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No. 03-90198-S

IN THE
SUPREME COURT
OF THE STATE OF KANSAS

STATE OF KANSAS,
Plaintiff-Appellee

v.

JONATHAN D. CARR
Defendant-Appellant

SECOND SUPPLEMENTAL BRIEF OF APPELLEE

Appeal from the District Court of Sedgwick County, Kansas
Honorable Paul W. Clark, Judge
District Court Case No. 00CR2979

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STATEMENT OF ISSUES TO BE SUPPLEMENTED

P5. Does K.S.A. 21-4624(c)'s allowance of testimonial hearsay (a) offend the heightened reliability standard applicable in death penalty cases or (b) violate the Confrontation Clause of the United States Constitution? (R. Carr's Issue 20)

P7. Did the district judge err by permitting the State's rebuttal witness to testify that he had consulted other experts and that they agreed with his opinion? (R. Carr's Issue 32; J. Carr's Issue 31)

P12. Did the district judge err by equating mercy to a mitigating factor? (R. Carr's Issue 25)

P13. Did the wording of Instruction 10, when read with the verdict forms, misstate the law on the need for jury unanimity on mitigating factors not outweighing aggravating factors? (J. Carr's Issue 25)

P14. Must J. Carr's death sentence 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? (R. Carr's Issue 40)

P17. Was the penalty phase infected by prosecutorial misconduct? (R. Carr's Issue 34; J. Carr's Issues 26, 34, and 35)

P20. Did state law require the severance of J. Carr's penalty-phase proceeding from that of his co-defendant?

P21. What effect, if any, did cumulative error on the sentencing decision?

INTRODUCTORY STATEMENT

Following remand from the United States Supreme Court in *Kansas v. Carr*, 577 U.S. ___, 136 S. Ct. 633, 646, 193 L. Ed. 2d 535 (2016), this Court issued an order for limited supplemental briefing on June 3, 2016. The State's second supplemental brief is now being presented pursuant to that order. Of the possible 19 issues that may be supplemented, the State will supplement 9 issues (P2, P5, P7, P12, P13, P14, P17, P20, and P21) while relying on the original briefing for the remaining 10 issues.

This court's order also permitted the State to address whether additional oral argument is necessary. The State submits that additional oral argument is necessary to expound upon and to help clarify 8 issues (P5, P7, P8, P12, P13, P17, P20, and P21), not all of which are addressed in this supplemental brief.

ARGUMENTS AND AUTHORITIES

P2. It was not constitutional error to omit the four aggravating circumstances asserted by the State from the amended complaint. (R. Carr's Issue 35)

This court has already rejected this claim based on the rationale in *State v. Scott*, 286 Kan. 54, 94, 183 P.3d 801 (2008), *overruled on other grounds by State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016), and should continue to do so. And since this Court's decision, at least one other court has cited to *Scott* with approval. See *State v. Abdullah*, 158 Idaho 386, 459-61, 348 P.3d 1 (2015) (citing *Scott* and recognizing the validity of its reasoning).

P5. K.S.A. 21-4624(c)'s allowance of testimonial hearsay does not (a) offend the heightened reliability standard applicable in death penalty cases or (b) violate the Confrontation Clause of the United States Constitution. (R. Carr's Issue 20)

In its initial brief in the R. Carr case, the State asserted that K.S.A. 21-4624(c)'s allowance for testimonial hearsay did not offend the heightened reliability standard applicable in death penalty cases and did not violate the Confrontation Clause of the United States Constitution. Citing *Scott*, this court agreed with the State regarding the heightened-reliability argument. This court, however, went on to hold "that confrontation law is applicable to a capital penalty phase trial" and then suggested that the Confrontation Clause would bar not only testimonial hearsay but also "any testimonial hearsay referenced in questions posed by counsel." *State v. Carr*, 300 Kan. 1, 99-101, 287-88, 331 P.3d 544

(2014), *cert. granted in part*, 135 S. Ct. 1698 (2015), and *cert. denied*, 135 S. Ct. 1698, 191 L. Ed. 2d 679 (2015), and *rev'd and remanded*, 577 U.S. ___, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016).

This court adopted that reasoning in J. Carr's case. *State v. Carr*, 300 Kan. 340, 368-69, 329 P.3d 1195, 1212 (2014), *cert. granted in part,* 135 S. Ct. 1698, 191 L. Ed. 2d 674 (2015), and *cert. denied,* 135 S. Ct. 1700, 191 L. Ed. 2d 679 (2015), and *rev'd and remanded,* 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016).

The State submits that this court correctly rejected the heightened-reliability argument and should maintain that position. The State, however, continues to challenge the notion that the Confrontation Clause applies to a capital penalty phase trial. Although there continues to be a split of authority between some lower courts and no definitive answer from the United States Supreme Court, federal courts have not waivered on this issue, as evidenced by a recent 9th Circuit decision. See *Smith v. Ryan*, 823 F.3d 1270, 1279-80 (9th Cir. 2016).

In *Smith v. Ryan*, the court found that Smith did not have the right to confrontation during his capital sentencing proceeding because of the United States Supreme Court's decision to the contrary in *Williams v. New York*:

> The U.S. Supreme Court has never established a right to confront witnesses at sentencing. To the contrary, Smith's argument is foreclosed by *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), "which held that the Confrontation Clause does not bar courts from considering unconfronted statements during sentencing proceedings." *Sivak v. Hardison*, 658 F.3d 898, 927 (9th Cir. 2011) (rejecting a Confrontation Clause challenge to the use of hearsay in a capital sentencing proceeding under pre-AEDPA standards); *see also United States v. Littlesun*, 444 F.3d 1196, 1197

> (9th Cir. 2006); *United States v. Petty*, 982 F.2d 1365 (9th Cir.), *amended by* 992 F.2d 1015 (9th Cir. 1993). We therefore conclude that the Arizona Supreme Court did not act unreasonably in rejecting Smith's Sixth Amendment confrontation claim. [Footnote omitted.]

This federal court perspective is the correct one, as lower courts do not have the authority to overrule precedent from the United States Supreme Court, even when subsequent cases raise doubts about the continuing validity of precedent. The United States Supreme Court recently stated as much when striking down an Oklahoma Court of Criminal Appeals decision:

> [I]t is this Court's prerogative alone to overrule one of its precedents." *United States* v. *Hatter*, 532 U. S. 557, 567 (2001) (quoting *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997); internal quotation marks omitted); see *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). The Oklahoma Court of Criminal Appeals has recognized that *Payne* "specifically acknowledged its holding did not affect" *Booth*'s prohibition on opinions about the crime, the defendant, and the appropriate punishment. *Ledbetter*, 933 P.2d at 890–891. That should have ended its inquiry into whether the Eighth Amendment bars such testimony; the court was wrong to go further and conclude that *Payne* implicitly overruled *Booth* in its entirety. "Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn* v. *United States*, 524 U. S. 236–253 (1998).
>
> The Oklahoma Court of Criminal Appeals remains bound by *Booth*'s prohibition on characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence unless this Court reconsiders that ban. The state court erred in concluding otherwise.

Bosse v. Oklahoma, No. 15-9173, 2016 WL 5888333, at *2 (U.S. Oct. 11, 2016).

Although this court did not expressly indicate that *Williams* had been overruled by *Crawford*, that is certainly the implication and practical effect. Otherwise, the inquiry would have ended with the *Williams* court's decision that uncontested statements are admissible in a death-sentence proceeding. This court should find that *Williams* controls and that J. Carr did not have the constitutional right to confrontation at his penalty-phase trial.

This court should also refrain from ruling on this issue in any instance where J. Carr's failed to make a confrontation objection when the particular exchanges were occurring on cross-examination. Without an established record that explains why J. Carr did not make a confrontation/hearsay objection on each occasion, this court is ill-equipped to rule on this issue. It may very well be that a confrontation objection was not made because much of the information was elicited or touched upon during direct examination of J. Carr's own witnesses and came from information already possessed and utilized by the defense. Or perhaps J. Carr did not want the State to produce more detailed information about the prior crimes or bad acts. Sometimes more is not better from the defense perspective during the course of a trial. The proper forum for such an inquiry would be a K.S.A. 60-1507 motion or a federal habeas action, not a direct appeal.

Another problematic aspect is the court's suggestion that impeachment questions fall within the definition of testimonial hearsay for purposes of the Confrontation Clause:

> It is not a wholly satisfactory response to say that the prosecutor's questions did not qualify as admitted evidence, that the statements were used only to impeach defense witnesses, or that the statements were not offered for the truth of the matter asserted. Inclusion of the statements as an explicit basis for the prosecutor's questions obviously implies to the jury that they have a basis in fact, regardless of whether the statements qualify for the label of evidence. But nothing in the record before us demonstrates that such a basis was ever tested. Any impeachment should only be effective if a sound basis for the prosecutor's impeaching question exists. And a sound basis exists only if the statements are true.

State v. Carr, 300 Kan. at 288.

This court's suggestion is untenable, as it changes the parameters of the *Crawford* decision and its progeny. This court seems to be focusing improperly on the potential negative effect of information rather than focusing on whether the information is testimonial and whether it is actually hearsay. The State is unaware of any case that applies *Crawford* to situations not involving testimonial hearsay. If there is no testimonial hearsay, there can be no confrontation violation—which was a concept recently embraced by this Court in the *Cheever* case:

> Cheever makes an additional argument, based on the Confrontation Clause and *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), that the statute is unconstitutional because it allows introduction of testimonial hearsay evidence. Notably, Cheever does not contend that any testimonial hearsay was admitted during his penalty-phase proceeding. See *State v. Williams*, 299 Kan. 911, 918, 329 P.3d 400 (2014) ("Generally, 'if there is no constitutional defect in the application of the statute to a litigant, [the litigant] does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.'"). Because Cheever points to no testimony that would be disallowed by the rule he wants applied, he lacks standing to raise a challenge to the rule's constitutionality.

State v. Cheever, 304 Kan. 866, 899, 375 P.3d 979 (2016). This court should adhere to this position.

The cross-examination technique used by the State was a valid technique that was based upon evidence and testimony presented in the case—including resources utilized by J. Carr's witnesses—and does not constitute use of hearsay, let alone testimonial hearsay, because it was not used to prove the truth of the matter asserted. The technique was used to explore the basis for each witness' testimony and to possibly impeach that testimony. It is not persuasive for J. Carr to assert now that the impeachment technique is not valid.

Moreover, the information gleaned from or revealed by any alleged errors committed by the State on cross-examination is mitigated by information elicited from J. Carr's witnesses on direct examination and the brutality of the acts committed in the current case. J. Carr's strategy was to show that his bad behavior was the product of a dysfunctional childhood and that there was "some good" in him and that he was worthy of the jury's mercy. (See penalty-phase opening statement, R. 67: 29-34.) The State's conduct was not at complete odds with that strategy; it indirectly supported it by showing how damaged he was while also undermining his attempt to show he was worthy of the jury's mercy. Any current disagreement with the State's conduct on cross-examination and the alleged prejudicial impact is without a reasonable basis under the weight of the entire record.

As noted by the United States Supreme Court, if there was any violation of the Confrontation Clause, it was harmless error. See *Kansas v. Carr*, 136 S. Ct. at 646 ("We are confident that cross-examination regarding these police reports would not have had the slightest effect upon the sentences. See *Delaware v. Van Arsdall,* 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).").

P7. The district judge did not err by permitting the State's rebuttal witness to testify that he had consulted other experts and that they agreed with his opinion. (R. Carr's Issue 32; J. Carr's Issue 31)

Resolution of this issue is related to the resolution of the confrontation issue discussed in Issue P5; the State incorporates that argument by reference here. As with that issue, the State submits that there is no constitutional right to confrontation during the penalty-phase trial.

Moreover, J. Carr had the fair opportunity to challenge and rebut the alleged testimonial hearsay concerning the opinions of the other experts. Nothing prevented him from calling the other experts as witnesses. The fair opportunity to rebut and challenge was consistent with the opportunity envisioned by Kansas law. See *State v. Cheever*, 304 Kan. 866, 898, 375 P.3d 979 (2016) (discussing K.S.A. 21-4624(c): "Under that provision, any evidence relevant to the question of sentence 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.").

If there was error, it was harmless, for the reasons argued in the State's original brief.

P12. The district judge did not err by equating mercy to a mitigating factor. (R. Carr's Issue 25)

This court rejected this issue in its original opinion and recently bolstered that decision in *State v. Cheever*, 304 Kan. at 885:

> Moreover, because mitigating circumstances must be determined by each juror individually and because mercy itself may be considered a mitigating factor, the challenged instruction also was factually appropriate in the sentencing phase of this capital proceeding. See *State v. Carr*, 300 Kan. 1, 307, 331 P.3d 544 (2014) (recognizing mercy as mitigating factor).

Accordingly, there is no reason for this court to reach a different result now.

P13. The wording of Instruction 10, when read with the verdict forms, did not misstate the law on the need for jury unanimity on mitigating factors not outweighing aggravating factors. (J. Carr's Issue 25)

In the original opinion, this Court found error in Instruction 10 but did not make a determination whether the error was reversible error because it was remanding for resentencing. 300 Kan. at 370. With the United States Supreme Court's decision to reverse this Court's decision on other grounds, this court must now address whether the error was reversible.

The State stands by the argument in its initial brief and that any error involving Instruction 10 does not warrant reversal of the death sentence. The additional "not" that created a double negative was not readily noticeable, as

multiple trial attorneys and the trial judge did not notice the error. Such a nuanced error did not confuse any juror, especially when considering Instruction 10 together with Verdict Form (3), the other instructions and two verdict forms, and the closing arguments of counsel. The jury was well aware a death sentence would not be imposed if they could not unanimously agree either that the evidence proved an aggravated circumstance or that an aggravated circumstance outweighed any mitigating circumstance. Perhaps more importantly, the jury then proceeded to find unanimously beyond a reasonable doubt that all four aggravating circumstances had been proved and that they outweighed any mitigating circumstances, utilizing Verdict Form (1). Any error in Instruction 10 and Verdict Form (3) was harmless under any test.

There is no reasonable likelihood that the jury applied Instruction 10 in a way that prevented consideration of constitutionally relevant evidence. In other words, when the instructions are read a whole and together with the verdict forms, it is clear that the jury could not have been misled.

P14. J. Carr's death sentence should not 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. (R. Carr's Issue 40)

In the original opinion, this court did not reach the merits of this issue because of the necessity of a remand. *State v. Carr*, 300 Kan. at 370. Because this Court has indicated that briefing is limited to newer cases only, the State's

argument relies in part on the arguments made in the original briefing of this issue in the R. Carr case, while also pointing out that this Court recently reaffirmed in the *Cheever* case, 304 Kan. at 898, that this issue is subject to harmless error analysis:

> Because the record did not contain evidence that could rationally lead a jury to find that Cheever was under the age of 18 at the time of the offense, any error in failing to have the jury find his age was harmless. See *Reyna*, 290 Kan. at 681, 234 P.3d 761 ("[T]his court will apply the harmless error analysis to the omission of an element from the instructions to the jury when a review of the evidence leads to the conclusion beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error.").

When applied to J. Carr, it is clear that the failure to submit the age issue to the jury to make a finding beyond a reasonable doubt was harmless error. Not only did J. Carr's attorney state in the penalty-phase opening statements that J. Carr was 22 years old at the time of trial in the fall of 2002—which was nearly two years after the murders were committed—but also the uncontested evidence established that he was at least 18 years old when he committed the murders in December of 2000.

J. Carr's mother, Janice Harding, testified that R. Carr was born in November 1977, that he and J. Carr were born three years apart, and that J. Carr was born in 1980. (R. 67: 39, 54, 57, 116) J. Carr's sister, Temica, testified that she was turning 28 years old the day after her testimony on November 5, 2002 and that she was six years older than J. Carr—evidence that corroborated counsel's

opening statement and was consistent with her mother's testimony that Temica was born on November 6, 1974. (R. 67: 37; R. 68: 90.) Dr. Cunningham testified that J. Carr was 15 years old in April 1995 when admitted to a hospital due to a concussion, that he was 9 years old in 1989 when he was accused of raping a classmate, that he was 19 years old when drinking in Dodge City with his brother, who had been released from prison, and that he was 18 years old when using hallucinogenic mushrooms. (R. 73: 96, 104, 109-10.) While there may be other references to J. Carr's age, none contradict the notion that he was at least 18 years old when he committed the murders. Any error regarding the age issue is harmless.

P17. The penalty phase was not infected by prosecutorial misconduct. (R. Carr's Issue 34; J. Carr's Issues 26, 34, and 35)

The State stands by its arguments in its original brief, but does point out that this court has since reworked the test for prosecutorial misconduct, including jettisoning the term "prosecutorial misconduct" and substituting it with "prosecutorial error" and then applying a new test to determine whether prejudice occurred:

> When a prosecutorial misconduct claim arises from a prosecutor's conduct during the penalty phase of a death penalty case, we have recognized a prosecutor's "heightened duty" to refrain from misconduct "[b]ecause of the life and death nature of the proceedings." *State v. Kleypas*, 272 Kan. 894, 1084, 40 P.3d 139 (2001) (*Kleypas I*), *cert. denied* 537 U.S. 834 (2002), *abrogated in part by Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 165 L.Ed. 2d 429 (2006). The *Kleypas I* court followed this statement with a

discussion of the appropriate standard of review identifying "subtle differences" in the standard from that applied in the guilt-phase trial and in non-death cases. 272 Kan. at 1084-88. The court discussed the challenges and difficulty of conducting a harmless error analysis in the penalty phase, which we have previously set forth above. In addition, the *Kleypas I* court determined it was necessary to analyze the cumulative effect of multiple instances of prosecutorial misconduct. "For a cumulative error analysis, the focus is on the net prejudicial effect the total prosecutorial misconduct had on the jury's ultimate verdict." 272 Kan. at 1088. "The question is whether the total effect of the cumulative misconduct found to exist, viewed in light of the record as a whole, had little, if any, likelihood [or any reasonable possibility] of changing the jury's ultimate conclusion regarding the weight of the aggravating and mitigating circumstances." 272 Kan. at 1088; see *State v. Cheever*, 304 Kan. 866, 901-02, 375 P.3d 979 (2016) (*Cheever II*).

In [*State v.*]*Sherman*, we jettisoned the term "prosecutorial misconduct" in favor of the term "prosecutorial error." 305 Kan. —, Syl. ¶ 5[, 378 P.3d 1060 (2016).] In analyzing claims of prosecutorial error, appellate courts will employ a two-step process, first determining whether error occurred and, if it did, then determining whether prejudice resulted. 305 Kan. —, Syl. ¶ 6. Under the first step, we will continue to analyze whether the prosecutor's statements "fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial." 305 Kan. —, Syl. ¶ 7. At the second stage of the analysis, rather than step through the three *Tosh* factors, the prejudice analysis will focus on whether the error prejudiced the defendant's due process rights to a fair trial; if a due process violation occurs, prejudice will be assessed by applying the *Chapman* constitutional error standard. 305 Kan. —, Syl. ¶ 8. Under that standard, "[p]rosecutorial error is harmless if the State 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." 305 Kan. —, Syl. ¶ 8.

State v. Kleypas, No. 101,724, 2016 WL 6137507, at *55 (Kan. Oct. 21, 2016).

The new test does not change the State's position that error has not occurred and that J. Carr's right to a fair trial was not violated. The references to his unadjudicated criminal conduct, to his jailhouse bragging about shooting the Birchwood victims, and to the crude reason for raping one of the female victims were not error. The references were designed to show the jury that the witnesses who were attempting to paint J. Carr in a positive light may not be fully aware of negative things about him, regardless of the truth of those negative things or the source of such information. The references were not offered to prove the truth of the matters asserted, and there was a good faith basis for them. There was no error.

If this court finds there was error, then it must also find that such error was harmless. The negative information in the references was not novel and did not work to inform the jury that J. Carr was a person of questionable character; the jury was already fully aware from the horrific details of the case. The references were designed to undermine any potentially mitigating evidence but did not contribute to the death sentence. It was already evident from his behavior during the commission of the crimes that J. Carr was not the person portrayed in a positive light by his witnesses. If any error occurred, it was harmless by virtue of not contributing to the death sentence.

P20. State law did not require the severance of J. Carr's penalty-phase proceeding from that of his co-defendant.

Although a majority of this court has already found in the original opinion that J. Carr was prejudiced by antagonistic evidence in the joint penalty-phase

trial, that finding should be re-evaluated and discarded in light of the proceedings in the United States Supreme Court and the arguments set forth in the State's briefs, including the arguments below. The evidence was not antagonistic to any degree that required severance; a mere disagreement on moral levels of culpability does not create an antagonistic defense. See generally *State v. Aikins,* 261 Kan. 346, 361, 932 P.2d 408 (1997), *disapproved on other grounds by State v. Warrior,* 294 Kan. 484, 277 P.3d 1111 (2012) ("[A] mere inconsistency in trial strategy does not constitute an antagonistic defense."); *State v. Reid,* 286 Kan. 494, 520, 186 P.3d 713 (2008) (presentation of inconsistent evidence by each defendant does not make the defenses antagonistic for purposes of severance). Neither R. Carr nor J. Carr was advocating for the death of the other when presenting mitigating evidence; each was advocating for a sentence of life for himself. From that standpoint, the jury could make an individualized sentencing decision.

In re-evaluating this issue, this court should be persuaded by the United States Supreme Court's determination that there was no federal constitutional error—under either the 8th Amendment to the United States Constitution or the Due Process Clause of the 14th Amendment—for conducting a joint penalty-phase trial and that both R. Carr and J. Carr received an individualized sentencing determination that was not tainted by anything improper that may have occurred in the case. As noted by that Court, only the most extravagant speculation, not reasoned judgment, would lead a court to conclude otherwise:

In light of all the evidence presented at the guilt and penalty phases relevant to the jury's sentencing determination, the contention that the admission of mitigating evidence by one brother could have "so infected" the jury's consideration of the other's sentence as to amount to a denial of due process is beyond the pale. To begin with, the court instructed the jury that it "must give separate consideration to each defendant," that each was "entitled to have his sentence decided on the evidence and law which is applicable to him," and that any evidence in the penalty phase "limited to only one defendant should not be considered by you as to the other defendant." App. to Pet. for Cert. in No. 14–450, at 501 (Instr. 3). The court gave defendant-specific instructions for aggravating and mitigating circumstances. *Id.*, at 502–508 (Instrs. 5, 6, 7, and 8). And the court instructed the jury to consider the "individual" or "particular defendant" by using four separate verdict forms for each defendant, one for each murdered occupant of the Birchwood house. *Id.*, at 509 (Instr. 10); App. in No. 14–449 etc., at 461–492. We presume the jury followed these instructions and considered each defendant separately when deciding to impose a sentence of death for each of the brutal murders. [Citation omitted.]

The contrary conclusion of the Kansas Supreme Court—that the presumption that jurors followed these instructions was "defeated by logic," 300 Kan., at 280, 331 P.3d, at 719—is untenable. The Carrs implausibly liken the prejudice resulting from the joint sentencing proceeding to the prejudice infecting the joint trial in *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), where the prosecution admitted hearsay evidence of a codefendant's confession implicating the defendant. That particular violation of the defendant's confrontation rights, incriminating evidence of the most persuasive sort, ineradicable, as a practical matter, from the jury's mind, justified what we have described as a narrow departure from the presumption that jurors follow their instructions, *Richardson v. Marsh,* 481 U.S. 200, 207, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). We have declined to extend that exception, . . . [citation omitted] and have continued to apply the presumption to instructions regarding mitigating evidence in capital-sentencing proceedings. . . . [Citation omitted.] There is no reason to think the jury could not follow its instruction to consider the defendants separately in this case.

Joint proceedings are not only permissible but are often preferable when the joined defendants' criminal conduct arises out of a single chain of events. Joint trial may enable a jury "to arrive more reliably

> at its conclusions regarding the guilt or innocence of a particular defendant and to assign fairly the respective responsibilities of each defendant in the sentencing." *Buchanan v. Kentucky,* 483 U.S. 402, 418, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987). That the codefendants might have "antagonistic" theories of mitigation . . . does not suffice to overcome Kansas's "interest in promoting the reliability and consistency of its judicial process. . . ." [Citations omitted.] Limiting instructions, like those used in the Carrs' sentencing proceeding, "often will suffice to cure any risk of prejudice." [Citation omitted.] To forbid joinder in capital-sentencing proceedings would, perversely, *increase* the odds of "wanto[n] and freakis[h]" imposition of death sentences. [Citation omitted.] Better that two defendants who have together committed the same crimes be placed side-by-side to have their fates determined by a single jury.
>
> It is improper to vacate a death sentence based on pure "speculation" of fundamental unfairness, "rather than reasoned judgment," [citation omitted]. Only the most extravagant speculation would lead to the conclusion that the supposedly prejudicial evidence rendered the Carr brothers' joint sentencing proceeding fundamentally unfair. It is beyond reason to think that the jury's death verdicts were caused by the identification of Reginald as the "corrupter" or of Jonathan as the "corrupted," the jury's viewing of Reginald's handcuffs, or the sister's retracted statement that Reginald fired the final shots. None of that mattered. What these defendants did—acts of almost inconceivable cruelty and depravity—was described in excruciating detail by Holly, who relived with the jury, for two days, the Wichita Massacre. The joint sentencing proceedings did not render the sentencing proceedings fundamentally unfair.

Kansas v. Carr, 136 S. Ct. at 644-46.

The State agrees with this assessment by the United States Supreme Court and submits that the same logic should apply to the inquiry concerning whether state law—either the Kansas Constitution or Kansas statutes—required severance of J. Carr's penalty-phase proceeding from that of R. Carr's. See also *People v. Sanchez*, 63 Cal. 4th 411, 465-66, 375 P.3d 812 (2016), *reh'g* denied (Aug. 17,

2016) (citing *Kansas v. Carr* with approval in a case involving defendant with different degrees of culpability and mitigation evidence; court did not abuse its discretion by denying motion for separate penalty juries or sequential penalty trials).

The Kansas counterpart to the Eighth Amendment is Section 9 of the Kansas Constitution Bill of Rights, which prohibits infliction of cruel or unusual punishment by the State:

> All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.

The United States Supreme Court's decision regarding how the Eighth Amendment has no application to the severance issue is consistent with this court's prior rulings regarding Section 9. This court has held that the protections of Section 9 apply to arguments concerning the proportionality of the sentence imposed and do not apply to arguments concerning the qualifying process used to determine "against whom the death penalty should be imposed." *State v. Scott*, 286 Kan. at 94. This court should apply the *Scott* rationale and find that Section 9 does not apply to the severance issue because the issue concerns the qualifying process and not proportionality.

Moreover, this court has generally held that Section 9 of the Kansas Constitution Bill of Rights provides no greater protection against death, nor a stronger presumption in favor of life than the Eighth Amendment. See 286 Kan. at

88 (recognizing precedent of construing Section 9 and the Eighth Amendment the same, while not foreclosing future deviation if circumstances warrant it). There is no reason to deviate from precedent now.

Kansas also has a counterpart to the federal Due Process Clause. Section 18 of the Kansas Constitution Bill of Rights states: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." The State has found no case where this court has found that due process protection under Section 18 provides greater protection than the Due Process Clause. And there is no valid reason for this court to construe Section 18 more broadly than its federal counterpart now. This court should follow the lead of the United States Supreme Court's federal due process decision and find that R. Carr's right to due process under Section 18 was not violated.

With no avenue for relief under the Kansas Constitution, the focus must now turn to Kansas statutes. K.S.A. 22–3204 states, in relevant part, that "the court may order a separate trial for any one defendant when requested by such defendant or by the prosecuting attorney." In construing this statute, this court has stated that severance should occur if a defendant establishes that there would be actual prejudice if a joint trial occurred. See *State v. Warren*, 302 Kan. 601, 617-18, 356 P.3d 396 (2015). On appellate review, "[a] trial court's denial of a motion to sever under K.S.A. 22–3204 will be reversed only when a clear abuse of discretion is shown" and that "[t]he party claiming that a severance denial was error has the burden of establishing an abuse of discretion." (Citations omitted.)

302 Kan. at 617-18. "If the . . . district court abused its discretion in refusing to sever a trial, the next step is to determine whether the severance denial resulted in prejudice. But the burden of demonstrating harmless error, *i.e.*, a lack of prejudice, is on the party benefitting from the error. [Citation omitted.]" 302 Kan. at 618.

J. Carr cannot meet his burden of establishing a clear abuse of discretion, especially considering the United States Supreme Court's position that severance was not warranted and did not render the sentencing proceedings fundamentally unfair. *Kansas v. Carr*, 136 S. Ct. at 646. Given this view by eight United States Supreme Court Justices and a similar view taken by a former Kansas Supreme Court Justice (Moritz) in the original decision, it cannot be said that no reasonable jurist would have denied severance for the penalty-phase trial. And, alternatively, it is clear that any error for failing to sever was harmless.

This court should hold that severance was not required under Kansas law.

P21. What effect, if any, did cumulative error on the sentencing decision?

The State's original brief contains a citation to a cumulative error test that has been replaced by another test, making it necessary to set out the new test in this supplemental brief.

In *State v. Kleypas*, No. 101,724, 2016 WL 6137507, at *73–74 (Kan. Oct. 21, 2016), this Court set out the two-part test for determining the effect of cumulative error on a penalty-phase trial. Pointing out that "[t]he analysis of cumulative error in the penalty phase differs somewhat from the analysis in the

guilt phase," this court indicated that the first step was to "consider whether the errors of the guilt-phase proceedings must be considered in conjunction with penalty-phase errors" and the second step was to determine whether "the total cumulative effect of the errors, viewed in the light of the record as a whole, had little, if any, likelihood [or no reasonable possibility] of changing the jury's ultimate conclusion regarding the weight of the aggravating and mitigating circumstances." This court then noted, "The overwhelming nature of the evidence is a factor to be considered, but its impact is limited . . . [and that] the question . . . 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." (Citations omitted.)

The *Kleypas* Court then determined it must jointly consider the requirements of K.S.A. 2015 Supp. 21-6619(c), which provides:

> (c) With regard to the sentence, the court shall determine:
>
> > (1) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and
> >
> > (2) whether the evidence supports the findings that an aggravating circumstance or circumstances existed and that any mitigating circumstances were insufficient to outweigh the aggravating circumstances.

When this case is reviewed under the lens of the applicable law, this court must conclude that no alleged error in this case, whether considered singularly or cumulatively, forms the basis for reversing J. Carr's death sentence.

Guilt-Phase Errors Affecting Residual Doubt

Given that the United States Supreme Court has found that failure to sever the penalty phase was not error and there is no state law basis for finding error, the failure to sever the guilt phase cannot be deemed a basis for reversible error in the penalty phase. Moreover, under the facts of this case, it is inconceivable that the same jury that found J. Carr guilty beyond a reasonable doubt would then question guilt during the penalty phase. There is no doubt about J. Carr's guilt of the offenses; indeed, this Court and the United States Supreme Court have found evidence of guilt to be overwhelming and compelling.

When rejecting R. Carr's cumulative-error argument in the guilt phase, this Court stated:

> This leaves us with five errors that carry weight. Four of these errors are interrelated and affected the defendant's ability to argue that he did not participate in the crimes—the failure to sever the trials, the erroneous application of the third-party evidence rule, the erroneous exclusion of expert testimony on eyewitness identification, and an erroneous eyewitness identification instruction. The remaining error, the reverse *Batson* error, more broadly affected the trial. But the combined weight of these individually harmless errors pales in comparison to the strength of the evidence against the defendants.
>
> Indeed, 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.

State v. Carr, 300 Kan. at 253-54. This court adopted that reasoning in J. Carr's case. *State v. Carr*, 300 Kan. at 359-60.

When rejecting J. Carr's position on severance of the penalty phase of the trial, the United States Supreme Court stated,

> It is improper to vacate a death sentence based on pure "speculation" of fundamental unfairness, "rather than reasoned judgment" . . . [Citation omitted.] Only the most extravagant speculation would lead to the conclusion that the supposedly prejudicial evidence rendered the Carr brothers' joint sentencing proceeding fundamentally unfair. It is beyond reason to think that the jury's death verdicts were caused by the identification of Reginald as the "corrupter" or of Jonathan as the "corrupted," the jury's viewing of Reginald's handcuffs, or the sister's retracted statement that Reginald fired the final shots. None of that mattered. What these defendants did—acts of almost inconceivable cruelty and depravity—was described in excruciating detail by Holly, who relived with the jury, for two days, the Wichita Massacre. The joint sentencing proceedings did not render the sentencing proceedings fundamentally unfair.

Kansas v. Carr, 136 S. Ct. at 646.

This court should continue to conclude that guilt was not based upon the failure to sever or trial court rulings on third-party evidence and hearsay in the joint guilt-phase trial; guilt was based upon eyewitness identification, physical evidence, and other corroborating evidence. The only question that may have been subject to debate during the trial is which of the two brothers actually shot and killed the victims—but this fact was largely academic due to the concerted actions of the brothers before, during, and after the murders. But since none of the alleged guilt-phase errors presented by J. Carr has any bearing on that aspect of the murders, further discussion about the trigger man is not warranted.

Consequently, this Court should reject any argument to the contrary and find that any alleged guilt-phase errors had no effect on the jury's ability to consider residual doubt and the imposition of the death sentence. The evidence was not only "unassailable" against J. Carr; it was also unassailable against R. Carr. Reasoned judgment establishes that the jury did not impose the death sentence because of the alleged guilt-phase errors; the jury imposed the death sentence because of the remarkably strong evidence that overwhelmingly and compellingly proved that J. Carr was one of two participants in the brutal crimes committed in this case.

Penalty-Phase Errors: United States Supreme Court on testimonial hearsay

The State maintains that this Court incorrectly determined that the Confrontation Clause applies to the penalty phase of a capital proceeding and that this issue is controlled by the United States Supreme Court's determination that any Confrontation Clause issue concerning police reports was harmless:

> When we granted the State's petition for a writ of certiorari for the Carrs' cases, we declined to review whether the Confrontation Clause, U.S. Const., Amdt. 6, requires that defendants be allowed to cross-examine witnesses whose statements are recorded in police reports referred to by the State in penalty-phase proceedings. The Kansas Supreme Court did not make the admission of those statements a basis for its vacating of the death sentences, but merely "caution[ed]" that in the resentencing proceedings these out-of-court testimonial statements should be omitted, 300 Kan., at 288, 331 P.3d, at 724. We are confident that cross-examination regarding these police reports would not have had the slightest effect upon the sentences. See *Delaware v. Van Arsdall,* 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

Kansas v. Carr, 136 S. Ct. at 646.

The Supreme Court's statement was made with an understanding of the mountain of evidence against R. Carr and J. Carr. If this Court disagrees, it should still give great deference to the statement because it is supported by the overwhelming evidence already recognized by this Court and the United States Supreme Court. If the arguments presented on the issue of severance in the penalty phase did not turn the tables in J. Carr's favor because of the overwhelming strength of the evidence, neither should speculation about how the absence of alleged testimonial hearsay (and addition of surrebuttal testimony) would have turned the tables in favor of J. Carr.

Penalty-Phase Errors: Consideration of R. Carr's death verdict

J. Carr may request that this court not consider R. Carr's death verdict when determining whether it was harmless error to have testimonial hearsay presented in the penalty phase. The State asserts that the jury's finding against R. Carr is relevant, but not controlling, information to consider and that it is a good indication of the mindset of the jury.

Penalty-Phase Errors: Effect of testimonial hearsay on mitigating circumstance

J. Carr may assert that had the trial court not permitted the State to utilize testimonial hearsay in violation of the Confrontation Clause that the jury could have determined that a life sentence was sufficient to protect and defend the public from him. As already noted above, there was no confrontation violation and, even if there was, any error in this regard is harmless and not a ground to vacate the death sentence.

Penalty-Phase Errors: Lack of surrebuttal hampered mitigating circumstance

J. Carr may assert that the trial court's refusal to allow him to recall Dr. David Preston as a surrebuttal witness deprived him of the ability to present evidence to support a mitigating circumstance—substantial impairment to his capacity to appreciate the criminality of his conduct or conform his conduct to the law. As already noted in the State's arguments, any error in this regard is harmless and not a ground to vacate the death sentence. If this court disagrees, it

should consider the following arguments.

J. Carr may argue that his death-penalty defense was irreparably harmed because he was not able to call back Dr. Preston to defend against a character attack. The State disagrees. The trial court's ruling did not prevent J. Carr from utilizing cross-examination to undermine the credibility of the State's expert, Dr. Pay, or arguing to the jury that Dr. Pay was the one lacking credibility. And it did not prevent J. Carr from arguing the positives of Dr. Preston's testimony in support of the mitigating factor. Surrebuttal in the form of denials of wrongdoing would have presented a nominal benefit to this endeavor, especially in light of all of the evidence presented including J. Carr's own witnesses who testified about his capacity to be a good person.

Penalty-Phase Error: Impossible to find harmless error

J. Carr may assert that it is impossible to apply harmless error analysis when determining whether a death sentence is unattributable to trial errors. He would be wrong, as the United States Supreme Court has already made such a decision in this case. If the jury wanted to grasp at the meager straws of mitigation—meager because of the overwhelming evidence of guilt and other evidence admitted in the case, not because of the trial court's evidentiary rulings—it could have done so. This court should utilize reasoned judgment and find that the jury's decision to impose a death sentence was not attributable to the alleged cumulative errors.

This court should conclude that cumulative error does not require the reversal of J. Carr's death sentence.

CONCLUSION

Based on the foregoing supplemental arguments and the arguments from the previous briefs, the State submits that J. Carr is not entitled to reversal of his death sentence. The State does believe, however, that additional oral arguments on the specified issues will assist this court in determining that the death sentence was not the product of any violation of federal or state law.

The State respectfully requests that this court affirm J. Carr's death sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of Appellee's second supplemental brief was emailed to Sarah Ellen Johnson, Appellate Capital Defender Office, sjohnson@sbids.org, on this 7th day of November 2016.

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