IN THE SUPREME COURT OF THE UNITED STATES

Jonathan D. Carr Petitioner,	)	
vs.	)	Case No. 14-449
State of Kansas, Respondent.	)	

Motion for Leave to Proceed In Forma Pauperis

Comes Now the Petitioner, Jonathan D. Carr, by counsel undersigned, and moves this Court for leave to proceed in forma pauperis. In support of this motion Petitioner would inform this Court:

1. That he has no funds with which to pay the necessary fees and costs of this action.

2. That he was determined to be an indigent in accordance with K.S.A. 22-4501 *et seq.* and entitled to appointed counsel on appeal on December 16, 2002. On that date the Kansas Capital Appellate Defender Office was appointed to represent him and he was, in accordance with Kansas law, allowed to pursue his direct appeal to the Kansas appellate courts without the payment of docketing fees, attorney fees or any other costs. (See attached order of appointment.) He has remained indigent since that time.

WHEREFORE, your Petitioner prays that his request for leave to proceed in forma pauperis be granted.

Respectfully submitted:

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No. 14-449

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS - PETITIONER

VS.

JOHNATHAN D. CARR - RESPONDENT

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

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BRIEF IN OPPOSITION

Counsel for Respondent

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CAPITAL CASE

QUESTIONS PRESENTED

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.

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.

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.

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.

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.

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

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

LIST OF PARTIES

The parties to this case are as stated in the caption, State of Kansas, petitioner, and the Jonathan D. Carr, respondent. In the courts below, petitioner was referred to as appellant-defendant and the respondent was referred to as appellee-plaintiff.

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BRIEF IN OPPOSITION

Respondent, Jonathan D. Carr, 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.

STATEMENT OF THE CASE

Respondent Jonathan Carr was convicted of capital murder, along with lesser counts. He was sentenced to death by a jury. The Kansas Supreme Court affirmed Respondent's capital murder conviction but reversed his death sentence, finding that the jury was not instructed as they should have been about mitigating circumstances and that his sentencing trial should have been severed from his co-defendant's.

REASONS WHY THE PETITION SHOULD BE DENIED

Question Number I

The Petitioner has failed to identify an issue of federal constitutional law for this Court to address. The Petitioner readily acknowledges that other states have similarly required that their juries be given the instruction at issue, noting that those state courts have looked to their own state statutes in reaching those decisions. Notably, the Petitioner does not quote the specific holding in *State v. Gleason,* 329 P.3d 1102 (Kan. 2014) that it asks this Court to reverse, because in that holding, the Kansas Supreme Court plainly referenced the Kansas statute. Were this Court to grant certiorari to issue an opinion clarifying that the Eighth Amendment does not require the instruction at issue in this case, the outcome for Respondent Carr would remain the same because such a ruling would have no affect on how the Kansas Supreme Court interprets its own statutes.

The Kansas Supreme Court laid out the Eighth Amendment jurisprudence from this Court that requires full effect be given to mitigation evidence. The court went on to note that this Court did not set out specific standards, but rather invited states to set their own standards. The Kansas Supreme Court then considered its own case law history and comparisons to other states before concluding this state's statutory scheme is satisfied by instructing juries as Respondent argued.

The Kansas Supreme Court did not make any novel or outlandish interpretation of federal constitutional law. To the extent that the court made reference to the Eighth Amendment, it was to the basic premise. The Kansas court did not rule that the Eighth Amendment requires all juries be instructed that mitigators need not be proven beyond a reasonable doubt. The Kansas Supreme Court merely ruled that to give proper effect to mitigation (an Eighth Amendment requirement) under the Kansas statutory scheme, Kansas juries must be so instructed, a decision well within that court's discretion.

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.

Despite the Petitioner's best efforts to convince this Court otherwise, this case does not present an issue of federal constitutional law. As this Court has previously declared, and as the Petitioner acknowledges in its petition, "the states are free to determine the manner in which a jury may consider mitigating evidence." *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006). While acknowledging this directive, the Petitioner asks this Court to tell Kansas, "Except for you." This Court specifically invited a split among the states; that a split now exists is as unsurprising as it is unworthy of a grant of certiorari.

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 Kansas court made no such finding and Petitioner misreads the decision in *State v. Gleason*, 329 P.3d 1102 (Kan. 2014)[1]. 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.

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*

[1] The decision in *Gleason* was issued one week before the decisions in Respondent's case and the companion case, *State v. Reginald Carr,* 331 P.3d 544, and featured the main discussion of this issue.

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).

The Kansas Supreme Court could not have been more clear that the holding in this case relied on its interpretation of a Kansas statute. Given the court's acknowledgment that the Eighth Amendment did not prescribe burdens of proof and that states are left to decide those for themselves, the court could not be misunderstood to base their decision on anything but Kansas law. 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." While the Petitioner would like this Court to focus exclusively on the Kansas Supreme Court's statement that such an instruction "protects a capital defendant's Eighth Amendment right to individualized sentencing," this Court cannot ignore the preceding phrase in that sentence, that this instruction "preserves the statute's favorable distinction." The Court's invocation of the Eighth Amendment was merely to reiterate the basic principle that full consideration must be given to mitigating evidence; the state statute provided the specific law from which the court derived the ultimate conclusion.

Combined with the Kansas Supreme Court's discussion of possible jury confusion with the instructions as given (see Section b below), it is clear the court's decision relies on state law. The decision of the Kansas Supreme Court, which holds that Kansas law requires an affirmative statement regarding the burden of proof, makes no pronouncements regarding federal constitutional requirements, thus 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.

The instruction addressing mitigation did not state that mitigating circumstances need not be proven beyond a reasonable doubt, even though this trial occurred years after the *Kleypas* Court called for that instruction. In contrast, the beyond a reasonable doubt burden of proof was stated many times, often in conjunction with the consideration of mitigating circumstances. While those instructions did not say mitigating circumstances had to be proven beyond a reasonable doubt, they repeatedly put the jury into the mindset of considering what had been proven beyond a reasonable doubt when considering mitigating circumstances.

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. *Gleason*, 329 P.3d at 1148. 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. As this Court has established, Kansas has broad discretion, within certain Constitutional parameters, to decide how to instruct juries on aggravators and mitigators. The Kansas Supreme Court did nothing more than exercise this discretion by considering the total effect of the jury instructions given in this case. 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 states were invited by this Court to establish different standards for the consideration of mitigating evidence. The Petitioner's recitation of different state court's decisions, therefore, does not demonstrate a split of authority on a point of federal law for this Court to address. Rather, it demonstrates that the states are doing exactly what this Court expected.

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 Kansas Supreme Court's 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 stating the instruction sought would have been duplicative, 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 from 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). While the California court in *Welch* did conclude that the jury in that case would not have mistakenly inferred that one jury instruction stating that aggravators must be proved beyond a reasonable doubt could also mean that standard applied to mitigating factors, it hardly gives rise to a split of authority on a point of federal constitutional law that the Kansas court reached a different conclusion when considering a different set of instructions.

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.

The fundamental problem with the Petitioner's effort to establish a split of authority, though, is that this Court invited the states to reach different conclusions on this point of law. The Kansas Supreme Court has not departed from other jurisdictions on point of federal constitutional law, but rather on a matter this Court explicitly left to the States' individual discretion. Kansas simply requires greater clarity in its jury instructions based on the requirements of a Kansas statute than other states require based on their own, different statutes. Because there is no true conflict on a point of federal law 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. *State v. Reginald Carr*, 331 P.3d at 723-724[2]. 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. In the main opinion of Respondent's co-defendant, the court merely held:

[2] The decision in Respondent's co-defendant's case is the main decision for both cases. Unless otherwise specified, the decision in Reginald Carr's case applies equally to Respondent and is the decision cited for discussion purposes.

> 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.

R. Carr, 331 P.3d at 724.

That brief comment was reiterated in Respondent's own decision, again with no discussion of the actual comments Respondent objected to. The Confrontation Clause issue played no role in the determination of the case. 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).

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 using 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.

This Court should find that the right to confrontation extends to the state's presentation of evidence at a capital sentencing trial. In Respondent's case, the disputed statements were relevant to an aggravating factor. As one of the aggravating factors, the state alleged that the crimes were committed in a heinous, atrocious, or cruel manner. To dispute that aggravating factor, as well as to present evidence in mitigation, the defense presented the testimony of Dr. Preston who testified that Respondent suffered from brain damage. Dr. Pay's testimony, offered in rebuttal, disputed Dr. Preston's conclusion of brain damage. The hearsay statements by Dr. Pay's colleagues also disputed the conclusion. (Record on Appeal volume 75, pp.65-66) Whether Respondent suffered from brain damage went to the state's claim that he committed the crimes in a heinous, atrocious, or cruel manner. While it was offered in the defense's mitigation case, it did work to challenge the state's assertion that the crimes were committed in a heinous, atrocious, or cruel manner. When the state presents evidence, even evidence that rebuts defense evidence, it is impossible to find that the evidence does not serve to meet the state's burden of proving the elements the state must prove beyond a reasonable doubt. In a guilt phase trial, the state would not be permitted to produce testimonial statements to rebut a defendant's alibi evidence without providing an opportunity for cross-examination. Though that evidence was

intended to directly rebut defense evidence, it cannot be denied that the evidence would ultimately work to prove the defendant's guilt, not just disprove his alibi.

The prosecution's use of testimonial hearsay in this case was used to challenge the Respondent's evidence designed to create reasonable doubt on an aggravating circumstance. Thus, the evidence went to the state's effort to prove an aggravating circumstance. 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." *R. 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:"When 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 (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 "the 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). "[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)("What 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 by being tied to his co-defendant's courtroom behavior and by the prosecution's arguments inextricably linking the two defendants as one unit, Respondent did not receive the

individualized sentencing determination to which he was entitled. This case posed a unique challenge for the Kansas courts in protecting that right to individualized determination at sentencing. Quite simply, this case was the most notorious murder case in Kansas since the Clutter family murders made famous by Truman Capote. The co-defendants in this case are brothers who are colloquially referred to throughout the state as "The Carr Brothers." Long before a jury was chosen in this case, the very real danger existed that the two co-defendants would not be judged as individuals, but would be lumped together as one entity.

The Petitioner erroneously claims that the Kansas Supreme Court set forth no independent reasons for finding that Respondent was prejudiced by the failure to sever because much of the court's rationale was articulated in the companion case and focused on mitigating evidence put forth by Respondent to show his co-defendant was more culpable. This is incorrect, as the Petitioner's own petition demonstrates. The court pointed to two bases for determining Respondent, like his brother, was prejudiced by a joint penalty trial, the very two arguments raised by Respondent in his brief to that court. *State v. Jonathan Carr*, 329 P.3d 1195, 1212 (2014). Respondent was prejudiced by having his sentencing fate tied to Reginald's in a joint penalty phase. On the opening morning of the penalty phase, the parties, outside of the presence of the jury, discussed the sheriff's requirements for security for the two defendants now that they had both been convicted. (Record on Appeal volume 67, pp.4-7). The district court first spoke with Respondent's defense counsel about Respondent wearing leg irons in the court room. The court noted that Respondent had not engaged in any disruptive behavior in the courtroom that would lead anyone to believe he was a security risk at all. (ROA. 67, p.5). The court also made certain to arrange boxes in the court room in such a way that the jury would be unable to see the leg irons on Respondent.

The discussion then turned to the co-defendant, Reginald. Reginald was not just in leg irons, but was also in handcuffs. The extra precaution was necessary against Reginald because he had told detention officers he was wanting to fight. (ROA. 104, p.91). According to one sargeant, Reginald warned the guards, "I'm also going to make all of you earn your money from here on out." (ROA. 104, p.93). For the penalty phase, he had been provided a sweater to cover the handcuffs so they would not be visible to the jury, but he refused to use the sweater. (ROA. 67, p.7). The district court informed Reginald's defense counsel that Reginald was inviting any prejudice he might suffer should the jury see the handcuffs. (ROA. 67, p.7). The district court, though, did not seem to consider that Respondent would not have invited that prejudice.

In closing arguments at the penalty phase, the state actively encouraged the jury to consider Jonathan and Reginald's common traits, instead of viewing them as the separate individuals the Eighth and Fourteenth Amendment requires a jury to consider.

> These defendants share a lot of things in common. They have somewhat of a common family history, although they were separated at times. Separated for a good period of time when Reginald Carr was in prison. They have the same eye color. They are now both wearing glasses, although their mother said that Reginald doesn't need them. They share some DNA. They share intelligence. They also share immediate self gratification. That they want something and they want it now. And they also share choices. (ROA.75, p.142).

In the prosecutor's initial closing argument, she did not distinguish between Reginald and Respondent. (ROA. 75, pp.128-145). Instead, there were constant references to "they," "Jonathan and Reginald," and "the two defendants." The prosecution went so far as to link Respondent to Reginald's diagnosis of antisocial personality disorder. (ROA.75, pp.186-187).

Rather than expound on the matter, the court simply accepted the prejudice and harm arguments made by Respondent. Doing so without setting out a lengthy explanation of its own is not grounds for a grant of certiorari. To the extent that the nuances of Respondent's particular

claims were not clearly addressed separately from his co-defendant's claims, that only further demonstrates that Respondent has still not truly been recognized as his own individual, separate from his brother. The Kansas Supreme Court made a sound, fact-based decision that in this particular case, trying the two defendants together prejudiced Respondent. The Petition for 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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