

CAPITAL CASE

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

PETITIONER'S REPLY BRIEF

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REPLY BRIEF**I. The Question Presented and Petition Assert Jonathan Carr's Right to Confront Witnesses Was Violated.**

Kansas quibbles over the framing of Petitioner's question presented, asserting that answering it alone would not impact the outcome of the case. Opp. 10-12. Petitioner broadly phrased the question presented to address the threshold issue of whether the Sixth Amendment's Confrontation Clause applied throughout Kansas' unitary capital-sentencing phase.

But, a question presented includes subsidiary questions that are fairly included therein. *Yee v. Escondido*, 503 U.S. 519, 535 (1992). Here, the subsidiary question to establishing that Petitioner's right to confront witnesses exists is that they were violated in this case. Kansas acknowledged that Petitioner raised and addressed the Kansas Supreme Court's holding after it assumed Confrontation Clause rights existed, and it had the opportunity to respond on those points. Opp. 10-12; Pet. 32-34. Still, Kansas presents meager defense for the lower court's erroneous conclusion that the presentation of testimonial statements of non-testifying witnesses was not a violation of the right to confront those witnesses. Opp. 10-12; Pet. 32-34. The whole of the issue, which serves as grounds for reversal, was wholly included in the question presented, addressed in the petition, and should be addressed by this Court.

II. The Split is Clear and Entrenched.

Kansas concedes that lower courts are divided over whether and to what extent the Confrontation Clause applies in capital sentencing proceedings. Opp. 12-16. Kansas' subsequent attempts to undermine the clarity of the split miss the mark. For example, Kansas emphasizes that Texas broadly concluded that the Confrontation Clause applies to punishment phase proceedings in a case addressing an eligibility question. *Russeau v. State*, 171 S.W.3d 871, 880-81 (Tex. Crim. App. 2005). Even if that holding were so limited, it would still conflict with federal and state courts finding the rights apply *in toto* or not at all. Kansas similarly attempts to dismiss Florida Supreme Court's decision in *Rodriguez v. State*, 753 So.2d 29, 43 (Fla. 2000), as a decision permitting confrontation solely during the eligibility phase. Opp. 13. But this ignores the case's express language, which holds the Confrontation Clause applies during the guilt, eligibility and selection phases of a capital trial. *Rodriguez*, 753 So.2d at 43. Specifically, the Florida Supreme Court noted the "uncontroverted proposition that the Sixth Amendment right of confrontation applies to all three phases of the capital trial." Further, Kansas' emphasis on the age of state court decisions simply shows those holdings are deeply entrenched, and that this split will not resolve itself. See, e.g., *Pitchford v. State*, 45 So. 3d 216, n.99 & 100 (Miss. 2010) (en banc) (Recognizing split with federal courts while continuing to apply long established state precedent); *State v. Holmes*, 565 S.E.2d 154, 165 (N.C. 2002) (Relying on long established precedent establishing confrontation right); *Ball v. State*,

699 A.2d 1170 (Md. 1997) (Established state precedent unlikely to be revisited in light of repeal of the death penalty). Kansas' arguments simply reinforce that the split is long-established, deeply entrenched, and is one that only this Court can resolve.

III. The Decision Below is Wrong.

As the Petition explained, the text of the Sixth Amendment, its history, as well as this Court's precedent demand concluding that the Confrontation Clause is violated when the prosecution presents the testimonial hearsay of non-testifying witnesses during a unitary jury trial addressing both eligibility and selection questions for capital sentencing. Pet. 11-34. Even Kansas acknowledges that the Sixth Amendment's text addresses rights "[i]n all criminal prosecutions", which would include sentencing proceedings. Opp. 23. However, Kansas then relies upon the discussion in *Williams v. New York*, 337 U.S. 241, 246 (1949), regarding judicial sentencing proceedings proscribing a sentence within a set range of penalties, as controlling of common law and history. That emphasis misses that this issue involves a jury trial, not judicial sentencing within a discretionary range. Kansas provides no textual or common law basis for removing confrontation rights from jury trial proceedings.

Moreover, Kansas acknowledges the reasons for applying confrontation rights to capital sentencing proceedings, at least to the extent eligibility questions are involved. Opp. 17-18. Yet Kansas argues the Confrontation Clause can be excised at those jury trial proceedings, prior to a jury returning a verdict on eligibility for the

death penalty, so long as the evidence is relevant solely to the selection question. Opp. 18. This ignores the fact that Kansas' sentencing scheme requires a jury's unitary verdict on eligibility and selection questions as a prerequisite for the imposition of the death penalty. Kan. Stat. Ann. § 21-6617(e) (2020). Instead, the Sixth Amendment protects an accused's right to confront adverse witnesses throughout the penalty phase of a capital trial in Kansas.

Finally, having established the Sixth Amendment's right to confront adverse witnesses applies throughout the penalty-phase jury trial in a capital case, those rights were violated by the prosecution's use of testimonial hearsay in this case. Indeed, Kansas does not dispute the Kansas Supreme Court's description of the statements used as testimonial. App. at 66a. Thus, that the Kansas Supreme Court allowed such evidence flouts this Court's direction 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). That rule applies here. Permitting the State to introduce the testimonial statements of non-testifying "experts," before the jury determined Mr. Carr was death eligible violated the Sixth Amendment and warrants the Court's intervention, review, and reversal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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