No. 14-7327

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

JONATHAN D. CARR,
*Petitioner*,

v.

KANSAS,
*Respondents*.

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

# RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

I. Whether the retroactive elimination of felony murder as a lesser included offense of capital murder violates the Ex Post Facto Clause and the Eighth Amendment?

II. Whether the Kansas Supreme Court applied the wrong standard of review in denying Petitioner's cliam that the trial court erred by denying his motion for change of venue?

III. Whether the Kansas Supreme Court violated Petitioner's right to due process under the Fourteenth Amendments by identifying eight separate and distinct trial errors and yet still affirming his convictions?

## LIST OF PARTIES

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

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## OPINION BELOW

The decision of the Kansas Supreme Court is reported, *State v. Carr*, 329 P.3d 1195 (Kan. 2014).

## STATEMENT OF JURISDICTION

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**The Ex Post Facto Clause of the United States Constitution** respecting the powers of the States provides, "No State shall ... pass any ... ex post facto Law...." U.S. Const. art. I, § 10.

**The Sixth Amendment to the United States Constitution** provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ...." U.S. Const. amend VI.

**The Eighth Amendment to the United States Constitution** provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend VIII.

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

**Kan. Stat. Ann. 2013 Supp. 21-5402** provides in relevant part:

(a) Murder in the first degree is the killing of a human being committed:

(1) Intentionally, and with premeditation; or

(2) in the commission of, attempt to commit, or flight from any inherently dangerous felony.

. . .

(d) Murder in the first degree as defined in subsection (a)(2) is an alternative method of proving murder in the first degree and is not a separate crime from murder in the first degree as defined in subsection (a)(1). The provisions of Kan. Stat. Ann. 2013 Supp. 21-5109, and amendments thereto, are not applicable to murder in the first degree as defined in subsection (a)(2). Murder in the first degree as defined in subsection (a)(2) is not a lesser included offense of murder in the first degree as defined in subsection (a)(1), and is not a lesser included offense of capital murder as defined in Kan. Stat. Ann. 2013 Supp. 21-5401, and amendments thereto. As set forth in subsection (b) of Kan. Stat. Ann. 2013 Supp. 21-5109, and amendments thereto, there are no lesser included offenses of murder in the first degree under subsection (a)(2).

**Kan. Stat. Ann. 2013 Supp. 21-5109** provides in relevant part:

. . .

(b) Upon prosecution for a crime, the defendant may be convicted of either the crime charged or a lesser included crime, but not both. A lesser included crime is:

(1) A lesser degree of the same crime, except that there are no lesser degrees of murder in the first degree under subsection (a)(2) of Kan. Stat. Ann. 2013 Supp. 21-5402, and amendments thereto;

## STATEMENT OF THE CASE

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

## ARGUMENT

### I. The First Question Presented Involves Primarily An Issue Of State Law, There Is No Split Of Authority Even Alleged, And The Kansas Supreme Court Correctly Decided The Question.

Cross-petitioner Jonathan Carr's first question presented does not merit this Court's review for at least three reasons: (1) the question whether a particular offense is a lesser-included offense of another crime is an issue of state law in state criminal cases such as this one, and no federal question is presented; (2) Carr does not even allege a split of authority on any issue of law, much less on a federal question, nor is there one present here; and (3) in any event, the Kansas Supreme Court correctly applied the relevant precedents of this Court and reached the correct conclusion.

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

### A. Whether A State Law Offense Is A Lesser Included Offense Of Another State Offense Is Purely A Question Of State Law, And Kansas Law Does Not Recognize Felony Murder As A Lesser Included Offense Of Capital Murder.

There can be no question that whether one state law offense is a lesser included offense of another state law offense is a question of state law. Nothing in the U.S. Constitution makes that determination for the States, and this Court long has deferred to and accepted state court interpretations of what state criminal law does or does not require or proscribe. Carr cannot and does not argue otherwise, nor does he even cite or discuss cases to allege any split of authority on a federal question implicated by the first question presented.[2]

Capital murder is the most severe degree of murder under Kansas law. *State v. Cheever*, 284 P.3d 1007, 1028 (Kan. 2012), *rev'd on other grounds by Kansas v. Cheever*, ___ U.S. ___, 134 S.Ct. 596 (2013). Lesser included offenses include first degree murder and second degree murder. *Id.* At issue here is the lesser included offense of first degree murder. Under Kansas law, first degree murder can be proven in two ways: (1) by proving a killing done with premeditation and intent; or (2) by proving a killing done in the

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[2] The one and only case Carr cites even suggesting that any kind of split exists is a Kentucky case, *Slaven v. Commonwealth*, 962 S.W. 2d 845 (Ky. 1998), which Carr cites for the proposition that a lesser included offense can be viewed as a "defense" to a greater offense. Cond. Cross-Petn. at 8. But *Slaven* involved a claim *solely under Kentucky law* that a defendant's alleged intoxication should have led to a jury instruction regarding second-degree manslaughter as a possible lesser-included offense of first degree murder. 962 S.W.2d at 856-858. Nothing in the case involved a federal question, nor had anything to do with whether felony murder is a lesser-included offense of capital murder.

commission of, attempt to commit, or flight from, an inherently dangerous felony. Kan. Stat. Ann. 2013 Supp. 21-5402(a)(1),(2). The latter method is referred to as "felony murder."

Decades-old Kansas case law has made clear that intentional, premeditated murder and felony murder are not separate and distinct crimes; rather, they are the same crime – first degree murder – that can be proven in two different ways. *State v. Hoge*, 80 P.3d 52, Syl. ¶ 6 (Kan. 2003); *State v. Chism*, 759 P.2d 105, 111 (Kan. 1988); *State v. Barncord*, 726 P.2d 1322, 1326 (Kan. 1986); *State v. McCowan*, 602 P.2d 1363, 1370-71 (Kan. 1979). When the prosecution elects to charge and pursue only one of these methods of proving first degree murder, Kansas law does not require that the jury be instructed on the other method even if the evidence would support it. *State v. Jackson,* 118 P.3d 1238,1252 (Kan. 2005); *State v. McKinney*, 961 P.2d 1, 7 (Kan. 1998); *State v. Murdock*, 689 P.2d 814, 821 (Kan. 1984). Whether to pursue a charge of first degree murder on one or both theories thus is left to the discretion of the prosecution.

That changed solely in the context of capital murder prosecutions in *State v. Cheever*, *supra*, when the Kansas Supreme Court held that if the evidence will support a felony murder charge, a felony murder instruction as a lesser included offense should be given. 284 P.3d at 1028. Prior to *State v. Cheever*, no Kansas case law held that when a defendant is charged with capital murder, and the jury is instructed on the lesser included offenses of

first degree premeditated intentional murder and second degree intentional murder, the jury *must* be instructed on first degree felony murder as well, if the evidence would support it. Jonathan Carr's trial occurred many years before the *Cheever* decision. Thus, at that time, Kansas law did not require a felony murder instruction.

Following the *Cheever* decision, the Kansas Legislature acted quickly to correct what it viewed as an erroneous decision of the Kansas Supreme Court, by amending Kan. Stat. Ann. 21-5402 in 2013 to make clear that the felony murder form of first degree murder is not a lesser included offense of capital murder. Kan. Stat. Ann. 2013 Supp. 21-5402(d). The legislature further made clear that its clarifying amendment applied to all capital cases currently pending. Kan. Stat. Ann. 2013 Supp. 21-5402(e).

On appeal, Jonathan Carr argued that the omission of a first degree felony murder instruction as a lesser included offense of capital murder was reversible error. His jury was instructed on first degree intentional premeditated murder and second degree intentional murder. The Kansas Supreme Court ruled, in light of the 2013 amendments to Kan. Stat. Ann. 21-5402, that felony murder was not a lesser included offense of capital murder and therefore, there was no error in Jonathan Carr's trial in this regard. *State v. Carr*, 329 P.3d 1195, 1207 (Kan. 2014) (referencing its opinion in the companion case, *State v. Carr*, 331 P.3d 544, 687-88 (Kan. 2014), ultimately relying on *State v. Gleason*, 329 P.3d 1102, 1125-28 (Kan. 2014)).

### B. Applying The 2013 Amendments To Kan. Stat. Ann. 21-5402 To Carr's Case Does Not Violate *Ex Post Facto* Principles.

The seminal exposition on what constitutes an *ex post facto* law is in *Calder v. Bull*, 3 U.S. 386, 391 (1798):

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

The 2013 amendment to Kan. Stat. Ann. 21-5402 clarifying that felony murder is not a lesser included offense of capital murder does none of these. It plainly does not criminalize previously innocent conduct. It does not aggravate any crime and certainly does not aggravate the crime for which Jonathan Carr was charged and convicted, capital murder. It does not change or inflict a greater punishment for the crime of capital murder. And the amendment does not alter the rules of evidence to require less or different evidence to convict of capital murder than the law required at the time Carr committed his crimes. Thus, application of Kan. Stat. Ann. 21-5402(d), as amended in 2013, to Carr's case does not offend the constitutional prohibition against *ex post facto* laws.

But Carr nonetheless argues that application of the amended statute to him violates the *ex post facto* prohibition because, in his view, it *disadvantages* him. This Court long ago rejected that very argument in the

capital murder context: "Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto." *Dobbert v. Florida*, 432 U.S. 282, 293 (1977). The 2013 amendments to Kan. Stat. Ann. 21-5402 are plainly procedural, because "'[t]he crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute.' [Citation omitted.]" 432 U.S. at 294 (quoting *Hopt v. Utah*, 110 U.S. 574, 589-90 (1884)).

In other words, a change cannot be considered substantive if it does not alter the crime charged, the punishment prescribed for that crime, or the quantity or degree of proof necessary to establish guilt for that crime. The amendment at issue here simply does not alter the crime for which Carr was charged, or the punishment prescribed, or the quantity or degree of proof necessary to establish his guilt. Instead, the statutory amendment is nothing more than a procedural change that clarifies the applicable lesser included offenses upon which a capital jury must be instructed.

Thus, on this point, *Dobbert* controls. In *Dobbert,* this Court held that a statutory amendment to the sentencing powers of judges and juries in death penalty cases was merely procedural. Before the change, a defendant convicted of capital murder was sentenced to death unless a majority of the jury recommended leniency. 432 U.S. at 288 & n. 3. After the change, a jury's decision became only an advisory decision. 432 U.S. at 291. The Court held

that the amendment was merely procedural because "'[t]he crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute.' [Citation omitted.]" 432 U.S. at 294.

The same is true in this case. Nothing in the 2013 amendment to Kan. Stat. Ann. 21-5402 changed or otherwise affected the crime for which Carr was charged, the punishment prescribed, or the degree of proof necessary to establish his guilt. Thus, applying the 2013 amendment to his case did not violate the constitutional prohibition on *ex post facto* laws.

### C. The Clarification That Felony Murder Is Not A Lesser Included Offense Of Capital Murder Did Not Deprive Carr Of A Defense.

Carr also argues that the amendment to Kan. Stat. Ann. 21-5402 affected his substantive rights because it deprived him of a defense. But the felony murder doctrine is not a *defense*. Rather, the felony murder doctrine is a mechanism for the State to deter inherently dangerous felonies and homicides committed during the course of such felonies by holding offenders responsible for any killing committed during the commission of a dangerous felony, regardless of the offenders' mental states. *See, e.g., United States v. Tham*, 118 F.3d 1501, 1509-10 (11th Cir. 1997); *People v. Cavitt*, 91 P.3d 222, 228 (Cal. 2004). The felony murder theory permits the prosecution to prove the crime of first degree murder by substituting the commission of an

inherently dangerous felony for the elements of premeditation and intent. *State v. Wilson*, 552 P.2d 931, 935 (Kan. 1976). The felony murder doctrine does not, by any stretch of contorted logic, define a defense or right of a criminal defendant.

Indeed, Carr's argument that the felony murder doctrine provides capital murderers a *defense* would lead to absurd and illogical results. Under Carr's logic, a capital murderer who commits other inherently dangerous felonies in the process of committing capital murder would benefit from such additional criminal conduct by creating for himself a "defense" that could be used to mitigate his crime of capital murder to felony murder, thus avoiding the possibility of the death penalty. On the other hand, a capital murderer who only commits capital murder and no other inherently dangerous felony would not be able to argue for a felony murder "defense." Thus, under Carr's theory, a defendant who commits multiple felonies during a capital murder would have available a "defense" not available to a defendant who committed only capital murder.

Such "logic" is patently absurd and quite dangerous. If felony murder was viewed as a "defense," murderers would have an incentive to commit additional dangerous felonies during a murder in order to obtain this "defense." That result would fly in the face of one of the fundamental purposes of the felony murder doctrine: to *deter felonies and homicides*. *See, e.g.*, *McDonald v. Champion*, 962 F.2d 1455, 1460 (10th Cir. 1992) ("The

purpose of the felony-murder rule was to prevent certain felonies to begin with, as well as homicide, where homicide is most likely to occur.").

### D. Clarifying That Felony Murder Is Not A Lesser Included Offense Of Capital Murder Does Not Contravene *Beck v. Alabama.*

Lastly, Carr argues that the statutory elimination of felony murder as a lesser included offense violates the Eighth Amendment holding in *Beck v. Alabama*, 447 U.S. 625 (1980). But Carr misapprehends *Beck*. In *Beck*, the Court found unconstitutional an Alabama law that both imposed a mandatory sentence of death upon conviction, and precluded the jury from considering *any* lesser included offenses. 447 U.S. at 628-29. Because the jury was given only the options of conviction with imposition of the death penalty or outright acquittal, with no third option, the Court held the law in question diminished the reliability of the guilt determination and enhanced the risk of an unwarranted conviction. *Id.* at 637-38.

But while *Beck* found a constitutional violation in the failure to give lesser included offense instructions in a capital case, that holding is limited to the particular circumstances present in that case. Specifically, in *Beck* (1) there were *no* lesser included offense instructions given, and (2) a conviction resulted in an automatic death sentence. 447 U.S. at 628-29. Thus, *Beck* holds that a constitutional violation occurs when the jury is (1) given an all-or-nothing option of either convicting for a capital offense or acquitting, and (2) conviction of the capital offense *automatically* results in a death sentence.

Because Kan. Stat. Ann. 21-5402 as amended involves neither circumstance, much less both, it cannot run afoul of *Beck* or the Constitution.

First, the exclusion of felony murder from the lesser included offenses of capital murder does not result in an all-or-nothing option between a capital offense and acquittal. Other non-capital lesser included offenses remain, and at the very least, a jury in a Kansas capital murder case will be instructed on (1) first degree premeditated murder and (2) second degree intentional murder, as was done in Carr's trial. Because the 2013 amendments do not lead to the type of all-or-nothing choice at issue in *Beck,* "the central concern of *Beck* is simply not implicated." *Schad v. Arizona*, 501 U.S. 624, 646 (1991); *Spaziano v. Florida*, 468 U.S 447 (1984).

Second, under Kansas law, conviction of capital murder does not automatically lead to imposition of a death sentence. Rather, it only creates the *possibility* of a death sentence to be imposed in a second, penalty-phase proceeding in which the State must prove aggravating circumstances, and the jury must weigh the aggravating circumstances against mitigating evidence to determine whether a death sentence is warranted. Kan. Stat. Ann. 21-6617.

As cases subsequent to *Beck* make clear, there is no constitutional requirement to instruct on every possible lesser included offense in capital cases. *Schad*, 501 U.S. at 645-47 (holding that *Beck* does not require capital juries to be instructed on every lesser included offense supported by the

evidence). So long as the jury is not forced into an all-or-nothing choice of either acquittal or a conviction that automatically results in the death penalty, due process is not violated by limits on lesser included offense instructions. *Id.*; *Hopkins v. Reeves*, 524 U.S. 88 (1998) (*Beck* does not require instructions on second degree murder and manslaughter as lesser included offenses of felony murder where existing state law excluded them as lesser included offenses).

In *Spaziano v. Florida*, 468 U.S 447 (1984), this Court rejected the argument that lesser included offense instructions are a necessary element of a fair trial: "The element the Court in *Beck* found essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations." *Id.* at 455. Thus, the Court explained, "[t]he goal of the *Beck* rule . . . is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." *Id.*

Likewise, in *Schad*, 501 U.S. at 646, the Court reiterated: "Our fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all." Therefore, the "central concern of *Beck* simply is not implicated" where the

jury is "not faced with an all-or-nothing choice" between a capital conviction and innocence. *Id.* at 647.

Finally, in *Hopkins,* 524 U.S. at 95, the Court again observed that the constitutional infirmity in *Beck* was "the denial of the third option of convicting the defendant of a noncapital lesser included offense." Because in *Beck* "the death penalty was automatically tied to conviction," that circumstance "threatened to make the issue at trial whether the defendant should be executed or not, rather than 'whether the State ha[d] proved each and every element of the capital crime beyond a reasonable doubt.'" *Id.* at 98. Where both of those factors are not present, *Beck* is not implicated. *Id.*

It is plain that the (1) all-or-nothing choice and (2) automatic death sentence factors are simply not present in this case, nor is it even possible under Kansas law, including Kan. Stat. Ann. 21-5402 as amended in 2013, for such a situation to arise. Kansas law does not eliminate *all* lesser included offense instructions as did the Alabama statute at issue in *Beck;* it only excludes instruction on felony murder as an alternate theory of first degree premeditated murder. Nor does Kansas law under any circumstances permit automatic imposition of a death sentence upon a conviction for the offense of capital murder.

Thus, application of the amended statute to Carr's case does not implicate any right recognized in *Beck.* Kansas law does not take away from the jury the "third option" of convicting a defendant of a non-capital crime

(again, the jury here was instructed on at least two such lesser crimes, first degree premeditated murder and second degree intentional murder). Thus, Carr never faced the situation that concerned the Court in *Beck*, and Kansas law fully complies with the due process holding of *Beck*.

## II. This Case Does Not Raise The Second Question Presented Because Carr Misrepresents The Kansas Supreme Court's Actual Holding, And In Fact He Received The De Novo Review He Seeks.

In his second question presented, Carr misrepresents what the Kansas Supreme Court actually did and the standard of review that court actually applied to his change of venue claim. Carr asserts that the Kansas Supreme Court sided with the majority view of the federal circuits and applied an abuse of discretion standard to his claim that prejudice should have been presumed from the extensive pretrial publicity and public sentiment against him. Pet. at 12. He further argues that this was error, that such a claim should be reviewed under a de novo standard, and that correcting this error of the Kansas Supreme Court and resolving a split of authority among the circuits warrants this Court's granting of his cross-petition.

But the Kansas Supreme Court did not apply an abuse of discretion standard of review as Carr alleges. Rather, the Kansas Supreme Court gave deference to the district court's *findings of fact*, but applied a *de novo* standard of review to the weighing of the factors relevant to a change of venue request. The court's ultimate conclusion of law – whether prejudice should be presumed – thus was the result of the very de novo review that

Carr now claims to seek. *State v. Reginald Carr*, 331 P.3d 544, 599 (Kan. 2014).[3] The Kansas Supreme Court explained its approach:

> In our view, a mixed standard of review must apply to a presumed prejudice challenge on appeal. The factors enumerated by the United States Supreme Court in *Skilling* require fact findings, whether explicit or necessarily implied, that we must review for support by substantial competent evidence in the record. If such evidence exists, we defer on the fact finding. However, overall weighing of the factors calls for a conclusion of law, and we must review the conclusion of law under a de novo standard.

331 P.3d at 599.

Thus, Carr's allegation of error is illusory. Carr is asking this Court to grant certiorari and hold that the Kansas Supreme Court erred because it should have applied a de novo standard of review when that is the very standard of review that the Kansas Supreme Court applied.

Moreover, a review of the Kansas Supreme Court's analysis of this issue shows that it correctly applied the most recent precedent of this Court, precedent which Carr does not cite or discuss in his conditional cross-petition. Specifically, the Kansas Supreme Court properly looked to and evaluated the seven relevant factors this Court recently identified in *Skilling v. United States*, 561 U.S. 358, 381-85 (2010). *Carr*, 331 P.3d at 598-99. Consistent with

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[3] This citation is to the companion case against Jonathan Carr's brother and co-defendant, Reginald Carr. In addressing the presumed prejudice argument issue in Jonathan's case, the Kansas Supreme Court relied on its reasoning and decision in Reginald Carr's case. *State v. Jonathan Carr*, 329 P.3d 1195, 1206 (Kan. 2014). Both decisions are included in the Appendices to Kansas' Petition for Certiorari in Jonathan's case, Case No. 14-449, with the relevant portion of the decision in Jonathan's case found at page 28, and the relevant portions from the opinion in Reginald's case at pages 154-174.

*Skilling*, the Kansas Supreme Court examined whether media interfered with courtroom proceedings, the magnitude and tone of news coverage, the size and characteristics of the community, the elapsed time between the crimes and the trial, the verdicts rendered by the jury, the impact of the crimes on the community, and the effect, if any, of any codefendant's publicized decision to plead guilty. 331 P.3d at 598-99.

The Kansas Supreme Court found no evidence in the record of media interference with the proceedings. 331 P.3d at 600. It found that the news coverage of the case "was more factual than gratuitously lurid." *Id.* The court also noted that Sedgwick County, where the trial was held, is home to the largest city in Kansas and is the most populous county in the state. *Id.* at 601. The court found all three of these factors weighed against a presumption of prejudice. *Id.* at 600-01. The court then noted that although more than a year-and-a-half passed between the date of the crimes and the trial, public interest in the case remained high and therefore, it determined this fourth factor was inconclusive. *Id.* at 601-02.

Addressing the fifth factor – the jury's verdict – the court observed that this was, of course, unknown at the time the district court denied Carr's request to change venue, but ultimately, the jury acquitted Jonathan Carr of all charges stemming from one of the three incidents (the "Schreiber incident"). *Id.* at 602, 605. Quoting this Court's observation in *Skilling*, the Kansas Supreme Court noted, "It would be odd for an appellate court to

presume prejudice in a case in which jurors' actions run counter to that presumption." 331 P.3d at 605 (quoting *Skilling*, 561 U.S. at 383). As for the sixth factor – the crimes' impact on the community – the Kansas Supreme Court found that the notorious crimes spread fear through the community and therefore, this factor weighed in favor of presumed prejudice. 331 P.3d at 602. And finally, the court observed that the seventh *Skilling* factor was inapplicable because no codefendant had pled guilty. *Id.*

Evaluating all of these factors together, the lower court determined – correctly – that this case was not one of the extremely rare cases where media publicity and community passion against the defendant was so pervasive as to presume prejudice in the county where it was tried. *Id.* at 605. There is nothing in the Kansas Supreme Court's analytical approach or its stated standard of review that warrants this Court's attention. The lower court properly applied this Court's most recent precedent to reach a correct decision.

Further, to the extent that Carr alleges a circuit split regarding the standard of review on questions of change of venue, all but one of the cases Carr cites for this proposition pre-date this Court's *Skilling* decision (and the one post-*Skilling* case cited by Carr, *United States v. Langford*, 647 F.3d 1309 (11th Cir. 2011), cites *Skilling* in its analysis, 647 F.3d at 1333). Notably, one of the two cases Carr cites as falling on his side of the alleged split is the Fifth Circuit's decision in *United States v. Skilling*, 554 F.3d 529 (5th Cir.

2009), the lower court decision whose analysis this Court subsequently rejected. *Skilling*, 561 U.S. at 385. To put it simply, it is doubtful whether there currently exists a split of authority among the circuits on the standard of review after this Court's recent *Skilling* decision.

Nevertheless, even if one were to assume that there is a circuit split, resolving that split would have no bearing on this case and therefore, this case is not an appropriate vehicle for addressing the split, again assuming it even exists. The Kansas Supreme Court in fact engaged in the very review Carr now claims is required and, in any event, under any standard of review Carr cannot demonstrate that his case is one of those extremely rare cases where prejudice can be presumed. Ultimately, this Court's review of the second question presented could not and would not change the outcome in this case. Accordingly, plenary review of this question is not warranted and Carr's cross-petition should be denied.

## III. Carr's Third Question Presented Involves At Most The Factbound (And Correct) Application Of Settled Law.

Carr's final question presented is nothing more than a misguided attempt to invite this Court to second-guess the Kansas Supreme Court's harmless error review. Nothing in his brief discussion of the third question even clearly identifies the federal question he purports to present, nor does he allege any split of authority on any federal issue. At bottom, Carr simply disagrees with the Kansas Supreme Court's factbound and correct conclusion that the evidence again him was so overwhelming (and it was, as described

briefly below) that the errors about which Carr complains did not alter or affect the jury's verdict that he was guilty of capital murder.

Indeed, the evidence against Jonathan Carr consisted of, among other things, the following:

(1) the eyewitness testimony of the surviving victim, Holly G., who identified Jonathan Carr as one of the perpetrators of many of the crimes charged, 331 P.3d at 585-86;

(2) DNA and other biological evidence linking Jonathan Carr to the crimes, 331 P.3d at 586-87;

(3) Jonathan's prior possession of the Lorcin handgun used in the crimes, 331 P.3d at 588;

(4) a shoe print found at the crime scene that matched the size, shape, and sole of Jonathan Carr's shoe, 331 P.3d at 588;

(5) Jonathan's possession of items stolen from the victims, including the engagement ring Jason B. had purchased for Holly G, 331 P.3d at 585.

Considering all of the evidence presented, the Kansas Supreme Court observed:

> ... the evidence of both of the defendants' guilt of the Birchwood offenses was not simply strong; it was nothing short of overwhelming. The evidence supporting the defendants' guilt need not be recounted in detail. Suffice it to say that biological evidence, in addition to other physical evidence, heavily implicated both defendants. Most notably, J. Carr's seminal fluid was collected from Holly G., and both Holly G.'s and Heather M.'s DNA matched DNA found in J. Carr's boxer shorts.

> Similarly, material found on Holly G's thigh implicated both R. Carr and J. Carr. And Heather M.'s blood was found on R. Carr's undershorts.
>
> This highly persuasive biological evidence coupled with other substantial physical evidence of guilt—such as footprints matching R. Carr's found at the Birchwood residence; both men's possession of property stolen from Birchwood, including cash and two vehicles—and the highly persuasive circumstantial evidence of guilt—such as R. Carr's attempt to flee and the clothing J. Carr wore when arrested—lead us to conclude that any effort by either brother to suggest that he was not involved in the Birchwood crimes would be futile.
>
> After weighing the cumulative errors from the trial against the overwhelming evidence of defendants' guilt, we remain unshaken in our confidence in the jury's verdicts. And, although we focus on the Birchwood crimes, having examined the entire record, we conclude beyond a reasonable doubt the cumulative impact of the multiple errors was harmless as to all of the verdicts we affirm today. Consequently, we hold the cumulative impact of those errors does not require reversal of any more of R. Carr's convictions.

331 P.3d at 706. In light of the evidence, there was nothing unreasonable about the Kansas Supreme Court's harmless error determination. It certainly did not amount to a denial of due process. The evidence of Jonathan Carr's guilt was indeed overwhelming and this Court should decline Carr's invitation to wade into the facts and reweigh the evidence. Certiorari is not warranted to re-evaluate the factbound determination of the state court.

## CONCLUSION

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

Respectfully submitted,

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January 2015