

No. _____

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

JONATHAN D. CARR,

Respondent.

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

**PETITION FOR WRIT OF CERTIORARI
AND VOLUME 1 OF APPENDIX**

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CAPITAL CASE**QUESTIONS PRESENTED**

1. Whether the Eighth Amendment requires that a capital-sentencing jury be *affirmatively instructed* that mitigating circumstances “need not be proven beyond a reasonable doubt,” as the Kansas Supreme Court held here, or instead whether the Eighth Amendment is satisfied by instructions that, in context, make clear that each juror must individually assess and weigh any mitigating circumstances?
2. Whether the Confrontation Clause, as interpreted in *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 547 U.S. 813 (2006), applies to the “selection” phase of capital *sentencing* proceedings, as the Kansas Supreme Court held here, *i.e.*, after a defendant has been convicted of capital murder and proof of eligibility for the death penalty has been presented in the guilt phase subject to full confrontation, or does *not* apply to such purely sentencing evidence, as at least three Circuits have held?
3. Whether the trial court’s decision not to sever the sentencing phase of the co-defendant brothers’ trial here—a decision that comports with the traditional approach preferring joinder in circumstances like this—violated an Eighth Amendment right to an “individualized sentencing” determination and was not harmless in any event?

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of Kansas respectfully petitions for a Writ of Certiorari to review the judgment of the Kansas Supreme Court.

OPINION BELOW

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

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 Sixth Amendment to the United States Constitution provides in relevant part that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .” U.S. Const. amend VI.

The Eighth Amendment to the United States Constitution provides in relevant part that “[e]xcessive 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.

STATEMENT OF THE CASE

A. The Facts

Jonathan Carr, Jr., and his brother, Reginald Carr, were jointly charged, tried, convicted, and sentenced for crimes committed in a series of three incidents in December 2000 in Wichita, Kansas.

In the first incident, on December 7, 2000, the Carr brothers carjacked Andrew Schreiber and drove to various ATMs, forcing Schreiber at gunpoint to withdraw money from his bank account. They ultimately abandoned Schreiber in a rural area after taking his watch, striking him in the head with a gun, and shooting out a tire on his vehicle. App. 95-98.

Four days later, the Carr brothers followed Linda Ann Walenta to her home. As she pulled into her driveway, one of the brothers approached her vehicle. When he pointed a gun through the driver's side window, Walenta attempted to reverse her vehicle and was shot. Although she survived for a few days in the hospital, Walenta died from the shooting. App. 99-101.

The third and utterly depraved incident began on December 14, 2000, at a home shared by three young men, Aaron S., Brad H., and Jason B. Two women, Holly G. and Heather M., were also at the home that night. App. 101.

Shortly after the occupants of the house went to bed, the Carr brothers, armed with guns, forced their way inside. They rounded up the occupants, gathered them into one bedroom, and demanded money. When the victims said they had no cash, the Carrs demanded ATM cards. App. 101-102. The Carrs also ordered the

victims to remove their clothes and forced all five of them into a closet, telling them to sit down and be quiet. App. 102.

The brothers then removed the two women from the closet and forced them to perform oral sex on each other and penetrate each other with their fingers, as the brothers watched and gave instructions. Next, they brought the male victims out of the closet one at a time and ordered each to have sexual intercourse with Holly G. The Carrs threatened to shoot the men if they did not perform. When one victim said he would not do it, he was struck in the back of the head with a hard object. App. 103-04.

After these acts, the Carrs returned Holly G. to the closet and brought out Heather M. They then ordered each of the men to have sexual intercourse with her. App. 104.

After these numerous coerced sex acts, Reginald Carr took Brad H. from the house and drove him to several ATMs to withdraw money. App. 104, 127. While they were gone, Jonathan ordered Holly G. out of the closet and raped her. He then took Heather M. out, and proceeded to rape or attempt to rape her. App. 105.

Brad H. and Reginald returned after about 30 minutes, and Reginald then took Jason B. to two ATMs to withdraw money. Upon their return, Reginald took Holly G. to several ATMs to withdraw money. Finally, Reginald returned with Holly G. and took Aaron S. to withdraw money. App. 105-07, 128-29.

When Reginald and Aaron S. returned, Reginald again raped Holly G. and forced her to perform oral

sex. Meanwhile, Jonathan was raping Heather. Jonathan then raped Holly G. again. App. 107-08.

When the brothers finished raping the women, they forced the men into the trunk of Aaron S.'s car, put Heather M. in the back seat of the car, and put Holly G. in the passenger seat of Jason B.'s truck. App. 109. Jonathan drove Aaron S.'s car, followed by Reginald driving Jason B.'s truck. App. 109.

The Carrs drove to a soccer field and ordered all of the victims out, forcing them to kneel in a line. The Carrs then shot each of the five victims in the back of the head, and drove away. App. 109-10, 123-24.

Miraculously, Holly G. survived. The bullet fired at the back of her head fractured her skull, but did not enter her brain, apparently because it was deflected by a plastic hairclip she was wearing. App. 110, 112. The impact stunned her, but she could hear the Carrs talking and heard them drive away. App. 110.

After the Carrs left, Holly G. got up and spotted a house in the distance. App. 110. Naked and barefoot, she ran more than a mile through snow and over fences to reach the house. App. 110.

Holly G. pounded on the door and awoke the homeowners, who took her inside and called 911. App. 110-11. Holly G. was treated for her injuries and eventually recovered. The other four victims, however, died. App. 123-24. Holly G. provided police with details of these heinous crimes and testified against the Carrs at trial.

The police quickly apprehended Reginald Carr. When he was arrested, Reginald had a gas card bearing

Jason B.'s name, a watch that belonged to Heather M., and \$996. Inside the apartment where they arrested Reginald, police found numerous additional items belonging to the four murder victims and Holly G. App. 117-18.

Meanwhile, Jonathan Carr had gone to a friend's apartment. When the friend and her mother saw news footage of Reginald Carr's arrest and learned that police were looking for another individual, they grew suspicious of Jonathan and called police. App. 118-20. Police arrived and apprehended Jonathan. Like Reginald, Jonathan had property of the victims, including the engagement ring Jason B. had purchased for, but not yet given to, Holly G. App. 121.

B. The Trial and Penalty Proceedings

The Carrs were jointly tried and convicted of numerous criminal counts arising from their crime spree, including the felony murder of Walenta, and four capital murders (of Aaron S., Brad H., Jason B., and Heather M.). App. 91-93. In the capital sentencing proceeding that followed their convictions, both Reginald and Jonathan were sentenced to death for the four capital murders. They each also received a life sentence for the Walenta murder and additional terms of imprisonment for their numerous non-capital convictions. App. 93.

C. The Kansas Supreme Court's Decision

The Kansas Supreme Court affirmed 25 of Jonathan Carr's 43 convictions, including one count of capital murder for the quadruple murder in the soccer field. App. 26. But the court reversed his death sentence, finding three constitutional errors in the penalty

proceedings. The court held (1) Reginald's Eighth Amendment right to an individualized sentencing determination was violated by the trial court's decision not to sever the brothers' penalty phase proceedings, App. 45, 470-79; (2) his Sixth Amendment right to confrontation was violated by admission of hearsay in the sentencing phase, App. 46, 483-90;¹ and (3) the trial court's failure to affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt violated the Eighth Amendment. App. 47, 511-12.² One justice dissented from the majority's finding of constitutional error in the jury instructions, stating that the majority's opinion "defies the United States Supreme Court's established Eighth Amendment jurisprudence." App. 63-65, 547-49. Another justice dissented from all of the majority's constitutional rulings and would have affirmed Jonathan Carr's death sentence. App. 65-66, 549-63.

¹ In ruling on these first two issues, the Kansas Supreme Court merely referenced its opinion in the companion case, *State v. Reginald Carr*, 331 P.3d 544 (2014), reproduced here as Appendix B. Reginald Carr's case is the subject of a Petition for Writ of Certiorari that Kansas has filed simultaneously with this petition.

² In ruling on this issue, the Kansas Supreme Court referenced its opinion in *State v. Gleason*, 329 P.3d 1102 (2014), released only one week earlier, to explain its reasoning. That case is the subject of a Petition for Writ of Certiorari that Kansas has filed simultaneously with this petition.

REASONS FOR GRANTING THE WRIT

This case is of perhaps unique significance to Kansas, because (along with the companion case, *State v. Reginald Carr*, 331 P.3d 544 (2014)) it involves one of the most heinous and notorious crime sprees in the history of Kansas. Although Kansas has endured other notorious murders, such as the murder of the Clutter family, and the murders committed by the Wichita serial killer BTK, the monstrosity of the Carrs' crimes is in many respects unparalleled. The sheer depravity of the brothers' crimes has elevated this case to a level of singular importance in the eyes of many Kansans.

But putting its infamous and notorious nature aside, this case presents the Court with three important federal constitutional questions – all matters of first impression for the Court – that merit the Court's attention because the resolution of these questions carries significant consequences for state and federal capital punishment systems.

Certiorari should be granted on the first question presented because the Kansas Supreme Court's holding (1) conflicts with the decisions of other state courts of last resort and calls into question the law of other states; (2) misinterprets this Court's precedents to reach a conclusion the Court has never endorsed or suggested; (3) contributes to a "crazy quilt" of federal constitutional death penalty jurisprudence; and (4) invalidates the sentences imposed on two-thirds of those currently under sentence of death in Kansas.

Certiorari should be granted on the second question presented because the Kansas Supreme Court's decision creates a split of authority between a state

court of last resort and at least three federal Circuits on an important and recurring issue of federal constitutional law.

Certiorari should be granted on the third question because it presents an important issue for the conduct of capital penalty proceedings that this Court has not previously addressed, and the Kansas Supreme Court's holding (1) effectively abolishes joint death penalty proceedings, and (2) misconstrues this Court's harmless error standard.

First Question Presented

- I. The Kansas Supreme Court's holding that the failure to affirmatively instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt violated the Eighth Amendment conflicts with the decisions of other state courts of last resort and the current law of several states, and possibly the law and procedures governing federal and U.S. military capital cases.**

Relying on its decision in *State v. Gleason*, 329 P.3d 1102 (2014), the Kansas Supreme Court ruled here that the trial court's failure to affirmatively instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt was constitutional error. App. 47, 511-12.³ In *Gleason*, the court held that

³ As noted in footnote 2, Kansas has petitioned this Court for a Writ of Certiorari in the *Gleason* case, raising this same issue. To

because “the instructions repeatedly emphasized the State’s burden to prove the existence of aggravating circumstances beyond a reasonable doubt and to prove beyond a reasonable doubt that the death penalty should be imposed,” but “never informed or explained to the jury that no particular burden of proof applied to mitigating circumstances,” the Eighth Amendment was violated. 329 P.3d at 1148.

The Court explained its reasoning as follows: “[the] jury was left to speculate as to the correct burden of proof for mitigating circumstances, and reasonable jurors might have believed they could not consider mitigating circumstances not proven beyond a reasonable doubt. Thus, jurors may have been prevented from giving meaningful effect or a reasoned moral response to [the defendant’s] mitigating evidence, implicating [the defendant’s] right to individualized sentencing under the Eighth Amendment.” *Id.*

In contrast to the Kansas Supreme Court’s decision here, several states have rejected the proposition that the Eighth Amendment requires affirmative instructions that mitigating circumstances need not be proven beyond a reasonable doubt. These jurisdictions include at least California, Delaware, Indiana, Louisiana, and Texas. On the other hand, some states affirmatively instruct capital juries on a burden of proof with regard to mitigating circumstances, although such instructions do not necessarily take the

the extent Kansas’ arguments in this Petition are not as extensive as in *Gleason*, Kansas incorporates by reference its complete argument from the *Gleason* Petition.

form mandated by the Kansas Supreme Court in this case, and it is not clear that any of these jurisdictions give such instructions as anything other than a matter of state or federal statute or practice. There also appear to be a number of jurisdictions that simply do not address the burden of proof (or lack thereof) for mitigating circumstances in any reported decision, by statute, or through their pattern jury instructions.

No decision of which Kansas is aware, other than the one for which Kansas is seeking review here and its companion cases, mandates such instructions as an Eighth Amendment requirement.

A. The Kansas Supreme Court’s decision clearly conflicts with the decisions of courts in several states.

A number of state supreme courts have addressed the question presented here and soundly rejected the Eighth Amendment argument embraced by the Kansas Supreme Court. California, for example, has held “a trial court is not required to instruct the jury that mitigating evidence need not be proved beyond a reasonable doubt.” *People v. Souza*, 277 P.3d 118 (Cal. 2012) (quoting *People v. Avila*, 208 P.3d 634, 670 (2009)); see also *People v. Welch*, 976 P.2d 754, 797 (Cal. 1999). Indeed, in *Welch*, the California Supreme Court rejected the very rationale the Kansas Supreme Court relied on in this case – that because the instructions repeatedly emphasized the State’s burden of proof beyond a reasonable doubt, the absence of any instruction on the defendant’s burden of proof regarding mitigating circumstances may have led the jury to apply the beyond a reasonable doubt standard to the mitigating circumstances and thus prevented the

jury from “giving meaningful effect or a reasoned moral response” to mitigating evidence. App. 512. The *Welch* court arrived at the exact opposite conclusion, holding “because the trial court instructed specifically that the reasonable doubt standard applied (partially erroneously) to aggravating factors, and mentioned nothing about mitigating factors, the reasonable juror would infer that no such reasonable doubt standard applied to mitigating factors.” 976 P.2d at 797.

Likewise, in *Dawson v. State*, 637 A.2d 57, 64-65 (Del. 1994), the Delaware Supreme Court held that jury instructions that included a beyond a reasonable doubt standard for aggravating circumstances but were silent with respect to the burden for mitigating circumstances were not ambiguous and did not preclude the jury from considering any mitigating circumstances.

The Indiana Supreme Court rendered a similar decision in *Matheney v. State*, 688 N.E.2d 883, 902 (Ind. 1997), rejecting the proposition that a jury might mistakenly assume that a beyond a reasonable doubt standard applies to mitigating circumstances in that context “[w]ithout something specific in the given instructions which would clearly lead a jury to such a misunderstanding.” 688 N.E.2d at 902.

Louisiana also has rejected the Kansas Supreme Court’s position. Like Kansas, Louisiana’s capital sentencing procedure “does not establish any presumptions or burdens of proof with respect to mitigating circumstances.” *State v. Jones*, 474 So.2d 919, 932 (La. 1985). In *Jones*, the defendant argued that because “the judge emphasized the reasonable doubt standard ... in the sentencing phase with respect

to aggravating circumstances, but was silent as to the standard of proof for mitigating circumstances,” the jury was misled into believing the beyond a reasonable doubt standard applied to mitigating circumstances. 474 So.2d at 932. The Louisiana Supreme Court disagreed, finding no error in the instructions. 474 So.2d at 932.

Finally, in *Green v. State*, 934 S.W.2d 92 (Tex.Crim.App. 1996), the Texas Court of Criminal Appeals faced a similar question. The defendant in *Green* argued that the articulation of the beyond a reasonable doubt standard with respect to the issues of his intent to kill and continued dangerousness, coupled with the absence of any burden of proof instruction regarding mitigation, confused the jury and denied him a fair trial. 934 S.W.2d at 108. The Texas Court of Criminal Appeals disagreed and found no error. 934 S.W.2d at 107-08.

1. Some jurisdictions require a burden of proof instruction regarding mitigating circumstances, but not a uniform instruction and not as a requirement of the Eighth Amendment.

Some states do give jury instructions regarding a burden of proof for mitigating circumstances, although these jurisdictions vary in at least two ways. Some give an instruction like the one the Kansas Supreme Court held is constitutionally required, *i.e.*, an affirmative directive that mitigating circumstances need not be proven beyond a reasonable doubt. Others, however, give an instruction that mitigating circumstances must be proven by a preponderance of the evidence, but no

instruction about not having to prove them beyond a reasonable doubt. It appears that the burden of proof instructions in these jurisdictions are given as a matter of state law or practice, or in the case of the federal government, pursuant to statutory command, not as a perceived requirement of the Eighth Amendment.

a. Juries instructed that proof beyond a reasonable doubt is not required.

Florida's standard jury instructions include the language, "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. A mitigating circumstance need only be proved by the greater weight of the evidence" Fla. Std. Jury Instr. (Crim.) § 921.141(6). Case law reiterates this, but without explaining a basis for the instruction. *See Campbell v. State*, 571 So.2d 415, 419-20 (Fla. 1990). Likewise, Mississippi and North Carolina provide similar instructions. *See Knox v. State*, 901 So.2d 1257, 1270 (Miss. 2005); *State v. Holden*, 488 S.E.2d 514, 532 (N.C. 1997). The primary purpose of these instructions appears to be simply to clarify the "preponderance of the evidence" standard that these states place on defendants to establish mitigating circumstances – a burden, notably, that is not present under Kansas law. *Gleason*, 329 P.3d at 1147; *Kansas v. Marsh*, 548 U.S. 163, 173 (2006)

Arkansas, Oklahoma, South Carolina, and South Dakota, like Kansas, place no particular burden of proof on mitigating circumstances. *Thessing v. State*, 230 S.W.3d 526, 542-43 (Ark. 2006); *Postelle v. State*, 267 P.3d 114, 144 n.29 (Okla.Crim.App. 2011); *State v. Hicks*, 499 S.E.2d 209, 217-18 (S.C. 1998); *State v.*

Rhines, 548 N.W.2d 415, 437 (S.D. 1996). Nevertheless, these states affirmatively instruct capital sentencing juries that mitigating circumstances need not be proven beyond a reasonable doubt. *Thessing*, 230 S.W.3d at 542-43; *Postelle*, 267 P.3d at 144 n.29; *Hicks*, 499 S.E.2d at 217-18. But, again, none of them appears to do so because there is any case law in their jurisdiction holding that the Eighth Amendment requires such an instruction.

b. Juries instructed only on proof by a preponderance standard.

Some states impose a preponderance of the evidence standard on mitigating evidence and instruct juries to that extent and no more. *See e.g.* Ariz. Revised Jury Instructions-Crim. Capital Case 2.6 (“The defendant bears the burden of proving the existence of any mitigating circumstance that the defendant offers by a preponderance of the evidence.”); *State v. Addison*, 87 A.3d 1, 173-75 (N.H. 2013); *Eaton v. State*, 192 P.3d 36, 115 (Wyo. 2008); *Commonwealth v. Williams*, 732 A.2d 1167, 1187 (Pa. 1999). This is also the rule in non-military, federal death penalty cases. *See* 18 U.S.C. § 3593(c) (“The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the evidence of such a factor is established by a preponderance of the information.”); *see also* Tenth Circuit Pattern Crim. Jury Instr. 3.10 *Mitigating Factors*; Eighth Circuit Model Crim. Jury Instr. 12.02 *Burden of Proof*. These jurisdictions do not appear to affirmatively instruct that mitigating circumstances need not be proven beyond a reasonable doubt.

c. Juries explicitly instructed that there is no burden of proof.

At least a few states, including Ohio, Tennessee and Washington, appear to instruct the jury only that the defendant has no burden of proof with regard to mitigating circumstances. *See, e.g.*, Ohio Jury Instructions: Chapter CR 503.011 *Aggravated murder; death penalty – sentencing phase, Section 1 and Section 4* (“The defendant does not have any burden of proof.”); 7 Tenn. Prac. Pattern Jury Instr. T.P.I. – Crim. 7.04(a) (“The defendant does not have the burden of proving a mitigating circumstance.”); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 31.05 *Burden of Proof—Presumption of Leniency—Reasonable Doubt (Capital Cases)* (“The defendant does not have to prove the existence of any mitigating circumstances or the sufficiency of any mitigating circumstances.”).

2. Some jurisdictions do not appear to address the burden of proof for mitigation at all.

A number of jurisdictions do not appear to have either pattern instructions or available decisions that address whether any burden of proof instruction is to be given regarding mitigating circumstances. Some states, like Kansas, impose a burden of production but do not impose any particular burden of proof on mitigating circumstances. *See e.g. State v. Johnson*, 284 S.W.3d 561, 587 n.19 (Mo. 2009); *Jiminez v. State*, 918 P.2d 687, 696 (Nev. 1996); *Mickens v. Commonwealth*, 478 S.E.2d 302, 305 (Va. 1996); *State v. Smith*, 863 P.2d 1000, 1011 (Mont. 1993); *State v. Hoffman*, 851 P.2d 934, 943 (Idaho 1993). No decisions or statutes or pattern instructions in these states indicate that any

affirmative instruction must be given. Accordingly, these states do not affirmatively instruct that mitigating circumstances need not be proven beyond a reasonable doubt, nor do they declare that such circumstances must be proven by a preponderance of the evidence.

Likewise, the United States Military capital sentencing procedures make no provision for a burden of proof instruction regarding mitigating circumstances. Rule of Court Martial 1004 is the relevant rule, and it does not put a burden of proof on mitigating circumstances, unlike the federal statute (18 U.S.C. § 3593) for federal capital cases generally. *See, e.g., RCM 1004(b)(3) Evidence in extenuation and mitigation.*

For these jurisdictions, the Kansas Supreme Court's holding calls into question their existing capital sentences. The Kansas Supreme Court decision certainly can be used as authority to attack the constitutionality of the existing procedures of these jurisdictions on Eighth Amendment grounds.

Thus, granting review of the first question presented here would allow the Court both to resolve the explicit split of authority created by the Kansas Supreme Court's decision and bring clarity to the constitutionality of the existing procedures utilized in a number of death penalty jurisdictions that currently do not give burden of proof instructions regarding mitigating circumstances.

B. The Kansas Supreme Court misinterpreted this Court's precedent to reach a conclusion the Court has never endorsed nor suggested.

This Court has never held or suggested that the Eighth Amendment requires states to assign a burden of proof for mitigating factors. *Blue v. Thaler*, 665 F.3d 647, 668 (5th Cir. 2011) (“No Supreme Court or Circuit precedent constitutionally requires that Texas’s mitigation special issue be assigned a burden of proof.”). Certainly, the Court has never held or suggested that the Eighth Amendment requires capital sentencing juries to be instructed explicitly and affirmatively that mitigating circumstances need *not* be proven beyond a reasonable doubt. The Court’s decisions, instead, strongly suggest that no such instruction is constitutionally required.

This Court has held it is constitutionally permissible to place a burden upon a criminal defendant in death penalty proceedings to prove the existence of mitigating circumstances. *Walton v. Arizona*, 497 U.S. 639, 650-51 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002). In *Walton*, the Court said that “[s]o long as a State’s method of allocating the burdens of proof does not lessen the State’s burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances,” there is no constitutional bar to placing upon a defendant the burden of proving mitigating circumstances sufficiently substantial to call for leniency. 497 U.S. at 650.

In fact, the Court has never held that the Constitution requires states to adopt, or bars them

from adopting, any specific standard of proof with respect to mitigating circumstances. The Constitution only requires that capital sentencing juries be allowed to consider mitigating evidence, broadly defined. *Blystone v. Pennsylvania*, 494 U.S. 299, 304-05 (1990). Otherwise, “the States are free to determine the manner in which a jury may consider mitigating evidence.” *Kansas v. Marsh*, 548 U.S. 163, 171 (2006) (citing *Walton*, 497 U.S. at 652; *Boyde v. California*, 494 U.S. 370, 374 (1990)). Thus, there is neither a constitutional requirement that states adopt a particular burden of proof, nor a proscription against a particular burden (*e.g.* beyond a reasonable doubt). The Kansas Supreme Court’s reasoning cannot be squared with this case law.

Further, the Kansas Supreme Court’s analysis of the effect of the instructions here is flawed. The instructions do not impose *any* burden of proof on the defendant to prove mitigating circumstances. Nonetheless, the Kansas Supreme Court found constitutional error in the fact that the instructions do not *affirmatively state* that mitigating factors “*need not be proved beyond a reasonable doubt.*” App. 512. Essentially, the court held “a per se violation of the Eighth Amendment occurs if a jury instruction correctly states that the State bears the burden of proving aggravating circumstances beyond a reasonable doubt but fails to affirmatively state that mitigating evidence need not be proved beyond a reasonable doubt.” *Gleason*, 329 P.3d at 1155 (Biles, J., dissenting). That holding is not and cannot be supported by this Court’s decisions. *Id.* at 1155-56.

The state court's reasoning is even more questionable in light of *Kansas v. Marsh*. In finding that Kansas' death penalty law satisfied constitutional requirements, this Court in *Marsh* considered jury instructions very close to those at issue here. Compare App. 573-74 (jury instructions given here) with *Marsh*, 548 U.S. at 176 (quoting jury instructions given there). Although the question presented here was not before the Court in *Marsh*, the Court observed that, under Kansas' law, a defendant "appropriately bears the burden of proffering mitigating circumstances – a burden of production," but never bears a burden of proof. 548 U.S. at 178; see also 548 U.S. at 173. Had there been an Eighth Amendment error in the jury instructions in *Marsh* – strikingly similar to the instructions here – it seems beyond implausible that the Court would have cited those very instructions as part of the justification for why Kansas' weighing procedures satisfied constitutional requirements.

C. The Kansas Supreme Court's decision undermines the uniform interpretation and application of the Eighth Amendment in capital cases, and undermines Kansas' efforts to enforce its capital murder law.

Given that the Kansas Supreme Court's decision here creates a split of authority among the States, and runs counter to this Court's Eighth Amendment precedent, certiorari is warranted because the decision below undermines the uniform interpretation and application of the federal Constitution. See *Kansas v. Marsh*, 548 U.S. at 185 (Scalia, J., concurring) ("Turning a blind eye to federal constitutional error ...,

allowing it to permeate in varying fashion each State Supreme Court’s jurisprudence, would change the uniform ‘law of the land’ into a crazy quilt.”).

Further, certiorari is warranted in this case because the Kansas Supreme Court’s decision has a severe impact on Kansas’ efforts to enforce its capital murder law. The Kansas capital murder law is narrowly tailored and sparingly applied – currently, only nine offenders are under sentence of death in Kansas. If allowed to stand, the decision below will invalidate the death sentences juries have imposed on at least six defendants currently on death row in Kansas – two-thirds of such offenders.⁴

⁴ These six include: (1) the defendant in *Kansas v. Cheever*, 134 S.Ct. 596 (2013), a case now on remand to the Kansas Supreme Court from this Court’s unanimous reversal in December 2013, (2) the respondent in this case, as well as his co-defendant, and (3) another defendant whose death sentence the Kansas Supreme Court reversed one week before this case. The Kansas Supreme Court’s decisions in the latter two cases are the subject of Petitions for Writ of Certiorari Kansas has filed simultaneously with this Petition in cases entitled *Kansas v. Reginald Carr* and *Kansas v. Sidney Gleason*. The petition in Jonathan Carr’s case includes all three questions presented here; the petition in *Gleason* includes the first question presented.

Second Question Presented

- II. There is a clear split of authority between the Kansas Supreme Court and at least three federal Circuits on the question whether the Confrontation Clause applies to the “selection” phase of death penalty sentencing proceedings.**

The second question presented is whether the Confrontation Clause applies to hearsay evidence admitted in the “selection” phase of a capital sentencing proceeding, *i.e.*, where “eligibility” for the death penalty already has been established. The Kansas Supreme Court phrased the question as “Does K.S.A. 21-4624(c)’s allowance of testimonial hearsay . . . (b) violate the Confrontation Clause of the United States Constitution and *Crawford*, 541 U.S. 36, 56, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004)?” App. 46. The court’s answer was “yes.” *Id.*

The Kansas Supreme Court set up and analyzed that question as follows:

Thus the first question before us is whether *Crawford*’s interpretation and application of the Confrontation Clause reaches the penalty phase of a capital proceeding. The United States Supreme Court has not yet answered this question. Until we have a definitive answer from that Court, we recognize that other jurisdictions are split and we accept convincing arguments that confrontation law is applicable to a capital penalty phase trial.

App. 488 (citations omitted). Having concluded that the Confrontation Clause applies, the Kansas Supreme

Court opined that “Carr is right to question whether the State’s mention of witness statements recorded in police reports during cross-examination of several defense witnesses should have been permitted.” App. 489. Thus, the court directed that in any “penalty phase hearing on remand, we caution the parties and the district judge that Kansas now holds that the Sixth Amendment applies in the proceeding and that out-of-court testimonial hearsay may not be placed before the jury without a prior opportunity for the defendant to cross-examine the declarant.” App. 489-90.

The Kansas Supreme Court cited three state court decisions as holding that the Confrontation Clause applies to capital sentencing proceedings. *See Vankirk v. State*, 385 S.W.3d 144 (Ark. 2011); *State v. Rodriguez*, 754 N.W.2d 672, 681 Minn. 2008); *State v. Hurt*, 702 S.E.2d 82 (N.C.App. 2010), *reversed by State v. Hurt*, 643 S.E.2d 173 (N.C. 2013). Notably, however, *none* of the three cases cited are in fact *capital punishment* cases. So the Kansas Supreme Court actually failed to point to *any* authority holding that the Confrontation Clause applies to capital sentencing proceedings. Thus, the Kansas Supreme Court appears to stand alone in that regard.

Instead, at least three federal Circuits have squarely held that the Confrontation Clause does not apply to such proceedings, and one decision of this Court strongly suggests, if not compels, that result. In *Williams v. New York*, 337 U.S. 241 (1949), the Court reviewed the death sentence of a defendant who complained that “the sentence of death was based upon information supplied by witnesses with whom the accused had not been confronted and as to whom he

had no opportunity for cross-examination or rebuttal.” 337 U.S. at 243 (internal citations and quotations omitted). In sentencing the defendant, the trial judge “stated that the pre-sentence investigation revealed many material facts concerning appellant’s background which though relevant to the question of punishment could not properly have been brought to the attention of the jury in its consideration of the question of guilt.” 337 U.S. at 244.

Because the case predated formal incorporation of Sixth Amendment protections through the Fourteenth Amendment to make those requirements applicable to the states, the defendant phrased his challenge—and the Court analyzed it—as a “due process” claim of fundamental procedural fairness. 337 U.S. at 245. The Court rejected the claim for at least two reasons.

First, the Court pointed out that “both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by law.” 337 U.S. at 246. But the historical basis was not the only reason for allowing such evidence in sentencing. As a second reason, the Court pointed out that “there are sound practical reasons for the distinction.” 337 U.S. at 246. Indeed, “[h]ighly relevant—if not essential—to [the judge’s] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.” 337 U.S. at 247. Thus, “modern concepts individualizing punishment have made it all

the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information” 337 U.S. at 247.

The Court concluded that the “due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure.” 337 U.S. at 251. Furthermore, the Court declared that “we cannot accept the contention” that “we should draw a constitutional distinction as to the procedure for obtaining information where the death sentence is imposed.” 337 U.S. at 251. After discussing the necessarily individualized determination whether a defendant merits a death sentence, the Court stated that it “cannot say that the due-process clause renders a sentence void merely because the judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence.” 337 U.S. at 252.

The Kansas Supreme Court never cited nor mentioned *Williams v. New York*, but the Kansas court did cite four federal Circuit decisions, all of which do address *Williams* and all of which reached the opposite conclusion of the Kansas Supreme Court. Most recently, in *United States v. Umana*, 750 F.3d 320 (4th Cir. 2014), a case that involved a challenge under the federal death penalty scheme, the majority concluded “that *Williams* squarely disposes of Umana’s argument that the Sixth Amendment should apply to capital sentencing proceedings.” 750 F.3d at 346. Thus, the *Umana* majority “conclude[d] that the Confrontation Clause does not preclude the introduction of hearsay statements during the sentence selection phase of capital sentencing.” 750 F.3d at 348. The dissent

argued, however, that the case raised “an important constitutional question that the Supreme Court has not yet resolved.” 750 F.3d at 360 (Gregory, J., dissenting).

In two other post-*Crawford* decisions, the Fifth and Eleventh Circuits also rejected the claim that the Confrontation Clause applies to the selection phase of capital sentencing proceedings. In *Muhammad v. Sec., Fla. Dept. of Corrections*, 733 F.3d 1065 (11th Cir. 2013), the majority reviewed a death sentence imposed under Florida law and found no Confrontation Clause violation. The majority opined that the “Supreme Court of the United States has held that hearsay testimony is admissible at capital sentencing hearings.” 733 F.3d at 1073 (citing *Williams*). After reviewing other Eleventh Circuit decisions, the majority declared that we “cleared up any confusion in our case law in *Chandler v. Moore*, 240 F.3d 907, 918 (11th Cir. 2001), when we confirmed that hearsay is admissible at capital sentencing and that a defendant’s rights under the Confrontation Clause are not violated if the defendant has an opportunity to rebut the hearsay.” 733 F.3d at 1076.

As in the Fourth Circuit, one judge dissented. 733 F.3d at 1081 (Wilson, J., dissenting). Although the dissent acknowledged that the “Supreme Court has held that trial courts may consider hearsay testimony at capital sentencing hearings,” *id.* at 1081-1082, the dissent opined that *Williams* was no longer good law because it predated both incorporation of the Confrontation Clause against the States and the Supreme Court’s much more recent confrontation decisions such as *Crawford*. 733 F.3d at 1082.

A panel of the Fifth Circuit also rejected the Confrontation Clause claim by a 2-1 vote in *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007), a federal death penalty case. The *Fields* majority opined that “*Williams* is a due process, rather than Sixth Amendment, case and therefore does not dictate the result of Fields’s Confrontation Clause challenge.” 483 F.3d at 327. Nonetheless, the majority declared “that *Williams*’s distinction between guilt and sentencing proceedings and its emphasis on the sentencing authority’s access to a wide body of information in the interest of individualized punishment is relevant to our Confrontation Clause inquiry.” 483 F.3d at 327.

After an extensive review of the arguments, the majority concluded that “the principles underlying *Williams* are relevant, persuasive, and ultimately fatal to Fields’s Confrontation Clause challenge.” 483 F.3d at 338. Emphasizing the “particular importance of individualized sentences in capital cases,” the majority declined to hold sentencing proceedings to the standards of guilt phase proceedings “where, as here, challenged testimony is relevant only to a sentencing authority’s selection decision.” 483 F.3d at 338. One judge dissented, arguing that “*Williams v. New York* is not controlling” in part because “*Crawford* and *Apprendi* render *Williams* inapplicable.” 483 F.3d at 364-365 (Benavides, J., dissenting).⁵

⁵ A Seventh Circuit decision that predates *Crawford* also rejects the argument, stating “the Supreme Court has held that the Confrontation Clause does not apply to capital sentencing. It applies through the finding of guilt, but not to sentencing, even when the sentence is the death penalty.” *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002). The Seventh Circuit was reviewing a

So, at best, when the Kansas Supreme Court here cited all of these cases and held that “we accept convincing arguments that confrontation law is applicable to a capital penalty phase trial,” App. 488, that court was agreeing with either (1) *dissenting opinions* in federal Circuit cases or (2) state appellate court opinions in *non-death penalty cases*. Thus, the Kansas Supreme Court’s decision necessarily creates a split of authority between a state court of last resort and at least three federal Circuits on an important and recurring issue of federal constitutional law. The Court should grant review here to resolve the Confrontation Clause issue that is cleanly presented.

Third Question Presented

III. The question whether the general presumption in favor of joinder applies in capital cases is an issue of first impression in this Court that has resulted in divergent outcomes in the lower courts, as here, where the Kansas Supreme Court effectively adopted a per se rule against joinder in capital sentencing proceedings.

Despite acknowledging that severance was not automatically required in death penalty proceedings, the Kansas Supreme Court effectively established a *per se* rule requiring severance. Importantly, the court relied on the premise that the differentiation in the

federal habeas challenge to an Illinois death sentence imposed in 1984, and the court opined that it “need not attempt to predict how the Supreme Court’s jurisprudence will develop” because “*Williams v. New York* shows that in 1985 Illinois was entitled to proceed as it did.” 313 F.3d at 399.

moral culpability of co-defendants necessarily affects the jury's ability to individually apply mercy to each defendant. App. 473-75. The court further concluded that any problem could not be cured by jury instructions; hence, Jonathan's death sentence violated the Eighth Amendment because, in the court's view, he failed to receive an individualized sentencing determination. App. 477-78. Because co-defendants will virtually always attempt to distinguish their moral culpability to avoid death sentences, *see, e.g.*, 18 U.S.C. § 3592(a)(4) (Jury may consider as mitigating factor that "[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death."), the Kansas Supreme Court's decision effectively creates a *per se* rule against joinder in capital sentencing proceedings and conflicts with the traditional presumption in favor of joinder in criminal cases.

A. This Court has never held that the Eighth Amendment mandates separate capital sentencing proceedings to protect the right to individualized sentencing, but the lower courts have divided over the question, reaching differing results.

The question presented here is an issue of first impression in this Court, but the Court has clearly expressed a preference for joint trials in criminal cases generally. *Zafiro v. United States*, 506 U.S. 534, 537-38 (1993) ("Joint trials 'play a vital role in the criminal justice system.' [Citation omitted.] They promote efficiency and 'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'

[Citation omitted.] For these reasons, we repeatedly have approved of joint trials.”). This presumption in favor of joinder does not evaporate and disappear in death penalty proceedings merely because co-defendants may attempt to distinguish their respective moral culpability.

The Eleventh Circuit has held the Eighth Amendment is not implicated *at all* in this context in determining whether severance is required, because severance is “not a part of [the] constitutional right to an individualized sentencing determination.” *Puiatti v. McNeil*, 626 F.3d 1283, 1315-16 (11th Cir. 2010). The court explained that this Court’s jurisprudence does not support recognizing an Eighth Amendment right against joinder:

...although Puiatti attempts to connect and intertwine severance with his constitutional right to an individualized sentencing determination, we can locate, and Puiatti has cited, no Supreme Court decision doing so. *Lockett* and its progeny do not address joint penalty phases or say that the presence of a co-defendant at a capital defendant’s penalty phase trial has any Eighth Amendment implications whatsoever. None of the *Lockett* line of cases relates to severance or helps Puiatti’s claim at all. Puiatti, like the district court, cites no precedent that suggests a joint penalty trial is improper for co-defendants who were properly joined in the guilt phase. The Supreme Court has never intimated, much less held, that the

special concerns in capital cases require, or even suggest, that severance is necessary.

Id. at 1315.

In contrast, some district courts have permitted severance based on a perceived need to protect the principle of individualized sentencing. *E.g.*, *United States v. Catalan–Roman*, 376 F.Supp.2d 96, 107 (D.P.R. 2005) (disparity between the strength of the co-defendants’ mitigating evidence); *United States v. Green*, 324 F.Supp.2d 311, 326 (D. Mass. 2004) (severance proper due to differing mitigation evidence which may raise Eighth Amendment concerns); *United States v. Taylor*, 293 F.Supp.2d 884, 889-900 (N.D.Ind.2003) (separate sentencing proceedings would ensure individualized consideration of each defendant’s punishment); see also *United States v. Usama Bin Laden*, 156 F.Supp.2d 359 FN 2 (S.D.N.Y.2001) (court allowed sequential sentencing hearings for defendants Al-Owhali and Mohamed after they argued they would be “significantly disadvantaged” by a joint hearing); *United States v. Henderson*, 442 F.Supp.2d 159, 162 (S.D.N.Y. 2006) (court agreed to sequential penalty hearings based on the government’s request and a prejudicial letter containing “admissions against interest by a declarant who committed suicide shortly after making it.”).

Only one other court of last resort, however, has overturned a death sentence based on the denial of a motion to sever the penalty phase. See *Foster v. Commonwealth*, 827 S.W.2d 670, 683 (Ky. 1991) (“The accumulated errors in the admission of prior acts of misconduct, contents of letters written by Foster to Powell, and evidence regarding the battered wife

syndrome by Powell's expert all stem from the improvident decision of the trial court to hold a joint penalty phase. Individually, these errors might be considered by this Court to be harmless, but viewed together or "cumulatively," their commission requires reversal of Foster's sentence.").

A number of courts have determined that jury instructions requiring individualized consideration sufficiently protect any right to individualized sentencing in the context of joint proceedings. *E.g.*, *United States v. Tipton*, 90 F.3d 861 (4th Cir.1996) (no Eighth Amendment violation because the district court gave repeated instructions to consider the evidence against each capital defendant individually); *United States v. Bernard*, 299 F.3d 467 (5th Cir.2002) (under plain error review, instructions were sufficient to address the risk of prejudice); *People v. Carasi*, 190 P.3d 616, 649-50 (Cal. 2008) (instructions ensured the jury was adequately apprised of the individualized nature of the sentencing determination); *Gutierrez v. Dretke*, 392 F.Supp.2d 802, 828 (W.D. Tex. 2005) (instructions sufficiently prevented any possibility of prejudice); *United States v. Rivera*, 363 F.Supp.2d 814, 822-23 (E.D.Va.2005) (denying pre-trial severance request and holding that "threat posed to individualized consideration will best be addressed by a joint penalty phase governed by the Court's limiting instructions"); *Hardy v. State*, 804 So.2d 247, 264 (Ala. Crim. App. 1999) (instructions were sufficient to allow individualized sentencing determinations). The rulings of these courts are consistent with the general rule that juries are presumed to be able to follow their instructions. *Blueford v. Arkansas*, 566 U.S. ___, ___, 132 S.Ct. 2044, 2051 (2012).

In the end, the severance question is one of first impression for this Court, the question has resulted in differing outcomes in the lower courts, and it arises with regularity. For all of these reasons, the Court should grant certiorari to resolve whether there is an Eighth Amendment right to severance in capital sentencing proceedings.

B. Even if the Eighth Amendment were to require severance in some circumstances, this case does not present any such circumstance.

In reversing Jonathan's death sentence based on the failure to sever the penalty proceedings, the court summarily adopted the findings it had made in co-defendant Reginald's appeal: (1) Jonathan "continued the pattern he had set in the guilt phase by emphasizing that [Reginald] was the more culpable actor and a negative influence in [Jonathan's] life," App. 39, 472; (2) this mitigating factor created antagonistic defenses because the mitigation evidence differentiated between the brothers' moral culpability and could have impacted a juror's decision to show mercy App. 39, 473-75; (3) Jonathan's cross-examination of Temica resulted in her testimony that Reginald admitted to shooting the victims during a visit to the jail, App. 39, 476; (4) that testimony could have negated any juror's willingness to show mercy based on residual doubt, App. 39, 476; and (5) Jonathan's mitigating evidence could have been considered by the jury as an improper, nonstatutory aggravating circumstance against Reginald. App. 39, 477. The court further noted that it was relying on the "family circumstances argument" raised by Jonathan

and on prejudice to Jonathan flowing from Reginald's visible handcuffs during the penalty phase. App. 39.

The court's reasoning, however, is inherently flawed because the same rationale simply cannot be applied to both Reginald and Jonathan. Evidence of Reginald's heightened culpability would not have negatively affected Jonathan. Arguably, the very evidence Reginald considered most damaging to his plea for mercy actually helped any such plea by Jonathan. Thus, the Kansas Supreme Court's summary adoption of the same rationale it set forth in Reginald's appeal fails to rationally distinguish the brothers' cases; the court does not articulate how the failure to sever was erroneous or harmful to Jonathan. Even assuming, for the sake of argument, that there was error in Reginald's case, it does not follow that prejudice to one co-defendant automatically results in prejudice to another co-defendant.

More importantly, the Kansas Supreme Court erred in determining that any effect on the jury's ability to fully consider mercy required severance. The jury was instructed that "mercy can itself be a mitigating factor in determining whether the state has proved beyond a reasonable doubt that the death penalty should be imposed." App. 573. But consideration of mercy is not required by the Eighth Amendment. *See e.g. People v. Lewis*, 28 P.3d 34, 75 (Cal. 2001) (the Eighth Amendment does not require an instruction stating "[i]n determining whether to sentence the defendant to life imprisonment without possibility of parole, or to death, you may decide to exercise mercy on behalf of the defendant."); *State v. Lafferty*, 20 P.3d 342, 373 (Utah 2001) (federal constitution does not require an

instruction telling jurors they should be guided by mercy); *State v. Johnson*, 723 N.E.2d 1054, 1076, 1080 (Ohio 2000) (summarily finding no Eighth or Fourteenth Amendment error in instruction that “fairness” and “mercy” are to be excised from the definition of mitigating factors); *Commonwealth v. Rainey*, 656 A.2d 1326, 1333-34 (Pa. 1995) (counsel was not ineffective for failing to request a mercy instruction since allowing the jury unbridled discretion to grant mercy would be clearly erroneous); *Austin v. Bell*, 927 F.Supp. 1058, 1064 -65 (M.D.Tenn. 1996) (no Eighth Amendment violation in the Tennessee Death Penalty Act based on the failure to inform jury they may impose a life sentence out of mercy).

The Kansas Supreme Court’s holding here essentially requires an instruction on mercy as a mitigating factor and mandates automatic severance in all death penalty cases. Because such a holding extends the Eighth Amendment’s individualized sentencing requirement far beyond the Court’s precedents, certiorari review is warranted.

C. The Kansas Supreme Court’s conclusion that any error here could not be harmless because the jury could not be presumed to have followed its instructions misapplies this Court’s constitutional harmless error analysis.

In concluding that reversal was required, the Kansas Supreme Court turned an unquestioned legal presumption on its head by refusing to believe the jury could follow the instructions given, instructions that plainly required the jury to give each brother individualized consideration in determining their

sentences. The court's rejection of such a foundational principle cannot stand in light of the holding in *Zafiro* that any possible prejudice generally can be cured by giving proper jury instructions. 506 U.S. at 539.

Moreover, even assuming any error occurred here, it was harmless in light of the atrocious and inhuman facts of the crimes Jonathan committed against his victims. Further, nothing prevented the jury from giving individualized consideration to the weak mitigating circumstances Jonathan presented. As the dissent noted, "the mitigating evidence simply pales in comparison to the aggravating factors." App. 66 (Moritz, J., dissenting).

Here, the Kansas Supreme Court improperly rejected the presumption that jurors follow their instructions, and ignored and discounted the overwhelming atrocity and inhuman nature of Jonathan's crimes against multiple victims. Even if the failure to sever the brothers' sentencing proceedings somehow violated the Eighth Amendment, any error was harmless. The Court should grant review of the Kansas Supreme Court's conclusion that joinder here was reversible Eighth Amendment error.

CONCLUSION

Kansas requests that the Petition for Writ of Certiorari be granted on all three questions presented.

Respectfully submitted,

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