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CASE NUMBER: 90198

No. 03-90198-S

IN THE
SUPREME COURT OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

JONATHAN D. CARR
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Sedgwick County, Kansas
Honorable Paul Clark, Judge
District Court Case No. 00 CR 2979

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Nature of the Case

Jonathan Carr was convicted of four counts of capital murder, as well as numerous other crimes. Relevant to the current posture of this case, one of Jonathan's capital murder convictions was affirmed in this Court's July 25, 2014, opinion. *See State v. J. Carr*, 300 Kan. 340, 329 P.3d 1195 (2014); *see also*, *State v. R. Carr*, 300 Kan. 1, 331 P.3d 544 (2014).

In that same opinion, this Court reversed Jonathan's death sentence based on an instructional error and the failure to sever his penalty phase trial from that of his co-defendant. Because Jonathan's death sentence was being reversed for those errors, this Court declined to rule on several other sentencing issues.

The State appealed, and the United States Supreme Court reversed this Court's opinion. *See Kansas v. Carr*, 136 S.Ct. 633, 193 L.Ed.2d 535 (2016). This Court must now decide Jonathan's remaining sentencing issues.

Statement of Issues

P5. K.S.A. 21-4624(c)'s allowance of testimonial hearsay violates the Confrontation Clause of the United States Constitution.

P7. The district judge erred by permitting the State's rebuttal witness to testify that he had consulted other experts and that they agreed with his opinion, in violation of Jonathan Carr's Sixth Amendment right to confront testimonial hearsay. (Appellant's Issue 31.)

P8. The district judge erred in denying an opportunity for surrebuttal testimony, and the error was not harmless. (Appellant's Issue 32.)

P11. The district judge erred in failing to instruct jurors that "the crime" to be considered when evaluating aggravating circumstances was capital murder, and the error was not harmless. (Appellant's Issue 29.)

P13. The wording of Instruction 10, when read with the verdict forms, misstates the law on the need for jury unanimity on mitigating factors not outweighing aggravating factors. This error was not harmless. (Appellant's Issue 25.)

P14. Jonathan Carr's death sentence must be vacated because a fact necessary to imposition of the penalty—his age of 18 or older at the time of the capital crime—was not submitted to the jury or found beyond a reasonable doubt. The State must prove this error was harmless.

P17. The penalty phase was infected by prosecutorial error. These errors require reversal. (Appellant's Issues 26, 34, and 35.)

P20. State law requires the severance of Jonathan Carr's penalty phase proceeding from that of his co-defendant.

P21. Cumulative error requires reversal of Jonathan Carr's death sentence.

Statement of Facts

Jonathan Carr relies on the statements of facts in all briefs and motions previously filed.

Arguments and Authorities

P5. K.S.A. 21-4624(c)'s allowance of testimonial hearsay violates the Confrontation Clause of the United States Constitution.

The United States Supreme Court did not take review on this question presented in the State's Petition for Certiorari, so this Court's ruling that the Confrontation Clause of the Sixth Amendment applies at the sentencing phase of capital murder trials in Kansas remains intact. *See J. Carr*, 300 Kan. at 369; *see also*, *R. Carr*, 300 Kan. at 288. In its decision, the Supreme Court expressed

confidence that the evidence involved wouldn't have changed the outcome of the case. *Kansas v. Carr,* 136 S.Ct. at 646. This is mere dicta and was frankly an irresponsible overreach by that court. The court was presuming to comment on an issue it had not reviewed. The Supreme Court was clearly not familiar with the issue as the decision does not reference all of the evidence challenged as a Confrontation Clause violation. Furthermore, the Supreme Court has recently made clear that questions of harm are generally not that court's purview, but the Supreme Court, "normally leaves it to state courts to consider whether an error is harmless." *Hurst v. Florida*, 136 S.Ct. 616, 624, 193 L.Ed.2d 504 (2016). This Court should give no deference to the Supreme Court's throwaway comment about an issue it did not review.

P7. The district judge erred by permitting the State's rebuttal witness to testify that he had consulted other experts and that they agreed with his opinion, in violation of Jonathan Carr's Sixth Amendment right to confront testimonial hearsay. (Appellant's Issue 31.)

As argued in the initial brief, the rebuttal testimony of Dr. Pay included inadmissible testimonial hearsay. Peppered throughout Dr. Pay's testimony were references to the agreement of other colleagues who had consulted with Dr. Pay as that doctor reviewed the evidence presented to him by the State. "[A]n expert exceeds the bounds of permissible expert testimony and violates a defendant's Confrontation Clause rights when he 'is used as little more than a conduit or transmitter for testimonial hearsay.'" *United States v. Vera*, 770 F.3d 1232, 1237

(9th Cir. 2014) (internal citations omitted). Dr. Pay was acting as a conduit for the opinion of other experts. In fact, two of those other experts for whom Dr. Pay claimed to speak were in the courtroom and identified for the jury. (R. 75: 57-58.) These two individuals were being presented as experts to the jury and offering their opinions countering Jonathan's mitigation evidence without being subjected to cross-examination. Their opinions were clearly formed and conveyed to Dr. Pay for use in a criminal trial. Why else would those two doctors be present in the courtroom if they did not expect their consultations with Dr. Pay to be part of his testimony? It could not have been more clear that Dr. Pay, the testifying witness, was also acting as a conduit for the opinions of Dr. Flynn and Dr. Grelinger. Furthermore, the prosecution knew those two were in the gallery and knew to identify them for the jury. The statement of their opinions through Dr. Pay's testimony was planned in advance. The repeated references to the opinions of two other doctors were testimonial hearsay that violated Jonathan's right to confront the witnesses against him.

The State bears the burden of establishing that the violation of Jonathan's constitutional right was harmless. The constitutional standard for harmless error provides:

> "[T]he error may be declared harmless where the party benefitting from the error proves beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, i.e., where there is no reasonable possibility that the error contributed to the verdict." *State v. Rosa*, 304 Kan. 429, 371 P.3d 915, 922–23 (2016) (citing

> *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011).

The State will be unable to meet this burden. This issue, standing alone, requires reversal of Jonathan Carr's death sentence.

P8. The district judge erred in denying an opportunity for surrebuttal testimony, and the error was not harmless. (Appellant's Issue 32.)

This Court previously found, unanimously, that denying surrebuttal was an abuse of discretion. *See J. Carr*, 300 Kan. at 369; *see also*, *R. Carr*, 300 Kan. at 258, 369-72. In fact, in addition to noting that the decision below was based on a mistake of law, this Court said,

> "It is hard to imagine a situation in which the allowance of surrebuttal would be more sensible and its denial more arbitrary. Judge Clark also abused his discretion because no reasonable person presiding over a death penalty case that had been in court for more than 2 months would have agreed with his decision to disallow surrebuttal requiring a delay of, at most, a couple of hours." *R. Carr*, 300 Kan. at 297-98.

Because it involved Jonathan's right to present relevant, admissible, and noncumulative evidence that was an integral part of his defense theory (as set out on pages 306-09 of Jonathan's original penalty phase brief) this error went to his right to a fair trial. *See State v. Roeder*, 300 Kan. 901, 915-16, 336 P.3d 831 (2014). As such, the constitutional harmless error test applies. The error cannot be declared harmless unless the State can prove beyond a reasonable doubt that the error will not or did not affect the outcome of the trial in light of the entire record, "*i.e.* where there is no reasonable possibility that the error contributed to the

verdict." *State v. Moyer*, 302 Kan. 892, 360 P.3d 384 (2015) (*citing State v. Ward*, 292 Kan. 541 Syl. ¶ 6, 256 P.3d 801 [2011], *cert. denied* —— U.S. ——, 132 S.Ct. 1594, 182 L.Ed.2d 205 [2012]).

Here, where the State was allowed to gut a major piece of the defense case—not just by attacking the evidence, but by attacking the defense expert's integrity—immediately before the close of the penalty trial, and the defense was improperly denied the right to rehabilitate itself, the State cannot meet its burden. This error is reversible, both standing alone and as part of cumulative error.

P11. The district judge erred in failing to instruct jurors that "the crime" to be considered when evaluating aggravating circumstances was capital murder, and the error was not harmless. (Appellant's Issue 29.)

This Court previously found that this instruction was erroneous, but declined to rule on reversibility. As such, this Court also declined to state the proper standard for reversibility. *See J. Carr*, 300 Kan. at 370; *see also*, *R. Carr*, 300 Kan. at 303-06.

In *State v. Kleypas*, Case No. 101,724, 2016 WL 6137507, at *50 (2016) (NOT FINAL) (*Kleypas II*), this Court subsequently declared that for penalty phase instructions,

> "[I]f a death penalty defendant fails to request or object to an instruction, we apply the clearly erroneous standard and determine 'whether [we are] firmly convinced that the jury would have reached a different verdict had the instruction error not occurred. The party claiming a clearly erroneous instruction maintains the burden to establish the degree of prejudice necessary for reversal.' *R. Carr*,

> 300 Kan. at 150–51, 331 P.3d 544 (quoting *State v. Williams*, 295 Kan. 506, Syl. ¶¶ 4–5, 286 P.3d 195)."

Here, based on the argument set out on pages 296-97 of Jonathan's original penalty phase brief, this Court can be firmly convinced. In summary, it is likely the jury considered Jonathan's underlying crimes—aggravated burglary and aggravated robbery—were committed for pecuniary purposes, rather than considering how that factor applied to his capital murder conviction. The instruction in this case was reversible error, both standing alone and as part of cumulative error.

P13. The wording of Instruction 10, when read with the verdict forms, misstates the law on the need for jury unanimity on mitigating factors not outweighing aggravating factors. This error was not harmless. (Appellant's Issue 25.)

This Court previously cited the Eighth and Fourteenth Amendments to unanimously find that Instruction 10, in combination with the verdict forms, was "simply wrong." *R. Carr*, 300 Kan. at 257, 311; *see also J. Carr*, 300 Kan. at 370. Because this case was being remanded for other issues, however, this Court declined to fully flesh out the basis for its finding of error or determine the standard for reversibility. *R. Carr*, 300 Kan. at 307-11.

While counsel believes that this Court's initial finding of error under the Eighth and Fourteenth Amendments was sound, if this Court disagrees, this instruction and verdict forms were still error under the greater protections of

K.S.A. 21-4624(e) (now K.S.A. 21-6617[e]). Further, this error is not subject to harmless error review, but is reversible per se.

A. *Even after Kansas v. Carr, this is still error.*

In *State v. Cheever*, 304 Kan. 866, 885, 375 P.3d 979 (2016), this Court held that K.S.A. 21-4624(e) provides greater protection than the federal Constitution. "[I]t evidences the legislature's intent that a capital penalty phase jury be instructed that mitigating circumstances need to be proved only to the satisfaction of the individual juror in the juror's sentencing decision and not beyond a reasonable doubt." *Cheever II*, 304 Kan. at 885.

While the issue in *Cheever II* was slightly different (the exact issue *Cheever II* decided is covered by P.10), as this Court recognized in its prior opinion, Issue P13 creates a similar problem.

> "The question before us is whether Instruction No. 10 and Verdict Form (3) were so confusing and misleading that the defendants' jury was deprived of a meaningful method of giving effect to mitigating evidence." *R. Carr*, 300 Kan. at 310.

While the *Cheever II* Court noted that issues like these have often been framed as a federal constitutional claims—as Issue P13 was originally here—"central to the decision in [prior cases] was this court's consideration of K.S.A. 21-4624(e)." *Cheever II*, 304 Kan. at 883; *see also R. Carr*, 300 Kan. at 303 (*citing State v. Gleason*, 299 Kan. 1194-98, *overruled by Kansas v. Carr*, 136 S. Ct. 633, 193 L. Ed. 2d [2016] [discussing the Eighth Amendment requirements versus those of K.S.A. 21-4624]). As such, this Court clarified that the claim in *Cheever*

was purely an issue of state law. *See Cheever II*, 304 Kan. at 884 ("This greater protection is a matter of state law outside the purview of the United States Supreme Court.")

Here, should this Court believe *Kansas v. Carr* calls its original, cursory finding of error under the Eighth and Fourteenth Amendments into doubt, the instruction is still error under the greater protections of K.S.A. 21-4624(e) as discussed in *Cheever II.*

B. *The error is not subject to harmless error analysis.*

Because no objection was made below, counsel acknowledges that this Court has indicated the clearly erroneous standard applies. See *Kleypas II*, 2016 WL 6137507 at *50. But that analysis is inapposite when applied to this question.

In the penalty trial of a capital murder case – where one juror can make the difference between life and death, and that one juror can vote for life based on nothing more than his or her personal, moral beliefs – applying a clearly erroneous standard would be improperly substituting this Court's personal, moral judgments for those of the jury.

Highly summarized, here, once the jury found an aggravating factor, the instructions made it impossible to give effect to Jonathan's mitigation to impose a verdict of life imprisonment. It was as if, once the jury found an aggravator, it was locked in a closet and not permitted to come out until it checked a verdict form for death.

The clearly erroneous standard is impossible to apply logically in that context.

The error here is, instead, akin to an error in the burden of proof instruction, *i.e.*, structural error.

> "'When a jury instruction is erroneous because it misdescribes the burden of proof, it "vitiates all the jury's findings," and no verdict within the meaning of the Sixth Amendment is rendered.' *Mendez v. Knowles*, 556 F.3d 757, 768 (9th Cir. 2008) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993)); see also *Byrd*, 566 F.3d at 867." *Cortez v. McDowell*, No. EDCV1600901JAKAFM, 2016 WL 6464479, at *4 (C.D. Cal. Sept. 19, 2016).

And, "'to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.'" *United States v. Garcia–Lagunas*, 835 F.3d 479 (4th Cir. 2016) (citing *Sullivan,* 508 U.S. 275 [1993]) (J. Davis, dissenting). It also—as discussed in Jonathan's original penalty phase brief on page 262—violates Eighth Amendment jurisprudence requiring a higher need for reliability when determining whether a death sentence is appropriate. This Court cannot declare a death sentence reliable when the jury was not able to vote for life.

This error in Instruction 10 and the verdict forms requires reversal, both standing alone and as part of cumulative error.

P14. Jonathan Carr's death sentence must be vacated because a fact necessary to imposition of the penalty—his age of 18 or older at the time of the capital crime—was not submitted to the jury or found beyond a reasonable doubt. The State must prove this error was harmless.

In this Court's prior opinion, it declined to rule on this issue, citing the unlikeliness that it would repeat on remand. *J. Carr*, 300 Kan. at 370; *R. Carr*, 300 Kan. at 311. However, in *Cheever II*, this Court reiterated that a defendant's age is a fact necessary to subject him to the death penalty, and is therefore within the scope of Sixth Amendment jury trial protections. 304 Kan. at 887.

As the party benefiting from this constitutional error, the State must show that it was harmless. See, *e.g.*, *State v. Walker*, 304 Kan. 441, 457, 372 P.3d 1147, 1160 (2016) ("When a defendant's constitutional rights have been violated, the State must 'carry the burden of proving "beyond a reasonable doubt that the error complained of ... did not affect the outcome of the trial in light of the entire record, *i.e.*, proves there is no reasonable possibility that the error affected the verdict."' *Aguirre*, 301 Kan. at 962, 349 P.3d 1245 (quoting *State v. Ward*, 292 Kan. 541, 569, 256 P.3d 801 [2011]).

Jonathan holds the State to its burden on this issue. Unless the State meets its burden, this issue is reversible standing alone. Regardless of the State's showing on harmlessness, this issue is reversible as part of cumulative error.

P17. The penalty phase was infected by prosecutorial error. These errors require reversal. (Appellant's Issues 26, 34, and 35.)

[Note: In its June 3, 2016 briefing order, this Court combined Jonathan's Issues 26, 34, and 35 under the heading of prosecutorial error. While Issue 34 (the pure prosecutorial error issue) does incorporate the problems discussed in Issues 26 and 35, Issues 26 and 35 (error in admitting prior bad acts and error in denying Jonathan's motion for mistrial, respectively) were and *are* separate grounds for error and reversal that still require rulings by this Court, both standing alone and under this Court's cumulative error analysis.]

In its previous opinion, this Court largely declined to rule on the prosecutorial misconduct which pervaded Jonathan's penalty trial, but, instead, admonished the State to "consider carefully" any repetition of its prosecutors' behaviors and statements on remand. *R. Carr*, 300 Kan. at 314; *J. Carr*, 300 Kan. at 371. Since that opinion, this Court has changed the test for prosecutorial misconduct and renamed it "prosecutorial error." See *State v. Sherman*, __ Kan. __, 378 P.3d 1060 (2016). The new test has two steps: error and prejudice. *Sherman*, 378 P.3d at 1075. Counsel will examine each in turn.

A. *The prosecutors' behavior and statements in this case were error.*

Under *Sherman*, the error step in the analysis remains what it always has been. Courts should only look to "whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors . . . ." *Sherman*, 378 P.3d at 1075. As such, *Sherman* does not alter Jonathan's arguments as to the error part

of the analysis, as set out in Issue 34 of his original penalty phase brief. He maintains that the introduction of prior bad acts and statements not in evidence, misstatements of the law on mitigation and mercy, prosecutor's personal opinion on the credibility of Dr. Preston, arguments denigrating mercy, and improper appeals to emotion and sympathy were all outside prosecutorial latitude.

B. *The error was not harmless beyond a reasonable doubt.*

For the prejudice step, *Sherman* held that the State must prove "'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, [that] there is no reasonable possibility that the error contributed to the verdict.'" *Sherman*, 378 P.3d at 1075 (*citing State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 [2011], *cert. denied* 132 S. Ct. 1594 [2012]). This new test removes the "ill will" and "gross and flagrant" steps that were part of the prejudice inquiry of the old analysis (see *e.g.*, *State v. Tosh*, 278 Kan. 83, 85, 91 P.3d 1204 [2004]), and in so doing, eliminates the subjective intent of the prosecutor to create an objective prejudice inquiry.

Subsequently to *Sherman*, this Court further clarified how the new prosecutorial error test applies specifically to the penalty phase of a capital murder trial. First, this Court must give full credit to all of Jonathan's mitigators. *Kleypas II*, 2016 WL 6137507 at *60. "With that in mind, the question is whether we can say the evidence that the aggravating circumstances outweigh the mitigating circumstances is so overwhelming that the misconduct had no reasonable possibility of changing the jury's verdict. [Citation omitted.]" *Kleypas II*, 2016

WL 6137507 at *60. As cited in Jonathan's original penalty phase brief on page 319, this Court must lastly conduct a separate cumulative error analysis of the prosecutorial error.

This new standard of prejudice only strengthens Jonathan's previous arguments for reversal, because – while he maintains that these were present – under the new test, he need not show ill will or gross and flagrant behavior. Further, the State has the burden of proving there was not even a reasonable possibility that the prosecutors' comments and behavior changed the jury's verdict. This the State cannot do.

First, the sheer pervasiveness of the prosecution's comments and behavior argues against harmlessness. To use this Court's own language, the penalty trial *was* "infected." *J. Carr*, 300 Kan. at 371; *R. Carr*, 300 Kan. at 257.

Second, the prosecutorial errors directly undercut Jonathan's mitigation case. Jonathan argued for mercy; the State denigrated the concept and misled the jury about when it could grant it. Jonathan argued he was merely an accomplice to his brother's crimes; the State improperly introduced an alleged statement Jonathan made to an unnamed jailhouse inmate to the contrary. Jonathan argued that Dr. Preston found the PET scans showed brain abnormalities; the State accused Dr. Preston of lying and called the scans "hocus pocus." Jonathan argued he'd had a horrific childhood; the State misled the jury into believing that horrific childhood had to excuse or justify the crimes. At every turn, Jonathan's mitigation case was stymied by the prosecutor's improper comments and behavior.

Third, because of the already emotionally charged question the jury was tasked with answering, the improper appeals to emotion and sympathy were that much more harmful.

Each instance of prosecutorial error standing alone is reversible, the net effect of the prosecutorial errors requires reversal, and these errors are also reversible as part of the whole penalty phase cumulative error.

P20. State law requires the severance of Jonathan Carr's penalty phase proceeding from that of his co-defendant.

In its briefing order, this Court invited counsel to argue the question of severance at Jonathan Carr's sentencing phase of trial as a matter of state law. This case is in the unique posture of analyzing the prejudice from a joint sentencing trial only because this Court found the error of trying Jonathan alongside his codefendant at the guilt phase was harmless. This Court has already established that it was error for the district court to deny Jonathan's repeated motions to sever his case from his codefendant's and that ruling remains unchanged. *J. Carr,* 300 Kan. at 356. As a matter of Kansas state law, Jonathan should have had a separate trial. The sole question now is whether Jonathan suffered prejudice at the sentencing phase of his trial, even if the failure to sever did not affect the outcome of the guilt phase of the trial.

On review of the question of severance at the penalty phase, the Supreme Court focused on the constitutional question of "fundamental unfairness" and held the joint sentencing trial in this case did not reach that level. *Kansas v. Carr*, 136

S.Ct. at 646. That Court was considering the question of severance solely under the Eighth Amendment as it relates to sentencing and was considering only the vacuum of what occurred at the sentencing portion of trial. That decision, then, does not speak to whether Jonathan Carr's right to a fair trial under Kansas state law was violated by trying him alongside his codefendant.

The question under Kansas state law is whether severance is necessary "to avoid prejudice and ensure a fair trial to each defendant." *State v. Davis*, 277 Kan 231, 239, 83 P.3d 182 (2004). When considering whether codefendants are entitled to separate trials under state law, Kansas courts consider familiar factors, as this Court noted in the original decisions:

> " '(1) that the defendants have antagonistic defenses; (2) that important evidence in favor of one of the defendants which would be admissible on a separate trial would not be allowed on a joint trial; (3) that evidence incompetent as to one defendant and introducible against another would work prejudicially to the former with the jury; (4) that the confession by one defendant, if introduced and proved, would be calculated to prejudice the jury against the others; and (5) that one of the defendants who could give evidence for the whole or some of the other defendants would become a competent and compellable witness on the separate trials of such other defendants.' " 277 Kan. at 240, 83 P.3d 182 (quoting *Butler,* 257 Kan. at 1063, 897 P.2d 1007). *R. Carr*, 300 Kan. at 94.

Applying those factors, this Court did find that the district court erred by failing to sever Jonathan's trial from that of his codefendant.

In considering whether Jonathan was prejudiced at the penalty phase of his trial by this error, this Court should not ignore the prejudice and concerns that

arose during the guilt phase from the joint trial. (See Appellant's argument in Issue P 21.) The State's case-in-chief at the penalty phase was limited to an invocation of all the evidence and testimony that had been introduced at the guilt phase. The prejudice that Jonathan suffered from Reginald Carr's antics in the courtroom and his defense's claims that Jonathan alone was involved – as set forth in volume 1 of his original brief, at pages 141-150 – followed to the penalty phase.

The further question of how to evaluate whether a failure to sever codefendants' trials at a penalty phase of a trial can be harmless is a novel question in Kansas law. This Court has previously indicated the list of factors for analyzing when a defendant is prejudiced by a failure to sever is not exhaustive. *See State v. Davis*, 277 Kan. 231, 83 P.3d 182 (2004) (noting the factors to consider in severance issues "includes" these five factors). The factors a court might consider when evaluating a sentencing severance issue, while similar perhaps, should reflect the inherent differences between a guilt phase of trial and a penalty phase. For example, this Court noted in the original decisions that the body of Kansas case law about finger-pointing between two defendants who each claimed the other was more culpable did not speak to the unique situation of finger-pointing between two defendants at a penalty trial. In previous cases, Kansas courts had rejected requests for separate trials from co-defendants who did not truly present antagonistic defenses but were merely trying to shift more blame onto the other. *See e.g. State v. Boyd,* 281 Kan. 70, 82, 127 P.3d 998 (2006). This distinction rested on the notion that the jury at guilt phase trial is assessing **legal**

culpability while a jury at penalty phase is assessing **moral** culpability. *R. Carr*, 300 Kan. at 278. Thus, assessing which defendant bears more moral culpability is relevant at a sentencing proceeding in a way it is not when only guilt is in question.

A penalty phase is a fundamentally different part of a criminal trial from the guilt phase. What might constitute prejudice to a defendant should be viewed through a different lens than cases that have only considered guilt phase trials have used. At the same time, a penalty phase is not a separate trial but is merely one part of the criminal trial. A defendant who is entitled to a trial separated from his codefendant's would not have his trial rejoined for a penalty phase of trial. There is no basis in state law for this Court to hold that the district court's failure to sever the trials ceased to be an error once the sentencing phase of trial began.

Jonathan was prejudiced by having his sentencing trial held jointly with his codefendant's for the reasons set forth in detail in volume II of his original brief, at pages 257-261. This Court has already found that Jonathan Carr was entitled to a new sentencing phase based on the district court's failure to sever his trial from that of his codefendant. This Court should reaffirm that holding as a matter of state law and once again reverse Jonathan's death sentence and remand for a new penalty phase trial.

P21. Cumulative error requires reversal of Jonathan Carr's death sentence

This Court recently stated the standard for considering cumulative error at the penalty phase of a death penalty trial.

> "When considering a claim that cumulative error infected the penalty-phase proceeding, our test is whether we are able to find that the total cumulative effect of the errors, viewed in the light of the record as a whole, had little, if any, likelihood of changing the jury's ultimate conclusion regarding the weight of the aggravating and mitigating circumstances. See *Kleypas,* 272 Kan. at 1087, 40 P.3d 139. The degree of certainty by which we must be persuaded turns on whether any of the errors infringe upon a right guaranteed by the United States Constitution. See *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011), *cert. denied* —— U.S. ——, 132 S.Ct. 1594, 182 L.Ed.2d 205 (2012). The overwhelming nature of the evidence is a factor to be considered, but its impact is limited. As with the prosecutorial-misconduct analysis, the question before this court is not what effect the error might generally be expected to have upon a reasonable jury but, rather, what effect it had upon the actual sentencing determination in the case on review. See *Kleypas*, 272 Kan. at 1088, 40 P.3d 139." *State v. Cheever*, 304 Kan. 866, 375 P.3d 979, 1005 (2016).

The errors previously identified by this Court that occurred at the guilt phase of Jonathan Carr's trial should be included when considering the cumulative effect of errors on the penalty phase of trial. The two phases of trial simply can't be divorced from one another. Everything that happens during the guilt phase of a capital trial is part and parcel of the penalty phase. Indeed, the State in Jonathan's trial did not present an independent case-in-chief at the penalty phase. Instead, the State incorporated all of the witnesses and evidence from the guilt phase and

rested its case. (R. 67: pp. 34-5.) The guilt phase *was* the State's case for death. Errors that occurred at that stage necessarily affected the penalty phase as well.

> "Because the capital sentencing decision is intrinsically a moral, rather than exclusively an evidentiary, decision, harmless error is an inadequate standard in the context of a capital murder prosecution. This insight applies with equal force, in my opinion, to the jury's guilt-phase determinations, for the reasons identified in *Beck v. Alabama, supra,* and the dissent in *Darden v. Wainwright, supra;* because the guilt-phase record is routinely moved into evidence as the foundation of the penalty-phase judgment, any distinction between the two phases disintegrates. A capital case is a prosecutorial continuum in which evidence moves without interruption or alteration from the trial of guilt and the determination of death eligibility to the trial of penalty and the imposition of sentence. A guilt-phase determination in a capital case differs in kind, therefore, from a guilt determination in the normal criminal case." *State v. Bey*, 112 N.J. 45, 115–16, 548 A.2d 846, 883 (1988) (Handler, J., concurring).

In short, it is all one trial.

Attempting to separate the two phases is a futile mission because they are intrinsically connected, as this Court recognized in *Cheever II*, 304 Kan. at 902. Given what we know about when juries actually reach their decisions regarding the sentence, the recognition that the two phases are indistinguishable is inescapable. Despite instructions to the contrary, capital jurors often reach their decisions about the appropriate sentence before the penalty phase of trial has even begun. *Foreclosed Impariality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making* 83 Cornell Law Review

1476, 1488-89 (1998). We cannot ignore the reality of how and when capital jurors make their decisions and how inextricably linked those decisions can be to the guilt phase of capital trials.

The Tenth Circuit has also recognized the appropriateness of considering guilt and penalty phase errors together when considering cumulative error. *See Cargle v. Mullin*, 317 F.3d 1196, 1208 (2003) ("The commensense notion that sentencing proceedings may be affected by errors in the preceding guilt phase is not novel.") This Court should consider guilt phase errors when analyzing the effect of cumulative error on Jonathan's right to a fair trial at the penalty phase.

In the guilt phase of Jonathan Carr's trial, this Court identified at least eight errors. Those errors included incorrectly instructing the jury on the law of aiding and abetting, disallowing a defense peremptory challenge to a juror, and charging errors. This Court found Jonathan's Sixth Amendment right to Confrontation was violated by the admission of Ann Walenta's statements to police. Most significantly, this Court found the district court erred by refusing to sever Jonathan's trial from his codefendant's. While the jury was considering Jonathan's sentence, those errors – at least one of which rose to the level of a federal constitutional violation – must have played a role. The jury had repeatedly been encouraged by the State not to distinguish between Jonathan and his brother rather than considering whether he was less culpable. This urging continued at the penalty phase. The failure to clearly instruct the jury on aiding and abetting law played into that idea that the jury didn't need to decide whether Jonathan

separately and independently possessed a mental state that would justify a verdict of death. The very act of making Jonathan sit in the courtroom alongside his brother day in and day out at trial further exacerbated the legal errors related to the severance and instructional issues by again reinforcing the idea the two defendants were one inseparable unit.

It cannot be forgotten that this Court found the foreperson of this jury should have been removed from the jury. *J. Carr*, 300 Kan. at 357. In the penalty phase, this error is magnified by the fact that one juror can change a verdict from death to life. That error alone necessarily affected the verdict because that juror voted for the death penalty and that vote would not have counted but for the district court's error.

In addition to the numerous errors identified at the guilt phase, this Court has also already found errors at the penalty phase. Jonathan's trial should have been severed from his codefendant's. The jury was not properly instructed on the burden of proof of mitigation evidence.[1] The district court abused its discretion in denying the opportunity to present surrebuttal testimony. *J. Carr*, 300 Kan. at 369. The jury was given instructions and verdict forms that precluded a finding for life.

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[1] Pursuant to this Court's June 3, 2016, order, supplemental briefing of this issue (Issue P10) is not permitted. Counsel would note, however, that this Court recently declared a nearly identical instruction erroneous in *State v. Cheever*, 304 Kan. 866, 885–87, 375 P.3d 979 (2016) (*Cheever II*), reaffirming that the instruction at issue is required at capital trials as a matter of state law. While Counsel continues to assert this error is reversible on its own merit, it should certainly be included when considering cumulative error as a whole.

J. Carr, 300 Kan. at 370. Finally, Jonathan continues to argue other errors also occurred at the penalty phase of his trial that have not yet been ruled on by this Court.

The sheer quantity of error that occurred throughout Jonathan Carr's trial makes it impossible for this Court to find the errors had no effect on the outcome at the sentencing phase. Error permeated every phase of this trial. It would be impossible to divorce the numerous errors and all their effects on the jury from the trial as a whole and determine the final verdict of death was reliable. Indeed, it would be inappropriate for this Court to attempt to do so, given the volume of established error in this case.

"We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it." *Ring v. Arizona*, 536 U.S. 584, 612, 122 S. Ct. 2428, 2445, 153 L. Ed. 2d 556 (2002) (Scalia, J., concurring). This Court likewise cannot preserve our state's veneration for the protection of the jury in death penalty cases if it identifies error after error after error that occurred at trial but affirms the result anyway. By affirming a jury's verdict of death after finding the process by which that jury reached its verdict was poisoned by error, this Court would be as much circumventing the jury trial right as if there had been no jury in the first place.

Overlooking all of the error that occurred in the trial that led a jury to impose a death sentence on Jonathan Carr because this Court believes the jury

ultimately reached the "correct" decision would be tantamount to judicial imposition of the death penalty. Regardless of the weight of evidence, there must come a point where a trial process is so flawed, there is no choice but to reverse the result and remand the case for a fair proceeding. Jonathan's case is just such a case. The accumulation of errors throughout his trial leaves this Court with no choice but to reverse his death sentence and remand his case for a new, fair, sentencing trial.

Conclusion

For the reasons stated above, Jonathan Carr respectfully requests this Court remand his case for a new penalty phase trial.

Respectfully submitted,

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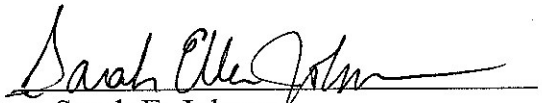
Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was e-mailed to David Lowden, Chief Attorney, Appeals Division, at appeals@sedgwick.gov; and by emailing a copy to Derek Schmidt, Attorney General, at ksagappealsoffice@ag.ks.govon the 7th day of November, 2016.



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