No. 22-5218

IN THE SUPREME COURT OF THE UNITED STATES

REGINALD DEXTER CARR, JR.,

Petitioner,

v.

STATE OF KANSAS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Kansas

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Were the trial court's erroneous evidentiary rulings structural error requiring automatic reversal?

2. Did the Kansas Supreme Court correctly determine that the trial court's erroneous evidentiary rulings were harmless?

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STATEMENT

1. Petitioner Reginald Carr, Jr., and his brother Jonathan Carr are "two of the most brutal and coldblooded killers in the history of Kansas." Pet. App. C, 59. (Stegall, J., concurring). The details of the brothers' "Wichita Massacre" are well summarized by Justice Scalia in this Court's opinion in *Kansas v. Carr*, 577 U.S. 108, 112-14 (2016), and are recounted in more detail in the Kansas Supreme Court's opinion in *State v. Carr*, 331 P.3d 544, 575-81 (Kan. 2014), *rev'd and remanded*, 577 U.S. 108.

The Carr brothers' "crime spree" started on December 7, 2000, when Petitioner and another man carjacked Andrew Schreiber. Pet. App. B, 3. While pointing a gun at Schreiber's head, the men forced Schreiber to drive to multiple ATMs and withdraw cash from his bank account. Pet. App. A, 9-11; B, 3. They hit him in the head multiple times. Pet. App. A, 9-10. They also took his watch. Pet. App. A, 10. When Schreiber's account ran out of funds, the men abandoned him in a remote location. Pet. App. A, 10. Before leaving him, they shot his tires. Pet. App. A, 10-11.

On December 11, the Carr brothers fatally shot Linda Ann Walenta, a cellist for the Wichita symphony. Pet. App. B, 3. The brothers followed Walenta home from orchestra practice that night. Pet. App. B, 3. After Walenta pulled into her driveway, one of the brothers approached her car and asked for help. Pet. App. A, 11; B, 3. Walenta rolled down her window, and the brother pointed a gun at her head. Pet. App. B, 3. Walenta put her car in reverse in an attempt to escape. Pet.

App. B, 3. The brother shot her three times in the head and then fled the scene. Pet. App. B, 3. One of the bullets severed Walenta's spine, rendering her paraplegic. Pet. App. A, 11; B, 3. She died in the hospital one month later. Pet. App. B, 3.

On December 14 and 15, the Carr brothers committed a series of robberies, rapes, acts of torture, and murders against five young friends: Aaron S., Brad H., Heather M., Holly G., and Jason B. Pet. App. A, 11-15; B, 3-4. At around 10:30 p.m. on December 14, the Carr brothers burst into a home at 12727 Birchwood shared by Aaron, Brad, and Jason. Pet. App. A, 11; B, 3. Heather (Aaron's friend) and Holly (Jason's girlfriend) were also in the home that night. Pet. App. B, 3. As was Holly's dog, Nikki. Pet. App. A, 11; B, 4. Armed with guns and a golf club, the Carr brothers ordered the friends to strip naked and forced them into a closet in Jason's bedroom. Pet. App. A, 12; B, 3. The friends were threatened not to speak to each other. Pet. App. A, 12.

The brothers then ordered Holly and Heather to go to the area outside of Jason's bedroom. Pet. App. A, 12. The brothers ordered the women to perform various sex acts on each other as the brothers watched and told them what to do. Pet. App. A, 12; B, 3. At one point, one of the brothers hit Holly's knee so he could have a better view. Pet. App. A, 12. The brothers then ordered Aaron, Brad, and Jason out of the closet one-by-one to have sex with Holly. Pet. App. A, 12; B, 3. Aaron initially refused, and one of the brothers hit him in the back of the head with something hard. Pet. App. A, 12. After crying out in pain, Aaron attempted to comply. Pet. App. A, 12. The brothers then ordered the three men to have sex with

Heather. Pet. App. A, 12; B, 3. Aaron again told the brothers he did not want to. Pet. App. A, 12. The brothers told the men that if the lack of an erection prevented them from having sex with the women, they would be shot. Pet. App. B, 3. Fearful for her boyfriend's life, Holly tried to help Jason achieve an erection before he was ordered out of the closet to have sex with Heather. Pet. App. B, 3.

Petitioner then took Brad, Jason, Holly, and Aaron one-by-one to ATMs around Wichita to withdraw cash. Pet. App. B, 3. While Petitioner was at the ATM with Brad, his brother snatched Holly from the closet. Pet. App. A, 13; B, 3. Setting his gun between her knees on the floor, he ordered her to perform sex acts on herself. Pet. App. B, 3. Then he raped her. Pet. App. B, 3. Then he raped Heather. Pet. App. B, 3. The others could hear from the closet. Pet. App. A, 13.

When Petitioner forced Holly to the ATM, she was wearing only a sweatshirt. Pet. App. A, 13. As she leaned out of the car to take the cash from the ATM, Petitioner groped her vagina with his gloved hand. Pet. App. A, 13. Petitioner told Holly as they were returning to the Birchwood home that "it was too bad they had not met under other circumstances because she was kind of cute and they could have dated." Pet. App. A, 13. He also asked Holly if being raped by his brother was better than having sex with her boyfriend. Pet. App. A, 13.

While Petitioner was at the ATM with Aaron, his brother found an engagement ring Jason had purchased for Holly and hidden in his bedroom. Pet. App. A, 13; B, 3-4. He had yet to propose with it. Petitioner's brother pointed a gun

at Jason's head and forced him to identify the engagement ring while Holly listened from the closet. Pet. App. B, 4.

When Petitioner had returned from his several ATM trips, he forced Holly into the dining room and ordered her to get down on all fours. Pet. App. A, 13-14; B, 4. Petitioner raped Holly from behind before spinning her around, ejaculating into her mouth, and ordering her to swallow. Pet. App. A, 14; B, 4. Petitioner's brother, meanwhile, raped Heather (again) in a bathroom. Pet. App. B, 4. Holly stumbled into the bathroom as Heather was being raped. Pet. App. A, 14. Petitioner's brother shut the door, telling Holly he was not finished. Pet. App. A, 14. Holly waited outside the bathroom for a few minutes and then opened the door again. Pet. App. A, 14. Petitioner's brother ordered her into the bathroom, where he raped her (again). Pet. App. A, 14.

At around 2:00 a.m., the brothers drove the five friends to a snow-covered soccer field. Pet. App. A, 14; B, 4. Petitioner drove Jason's truck, with Holly in the cabin. Pet. App. A, 14; B, 4. Petitioner's brother drove Aaron's car, with Heather in the cabin and the three men in the trunk. Pet. App. A, 14; B, 4. At the soccer field, the brothers ordered the five friends to exit the vehicles and kneel in the snow. Pet. App. B, 4. The brothers shot the friends one-by-one, execution-style in the back of the head. Pet. App. A, 14; B, 3. Holly was the final friend shot. Pet. App. B, 4. Because a hairclip she was wearing deflected the bullet, it did not hit her brain and she did not die. Pet. App. A, 15; B, 4. Seeing that Holly was still kneeling, the brothers kicked her so that she fell face-first into the snow. Pet. App. B, 4. In an

attempt to make sure that Holly was dead, the brothers drove over her in Jason's truck. Pet. App. B, 4. The brothers then returned to the Birchwood home, where they ransacked it for valuables and beat Holly's dog to death with a golf club. Pet. App. B, 4.

Despite being shot in the head and run over by a truck, Holly remained alive and conscious. She waited for the truck's lights to disappear into the distance before getting up to check on her friends. Pet. App. A, 14. Holly removed her sweater (the only piece of clothing she had on) and tied it around Jason's head to stop the bleeding from his eye. Pet. App. A, 14; B, 4. Searching for help, Holly spotted a house with Christmas lights on it. Pet. App. B, 4. Holly ran more than a mile through the snow to the house, "naked, skull shattered, and without shoes." Pet. App. B, 4; *see* Pet. App. A, 15. When she eventually made it to the house and pounded on the door, a man answered. Pet. App. B, 4. Holly told the man what had happened. Pet. App. B, 4. They called 911 at 2:37 a.m. Pet. App. A, 15. Afraid she was not going to survive, Holly quickly relayed what had happened to the 911 operator. Pet. App. B, 4.

Holly was taken to a local hospital for treatment. Pet. App. A, 15. Foreign material on Holly's thigh was tested and excluded everyone from the Birchwood home as its source except for her and both Carr brothers. Pet. App. A, 19. A few months later, Holly learned that she had HPV (Human papillomavirus), which can cause genital warts. Pet. App. A, 20. Evidence presented at trial showed that Petitioner had genital warts. Pet. App. A, 20.

While Holly was in the hospital on December 15, police found the bodies of the other four friends in the soccer field where they had been shot. Pet. App. A, 15. Neither Heather nor Jason had a pulse. Pet. App. A, 15. Aaron and Brad appeared to be struggling to breathe. Pet. App. A, 15. All four of them ultimately died of gunshot wounds to the head. Pet. App. A, 19.

Police arrived at the Birchwood home at approximately 3 a.m. to investigate. Pet. App. A, 15. The home had been ransacked, and large electronics had plainly been taken. Pet. App. A, 15-16. In Jason's bedroom, there was a large pool of blood on the bed and a dead dog next to it on the floor. Pet. App. A, 16. Footprints found on items under Jason's bed matched the soles of Petitioner's boots. Pet. App. A, 21. At around 4 a.m., police observed a white car drive by the Birchwood home. Pet. App. A, 16. A few minutes later, it drove by again. Pet. App. A, 16. Police stopped the car as it was driving away from the Birchwood home. Pet. App. A, 16. Petitioner was the driver. Pet. App. A, 16. He identified himself, and the police let him go. Pet. App. A, 16.

Both brothers were arrested on December 15. Pet. App. A, 17-18. Petitioner attempted to flee the apartment he was in by preparing to jump off the balcony but was ultimately arrested. Pet. App. A, 17. At the time of his arrest, he possessed Jason's gas card, Heather's watch, and $996 ($980 of it in $20 bills). Pet. App. A, 17. The apartment he was in at the time had numerous additional items belonging to the five friends, including Brad's television, Jason's checkbook, Aaron's garment bag, Holly's credit card, Aaron's computer equipment, and Brad's wallet. Pet. App.

A, 17. A pair of red undershorts with Heather's blood on them were lying on the bathroom floor, and a white t-shirt with Heather's DNA on it was lying on the sofa. Pet. App. A, 19. A DNA test of a gray t-shirt also lying on the sofa excluded everyone at the Birchwood home except for Heather. Pet. App. A, 19. Elsewhere in the apartment, police found Schreiber's watch and bank receipts from just after midnight bearing Brad's name. Pet. App. A, 17. Jason's truck was outside the apartment, and a comforter from the Birchwood home was in a nearby dumpster. Pet. App. A, 16-17.

2. The State charged each brother with a slew of felonies—including rape, aggravated criminal sodomy, aggravated kidnapping, first-degree felony murder, and capital murder. Pet. App. B, 4.

A few weeks before trial, the State filed two motions in limine seeking to prevent introduction of (1) out-of-court statements made by either brother unless a hearsay exception applied and (2) evidence of any third party's guilt for the Birchwood crimes, under the third-party evidence rule. Pet. App. A, 42, 90-91. The trial court granted both motions. Pet. App. A, 91.

The brothers were tried together. Pet. App. B, 4. In his opening statement, Petitioner's counsel stated that "the DNA evidence will show that Jonathan Carr, not Reginald Carr, Jonathan Carr committed most, if not all of the crimes which are alleged in the complaint and that he did it with a third black male who still walks the streets of Wichita." Pet. App. A, 92. The State objected to the statement, and the trial court sustained the objection. Pet. App. A, 92. The State later moved for

sanctions, and Petitioner's brother moved for a mistrial. Pet. App. A, 92-93. The trial court denied the motion for a mistrial but deemed the remarks "misconduct." Pet. App. A, 93.

The State put on a "mountain of evidence," Pet. App. A, 104, against Petitioner, including:

- Holly's "identification of [Petitioner], both immediately following the attack and at trial";
- "mitochondrial DNA analysis," which revealed that Petitioner "could not be excluded as the donor" of two of the four hairs collected from the Birchwood home;
- "nuclear DNA test results" that revealed Petitioner "could not be excluded as the donor of the DNA evidence recovered from [Holly's] inner thigh";
- "nuclear DNA test results" that "identified the blood on [Petitioner's] shirt and underwear as that of [Heather]";
- "medical evidence, which demonstrated that a few short months after the attack [Holly] developed the same sexually transmitted disease that [Petitioner] carried";
- "footwear impressions taken from a Voicestream box and tarp at the Birchwood residence" that "match[ed] the size, shape, and character of the 'B-Boots' [Petitioner] wore";
- "[a] cigar-type ash" that was found at the Birchwood home that "matched the diameter of the cigar recovered from [Petitioner's] coat pocket" when he was arrested;
- Petitioner's "possession of a vast majority of the property taken from the Birchwood residence," including "a big screen TV, various electronics, bedding, luggage, a vast amount of clothing, and numerous personal items belonging to each victim—including checkbooks, wallets, credit cards, drivers' licenses, sets of keys, gas cards, watches, and day planners—as well as numerous ATM receipts and just under $1000.00 in cash";

- the fact that Petitioner "was stopped by law enforcement officers after driving by the Birchwood residence at approximately 4:00 a.m. on the morning of the killings"; and
- Petitioner's "link to the Lorcin handgun used in the commission of the murders."

Pet. App. A, 102.

During Petitioner's case-in chief, his counsel told the trial court that Petitioner was weighing whether to testify. Pet. App. A, 93. Petitioner's counsel made an oral proffer of the testimony so that the trial court could determine its admissibility. According to Petitioner's counsel, Petitioner would testify that he and his brother parted ways on December 14 before the Birchwood crimes and that the Birchwood crimes were committed by Petitioner's brother and an "unknown, uncharged black male." Pet. App. A, 93-94. Petitioner would also testify that he received three calls from his brother during and shortly after the Birchwood crimes in which his brother was distraught, discussed the crimes, and made plans regarding the stolen property. Pet. App. A, 94. The trial court determined that the testimony was inadmissible hearsay, and Petitioner decided not to testify at trial. Pet. App. A, 95.

The jury ultimately convicted each brother of a long list of felonies, including capital murder. Pet. App. B, 4. Petitioner received 50 convictions. Pet. App. A, 8. For the Schreiber carjacking, the jury convicted Petitioner of one count of kidnaping, one count of aggravated robbery, one count of aggravated battery, and one count of criminal damage to property. Pet. App. B, 4. For the Walenta shooting, the jury convicted Petitioner of one count of first-degree felony murder. Pet. App. B, 4. For

the events that occurred in the Birchwood home, the jury convicted Petitioner of four counts of capital murder,[1] one count of attempted first-degree murder, five counts of aggravated kidnaping, five counts of aggravated robbery,[2] thirteen counts of rape, seven counts of attempted rape, three counts of aggravated criminal sodomy, one count of aggravated burglary, one count of burglary, one count of theft, and one count of cruelty to animals. Pet. App. A, 8-9; B, 4. And for the three incidents together, the jury convicted Petitioner of three counts of unlawful possession of a firearm. Pet. App. B, 4. Petitioner's brother was also convicted of four counts of capital murder and a slew of other violent felonies. Pet. App. B, 4.

The State sought the death penalty for each brother, and the brothers were sentenced together. Pet. App. B, 4. During the penalty phase, the State relied on the guilt-phase evidence already presented to the jury—including two days of testimony from Holly. Pet. App. B, 4. Each brother put on a case for mitigation. Pet. App. B, 4. The jury returned four separate verdicts of death for each brother. Pet. App. B, 4. The jury unanimously found the existence of four aggravating circumstances for each murder: "[1] that the defendants knowingly or purposely killed or created a great risk of death to more than one person; [2] that they committed the crimes for the purpose of receiving money or items of monetary value; [3] that they committed

[1] Petitioner's four capital murder convictions stemmed from eight alternative charged counts—four based on a related sex crime, and four based on multiple first-degree premeditated murders. Pet. App. A, 8.

[2] Four of Petitioner's aggravated robbery convictions stemmed from eight alternative charged counts—four based on use of a dangerous weapon, and four based on infliction of bodily harm. Pet. App. A, 9.

the crimes to prevent arrest or prosecution; and [4] that they committed the crimes in an especially heinous, atrocious, or cruel manner." Pet. App. B, 4. The jury also found unanimously that those four aggravating circumstances outweighed any mitigating circumstances. Pet. App. B, 4. As relevant here, in addition to his four death sentences, Petitioner was also sentenced to life with no parole for 20 years for his felony murder conviction and 570 months in prison (consecutive to the life sentence) for his other convictions. Pet. App. A, 9.

3. The brothers appealed to the Kansas Supreme Court, which vacated their death sentences under the Eighth Amendment to the U.S. Constitution. *See* Pet. App. A, 152 (Petitioner); *State v. Carr*, 329 P.3d 1195, 1214 (Kan. 2014) (Petitioner's brother), *rev'd and remanded*, 577 U.S. 108. Among other things, the Kansas Supreme Court held that the death sentences had to be vacated because the instructions used at sentencing violated the Eighth Amendment by "fail[ing] to tell the jury that mitigating factors need not be proved beyond a reasonable doubt." Pet. App. A, 146. It additionally held that the death sentences had to be vacated because the trial court's failure to sever the sentencing proceedings violated the "Eighth Amendment right to an individualized sentencing determination." Pet. App. A, 135. The Kansas Supreme Court also reversed three of each brother's capital murder convictions and several of each brother's other felony convictions. Pet. App. A, 9.

Each brother petitioned this Court in his case, and the State petitioned this Court in both cases. This Court denied the brothers' petitions, *Carr v. Kansas*, 575 U.S. 937 (No. 14-6810) (2015) (Petitioner); *Carr v. Kansas*, 575 U.S. 937 (No. 14-

7327) (2015) (Petitioner's brother), and granted the State's petitions, *Kansas v. Carr*, 575 U.S. 934 (No. 14-450) (2015) (Petitioner's case); *Kansas v. Carr*, 575 U.S. 934 (No. 14-449) (2015) (Petitioner's brother' case).

This Court ultimately reversed the Kansas Supreme Court by an 8-1 vote. Pet. App. B, 9. The Court first held that the Eighth Amendment "does not require capital sentencing courts 'to affirmatively inform the jury that mitigating circumstances need not be proved beyond a reasonable doubt.'" Pet. App. B, 6 (citation omitted). It then held that the brothers' joint sentencing proceedings did not violate the U.S. Constitution. *See* Pet. App. B, 7-9. This Court accordingly reversed the Kansas Supreme Court and remanded the brothers' cases for further proceedings. Pet. App. B, 9.

4. On remand in Petitioner's case, the Kansas Supreme Court considered "the penalty phase issues that remain unresolved following the decision of the United States Supreme Court." Pet. App. C, 6. Among those issues was whether cumulative error required reversal of Petitioner's death sentence. Pet. App. C, 54-58. And among those cumulative errors was the trial court's "erroneous application of Kansas' third-party evidence and hearsay rules, which prevented [Petitioner] from pursuing his defense to the Birchwood crimes."[3] Pet. App. C, 55.

The Kansas Supreme Court previously identified those evidentiary errors in its first opinion in Petitioner's case. There, the Kansas Supreme Court unanimously

[3] As the Kansas Supreme Court explained, this guilt-phase error is "put into the same 'error pot' as the penalty-phase errors" because "the same jury heard both the guilt and penalty phase[s]." Pet. App. C, 55.

determined that the trial court erred by excluding Petitioner's proffered testimony under the hearsay and third-party evidence rules. Pet. App. A, 95-100. Those errors, the court held, were a violation of Petitioner's "right to present his defense" that "effective[ly] preclu[ded] . . . his ability to testify to anything useful to the defense." Pet. App. A, 101. But the court also unanimously held that the violation did not require automatic reversal of "all of [Petitioner's] convictions on the Birchwood crimes." Pet. App. A, 100. The court explained that this Court "has held that denial of a defendant's right to present a defense is subject to the constitutional harmlessness standard." Pet. App. A, 102 (citing *Crane v. Kentucky*, 476 U.S. 683, 691 (1986)). It also noted that "the majority of courts that have considered the issue have applied a constitutional harmless error standard to denial of a defendant's right to testify." Pet. App. A, 102.

The court accordingly performed a harmlessness analysis and, "[g]iven the remarkable strength of the State's case against [Petitioner]," was "persuaded beyond a reasonable doubt that there was no impact on the trial's outcome from the exclusion of [Petitioner's] proffered testimony." Pet. App. A, 102. The court detailed the extensive evidence the State presented against Petitioner at trial, including eyewitness identifications, DNA and other biological evidence, evidence discovered at the scene of the crime, evidence discovered upon Petitioner's arrest, and gun evidence. Pet. App. A, 102; *see supra* 8-9. The court also held that cumulative error (including the trial court's misapplication of the third-party evidence and hearsay rules) did not require reversal of Petitioner's convictions. Pet. App. A, 121-23. As the

court put it, "any effort by either brother to suggest that he was not involved in the Birchwood crimes would be futile." Pet. App. A, 123.

On remand from this Court, the Kansas Supreme Court's analysis of the trial court's evidentiary errors was limited to its cumulative error analysis. The court held that cumulative error did not require reversal of Petitioner's death sentence.[4] The court again noted the trial court's "erroneous application of Kansas' third-party evidence and hearsay rules." Pet. App. C, 55. But it held that the "strength of the evidence establishing [Petitioner's] role and culpability in perpetrating these crimes left no room for any meaningful amount of residual doubt," even if those errors had not occurred and Petitioner had given his proffered testimony. Pet. App. C, 58.

REASONS FOR DENYING THE WRIT

The Petition is Petitioner's attempt at a second bite at the apple. After the Kansas Supreme Court's first opinion in this case, Petitioner sought this Court's review of, among other things, the Kansas Supreme Court's application of the harmless-error analysis to the same erroneous evidentiary rulings at issue here. Pet. 26, *Carr v. Kansas*, 575 U.S. 937 (No. 14-6810) (2015) (hereinafter "Prior Pet.") (asking whether "[t]he trial court's erroneous exclusion of the Petitioner's entire defense constituted structural error" and, in the alternative, whether "the erroneous exclusion of the Petitioner's entire defense was not harmless" (formatting altered)).

[4] The Kansas Supreme Court also affirmed Petitioner's brother's death sentence on remand. *State v. Carr*, 502 P.3d 511 (Kan. 2022). Petitioner's brother has a separate petition for certiorari pending before this Court in that case. *See Carr v. Kansas*, No. 22-5731.

This Court denied certiorari, refusing to take up Petitioner's arguments that such errors were in fact structural defects and that, even if the harmless-error analysis applied, the Kansas Supreme Court misapplied that analysis.

After the Kansas Supreme Court's opinion on remand—which did not expound on those issues—Petitioner parrots these same arguments in his present Petition to this Court. Once again, Petitioner is wrong. And once again, this Court should deny certiorari. This case does not present the Court with the opportunity to address the sole split Petitioner alleges. And Petitioner's second attempt to get this Court to correct the Kansas Supreme Court's factbound harmless error analysis is unconvincing.

I. This Case Does Not Present an Opportunity to Resolve Petitioner's Alleged Split Regarding Complete Denial of the Right to Testify.

Petitioner casts his first question presented as an opportunity for this Court to "settle the split in authority" regarding whether "denial of [a] defendant's right to testify . . . is structural constitutional error." Pet. 39. This Court, however, has previously declined to review similar questions. *See Nelson v. Wisconsin*, 575 U.S. 935 (No. 14-555) (2015) (declining to decide whether complete denial of the right to testify is structural error); *Fair v. United States*, 546 U.S. 1175 (No. 05-819) (2006) (declining to decide whether unknowing and involuntary waiver of the right to testify is subject to harmless-error analysis). Indeed, this Court previously declined to review whether the very evidentiary errors at issue in this case were structural defects. *See* Prior Pet. 29 (arguing that this Court should "find that the court[']s

erroneous decision significantly limiting [Petitioner's] right to testify is a structural error which requires reversal").

This Court should again deny certiorari here for two reasons. *First*, the split Petitioner alleges involves materially different circumstances that were not present here. Whereas Petitioner was given the opportunity to present testimony (albeit restricted by the trial court's erroneous evidentiary rulings) and chose not to, the cases Petitioner relies on involve defendants who were prevented or prohibited from testifying altogether. Petitioner's alleged split therefore is not implicated here. *Second*, the Kansas Supreme Court did not hold that Petitioner's right to testify was violated. This poses a threshold problem that would complicate (or even prevent) this Court's review of Petitioner's first question presented.

A. Petitioner's Alleged Split Is Not Implicated Here.

Petitioner alleges that the Kansas Supreme Court's decision to apply harmless-error analysis to the denial of Petitioner's right to testify conflicts with decisions of the South Carolina Supreme Court, Louisiana Supreme Court, and D.C. Court of Appeals (plus dicta from the Minnesota Supreme Court[5]). But those cases are factually distinguishable. Those cases involved the *complete denial* of the defendant's right to testify—that is, they are cases in which the defendant was not permitted to testify at all. In this case, by contrast, Petitioner was permitted to

[5] Petitioner concedes that the part of *State v. Rosillo*, 281 N.W.2d 877 (Minn. 1979), he relies on is merely dicta. Pet. 16. The court in that case ultimately concluded that no denial of the right to testify occurred—so it had no need to decide what remedy was appropriate. *Rosillo*, 281 N.W.2d at 879.

testify, but his testimony was limited in certain respects. Faced with those limitations, Petitioner "decided not to testify after consulting with counsel." Pet. App. A, 102.

In *State v. Rivera*, 741 S.E.2d 694 (S.C. 2013), for instance, the trial court refused to permit the defendant to testify, reasoning that taking the stand would not have been in the defendant's "best interest." *Id.* at 700-01. The trial court, in other words, "prevent[ed] him from taking the stand." *Id.* at 703. Similarly, in *Boyd v. United States*, 586 A.2d 670 (D.C. 1991), the defendant informed the trial court after her conviction that she had wanted to testify but that her counsel had prevented her from doing so. *Id.* at 671. The trial court ultimately concluded that this was a reasonable tactical decision of defense counsel. *Id.*

In *State v. Dauzart,* 769 So.2d 1206 (La. 2000), the trial court "refused to allow the defense to reopen its case, after it had ostensibly rested, for purposes of allowing [the] relator to testify." *Id.* at 1208. The relator, in other words, did not have an opportunity to testify. Tellingly, the Kansas Supreme Court below distinguished Petitioner's case from another Louisiana Supreme Court case that relied on *Dauzart* because it too involved a complete denial of the right to testify. Pet. App. A, 102 (distinguishing *State v. Hampton*, 818 So.2d 720 (La. 2002)). In *State v. Hampton*, the defendant wanted to testify but did not after his counsel said that he "controlled that decision." 818 So.2d at 726. The defendant was, as in *Dauzart*, "prevented from testifying." *Id.* at 729 (citing *Dauzart,* 769 So.2d at 1210-11).

Unlike the cases that Petitioner relies on, this case does not involve the complete denial of Petitioner's right to testify. Rather, Petitioner was given the choice whether to testify but his testimony was restricted in certain ways. In light of those restrictions, Petitioner chose not to testify. Neither Petitioner's counsel nor the trial court prohibited Petitioner from taking the stand. Rather, "the record . . . indicates that [Petitioner] decided not to testify after consulting with counsel in the wake of the judge's rulings." Pet. App. A, 102; *see* Pet. 8 ("Reginald Carr decided to not testify.").

This case therefore involves a constitutional error different in kind from the cases Petitioner attempts to use to forge a split. And should this Court wish to evaluate whether a complete denial of the right to testify constitutes structural error, it should wait for a case that presents such facts to do so.

B. The Kansas Supreme Court Did Not Hold that Petitioner's Right to Testify Was Denied.

The Kansas Supreme Court did not hold that Petitioner's right to testify was violated. As such, this case does not present a clean opportunity for this Court to address the question whether a denial of the right to testify is structural error.

When addressing Petitioner's convictions in its first opinion in this case, the Kansas Supreme Court held that the trial court's erroneous evidentiary rulings violated Petitioner's "right to present his defense." Pet. App. A, 101. That holding was based on the court's analysis of this Court's case law regarding "the nature of a criminal defendant's right to present a defense." Pet. App. A, 100. Having held that Petitioner's right to present a defense was violated, the Kansas Supreme Court

quickly remarked that this constitutional violation "implicates [the] defendant's right to testify," Pet. App. A, 5, because it "effective[ly] preclu[ded]" Petitioner from "testify[ing] to anything useful to the defense," Pet. App. A, 101. The Kansas Supreme Court did not further address the right to testify in either that opinion or in its most recent opinion in this case.

Given this lack of a holding that Petitioner's right to testify was in fact violated, this Court would need to first determine whether Petitioner's right to testify was actually denied before addressing Petitioner's questions regarding the remedy for a denial of the right to testify. This antecedent issue would complicate this Court's review of Petitioner's questions about how to treat a denial of the right to testify. And it could prevent this Court's review if it is ultimately determined that Petitioner's right to testify was not, in fact, violated.

II. The Kansas Supreme Court's Application of the Harmless-Error Analysis Does Not Need to Be Corrected.

The bulk of the Petition relates to the Kansas Supreme Court's application of the harmless-error analysis in this case—first whether it was the proper analysis to apply (the first question presented in the Petition), and then whether it was applied correctly (the second and third questions presented in the Petition). As noted above, this Court has already been asked to correct the Kansas Supreme Court's application of harmless-error analysis in this case. *See* Prior Pet. 26-33. This Court declined to do so then, and it should decline to do so again now. No error is apparent in the Kansas Supreme Court's decisions.

A. Harmless-Error Analysis Was Proper.

The "general rule" is that "a constitutional error does not automatically require reversal of a conviction." *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). This Court has classified constitutional errors in criminal trials "into two classes": "trial error[s]" (which are subject to harmless-error analysis) and "structural defects" (which are not). *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006).

"[M]ost constitutional errors" are trial errors subject to harmless-error analysis. *Fulminante*, 499 U.S. at 306; *see Neder v. United States*, 527 U.S. 1, 8 (1999) ("[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." (citation omitted)). Trial errors "occur[] during the presentation of the case to the jury, and . . . may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Fulminante*, 499 U.S. at 307-08. As this Court has explained, the harmless-error analysis "preserve[s] 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.'" *Id.* at 308 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)). This Court has thus applied a harmless-error analysis to, among other things, exclusion of a defendant's testimony regarding the circumstances of his confession, *Crane v. Kentucky*, 476 U.S. 683, 691 (1986); restriction on a defendant's right to cross-

examine a witness, *Van Arsdall*, 475 U.S. at 680-84; improper comment on a defendant's silence at trial, *United States v. Hasting*, 461 U.S. 499, 512 (1983); and the denial of a defendant's right to be present at trial, *Rushen v. Spain*, 464 U.S. 114, 117-18 & n.2 (1983).

The list of errors that constitute structural defects, meanwhile, is "very limited." *Johnson v. United States*, 520 U.S. 461, 468 (1997). Structural defects are errors that "affect[] the framework within which the trial proceeds, rather than simply . . . error[s] in the trial process itself." *Fulminante*, 499 U.S. at 310. The limited class of structural errors includes total denial of the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963); denial of a public trial, *Waller v. Georgia*, 467 U.S. 39 (1984); racial discrimination in grand jury selection, *Vasquez v. Hillery*, 474 U.S. 254 (1986); and a biased trial judge, *Tumey v. Ohio*, 273 U.S. 510 (1927).

The Kansas Supreme Court in this case held that the trial court's erroneous evidentiary rulings constituted a "violation of [Petitioner's] right to present a defense" that "effective[ly] preclu[ded]" Petitioner from "testify[ing] to anything useful to the defense." Pet. App. A, 101.[6] Whether cast as a violation of the right to present a defense (as Petitioner previously argued to this Court in seeking automatic reversal, Prior Pet. 26-33) or as a violation of the right to testify (as

[6] The Kansas Supreme Court did not again independently analyze the rights to present a defense and testify with respect to the penalty phase of the trial, but rather considered them only as part of its cumulative error analysis. Pet. App. C, 54-58. To the extent Petitioner alleges any violation of his right to present a defense or testify with respect to the penalty phase in particular, the lack of any such analysis in the Kansas Supreme Court's opinion in the first instance renders this case further unsuitable as a vehicle.

Petitioner now argues in seeking automatic reversal, Pet. 12-23), that constitutional violation is subject to harmless error review.

As the Kansas Supreme Court correctly noted, this Court "has held that denial of a defendant's *right to present a defense* is subject to the constitutional harmlessness standard." Pet. App. A, 102 (citing *Crane*, 476 U.S. at 691) (emphasis added). Petitioner does not now appear to disagree. Pet. 33 (arguing that "[t]he denial of [Petitioner's] right to defend was not harmless" (formatting altered)).[7]

Petitioner argues, however, that the trial court's restriction of his *right to testify* is structural error that requires automatic reversal. Pet. 12-23. The Kansas Supreme Court was correct to reject that argument.

First, a violation of the right to testify, like other trial errors, occurs at a specific time in the trial. As noted above, structural errors are "structural defects in the constitution of the trial mechanism" itself. *Fulminante*, 499 U.S. at 309. They occur when the "entire conduct of the trial from beginning to end is obviously affected." *Id.* at 309-10. A violation of the right to testify is not such an error. It does not permeate the entire trial process from beginning to end but rather occurs at a

[7] To the extent Petitioner argues that a denial of the right to present a defense constitutes structural error, *see* Pet. 35, this Court already declined to review that issue when denying Petitioner's first petition in this case. Prior Pet. i (asking "[w]hether, when a trial court's erroneous evidentiary rulings result in the complete exclusion of the accused's defense, the error can ever be declared harmless"). And Petitioner is wrong for all the reasons given in the State's opposition to Petitioner's first petition in this case. *See* Opp. 7-13, *Carr*, 575 U.S. 937.

discrete point in time: "during the presentation of the case to the jury." *Id.* at 308. This is a hallmark of trial error.

Second, because it occurs during the presentation of the case to the jury, a denial of the right to testify is amenable to harmless-error review. That is, a defendant's testimony (or lack thereof) "may . . . be quantitatively assessed in the context of other evidence presented." *Id.* at 307-08. This is in stark contrast to structural errors, which would set courts to the difficult task of assessing "intangibles" and "speculat[ion]." *Gonzalez-Lopez*, 548 U.S. at 151; *see id.* at 149 n.4 (explaining that this Court often "rest[s] [its] conclusion of structural error upon the difficulty of assessing the effect of the error").

Third, a restriction on the right to testify "does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 9. As the Wisconsin Supreme Court has explained, "[i]n some cases, the defendant's testimony would have no impact, or even a negative impact, on the result of trial." *State v. Nelson*, 849 N.W.2d 317, 324 (Wis. 2014) (quoting *Momon v. State*, 18 S.W.3d 152, 166 (Tenn. 1999)). "Likewise, in some cases, denial of a defendant's right to testify may be devastating to the defense." *Id.* (quoting *Momon*, 18 S.W.3d at 166). A trial court employing harmless-error analysis is perfectly capable of parsing and remedying such cases as needed. *See Fulminante*, 499 U.S. at 310 ("[T]he appellate court, as it does with the admission of other forms of improperly admitted evidence, simply reviews the

remainder of the evidence against the defendant to determine whether the [error] was harmless beyond a reasonable doubt.").

Rock v. Arkansas, 483 U.S. 44 (1987), is not to the contrary. In *Rock*, this Court invalidated an Arkansas evidentiary rule that excluded all post-hypnosis testimony as a violation of the right to testify. This Court expressly recognized, however, that the State "may be able to show that testimony in a particular case is so unreliable that exclusion is justified." *Id.* at 61. If the exclusion of such testimony constituted structural error requiring automatic reversal, then its admission in certain cases—as the Court specifically contemplated—would not be proper.

Petitioner states that the right to testify is designed not to protect the defendant from erroneous conviction but rather to "protect[] the defendant's right to autonomy." Pet. 18. But this alone does not make a violation of that right structural error. As explained above, the defining feature of a structural error is that it "affect[s] the framework within which the trial proceeds." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (quoting *Fulminante*, 499 U.S. at 310). In contrast, the right to testify results only in the trier of fact not hearing certain evidence during the presentation of the defendant's case. The absence of that evidence—like the absence of many other types of evidence that could have been presented to the trier of fact—does not taint the entirety of the trial such that its effect cannot be isolated and assessed. Rather, courts are amply equipped to determine the effect that evidence would have had on a case's outcome in performing the harmless-error

analysis. And, if a court can determine whether an error is harmless, then it is a trial error. *See Gonzalez-Lopez*, 548 U.S. at 149 n.4.

For these reasons, the trial court's erroneous evidentiary rulings—whether they violated the right to present a defense, the right to testify, or both—do not constitute structural error and are therefore subject to harmless-error analysis.

B. The Kansas Supreme Court Correctly Determined that the Trial Court's Erroneous Evidentiary Rulings Were Harmless.

Having correctly determined that the harmless-error analysis applies, the Kansas Supreme Court proceeded to correctly apply that standard. Under this Court's precedents, a constitutional error is harmless if, "assuming that the damaging potential of the [evidence] were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Van Arsdall*, 475 U.S. at 684; *Weaver*, 137 S. Ct. at 1907 (explaining that the government must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" (citation omitted)).

The Kansas Supreme Court properly held that the trial court's erroneous evidentiary rulings were harmless beyond a reasonable doubt. As the court explained when assessing the guilt phase of Petitioner's trial, "[g]iven the remarkable strength of the State's case against [Petitioner], [the court was] persuaded beyond a reasonable doubt that there was no impact on the trial's outcome from the exclusion of [Petitioner's] proffered testimony." Pet. App. A, 102. Likewise when assessing the penalty phase, the Kansas Supreme Court determined that the mountain of evidence presented against Petitioner at trial left "no room for

any meaningful amount of residual doubt, even if the guilt and penalty phase errors had not occurred." Pet. App. C, 58. The court deemed the trial court's erroneous evidentiary rulings "harmless in isolation" and concluded that "there is no reasonable possibility the identified errors . . . cumulatively affected the jury's ultimate conclusion regarding the weight of the aggravating and mitigating circumstances, i.e., the death sentence verdict." Pet. App. C, 58.

Both times, the court detailed the extensive evidence the State presented against Petitioner at trial, including:

- Holly's multiple identifications of Petitioner,
- the DNA analysis that could not exclude Petitioner as the donor of a hair at the Birchwood home or the source of material on Holly's inner thigh,
- the DNA analysis that identified Heather's blood on Petitioner's undershorts and shirt,
- Holly's development of the same sexually transmitted disease Petitioner had,
- Petitioner's possession of several items stolen from the Birchwood home and victims,
- Petitioner's footprints at the Birchwood home,
- cigar ash from the Birchwood home that matched the cigar in Petitioner's jacket,
- Petitioner's trip to the Birchwood home shortly after the murders, and
- Petitioner's link to the gun used to commit the murders.

See Pet. App. A, 102; C, 57-58; *see also supra* 8-9. All of this evidence combined leads to one inexorable conclusion: that Petitioner was a principal, not an after-the-fact aider and abettor, but a full participant in these horrific crimes.

That is all the more so given the outlandish nature of Petitioner's proffered testimony. Petitioner sought to testify at trial that some unidentified (and apparently unidentifiable) third party whose existence was not corroborated by any physical, circumstantial, or eyewitness evidence committed the Birchwood crimes with his brother. This is precisely the sort of fanciful testimony that "would have no impact, or even a negative impact, on the result of trial." *Nelson*, 849 N.W.2d at 324 (citation omitted). For instance, Petitioner's proffered explanation for the presence of Holly's blood on his *undershorts* on a snowy winter night—that it was "transferred from contact with the stolen property," Pet. 38—strains credulity.

Petitioner argues that the Kansas Supreme Court "considered only the strength of the prosecution's case, without considering the nature of the evidence proffered by [Petitioner], or the weaknesses in the prosecution's case." Pet. 25. To the contrary, the Kansas Supreme Court expressly considered "the record as a whole"—including Petitioner's proffered testimony. Pet. App. C, 54 (citation omitted). As the Court explained, the State's case against Petitioner was "remarkabl[y]" strong. Pet. App. C, 57 (quoting *State v. Carr*, 331 P.3d 544, 682 (Kan. 2014)). It was so strong that "any effort by either brother to suggest that he was not involved in the Birchwood crimes would be futile." Pet. App. A, 123.

Petitioner also argues that, had the trial court allowed him to deliver his proffered testimony, "this could have led the jury to, if not an acquittal, a life sentence based on residual doubt." Pet. 38. The Kansas Supreme Court expressly acknowledged that the trial court's erroneous evidentiary rulings might have

"contribute[d] to the idea of residual doubt." Pet. App. C, 57. But it nonetheless correctly determined that "[t]he strength of the evidence establishing [Petitioner's] role and culpability in perpetrating these crimes left no room for any meaningful amount of residual doubt, even if the guilt and penalty phase errors had not occurred." Pet. App. C, 58. Put otherwise, the Kansas Supreme Court considered the effect of the exclusion of Petitioner's proffered testimony and determined that "[n]one of that mattered." Pet. App. C, 58 (quoting *Kansas v. Carr*, 577 U.S. 108, 126 (2016)). That determination accords with the facts and does not require this Court's intervention.

Petitioner suggests that the Kansas Supreme Court's harmless-error analysis "failed to obtain the heightened reliability required for death penalty proceedings." Pet. 29. It is of course "important to avoid error in capital sentencing proceedings." *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988). But in the case of immaterial evidentiary errors such as the one at issue here, "reviewing court[s] can make an intelligent judgment about whether the [error] might have affected a capital sentencing jury." *Id.* The harmless-error analysis is designed the safeguard the reliability of trial proceedings while also promoting respect for the trial mechanism. *See Van Arsdall*, 475 U.S. at 681 ("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 . . . ."). It is thus no surprise that this Court has "permitted harmless error analysis in both capital and noncapital cases." *Satterwhite*, 486 U.S. at 257-58 (applying harmless-error analysis to admission of

evidence in violation of the Sixth Amendment at capital sentencing); *see also, e.g.*, *Clemons v. Mississippi*, 494 U.S. 738, 752-54 (1990) (applying harmless-error analysis to unconstitutionally overbroad jury instructions at capital sentencing).

The Kansas Supreme Court's factbound harmless-error analysis is fully consistent with this Court's precedents and does not warrant review.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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