

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

REGINALD DEXTER CARR, JR., *Petitioner*

VS.

STATE OF KANSAS, *Respondent.*

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Was the denial of Reginald Carr's Fifth, Sixth and Fourteenth Amendment rights to testify structural constitutional error requiring automatic reversal?
2. Was the harmless error analysis employed by the Kansas Supreme Court to affirm Reginald Carr's convictions and sentence of death contrary to this Court's firmly established precedent in *Chapman v. California*, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967)?
3. Does the Due Process Clause of the Sixth and Fourteenth Amendments to the United States Constitution prohibit the conviction and execution of Reginald Carr, who was prevented - by erroneous trial court rulings - from denying, explaining or rebutting the allegations made against him?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

State v. Reginald Carr, 300 Kan. 1, 331 P.3d 544 (Kan. 2014)

State v. Jonathan Carr, 300 Kan. 340, 329 P.3d 1195 (Kan. 2014)

State v. Jonathan Carr, 314 Kan. 744, 502 P.3d 511 (2022)

Kansas v. Carr, 577 U.S. 108, 193 L.Ed.2d 535, 136 S.Ct. 633 (2016)

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IN THE SUPREME COURT OF THE UNITED STATES**PETITION FOR A WRIT OF CERTIORARI**

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

OPINIONS BELOW

The first opinion of the Kansas Supreme Court (the highest court to review the merits) appears at Appendix A to this Petition and is reported at *State v. Carr*, 300 Kan. 1, 331 P.3d 544 (Kan. 2014). This Court's opinion on certiorari from that judgment appears at Appendix B to this Petition and is reported at *Kansas v. Carr*, 577 U.S. 108, 193 L.Ed.2d 535, 136 S.Ct. 633 (2016). The opinion of the Kansas Supreme Court on remand from this Court appears at Appendix C to this Petition and is reported at *State v. Carr*, 314 Kan. 615, 502 P.3d 546 (2022). The Order of the Kansas Supreme Court denying Reginald Carr's Motion for Modification or Rehearing appears at Appendix D to this Petition and is unpublished.

JURISDICTION

The Kansas Supreme Court issued its decisions in this case on January 25, 2014 and January 21, 2022. (Appendices A, C). The Kansas Supreme Court denied Reginald Carr's timely Motion for Modification or Rehearing on **May 4, 2022**. (Appendix D).

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part, “No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law...” U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides in pertinent part, “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI.

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

Petitioner, Reginald Dexter Carr, Jr., is under a sentence of death for a conviction of capital murder, as well as a life sentence for an unrelated offense and determinate sentences for 34 other felony convictions. This Petition for a Writ of Certiorari concerns the capital murder conviction, convictions for offenses associated with that conviction, and the sentence of death.

Procedural Background

On November 4, 2002, Reginald Carr was convicted of four counts of capital murder, one count of felony murder, and 49 other felonies. On November 15, 2002, he was sentenced to death on each capital murder conviction, life with no parole for 20 years on the felony murder conviction, and 570 months imprisonment on the remaining felony convictions, consecutive to the life sentence.

On direct appeal, the Kansas Supreme Court affirmed one capital murder conviction, the felony murder conviction, and 34 other felony convictions, but reversed his sentence of death. *State v. Carr*, 300 Kan. 1, 331 P.3d 544 (2014)(*Carr I*).

This Court granted the State's Petition for a Writ of Certiorari, and reversed the decision of the Kansas Supreme Court, as to the death sentence. *Kansas v. Carr*, 577 U.S. 108, 193 L.Ed.2d 535, 136 S.Ct. 633 (2016).

On remand, the Kansas Supreme Court ordered further briefing, heard argument, and then issued a decision affirming Reginald Carr's sentence of death. *State v. Carr*, 314 Kan. 615, 502 P.3d 506 (2022)(*Carr II*). The Court denied Mr. Carr's Motion for Modification or Rehearing on May 4, 2022.

Factual Background

Narrative of Events

Late in the evening of December 14, 2000, two armed intruders forced their way into a home in Wichita, Kansas. The three men who shared the residence were all home that evening, two women were visiting as well. The intruders forced all five occupants of the home to undress and then sexually assaulted them.

One of the intruders drove the occupants, one at a time, to automatic teller machines and directed them to withdraw money from their accounts. The other intruder remained on guard in the home. The sexual assaults continued.

At around 2 a.m., on December 15, the intruders drove the occupants, in two vehicles, to an undeveloped area. The intruders removed the occupants from the vehicles, made them kneel, then shot each one of them in the head. One of the women survived the shooting and remained conscious. When the intruders drove away, she ran to a house that she saw in the distance, where the residents called 911.

Law enforcement officers were soon at the site of the home invasion. The house had been ransacked and it appeared that valuable electronics had been taken. At about 4 a.m., on December 15, those officers saw Reginald Carr drive by the residence. He drove by again a few minutes later.

Earlier that evening, Reginald Carr and his brother, Jonathan Carr, had borrowed Stephanie Donley's Toyota Camry. After borrowing the car, the brothers spent time at the home of Tronda Adams, leaving together around 9:30 p.m.

Reginald Carr returned to the apartment he shared with Ms. Donley at about 4:20 or 4:30 a.m., on December 15. He and Ms. Donley argued and he soon left the apartment. When he returned, about 45 minutes later, he had clothing, computer equipment and two televisions with him. He had about \$900 in cash and was carrying a set of car keys that Ms. Donley did not recognize. That same morning, law enforcement officers entered her apartment, found property taken during the home invasion, and arrested Reginald Carr.

Jonathan Carr called Tronda Adams at about 3:30 a.m., December 15, then arrived at her home about 15 minutes later, driving Ms. Donley's Camry. Sometime between 4:00 and 5:00 a.m. Jonathan Carr told Ms. Adams that Reginald Carr was there, and they were going to trade cars. The Camry was gone when Ms. Adams took her grandmother to work at 6:00 a.m.

After seeing news coverage of Reginald Carr's arrest on television, around noon the same day, and discovering a ring in Jonathan Carr's jacket pocket, Tronda Adams and her mother called the police who quickly arrived and arrested him at their home.

Evidence Against Jonathan and Reginald Carr

Both Jonathan and Reginald Carr were discovered in possession of personal property belonging to the victims of the home invasion, shortly after it occurred. Reginald was in possession of receipts reflecting withdrawals or balance inquiries from bank accounts belonging to the victims, dated the night of the crimes.

The firearm used to shoot all five victims was found about three months later, near the field where the shootings took place. Jonathan Carr had given the firearm to Tronda Adams, then asked for its return, a few days before the crimes occurred.

Footwear impressions from the scene of the home invasion were similar to impressions made by footwear worn by both Jonathan and Reginald Carr when they were arrested.

No conclusive DNA evidence placed Reginald Carr at the scene of the home invasion, or the shootings, but the DNA evidence against Jonathan Carr was strong. Jonathan Carr's DNA was found in a semen stain at the scene, and nuclear DNA testing

of a hair from the scene revealed the hair to be Jonathan Carr's. Reginald Carr was excluded as the source of that hair. Two other hairs were subjected to mitochondrial DNA testing, which cannot distinguish between maternal relatives. Both Jonathan Carr and Reginald Carr - who have identical mitochondrial DNA - had the same mitochondrial DNA sequence as the hairs.

The surviving victim told law enforcement officers that one of the intruders raped her, then ejaculated in her mouth. Jonathan Carr's DNA was found in the oral swab taken from the survivor. A piece of latex found in her genital area had Jonathan Carr's seminal fluid and semen on it, and discharge from her introitus area contained Jonathan Carr's blood, seminal fluid and semen. Only one swab taken from her body had DNA that did not exclude Reginald Carr as a contributor: a swab taken from her thigh generated a DNA profile that was a combination of profiles from which the victim, Jonathan Carr and Reginald Carr could not be excluded as possible contributors. But the correlation was weak: the profile obtained occurs once in every 16,000 individuals, and the allele used to include Reginald Carr as a possible contributor appears in 18 percent of the African American population. *State v. Carr*, No. 90,044, Record on Appeal, (hereinafter "Record"), Vol. 103, p. 65; Vol. 104, p.10-15; Vol. 90, p. 104-106. (Appendix E).¹

Jonathan Carr's boxer shorts had a stain that contained a mixture of his DNA with the DNA of both female victims. There was a small amount of blood from the female

¹ Petitioner has appended portions of the record to support facts that do not appear in either Kansas Supreme Court opinion. (Appendices E, F, G, and H).

victim who did not survive on the clothing that Reginald Carr was wearing the night of December 14.

At trial, the surviving victim identified both Reginald Carr and Jonathan Carr as the intruders, but her identification of Reginald Carr was problematic. The witness distinguished between the two intruders as the “thin” and the “stocky” intruder. She identified Reginald Carr as the stocky intruder and testified that it was the stocky intruder who ejaculated in her mouth. *Carr I*, 300 Kan. 26-27. However, Jonathan Carr’s DNA, and only Jonathan Carr’s DNA, was found in her mouth. *Carr I*, 300 Kan. 39. *Record*, Vol. 158, p. 119-121; Vol. 103, p. 64; Vol. 104, p. 6-10 (Appendix F). She testified at trial that she chose Reginald Carr’s photograph from an array she viewed the evening of December 15. But according to the detective who showed her the array, Reginald Carr’s photograph was not in that array, Jonathan Carr’s photograph was. *Record*, Vol. 159, p. 91-96; Vol. 123, p. 124 (Appendix G). Finally, at the preliminary hearing she identified Jonathan Carr as one of the intruders, but did not identify Reginald Carr. *Carr I*, 300 Kan. 38. *Record*, Vol. 56, p. 191 (Appendix H).

Reginald Carr’s Defense

Reginald Carr had a defense to the capital crimes: that they were committed by Jonathan Carr and another man, and that the surviving witness misidentified him. Reginald Carr was prepared to testify in support of this defense, but was prevented from doing so by the trial court’s erroneous evidentiary rulings.

Reginald Carr proffered his defense several times, out of the hearing of the jury. *Carr I*, 300 Kan. 85, 187-188, 194-196. He would have testified that on the evening of

December 14, he borrowed Stephanie Donley's Camry and he and Jonathan Carr spent some time at the home of Tronda Adams. When they left Tronda Adams' home, they returned to the parking lot of Stephanie Donley's apartment complex so that Reginald Carr could pick up his Plymouth Fury. They parted company there. Jonathan Carr took the Camry and Reginald Carr drove the Plymouth to north Wichita.

Later on December 14, and in the early morning hours of December 15, Reginald Carr received three telephone calls from Jonathan Carr. Jonathan Carr was upset and distraught, he told Reginald Carr that his companion had shot some people. He asked Reginald Carr to come to Tronda Adams' house. There, he met Jonathan Carr and his companion, a black male whom he did not know. Jonathan Carr and the other man had a truck full of stolen property. They agreed that the other man would drive the truck to Stephanie Donley's apartment complex, that Reginald Carr would return Stephanie Donley's car to the complex and Jonathan Carr would keep the Plymouth Fury. Jonathan Carr told Reginald Carr that the property was stolen, that people had been killed and told him the location of the home invasion. Reginald Carr drove by the residence while the police were there. Reginald Carr had no foreknowledge of the crimes.

The trial judge would not allow Reginald Carr to testify about Jonathan Carr's companion, citing the Kansas third-party evidence rule, and would not allow Reginald Carr to testify as to Jonathan's statements, finding them to be inadmissible hearsay. "[I]n the wake of the judge's [erroneous] rulings," Reginald Carr decided to not testify. *Carr I*, 300 Kan. 210.

The Kansas Supreme Court found both these rulings to be error. *Carr I*, 300 Kan. 1, 8, Syl. ¶¶ 41, 42.

The court noted that the exclusion of Reginald Carr's observations of and interactions with Jonathan Carr's companion and Jonathan Carr's statements to him about the crimes acted as a complete bar to his defense:

We have already determined that R. Carr's proffered evidence was relevant and admissible. It was not merely integral to his defense; it was his defense. *Rock v. Arkansas*, 483 U.S. 44, 52, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (defendant's testimony may be indispensable). The State has not argued, and we do not divine, how either the third-party evidence rule, as understood and applied by Judge Clark, or the judge's refusal to apply the hearsay exception for declarations against interest was supported by a legitimate interest sufficient to overcome R. Carr's right to present his defense.

Carr I, 300 Kan. 210.

The court decided that the denial of the right to testify could be reviewed under the constitutional harmless error standard, as could the denial of the right to present a defense. *Carr I*, 300 Kan. 211. Despite finding that the trial court's erroneous rulings resulted in a violation of Reginald Carr's right to present a defense, and the preclusion of his ability to testify as to anything useful to the defense, the court found the error harmless, as to the jury's determination of guilt, "[g]iven the strength of the State's case against the defendant." *Carr I*, 300 Kan. 9, Syl. ¶ 45. This determination was made by copying verbatim the prosecution's summary of the evidence against Reginald Carr found in its brief. *Carr I*, 300 Kan. 211-212. There was no mention, in the harmless error analysis, of the evidence supporting Reginald Carr's defense of misidentification, or the manner in which his proffered testimony would have explained the prosecution's evidence against him.

The court reversed Reginald Carr's sentence of death, on other grounds. *Carr I*, 300 Kan. 11, Syl. ¶¶ 58, 59. This reversal rendered resolution of Reginald Carr's other claims of penalty-phase error unnecessary. After this Court reversed that holding, the Kansas Supreme Court ordered further briefing and argument, with regard to penalty-phase issues that had not been addressed in the first opinion.

On remand, the court considered the effect of guilt-phase errors on the death verdict including the "erroneous application of Kansas' third-party evidence and hearsay rules, which prevented R. Carr from pursuing his defense to the Birchwood² crimes." *Carr II*, 314 Kan. 724. The court noted that these errors "arguably lessened the chance a juror would have possessed residual doubt of R. Carr's guilt during the penalty phase." *Carr II*, 314 Kan. 728.

Then the court noted that the first opinion relied on the strength of the State's case against Reginald Carr in finding that the error had no effect on the convictions, simply copying that portion of first *Carr* decision (which, as noted, had simply copied the State's summation against Reginald Carr). *Carr II*, 314 Kan. 728-729. The court found that the strength of the State's case "left no room for any meaningful amount of residual doubt, even if the guilt and penalty phase errors had not occurred." *Carr II*, 314 Kan. 729. Once again, there was no acknowledgement of the evidence that supported Reginald Carr's theory of misidentification, or the manner in which his proffered testimony would have explained the prosecution's evidence against him.

² The scene of the home invasion.

REASONS FOR GRANTING THE WRIT

Reginald Carr was convicted of capital murder and sentenced to death after he was wrongfully stripped of his defense and rendered unable to speak in his own defense. The jury that convicted, then condemned him, heard neither the testimony (his own), nor the defense, that he was constitutionally entitled to present when on trial for his life. As the Kansas Supreme Court observed, Reginald Carr's proposed testimony was not merely integral to his defense; it *was* his defense. Condemning a person to die without giving them a fair chance to defend themselves offends our most basic concept of justice in America. Nevertheless, the Kansas Supreme Court, after finding that he had been deprived of his Fifth, Sixth and Fourteenth Amendment rights to testify and to defend himself, affirmed both Reginald Carr's convictions and his sentence of death. This shocking result was reached through the court's use of what it termed a constitutional harmless error review. However, this review - focusing only on the sufficiency of the evidence in support of the verdicts - did not conform to the constitutional harmless error review mandated by this Court.

This case presents several legal issues that warrant this Court's review because:

1) The erroneous denial of Reginald Carr's right under the Fifth, Sixth and Fourteenth Amendments, to testify is a structural error requiring automatic reversal. The Kansas Supreme Court's determination that it is trial error, amenable to a harmless error analysis, conflicts with decisions of at least two state courts of last resort as well as the court of last resort for the District of Columbia. The split in jurisdictions merits this Court's review under Rule 10(b).

2) If a harmless error analysis is appropriate, the state court's analysis, which considered only the strength of the prosecution's case, was contrary to this Court's firmly established precedent and thus merits this Court's review under Rule 10(c). And, because the guilt-phase fact-finding was the basis of the death sentence imposed in this case, the flawed analysis violated the constitutional requirement of heightened reliability in death penalty proceedings, rendering appropriate this Court's review to correct error, acting as the court of last resort.

3) The erroneous denial of Reginald Carr's right to defend resulted in convictions and a sentence of death based on evidence he had no opportunity to rebut, deny or explain, in violation of the Due Process Clause of the Sixth and Fourteenth Amendments and this Court's precedent, meriting this Court's review under Rule 10(c).

DISCUSSION

I. The erroneous denial of the right to testify is a structural error requiring automatic reversal.

a. The trial court's erroneous rulings violated Reginald Carr's Fifth, Sixth and Fourteenth Amendment rights to testify and to present a defense.

Reginald Carr was prepared to tell the jury "his own version of events" an exercise of rights which is rooted in the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. *Rock v. Arkansas*, 483 U.S. 44, 51-53, 97 L.Ed.2d 37, 107 S.Ct. 2704 (1987). The trial court's erroneous evidentiary rulings, excluding Reginald Carr's testimony and his entire defense, resulted in a complete and catastrophic denial of his constitutional right "to present [his] version of the facts as well as the prosecution's to the

jury so it may decide where the truth lies.” *Washington v. Texas*, 388 U.S. 14, 19, 18 L.Ed.2d 1019, 87 S.Ct 1920 (1967).

The defendant’s right to testify is one of the rights essential to due process of law in a fair adversary process. *Rock*, 483 U.S. 51, citing *Faretta v. California*, 422 U.S. 806, 819, f.n.15, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975)(right of self-representation). “Even more fundamental to a personal defense than the right of self-representation, which was found to be ‘necessarily implied by the structure of the Amendment,’ *ibid.*, is an accused's right to present his own version of events in his own words. A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness.” *Rock*, 483 U.S. 52.

b. There is a split in jurisdictions as to whether the violation of the right to testify requires automatic reversal or is amenable to harmless error analysis.

Not all constitutional error requires automatic reversal. *Chapman v. California*, 386 U.S. 18, 21-22, 23-24, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967). Constitutional trial error occurs during the presentation of the case to the jury and may be “quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt,” while “structural defects in the constitution of the trial mechanism” defy such assessment. *Arizona v. Fulminante*, 499 U.S. 279, 113 L.Ed.2d 302, 111 S.Ct. 1246 (1991). Structural error is the deprivation of “basic protections” without which “a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as

fundamentally fair.” *Fulminante*, 499 U.S. 310 (citing *Rose v. Clark*, 478 U.S. 570, 92 L.Ed.2d 460, 106 S.Ct. 3101 (1986)).

The Kansas court’s determination that the violation of Reginald Carr’s right to testify was trial error that could be reviewed for harmlessness is in direct conflict with decisions from the supreme courts of South Carolina and Louisiana as well as the court of last resort of the District of Columbia. It conflicts with the position taken by the Supreme Court of Minnesota in *dicta* as well.

State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013), presents the clearest conflict with this case. In both *Rivera* and here, the defendant’s proposed testimony was excluded from his capital trial under “the erroneous application of evidentiary rules.” 402 S.C. 246. Having found the exclusion erroneous in *Rivera*, the South Carolina Supreme Court rejected the prosecution’s contention that it could be characterized as trial error and thus subject to harmless-error review. 402 S.C. 246. The court found this error instead to be structural, the type of error which “transcends the criminal process.” 402 S.C. 247.

Drawing from this Court’s precedent, the South Carolina court found many grounds for declaring the error not appropriate for harmless error review: that the consequences of denying the defendant the right to testify are “unquantifiable and indeterminate,” *Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 124 L.Ed.2d 182, 113 S.Ct. 2078 (1993), and would require speculation, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150, 165 L.Ed.2d 409, 126 S.Ct. 2557 (2006); that ascertaining prejudice requires the court to know the precise nature of the defendant’s testimony, which is unknowable unless the defendant testifies, *Luce v. United States*, 469 U.S. 38, 41, 83 L.Ed.2d 443,

105 S.Ct. 460 (1984); that the right to testify in one's own defense is, like the right of self-representation, one that usually increases the likelihood of an unfavorable outcome, and therefore not amenable to a harmless error review, *McKaskle v. Wiggins*, 465 U.S. 168, 177, f.n. 8, 79 L.Ed.2d 122, 104 S.Ct. 944 (1984); and that the defendant's right to testify is a basic protection, without which a criminal trial cannot function as a reliable vehicle for determination of guilt or innocence. *Neder v. United States*, 527 U.S. 1, 8–9, 144 L.Ed.2d 35, 119 S.Ct. 1827 (1999).

The court found that the execution of a defendant, after erroneously barring his testimony, would deprive the defendant of his life without due process of law, *Rivera*, 402 S.C. 248-249, and concluded, "In sum, we are persuaded that the right of an accused to testify in his defense is fundamental to the trial process and transcends a mere evidentiary ruling. An accused's right to testify 'is either respected or denied; its deprivation cannot be harmless' ... As such, the error is structural in that it is 'so basic to a fair trial that [its] infraction can never be treated as harmless error.'" 402 S.C. 249-250 (internal citations omitted).

The decision of the Kansas court also conflicts with *State v. Dauzart*, 769 So.2d 1206 (La. 2000). In *Dauzart*, the Louisiana Supreme Court found error when the trial court denied the defense request to re-open its case so the defendant could testify. 769 So.2d 1209-1210. The court then found the error required automatic reversal:

Because "the most important witness for the defense in many criminal cases is the defendant himself," *Rock* deemed the accused's right to present his or her testimony at trial "[e]ven more fundamental to a personal defense than the right of self-representation" under the Sixth Amendment. *Rock*, 483 U.S. at 52, 107 S.Ct. at 2709; ... **No matter how daunting the task, the accused therefore has the**

right to face jurors and address them directly without regard to the probabilities of success. As with the right of self-representation, denial of the accused's right to testify is not amenable to harmless-error analysis. The right “is either respected or denied; its deprivation cannot be harmless.” *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8, 104 S.Ct. 944, 950 n. 8, 79 L.Ed.2d 122 (1984). 769 So. 2d 1210–1211 (emphasis added).

The decision of the Kansas court also conflicts with *Boyd v. United States*, 586 A.2d 670 (D.C. 1991), from the District of Columbia Court of Appeals. In *Boyd*, the defendant claimed that she wanted to testify at her trial, but her attorney would not allow her to take the witness stand. 586 A.2d 671-672. The Court remanded the case for a hearing to determine whether she had waived her right to testify and stated, “... [I]n view of the nature of the defendant's right to testify, the trial judge's failure to hold a hearing to determine whether Boyd had waived her right to testify cannot be deemed harmless error.” The court found that the defendant would be entitled to a new trial, should the trial judge determine that she had not made a knowing and intelligent waiver of her right to testify. 586 A.2d 677–78 (internal citations omitted).

Finally, although it was *dicta*, in *State v. Rosillo*, 281 N.W.2d 877 (Minn. 1979), the Supreme Court of Minnesota stated that if a defendant were erroneously denied the right to testify, such error would require automatic reversal. “Our opinion is that the right to testify is such a basic and personal right that its infraction should not be treated as harmless error. In *Chapman v. California*, ..., the court stated that ‘there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.’ Examples there cited include right to counsel and right to an impartial judge. We believe that the defendant's right to testify is another such right.” *Rosillo*, 281

N.W.2d 879(footnote and internal citation omitted). See also, *State v. Walen*, 563 N.W.2d 742, 750 (Minn. 1997)(“it never can be harmless error when an attorney denies a defendant his right to testify”)(also dicta).

On the other hand, several state supreme courts take the view that the denial of the right to testify is amenable to harmless error review. The courts of last resort in Alaska, *LaVigne v. State*, 812 P.2d 217, 220–22 (Alaska 1991); Wisconsin, *State v. Nelson*, 355 Wis. 2d 722, 849 N.W.2d 317, 319 (2014); Tennessee, *Momon v. State*, 18 S.W.3d 152, 166 (Tenn. 1999) and Kentucky, *Quarels v. Commonwealth*, 142 S.W.3d 73, 82 (Ky. 2004) have so held. Several federal circuits also hold this error amenable to harmless error analysis. *Gill v. Ayers*, 342 F.3d 911, 921 (9th Cir. 2003); *Ortega v. O’Leary*, 843 F.2d 258, 262 (7th Cir. 1988); *Wright v. Estelle*, 549 F.2d 971, 974 (5th Cir.1977). But see, *Yannai v. United States*, 346 F. Supp. 3d 336, 346 (E.D.N.Y. 2018)(denial of right to testify is structural error, holding not contradicted by subsequent Second Circuit rulings).

This split in authority among state courts of last resort renders this case appropriate for this Court’s review under Rule 10(b).

c. This Court should hold that the federal constitutional right of the defendant to testify in his own defense is so fundamental to a fair trial that the denial of this right is structural error, requiring automatic reversal.

In *Weaver v. Massachusetts*, ___ U.S. ___, 198 L.Ed.2d 420, 137 S.Ct. 1899 (2017), this Court discussed three broad categories of constitutional error deemed to be structural. First, error has been deemed structural if the constitutional right in question is not designed to protect the defendant from erroneous conviction, but instead some other

interest, such as a defendant's right to conduct their own defense, which usually increases the likelihood of a conviction. 137 S.Ct. 1908 (citing *McKaskle*, 465 U.S. 177, f.n. 8). As previously noted, the right to testify has been held, by this Court, to be more fundamental than the right to self-representation. *Rock*, 483 U.S. 52. And, like that right, the exercise of the defendant's right to testify can often increase the chance of conviction. The right to speak to the jury directly, even with its perils, protects the defendant's right to autonomy and the right to choose how to best protect not only his liberty, but, in this case, his life. *See, McCoy v. Louisiana*, ___ U.S. ___, 200 L.Ed.2d 821, 138 S.Ct. 1500, 1511 (2018)(error may be ranked structural when right at issue is designed to protect the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty). The premise that a defendant must be allowed to speak in their own defense is so fundamental to our concept of basic justice, that the harm in its deprivation is irrelevant.

Second, "an error has been deemed structural if the effects of the error are simply too hard to measure." *Weaver*, 137 S.Ct. 1908. In *Luce*, 469 U.S. 42, this Court held that the defendant must testify to pursue a Federal Rule 609(a) claim. This was because an appellate court could not otherwise assess the impact of erroneous impeachment in light of the record as a whole. Accordingly, this Court noted, "the appellate court could not logically term 'harmless' an error that presumptively kept the defendant from testifying." 469 U.S. 42. Although the lower court had the benefit of Reginald Carr's proffer in this case, it did not have his testimony or any cross-examination. The court could not assess the impact of his inability to participate meaningfully in his own trial because it was

required to speculate as to his actual, rather than his proposed testimony, and how he would have acquitted himself under cross-examination.

The effect of the deprivation of the right to testify is especially hard to measure in a death penalty proceeding. Because of the trial court's erroneous rulings, Reginald Carr was silent, and offered no defense to the horrendous allegations against him. It is simply impossible to determine what effect that silence had on the jury deciding whether to extend mercy to him, or sentence him to death, after convicting him.

Under Kansas law, jurors have no discretion to impose a sentence of death unless they have found at least one aggravating circumstance beyond a reasonable doubt. But once that hurdle is crossed, each individual juror has the discretion to extend mercy, or not. K.S.A. 21-6617. Jurors are instructed that question of sentence is an individual determination. PIK 4th 54.050. As this Court stated in its first decision in this case, *Kansas v. Carr*, 577 U.S. 108, 119, 193 L.Ed.2d 535, 136 S.Ct. 633 (2016):

Approaching the question in the abstract, and without reference to our capital-sentencing case law, we doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination (the so-called "selection phase" of a capital-sentencing proceeding). It is possible to do so for the aggravating-factor determination (the so-called "eligibility phase"), because that is a purely factual determination. **The facts justifying death set forth in the Kansas statute either did or did not exist-and one can require the finding that they did exist to be made beyond a reasonable doubt. Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not.**

And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy - the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it. ... **In the last analysis, jurors will**

accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.
(emphasis added).

As explained above, the decision to extend mercy is based on the value system of each individual juror. See, *Penry v. Lynaugh*, 492 U.S. 302, 319, 106 L.Ed.2d 256, 109 S.Ct. 2934 (1989) *abrogated on other grounds*, *Atkins v. Virginia*, 536 U.S. 304, 153 L.Ed.2d 335, 122 S.Ct. 2242 (2002) (“In the penalty phase of the capital trial, the individual jurors are called upon to give their reasoned moral response to the defendant’s background, character and crime.”). Therefore, it is impossible to know the effect of Reginald Carr’s failure to offer any defense and testify in each juror’s own personal calculus. Or, in the words of *Luce*, the reviewing court has no way to assess the impact of Reginald Carr’s failure to testify and failure to defend himself on the penalty phase. Instead, appellate judges undertaking a harmless error review can only substitute their values for those of the jurors and speculate as to the juror’s inclinations to or motives for extending or denying mercy.

Finally, “an error has been deemed structural if the error always results in fundamental unfairness.” *Weaver*, 137 S.Ct. 1908. However, this Court noted that “[a]n error can count as structural even if the error does not lead to fundamental unfairness in every case.” 137 S.Ct. 1908. Deprivation of the right to testify is such an error. If the proffered testimony was irrelevant to the charges, or cumulative to other evidence, its exclusion might not render the trial fundamentally unfair. But, of course, in this case the error deprived Reginald Carr of his entire defense in both the guilt and penalty phases of

his capital trial, and unfairly increased the chance that he would be convicted and sentenced to death.

Long before this Court's decisions in *Weaver*, and *Rock*, the Fifth Circuit Court of Appeals decided *Wright v. Estelle*, 549 F.2d 971, 974 (1977). In that case, the court found harmless any assumed constitutional error that occurred when the defendant's attorney refused to allow him to testify at his murder trial. Upon rehearing en banc, the decision was affirmed. *Wright v. Estelle*, 572 F.2d 1071 (5th Cir. 1978). Judge Godbold, with two other judges, dissented to the finding that that the denial of the constitutional right to testify could be treated as federal harmless error.

Noting that in *Chapman*, 386 U.S. 23, this Court excluded from harmless error review those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," *Wright*, 572 F.2d 1080, Judge Godbold placed the right to testify in this category, calling it "fundamental." *Wright*, 572 F.2d 1081.

It is part of the due process right to fair trial and is recognized as such even in some extra-judicial proceedings. It is embraced in the right of the defendant to meet and deny the accusation against him and to present evidence in his behalf, including himself as a witness. The decision whether defendant will testify is a choice between mere passivity at trial and active participation through which the defendant can inject his own acts, voice and personality into the process. **Taking the stand is the defendant's opportunity, if he wants it, to face his accusers and the jury, tell his story, submit to examination, and exercise such ability as he may have to persuade those who will make a decision that may vitally affect his life.** And the witness box gives the defendant a forum to speak to a world larger than the courtroom. Considerations such as these make the right to testify fundamental to the fairness, the dignity and the vitality of the twentieth century judicial process.

572 F.2d 1081 (emphasis added).

Judge Godbold also noted that the right to testify is a personal right, designed to prevent the individual from being overcome by the criminal process, rather than a right concerned with the ultimate consequences of the trial, making a harmless error review, which focuses on the outcome of the case, inappropriate. 572 F.2d. 1081.

Judge Godbold also argued that while a harmless error analysis is appropriate when the testimony of a mere witness is excluded, the testimony of the defendant is a different matter:

Where the error is in keeping the defendant from the stand the judge can consider the content of what the defendant might have said the same as for a nonparty witness. **But he cannot weigh the possible impact upon the jury of factors such as the defendant's willingness to mount the stand rather than avail himself of the shelter of the Fifth Amendment, his candor and courtesy (or lack of them), his persuasiveness, his respect for court processes.** These are elusive and subjective factors, even among persons who might perceive and hear the defendant, but more significantly, they are matters neither communicated to an appellate judge nor susceptible of communication to him. **Appellate attempts to appraise impact upon the jury of such unknown and unknowable matters is purely speculative.**

Because we cannot truly judge the effect of the defendant's being denied the right to take the stand, and because we should be concerned with protecting both the right to choose whether to testify and the substance of the testimony, I suggest that the majority's reliance on *Chapman* is entirely misplaced. To apply such an outcome-determinative analysis at worst denigrates the position of the individual with respect to his own defense and trial and at best exhibits an unthinking paternalism toward criminal defendants.

572 F.2d 1082 (emphasis added).

Because the effect of the exclusion of the defendant's testimony on the outcome of a trial is unknowable and because the defendant's right to testify is fundamental, both to the fairness of the proceeding and to the recognition of the dignity of the individual, its denial transcends mere trial error. This Court should hold that the denial of the

defendant's right to testify is structural error which requires automatic reversal of Reginald Carr's convictions of capital murder and the related charges, and his sentence of death.

II. The harmless error analysis employed by the Kansas Supreme Court to affirm Reginald Carr's convictions and sentence of death was contrary to this Court's firmly established precedent in *Chapman v. California*, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967).

a. The Kansas Supreme Court failed to correctly apply the Chapman constitutional harmless error analysis.

“The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence ... and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.” *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 89 L.Ed.2d 674, 106 S.Ct.1431 (1986). The exclusion of Reginald Carr's testimony and entire defense cannot be called immaterial error, nor can this trial be considered a fair process to determine his guilt or innocence, or the appropriate punishment. Rather, the complete exclusion of his defense rendered the trial an “unreliable vehicle for determining guilt or innocence.” *Neder*, 527 U.S. 9.

The prosecution, as the beneficiary of the constitutional error in this case, was required to show, beyond a reasonable doubt, that there was no reasonable possibility that the combined effect of the denial of Reginald Carr's right to testify and right to present his defense contributed to his convictions. *Chapman*, 386 U.S. 24. The Kansas Supreme

Court determined that the prosecution made that showing - with regard to the guilt phase - by copying the prosecution's recitation of its evidence from the prosecution brief and concluding that it was overwhelming. *Carr I*, 300 Kan. 211. The Court followed the same route later, with regard to the penalty phase, once again copying the prosecution's brief. *Carr II*, 314 Kan. 728-729. But the *Chapman* test is not a sufficiency test: "The question, however, is not whether the legally admitted evidence was sufficient ... but rather, whether the [prosecution] has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Satterwhite v. Texas*, 486 U.S. 249, 258-59, 100 L.Ed.2d 284, 108 S.Ct. 1792 (1988) quoting *Chapman*, 386 U.S. 24. To make that determination, the error must be "quantitatively assessed in the context of other evidence presented." *Arizona v. Fulminate*, 499 U.S. 308. In reviewing for harmless error, the Kansas Supreme Court failed to consider the evidence as a whole, which included evidence supporting Reginald Carr's proposed defense that he had been misidentified.

As in this case, *Holmes v. South Carolina*, 547 U.S. 319, 321, 164 L.Ed.2d 503, 126 S.Ct. 1727 (2006) concerned the trial court's exclusion of defense evidence on the grounds of a state third-party evidence rule. The rule in question prohibited the defendant from offering evidence of third-party guilt if the prosecution had introduced forensic evidence that, if believed, strongly supported a guilty verdict. This Court found the rule violated the defendant's right to have a meaningful opportunity to present a complete defense and reversed. 547 U.S. 331. The constitutional flaw with the rule was that it focused on the strength of the prosecution's case, instead of the probative value of the

defendant's proffered evidence, and the rule did not call for an examination of the reliability of the prosecution's evidence. *Holmes*, 547 U.S. 329.

The rule applied in this case appears to be based on the following logic: Where (1) it is clear that only one person was involved in the commission of a particular crime and (2) there is strong evidence that the defendant was the perpetrator, it follows that evidence of third-party guilt must be weak. But this logic depends on an accurate evaluation of the prosecution's proof, and the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence. Just because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case. And where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact and that the South Carolina courts did not purport to make in this case.

The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.

547 U.S. 330-331 (emphasis added).

The *Holmes* reasoning demonstrates the flaws in the Kansas Supreme Court's harmless error analysis. The court considered only the strength of the prosecution's case, without considering the nature of the evidence proffered by Reginald Carr, or the weaknesses in the prosecution's case, which supported his defense of misidentification. As in *Holmes*, just because the prosecution's evidence, if credited, provides strong support for a guilty verdict, it does not follow that Reginald Carr's defense would have made no difference.

b. The correct inquiry for harmlessness in this type of constitutional error is found in this Court's opinion in Delaware v. Van Arsdall, 475 U.S. 673, 681, 89 L.Ed.2d 674, 106 S.Ct. 1431 (1986).

In *Van Arsdall*, a case involving denial of the defendant's Sixth Amendment Right to Confrontation, this Court found that the improper denial of a defendant's opportunity to impeach a witness for bias was subject to harmless error review, and stated:

The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

475 U.S. 684.

The error in *Van Arsdale* prevented the defendant from presenting evidence to the jury, just as in this case. The factors this Court cited for the correct inquiry should be used in this case as well. The prosecution cannot show, beyond a reasonable doubt that if Reginald Carr had been allowed to testify and defend himself, and if the beneficial potential of his evidence were fully realized, his testimony would have made no difference.

The *Van Arsdale* factors support this assertion. First, his testimony was not only crucial to his defense, it was his complete defense, and cumulative to no other evidence. Next, his testimony would have explained much of the circumstantial evidence against him: how he came to drive by the Birchwood residence while the police were on the scene; how he came into possession of some of the stolen property; how a small amount of one victim's blood came to be on his clothing; and, the presence of a second intruder, in addition to Jonathan Carr. Finally, his claim that he was misidentified is corroborated

by the lack of DNA evidence - his DNA was at neither crime scene, nor was it on the oral swab taken from the surviving witness who testified that he ejaculated in her mouth. In contrast, Jonathan Carr's DNA was present at the crime scene and detected on the oral swab. His claim is further corroborated by the surviving witness' failure to identify him as one of the intruders at the preliminary hearing (she identified Jonathan Carr) and her testimony that she identified Reginald Carr from a photographic array that did not contain his photograph (it contained Jonathan Carr's photograph). The lower court failed to consider any of this evidence, and, in fact, it is not even mentioned in the court's opinion.

Instead of considering the evidence that the trial court's constitutional error prevented the jury from hearing, and its potential impact on either the guilt or penalty phase verdicts, the Kansas Supreme Court simply declared the State's evidence overwhelming - and in the absence of Reginald Carr's testimony and defense, it certainly was.

Additionally, given the nature of the constitutional error - the denial of his right to testify - the court should have considered how Reginald Carr's involuntary silence in the face of the accusations against him likely prejudiced him in the eyes of the jury. Although the defendant has the right to decline to testify at his or her trial, a jury might infer guilt from the defendant's silence during the proceedings. *Carter v. Kentucky*, 450 U.S. 288, 301, 67 L.Ed.2d 241, 101 S.Ct. 1112 (1981). Many view the Fifth Amendment privilege as "a shelter for wrongdoers," and assume that those who invoke it are guilty. 450 U.S. 302.

Reginald Carr's jury did not know that his silence at trial was based, not on his desire to shelter behind his Fifth Amendment rights, but on the trial court's erroneous evidentiary rulings which prevented him from testifying. The jurors only knew that, in the face of accusations that he had committed a host of violent offenses, he rested on his presumption of innocence. No doubt those jurors assumed that if he could have denied, rebutted or explained the evidence against him, he would have done so.

c. The Kansas Supreme Court's harmless error analysis did not comply with this Court's mandate that capital proceedings meet a heightened standard of reliability.

In capital cases, this Court demands that "factfinding procedures aspire to a heightened standard of reliability" as a "natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." *Ford v. Wainwright*, 477 U.S. 399, 411, 91 L.Ed.2d 335, 106 S.Ct. 2595 (1986). "[I]f the Constitution renders the fact...of [the defendant's] execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being." *Ford*, 477 U.S. 411. "To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' ...[this Court has]...invalidated procedural rules that tended to diminish the reliability of the sentencing determination. [Footnote omitted]. The same reasoning must apply to rules that diminish the reliability of the guilt determination." *Beck v. Alabama*, 447 U.S. 625, 638, 65 L.Ed.2d 392, 100 S.Ct. 2382 (1980).

The trial court's erroneous evidentiary rulings deprived Reginald Carr of his only opportunity to deny that he committed the crimes he was charged with and to explain the

evidence against him. Then, the Kansas Supreme Court validated the result of the trial by violating this Court's mandate in *Chapman*, when it considered, in its harmless error analysis, only the strengths of the prosecution's case. As a result, the appellate review of Reginald Carr's sentence of death failed to obtain the heightened reliability required for death penalty proceedings.

The harmless error doctrine is an embodiment of the fundamental premise that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Van Arsdall*, 475 U.S. 681. Clearly, Reginald Carr did not receive a fair trial. For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari, and determine that the harmless error analysis in this case was contrary to this Court's precedent and failed to meet the standard of reliability required for capital cases.

III. The United States Constitution does not support the conviction and execution of Reginald Carr, who was prevented - by erroneous trial court rulings - from denying, explaining or rebutting the allegations made against him.

a. Reginald Carr was convicted and condemned on the basis of evidence that he had no opportunity deny, rebut or explain, in violation of the Due Process Clause of the Sixth and Fourteenth Amendments.

The Sixth Amendment to the United States Constitution grants "the right in an adversary criminal trial to make a defense as we know it." *Faretta*, 422 U.S. 818. The Due Process Clause of the Fourteenth Amendment requires that criminal prosecutions "comport with prevailing notions of fundamental fairness" and "that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v.*

Trombetta, 467 U.S. 479, 485, 81 L.Ed.2d 413, 104 S.Ct. 2528 (1984). The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. *Chambers v. Mississippi*, 410 U.S. 284, 294, 35 L.Ed.2d 297, 93 S.Ct. 1038 (1973). The Due Process Clause of the Fourteenth Amendment protects the accused's right to "a fair ascertainment of guilt or innocence. Inherent in the notion of fairness is ample opportunity to meet an accusation." *Carter v. Illinois*, 329 U.S. 173, 174, 91 L.Ed.172, 67 S.Ct. 216 (1946). It is simply a broad "premise that has never been doubted in our constitutional system: that a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend." *Jackson v. Virginia*, 443 U.S. 307, 314, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, ... or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, ... the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' ... an essential component of procedural fairness is an opportunity to be heard." (internal citations omitted). *Crane v. Kentucky*, 476 U.S. 683, 690, 90 L.Ed.2d 636, 106 S.Ct. 2142 (1986).

"At common law no man was condemned without being afforded opportunity to be heard." *Hovey v. Elliott*, 167 U.S. 409, 415, 42 L.Ed. 215, 17 S.Ct. 841 (1897). Due process of law is denied "when ...[a]...death sentence ...[is]...imposed, at least in part, on the basis of information which ...[a defendant]...had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362, 51 L.Ed.2d 393, 97 S.Ct.1197 (1977).

In *Gardner*, this Court found a due process violation when a judge sentenced the defendant to death relying in part on information in a presentence report that had not been disclosed to the defense. 430 U.S. 352. The defendant had no opportunity to rebut the allegations in the report. Reginald Carr had no opportunity, because of trial court error, to rebut the allegations which formed the basis of both the charges against him, and the aggravating circumstances that the prosecution claimed warranted his execution. See, *Skipper v. South Carolina*, 476 U.S. 1, 90 L.Ed.2d 1, 106 S.Ct. 1669 (1986) (due process requires admission of defendant's evidence in rebuttal to prosecution's aggravating circumstance).

b. It is appropriate for this Court to act as the court of last resort because Reginald Carr was sentenced to death after the erroneous exclusion of his defense in its entirety, then those judgments were affirmed by the Kansas Supreme Court by misapplying this Court's precedent.

The effect of the trial court's error in this case was extreme. Not only was Reginald Carr erroneously prevented from taking the witness stand, offering his defense in his own words, and answering the prosecution's questions, the trial court's errors excluded his defense in its entirety. Then he was sentenced to death, based on the allegations that he was prevented from answering. Under these circumstances, it is not contrary to this Court's mission to act as the court of last resort and review this case to correct the state court's determination that the erroneous and complete exclusion of Reginald Carr's testimony and defense was harmless as to the guilt and/or penalty phase verdicts.

This Court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Kyles v. Whitley*, 514 U.S. 419, 422, 131 L. Ed.2d 490, 115 S. Ct. 1555 (1995) citing *Burger v. Kemp*, 483 U.S. 776, 785, 97 L.Ed.2d 638, 107 S.Ct. 3114 (1987). In *Kyles*, this Court reversed the defendant's conviction after a close examination and evaluation of the facts of the case. In a concurring opinion, joined by Justice Ginsburg and Justice Breyer, Justice Stevens addressed the dissent position that certiorari should not have been granted, as it was a case in which a correct view of the law was incorrectly applied to the facts:

Our duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case, even though our labors may not provide posterity with a newly minted rule of law. The current popularity of capital punishment makes this ... especially important. ... I wish such review were unnecessary, but I cannot agree that our position in the judicial hierarchy makes it inappropriate. Sometimes the performance of an unpleasant duty conveys a message more significant than even the most penetrating legal analysis.
514 U.S. 455-456.

See, United States v. Hasting, 461 U.S. 499, 510, 76 L.Ed.2d 96, 103 S.Ct. 1974 (1983) ("Although we are not required to review records to evaluate a harmless error claim, and do so sparingly, we plainly have the authority to do so.")

In this case, the trial court's errors struck at the heart of fundamental due process: "The right to be heard in open court before one is condemned..." *In re Oliver*, 333 U.S. 257, 278, 92 L.Ed. 682, 68 S.Ct. 499 (1948). "A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." *Hovey*, 167 U.S. 414. Because of the extraordinary failure of the judicial process in this death

penalty proceeding, this Court should grant certiorari to correct the error of the lower courts.

Should this Court not act, Reginald Carr will be forced to seek relief by way of post-conviction review. On direct review, the burden is on the prosecution, as the beneficiary of the error, to show that the trial court error was harmless beyond a reasonable doubt: that there is no reasonable possibility that the error contributed to the verdict. *Chapman*, 386 U.S. 24. But should this Court deny review, the burden will shift to Reginald Carr to prove the error resulted in actual prejudice: that it had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 638, 123 L.Ed.2d 353, 113 S.Ct. 1710 (1993). Given the failure of the courts, to this point, to honor his right to testify and to make a defense when on trial for his life, this would heap another injustice on him.

c. The denial of Reginald Carr's right to defend was not harmless as to the guilt phase and/or the penalty phase of his capital trial.

Under the *Van Arsdall* rubric for constitutional harmless error review, the prosecution cannot show, beyond a reasonable doubt, that the exclusion of Reginald Carr's testimony and his defense in its entirety did not affect the verdicts the prosecution obtained against him for the capital offense and related crimes.

If Reginald Carr had been allowed to testify and defend himself, if the beneficial potential of his evidence were fully realized, his testimony would have created reasonable doubt in the guilt phase. The jury did not hear Reginald Carr's account of the events of the night of December 14, 2000. Highly summarized, his proffered testimony was that he

parted company with Jonathan Carr early in the evening, with no foreknowledge of any criminal activity. He learned of the crimes when Jonathan Carr called him and told him that his companion had shot some people, and asked for his help. When he met with Jonathan Carr and Jonathan Carr's companion, they had a truck full of stolen property. Jonathan Carr told him that they had stolen the property and killed some people. He gave Reginald Carr the address of the home invasion. This prompted Reginald Carr to drive by that address. He agreed to help Jonathan Carr and his companion, which is why he was arrested with some of the stolen property in his possession, and why he had a small amount of one victim's blood on his clothing.

Reginald Carr proposed to defend on the grounds that he had been misidentified. This defense was supported by the lack of any conclusive DNA evidence placing him at either crime scene (in contrast to Jonathan Carr who was connected to the crime scene through numerous DNA samples). This defense was supported by the surviving witness' failure to identify him at the preliminary hearing (once again in contrast to Jonathan Carr). This defense was supported by the surviving witness' belief that she had picked him from a photographic array that did not include his photograph. Finally, the defense is supported by the surviving witness' testimony that Reginald Carr ejaculated in her mouth - testimony contradicted by the fact that only Jonathan Carr's DNA was found on the oral swab.

The prejudice of the guilt phase error which prevented Reginald Carr from testifying and offering his defense continued into the penalty phase. Reginald Carr was denied due process when he was prevented from answering or rebutting the State's case

for death against him, which was based on the circumstances of the capital crimes. The jury found four aggravating circumstances with regard to each murder: that the defendant knowingly or purposely killed or created a great risk of death to more than one person; that the defendant committed the crime for the defendant's self or another for the purpose of receiving money or anything of monetary value; that the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution; and that the defendant committed the crime in an especially heinous, atrocious or cruel manner. *Carr II*, 314 Kan. 729. All these aggravating circumstances involve facts particular to the crimes, facts Reginald Carr was erroneously prevented from answering or rebutting.

It would violate the most basic principles of fairness and due process to execute Reginald Carr based on the particular circumstances of these crimes, after denying him the opportunity to defend himself against the allegations which the State claims justify his execution.

This error, standing alone, should require reversal of his sentence of death, without a harmless error review, just as this Court in *Gardner* reversed without reviewing for harmless error. 430 U.S. 362. Should this Court require a showing of prejudice, the prejudice to Reginald Carr, in the penalty phase, was first that he was deprived of the mitigating circumstance of residual doubt. This mitigating circumstance is supported by the deficiencies in the State's case against him, and would have been buttressed by his testimony explaining the evidence against him.

"Residual doubt" has been defined as "a lingering uncertainty about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute

certainty.’ ” *Franklin v. Lynaugh*, 487 U.S. 164, 188, 101 L.Ed.2d 155, 108 S.Ct. 2320 (1988). And while there is no constitutional right to a residual doubt instruction, 487 U.S. 175, or to present residual doubt evidence at a capital sentencing, *Oregon v. Guzek*, 546 U.S. 517, 163 L.Ed.2d 1112, 126 S.Ct. 1226 (2006), neither is there a constitutional ban on consideration of residual doubt as a mitigating factor. See, *Franklin*, 487 U.S. 173. And this Court recognized that where States are willing to allow the consideration of residual doubt, it will “inure to the defendant’s benefit.” *Franklin*, 487 U.S. 173, citing *Lockhart v. McCree*, 476 U.S. 162, 181 90 L.Ed.2d 137, 106 S.Ct. 1758 (1986).

Kansas is one of the jurisdictions that allow residual doubt to be considered. *Carr II*, 314 Kan. 728 (trial error arguably lessened the chance a juror would have possessed residual doubt of Reginald Carr’s guilt during the penalty phase.); *State v. Kleypas*, 272 Kan. 894, 994–95, 40 P.3d 139 (2001)(noting defendant could benefit from residual doubt concerning his guilt during the penalty phase in upholding the trial court’s denial of the defendant’s request for a separate sentencing jury)(*overruled in part on other grounds State v. Marsh*, 278 Kan. 520, 102 P.3d 445 (2004)). See also, *Chandler v. United States*, 218 F.3d 1305, 1320 (11th Cir. 2000)(trial counsel’s focus on residual doubt at sentencing was reasonable trial strategy); *State v. Hartman*, 42 S.W.3d 44, 47 (Tenn. 2001)(trial court erred in refusing to allow the defendant to present evidence relevant to establish residual doubt as a mitigating circumstance); *Head v. Ferrell*, 274 Ga. 399, 405, 554 S.E.2d 155 (2001)(mitigating evidence is anything that might persuade a jury to impose a sentence less than death, mitigation theory of reasonable doubt was reasonable); *People v. Thompson*, 45 Cal. 3d 86, 134–35, 753 P.2d 37 (1988), *as*

modified on denial of reh'g (June 23, 1988)(defendant may call upon residual doubt in the penalty phase).

This Court's observation in *Lockhart*, that under a unitary jury capital system, the defendant could benefit, at the sentencing phase, from residual doubts formed during the guilt phase, is borne out by empirical data. See, Geimer and Amsterdam, Why Jurors Vote for Life or Death: Operative Factors in Ten Florida Death Penalty Cases, 15 *Am.J.Crim.L.* 1, 28, Fall/Winter 1987-1988 ("Lingering Doubt - The existence of some degree of doubt about the guilt of the accused was the most often recurring explanatory factor in the life recommendation cases studied. Sixty-nine percent of the jurors interviewed identified it as explaining the recommendation."). See also, Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 *Colum. L. Rev.* 1538, 1563, October 1998. ("Residual doubt' over the defendant's guilt is the most powerful 'mitigating' fact. ... [T]he best thing a capital defendant can do to improve his chances of receiving a life sentence has nothing to do with mitigating evidence strictly speaking. The best thing he can do, all else being equal, is to raise doubt about his guilt."). The Arizona Supreme Court has recognized:

"[C]onviction beyond reasonable doubt is not beyond all doubt. While beyond a reasonable doubt may be an adequate standard for the guilt phase of a capital case, absolute certainty may be a more appropriate standard for the imposition of the death penalty. As a practical matter, any trial judge who entertains any doubt about the defendant's guilt, even though not sufficient to warrant a new trial...is likely to sentence the defendant to a life term..."

State v. Harrod, 200 Ariz. 309, 26 P.3d 492, 500 fn.7 (2001).

As discussed earlier, there was room for residual doubt about Reginald Carr's guilt. While Jonathan Carr left his DNA on the victims and at the crime scene, the only strong DNA match connecting Reginald to the Birchwood crimes was a small amount of one victim's blood on his clothing. His defense would have explained how it could have been transferred from contact with the stolen property. While the surviving witness' identification of Jonathan Carr was unassailable, her identification of Reginald Carr, as explained previously, was problematic. If the jury had the opportunity to consider these weaknesses in the State's case against Reginald Carr, *in conjunction with his defense*, this could have led the jury to, if not an acquittal, a life sentence based on residual doubt.

Second, the prosecution cannot prove beyond a reasonable doubt that his silence did not have an impact on the jury's "reasoned moral response" to his "background, character and crime." *Penry*, 492 U.S. 319. Because of the trial court's error, which kept him from testifying, he was not able to tell his account to the jury. There is simply no way to know how his demeanor, his responses to the prosecution's questions could have moved the jury; rather, he was forced to be an unwillingly silent spectator at the trial for his life.

This was truly a situation in which it was "the accused, who above all others [was] in a position to meet the prosecution's case." *Ferguson v. Georgia*, 365 U.S. 570, 582, 5 L.Ed.2d 783, 81 S.Ct. 756 (1961). The trial court's erroneous rulings deprived Reginald Carr of his only defense to the crime of capital murder and the associated offenses and made his trial fundamentally unfair. He was inaccurately perceived by the jury as a defendant who had decided that his best defense was to shelter in the protection of the

Fifth Amendment and make the prosecution prove its case. He was inaccurately perceived by the jurors as a defendant who had nothing whatsoever to say in his own defense. The jurors did not know that he was ready and willing to face the prosecutor's cross-examination and give his evidence. The fact-finding process was fatally prejudiced in both the guilt and penalty phases of this capital trial by the trial court's erroneous rulings, rendering unreliable results in both phases. Then, those results were ratified by the Kansas Supreme Court, through a misapplication of federal constitutional harmless error review.

CONCLUSION

For the foregoing reasons, your Petitioner respectfully prays this Court issue a writ of certiorari to the Supreme Court of Kansas:

(1) to settle the split in authority and hold that denial of the defendant's right to testify as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution is structural constitutional error, requiring automatic reversal of Reginald Carr's convictions.

(2) to correct the lower court's misapplication of the federal constitutional harmless error analysis, as set out in *Chapman v. California*.

(3) to correct the denial of Due Process that occurred when Reginald Carr was convicted and condemned based on allegations he had no opportunity to deny, rebut or explain.

Respectfully submitted,



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