**CAPITAL CASE**

**No. 22-____**

# In the Supreme Court of the United States

JONATHAN D. CARR,

*Petitioner*

*v.*

STATE OF KANSAS,

*Respondent*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Sixth Amendment's Confrontation Clause secures an accused's right to confront witnesses against him throughout the sentencing phase of a capital trial.

## PARTIES TO THE PROCEEDING

Petitioner is Jonathan D. Carr. Respondent is the State of Kansas. Neither party is a corporation. Rule 29.6.

## RELATED PROCEEDINGS

United States Supreme Court:

*Kansas v. Carr*, 577 U.S. 108 (2016) (opinion reversing Kansas Supreme Court on constitutionality of death sentences following joint sentencing phase for co-defendants).

Kansas Supreme Court:

*State v. Jonathan D. Carr,* 502 P.3d 511 (Kan. 2022) (opinion on remand from the Court, affirming sentence of death).

*State v. Reginald D. Carr, Jr.*, 502 P.3d 546 (Kan. 2022) (opinion on remand from the Court, affirming sentence of death).

*State v. Jonathan D. Carr*, 329 P.3d 1195 (Kan. 2014) (opinion on direct appeal with original appellate jurisdiction in Kansas Supreme Court, affirming convictions, but vacating death sentence).

*State v. Reginald D. Carr, Jr.*, 331 P.3d 544 (Kan. 2014) (opinion on direct appeal with original appellate jurisdiction in Kansas Supreme Court, affirming convictions, but vacating death sentence).

## TABLE OF CONTENTS

**TABLE OF CONTENTS**
(continued)

**Page**

**TABLE OF CONTENTS**
(continued)

**Page**

**TABLE OF CONTENTS**
(continued)

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

## TABLE OF AUTHORITIES
(continued)

**Page(s)**



**CONSTITUTION AND STATUTES**



**OTHER AUTHORITIES**

## PETITION FOR WRIT OF CERTIORARI

Petitioner Jonathan D. Carr respectfully petitions for a writ of certiorari to review the judgment of the Kansas Supreme Court.

## INTRODUCTION

This case presents a significant question that confuses and divides state and federal courts: whether, and to what extent, the Confrontation Clause of the Sixth Amendment applies at capital sentencing proceedings before a jury. The Sixth Amendment provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Sixth Amendment's text and history, as well as the Court's precedent establish that the right to confront witnesses applies at all times during Kansas' jury-trial sentencing phase before an accused may be sentenced to death. The confrontation right is pivotal to Kansas' capital scheme, where a jury returns a unitary verdict that aggregates eligibility and selection considerations.

Despite the seemingly obvious premise that accused individuals should have the right to confront witnesses whose testimony bears on whether they will be sentenced to death, lower courts have struggled to determine whether the confrontation right applies during the penalty phase of a capital jury trial. Some courts have concluded that *Williams v. New York*, 337 U.S. 241 (1949), controls the issue, and that confrontation rights do not apply at any time during capital

sentencing proceedings. Other jurisdictions, recognizing that *Williams* neither addressed the Confrontation Clause nor the Court's modern death-penalty jurisprudence, have relied on *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002), to conclude that confrontation rights must be recognized when other jury-trial rights attach. These jurisdictions have therefore recognized the right to confront adverse witnesses applies at the eligibility phase, at the selection phases, or in both parts of the penalty phase.

Given that the right to confront witnesses has significant consequences on whether the irrevocable punishment of death is appropriate in a given case, it is vitally important for this Court to make clear when an individual facing death has the right to confront the witnesses against him. The Court should take this opportunity to explicitly hold that the Confrontation Clause applies throughout the penalty phase of a capital jury trial.

## OPINIONS BELOW

The opinions of the Kansas Supreme Court are reported at 329 P.3d 1195 (J. Carr I), Petition Appendix at 119a-143a ("App."), 502 P.3d 511, App. at 1a-30a, (J. Carr II), 331 P.3d 544, App. at 144a-323a (R. Carr I), and 502 P.3d 546, App. at 31a-103a, (R. Carr II).

## JURISDICTION

The Kansas Supreme Court affirmed Mr. Jonathan Carr's convictions on July 25, 2014, but vacated his sentence of death. The Court granted the State's Petition for Certiorari and reversed the Kansas Supreme Court on January 20, 2016. On remand, the Kansas Supreme Court affirmed Mr. Carr's death sentence on January 21, 2022. The Kansas Supreme Court denied a motion for rehearing on May 4, 2022. On July 15, 2022, Justice Gorsuch extended the time to file a petition for a writ of certiorari to October 1, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments to the U.S. Constitution, as well as the relevant Kansas statutes, are reproduced in the appendix. App. at 326a-334a.

## STATEMENT OF THE CASE

### A. Kansas Law

In Kansas, the death penalty may be imposed upon a person convicted of capital murder only "[i]f, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated [by statute] exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist[.]" Kan. Stat. Ann. § 21-6617(e)

(2020)[1]; App. at 330a-331a. Without such a jury finding, a death sentence cannot be imposed. *Id.*; see also *Kansas v. Marsh*, 548 U.S. 163, 178–79 (2006) ("Absent the State's ability to meet that burden, the default is life imprisonment.").

"Kansas' capital sentencing scheme does not contemplate bifurcated *penalty-phase* proceedings" to separate the eligibility and selection determinations. *State v. R. Carr II*, 502 P.3d 546, 595 (2022); App. at 63a (emphasis in original). Rather, Kansas employs a unitary penalty-phase proceeding that includes the eligibility and selection determinations, resulting in a singular jury verdict. *Id.*

**B. Factual Background and Trial Court Proceedings**

A jury found Petitioner Jonathan Carr guilty of multiple crimes, including capital murder. The underlying facts of those "notorious" crimes, as well as the trial of Petitioner alongside his co-defendant and brother, Reginald Carr, are well documented. See *Kansas v. Carr*, 577 U.S. 108, 111 (2016); App. at 107a.

Following the initial guilt determination, the case proceeded to the unitary penalty-phase proceeding during which the State had the burden to prove beyond a reasonable doubt that one or more statutorily enumerated aggravating circumstances exist, and "that the existence of such aggravating circumstances [was] not outweighed by any mitigating circumstances which are found to exist[.]" App. at 331a-332a. After

[1] The Kansas Criminal Code was recodified in 2011, resulting in new statute numbers. The contents of the relevant statutory provisions remain unchanged. See Kan. Stat. Ann. § 21-4624(e) (1994).

the presentation of the State's evidence regarding alleged aggravating circumstances, Mr. Carr's evidence pertaining to mitigating circumstances, and a rebuttal by the State of Mr. Carr's mitigating evidence, the jury delivered a unitary verdict to sentence Mr. Carr to death.

More specifically, Mr. Carr presented a mitigation case focusing on his dysfunctional upbringing and psychological profile. *State v. R. Carr I*, 331 P.3d 544, 708 (2014)[2], *rev'd and remanded,* 577 U.S. 108 (2016); App. at 280a. Petitioner grew up in homes without meaningful parental connections where drug use, and physical and sexual abuse of the children were common. *Id.* at 279a-286a. Mr. Carr's family provided a social history describing numerous instances of head trauma during his childhood stemming from, *inter alia*, a suicide attempt by hanging, a suicide attempt by drinking antifreeze resulting in a coma, and a go-kart accident causing a concussion and a period of unconsciousness for over an hour. *Id.* (R. 67, 117-118; R. 71, 55; R. 73, 97; R. 74, 133-135.). To explain these head traumas, Mr. Carr presented testimony from Dr. David Preston who had performed positron emission tomography (PET) scans of his brain. *Id.* Dr. Preston testified the scans showed decreased functioning in the regions of the brain that manage short-term memory and the

[2] The Kansas Supreme Court issued separate opinions on the same day for Jonathan Carr and Reginald Carr, placing the facts and primary legal reasoning on issues shared between the two cases in the R. Carr opinions and resolving the issue in the J. Carr opinions by referencing the former. As such, this Petition primarily references the analysis in the R. Carr opinions.

assignment of risk to events; damage which is consistent with head trauma. (R. 69, 77, 79-80.)

In rebuttal, the State called Dr. Norman Pay, a neuro-radiologist from a local hospital, who was extremely critical of Dr. Preston, claiming the PET scans he used "had been manipulated—according to what he was told—by design" and failed to show brain damage. App. at 298a. Dr. Pay repeatedly testified that he had been "in consultation with other members and colleagues in the neurological field" and that he and the other experts had "reach[ed] a consensus" "without quarrel" that Mr. Carr's brain was normal. *Id.* at 298a-299a. Some of Dr. Pay's colleagues were allegedly in the courtroom, and individuals in the room rose their hands to identify themselves as Pay's colleagues while he discussed their agreement with his interpretation of the scans. *Id.* The district court prevented Mr. Carr from recalling Dr. Preston in surrebuttal to refute those claims. *Id.* at 300a-301a.

During closing argument, the State contended Mr. Carr's brain-trauma evidence was "hocus pocus," noting that "doctors" (plural) had debunked it:

> "In closing argument, one of the prosecutors argued that the 'truth' as revealed by the 'doctors' showed that Preston's 'slick' PET scan images and related testimony were 'hocus pocus.' The prosecutor said that the 'foundation of the [defendants'] sympathy and abuse excuse and blame' had come 'crashing down' and that they were simply dragging their 'laundry' into court." *Id.* at 288a.

Thereafter, the jury returned a unitary verdict—a sentence of death. *State v. J. Carr II*, 502 P.3d 511, 538 (2022); App. at 22a.

### C. Appellate Proceedings

On appeal, the Kansas Supreme Court vacated Mr. Carr's death sentence because the district court had failed to sever his penalty-phase proceedings from his brother's and because of instructional errors, issuing an opinion which left numerous penalty-phase issues unanswered as moot. App. at 119a-323a. But the opinion concluded, for purposes of aiding the district court on remand, that the Sixth Amendment right to confront witnesses applies during a capital penalty-phase trial. *Id.* at 295a. The State petitioned the Court for a writ of certiorari, which it granted. The Court then reversed the Kansas Supreme Court's original opinion and remanded the case for consideration of the remaining penalty-phase issues. *Kansas v. Carr*, 577 U.S. 108 (2016); App. at 104a-118a; *J. Carr II*, 502 P.3d at 521; App. at 6a.

On remand, the Kansas Supreme Court limited its initial Confrontation Clause holding. Relying upon federal cases addressing capital-punishment systems where penalty-phase proceedings are bifurcated into separate eligibility and selection proceedings, with separate verdicts, it pronounced a new rule:

> "When the State introduces or relies on testimonial hearsay during its rebuttal and cross-examination for purposes of controverting or impeaching the testimony of a capital defendant's mitigation witnesses—provided such evidence does not bolster an aggravating circumstance—the Confrontation Clause shall not apply to such evidence." App. at 63a.

The Kansas Supreme Court made this finding even though Kansas' capital-sentencing scheme does not contemplate bifurcated penalty-phase proceedings, or the issuance of multiple jury verdicts. *Id.* at 63a-64a.

The Kansas Supreme Court then addressed whether the State's rebuttal evidence involving the "doctors" violated Mr. Carr's Sixth Amendment Rights. It noted that the new rule called into question whether the Confrontation Clause would apply. *Id.* at 66a. Assuming the confrontation right did apply, it concluded the statements made by Dr. Pay's colleagues were testimonial in nature as they were made specifically in preparation for trial, but that the use of the testimonial hearsay did not violate the Confrontation Clause. *Id.* at 66a-68a. Because Dr. Pay was testifying to his own opinion in portions of the testimony, the Kansas Supreme Court held that testifying to a "consensus" that the brain scans were "normal" did not violate the Confrontation Clause. *Id.*

## REASONS FOR GRANTING THE PETITION

It has been said that "[t]he value of confrontation is never more vivid than when the state puts a defendant to death based on testimony he had no opportunity to challenge." *United States v. Fields*, 483 F.3d 313, 362-63 (5th Cir. 2007) (Benavides, J., dissenting). But whether, and to what extent, the Confrontation Clause of the Sixth Amendment applies at capital sentencing proceedings before a jury remains a question that confuses and divides state and federal courts.

The Sixth Amendment to the United States Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Sixth Amendment's text and history, modern death-penalty jurisprudence, as well as the Court's precedent through *Apprendi* and its progeny, indicate that the confrontation right applies to all stages of a capital-sentencing proceeding occurring before a jury, before that jury may sentence someone to death. The acknowledgment of confrontation rights throughout capital-penalty-phase proceedings is uniquely important in Kansas, where the jury returns a unitary verdict that addresses eligibility- and selection-phase matters as one.

But lower courts have divided on the issue, creating a confusing patchwork of holdings. Some courts consider this issue to be controlled by *Williams v. New York*, 337 U.S. 241 (1949), which they believe stands for the proposition that no confrontation rights exist during capital sentencing. Other jurisdictions recognize that *Williams* neither addressed the Confrontation Clause nor the Court's modern death-penalty jurisprudence. Those jurisdictions have relied in part on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), to require confrontation when other jury-trial rights attach at the eligibility or selection phases, or both.

Under Kansas law, before an accused may be sentenced to death, a *jury* must return a unitary verdict finding beyond a reasonable doubt that aggravating circumstances exist *and* that those aggravating circumstances are not outweighed by

mitigating circumstances. Because the jury's weighing of aggravators versus mitigators can result in a death sentence that would not be permissible based on the finding of aggravated circumstances alone, the weighing decision increases the punishment a capital accused may face in Kansas. As such, the Sixth Amendment's text, its history, and the Court's precedent require recognizing the full panoply of Sixth Amendment rights—including the right to confront adverse witnesses—throughout Kansas' capital-penalty phase.

The Kansas Supreme Court's decision below denied Mr. Carr the right to confront adverse witnesses before the jury in the proceeding to determine both if he was death-eligible and if death should be selected, simply because the State designated the adverse witnesses as rebuttal witnesses. The Kansas Supreme Court's decision erodes guaranteed and vitally important Sixth Amendment protections and flouts the Court's repeated requirement for heightened reliability in capital proceedings.

Given that the matter is one of grave consequence in the determination of whether the irrevocable punishment of death is appropriate, Mr. Carr begs this Court to clarify, here and now, the murky and divided landscape of Confrontation Clause jurisprudence in capital sentencing that is percolating in state and federal courts.

## I. The decision below is incorrect: the Sixth Amendment's Confrontation Clause, coupled with the requirement for heightened reliability in death-penalty cases, guarantees individuals the right to confront adverse witnesses against them throughout a capital penalty phase.

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford v. Washington,* 541 U.S. 36, 53-54 (2004), the Court held this clause bars the admission of "testimonial statements" of a witness who does not appear at trial, unless that witness is unavailable and the defendant previously had the opportunity to cross-examine that witness.

While *Crawford* examined the Confrontation Clause in the context of a non-capital conviction proceeding, the Court has acknowledged that its protections apply to certain aspects of sentencing. In *Specht v. Patterson*, 386 U.S. 605, 607, 610 (1967), for example, the Court struck down a Colorado statute that permitted an individual convicted of a sex offense but not sentenced for it, to be sentenced under another Act, the Sex Offenders Act. The Sex Offenders Act could be invoked, and an additional sentence of one day to life imprisonment could be imposed where, following a psychiatric examination, the district court found the accused either posed a threat of bodily harm to the public if not incarcerated, or that the individual was mentally ill and a habitual sex offender. *Id.* at 607-08. The Sex Offenders Act was invoked in Mr. Specht's case, and he argued to the Court that Due Process had been violated because

he had not been afforded a hearing at which he could confront the drafter of the psychiatric report, or present contrary evidence. *Id.* at 608.

Noting that the invocation of additional sentencing under the Sex Offenders Act required "a new finding of fact that was not an ingredient of the offense charged," the Court concluded that finding of fact entitled the accused to "all those safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine the witnesses against him." *Id.* at 609-10 (citation omitted). Though couched in due-process terms, *Specht* recognized the Confrontation Clause's applicability in certain sentencing proceedings following conviction: *i.e.*, in situations in which proof of an additional fact is required before the judge may impose an increased sentence.

Similarly, in the Sixth Amendment context, the Court has repeatedly emphasized the right to a jury trial on sentence-enhancing facts beyond the mere existence of a prior conviction. First, in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Court held it unconstitutional for a legislature to "remove from the jury the assessment of facts that increase the prescribed range of penalties" to which an individual is exposed.

Then, in *Ring v. Arizona,* 536 U.S. 584, 609 (2002), the Court applied this rule in the capital context, concluding that where a death-penalty scheme required the finding of an "aggravated circumstance" before a death sentence could be imposed, that aggravated circumstance subjected the accused to a greater punishment then

could be imposed by the jury's verdict alone. As such, it held that the "aggravating factors operate as the functional equivalent of the element of a greater offense" and therefore the Sixth Amendment requires those factors to be found by a jury. *Id.* Thus, *Ring* clarifies that aggravating circumstances must be found by a jury, and implicitly, that the accused enjoys the panoply of rights that attach to a jury trial, including the right to cross-examine adverse witnesses, during the presentation of aggravators.

What *Ring* did not *explicitly* decide, however, is whether the Sixth Amendment protects a capital defendant's right to cross-examine witnesses *after* the State has put on evidence of aggravating circumstances, but before the jury has deliberated on whether those circumstances have been proved to their satisfaction. Though lower courts have split on whether confrontation rights apply during the pendency of capital sentencing trials, the only logical synthesis of the text and history of the Confrontation Clause, the Court's precedent, and Kansas' unitary capital sentencing scheme is that an accused maintains the right to confront witnesses against him throughout a capital jury trial.

### A. The Sixth Amendment's text and history guarantee confrontation during capital sentencing.

The Sixth Amendment's text makes clear that the right to confront adverse witnesses applies "[i]n all criminal prosecutions." U.S. Const., amend VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him."). In *Mempa v. Rhay*, 389 U.S. 128, 134 (1967), the Court examined the Sixth Amendment's parallel clause that guarantees an accused the

right to counsel: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The Court concluded that sentencing constitutes a criminal "prosecution" to which an accused's Sixth Amendment right to counsel attaches. *Id.* There is no basis in the Amendment's text for concluding that an accused enjoys the right to counsel at sentencing, but not to confrontation.

Rather, the opposite result is compelled: confrontation rights, like the right to counsel, apply at sentencing. As Judge Noonan explained, "[t]his conclusion is stronger because 'the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process . . . .'" *United States v. Petty*, 982 F.2d 1365, 1370-71 (9th Cir.) (Noonan, J., dissenting) (quoting *Herring v. New York,* 422 U.S. 853, 857 (1975)), *amended* 992 F.2d 1015 (9th Cir. 1993). Indeed, he queries, "What is the point of having counsel if counsel cannot exercise an essential function of counsel-the cross-examination of the witnesses against counsel's client?" *Petty*, 982 F.2d at 1370-71.

Moreover, the Sixth Amendment's history suggests no principled basis for cleaving the confrontation right at capital sentencing. At the time of the Amendment's drafting, capital conviction and sentencing occurred during a unitary proceeding. "[T]he jury in those proceedings did not simply determine guilt or innocence with no eye to the sentencing consequences [but rather] frequently brought in verdicts of not guilty or guilty of lesser offenses precisely to avoid application of the

death penalty." Petition for Writ of Certiorari, *United States v. Umana*, 2014 WL 6680495, at *24 (2014). And the jury's role in curtailing executions was accepted as a "necessary safeguard against 'too much death.'" *Id.* (quoting Langbein, *The Origins of Adversary Criminal Trial* 334 (2003)); *see also Apprendi*, 530 U.S. at 479 n.5. The Amendment's history, like its text, demonstrates that the Confrontation Clause was intended to ensure that an accused would neither be convicted of a crime *nor* sentenced to death on the basis of unreliable, unchecked evidence.

### B. The Court's precedent contours, if not compels, the recognition of Sixth Amendment protections throughout capital sentencing in Kansas.

*Apprendi* and its progeny, combined with *Specht* and the Court's modern death-penalty jurisprudence, compel the recognition of Sixth Amendment protections throughout capital sentencing in Kansas. *Apprendi* held it unconstitutional for a legislature to "remove from the jury the assessment of facts that increase the prescribed range of penalties" to which an individual is exposed. 530 U.S. at 490. Four years later, in *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004), the Court further clarified the Sixth Amendment's application at sentencing.

While *Apprendi* held that a jury must determine facts that increase a statutory maximum sentence, *Blakely* explained what a "statutory maximum" is: the highest sentence the judge may impose based solely on the jury's findings, even if the statute allows a greater sentence based on further judicial findings. *Id.* at 303-04. Blakely had pled guilty to kidnapping, which carried a standard sentence of 49 to 53 months'

prison, and a maximum of 10 years' prison. *Id*. at 299. The judge sentenced Blakely to 90 months' imprisonment, concluding that he'd acted with "deliberate cruelty." *Id*. at 299-300. But the "facts supporting that finding were neither admitted by petitioner nor found by a jury." *Id*. at 303.

The Court held that Blakely's sentence violated *Apprendi* because the jury verdict alone did not authorize the enhanced sentence the judge imposed. *Id*. at 304-14. The Court explained that the statutory maximum under the Sixth Amendment "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Id*. at 303-04. As such, *Blakely* reinforced that a jury must find beyond a reasonable doubt any fact increasing the penalty for a crime beyond the statutory maximum. *Id*. at 301. *Ring* clarified that this rule applies to any fact-finding necessary to impose a sentence of death as opposed to life. *Ring*, 536 U.S. at 609. *Ring* therefore requires a jury to find the presence of aggravating circumstances. *Id*.

*Specht* adds to the *Apprendi* line of cases by emphasizing the right of confrontation. Indeed, the *Specht* court found the accused was entitled to "confront and cross-examine the witnesses against him" regarding the presentation of evidence relating to a sentencing enhancement based on "a new finding of fact that was not an ingredient of the offense charged." 386 U.S. at 608. Thus, the right to a jury trial is more than just the right to have a jury make the sentence-enhancing decision; but

also the right to confront witnesses whose statements bear on the sentence-enhancing decision.

Combined, these cases dictate a single result to the question presented: the Sixth Amendment's Confrontation Clause applies throughout capital sentencing in Kansas. Under Kansas law, an individual convicted of a capital offense may be sentenced to death only if "by unanimous vote, the jury finds beyond a reasonable doubt that": (1) one or more enumerated aggravating circumstances exist; and (2) that the existence of the aggravating circumstances is "not outweighed by any mitigating circumstances." App. at 330a-331a. Otherwise, a judge may impose only the term of imprisonment provided by statute. *Id.*

Under *Ring* and *Specht*, the Sixth Amendment's Confrontation Clause unquestionably applies during the State's presentation of aggravating circumstances. However, *Ring* implicitly requires that the Confrontation Clause likewise applies in Kansas during the presentation of mitigating circumstances and the rebuttal of those circumstances, as well. In Kansas, an accused may not be sentenced to death merely because the jury finds the existence of one or more aggravating circumstances; rather, mitigating circumstances likewise constitute critical factual findings the jury must make *and* weigh before issuing a verdict of death. App. at 330a-331a. As the Court clarified in *Kansas v. Marsh*, 548 U.S. 163, 173 (2006), "the Kansas statute requires the State to bear the burden of proving to the jury, beyond a reasonable doubt, that

aggravators are not outweighed by mitigators *and* that a sentence of death is therefore appropriate . . . ." (emphasis added).

Indeed, Kansas capital-sentencing jurors must answer three fact-intensive questions in the unitary penalty-phase proceeding: (1) whether the State proved the existence of any aggravating circumstances beyond a reasonable doubt; (2) whether the accused established the existence of any mitigating circumstances to each juror's individual satisfaction; and (3) whether the State proved beyond a reasonable doubt that the aggravators are *not* outweighed by the mitigating circumstances found to exist by each individual juror. App. at 330a-331a. In the absence of *any* of these findings in favor of the State, the judge may only impose a term of imprisonment as provided by statute. *Id*.; see also *Marsh*, 548 U.S. at 179-80.

*Apprendi* and its progeny therefore mandate applying the Sixth Amendment throughout Kansas' capital penalty phase—during the presentation of aggravators, during the presentation of mitigators, and during rebuttal of the mitigators. All three of these portions of the capital penalty phase constitute key evidentiary phases which impact the jury's unitary decision to impose a sentence of life or death. As the dissent explained in *United States. v. Umana*, 750 F.3d 320, 366 (4th Cir. 2014) (Gregory, J., dissenting), when examining the Federal Death Penalty Act (FDPA)—which imposes a jury-weighing question similar to Kansas'—constitutionally significant fact-finding occurs not only during the presentation of aggravating factors but also during the weighing of those factors against any mitigating factors:

> "Under the FDPA, a jury cannot impose a death sentence until it finds that 'all . . . the aggravating factors found to exist sufficiently outweigh all the mitigating factors. 18 U.S.C. § 3593(e). Only when a jury finds that aggravating factors sufficiently outweigh mitigating factors may it impose a death sentence under FDPA. Thus, while stage three of FDPA trials involves some jury discretion, juries must nonetheless make certain factual findings in this final stage before the death sentence can be imposed.
>
> "Put another way, the jury's burden in stage three—a finding that the aggravating factors sufficiently outweigh the mitigating factors—is not optional." (internal citations and punctuation omitted).

In sum, to be death-eligible in Kansas, the jury needs to find not only that an aggravating circumstance exists but also that the aggravating circumstance is not outweighed by mitigating circumstances. Because the presentation and rebuttal of mitigating evidence constitute phases of trial that impact the ultimate verdict authorizing the sentence, which in Kansas, must be done by a jury, those phases involve the finding of sentence-enhancing facts under *Apprendi.* The weighing of the mitigating evidence is therefore a prerequisite to death-eligibility and a defendant is entitled to Sixth Amendment jury-trial protections during its presentation and rebuttal under *Apprendi*, *Blakely*, and *Ring*.

### C. The Kansas Supreme Court erroneously cleaved the Sixth Amendment's protection at the "selection" phase.

The Kansas Supreme Court therefore erred when it held that the Sixth Amendment's Confrontation Clause applied only during the presentation of aggravating factors. Specifically, the Kansas Supreme Court attributed *Williams v. New York*, 337 U.S. 241 (1949) as standing for the "general rule" that the

Confrontation Clause does not apply at sentencing. App. at 63a (quoting *United States v. Lujan*, No. CR 05-0924RB, 2011 WL 13210246, at *8 (D.N.M. 2011)). However, it concluded that the "general rule" applies only during the "eligibility" portion of Kansas' capital penalty-phase proceedings.

The Kansas Supreme Court recognized that under *Tuilaepa v. California*, 512 U.S. 967, 971 (1994), two phases exist in capital sentencing for purposes of the Eighth Amendment: eligibility and selection. App. at 61a. The Kansas Supreme Court found that an accused becomes *eligible* for the death penalty in Kansas under the Eighth Amendment's "requirement to narrow" the class of eligible individuals "when the State establishes the existence of one or more aggravating circumstances enumerated by statute." *Id.* (internal quotations and citation omitted). During the "selection stage," it concluded, "Kansas juries make their selection decision by applying the statutory weighing equation that pits aggravating circumstances against mitigating circumstances." *Id.* The selection phase, it explained, constituted an individualized determination of the offender and the particular crime under the Eighth Amendment. *Id.* at 61a-62a.

Because the Eighth Amendment character of the eligibility and selection phase differs, the Kansas Supreme Court concluded that *Williams* did not apply to the "eligibility phase" of Kansas' capital sentencing scheme. It noted that during the eligibility phase," statutory aggravators are proven, which, pursuant to *Ring* are "effectively elements of a greater offense for federal constitutional purposes and

subject to the procedural requirements the Constitution attaches to trial of elements." *Id*. at 62a (internal quotations and citation omitted).

Nonetheless, the Kansas Supreme Court concluded that the Sixth Amendment's protections abruptly end after the State finishes presenting evidence of aggravating circumstances. It held that evidence introduced by the State to rebut an accused's mitigation evidence was used by the jury only "to assist it in exercising its discretion to select the appropriate sentence" only *after* finding the accused eligible to receive the death penalty. App. at 63a (quoting *Umana*, 750 F.3d. at 348). Its ultimate holding therefore distinguished between "hearsay used to *establish an aggravating factor*, to which [it held] the Confrontation Clause applies, and hearsay used to *rebut mitigation*, to which [it held] the Confrontation Clause does not apply[.]" *Id*. at 63a-64a (emphasis in original) (quoting *State v. McGill*, 140 P.3d 930 (Kan. 2006)).

But the Kansas Supreme Court erred by cleaving the right to confrontation under the Sixth Amendment on Eighth Amendment lines. One does not become "eligible" for death in Kansas merely because the jury finds the existence of one or more aggravating circumstances. Indeed, an accused is no more eligible for a death sentence following the jury's finding of aggravating circumstances than he or she was before. This is because the jury must *also* find the aggravators are not outweighed by the mitigating evidence. The two findings—(1) that aggravators exist; (2) which are not outweighed by mitigators—are what make an accused death-sentence eligible.

Both are required. The plain language of Kansas' death-penalty statute therefore requires a jury's balancing of aggravating and mitigating factors before a determination by the judge of whether the accused may properly be sentenced to death. As such, the eligibility and selection decisions are, by statute, indivisible under Kansas law.

Moreover, the Kansas court's finding ignores the temporal reality of a jury's decision under Kansas law. When it held that evidence introduced by the State to rebut an accused's mitigation evidence was used by the jury only to assist it in exercising its discretion to select the appropriate sentence' *after* finding the accused eligible to receive the death penalty it ignored the reality that the jury has made no findings whatsoever regarding death-penalty eligibility at the time the presentation of aggravators ends and the presentation of mitigators begins. Indeed, the jury cannot render an accused death-eligible until after the presentation of *all* of the penalty phase evidence. Unlike federal trials, which are frequently trifurcated into a guilt-innocence phase, an eligibility phase, and a selection phase, the capital penalty phase in Kansas occurs in a single sitting resulting in a unitary verdict. The Kansas Supreme Court acknowledged as much below: "Kansas' capital sentencing scheme does not contemplate bifurcated *penalty-phase* proceedings (only the guilt phase and penalty phase are bifurcated)[.]" App. at 63a (emphasis in original).

While Mr. Carr acknowledges that the two findings required by Kansas have the color of the Eighth Amendment narrowing and individualized determination that

the Court prescribed in *Tuilaepa*, it does not automatically follow that the two must be parsed under a Sixth Amendment analysis. See 512 U.S. at 972. Indeed, the question in *Tuilaepa* was not whether the Sixth Amendment applied to the penalty phase, but whether the Eighth Amendment required more specific iterations of certain aggravating factors. So, while "eligibility" and "selection" considerations may be reflected in Kansas' scheme and may even be required by the Eighth Amendment, there is no corollary requirement that they be handled distinctly or excised for Sixth Amendment purposes.

The problem with the Kansas Supreme Court's analysis is that it tries to gerrymander the Eighth Amendment's distinction between narrowing and selection requirements into the Sixth Amendment's purview. And, this can't be done without the application of a faulty premise: *i.e.*, that only aggravating circumstances must be found to impose a sentence of death. Indeed, a Kansas jury that has heard the presentation of aggravating-circumstance evidence "has not found all the facts which the law makes essential to the punishment." *Blakely*, 542 U.S. at 304. Instead, in Kansas, the conclusion that an aggravating circumstance exists, the existence of mitigating circumstances, and the weighing of the mitigating circumstances against any aggravating circumstances is constitutionally significant fact-finding to which the Confrontation Clause applies.

### D. *Williams*' holding does not preclude finding the right to confrontation exists throughout capital sentencing.

Moreover, the Kansas Supreme Court's reliance on *Williams*—to withhold the critical confrontation right during portions of capital sentencing before the jury renders a verdict—is likewise faulty. *Williams* does not address the imposition of a death sentence when the "default" is a life sentence, nor does it address the Confrontation Clause.

In *Williams*, the accused had been sentenced to death in state court based in part on evidence from the court's probation department, which was "information supplied by witnesses with whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal." 337 U.S. at 243 (quoting *People v. Williams*, 83 N.E.2d 698 (N.Y. 1949)). The Court held that Mr. Williams' sentence was not infirm simply because he'd been unable to cross-examine the authors of the probation report. It noted that sentencing judges should be able to consider "the fullest information possible concerning the defendant's life and characteristics" and that requiring cross-examination of such evidence could potentially render that evidence unavailable. It also concluded that death sentences should be treated no differently. *Id.* at 251-52.

But *Williams* is distinguishable from Mr. Carr's case, and many of the cases cited by the Kansas Supreme Court that relied on *Williams*. As an initial matter, *Williams* did not analyze the confrontation right in the context of the Sixth

Amendment, but instead as a component of due process. *Williams*, 337 U.S. at 245. In fact, at the time of *Williams*, the Sixth Amendment had yet to be incorporated against the states. *Pointer v. Texas*, 380 U.S. 400, 403 (1965). As such, *Williams* does not foreclose a finding that the Sixth Amendment's Confrontation Clause applies throughout a capital-sentencing trial. The case merely stands for the proposition that, at the time of its deciding, due process did not require the States to provide confrontation at sentencing.

Additionally, when considering the unchallenged hearsay statements in the probation report, the judge had unlimited discretion to impose a death sentence following a conviction for the crime. Thus, the judge was merely proscribing a sentence within the range of penalties for the crime. The judge was not relying on the unchecked evidence to find a fact that would increase the penalty beyond the jury's finding of guilt. As the Court acknowledged in *Alleyne*, the hearsay evidence in *Williams* was not altering the potential penalties to which Mr. Williams was exposed:

> "Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty. *Importantly, this is distinct from factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.' Williams*[], 337 U.S. [at] 246[]. While such findings of fact may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing." 570 U.S. at 113 n.2 (emphasis added).

*Williams* therefore does not control the outcome of Mr. Carr's appeal.

Instead, *Williams* permits hearsay evidence that does not alter the range of penalties that may be imposed. Conversely, *Ring* and *Specht* preclude hearsay evidence that increase the penalty to which an accused may be exposed. Here, the outcome of the weighing question can increase an accused's penalty from life to death. The question posed by Mr. Carr's case is beyond the facts contemplated by *Williams*.

In sum, the Kansas Supreme Court erred by relying on *Williams* to conclude that the Confrontation Clause does not apply to evidence presented to rebut mitigating circumstances. *Williams* does not answer the question of the Sixth Amendment's application to Kansas' capital sentencing scheme, nor should it be expanded to do so.

**E. The law has evolved since *Williams*. Now, confrontation means cross examination. And, death *is* different.**

The Kansas Supreme Court also erred in relying on *Williams* given that two major changes in the law have occurred since the Court decided *Williams*, which call into question its applicability to Mr. Carr's case.

*First*, *Crawford* changed what constitutes reliable evidence. Pre-*Crawford*, out-of-court evidence satisfied the Confrontation Clause so long as it contained "an adequate indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *overruled by Crawford*, 541 U.S. at 68-69. After *Crawford*, the test is not whether the out-of-court evidence is reliable but whether its reliability has been assessed "in a particular manner: by testing in the crucible of cross-examination." 541 U.S. at 61. Thus, even

if the Court had applied the Confrontation Clause analysis existing pre-*Crawford* to the facts in *Williams*, it would have been satisfied. However, that is not the test post-*Crawford,* which further limits *Williams'* applicability to Mr. Carr's case.

*Second*, *Williams'* conclusion that death sentences should be treated no differently than other sentences no longer holds true. The Court has explicitly acknowledged that "death is qualitatively different" and both the sentencing process and the trial must now satisfy a heightened form of due process. See, *e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976). Indeed, the Court has explained that because "[t]here is a significant constitutional difference between the death penalty and lesser punishments . . . we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination." *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); see also *Strickland v. Washington*, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of fact finding."); *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring) (Our system of justice must go "to extraordinary measures to ensure that the prisoner [who is] sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.").

The Kansas Supreme Court's holding with regard to capital defendants' right to confrontation cannot be squared with *Crawford* and the Court's modern death-

penalty jurisprudence. Indeed, under Kansas' framework, the State could save its most damning testimonial hearsay evidence until rebuttal of the defendant's mitigating circumstances to avoid subjecting that evidence to the crucible of confrontation. Where death is on the table, the Kansas Supreme Court's finding that a defendant's confrontation right—the "greatest legal engine ever invented for the discovery of truth," *California v. Green*, 399 U.S. 149, 158 (1970)—is inapplicable to evidence the State offers to rebut the defendant's mitigation cannot be squared with this Court's repeated recognition that because death is different, there is a corresponding need for heightened reliability in the determination that death is the appropriate punishment.

Recognizing the application of the Sixth Amendment throughout capital sentencing is also of particular import in Kansas, where the *jury* is designated as the arbiter of the weighing question at a unitary penalty proceeding. *C.f. McKinney v. Arizona*, 140 S. Ct. 702 (2021) (upholding appellate reweighing of aggravating and mitigating circumstances on collateral review where sentencing scheme vested the weighing decision with the judge, and not the jury). A Kansas jury does not render a verdict on the presence of aggravating circumstances until the close of *all* sentencing evidence—aggravating-circumstance evidence, mitigating-circumstance evidence, and rebuttal evidence. Thus, because a Kansas capital-sentencing jury hears *all* evidence before determining if the State has met its burden to prove the existence of an aggravating circumstance, it could easily rely on un-confronted

"rebuttal evidence" to determine the existence of an aggravator. As applied here, unrebutted evidence that Mr. Carr did not suffer from brain damage might make his participation in the murders seem more heinous, atrocious, or cruel. But using the rebuttal evidence to "bolster" the aggravator would clearly violate *Ring*. Kansas' procedure offers no way to guarantee un-confronted evidence is not used as further support of an aggravating circumstance, especially to the level of reliability required under this Court's modern death-penalty jurisprudence.

**F. In Kansas, where the weighing determination is delegated to the jury, jury-trial rights must attach to the presentation of all evidence relevant to the weighing.**

Importantly, the Court's recognition that a jury is not required to reweigh aggravators and mitigators on collateral review does not mean that jury-trial rights do not apply to the initial weighing question before a jury. See *McKinney*, 140 S. Ct. at 709. In *McKinney*, the Court upheld an accused's death sentence following a reweighing of aggravating circumstances versus mitigating circumstances by the Arizona Supreme Court. The Arizona Supreme Court had engaged in the reweighing following a remand of the accused's case from the United States Court of Appeals for the Ninth Circuit, after the Ninth Circuit held that the district court had failed to properly consider a mitigating circumstance. The Court found that so long as a jury "find[s] the aggravating circumstance that makes the defendant death eligible . . . a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision." 140 S.

Ct. at 708. Accordingly, an appellate court may reweigh aggravating and mitigating circumstances on collateral review when doing so is "appropriate and provided under state law." 140 S. Ct. at 709.

A cursory review may lead to the conclusion that *McKinney* stands for the proposition that no jury-trial right exists as to the weighing question; therefore, no right to confrontation right exists as to the weighing question, either. But such a reading would be imprudent.

*First*, the *McKinney* court candidly admitted that *Ring* and *Hurst* did "not apply" to McKinney's case because it became final on direct review in 1996, and those cases do not apply retroactively.

*Second*, the facts of McKinney are vividly distinguishable from the facts presented by Mr. Carr's appeal. Even if judges may *still* constitutionally engage in the weighing of aggravating and mitigating circumstances post *Ring*, *McKinney* arose out of a capital scheme that permitted a judge to sentence an accused to death if at least one aggravator was found. Ariz. Stat. Ann. § 13-703(F) (1993). Moreover, at the time of Mr. McKinney's sentencing, the judge alone found the existence aggravating factors. 140 S. Ct. at 708. Then, the judge could impose a life sentence if the mitigating circumstances were "sufficiently substantial" to mandate leniency. Ariz. Stat. Ann. § 13-703(E) (1993). Thus, under the scheme at issue in *McKinney*, neither weighing, nor a jury-determination of the existence of aggravating or mitigating circumstances were prerequisites to death eligibility.

In contrast, Kansas's scheme requires a jury determination of the relative weight of the aggravating and mitigating circumstances before a judge may sentence an accused to death. Put differently, the jury's weighing decision is a prerequisite to death eligibility in Kansas, but not under the Arizona scheme at issue in *McKinney*. As such, *McKinney* does not control, nor should it be read to do so. Instead, the Sixth Amendment protects an accused's right to confront adverse witnesses throughout the penalty-phase of a capital trial in Kansas.

### G. Because the district court violated Mr. Carr's Confrontation Clause rights by admitting hearsay evidence of multiple doctors, this Court should reverse the decision of the Kansas Supreme Court.

Because the Sixth Amendment's right to confront adverse witnesses applies throughout the penalty-phase jury trial in a capital case, the district court violated Mr. Carr's Sixth Amendment rights when it allowed Dr. Pay to testify about the opinions of other doctors without giving Mr. Carr the opportunity to cross-examine those doctors. In fact, the State never asserted in the proceedings below that Dr. Pay's statements would not be testimonial hearsay if the Sixth Amendment applied; the State only argued only that the Confrontation Clause did not apply to the penalty-phase proceedings. (Brief Of Appellee Volume II Penalty Phase filed in Kansas Supreme Court 4/2/2012 p. 229-238, 2012 WL 1620970; Second Supplemental Brief of Appellee filed in Kansas Supreme Court 11/7/2016 p. 9-10, 2016 WL 11713464).

But the Kansas Supreme Court still rejected the issue, assuming without deciding that if confrontation rights applied, no error occurred. App. at 10a, 66a-68a.

The Kansas Supreme Court acknowledged that the opinions of Dr. Pay's colleagues agreeing with Dr. Pay's interpretation that Mr. Carr's PET scans showed no brain abnormalities were testimonial as they were specifically made in preparation for trial testimony. *Id.* at 66a. However, it concluded that Dr. Pay's testimony that other experts reached a consensus on the issue and had no quarrels with his opinion, coupled with individuals purporting to be those doctors raising their hands to identify themselves in the courtroom audience during that testimony, while "problematic," was acceptable because Dr. Pay was not merely a "conduit" for that testimonial hearsay. *Id*. at 67a.

The Kansas Supreme Court's conclusion was in error and flouts the Court's mandate that, "[a]s a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." *Bullcoming v. New Mexico*, 564 U.S. 647, 657 (2011). Here, Dr. Pay was in a position to testify as an expert in his own right. However, eliciting from Dr. Pay testimonial hearsay that other experts, purportedly in the courtroom, were in consensus with Dr. Pay's opinion and that there was no dispute in reaching that consensus, violated the Confrontation Clause. The rule of *Bullcoming* neatly applies here and should have barred the contested testimonial evidence.

To some extent, the Kansas Supreme Court's erroneous conclusion based upon "conduit" reasoning illustrates ongoing confusion in the lower courts left by the

plurality decision in *Williams v. Illinois*, 567 U.S. 50 (2012). See App. 67a-68a. That decision has "sown confusion" regarding when the evidence underlying an expert's opinion amounts to testimonial hearsay. *Stuart v. Alabama*, 139 S. Ct. 36 (2018) (Gorsuch, J., joined by Sotomayor, J., dissenting from denial from denial of certiorari). But a plain confrontation violation exists in this case, regardless of how the Court reads *Williams v. Illinois*, as even the Kansas Supreme Court acknowledged Dr. Pay testified to the testimonial statements of others. See *Stuart v. Alabama*, 139 S. Ct. 36 (2018) ("[H]owever you slice it, a routine postarrest forensic report like the one here must qualify as testimonial.").

The Kansas Supreme Court erroneously held that an expert can present the testimonial hearsay of other experts as to the truth of the matter asserted, so long as the testifying expert also testified as to his own opinion. This violates *Bullcoming* and exceeds the confusion left by the *Williams v. Illinois* plurality. It cannot stand to reason that because an expert provides some constitutionally permissible testimony the expert may pepper his testimony with testimonial hearsay that a defendant has no right to confront. Indeed, if the Kansas Supreme Court's conclusion is correct, then every expert may testify that "every other expert that I talked to agreed with me, and I talked to the following people . . . [,]" and the accused will have no recourse.

This can't be the proper outcome because it is exactly what the Confrontation Clause was designed to prohibit: the admission of unsworn, unchallenged third-party testimony. See *Crawford*, 541 U.S. at 69 ("Where testimonial statements are

at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.").

## II. State and Federal courts are intractably split over whether and to what extent the Confrontation Clause applies in capital sentencing proceedings.

Kansas improperly cleaved Sixth Amendment protections during a capital proceeding in which constitutionally significant fact-finding occurred, but it is not alone. Indeed, significant confusion and a wide split of authority amongst state and federal courts exist on whether, and to what extent, the Confrontation Clause applies in capital sentencing proceedings. See, *e.g.*, *United States v. Fields*, 483 F.3d 313, 363 (5th Cir. 2007) (Benavides, J., dissenting in part) ("The persuasive authorities, and our Sister Circuits in particular, are divided on the issue *sub judice*."); Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1970 (2005) (This is a "fundamental" question over which lower courts disagreed even then). As demonstrated below, the split amongst courts on this oft-recurring, critically important issue of constitutional dimension is substantial and entrenched. It warrants the Court's immediate intervention.

### A. Courts holding the Confrontation Clause applies in full throughout capital proceedings.

Some federal district courts have found that the Confrontation Clause applies to both the eligibility and selection phases of a capital murder trial. *See, e.g., United*

*States v. Concepcion Sablan*, 555 F. Supp. 2d 1205, 1222 (D. Colo. 2007); *United States v. Mills*, 446 F. Supp. 2d 1115, 1135 (C.D. Cal. 2006).

Likewise, six State courts of last resort—Florida, Maryland, Mississippi, North Carolina, Pennsylvania, and Texas—have held confrontation rights extend to evidence introduced throughout capital sentencing proceedings. See *Rodriguez v. State*, 753 So.2d 29, 43 (Fla. 2000) (stating the "uncontroverted proposition that the Sixth Amendment right of confrontation applies to all three phases of the capital trial"); *Ball v. State*, 699 A.2d 1170, 1190 (Md. App.1997) (Confrontation Clause extends to sentencing phase of a capital trial, including victim impact and factual witnesses); *Pitchford v. State*, 45 So. 3d 216, 251–52 (Miss. 2010) ("While we are aware of federal authority that the Sixth Amendment does not apply at sentencing proceedings, this Court's precedent holds otherwise."); *State v. Holmes*, 565 S.E.2d 154, 165 (N.C. 2002) ("While the Rules of Evidence do not apply to a capital sentencing proceeding, the constitutional right to confront witnesses does apply."); *Commonwealth v. Green*, 581 A.2d 544, 564 (Pa. 1990) (vacating death sentence because defendant could not cross-examine state's mitigation-rebuttal witness); *Russeau v. State*, 171 S.W.3d 871, 880-81 (Tex. Crim. App. 2005) (admitting prison "incident" and "disciplinary" reports at sentencing violated capital defendant's confrontation rights). Likewise, Arkansas has concluded the right to confront witnesses applies to non-capital jury sentencing trials. *Vankirk v. State*, 385 S.W.3d 144, 150 (Ark. 2011) (rejecting *Williams* as controlling precedent).

**B. Courts holding or suggesting the Confrontation Clause applies at the eligibility phase, but not the selection phase.**

Two federal court of appeals, the United States Courts of Appeals for the Fourth and Fifth Circuits, have held that, under *Williams*, the Confrontation Clause does not apply during the selection phase of capital sentencing proceedings, while suggesting it does apply during the eligibility phase. *United States. v. Umana*, 750 F.3d 320, 348 (4th Cir. 2014) (selection phase of FDPA is not constitutionally significant phase of trial for Confrontation purposes, though guilt and eligibility phases jury makes constitutionally significant factual findings); *United States v. Fields*, 483 F.3d 313, 326 (5th Cir. 2007) ("[T]he Confrontation Clause does not operate to bar the admission of testimony relevant only to a capital sentencing authority's selection decision."); see also *United States v. Fell*, 531 F.3d 197, 239 (2d Cir. 2008) (noting that splitting sentencing phase into separate hearings on eligibility and selection assists in delineating Confrontation Clause concerns).

Two state courts, Arizona and now Kansas, have reached similar conclusions. App. at 34a, 61a (confrontation applies to eligibility, but not selection evidence); *State v. McGill*, 140 P.3d 930, 942 (Ariz. 2006) (distinguishing "hearsay used to establish an aggravating factor, to which the Confrontation Clause applies, and hearsay used to rebut mitigation, to which the Confrontation Clause does not apply."). Likewise, Minnesota has held the Confrontation Clause applies to a non-capital jury trial on

aggravating circumstances, without discussion of mitigating or selection-type proceedings. *State v. Rodriguez*, 754 N.W.2d 672, 680 (Minn. 2008)**.**

Finally, Missouri and South Dakota have held the Confrontation Clause does not apply to the selection phase without addressing eligibility. *State v. Johnson*, 284 S.W.3d 561, 584 (Mo. 2009); *State v. Berget*, 826 N.W.2d 1, 20-21 n.11 (S.D. 2013).

### C. Courts holding or implying the Confrontation Clause does not apply at all in capital sentencing proceedings.

Finally, the United States Courts of Appeals for the Seventh, Eighth, and Eleventh Circuits have relied on *Williams* to reject the application of Confrontation rights to capital sentencing *in toto*. See *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002) (confrontation rights do not apply at sentencing, "even when that sentence is the death penalty"); *United States v. Coonce*, 932 F.3d 623, 640-41 (8th Cir. 2019); *Muhammad v. Sec'y, Fla. Dept. of Corr.*, 733 F.3d 1065, 1073-77 (11th Cir. 2013).

And some state courts of last resort have concluded likewise. *State v. Dunlap*, 313 P.3d 1, 34, 40 (Ida. 2013) (holding that "the Confrontation Clause does not apply in sentencing proceedings"); *People v. Banks*, 934 N.E. 2d 435, 462 (Ill. 2010) ("[W]e hold that the confrontation clause does not apply to the aggravation/mitigation phase of a capital sentencing hearing."); *Summers v. State*, 148 P.3d 778, 783 (Nev. 2006) ("[N]either the Confrontation Clause nor *Crawford* apply to evidence admitted at a capital penalty hearing[.]").

These conflicting decisions reveal a deep divide amongst the lower courts over whether and to what extent the Confrontation Clause applies to bar testimonial hearsay in capital sentencing proceedings before a jury. There appears to be no sign that this split will resolve itself. Only this Court can clarify the uncertainty of *Williams'* scope.

## III. This case presents a vitally important issue and is an ideal vehicle for resolving it.

Whether, and to what extent, the Confrontation Clause applies in capital sentencing remains one of the most significant, unsettled questions in death-penalty litigation. Fractured lower courts have expressed profound disagreement on whether *Williams* controls the issue, which is something only this Court can resolve. Here, the Kansas Supreme Court's decision stripped Mr. Carr of his right to confront adverse witnesses in a proceeding to decide whether he will die. At this critical juncture, the decision below holds that the "constitutionally prescribed method of assessing [the] reliability" of witness testimony does not apply. See *Crawford*, 541 U.S. at 62. That holding is not only wrong, but fatal.

This case is a strong vehicle for reaching this issue. It comes to this Court on direct appeal from a death sentence, and is, thus, unencumbered from the procedural complexities of a case on *habeas* review. The issue was addressed and examined by the Kansas Supreme Court, and thus is free from preservation concerns. And the issue strongly illustrates the dangers of unchecked hearsay evidence being used in

capital sentencing proceedings as the State rebutted Mr. Carr's mitigation evidence not by meeting the challenge in the courtroom through the adversarial system, but through uncontested opinions of other, unsworn witnesses regarding the veracity of the defense experts. Moreover, not only was Mr. Carr prevented from confronting the unsworn witnesses, he was likewise prevented from recalling his expert in surrebuttal to address the allegations.

## CONCLUSION

The district court violated Mr. Carr's right to confront adverse witnesses against him while the jury remained undecided on whether the State had established beyond a reasonable doubt the existence of an aggravating circumstance that would permit a sentence of death if mitigating circumstances did not outweigh it. This violated the clear command of the Sixth Amendment's text, history, and the Court's precedent on an issue over which lower courts have sharply divided. Holding the Sixth Amendment protects an individual facing death throughout a penalty-phase jury trial is imminently necessary to prevent further erosion of the confrontation right in capital "prosecutions." Mr. Carr's case provides an ideal vehicle for making this pivotal holding. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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September 26, 2022