No. 22-5731

**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

# BRIEF IN OPPOSITION


DEREK SCHMIDT
*Attorney General of Kansas*
JEFFREY A. CHANAY
*Chief Deputy Attorney General*

BRANT LAUE
*Solicitor General of Kansas*
(Counsel of Record)
DWIGHT R. CARSWELL
*Deputy Solicitor General*
SHANNON GRAMMEL
*Deputy Solicitor General*
KURTIS K. WIARD
*Assistant Solicitor General*

120 S.W. 10th Ave., 2nd Floor
Topeka, Kansas 66612
(785) 296-2215
brant.laue@ag.ks.gov

**CAPITAL CASE**

## QUESTION PRESENTED

Whether the Sixth Amendment's Confrontation Clause applies in capital sentencing proceedings to testimony relevant solely to the jury's selection decision, as opposed to testimony relevant to the existence of a statutory aggravating factor that renders the defendant eligible for the death penalty.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

**STATUTE**



**OTHER AUTHORITIES**

## INTRODUCTION

Certiorari should be denied because the answer to the question presented would not affect the outcome of this case. Although the Kansas Supreme Court held that the Confrontation Clause does not apply to evidence relevant solely to the jury's selection decision in capital sentencing proceedings, it did not apply that holding here. Instead, it assumed that the Confrontation Clause applied to the testimony in question and found no Confrontation Clause violation. Thus, even if Petitioner is correct that the Confrontation Clause applies throughout the sentencing phase, that would not call into question the judgment below. In any event, the holding of the Kansas Supreme Court was correct and does not otherwise warrant this Court's intervention.

## STATEMENT

1. Petitioner Jonathan Carr and his brother, Reginald Carr, Jr., are "two of the most brutal and coldblooded killers in the history of Kansas." *State v. Carr*, 502 P.3d 546, 630 (Kan. 2022) (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's brother and another man carjacked Andrew Schreiber, held a gun to his head, and forced him to make cash withdrawals at various ATMs. Pet. App. 107a.

On December 11, the Carr brothers fatally shot Linda Ann Walenta, a cellist for the Wichita symphony. Pet. App. 107a. The brothers followed Walenta home from orchestra practice that night. Pet. App. 107a. After Walenta pulled into her driveway, one of the brothers approached her car and asked for help. Pet. App. 107a; 156a. Walenta rolled down her window, and the brother pointed a gun at her head. Pet. App. 107a. Walenta put her car in reverse in an attempt to escape. Pet. App. 107a. The brother shot her three times in the head and then fled the scene. Pet. App. 107a. One of the bullets severed Walenta's spine, rendering her paraplegic. Pet. App. 107a; 156a. She died in the hospital one month later. Pet. App. 107a.

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. 108a; 156a-160a. 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. 108a; 156a. Heather (Aaron's friend) and Holly (Jason's girlfriend) were also in the home that night. Pet. App. 108a. As was Holly's dog, Nikki. Pet. App. 108a; 156a. 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. 108a; 157a. The friends were threatened not to speak to each other. Pet. App. 157a.

The brothers then ordered Holly and Heather to go to the area outside of Jason's bedroom. Pet. App. 157a. 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. 108a; 157a. At one point, one of the brothers hit Holly's knee so he could have a better view. Pet. App. 157a. The brothers then ordered Aaron, Brad, and Jason out of the closet one-by-one to have sex with Holly. Pet. App. 157a. Aaron initially refused, and one of the brothers hit him in the back of the head with something hard. Pet. App. 157a. After crying out in pain, Aaron attempted to comply. Pet. App. 157a. The brothers then ordered the three men to have sex with Heather. Pet. App. 157a. Aaron again told the brothers he did not want to. Pet. App. 157a. 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. 157a. 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. 108a.

Petitioner's brother then took Brad, Jason, Holly, and Aaron one-by-one to ATMs around Wichita to withdraw cash. Pet. App. 108a. While Petitioner's brother was at the ATM with Brad, Petitioner snatched Holly from the closet. Pet. App. 108a. Setting his gun between her knees on the floor, he ordered her to perform sex acts on herself. Pet. App. 108a. Then he raped her. Pet. App. 108a. Then he raped Heather. Pet. App. 108a. The others could hear from the closet. Pet. App. 158a.

When Petitioner's brother forced Holly to the ATM, she was wearing only a sweatshirt. Pet. App. 158a. As she leaned out of the car to take the cash from the ATM, Petitioner's brother groped her vagina with his gloved hand. Pet. App. 158a. Petitioner's brother 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. 158a. He also asked Holly if being raped by Petitioner was better than having sex with her boyfriend. Pet. App. 158a. While Petitioner's brother was at the ATM with Aaron, Petitioner found an engagement ring Jason had purchased for Holly and hidden in his bedroom. Pet. App. 108a; 158a. He had yet to propose with it. Petitioner pointed a gun at Jason's head and forced him to identify the engagement ring while Holly listened from the closet. Pet. App. 108a.

When Petitioner's brother 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. 108a; 159a. Petitioner's brother raped Holly from behind before spinning her around, ejaculating into her mouth, and ordering her to swallow. Pet. App. 159a. Petitioner, meanwhile, raped Heather (again) in a bathroom. Pet. App. 108a. Holly stumbled into the bathroom as Heather was being raped. Pet. App. 159a. Petitioner shut the door, telling Holly he was not finished. Pet. App. 159a. Holly waited outside the bathroom for a few minutes and then opened the door again. Pet. App. 159a. Petitioner ordered her into the bathroom, where he raped her (again). Pet. App. 159a.

At around 2:00 a.m., the brothers drove the five friends to a snow-covered soccer field. Pet. App. 108a; 159a. Petitioner's brother drove Jason's truck, with Holly in the cabin. Pet. App. 108a; 159a. Petitioner drove Aaron's car, with Heather in the cabin and the three men in the trunk. Pet. App. 108a, 159a. At the soccer

field, the brothers ordered the five friends to exit the vehicles and kneel in the snow. Pet. App. 108a. The brothers shot the friends one-by-one, execution-style in the back of the head. Pet. App. 108a; 159a. Holly was the final friend shot. Pet. App. 108a. Because a hairclip she was wearing deflected the bullet, it did not hit her brain and she did not die. Pet. App. 108a; 160a. Seeing that Holly was still kneeling, the brothers kicked her so that she fell face-first into the snow. Pet. App. 108a. In an attempt to make sure that Holly was dead, the brothers drove over her in Jason's truck. Pet. App. 108a. 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. 108a.

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. 160a. 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. 108a; 160a. Searching for help, Holly spotted a house with Christmas lights on it. Pet. App. 108a. Holly ran more than a mile through the snow to the house, "naked, skull shattered, and without shoes." Pet. App. 108a; 160a. When she eventually made it to the house and pounded on the door, a man answered. Pet. App. 108a. Holly told the man what had happened. Pet. App. 108a. They called 911 at 2:37 a.m. Pet. App. 160a. Afraid she was not going to survive, Holly quickly relayed what had happened to the 911 operator. Pet. App. 108a.

Holly was taken to a local hospital for treatment. Pet. App. 160a. While Holly was in the hospital, police found the bodies of the other four friends in the soccer field where they had been shot. Pet. App. 160a. Neither Heather nor Jason had a pulse. Pet. App. 160a. Aaron and Brad appeared to be struggling to breathe. Pet. App. 160a. All four of them ultimately died of gunshot wounds to the head. Pet. App. 164a.

2. Petitioner was charged and tried for these crimes in a joint trial with his brother. Pet. App. 127a. The jury found Petitioner and his brother guilty of capital murder and numerous other offenses. Pet. App. 127a-128a. The case then proceeded to sentencing to determine whether Petitioner and his brother should be sentenced to death. In Kansas, the death penalty may only be imposed if the jury unanimously finds beyond a reasonable doubt that one or more statutory aggravating factors exist and that the aggravating factors are not outweighed by any mitigating circumstances. *See* Kan. Stat. Ann. § 21-6617(e) (formerly codified as Kan. Stat. Ann. § 21-4624(e)).

As part of its case in mitigation, the defense called Dr. David Preston, a specialist in nuclear medicine who testified that there were abnormalities in positron emission tomography (PET) scans of Petitioner's brain. Pet. App. 65a. Specifically, Dr. Preston said that images of Petitioner's temporal lobes demonstrated marked deficits in metabolism in the regions of the hippocampus and amygdala. Pet. App. 65a.

The State called Dr. Norman Pay, a neuroradiologist, to rebut this testimony. Pet. App. 65a. Dr. Pay testified that he had consulted with the person who conducted the PET scans on Petitioner, the doctor in charge of PET scans at the medical center where the scans were performed, and another neurologist at the medical center. Pet. App. 65a. The prosecution had Dr. Pay identify these individuals, who were in the courtroom, and asked each of them to raise a hand, which they did. Pet. App. 65a. Dr. Pay testified that all three agreed with him that the image of Petitioner's brain scan that formed the basis of Dr. Preston's testimony was skewed in color and was manipulated so that the anterior portion of the temporal lobe, which includes the amygdala, would not appear in the image. Pet. App. 65a. When the prosecutor asked Dr. Pay if the manipulated images were "by design," he responded, "We were told." Pet. App. 65a. Dr. Pay also testified that after looking at all of the PET images, he and the others he consulted had reached the opinion that the scans showed normal metabolism in Petitioner's brain. Pet. App. 65a.

At the conclusion of the sentencing phase, the jury found that the State had proved the existence of four aggravating factors beyond a reasonable doubt and that those aggravating factors outweighed any mitigating circumstances. Pet. App. 109a. Petitioner was therefore sentenced to death. Pet. App. 109a.

3. On direct appeal, the Kansas Supreme Court initially vacated the death sentences of Petitioner and his brother, holding that their Eighth Amendment rights were violated when the district court declined to sever their

penalty phase proceedings from each other and also because the district judge did not instruct the jury that the existence of mitigating factors need not be proved beyond a reasonable doubt. Pet. App. 135a-136a; 289a-292a; 303a-304a. Although that holding made it unnecessary to consider other alleged penalty-phase errors, including the Confrontation Clause claim Petitioner presents here, the Kansas Supreme Court held for the benefit of remand that the Confrontation Clause applies during capital sentencing proceedings. Pet. App. 135a; 295a. It thus explained that the "controlling question" in analyzing the admissibility of Dr. Pay's testimony "will be whether the out-of-court statements of agreement by Pay's colleagues qualify as testimonial hearsay under the Sixth Amendment and *Crawford* [*v. Washington*, 541 U.S. 36 (2004)]." Pet. App. 300a.

This Court granted certiorari on the two Eighth Amendment questions and reversed the Kansas Supreme Court, holding that the joint penalty-phase did not violate the Carrs' Eighth Amendment rights and that the Eighth Amendment does not require judges to instruct juries that mitigating factors need not be proved beyond a reasonable doubt. Pet. App. 109a-113a.

4. On remand from this Court, the Kansas Supreme Court considered the remaining penalty phase errors alleged by Petitioner and affirmed his death sentence.[1] On the question of whether the Confrontation Clause applies to capital

[1] The Kansas Supreme Court also affirmed Petitioner's brother's death sentence on remand. *See State v. Carr*, 502 P.3d 546 (Kan. 2022). Petitioner's brother has a separate petition for certiorari pending before this Court in that case. *See Carr v. Kansas*, No. 22-5218.

sentencing proceedings, the court first reviewed the governing law and decisions from other courts. Pet. App. 61a-63a. The court then qualified its earlier "general pronouncement . . . that the Confrontation Clause applies during the penalty phase" "by clarifying that the Confrontation Clause applies only to evidence relevant to the jury's eligibility decision" but does not extend "to evidence relevant to the jury's selection decision." Pet. App. 63a. Although Kansas's capital sentencing scheme does not contemplate bifurcated penalty-phase proceedings, as the Federal Death Penalty Act does, the court explained that "district court judges are still well-positioned to delineate between evidence relevant to eligibility and other evidence relevant to selection." Pet. App. 63a.

Turning to the admissibility of Dr. Pay's testimony, the Kansas Supreme Court noted that in its prior opinion, it framed the controlling question as whether the out-of-court statements qualified as testimonial hearsay. Pet. App. 66a. The court recognized that its new qualification that the Confrontation Clause does not apply to evidence relevant solely to the jury's selection decision "potentially calls into question the framing of this issue prospectively." Pet. App. 66a. But the court explained that "for today's purposes, in the spirit of the doctrine of the law of the case, we will continue to frame the issue" as in the court's prior opinion. Pet. App. 66a. Thus, the court "assumed, without deciding, that the Confrontation Clause applied" to Dr. Pay's testimony. Pet. App. 11a. But the court went on to hold that Dr. Pay's testimony did not violate the Confrontation Clause because, in discussing his reliance on conversions with other experts, he provided an independent opinion

based on his synthesis of the evidence rather than merely serving as a conduit for the opinions of others. Pet. App. 11a; 66a-68a.

## REASONS FOR DENYING THE WRIT

This case does not warrant certiorari because the question presented is not outcome dispositive. The Kansas Supreme Court assumed that the Confrontation Clause applied to Dr. Pay's testimony—as Petitioner asks this Court to decide—but held that even so, Dr. Pay's testimony did not violate the Confrontation Clause. Thus, nothing in this case turns on the answer to the question presented.

Even if the Kansas Supreme Court's decision had been based on its holding that the Confrontation Clause does not extend to evidence relevant to the jury's selection decision, there is no split of authority on that question that warrants this Court's intervention. And the Kansas Supreme Court's analysis was correct in any event. This Court should deny review, as it has done with several previous petitions presenting this issue. *See Coonce v. United States*, 142 S. Ct. 25 (No. 19-7862) (2021); *Haberstroh v. Nevada*, 578 U.S. 922 (No. 15-899) (2016); *Umana v. United States*, 576 U.S. 1035 (No. 14-602) (2015); *Dunlap v. Idaho*, 574 U.S. 932 (No. 13-1315) (2014).

### I. The Question Presented Did Not Form the Basis of the Kansas Supreme Court's Decision Below.

As noted above, the Kansas Supreme Court did not base its rejection of Petitioner's Confrontation Clause claim on its holding that the Confrontation Clause does not extend to evidence relevant solely to the jury's selection decision. Rather, because the court had held in its earlier decision in the case that the

Confrontation Clause applies to capital sentencing proceedings, the court stood by its earlier framing of the issue "in the spirit of the doctrine of the law of the case" and thus assumed that the Confrontation Clause applied to Dr. Pay's testimony. Pet. App. 66a. Petitioner asks this Court to hold something that the Kansas Supreme Court already assumed to be true for purposes of this case and that therefore would not affect the outcome.

If the Kansas Supreme Court had applied its new holding that the Confrontation Clause does not extend to evidence relevant to the jury's selection decision, it would have needed to determine whether Dr. Pay's testimony was relevant solely to the selection decision or whether that testimony was relevant to the existence of an aggravating circumstance, as Petitioner suggests. *See* Pet. 29. But the Kansas Supreme Court did not decide that question because of its assumption that the Confrontation Clause applied.

While the Kansas Supreme Court assumed that the Confrontation Clause applied to Dr. Pay's testimony, it held that his testimony did not violate the Confrontation Clause because he "offered an independent opinion and interpretation of the PET scans based on his synthesis of the expert opinions of others" and was not "merely a conduit for the expert opinions of others." Pet. App. 67a. Although Petitioner disagrees with that analysis, Pet. 32-34, he does not seek certiorari on that question.[2] And so even if this Court were to agree with Petitioner

[2] Nor would the issue of whether Dr. Pay's testimony violated the Confrontation Clause be worthy of this Court's review if Petitioner had sought certiorari. Petitioner has identified no conflict among lower courts on the question. The Kansas

on the question presented, that would not form a basis for reversing the judgment below.

Because the answer to the question presented would not affect the outcome of this case, this Court should deny certiorari.

## II. There Is No Conflict Warranting this Court's Intervention.

Even if the Kansas Supreme Court had based its decision on its holding that the Confrontation Clause does not extend to evidence relevant solely to the jury's selection decision, there is no conflict among lower courts that would warrant this Court's review. This Court should therefore deny certiorari, as it has previously done with petitions alleging a similar split on the question. *See Coonce v. United States*, 142 S. Ct. 25 (No. 19-7862) (2021); *Haberstroh v. Nevada*, 578 U.S. 922 (No. 15-899) (2016); *Umana v. United States*, 576 U.S. 1035 (No. 14-602) (2015); *Dunlap v. Idaho*, 574 U.S. 932 (No. 13-1315) (2014).

Every federal court of appeals to have addressed the issue has held that the Confrontation Clause does not extend to the sentence selection phase of federal death penalty proceedings. *See United States v. Coonce*, 932 F.3d 623, 640-41 (8th Cir. 2019); *United States v. Umana*, 750 F.3d 320, 347-48 (4th Cir. 2014);

---

Supreme Court carefully considered decisions from other jurisdictions and resolved Petitioner's Confrontation Clause claim consistent with those decisions. Pet. 66a-68a. The Kansas Supreme Court also characterized the challenged testimony as harmless, explaining that Dr. Pay's reference to other experts "added nothing substantive to what the jury already heard." Pet. 67a. The court also explained that "[i]t is speculative to suggest this testimony added substantial weight to his opinion given the extraordinary vague reference to the other experts Pay consulted" and that "such speculation is unrealistic given that the defense's own expert conceded the PET scans were not reliable tools to predict or explain criminal behavior." Pet. 67a.

*Muhammad v. Secretary, Fla. Dep't of Corrs.*, 733 F.3d 1065, 1073-77 (11th Cir. 2013); *United States v. Fields*, 483 F.3d 313, 324-38 (5th Cir. 2007).

While Petitioner cites state court decisions addressing the applicability of the Confrontation Clause to capital sentencing proceedings, those cases do not present a split of authority warranting certiorari. Some of those cases involve the application of the Confrontation Clause to evidence relevant to the death penalty eligibility determination, which the Kansas Supreme Court agreed falls within the scope of the Confrontation Clause. *Russeau v. State*, 171 S.W.3d 871 (Tex. Crim. App. 2005), involved evidence about the defendant's repeated disciplinary offenses when incarcerated, *id.* at 880, which was relevant to the statutory eligibility factor of "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* at 878 (quoting Tex. Code Crim. Proc. art. 37.071 § 2(b)(1)); *see also* Def's Br., *Russeau v. State*, No. 74,466, 2003 WL 23320300, at *158 (Tex. Crim. App. Nov. 21, 2003) (explaining that the State offered evidence of defendant's disciplinary offenses "to support its contention that [defendant] would be [a] continuing threat to society"). And the Florida Supreme Court's decision in *Rodriguez v. State*, 753 So. 2d 29 (Fla. 2000), addressed testimony about the defendant's state of mind, which was relevant to the aggravating circumstance of whether "the murder was cold, calculated, and premeditated." *Id.* at 35, 43.

Other state court decisions that Petitioner cites are dated, assumed that the Confrontation Clause applied without analysis, and have not been reconsidered or

affirmed in light of more recent decisions. For instance, in *Commonwealth v. Green*, 581 A.2d 544 (Pa. 1990), the Pennsylvania Supreme Court offered no analysis of the Confrontation Clause's applicability to capital sentencing but cited the Eleventh Circuit's decision in *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir. 1982), to conclude that a defendant's confrontation rights had been denied. 581 A.2d at 564. But the Eleventh Circuit has since limited *Proffitt* to the facts of that case, recognizing that "*Williams* [*v. New York*, 337 U.S. 241 (1949),] is still good law and that hearsay is admissible at capital sentencing." *Muhammad*, 733 F.3d at 1073-77. In reaching this conclusion, the Eleventh Circuit favorably cited the Fifth Circuit's decision in *United States v. Fields*, 483 F.3d 313, 326 (5th Cir. 2007), which drew a distinction between the jury's eligibility determination and selection decision. The Pennsylvania Supreme Court has not considered these intervening developments. Nor has the court even cited *Green* since it was decided for the proposition that the Confrontation Clause applies to sentencing.

In *Pitchford v. State*, 45 So. 3d 216 (Miss. 2010) (en banc), the Mississippi Supreme Court acknowledged its earlier precedent in *Lanier v. State*, 533 So. 2d 473, 488 (Miss. 1998), which assumed that the Confrontation Clause applies to capital sentencing proceedings without analyzing the issue. 45 So. 3d at 251-52 & n.100. *Pitchford* recognized that a number of federal courts had held otherwise but ultimately found that the admission of evidence during the sentencing phase was harmless. *Id.* at 251-52 & n.99. Thus, the Mississippi Supreme Court had no need to reconsider *Lanier*.

Likewise, the North Carolina Supreme Court in *State v. Holmes*, 565 S.E.2d 154 (N.C. 2002), merely relied on its earlier decision in *State v. McLaughlin*, 462 S.E.2d 1, 19 (N.C. 1995), for the proposition that the constitutional right to confront witnesses applies to capital sentencing proceedings. 565 S.E.2d at 165. But that earlier decision offered no reasoning, and neither case considered the distinction that has been drawn in more recent decisions between eligibility and selection.

And while *Ball v. State*, 699 A.2d 1170 (Md. 1997), stated with no analysis that the Confrontation Clause extends to the sentencing phase of a capital trial, *id.* at 1190, the death penalty in Maryland has since been repealed. *See Bellard v. State*, 157 A.3d 272, 274-75 (Md. 2017) (noting that Maryland repealed the death penalty in 2013). *Ball* therefore has no current applicability, and the Maryland Court of Appeals has had no reason to address the issue in light of more recent decisions. In addition, *Ball* specifically declined to consider whether a defendant is entitled to cross-examine the authors of written victim impact statements offered at sentencing, finding the issue had been waived. 699 A.2d at 1191. The court did explain, however, that the Confrontation Clause does not prohibit the introduction of a presentence investigation report that contains out-of-court statements from individuals that the defendant has not been able to cross-examine. *Id.*

Finally, Petitioner cites *Vankirk v. State*, 385 S.W.3d 144 (Ark. 2011), which held that the Confrontation Clause applies to sentencing generally. *Id.* at 150-51. But that was not a capital case, so the court did not consider arguments that the

Confrontation Clause should apply specifically to capital sentencing proceedings, as Petitioner argues here.

In short, none of these decisions forms a developed conflict that would warrant certiorari.

## III. The Kansas Supreme Court's Holding Was Correct.

The Kansas Supreme Court's holding that the Confrontation Clause does not extend to evidence relevant solely to the jury's selection decision was also correct. This Court has held that the Sixth Amendment's Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Crawford v. Washington*, 541 U.S. 36, 54 (2004); *see also id.* at 68 ("Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required."). And the confrontation right at common law did not restrict the use of testimony for purposes of sentencing. *See Williams v. New York*, 337 U.S. 241, 246 (1949). "[B]oth before and since the American colonies became a nation," sentencing judges exercised "wide discretion in the sources and types of evidence used to assist [them] in determining the kind and extent of punishment to be imposed within limits fixed by law." *Id.* (noting that "[o]ut-of-court affidavits have been used frequently" in sentencing).

Petitioner argues that *Williams* does not control because it was a due process decision and was not based on the Confrontation Clause, which had not yet been incorporated against the States. Pet. 24-25. But the *Williams* Court based its reasoning on the fact that traditional confrontation protections did not restrict the

use of evidence at sentencing. 337 U.S. at 246-47; *see also id.* at 250-51 (referring to the "age-old practice of seeking information from out-of-court sources to guide [court's] judgment" in sentencing). Because the scope of the Confrontation Clause is determined by the confrontation right at common law, the analysis in *Williams* is just as applicable to a Confrontation Clause claim. This also refutes Petitioner's claim that because *Williams* pre-dated *Crawford* it is inconsistent with *Crawford*'s approach to the Confrontation Clause. Pet. 26-27. What *is* at odds with *Crawford* is Petitioner's claim that because somehow "death is different," the Confrontation Clause should be given a different meaning—rather than its common law meaning—in death penalty cases. Pet. 27.

Petitioner is also incorrect in arguing that because the introductory clause to the Sixth Amendment—which provides a number of rights besides confrontation—refers to "all criminal prosecutions," the Confrontation Clause must apply throughout sentencing. Pet. 13-14. While sentencing is part of a prosecution, the meaning of the confrontation right protected by the Sixth Amendment is based on the common law. That common law meaning therefore governs how, if at all, the Confrontation Clause applies to sentencing.

Nor was the Kansas Supreme Court's decision inconsistent with this Court's jury-trial jurisprudence. Statutory aggravating factors that render a defendant eligible for the death penalty "operate as 'the functional equivalent of an element of a greater offense'" and thus "the Sixth Amendment requires that they be found by a jury." *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (quoting *Apprendi v. New Jersey*,

530 U.S. 466, 494 n.19 (2000)). This has led some courts, including the Kansas Supreme Court below, to conclude that the Confrontation Clause applies to evidence relevant to a jury's eligibility determination. But in weighing aggravating and mitigating factors, the jury is exercising its discretion to select a sentence "*within the range* prescribed" by law. *Apprendi*, 530 U.S. at 481 (citing *Williams*, 337 U.S. at 246). There is no basis for extending the Confrontation Clause to evidence relevant solely to this decision. *See Alleyne v. United States*, 570 U.S. 99, 113 n.2 (2013) (explaining that the "Sixth Amendment does not govern" "factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law'" (quoting *Williams*, 337 U.S. at 246)).

Petitioner argues that because Kansas utilizes a unitary penalty phase, rather than bifurcating penalty phase proceedings between the eligibility and selection questions as the Federal Death Penalty Act does, the Confrontation Clause should apply to all penalty phase testimony. Pet. 28-29. But he has not identified a single lower court decision concluding that the Confrontation Clause applies to penalty phase testimony for this reason. Nor does he provide any reason to question the Kansas Supreme Court's explanation that even without bifurcated penalty phase proceedings, "district court judges are still well-positioned to delineate between evidence relevant to eligibility and other evidence relevant to selection," Pet. App. 63a, a distinction that can be reviewed on appeal. Of course, that distinction was not made here because the Kansas Supreme Court assumed,

for purposes of this case, that the Confrontation Clause applied to Dr. Pay's testimony.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DEREK SCHMIDT
*Attorney General of Kansas*
JEFFREY A. CHANAY
*Chief Deputy Attorney General*
BRANT LAUE
*Solicitor General of Kansas*
(Counsel of Record)
DWIGHT R. CARSWELL
*Deputy Solicitor General*
SHANNON GRAMMEL
*Deputy Solicitor General*
KURTIS K. WIARD
*Assistant Solicitor General*
120 S.W. 10th Ave., 2nd Floor
Topeka KS 66612
(785) 296-2215
brant.laue@ag.ks.gov

*Counsel for Respondent*