capital sentencing statute differs distinctly from the statute at issue in Walton, and that distinction is critical to our analysis here. Namely, while K.S.A. 21–4624

> requires the State to prove aggravating circumstances beyond a reasonable doubt, the statute is silent as to any burden of proof for mitigating circumstances. K.S.A. 21–4624(e); see also [Kansas v. Marsh, 548 U.S. 163, 173 (2006)] (contrasting Kansas' statute, which places no evidentiary burden on capital defendants, with Arizona's statute, which requires capital defendants to prove mitigating circumstances by a preponderance of the evidence).
>
> As the United States Supreme Court recognized, "[t]his distinction operates in favor of Kansas capital defendants." 548 U.S. at 173. Notably, [State v. Kleypas, 40 P.3d 139 (Kan. 2001)]' first statement-that any mitigating circumstance instruction must inform the jury that mitigating instructions "need to be proved only to the satisfaction of the individual juror in the juror's sentencing decision and not beyond a reasonable doubt," **both preserves the statute's favorable distinction** and protects a capital defendant's Eighth Amendment right to individualized sentencing by ensuring jurors are not precluded from considering all relevant mitigating evidence. Kleypas, 40 P.3d at 268.
> …
> **Because K.S.A. 21–4624 expressly burdens the State with proving the existence of aggravating circumstances beyond a reasonable doubt but places no evidentiary burden regarding the existence of mitigating circumstances on the defendant** beyond the burden of production, we reiterate our holding in Kleypas and [State v. Scott, 183 P.3d 801 (Kan. 2008)] that capital juries **in Kansas** must be informed that mitigating circumstances need not be proven beyond a reasonable doubt.

Gleason, 329 P.3d at 1147 (emphasis added).

This Court stated in Smith v. Phillips, 455 U.S. 209, 221 (1982), "Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." The decision in Gleason, which holds that Kansas law requires an affirmative statement regarding the burden of proof, makes no pronouncements regarding federal constitutional requirements. The decision of the Kansas Supreme Court regarding this issue presents no questions of federal constitutional dimension and the Petition for a Writ of Certiorari should be denied.

b. The decision of the Kansas Supreme Court rests on an independent and adequate state ground: the penalty phase instructions in this case, read together as a whole, misled the jury into believing that, contrary to provisions of state law, the Respondent bore the burden of proving mitigating circumstances beyond a reasonable doubt.

This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729 (1991). If the same judgment would be rendered by the state court after this Court corrects its views of federal law, the review would amount to nothing more than advisory opinion. Herb v. Pitcairn, 324 U.S. 117, 125–126 (1945). "When this Court reviews a state court decision on direct review pursuant to 28 U.S.C. § 1257, it is reviewing the *judgment;* if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do." Coleman, 501 U.S. at 730.

The decision of the Kansas Supreme Court in this case was based on the former K.S.A. § 21-4624(e). The Court determined that there was a reasonable probability that the instructions in this case, considered as a whole, misled the jury as to the burden of proof regarding mitigating circumstances under Kansas law, resulting in a misapplication of that statute. Therefore, the decision of the Kansas Supreme Court in this case would be the same, regardless of its view of the requirements of the Eighth Amendment.

This Court has held that the individual states have a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed. Kansas v. Marsh, 548 U.S. 163, 173-74 (2006). Individual states are free to allocate a burden of proof to the defendant to prove mitigating circumstances, as long as the prosecution continues to bear the burden of proving every element of the offense charged or the aggravating circumstances. Walton, 497 U.S. at 650. The Kansas law in effect at the time of Respondent's trial required that the prosecution prove aggravating circumstances beyond a reasonable doubt, but imposed no such requirement on the defendant, with regard to mitigating circumstances:

> If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625, and amendments thereto, exist

> and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced to life without the possibility of parole.

K.S.A. § 21-4624(e).

As previously noted, this Court has recognized:

> "…the Kansas statute requires the State to bear the burden of proving to the jury, beyond a reasonable doubt, that aggravators are not outweighed by mitigators and that a sentence of death is therefore appropriate; it places no additional evidentiary burden on the capital defendant. This distinction operates in favor of Kansas capital defendants."

Marsh, 548 U.S. at 173 (2006).

An instruction to penalty phase jurors that they must find that the defendant had proved a mitigating circumstance beyond a reasonable doubt before weighing it against any aggravating circumstances would be contrary to Kansas law. Likewise, potentially reversible error would occur if the instructions, when read as a whole, could mislead the jurors into that conclusion. The Kansas Supreme Court found that occurred in this case, and that finding is well-supported by the record.

In this case, there were two penalty phase instructions that addressed mitigating circumstances:

> **INSTRUCTION NO. 6**
> **REGINALD D. CARR, JR.**
> **MITIGATING CIRCUMSTANCES**
>
> Mitigating circumstances are those which in fairness may be considered as extenuating or reducing the degree or moral culpability or blame or which justify a sentence of less than death, even though they do not justify or excuse the offense.
>
> In this proceeding, you may consider sympathy for a defendant. The appropriateness of exercising mercy can itself be a mitigating factor in determining whether the State has proved beyond a reasonable doubt that the death penalty should be imposed.
>
> The determination of what are mitigating circumstances is for you as jurors to decide under the facts and circumstances of the case. Mitigating circumstances are to be determined by each individual juror when deciding whether the State had proved beyond a reasonable doubt that the death penalty should be imposed. The same mitigating circumstances do not need to be found

by all members of the jury in order to be considered by an individual juror in arriving at his or her sentencing decision.Our State Legislature has provided that mitigating circumstances include, but are not limited to, the following:

...

You may further consider as a mitigating circumstance any other factor which you find may serve as a basis for imposing a sentence of less than death. Each of you must consider every mitigating circumstance found to exist.

(Record on Appeal, Vol. 54, pages 4064-4065).

INSTRUCTION NO. 10

When considering an individual defendant, if you find unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh mitigating circumstances found to exist, then you shall impose a sentence of death. If you sentence the particular defendant to death, you must designate upon the appropriate verdict form with particularity the aggravating circumstances which you unanimously find beyond a reasonable doubt. That is Verdict Form (1).

If you find that the evidence does not prove any of the claimed aggravating circumstances beyond a reasonable doubt, your presiding juror should mark the appropriate verdict form. That is Verdict Form (2). The court will fix a proper sentence for the particular defendant.

If one or more jurors is not persuaded beyond a reasonable doubt that aggravating circumstances exist or that those found to exist do not outweigh mitigating circumstances, then you should sign the appropriate alternative verdict form indicating the jury is unable to reach a unanimous verdict sentencing the defendant to death. That is Verdict Form (3). In that event, the court will fix a proper sentence for the particular defendant. ...

(Record on Appeal, Vol. 54, page 4071).

Neither instruction addressing mitigation stated that mitigating circumstances need not be proven beyond a reasonable doubt. In contrast, the Abeyond a reasonable doubt@ burden of proof was stated many times:

The State has the burden to prove **beyond a reasonable doubt** that there are one or more aggravating circumstances and that they outweigh mitigating circumstances found to exist.

(Record on Appeal, Vol. 54, page 4061, Instruction No. 4)(emphasis added).

The appropriateness of exercising mercy can itself be a mitigating factor in determining whether the State has proved **beyond a reasonable doubt** that the death penalty should be imposed.

(Record on Appeal, Vol. 54, page 4064, Instruction No. 6)(emphasis added).

> When considering an individual defendant, if you find unanimously **beyond a reasonable doubt** that there are one or more aggravating circumstances and that they outweigh mitigating circumstances found to exist, then you shall impose a sentence of death.

(Record on Appeal, Vol. 54, page 4071, Instruction No. 10)(emphasis added).

> If you find that the evidence does not prove any of the claimed aggravating circumstances **beyond a reasonable doubt**, your presiding juror should mark the appropriate verdict form.

(Record on Appeal, Vol. 54, page 4071, Instruction No. 10)(emphasis added).

> If one or more jurors is not persuaded **beyond a reasonable doubt** that aggravating circumstances exist or that those found to exist do not outweigh mitigating circumstances, then you should sign the appropriate alternative verdict form...

(Record on Appeal, Vol. 54, page 4071, Instruction No. 10)(emphasis added).

The verdict forms for each of the victims of capital murder contained the following language:

> As to Count ___, Capital Murder of ____, we find unanimously, **beyond a reasonable doubt** that the following aggravating circumstance(s) have been proven to exist:
>
> ...
>
> We find unanimously **beyond a reasonable doubt** that the aggravating circumstances found to exist outweigh mitigating circumstances found to exist.

(Record on Appeal, Vol. 54, pages 4075, 4078, 4081, 4084, Verdict Form 1 for Counts 1, 2, 3, 4) (emphasis added).

> As to Count ___, Capital Murder of ___, we the jury being duly sworn upon oath find that the aggravating circumstances claimed by the Plaintiff, State of Kansas, have not been proved to exist **beyond a reasonable doubt**.

(Record on Appeal, Vol. 54, pages 4076, 4079, 4082, 4085, Verdict Form 2 for Counts 1, 2, 3, 4) (emphasis added).

The Court found that because the only burden mentioned was the "beyond a reasonable doubt" burden, the jurors may not have understood that they could consider any mitigation that they found existed, even if not proved beyond a reasonable doubt. Carr, 331 P.3d at 732-33. Although the Court noted that instructions that prevent jurors from giving meaningful effect or a reasoned moral response to mitigating evidence implicate a defendant's right to individualized

sentencing under the Eighth Amendment, those same instructions would likewise prevent jurors from following the provisions of state law as expressed in K.S.A. 21-4624(e).

The Kansas Supreme Court will not reverse a case based on instructional error if the instructions properly and fairly state the law as applied to the facts of the case and if they could not reasonably have misled the jury. State v. Scott, 183 P.3d 801, 810, Syl. & 32 (Kan. 2008). Reversal in this case was founded on the court's view that the instructions as a whole created a substantial probability that reasonable jurors could have believed that they were required to find the existence of a mitigating circumstance beyond a reasonable doubt in order to consider it in the weighing process. Whether or not this is contrary to the Eighth Amendment, it is contrary to the Kansas statutory provisions for the consideration and weighing of aggravating circumstances against mitigating circumstances. Kansas law provides the basis of the Court's decision. This Court defers to the decisions of state courts on issues of state law, Bush v. Gore, 531 U.S. 98, 112 (2000), and should deny the Petition for a Writ of Certiorari in this case.

c. Because the decision of the Kansas Supreme Court is based on Kansas law, not the Eighth Amendment, there is no real conflict between this decision and any other decision of any state court of last resort.

As stated in the preceding arguments, the decision rendered in this case is a decision based on the particular provisions of Kansas law. Thus Kansas is not in conflict with any other jurisdiction, whether that jurisdiction is interpreting its own state law, or the United States Constitution.

The Petitioner first claims conflict with the Supreme Court of California, citing People v. Souza, 277 P.3d 118, 156-157 (Cal. 2012). Even if one could read, into the Gleason decision, a pronouncement that the Eighth Amendment requires an affirmative instruction on the burden of

proof, the California cases cited in the Petitioner's brief, do not engage in any Eighth Amendment analysis regarding instructions on the burden of proof. Souza rejected the defendant's Eighth Amendment burden of proof claim without discussion, citing People v. Avila, 208 P.3d 634, 670 (Cal. 2009), as modified (Aug. 12, 2009). In Avila, the court rejected the claim without analysis, citing People v. Samayoa, 938 P.2d 2, 47 (Cal. 1997) as modified on denial of reh'g (Aug. 13, 1997). In Samayoa, the court rejected the claim without analysis, citing People v. Breaux, 821 P.2d 585, 604-605 (Cal. 1991). In Breaux, the court did not consider the burden of proof claim, the issue presented in Breaux was whether the trial court should have affirmatively instructed the jurors that they were not required to unanimously find a mitigating circumstance in order to consider it. Id. Additionally, the California court was interpreting capital sentencing statutes that were substantially different than those of Kansas. Unlike the Kansas statute in question, the California statutes do not require that aggravating circumstances be found beyond a reasonable doubt and neither the defense nor the prosecution carries a burden of proof during the penalty phase. People v. Welch, 976 P.2d 754, 797 (Cal. 1999).

The issue in Dawson v. State, 637 A.2d 57 (Del. 1994) was not whether the Eighth Amendment requires that the jury receive an affirmative instruction regarding the burden of proof for mitigating circumstances. Rather, the question before the court was whether the instructions in that case were unconstitutionally ambiguous. Id. at 64. Additionally, the death penalty statute in question in Dawson is different from the Kansas statute as it requires the prosecution to convince the sentencer that aggravating circumstances found to exist outweigh the mitigating circumstances "by a preponderance of the evidence." Id. at 63.

There was no Eighth Amendment claim or analysis in the Indiana case cited by the Petitioner, Matheney v. State, 688 N.E.2d 883 (Ind. 1997). And the case concerned a

significantly different statute. Under the Indiana statute, mitigating circumstances must be proven by a preponderance of the evidence, and the court found that an instruction to that effect would have been appropriate. Id. at 902. However, because there was nothing in the Matheney jury instructions that would have led the jury "to a misunderstanding" regarding the burden of proof, there was no error in failing to give the instruction. Id.

State v. Jones, 474 So. 2d 919, 932 (La. 1985) did not address the Eighth Amendment, presumably because there was no Eighth Amendment claim. The defendant merely requested an instruction that the jury need find mitigating circumstances only by "any substantial evidence" or by a "preponderance of the evidence."

Similarly, in Green v. State, 934 S.W.2d 92 (Tex.Crim.App. 1996), there was no discussion of the Eighth Amendment, because the defendant did not claim, in that case, that the Eighth Amendment required an affirmative instruction to the jury that mitigation need not be proved beyond a reasonable doubt. In fact, the defendant raised no claim (constitutional or not) that an affirmative instruction was required. Rather, the defendant claimed that the instructions might have misled the jurors into believing "that a death sentence was appropriate unless the State proved "beyond a reasonable doubt" that a life sentence was appropriate in view of Appellant's mitigating circumstances." Id. at 107.

Because there is no true conflict between the decision of the Kansas Supreme Court and that of any other jurisdiction, this Court should deny the Petition for a Writ of Certiorari.

d. The error identified by the Kansas Supreme Court in this case is unlikely to occur again, because the required language has been incorporated into the Pattern Instructions for Kansas.

The Kansas Supreme Court first held in State v. Kleypas, 40 P.3d 139, 268 (Kan. 2001) *overruled on other grounds*, State v. Marsh,102 P.3d 445 (Kan. 2004), that in a capital sentencing proceeding, "... any instruction dealing with the consideration of mitigating circumstances should state (1) they need to be proved only to the satisfaction of the individual juror in the juror's sentencing decision and not beyond a reasonable doubt and (2) mitigating circumstances do not need to be found by all members of the jury in order to be considered in an individual juror's sentencing decision." Soon afterwards, Kansas' pattern instruction on mitigating circumstances was amended to clarify that jurors need not be unanimous on mitigating circumstances, but failed to include the language that mitigating circumstances need not be proven beyond a reasonable doubt. Gleason, 329 P.3d at 1145. Since that time, the PIK instruction on mitigating circumstances, PIK Crim. 4th 54.050, has incorporated both of Kleypas' recommended statements and correctly instructs the jury that "[m]itigating circumstances need not be proved beyond a reasonable doubt." Gleason, 329 P.3d at 1146. Because the pattern instruction now contains the correct language under the Kleypas decision, this issue is unlikely to arise in the future, and the Petition for a Writ of Certiorari should be denied.

Question Number II

a. The Respondent agrees that there is a split in authority regarding the application of the Confrontation Clause to the penalty phase of a capital trial. However, the Kansas Supreme Court did not make any ultimate determination on that issue in this case. Resolving the legal question would not affect the judgment in this case.

The second question presented is whether this Court's ruling in Crawford v. Washington, 541 U.S. 36 (2004) applies in the penalty phase of a capital trial to bar the admission of

testimonial hearsay against the defendant, unless he or she has had a previous opportunity to cross-examine the declarant. The Kansas Supreme Court answered that question in the affirmative. Carr, 331 P.3d at 723-724. However, on the record before it, the Court made no findings with regard to the questioned evidence in this case, whether the admission of the questioned evidence actually violated Crawford, or whether, if so, the error in the admission of the evidence required reversal. The court merely held:

> At any repeat penalty phase hearing on remand, we caution the parties and the district judge that Kansas now holds that the Sixth Amendment applies in the proceeding and that out-of-court testimonial hearsay may not be placed before the jury without a prior opportunity for the defendant to cross-examine the declarant. This includes any testimonial hearsay referenced in questions posed by counsel.

Carr, 331 P.3d at 724.

The Court's judgment reversing the Respondent's sentence of death was not based on the admission of testimonial hearsay in the penalty phase. Thus, should this Court grant certiorari on this issue and find that the Kansas Supreme Court erred in its determination, the outcome of the case will be the same, because that determination played no part in the ultimate judgment.

As previously stated, if the same judgment would be rendered by the state court after this Court corrects its views of federal law, the review would amount to nothing more than an advisory opinion. Herb v. Pitcairn, 324 U.S. at 125–126; Coleman v. Thompson, 501 U.S. at 730. For those reasons, this Court should deny the Petition for a Writ of Certiorari.

b. In the alternative, this issue was correctly decided.

Under the Confrontation Clause, a testimonial statement of a declarant who does not testify at trial is inadmissible unless the declarant is unavailable and the defendant had a previous opportunity to cross-examine the declarant. Crawford, 541 U.S. at 59, 68. However, K.S.A. § 21-4624(c), which was in effect at the time of Respondent's trial, allows the admission of hearsay during the penalty phase of a capital trial:

> In the sentencing proceeding, evidence may be presented concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto and any mitigating circumstances. **Any such evidence which the court deems to have probative value may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements.**

(emphasis added).

Under the provisions of that statute, the prosecution cross-examined the Respondent's witnesses by referring to allegations contained in police reports, that Respondent:

- Robbed a college bookstore wearing a "Jason horror mask," threatened to shoot a woman during the robbery, threatened a man in the parking lot with a cinder block, and then gave a false name when arrested. (Record on Appeal, Vol. 126, pages 8-9, 16-17, 92-93; Vol. 128, pages 103-104).

- Battered a man at a drive-in restaurant. (Record on Appeal, Vol. 127, page 23; Vol. 128, page 115).

- Exposed himself to corrections officers. (Record on Appeal, Vol. 127, pages 124, 125, 138; Vol. 129, pages 27-28).

- Possessed contraband in jail. (Record on Appeal, Vol. 129, pages 28-29).

Referring to a report, the prosecutor cross-examined another witness regarding the conclusions of an unnamed individual that the Respondent was self-centered, poorly socialized, primarily concerned with instant gratification of his immediate wants and needs, demanding and domineering in his relationships, with very little respect for the rights and property of others, and quick to blame others for his problems. (Record on Appeal, Vol. 130, pages 80-81).

The application of K.S.A. 21-4624(c) in this case resulted in the admission of a great deal of prejudicial hearsay. Much of it was the prototypical type of testimonial hearsay described

in Davis v. Washington, 547 U.S. 813 (2006), statements made in response to police questioning, contained in police reports and/or reports, prepared for the purpose of prosecution.

The Petitioner correctly notes that there is disagreement among jurisdictions regarding the application of Crawford to the penalty phase of a capital trial. The decision of the Kansas Supreme Court is in harmony with this Court's pronouncements in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002) that facts which increase the defendant's sentence beyond the sentence authorized by the conviction must be found by the jury beyond a reasonable doubt, in the same manner as the facts necessary for a conviction.

If aggravating circumstances must be proved in the same manner as the elements of a crime, at the very least, the protection of Crawford extends to the evidence used by the prosecution to prove those circumstances. This was the holding of United States v. Jordan, 357 F. Supp. 2d 889, 903-904 (E.D. Va. 2005)("Consistent with the constitutional safeguards identified by the United States Supreme Court, as interpreted by the Fourth Circuit, this Court is of the opinion that with respect to the eligibility phase of the penalty stage of a capital trial, the Confrontation Clause is equally applicable."). However, that court declined to extend the protections of Crawford to the selection phase. Id.

In this case, the prosecution did not rely on any testimonial hearsay to prove aggravating circumstances, instead used it to challenge evidence of mitigating circumstances, so Jordan does not completely address the issue raised by the use of testimonial hearsay against the Respondent. In United State v. Mills, 446 F.Supp.2d 1115 (C. D. Cal. 2006), the court held Crawford applicable to both the eligibility and selection stages of the penalty phase. The Mills court agreed with the Jordan court that Crawford applied at the eligibility phase, but did not agree that constitutional safeguards could be relaxed in the selection phase. "[T]his call to admit more

evidence does not sanction the admission of unconstitutional evidence against the defendant… while the Court recognizes the policy reasons encouraging the admission of the maximum quantum of evidence during the selection phase, that policy is insufficient to override Defendants' right to confront witnesses during such a critical portion of the capital trial." Mills, 446 F.Supp.2d at 1130. This reasoning was accepted by the court in United States v. Concepcion Sablan, 555 F.Supp.2d 1205, 1218 -1222 (D. Colo. 2007), in which the court found that testimonial hearsay would not be admitted during the penalty portion of the defendant's trial.

The Mills court was addressing additional statutory and non-statutory aggravating factors in its decision. In this case, the prosecution was using testimonial hearsay to counter the Respondent's mitigation evidence. Mills did not decide whether the determination of mitigating factors or the weighing portions of the penalty phase required the application of Crawford. Mills, 446 F.Supp.2d 1134-1135. At least one court has found that testimonial hearsay may be used to rebut the defendant's mitigation: State v. McGill, 140 P.3d 930, 941-942 (Ariz. 2006). However, McGill relies primarily on Williams v. New York, 337 U.S. 241 (1949), in which this Court found the defendant's right to confront witnesses does not apply to sentencing proceedings. Williams, of course, was decided more than 50 years before Crawford, Apprendi and Ring.

This Court's holding in Crawford should be extended to all portions of the penalty phase of a capital trial. In death penalty proceedings, the Eighth Amendment requires that fact-finding procedures aspire to a heightened standard of reliability, Ford v. Wainwright, 477 U.S. 399, 411, (1986), particularly "in the determination [of] whether the death penalty is appropriate in a particular case." Sumner v. Shuman, 483 U.S. 66, 72 (1987). It would be completely contrary to these principles to find that testimonial hearsay could be introduced, as in this case, to counter

mitigation evidence or persuade the sentencer to assign the mitigation little or no weight, when such evidence would not be admissible in a shoplifting prosecution.

The testimonial hearsay in this case was used to inform the jury that Respondent had been involved in other crimes of violence, and sexual offenses against corrections officers. It was extremely prejudicial because it presented him as an incorrigible career offender, and as an inmate who would continue to offend, even in a prison setting. This was quite damaging to his mitigation argument that a term of imprisonment would be sufficient to protect the public. (Record on Appeal, Vol. 108, pages 118-119). While the prosecution had the right to contest or rebut evidence and arguments made in mitigation, Respondent had the right to confront the witnesses used for those purposes. Because this issue was correctly decided, the Petition for a Writ of Certiorari should be denied.

Question Number III

The decision of the Kansas Supreme Court that the joint penalty phase hearing conducted in this case was so prejudicial to Respondent's Eighth Amendment right to an individualized sentencing hearing that it required reversal, was based on the particular facts of this case, and creates no new rules of law.

The Petitioner has claimed that the decision of the Kansas Supreme Court that Respondent's Eighth Amendment rights to an individualized capital sentencing determination were violated by the trial court's failure to sever the penalty phase of his trial from that of his co-defendant has created a *per se* rule against joinder in capital trials. To the contrary, the Court acknowledged that the Eighth Amendment does **not** mandate separate penalty proceedings for co-defendants in capital trials: "The Eighth Amendment to the United States Constitution requires the jury to make an individualized sentencing determination. It does not categorically

mandate separate penalty phase proceedings for each codefendant in a death penalty case." Carr, 331 P.3d at 717-718. The ruling is clearly based on the particular facts of this case. Petitioner is actually seeking a ruling from this Court that would render unreviewable any decision by a state trial court to conduct a joint penalty hearing for co-defendants in a capital trial.

Kansas law allows the trial court to sever the trials of co-defendants: AWhen two or more defendants are jointly charged with any crime, the court may order a separate trial for any one defendant...@ K.S.A. § 22-3204. Severance should be granted when it appears necessary to avoid prejudice and ensure a fair trial to each defendant. State v. Davis, 83 P.3d 182 & 5 (Kan. 2004). See also, Zafiro v. United States, 506 U.S. 534, 538-539 (1993)(severance required when there is a serious risk that a joint trial will compromise a specific trial right of one of the defendants). This Court has stated that Athe trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear.@ Schaffer v. United States, 562 U.S. 511, 516 (1960).

The Eighth Amendment requires an individualized sentencing determination in a death penalty case. Stringer v. Black, 503 U.S. 222, 230 (1992). A[T]he sentencing process must permit consideration of the >character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.=@ Lockett v. Ohio, 438 U.S. 586, 601 (1978)(citing Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The defendant has a constitutional right to an individualized determination of his culpability. Zant v. Stephens, 462 U.S. 862, 879 (1983)(AWhat is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.@).

The decision of the Kansas Supreme Court does not mandate separate penalty phases in all capital cases. The Court's ruling applies to this case alone, and is based on its finding that his

co-defendant's mitigation case was so antagonistic to the Respondent, that he did not receive the individualized sentencing determination to which he was entitled.

The unique fact of this case is that the Respondent and his co-defendant are brothers. Particularly prejudicial, the Court noted, was the evidence elicited by his brother, during the penalty phase, from their sister, that the Respondent had admitted to her that he shot the victims of the capital crimes. (The prosecution had not identified the actual triggerman in this case). The Court observed that it was far from certain that such evidence would have come in, in a separate penalty phase, as the prosecution seemed to be unaware of this alleged admission until Respondent's brother elicited it. Id. at 719. "If any juror was inclined to show mercy to R. Carr because of residual doubt, as R. Carr argues, or because of a belief that J. Carr was the one who fired the black Lorcin in the soccer field, that juror was much less inclined to do so after Temica's testimony was introduced by J. Carr's counsel." Id.

The Court also noted a statement made by Respondent's brother, and admitted, in the penalty phase, against the Respondent's brother, but implicating the Respondent as well, in the rape of one of the capital victims, "in particularly disgusting and demeaning language." Id.

The Court further found that his brother's mitigation evidence, that would not have been introduced in a separate hearing, was likely used as improper, nonstatutory aggravating evidence against the Respondent. Respondent and his brother were raised together, and their family chose sides in this joint hearing, maintaining that the Respondent was a corrupting influence on his brother. Id. at 719-720. And, the Court noted, "This inevitable effect was compounded by the fact that the aggravators against which the evidence must be compared were precisely the same for both defendants. And similarly, the court's instructions identified the same statutory

mitigating circumstances for both [the respondent and the co-defendant]." Id. at 720. These findings are well-supported by the record.

The trial court was advised, well before trial, that his brother's penalty phase strategy would be antagonist and prejudicial to the Respondent. At the first pre-trial hearing regarding the motion for severance, the Respondent informed the trial court that he anticipated antagonistic defenses. (Record on Appeal Vol. 77, pages 44-45). His brother agreed and told the court that his defense would be antagonist towards the Respondent in both the guilt and the penalty phases:

> [Counsel for Jonathan Carr]...Judge, there is no way if this case proceeds the way it is now with these brothers being tried together that I cannot prosecute Reginald Carr. That=s true in the first stage, but it=s absolutely true in the second stage. ... I have to be Reginald=s prosecutor. That adds another prosecutor in the room. There is no way that that doesn=t prejudice Reginald.

(Record on Appeal, Vol. 77, pages 50-51).

> We=re going to get into things on Reginald that there=s no way the State would get to introduce into evidence against him if he was sitting there by himself.

(Record on Appeal Vol. 77, page 52).

During another pretrial hearing, his brother again warned the court that he would attack Respondent during the guilt phase. (Record on Appeal, Vol. 80, page 21). He candidly stated that he was trying to make Respondent look bad so that he could benefit from the comparison. (Record on Appeal, Vol. 80, page 21). He also noted that during the penalty phase, evidence prejudicial to Respondent would be essential to his mitigation case. (Record on Appeal, Vol. 80, pages 22-24). He repeated these warnings at another hearing on August 9, 2002, saying he wanted to introduce evidence about Respondent's Abad character, about his propensity for violence, about what he did in prison...@ (Record on Appeal, Vol. 114, page 12).

His brother began laying the blame for his own behavior on the Respondent in his penalty phase opening statement: AWhen he=s not around Reggie, he does pretty well.@ (Record on

Appeal, Vol. 125, page 33). His brother then used their mother to establish that he followed the Respondent's lead and that the Respondent got him into trouble. (Record on Appeal, Vol. 125, pages 116, 119-120). His brother's expert called the Respondent Aa situational factor@ contributing to his criminal behavior, leading him to drink and exacerbating his substance abuse. (Record on Appeal, Vol. 106, pages 64, 108-109, 112-113). This witness blamed his brother's Apremature sexualization,@ in part on the Respondent. (Record on Appeal, Vol. 107, pages 24-26). He testified that the Respondent criminalized his brother and used ridicule to push him into criminal activity:

> Jonathan described that Reggie was gang-involved and dealing drugs from age 13 and that he looked up to Reggie. Jonathan also - well, Temica described that Reggie would ridicule Jonathan as being weak, a wus, and other - other disparaging adjectives about his lacking masculinity when he didn=t do what Reggie wanted him to do.

(Record on Appeal, Vol. 107, page 37).

Finally, the witness blamed the Respondent, in part, for the brother's participation in the capital offenses:

> A: We have an individual with some very problematic genetic predispositions who, in addition to that, has neurological abnormalities that impact on them, …then grows up in a catastrophic family setting, and out of that comes substance abuse and disturbed adjustment that are aggravating each other during adolescence. **Out of that, you have the influence of his older brother and intoxication at the time**. And from that, you have the capital offense.

(Record on Appeal, Vol. 107, page 42)(emphasis added).

His brother used their sister Temica in the same way he used their mother, eliciting testimony from her that he looked up to and followed the Respondent, and that she warned him to stay away from the Respondent. (Record on Appeal, Vol. 126, pages 89-90). But with this witness, the prejudice went further, when he had her testify that the Respondent had actually confessed to being the shooter in the capital crimes:

> Q: Did you have a conversation with Reggie about what happened that night in the snow?
> A: Reggie really never talked about it that often. He really didn=t say anything about - about this case.
> **Q: Did Reggie tell you he was the one that shot those people?**
> **A: Yes.**

(Record on Appeal, Vol. 126, pages 89-90)(emphasis added).

This of course, was not lost on the prosecutor, who had Temica repeat the claim that the Respondent had confessed to her:

> Q: **And you told us that your brother Reginald Carr said that he personally shot these people?**
> A: I believe I heard him tell me something like that. I don=t remember.

(Record on Appeal, Vol. 126, pages 110-111)(emphasis added).

In her closing, the prosecutor took advantage of this evidence: ACan you tell who the shooter is? Temica said that Reginald said he was.@ (Record on Appeal, Vol. 108, page 185).

In addition to placing another prosecutor in the room, his brother's presence resulted in the jury hearing admissions made by his brother that implicated him as well.

The prosecutor asked his brother's witness during the penalty phase:

> And this lack of remorse might be reflected in statements that I assume you reviewed where **he said he and his brother raped the one bitch** because she had a tight pussy.

(Record on Appeal, Vol. 107, page 106)(emphasis added).

The prosecutor repeated this question to another one of his brother's witnesses:

> Q: So it would surprise you to learn that if he told another inmate that he and his - ...
>
> ...(objection deleted)...
>
> MS. PARKER: That **he told another inmate that he and his brother both raped one of the girls** because she had a tight pussy, would that sort of bragging and that use of those words be different from the man you saw?

(Record on Appeal, Vol. 128, 16)(emphasis added).

The Petitioner argues that the decision of the Kansas Supreme Court is contrary to the presumption that jurors follow instructions. The jury was instructed:

> You must give separate consideration to each defendant. Each is entitled to have his sentence decided on the evidence and law which is applicable to him. Any evidence in this phase that was limited to only one defendant should not be considered by you as to the other defendant.

(**108**, 114-115).

But this Court has recognized at least two types of evidence that are so prejudicial that their wrongful admission cannot be cured by an instruction. In this case, both types of evidence were admitted, due to the joint penalty phase hearing.

First, there was Temica's evidence, adduced by their brother, that Respondent confessed he was the triggerman in this case.

In Jackson v. Denno, 378 U.S. 368 (1964), this Court considered a procedure in which the question of the voluntariness of the defendant's confession was submitted to the jury, along with an instruction to the jury to disregard the confession if the jury found it to be involuntary. 378 U.S.374-375. This Court found that the defendant was entitled to a hearing to determine the voluntariness of his confession, uninfluenced by the truth or falsity of the confession and found that the procedure did not protect that right. Id. at 377-378. In a previous case, Stein v. New York, 346 U.S. 156 (1953), this Court had found this procedure adequate to protect the defendant's rights by assuming that either the jury determined the confession to be voluntary and properly relied on it, or found it involuntary and then, following the instructions of the trial court, disregarded the confession in reaching its verdict. 378 U.S. 380-381. In Jackson v. Denno, this Court reversed itself, rejecting the idea that the jury, having heard the confession, could then disregard it after finding it involuntary:

> If it finds the confession involuntary, does the jury—indeed, can it—then disregard the confession in accordance with its instructions? If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest by resort to the confession? Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows the defendant has given a truthful confession?

378 U.S. at 388.

Next, there were the inflammatory statements regarding the rape of one of the victims, made by his brother, but implicating the Respondent as well.

This type of evidence was the subject of Bruton v. United States, 391 U.S. 123 (1968). In Bruton, this Court overruled its previous decision in Delli Paoli v. United States, 352 U.S. 232 (1957). In Delli Paoli this Court had held that it was not necessary to reverse the conviction of a defendant in a joint trial in which the jury had heard the co-defendant's confession inculpating the defendant, because the jury had been instructed to disregard the co-defendant's confession in determining the guilt or innocence of the defendant. 391 U.S. at 123-124. The Bruton Court repudiated the basic premise of Delli Paoli, that the jury would be able to disregard the confessor's extrajudicial statement that the defendant had participated in the crime with him. Bruton, 391 U.S. at 126. This Court also commented:

> … as was recognized in Jackson v. Denno, supra, there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. ...Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.

Id. at 135-136.

The instruction given in this case was not adequate to protect Respondent from the prejudice of his brother's mitigation case. The phrase "Any evidence in this phase that was limited to only one defendant should not be considered by you as to the other defendant." does not inform the jury that evidence concerning the Respondent, introduced by his brother, should not be considered against the Respondent. In this particular case, there was a great risk that his brother's mitigation case was used as aggravation against the Respondent.

The Petitioner has argued that the Respondent conceded guilt in the penalty phase, citing a brief passage in closing argument: "And ended up on December of the year 2000 like a guy like this, committing the horrible acts that you guys have heard all about. Nobody's denied it. That is the most atrocious tragedy you can imagine. …We are not saying that Reggie is not responsible. We are not saying that Reggie shouldn't be punished for what he has done." Appendix to Petition, pages 513-514. But the Respondent was still entitled to rely on residual doubt regarding the identity of the triggerman. Additionally, regardless of residual doubt, the jury had the option to extend mercy. His brother's mitigation case, however, made the exercise of mercy less likely.

The Petitioner also argues that the Kansas Supreme Court held that the Eighth Amendment requires an instruction on mercy. There was no such finding in this case, and there was no such argument. Respondent's only argument regarding an instruction on mercy was rejected by the Court. Carr, 331 P.3d at 734-735. The Petition for a Writ of Certiorari should be denied.

CONCLUSION

For all these reasons, the Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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