No. _____

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

REGINALD DEXTER CARR, JR.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI AND VOLUME 1 OF APPENDIX

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Eighth Amendment requires that a capital-sentencing jury be *affirmatively instructed* that mitigating circumstances "need not be proven beyond a reasonable doubt," as the Kansas Supreme Court held here, or instead whether the Eighth Amendment is satisfied by instructions that, in context, make clear that each juror must individually assess and weigh any mitigating circumstances?

2. Whether the Confrontation Clause, as interpreted in *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 547 U.S. 813 (2006), applies to the "selection" phase of capital *sentencing* proceedings, as the Kansas Supreme Court held here, *i.e.*, after a defendant has been convicted of capital murder and proof of eligibility for the death penalty has been presented in the guilt phase subject to full confrontation, or does *not* apply to such purely sentencing evidence, as at least three Circuits have held?

3. Whether the trial court's decision not to sever the sentencing phase of the co-defendant brothers' trial here—a decision that comports with the traditional approach preferring joinder in circumstances like this—violated an Eighth Amendment right to an "individualized sentencing" determination and was not harmless in any event?

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of Kansas respectfully petitions for a Writ of Certiorari to review the judgment of the Kansas Supreme Court.

OPINION BELOW

The decision of the Kansas Supreme Court is reported, *State v. Carr*, 331 P.3d 544 (Kan. 2014), and is reproduced as Appendix A.

JURISDICTION

The Kansas Supreme Court decided this case July 25, 2014. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him …" U.S. Const. amend VI.

The Eighth Amendment to the United States Constitution provides in relevant part that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . ." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

A. The Facts

Reginald Carr, Jr., and his brother, Jonathan Carr, were jointly charged, tried, convicted, and sentenced for crimes committed in a series of three incidents in December 2000 in Wichita, Kansas.

In the first incident, on December 7, 2000, the Carr brothers carjacked Andrew Schreiber and drove to various ATMs, forcing Schreiber at gunpoint to withdraw money from his bank account. They ultimately abandoned Schreiber in a rural area after taking his watch, striking him in the head with a gun, and shooting out a tire on his vehicle. App. 29-32.

Four days later, the Carr brothers followed Linda Ann Walenta to her home. As she pulled into her driveway, one of the brothers approached her vehicle. When he pointed a gun through the driver's side window, Walenta attempted to reverse her vehicle and was shot. Although she survived for a few days in the hospital, Walenta died from the shooting. App. 33-35.

The third and utterly depraved incident began on December 14, 2000, at a home shared by three young men, Aaron S., Brad H., and Jason B. Two women, Holly G. and Heather M., were also at the home that night. App. 35.

Shortly after the occupants of the house went to bed, the Carr brothers, armed with guns, forced their way inside. They rounded up the occupants, gathered them into one bedroom, and demanded money. When the victims said they had no cash, the Carrs demanded ATM cards. App. 36. The Carrs also ordered the

victims to remove their clothes and forced all five of them into a closet, telling them to sit down and be quiet. App. 35-36.

The brothers then removed the two women from the closet and forced them to perform oral sex on each other and penetrate each other with their fingers, as the brothers watched and gave instructions. Next, they brought the male victims out of the closet one at a time and ordered each to have sexual intercourse with Holly G. The Carrs threatened to shoot the men if they did not perform. When one victim said he would not do it, he was struck in the back of the head with a hard object. App. 37-38.

After these acts, the Carrs returned Holly G. to the closet and brought out Heather M. They then ordered each of the men to have sexual intercourse with her. App. 38.

After these numerous coerced sex acts, Reginald Carr took Brad H. from the house and drove him to several ATMs to withdraw money. App. 38-39, 61. While they were gone, Jonathan ordered Holly G. out of the closet and raped her. He then took Heather M. out, and proceeded to rape or attempt to rape her. App. 39.

Brad H. and Reginald returned after about 30 minutes, and Reginald then took Jason B. to two ATMs to withdraw money. Upon their return, Reginald took Holly G. to several ATMs to withdraw money. Finally, Reginald returned with Holly G. and took Aaron S. to withdraw money. App. 39-41, 62-63.

When Reginald and Aaron S. returned, Reginald again raped Holly G. and forced her to perform oral

sex. Meanwhile, Jonathan was raping Heather M. Jonathan then raped Holly G. again. App. 41-42.

When the brothers finished raping the women, they forced the men into the trunk of Aaron S.'s car, put Heather M. in the back seat of the car, and put Holly G. in the passenger seat of Jason B.'s truck. Jonathan drove Aaron S.'s car, followed by Reginald driving Jason B.'s truck. App. 43.

The Carrs drove to a soccer field and ordered all of the victims out, forcing them to kneel in a line. The Carrs then shot each of the five victims in the back of the head, and drove away. App. 43-44, 57-58.

Miraculously, Holly G. survived. The bullet fired at the back of her head fractured her skull, but did not enter her brain, apparently because it was deflected by a plastic hairclip she was wearing. App. 44, 46. The impact stunned her, but she could hear the Carrs talking and heard them drive away. App. 44.

After the Carrs left, Holly G. got up and spotted a house in the distance. Naked and barefoot, she ran more than a mile through snow and over fences to reach the house. App. 44.

Holly G. pounded on the door and awoke the homeowners, who took her inside and called 911. App. 44-45. Holly G. was treated for her injuries and eventually recovered. The other four victims, however, died. App. 57-58. Holly G. provided police with details of these heinous crimes and testified against the Carrs at trial.

The police quickly apprehended Reginald Carr. When he was arrested, Reginald had a gas card bearing

Jason B.'s name, a watch that belonged to Heather M., and $996. Inside the apartment where they arrested Reginald, police found numerous additional items belonging to the four murder victims and Holly G. App. 51-52.

Meanwhile, Jonathan Carr had gone to a friend's apartment. When the friend and her mother saw news footage of Reginald Carr's arrest and learned that police were looking for another individual, they grew suspicious of Jonathan and called police. App. 52-54. Police arrived and apprehended Jonathan. Like Reginald, Jonathan had property of the victims, including the engagement ring Jason B. had purchased for, but not yet given to, Holly G. App. 55.

B. The Trial and Penalty Proceedings

The Carrs were jointly tried and convicted of numerous criminal counts arising from their crime spree, including the felony murder of Walenta, and four capital murders (of Aaron S., Brad H., Jason B., and Heather M.). App. 25-27. In the capital sentencing proceeding that followed their convictions, both Reginald and Jonathan were sentenced to death for the four capital murders. They each also received a life sentence for the Walenta murder and additional terms of imprisonment for their numerous non-capital convictions. App. 27.

C. The Kansas Supreme Court's Decision

The Kansas Supreme Court affirmed 32 of Reginald Carr's 50 convictions, including one count of capital murder for the quadruple murder in the soccer field. App. 28. But the court reversed his death sentence, finding three constitutional errors in the penalty

proceedings. The court held (1) Reginald's Eighth Amendment right to an individualized sentencing determination was violated by the trial court's decision not to sever the brothers' penalty phase proceedings, App. 404-14; (2) his Sixth Amendment right to confrontation was violated by admission of hearsay in the sentencing phase, App. 421-424; and (3) the trial court's failure to affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt violated the Eighth Amendment. App. 445-46.[1] One justice dissented from the majority's finding of constitutional error in the jury instructions, stating that the majority's opinion "defies the United States Supreme Court's established Eighth Amendment jurisprudence." App. 481-83. Another justice dissented from all of the majority's constitutional rulings and would have affirmed Reginald Carr's death sentence. App. 483-97.

[1] In ruling on this issue, the Kansas Supreme Court referenced its opinion in *State v. Gleason*, 329 P.3d 1102 (2014), released only one week earlier, to explain its reasoning. That case is the subject of a Petition for Writ of Certiorari that Kansas has filed simultaneously with this petition.

REASONS FOR GRANTING THE WRIT

This case is of perhaps unique significance to Kansas, because (along with the companion case, *State v. Jonathan Carr*, 329 P.3d 1195 (Kan. 2014)) it involves one of the most heinous and notorious crime sprees in the history of Kansas. Although Kansas has endured other notorious murders, such as the murder of the Clutter family, and the murders committed by the Wichita serial killer BTK, the monstrosity of the Carrs' crimes is in many respects unparalleled. The sheer depravity of the brothers' crimes has elevated this case to a level of singular importance in the eyes of many Kansans.

But putting its infamous and notorious nature aside, this case presents the Court with three important federal constitutional questions – all matters of first impression for the Court – that merit the Court's attention because the resolution of these questions carries significant consequences for state and federal capital punishment systems.

Certiorari should be granted on the first question presented because the Kansas Supreme Court's holding (1) conflicts with the decisions of other state courts of last resort and calls into question the law of other states; (2) misinterprets this Court's precedents to reach a conclusion the Court has never endorsed or suggested; (3) contributes to a "crazy quilt" of federal constitutional death penalty jurisprudence; and (4) invalidates the sentences imposed on two-thirds of those currently under sentence of death in Kansas.

Certiorari should be granted on the second question presented because the Kansas Supreme Court's

decision creates a split of authority between a state court of last resort and at least three federal Circuits on an important and recurring issue of federal constitutional law.

Certiorari should be granted on the third question because it presents an important issue for the conduct of capital penalty proceedings that this Court has not previously addressed, and the Kansas Supreme Court's holding (1) effectively abolishes joint death penalty proceedings, and (2) misconstrues this Court's harmless error standard.

First Question Presented

I. The Kansas Supreme Court's holding that the failure to affirmatively instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt violated the Eighth Amendment conflicts with the decisions of other state courts of last resort and the current law of several states, and possibly the law and procedures governing federal and U.S. military capital cases.

Relying on its decision in *State v. Gleason*, 329 P.3d 1102 (2014), the Kansas Supreme Court ruled here that the trial court's failure to affirmatively instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt was constitutional error. App. 445-46.[2] In *Gleason,* the court held that

[2] As noted in footnote 1, Kansas has petitioned this Court for a Writ of Certiorari in the *Gleason* case, raising this same issue. To

because "the instructions repeatedly emphasized the State's burden to prove the existence of aggravating circumstances beyond a reasonable doubt and to prove beyond a reasonable doubt that the death penalty should be imposed," but "never informed or explained to the jury that no particular burden of proof applied to mitigating circumstances," the Eighth Amendment was violated. 329 P.3d at 1148.

The Court explained its reasoning as follows: "[the] jury was left to speculate as to the correct burden of proof for mitigating circumstances, and reasonable jurors might have believed they could not consider mitigating circumstances not proven beyond a reasonable doubt. Thus, jurors may have been prevented from giving meaningful effect or a reasoned moral response to [the defendant's] mitigating evidence, implicating [the defendant's] right to individualized sentencing under the Eighth Amendment." *Id.*

In contrast to the Kansas Supreme Court's decision here, several states have rejected the proposition that the Eighth Amendment requires affirmative instructions that mitigating circumstances need not be proven beyond a reasonable doubt. These jurisdictions include at least California, Delaware, Indiana, Louisiana, and Texas. On the other hand, some states affirmatively instruct capital juries on a burden of proof with regard to mitigating circumstances, although such instructions do not necessarily take the

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the extent Kansas' arguments in this Petition are not as extensive as in *Gleason,* Kansas incorporates by reference its complete argument from the *Gleason* Petition.

form mandated by the Kansas Supreme Court in this case, and it is not clear that any of these jurisdictions give such instructions as anything other than a matter of state or federal statute or practice. There also appear to be a number of jurisdictions that simply do not address the burden of proof (or lack thereof) for mitigating circumstances in any reported decision, by statute, or through their pattern jury instructions.

No decision of which Kansas is aware, other than the one for which Kansas is seeking review here and its companion cases, mandates such instructions as an Eighth Amendment requirement.

A. The Kansas Supreme Court's decision clearly conflicts with the decisions of courts in several states.

A number of state supreme courts have addressed the question presented here and soundly rejected the Eighth Amendment argument embraced by the Kansas Supreme Court. California, for example, has held "a trial court is not required to instruct the jury that mitigating evidence need not be proved beyond a reasonable doubt." *People v. Souza*, 277 P.3d 118 (Cal. 2012) (quoting *People v. Avila*, 208 P.3d 634, 670 (2009)); *see also People v. Welch*, 976 P.2d 754, 797 (Cal. 1999). Indeed, in *Welch*, the California Supreme Court rejected the very rationale the Kansas Supreme Court relied on in this case – that because the instructions repeatedly emphasized the State's burden of proof beyond a reasonable doubt, the absence of any instruction on the defendant's burden of proof regarding mitigating circumstances may have led the jury to apply the beyond a reasonable doubt standard to the mitigating circumstances and thus prevented the

jury from "giving meaningful effect or a reasoned moral response" to mitigating evidence. App. 446. The *Welch* court arrived at the exact opposite conclusion, holding "because the trial court instructed specifically that the reasonable doubt standard applied (partially erroneously) to aggravating factors, and mentioned nothing about mitigating factors, the reasonable juror would infer that no such reasonable doubt standard applied to mitigating factors." 976 P.2d at 797.

Likewise, in *Dawson v. State*, 637 A.2d 57, 64-65 (Del. 1994), the Delaware Supreme Court held that jury instructions that included a beyond a reasonable doubt standard for aggravating circumstances but were silent with respect to the burden for mitigating circumstances were not ambiguous and did not preclude the jury from considering any mitigating circumstances.

The Indiana Supreme Court rendered a similar decision in *Matheney v. State*, 688 N.E.2d 883, 902 (Ind. 1997), rejecting the proposition that a jury might mistakenly assume that a beyond a reasonable doubt standard applies to mitigating circumstances in that context "[w]ithout something specific in the given instructions which would clearly lead a jury to such a misunderstanding." 688 N.E.2d at 902.

Louisiana also has rejected the Kansas Supreme Court's position. Like Kansas, Louisiana's capital sentencing procedure "does not establish any presumptions or burdens of proof with respect to mitigating circumstances." *State v. Jones*, 474 So.2d 919, 932 (La. 1985). In *Jones*, the defendant argued that because "the judge emphasized the reasonable doubt standard … in the sentencing phase with respect

to aggravating circumstances, but was silent as to the standard of proof for mitigating circumstances," the jury was misled into believing the beyond a reasonable doubt standard applied to mitigating circumstances. 474 So.2d at 932. The Louisiana Supreme Court disagreed, finding no error in the instructions. 474 So.2d at 932.

Finally, in *Green v. State*, 934 S.W.2d 92 (Tex.Crim.App. 1996), the Texas Court of Criminal appeals faced a similar question. The defendant in *Green* argued that the articulation of the beyond a reasonable doubt standard with respect to the issues of his intent to kill and continued dangerousness, coupled with the absence of any burden of proof instruction regarding mitigation, confused the jury and denied him a fair trial. 934 S.W.2d at108. The Texas Court of Criminal Appeals disagreed and found no error. 934 S.W.2d at 107-08.

1. Some jurisdictions require a burden of proof instruction regarding mitigating circumstances, but not a uniform instruction and not as a requirement of the Eighth Amendment.

Some states do give jury instructions regarding a burden of proof for mitigating circumstances, although these jurisdictions vary in at least two ways. Some give an instruction like the one the Kansas Supreme Court held is constitutionally required, *i.e.*, an affirmative directive that mitigating circumstances need not be proven beyond a reasonable doubt. Others, however, give an instruction that mitigating circumstances must be proven by a preponderance of the evidence, but no

instruction about not having to prove them beyond a reasonable doubt. It appears that the burden of proof instructions in these jurisdictions are given as a matter of state law or practice, or in the case of the federal government, pursuant to statutory command, not as a perceived requirement of the Eighth Amendment.

a. Juries instructed that proof beyond a reasonable doubt is not required.

Florida's standard jury instructions include the language, "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. A mitigating circumstance need only be proved by the greater weight of the evidence …." Fla. Std. Jury Instr. (Crim.) § 921.141(6). Case law reiterates this, but without explaining a basis for the instruction. *See Campbell v. State*, 571 So.2d 415, 419-20 (Fla. 1990). Likewise, Mississippi and North Carolina provide similar instructions. *See Knox v. State*, 901 So.2d 1257, 1270 (Miss. 2005); *State v. Holden*, 488 S.E.2d 514, 532 (N.C. 1997). The primary purpose of these instructions appears to be simply to clarify the "preponderance of the evidence" standard that these states place on defendants to establish mitigating circumstances – a burden, notably, that is not present under Kansas law. *Gleason,* 329 P.3d at 1147; *Kansas v. Marsh*, 548 U.S. 163, 173 (2006)

Arkansas, Oklahoma, South Carolina, and South Dakota, like Kansas, place no particular burden of proof on mitigating circumstances. *Thessing v. State*, 230 S.W.3d 526, 542-43 (Ark. 2006); *Postelle v. State,* 267 P.3d 114, 144 n.29 (Okla.Crim.App. 2011); *State v. Hicks*, 499 S.E.2d 209, 217-18 (S.C. 1998); *State v.*

Rhines, 548 N.W.2d 415, 437 (S.D. 1996). Nevertheless, these states affirmatively instruct capital sentencing juries that mitigating circumstances need not be proven beyond a reasonable doubt. *Thessing,* 230 S.W.3d at 542-43; *Postelle*, 267 P.3d at 144 n.29; *Hicks*, 499 S.E.2d at 217-18. But, again, none of them appears to do so because there is any case law in their jurisdiction holding that the Eighth Amendment requires such an instruction.

b. Juries instructed only on proof by a preponderance standard.

Some states impose a preponderance of the evidence standard on mitigating evidence and instruct juries to that extent and no more. *See e.g.* Ariz. Revised Jury Instructions-Crim. Capital Case 2.6 ("The defendant bears the burden of proving the existence of any mitigating circumstance that the defendant offers by a preponderance of the evidence."); *State v. Addison*, 87 A.3d 1, 173-75 (N.H. 2013); *Eaton v. State*, 192 P.3d 36, 115 (Wyo. 2008); *Commonwealth v. Williams*, 732 A.2d 1167, 1187 (Pa. 1999). This is also the rule in non-military, federal death penalty cases. *See* 18 U.S.C. § 3593(c) ("The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the evidence of such a factor is established by a preponderance of the information."); *see also* Tenth Circuit Pattern Crim. Jury Instr. 3.10 *Mitigating Factors*; Eighth Circuit Model Crim. Jury Instr. 12.02 *Burden of Proof.* These jurisdictions do not appear to affirmatively instruct that mitigating circumstances need not be proven beyond a reasonable doubt.

c. Juries explicitly instructed that there is no burden of proof.

At least a few states, including Ohio, Tennessee and Washington, appear to instruct the jury only that the defendant has no burden of proof with regard to mitigating circumstances. *See, e.g.*, Ohio Jury Instructions: Chapter CR 503.011 *Aggravated murder; death penalty – sentencing phase, Section 1 and Section 4* ("The defendant does not have any burden of proof."); 7 Tenn. Prac. Pattern Jury Instr. T.P.I. – Crim. 7.04(a) ("The defendant does not have the burden of proving a mitigating circumstance."); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 31.05 *Burden of Proof—Presumption of Leniency—Reasonable Doubt (Capital Cases)* ("The defendant does not have to prove the existence of any mitigating circumstances or the sufficiency of any mitigating circumstances.").

2. Some jurisdictions do not appear to address the burden of proof for mitigation at all.

A number of jurisdictions do not appear to have either pattern instructions or available decisions that address whether any burden of proof instruction is to be given regarding mitigating circumstances. Some states, like Kansas, impose a burden of production but do not impose any particular burden of proof on mitigating circumstances. *See e.g. State v. Johnson,* 284 S.W.3d 561, 587 n.19 (Mo. 2009); *Jiminez v. State,* 918 P.2d 687, 696 (Nev. 1996); *Mickens v. Commonwealth*, 478 S.E.2d 302, 305 (Va. 1996); *State v. Smith*, 863 P.2d 1000, 1011 (Mont. 1993); *State v. Hoffman*, 851 P.2d 934, 943 (Idaho 1993). No decisions or statutes or pattern instructions in these states indicate that any

affirmative instruction must be given. Accordingly, these states do not affirmatively instruct that mitigating circumstances need not be proven beyond a reasonable doubt, nor do they declare that such circumstances must be proven by a preponderance of the evidence.

Likewise, the United States Military capital sentencing procedures make no provision for a burden of proof instruction regarding mitigating circumstances. Rule of Court Martial 1004 is the relevant rule, and it does not put a burden of proof on mitigating circumstances, unlike the federal statute (18 U.S.C. § 3593) for federal capital cases generally. *See, e.g.*, RCM 1004(b)(3) *Evidence in extenuation and mitigation*.

For these jurisdictions, the Kansas Supreme Court's holding calls into question their existing capital sentences. The Kansas Supreme Court decision certainly can be used as authority to attack the constitutionality of the existing procedures of these jurisdictions on Eighth Amendment grounds.

Thus, granting review of the first question presented here would allow the Court both to resolve the explicit split of authority created by the Kansas Supreme Court's decision and bring clarity to the constitutionality of the existing procedures utilized in a number of death penalty jurisdictions that currently do not give burden of proof instructions regarding mitigating circumstances.

B. The Kansas Supreme Court misinterpreted this Court's precedent to reach a conclusion the Court has never endorsed nor suggested.

This Court has never held or suggested that the Eighth Amendment requires states to assign a burden of proof for mitigating factors. *Blue v. Thaler*, 665 F.3d 647, 668 (5th Cir. 2011) ("No Supreme Court or Circuit precedent constitutionally requires that Texas's mitigation special issue be assigned a burden of proof."). Certainly, the Court has never held or suggested that the Eighth Amendment requires capital sentencing juries to be instructed explicitly and affirmatively that mitigating circumstances need *not* be proven beyond a reasonable doubt. The Court's decisions, instead, strongly suggest that no such instruction is constitutionally required.

This Court has held it is constitutionally permissible to place a burden upon a criminal defendant in death penalty proceedings to prove the existence of mitigating circumstances. *Walton v. Arizona*, 497 U.S. 639, 650-51 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002). In *Walton*, the Court said that "[s]o long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances," there is no constitutional bar to placing upon a defendant the burden of proving mitigating circumstances sufficiently substantial to call for leniency. 497 U.S. at 650.

In fact, the Court has never held that the Constitution requires states to adopt, or bars them

from adopting, any specific standard of proof with respect to mitigating circumstances. The Constitution only requires that capital sentencing juries be allowed to consider mitigating evidence, broadly defined. *Blystone v. Pennsylvania*, 494 U.S. 299, 304-05 (1990). Otherwise, "the States are free to determine the manner in which a jury may consider mitigating evidence." *Kansas v. Marsh*, 548 U.S. 163, 171 (2006) (citing *Walton*, 497 U.S. at 652; *Boyde v. California*, 494 U.S. 370, 374 (1990)). Thus, there is neither a constitutional requirement that states adopt a particular burden of proof, nor a proscription against a particular burden (*e.g.* beyond a reasonable doubt). The Kansas Supreme Court's reasoning cannot be squared with this case law.

Further, the Kansas Supreme Court's analysis of the effect of the instructions here is flawed. The instructions do not impose *any* burden of proof on the defendant to prove mitigating circumstances. Nonetheless, the Kansas Supreme Court found constitutional error in the fact that the instructions do not *affirmatively state* that mitigating factors *"need not be proved beyond a reasonable doubt."* App. 446. Essentially, the court held "a per se violation of the Eighth Amendment occurs if a jury instruction correctly states that the State bears the burden of proving aggravating circumstances beyond a reasonable doubt but fails to affirmatively state that mitigating evidence need not be proved beyond a reasonable doubt." App. 482; *Gleason*, 329 P.3d at 1155 (Biles, J., dissenting). That holding is not and cannot be supported by this Court's decisions. *Gleason,* 329 P.3d at 1155-56 (Biles, J., dissenting).

The state court's reasoning is even more questionable in light of *Kansas v. Marsh*. In finding that Kansas' death penalty law satisfied constitutional requirements, this Court in *Marsh* considered jury instructions very close to those at issue here. *Compare* App. 503-05 (jury instructions given here) *with Marsh*, 548 U.S. at 176 (quoting jury instructions given there). Although the question presented here was not before the Court in *Marsh*, the Court observed that, under Kansas' law, a defendant "appropriately bears the burden of proffering mitigating circumstances – a burden of production," but never bears a burden of proof. 548 U.S. at 178; *see also* 548 U.S. at 173. Had there been an Eighth Amendment error in the jury instructions in *Marsh* – strikingly similar to the instructions here – it seems beyond implausible that the Court would have cited those very instructions as part of the justification for why Kansas' weighing procedures satisfied constitutional requirements.

C. The Kansas Supreme Court's decision undermines the uniform interpretation and application of the Eighth Amendment in capital cases, and undermines Kansas' efforts to enforce its capital murder law.

Given that the Kansas Supreme Court's decision here creates a split of authority among the States, and runs counter to this Court's Eighth Amendment precedent, certiorari is warranted because the decision below undermines the uniform interpretation and application of the federal Constitution. *See Kansas v. Marsh,* 548 U.S. at 185 (Scalia, J., concurring) ("Turning a blind eye to federal constitutional error …,

allowing it to permeate in varying fashion each State Supreme Court's jurisprudence, would change the uniform 'law of the land' into a crazy quilt.").

Further, certiorari is warranted in this case because the Kansas Supreme Court's decision has a severe impact on Kansas' efforts to enforce its capital murder law. The Kansas capital murder law is narrowly tailored and sparingly applied – currently, only nine offenders are under sentence of death in Kansas. If allowed to stand, the decision below will invalidate the death sentences juries have imposed on at least six defendants currently on death row in Kansas – two-thirds of such offenders.[3]

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[3] These six include: (1) the defendant in *Kansas v. Cheever*, 134 S.Ct. 596 (2013), a case now on remand to the Kansas Supreme Court from this Court's unanimous reversal in December 2013, (2) the respondent in this case, as well as his co-defendant, and (3) another defendant whose death sentence the Kansas Supreme Court reversed one week before this case. The Kansas Supreme Court's decisions in the latter two cases are the subject of Petitions for Writ of Certiorari Kansas has filed simultaneously with this Petition in cases entitled *Kansas v. Jonathan Carr* and *Kansas v. Sidney Gleason*. The petition in Jonathan Carr's case includes all three questions presented here; the petition in *Gleason* includes the first question presented.

Second Question Presented

II. There is a clear split of authority between the Kansas Supreme Court and at least three federal Circuits on the question whether the Confrontation Clause applies to the "selection" phase of death penalty sentencing proceedings.

The second question presented is whether the Confrontation Clause applies to hearsay evidence admitted in the "selection" phase of a capital sentencing proceeding, *i.e.*, where "eligibility" for the death penalty already has been established. The Kansas Supreme Court phrased the question as "Does K.S.A. 21-4624(c)'s allowance of testimonial hearsay . . . (b) violate the Confrontation Clause of the United States Constitution and *Crawford*, 541 U.S. 36, 56, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004)?" App. 378. The court's answer was "yes." *Id.*

The Kansas Supreme Court set up and analyzed that question as follows:

> Thus the first question before us is whether *Crawford*'s interpretation and application of the Confrontation Clause reaches the penalty phase of a capital proceeding. The United States Supreme Court has not yet answered this question. Until we have a definitive answer from that Court, we recognize that other jurisdictions are split and we accept convincing arguments that confrontation law is applicable to a capital penalty phase trial.

App. 422 (citations omitted). Having concluded that the Confrontation Clause applies, the Kansas Supreme

Court opined that "[Reginald] Carr is right to question whether the State's mention of witness statements recorded in police reports during cross-examination of several defense witnesses should have been permitted." App. 423. Thus, the court directed that in any "penalty phase hearing on remand, we caution the parties and the district judge that Kansas now holds that the Sixth Amendment applies in the proceeding and that out-of-court testimonial hearsay may not be placed before the jury without a prior opportunity for the defendant to cross-examine the declarant." App. 423-24.

The Kansas Supreme Court cited three state court decisions as holding that the Confrontation Clause applies to capital sentencing proceedings. *See Vankirk v. State*, 385 S.W.3d 144 (Ark. 2011); *State v. Rodriguez*, 754 N.W.2d 672, 681 (Minn. 2008); *State v. Hurt*, 702 S.E.2d 82 (N.C.App. 2010), *reversed by State v. Hurt*, 643 S.E.2d 173 (N.C. 2013). Notably, however, *none* of the three cases cited are in fact *capital punishment* cases. So the Kansas Supreme Court actually failed to point to *any* authority holding that the Confrontation Clause applies to capital sentencing proceedings. Thus, the Kansas Supreme Court appears to stand alone in that regard.

Instead, at least three federal Circuits have squarely held that the Confrontation Clause does not apply to such proceedings, and one decision of this Court strongly suggests, if not compels, that result. In *Williams v. New York*, 337 U.S. 241 (1949), the Court reviewed the death sentence of a defendant who complained that "the sentence of death was based upon 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 (internal citations and quotations omitted). In sentencing the defendant, the trial judge "stated that the pre-sentence investigation revealed many material facts concerning appellant's background which though relevant to the question of punishment could not properly have been brought to the attention of the jury in its consideration of the question of guilt." 337 U.S. at 244.

Because the case predated formal incorporation of Sixth Amendment protections through the Fourteenth Amendment to make those requirements applicable to the states, the defendant phrased his challenge—and the Court analyzed it—as a "due process" claim of fundamental procedural fairness. 337 U.S. at 245. The Court rejected the claim for at least two reasons.

First, the Court pointed out that "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by law." 337 U.S. at 246. But the historical basis was not the only reason for allowing such evidence in sentencing. As a second reason, the Court pointed out that "there are sound practical reasons for the distinction." 337 U.S. at 246. Indeed, "[h]ighly relevant—if not essential—to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." 337 U.S. at 247. Thus, "modern concepts individualizing punishment have made it all

the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information ….” 337 U.S. at 247.

The Court concluded that the “due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure.” 337 U.S. at 251. Furthermore, the Court declared that “we cannot accept the contention” that “we should draw a constitutional distinction as to the procedure for obtaining information where the death sentence is imposed.” 337 U.S. at 251. After discussing the necessarily individualized determination whether a defendant merits a death sentence, the Court stated that it “cannot say that the due-process clause renders a sentence void merely because the judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence.” 337 U.S. at 252.

The Kansas Supreme Court never cited nor mentioned *Williams v. New York*, but the Kansas court did cite four federal Circuit decisions, all of which do address *Williams* and all of which reached the opposite conclusion of the Kansas Supreme Court. Most recently, in *United States v. Umana*, 750 F.3d 320 (4th Cir. 2014), a case that involved a challenge under the federal death penalty scheme, the majority concluded “that *Williams* squarely disposes of Umana’s argument that the Sixth Amendment should apply to capital sentencing proceedings.” 750 F.3d at 346. Thus, the *Umana* majority “conclude[d] that the Confrontation Clause does not preclude the introduction of hearsay statements during the sentence selection phase of capital sentencing.” 750 F.3d at 348. The dissent

argued, however, that the case raised "an important constitutional question that the Supreme Court has not yet resolved." 750 F.3d at 360 (Gregory, J., dissenting).

In two other post-*Crawford* decisions, the Fifth and Eleventh Circuits also rejected the claim that the Confrontation Clause applies to the selection phase of capital sentencing procedings. In *Muhammad v. Sec., Fla. Dept. of Corrections*, 733 F.3d 1065 (11th Cir. 2013), the majority reviewed a death sentence imposed under Florida law and found no Confrontation Clause violation. The majority opined that the "Supreme Court of the United States has held that hearsay testimony is admissible at capital sentencing hearings." 733 F.3d at 1073 (citing *Williams*). After reviewing other Eleventh Circuit decisions, the majority declared that we "cleared up any confusion in our case law in *Chandler v. Moore*, 240 F.3d 907, 918 (11th Cir. 2001), when we confirmed that hearsay is admissible at capital sentencing and that a defendant's rights under the Confrontation Clause are not violated if the defendant has an opportunity to rebut the hearsay." 733 F.3d at 1076.

As in the Fourth Circuit, one judge dissented. 733 F.3d at 1081 (Wilson, J., dissenting). Although the dissent acknowledged that the "Supreme Court has held that trial courts may consider hearsay testimony at capital sentencing hearings," *id*. at 1081-1082, the dissent opined that *Williams* was no longer good law because it predated both incorporation of the Confrontation Clause against the States and the Supreme Court's much more recent confrontation decisions such as *Crawford*. 733 F.3d at 1082.

A panel of the Fifth Circuit also rejected the Confrontation Clause claim by a 2-1 vote in *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007), a federal death penalty case. The *Fields* majority opined that "*Williams* is a due process, rather than Sixth Amendment, case and therefore does not dictate the result of Fields's Confrontation Clause challenge." 483 F.3d at 327. Nonetheless, the majority declared "that *Williams*'s distinction between guilt and sentencing proceedings and its emphasis on the sentencing authority's access to a wide body of information in the interest of individualized punishment is relevant to our Confrontation Clause inquiry." 483 F.3d at 327.

After an extensive review of the arguments, the majority concluded that "the principles underlying *Williams* are relevant, persuasive, and ultimately fatal to Fields's Confrontation Clause challenge." 483 F.3d at 338. Emphasizing the "particular importance of individualized sentences in capital cases," the majority declined to hold sentencing proceedings to the standards of guilt phase proceedings "where, as here, challenged testimony is relevant only to a sentencing authority's selection decision." 483 F.3d at 338. One judge dissented, arguing that "*Williams v. New York* is not controlling" in part because "*Crawford* and *Apprendi* render *Williams* inapplicable." 483 F.3d at 364-365 (Benavides, J., dissenting).[4]

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[4] A Seventh Circuit decision that predates *Crawford* also rejects the argument, stating "the Supreme Court has held that the Confrontation Clause does not apply to capital sentencing. It applies through the finding of guilt, but not to sentencing, even when the sentence is the death penalty." *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002). The Seventh Circuit was reviewing a

So, at best, when the Kansas Supreme Court here cited all of these cases and held that "we accept convincing arguments that confrontation law is applicable to a capital penalty phase trial," App. 422, that court was agreeing with either (1) *dissenting opinions* in federal Circuit cases or (2) state appellate court opinions in *non-death penalty cases*. Thus, the Kansas Supreme Court's decision necessarily creates a split of authority between a state court of last resort and at least three federal Circuits on an important and recurring issue of federal constitutional law. The Court should grant review here to resolve the Confrontation Clause issue that is cleanly presented.

Third Question Presented

III. The question whether the general presumption in favor of joinder applies in capital cases is an issue of first impression in this Court that has resulted in divergent outcomes in the lower courts, as here, where the Kansas Supreme Court effectively adopted a per se rule against joinder in capital sentencing proceedings.

Despite acknowledging that severance was not automatically required in death penalty proceedings, the Kansas Supreme Court effectively established a *per se* rule requiring severance. Importantly, the court relied on the premise that the differentiation in the

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federal habeas challenge to an Illinois death sentence imposed in 1984, and the court opined that it "need not attempt to predict how the Supreme Court's jurisprudence will develop" because "*Williams v. New York* shows that in 1985 Illinois was entitled to proceed as it did." 313 F.3d at 399.

moral culpability of co-defendants necessarily affects the jury's ability to individually apply mercy to each defendant. App. 407-09. The court further concluded that any problem could not be cured by jury instructions; hence, Reginald's death sentence violated the Eighth Amendment because, in the court's view, he failed to receive an individualized sentencing determination. App. 411-42. Because co-defendants will virtually always attempt to distinguish their moral culpability to avoid death sentences, *see, e.g.*, 18 U.S.C. § 3592(a)(4) (Jury may consider as mitigating factor that "[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death."), the Kansas Supreme Court's decision effectively creates a *per se* rule against joinder in capital sentencing proceedings and conflicts with the traditional presumption in favor of joinder in criminal cases.

A. This Court has never held that the Eighth Amendment mandates separate capital sentencing proceedings to protect the right to individualized sentencing, but the lower courts have divided over the question, reaching differing results.

The question presented here is an issue of first impression in this Court, but the Court has clearly expressed a preference for joint trials in criminal cases generally. *Zafiro v. United States*, 506 U.S. 534, 537-38 (1993) ("Joint trials 'play a vital role in the criminal justice system.' [Citation omitted.] They promote efficiency and 'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'

[Citation omitted.] For these reasons, we repeatedly have approved of joint trials."). This presumption in favor of joinder does not evaporate and disappear in death penalty proceedings merely because co-defendants may attempt to distinguish their respective moral culpability.

The Eleventh Circuit has held the Eighth Amendment is not implicated *at all* in this context in determining whether severance is required, because severance is "not a part of [the] constitutional right to an individualized sentencing determination." *Puiatti v. McNeil*, 626 F.3d 1283, 1315-16 (11th Cir. 2010). The court explained that this Court's jurisprudence does not support recognizing an Eighth Amendment right against joinder:

> …although Puiatti attempts to connect and intertwine severance with his constitutional right to an individualized sentencing determination, we can locate, and Puiatti has cited, no Supreme Court decision doing so. *Lockett* and its progeny do not address joint penalty phases or say that the presence of a co-defendant at a capital defendant's penalty phase trial has any Eighth Amendment implications whatsoever. None of the *Lockett* line of cases relates to severance or helps Puiatti's claim at all. Puiatti, like the district court, cites no precedent that suggests a joint penalty trial is improper for co-defendants who were properly joined in the guilt phase. The Supreme Court has never intimated, much less held, that the

> special concerns in capital cases require, or even suggest, that severance is necessary.

Id. at 1315.

In contrast, some district courts have permitted severance based on a perceived need to protect the principle of individualized sentencing. *E.g.*, *United States v. Catalan–Roman*, 376 F.Supp.2d 96, 107 (D.P.R. 2005) (disparity between the strength of the co-defendants' mitigating evidence); *United States v. Green*, 324 F.Supp.2d 311, 326 (D. Mass. 2004) (severance proper due to differing mitigation evidence which may raise Eighth Amendment concerns); *United States v. Taylor*, 293 F.Supp.2d 884, 889-900 (N.D.Ind.2003) (separate sentencing proceedings would ensure individualized consideration of each defendant's punishment); see also *United States v. Usama Bin Laden*, 156 F.Supp.2d 359 FN 2 (S.D.N.Y.2001) (court allowed sequential sentencing hearings for defendants Al-Owhali and Mohamed after they argued they would be "significantly disadvantaged" by a joint hearing); *United States v. Henderson*, 442 F.Supp.2d 159, 162 (S.D.N.Y. 2006) (court agreed to sequential penalty hearings based on the government's request and a prejudicial letter containing "admissions against interest by a declarant who committed suicide shortly after making it.").

Only one other court of last resort, however, has overturned a death sentence based on the denial of a motion to sever the penalty phase. See *Foster v. Commonwealth*, 827 S.W.2d 670, 683 (Ky. 1991) ("The accumulated errors in the admission of prior acts of misconduct, contents of letters written by Foster to Powell, and evidence regarding the battered wife

syndrome by Powell's expert all stem from the improvident decision of the trial court to hold a joint penalty phase. Individually, these errors might be considered by this Court to be harmless, but viewed together or "cumulatively," their commission requires reversal of Foster's sentence.").

A number of courts have determined that jury instructions requiring individualized consideration sufficiently protect any right to individualized sentencing in the context of joint proceedings. *E.g.*, *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996) (no Eighth Amendment violation because the district court gave repeated instructions to consider the evidence against each capital defendant individually); *United States v. Bernard*, 299 F.3d 467 (5th Cir. 2002) (under plain error review, instructions were sufficient to address the risk of prejudice); *People v. Carasi*, 190 P.3d 616, 649-50 (Cal. 2008) (instructions ensured the jury was adequately apprised of the individualized nature of the sentencing determination); *Gutierrez v. Dretke*, 392 F.Supp.2d 802, 828 (W.D. Tex. 2005) (instructions sufficiently prevented any possibility of prejudice); *United States v. Rivera*, 363 F.Supp.2d 814, 822-23 (E.D.Va.2005) (denying pre-trial severance request and holding that "threat posed to individualized consideration will best be addressed by a joint penalty phase governed by the Court's limiting instructions"); *Hardy v. State*, 804 So.2d 247, 264 (Ala. Crim. App. 1999) (instructions were sufficient to allow individualized sentencing determinations). The rulings of these courts are consistent with the general rule that juries are presumed to be able to follow their instructions. *Blueford v. Arkansas*, 566 U.S. ___, ___, 132 S.Ct. 2044, 2051 (2012).

In the end, the severance question is one of first impression for this Court, the question has resulted in differing outcomes in the lower courts, and it arises with regularity. For all of these reasons, the Court should grant certiorari to resolve whether there is an Eighth Amendment right to severance in capital sentencing proceedings.

B. Even if the Eighth Amendment were to require severance in some circumstances, this case does not present any such circumstance.

In reversing Reginald's death sentence based on the failure to sever the penalty proceedings, the court relied on the following factors: (1) Jonathan "continued the pattern he had set in the guilt phase by emphasizing that [Reginald] was the more culpable actor and a negative influence in [Jonathan's] life," App. 406; (2) this mitigating factor created antagonistic defenses because the mitigation evidence differentiated between the brothers' moral culpability and could have impacted a juror's decision to show mercy, App. 407-09; (3) Jonathan's cross-examination of Temica resulted in her testimony that Reginald admitted to shooting the victims during a visit to the jail, App. 409-10; (4) that testimony could have negated any juror's willingness to show mercy based on residual doubt or a belief that Jonathan was the shooter, App. 410; and (5) Jonathan's mitigating evidence could have been considered by the jury as an improper, nonstatutory aggravating evidence against Reginald. App. 411.

The court's reasoning, however, is undermined by the closing arguments in this case. For example, Reginald did not ask for mercy based on "residual

doubt"; instead he admitted to committing the crimes. App. 514. Further, the jury was explicitly instructed that the *only* aggravators it was allowed to consider were those set forth in the instructions. App. 503.

More importantly, the court erred in determining that any effect on the jury's ability to fully consider mercy required severance. In this case, the jury was instructed, "mercy can itself be a mitigating factor in determining whether the state has proved beyond a reasonable doubt that the death penalty should be imposed." App. 503-04. But consideration of mercy is not required by the Eighth Amendment. *See e.g. People v. Lewis*, 28 P.3d 34, 75 (Cal. 2001) (the Eighth Amendment does not require an instruction stating "[i]n determining whether to sentence the defendant to life imprisonment without possibility of parole, or to death, you may decide to exercise mercy on behalf of the defendant."); *State v. Lafferty*, 20 P.3d 342, 373 (Utah 2001) (federal constitution does not require an instruction telling jurors they should be guided by mercy); *State v. Johnson*, 723 N.E.2d 1054, 1076, 1080 (Ohio 2000) (summarily finding no Eighth or Fourteenth Amendment error in instruction that "fairness" and "mercy" are to be excised from the definition of mitigating factors); *Commonwealth v. Rainey*, 656 A.2d 1326, 1333-34 (Pa. 1995) (counsel was not ineffective for failing to request a mercy instruction since allowing the jury unbridled discretion to grant mercy would be clearly erroneous); *Austin v. Bell*, 927 F.Supp. 1058, 1064-65 (M.D.Tenn. 1996) (no Eighth Amendment violation in the Tennessee Death Penalty Act based on the failure to inform jury they may impose a life sentence out of mercy).

The Kansas Supreme Court's holding here essentially requires an instruction on mercy as a mitigating factor and mandates automatic severance in all death penalty cases. Because such a holding extends the Eighth Amendment's individualized sentencing requirement far beyond the Court's precedents, certiorari review is warranted.

C. The Kansas Supreme Court's conclusion that any error here could not be harmless because the jury could not be presumed to have followed its instructions misapplies this Court's constitutional harmless error analysis.

In concluding that reversal was required, the Kansas Supreme Court turned an unquestioned legal presumption on its head by refusing to believe the jury could follow the instructions given, instructions that plainly required the jury to give each brother individualized consideration in determining their sentences. The court's rejection of such a foundational principle cannot stand in light of the holding in *Zafiro* that any possible prejudice generally can be cured by giving proper jury instructions. 506 U.S. at 539.

Moreover, in order to conclude any error was harmless, this Court merely has to read the atrocious and inhuman facts of the crimes Reginald committed against his victims. His confession and his brother's meager attempts to claim Reginald was the main actor simply could not have been prejudicial in light of this overwhelming evidence against Reginald. The dissent aptly assessed the situation here:

> The majority gives lip service to the standard of review…But it entirely fails to conduct the analysis. Had it done so, I do not believe it could arrive at any conclusion other than that the severance error, if any, had little, if any, likelihood of changing the jury's ultimate conclusion. Instead, the court should hold that this jury, which demonstrated its willingness to independently assess the respective culpability of each defendant, appropriately conducted the required weighing of aggravating and mitigating circumstances and concluded Reginald Carr deserved the penalty of death.

App. 496-97.

Here, the Kansas Supreme Court improperly rejected the presumption that jurors follow their instructions, and ignored and discounted the overwhelming atrocity and inhuman nature of Reginald's crimes against multiple victims. Even if the failure to sever the brothers' sentencing proceedings somehow violated the Eighth Amendment, any error was harmless. The Court should grant review of the Kansas Supreme Court's conclusion that joinder here was reversible Eighth Amendment error.

CONCLUSION

Kansas requests that the Petition for Writ of Certiorari be granted on all three questions presented.

Respectfully submitted,

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October 2014

APPENDIX

APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 90,044

[Filed July 25, 2014]

STATE OF KANSAS,
Appellee,

v.

REGINALD DEXTER CARR, JR.,
Appellant.

SYLLABUS BY THE COURT

1.

The Sixth Amendment to the United States Constitution guarantees an accused in all serious criminal prosecutions the right to trial by an impartial jury. This protection is incorporated into and made applicable to the states through the due process provision of the Fourteenth Amendment. The Kansas Constitution includes a similarly worded guarantee for its citizens in Section 10 of the Bill of Rights, which recognizes a defendant's right to a speedy and public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. We have analyzed the state constitutional provision in the same way as the federal constitutional provision.

2.

K.S.A. 22-2616(1) gives Kansans a vehicle to obtain a change of venue to prevent a local community's hostility or preconceived opinion on a defendant's guilt from hijacking his or her criminal trial.

3.

Seven factors are considered relevant to evaluate whether the existence of presumed prejudice demands a change of venue: (1) media interference with courtroom proceedings; (2) the magnitude and tone of the coverage; (3) the size and characteristics of the community in which the crime occurred; (4) the amount of time that elapsed between the crime and the trial; (5) the jury's verdict; (6) the impact of the crime on the community; and (7) the effect, if any, of a codefendant's publicized decision to plead guilty.

4.

On appeal, a claim of presumed prejudice is judged by a mixed standard of review. A district judge's findings of fact on the seven relevant factors considered in determining whether presumed prejudice demands a change of venue are examined to determine whether they are supported by substantial competent evidence in the record. The district court's weighing of the factors and ultimate legal conclusion on whether presumed prejudice has been established is reviewed de novo.

5.

In this case, the district judge did not err by refusing defendant's motions to transfer venue out of Sedgwick County on the basis of presumed prejudice.

6.

In reviewing for actual prejudice from refusal to change venue, an appellate court examines whether the district judge had a reasonable basis for concluding that the jurors selected could be impartial. The crucible for determination of actual prejudice is voir dire. The judge must review the media coverage and the substance of the jurors' statements at voir dire to determine whether a community-wide sentiment exists against the defendant. Negative media coverage by itself is insufficient to establish actual prejudice.

7.

A district judge's decision on actual prejudice is reviewed under an abuse of discretion standard.

8.

In this case, all of defendant's jurors who had formed an opinion on guilt said during voir dire they could put their opinions aside. These voir dire responses gave the district judge a reasonable basis for ruling that no actual prejudice required a venue change. This case was not so extreme that the jurors' statements about their ability to be impartial cannot be credited.

9.

Under K.S.A. 22-2616(1), the burden is on the defendant to show prejudice in the community significant enough that there is a reasonable certainty he or she cannot obtain a fair trial without a venue change.

10.

Factors to be considered on whether a venue change is necessary under the Kansas statute include: (1) the particular degree to which the publicity circulated throughout the community; (2) the degree to which the publicity or that of a like nature circulated to other areas to which venue could be changed; (3) the length of time which elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the ease encountered in the selection of the jury; (5) the familiarity with the publicity complained of and its resultant effects, if any, upon the prospective jurors or the trial jurors; (6) the challenges exercised by the defendant in the selection of the jury, both peremptory and for cause; (7) the connection of government officials with the release of the publicity; (8) the severity of the offense charged; and (9) the particular size of the area from which the venire is drawn.

11.

The district judge did not abuse his discretion by denying defendant's motions for change of venue under K.S.A. 22-2616(1).

12.

Although two or more defendants may be charged in the same complaint, information, or indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting the charged crime or crimes, the court may order a separate trial for any one defendant when requested by the defendant or the prosecutor. The decision whether to sever a trial is one within the trial court's discretion.

13.

A single trial of multiple defendants may serve judicial economy and ensure consistent verdicts, but the right of a defendant to a fair trial must be the overriding consideration. Five factors are useful for an appellate court to consider in determining whether there is sufficient prejudice to mandate severance: (1) whether the defendants have antagonistic defenses; (2) whether important evidence in favor of one of the defendants which would be admissible on a separate trial would not be allowed on a joint trial; (3) whether evidence incompetent as to one defendant and introducible against another would work prejudicially to the former with the jury; (4) whether the confession by one defendant, if introduced and proved, would be calculated to prejudice the jury against the other or others; and (5) whether one of the defendants who could give evidence for the whole or some of the other defendants would become a competent and compellable witness on the separate trials of such other defendants.

14.

A party moving for severance has the burden to demonstrate actual prejudice to the district court judge, who has a continuing duty at all stages of a trial to grant severance if prejudice does appear.

15.

On appeal from a denial of severance, the party claiming error has the burden to establish a clear abuse of discretion by the trial judge. Once abuse of discretion is established, the party benefitting from the error bears the burden of demonstrating harmlessness.

16.

The district judge abused his discretion in this case by repeatedly refusing to sever the defendant's trial from that of his codefendant brother. However, because of the overwhelming independent evidence presented by the State, the judge's failure to sever the guilt phase of the trial was harmless error.

17.

The district judge in this case did not abuse his discretion by denying defendant's motion to sever noncapital counts from capital counts. Similarity of punishment is not an indispensable attribute of crimes of same or similar character under K.S.A. 22-3202(1).

18.

K.S.A. 22-3410(2)(i) permits a district judge to remove a prospective juror for cause when his or her "state of mind with reference to the case or any of the parties" persuades the judge that there is doubt he or

she can act impartially. A criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. But this right is balanced against the State's strong interest in seating jurors who are able to apply the sentence of capital punishment within the framework provided for by the federal Constitution and state law.

19.

In this case, the district judge's excuse of prospective juror M.W. for cause was fairly supported by the record and not an abuse of discretion under K.S.A. 22-3410(2)(i). Eleven other prospective jurors to whom defendant and his codefendant brother compare M.W. expressed a willingness to follow the law, while M.W. did not.

20.

The same standard of review and legal framework applicable to a district judge's decision to excuse a prospective juror who cannot set aside his or her objection to the death penalty applies equally to decisions not to excuse prospective jurors challenged for cause based on their inability to consider a sentence other than death.

21.

The district judge's refusal to excuse four prospective jurors for cause was fairly supported by the record and not an abuse of discretion under K.S.A. 22-3410(2)(i). These four prospective jurors expressed a willingness to consider and give effect to mitigating evidence.

22.

Section 7 of the Kansas Constitution Bill of Rights provides that "[n]o religious test or property qualification shall be required for any office of public trust." This section does not provide any greater limitation than already provided under K.S.A. 43-156, which provides that "[n]o person shall be excluded from service as a grand or petit juror in the district courts of Kansas on account of . . . religion . . . ."

23.

K.S.A. 43-156 is in some tension with K.S.A. 22-3410(2)(i) which provides that a prospective juror may be challenged for cause as unqualified to serve when he or she is partial or biased—because K.S.A. 22-3410(2)(i) requires a prospective juror who can never participate in imposition of the death penalty to be excused for cause as partial, even though his or her scruples have a basis in a religious code. Jurors cannot be discriminated against on the basis of their religious belief or lack of belief, but they can be excluded from jury service when their belief or nonbelief makes it impossible for them to act in conformance with the signature requirement of that service: impartiality under the rule of law.

24.

In this case, the district judge did not violate Section 7 of the Kansas Constitution Bill of Rights or K.S.A. 43-156 when he excused prospective jurors for cause because they had said their religious beliefs would prevent them from behaving impartially.

25.

A district judge's handling of a challenge to a criminal defendant's peremptory strike under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), involves three steps, each subject to its own standard of review on appeal. Under the first step, the party challenging the strike must make a prima facie showing that the other party exercised a peremptory challenge on the basis of race. Appellate courts utilize plenary or unlimited review over this step. If a prima facie case is established, the burden shifts to the party exercising the strike to articulate a race-neutral reason for striking the prospective juror. This reason must be facially valid, but it does not need to be persuasive or plausible. The reason offered will be deemed race-neutral unless a discriminatory intent is inherent in the explanation. The opponent of the strike continues to bear the burden of persuasion. The scope of review on a district judge's ruling that the party attempting the strike has expressed racially neutral reasons is abuse of discretion. In the third step, the district judge determines whether the party opposing the strike has carried its burden of proving purposeful discrimination. This decision is reviewed under an abuse of discretion standard.

26.

The district judge erred in this case by granting the State's challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), to the defendants' peremptory strikes of the eventual presiding juror by failing to perform the necessary three steps of analysis.

27.

Each state is free to determine whether a district judge's good faith error in denying a criminal defendant's peremptory challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), is subject to review for harmlessness. In Kansas, review for harmless error applies to such error, and the district judge's error in this case does not require reversal of all of defendant's convictions, standing alone.

28.

In this case, because defendants did not object to testimony from a felony-murder victim's neighbor and husband about the victim's out-of-court statements to them, any issue based on that testimony under the Confrontation Clause or *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), was not preserved for appeal. Any error in admission of testimony from law enforcement witnesses about the victim's statements that was subject to defense objection based on the Confrontation Clause or *Crawford*, was harmless because the testimony was largely repetitive of the testimony admitted without objection.

29.

When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after reviewing all the evidence in a light most favorable to the prosecution, the appellate court is convinced a rational factfinder could have found the defendant guilty beyond a reasonable doubt. A conviction for felony murder cannot stand without

sufficient evidence of one of the enumerated inherently dangerous felonies listed in K.S.A. 21-3436.

30.

The jury in this case was permitted to consider evidence against defendant on joined charges when deciding whether to find him guilty or not guilty on a charge of felony murder involving a different victim at a different time and place. Some of the evidence in support of the joined charges also was applicable to the felony murder and made the State's evidence on that crime sufficient to convince a rational factfinder of defendant's guilt beyond a reasonable doubt.

31.

Under *State v. Todd*, 299 Kan. 263, ___, 323 P.3d 829 (2014), and *State v. Gleason*, No. 97,296, 299 Kan. ___, ___ P.3d ___ (filed July 18, 2014) (slip op. at 42), defendant was not entitled to lesser included instructions for felony murder because a subsequent statutory amendment abolishing any lesser included offenses for that crime can be applied to defendant without violation of the Ex Post Facto Clause or due process.

32.

In this case, the jury instructions on capital murder under K.S.A. 21-3439(a)(4) failed to state the elements of the crime because they relied on sex-crime instructions defining the underlying sex crime for a victim other than the victim of the capital murder. In addition, three of the four counts of capital murder under K.S.A. 21-3439(a)(6) were multiplicitous with the first count. Under *Stromberg v. California*, 283 U.S.

359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931), and *Yates v. United States*, 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957), the combination of these errors requires reversal of three of the defendant's four convictions of capital murder.

33.

The defendant's appellate claim that a special unanimity instruction was required because of a multiple acts problem on the capital murders charged under K.S.A. 21-3439(a)(4) is moot.

34.

The defendant's appellate claim that he is entitled to reversal of his convictions for sex offenses on which capital charges under K.S.A. 21-3439(a)(4) were based is moot.

35.

In this case, the State's evidence against the defendant on aggravated burglary, viewed in the light most favorable to the prosecution, was sufficient to support a reasonable factfinder's verdict of guilty.

36.

Although it is possible to prosecute a male as a principal or an aider or abettor for causing a rape or attempted rape under Kansas law, the State did not succeed in charging those crimes here; and the defendant's convictions based on coerced victim-on-victim sex acts are void because the amended complaint failed to endow the district court with subject matter jurisdiction.

37.

The State's evidence against the defendant as an aider and abettor of a victim's digital penetration of herself, viewed in the light most favorable to the prosecution, was sufficient to support a reasonable factfinder's guilty verdict on rape.

38.

In this case, the defendant's conviction as an aider and abettor of penile rape of a victim immediately after digital rape of the same victim rests on unitary conduct and must be reversed as multiplicitous.

39.

In this case, abundant evidence supported the defendant's conviction as an aider and abettor of his codefendant's sex crimes. It is not necessary that an aider and abettor be contemporaneously aware that his or her principal is committing a crime that the aider and abettor has encouraged or facilitated. It also is not necessary that an aider and abettor be in the immediate vicinity of the principal and the victim during commission of the crime.

40.

Although omission of a defendant's name from a charging document may pose a subject matter jurisdiction problem, the defendant's name was included in Count 43 charging attempted rape in this case. Any technical defect in this charge did not deprive the district court of subject matter jurisdiction.

41.

Kansas' third-party evidence rule does not prevent a criminal defendant from introducing circumstantial evidence of an uncharged person's guilt simply because the State's case against the defendant includes direct evidence. The district judge abused his discretion in excluding relevant evidence of a third party's guilt proffered by the defendant in the form of the defendant's own testimony about observations of the third party, including the third party's possession of victims' stolen property.

42.

The hearsay rule is subject to a K.S.A. 60-460(j) exception for out-of-court statements against the declarant's interest. The district judge abused his discretion in excluding the defendant's testimony about statements made by his codefendant brother that, based on the record before this court, qualified as declarations against interest.

43.

A criminal defendant is entitled to a meaningful opportunity to present a complete defense, but protection of this fundamental right is tempered by sensible control of the criminal trial process, including procedural rules and evidentiary rulings that serve legitimate interests. When a district judge excludes relevant, admissible, and noncumulative evidence integral to a defendant's theory of defense, without furthering a legitimate interest, the right to present a defense is violated.

44.

The district judge abused his discretion by excluding evidence to support the defendant's defense under a misinterpretation of the third-party evidence rule and by refusing to apply a K.S.A. 60-460(j) hearsay exception, which violated the defendant's right to present a defense. However, such a constitutional error, even when it implicates a defendant's right to testify, is subject to evaluation for harmlessness.

45.

Given the strength of the State's case against the defendant on the record before the court, the district judge's violation of the defendant's right to present a defense was not reversible, standing alone.

46.

The district judge in this case did not err by admitting evidence of the results of mitochondrial DNA testing of four hairs found at the crime scene, which narrowed the list of contributors to maternal relatives of the defendant. This was circumstantial evidence of the defendant's presence at the scene, even though more precise nuclear DNA analysis of one hair was admitted at trial and implicated his codefendant brother and not the defendant. The district court also need not have excluded the mitochondrial DNA evidence because the risk of undue prejudice outweighed its probative value.

47.

Under K.S.A. 2013 Supp. 21-5402(d), felony murder is not a lesser included offense of capital murder.

Application of this statute to a defendant whose direct appeal was pending at the time the statute took effect does not violate the Ex Post Facto Clause or due process.

48.

A district judge does not abuse his or her discretion by denying a mistrial because of an alleged discovery violation by the State, when the State was unaware of new medical evidence linking the defendant and a victim until midtrial and disclosed the evidence to the defense as soon as it surfaced. Under such circumstances, there is no discovery violation that amounts to a fundamental failure in the proceedings.

49.

It is an abuse of discretion for a district judge to automatically exclude expert testimony on the reliability of eyewitness identifications. However, on the entire record in this case, there is no reasonable probability the judge's error affected the outcome of the trial of the defendant.

50.

A jury view is nonevidentiary and not a critical stage of a criminal prosecution requiring the presence of a criminal defendant; neither the defendant's statutory nor his constitutional right to be present at all critical stages of the proceedings against him was violated by the judge's failure to ensure his presence during the jury view in this case.

51.

A jury view may occur outside of the presence of a criminal defendant's counsel without violating the Sixth Amendment or K.S.A. 22-4503.

52.

Given the cautionary eyewitness identification instruction's inclusion of "any other circumstances that may have affected the accuracy of the . . . identification" as a catch-all factor the jury was permitted to consider, there was no error in the judge's omission of the defendant's requested language, "the race of the witness and the race of the person observed." Under the catch-all factor's broad language, counsel for the defense were free to argue any factor the evidence would support.

53.

In this case, the district judge committed error by giving both PIK Crim 3d 54.05 (Responsibility for Crimes of Another) and PIK Crim. 3d 54.06 (Responsibility for Crimes of Another—Crime Not Intended), when the defendant was charged with specific intent crimes demanding proof of premeditation. The error does not merit reversal as clear error because of the strength of the State's premeditation case.

54.

A jury instruction stating "[a] person who, either before or during its commission, intentionally aids, abets, advises, or counsels another to commit a crime with intent to promote or assist in its commission is

criminally responsible for the crime committed regardless of the extent of the person's participation, if any, in the actual commission of the crime" is adequate to communicate that the aider and abettor must personally possess the same specific intent as the principal. There was no error in this case attributable to the district judge's failure to tell the jury explicitly that the State must prove an aider and abettor's premeditation in order to convict him of capital murder or attempted first-degree premeditated murder.

55.

Omission of "by such person as a probable consequence of committing or attempting to commit the crime intended" from the end of PIK Crim. 3d 54.06 does not result in clear error because of a failure to communicate a need for causation and a measurement of probability.

56.

A prosecutor is permitted wide latitude in discussing the evidence. The prosecutor's first few dramatic sentences in her closing argument on this 58-count case did not exceed the wide latitude by inviting jurors to put themselves in the position of the victims.

57.

Cumulative error can require reversal of all of a criminal defendant's convictions even when one error standing alone does not. Cumulative error does not require reversal of all of the defendant's convictions in this case.

58.

The Eighth Amendment to the United States Constitution requires a jury to make an individualized capital sentencing determination. It does not categorically mandate separate penalty phase proceedings for each codefendant in a death penalty case. The Eighth Amendment was violated in this capital case when the district judge refused to sever the penalty phase of the proceedings; because the codefendants' mitigation cases were at least partially antagonistic; because evidence admitted in the joint penalty phase may not have been admitted in a severed proceeding; and because mitigating evidence as to one codefendant was prone to be used by the jury as improper, nonstatutory aggravating evidence against the other.

59.

The standard of review and the ultimate question that must be answered with regard to whether error in the penalty phase of a capital trial was harmless is whether the court is able to find beyond a reasonable doubt that the error, viewed in the light of the record as a whole, had little, if any, likelihood of changing the jury's ultimate conclusion regarding the weight of the aggravating and mitigating circumstances. The test is not whether a death penalty sentence would have been imposed but for the error; instead the inquiry is whether the death verdict actually rendered in this trial was surely unattributable to the error. In this case, the judge committed reversible error by refusing to sever the penalty phase of the codefendants' trial.

60.

The State's compliance with K.S.A. 21-4624(a) provides a capital murder defendant with constitutionally sufficient notice of aggravating factors.

61.

K.S.A. 2013 Supp. 21-6624's aggravators—that the defendants knowingly or purposely killed or created a great risk of death to more than one person; that they committed the crime for themselves or for another for the purpose of receiving money or any other thing of monetary value; that they committed the crime in order to avoid or prevent a lawful arrest or prosecution; and that they committed the crime in an especially heinous, atrocious, or cruel manner—are adequate to channel the jury's discretion in the penalty phase of a capital case.

62.

Due process requires a reasonably accurate and complete record of the trial proceeding in order to allow meaningful and effective appellate review. And, when a claim appears to have a substantial foundation based on the available record but the claim cannot be reviewed because of the incomplete or inaccurate transcript, the proper remedy is reversal. Still, a defendant does not have a constitutionally protected right to a totally accurate transcript of the criminal proceedings. A record that is incomplete but that involves no substantial or significant omissions does not require reversal. Appellants seeking reversal on the grounds that they are denied due process because of an inaccurate or incomplete transcript must make the best feasible showing possible that a complete and accurate

transcript might have changed the outcome of the appeal. If no such showing is made, no relief is appropriate.

63.

K.S.A. 21-4624(c) provides for a relaxed evidentiary standard during the penalty phase of a capital proceeding:

> "In the sentencing proceeding, evidence may be presented concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto and any mitigating circumstances. Any such evidence which the court deems to have probative value may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. Only such evidence of aggravating circumstances as the state has made known to the defendant prior to the sentencing proceeding shall be admissible, and no evidence secured in violation of the constitution of the United States or of the state of Kansas shall be admissible."

64.

K.S.A. 21-4624(c)'s relaxed evidentiary standard of admission is consistent with the United States Supreme Court's all relevant evidence doctrine, which demands that a capital sentencing jury have before it all possible relevant information about the individual defendant whose fate it must determine. It provides for

an individualized inquiry and does not limit the discretion of the sentencer to consider relevant circumstances offered by the defendant. K.S.A. 21-4624(c) provides that only relevant evidence is to be admitted, thus assuring the evidence actually has probative value. Moreover, evidence secured in violation of the United States Constitution or the Kansas Constitution is inadmissible. The relaxed evidentiary standard is sufficient to protect the defendant's right to a fair trial and does not violate either the United States or Kansas Constitutions.

65.

The Sixth Amendment Confrontation Clause and *Crawford v. Washington*, 541 U.S. 36, 56, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), apply in the penalty phase of a capital case and control over any contrary interpretation or application of K.S.A. 21-4624(c).

66.

In order to be admissible in a penalty phase of a capital trial, mitigating evidence must be relevant to the defendant. The district judge in this case did not abuse his discretion by excluding general testimony about parole likelihood, including an explanation of the statutory rubric and statistics on past paroles of others.

67.

Testimony about the impact of a defendant's execution must be probative on the material question of the defendant's character.

68.

A State expert's testimony about other experts' out-of-court agreement with him is subject to evaluation for admissibility under the Sixth Amendment, *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and K.S.A. 21-4624(c).

69.

Rebuttal evidence is that which contradicts evidence introduced by an opposing party. It may tend to corroborate evidence of a party who first presented evidence on the particular issue, or it may refute or deny some affirmative fact which an opposing party has attempted to prove. It may be used to explain, repel, counteract, or disprove testimony or facts introduced by or on behalf of the adverse party. Such evidence includes not only testimony that contradicts the witnesses on the opposite side, but also corroborates previous testimony. There is no inflexible legal requirement that rebuttal or surrebuttal evidence be new. A district judge who excludes surrebuttal testimony because he or she believes it will not be new abuses his or her discretion.

70.

In the absence of a request, the trial court has no duty to inform the jury in a capital murder case of the term of imprisonment to which a defendant would be sentenced if death were not imposed. Where such an instruction is requested, the trial court must provide the jury with the alternative number of years that a defendant would be required to serve in prison if not sentenced to death. Additionally, where a defendant

has been found guilty of charges in addition to capital murder, the trial court upon request must provide the jury with the possible terms of imprisonment for each additional charge and advise the jury that the determination of whether such other sentences shall be served consecutive to or concurrent with each other and the sentence for the murder conviction is a matter committed to the sound discretion of the trial court.

71.

A district judge must instruct a penalty phase jury in a capital case not only that it need not be unanimous on the existence of a mitigating circumstance but also that a mitigating circumstance need not be proved beyond a reasonable doubt.

72.

It is inadvisable for an aggravating circumstances instruction in the penalty phase of a capital case to reference a generic crime rather than capital murder.

73.

An instruction to a jury in a penalty phase of a capital case that reads: "Mitigating circumstances are those which in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, even though they do not justify or excuse the offense. In this proceeding, you may consider sympathy for a defendant. The appropriateness of exercising mercy can itself be a mitigating factor in determining whether the State has proved beyond a reasonable doubt that the death penalty should be imposed," is not erroneous because it equates mercy to a mitigating factor.

74.

The aggravating circumstances instruction for a penalty phase in a capital case must be corrected to be consistent with the verdict form designed to cover the situation when the jury agrees unanimously on the existence of an aggravating circumstance but cannot agree unanimously on how it weighs against any mitigation.

Appeal from Sedgwick District Court; PAUL W. CLARK, judge. Opinion filed July 25, 2014. Affirmed in part, reversed in part, sentence of death vacated, and case remanded.

Debra J. Wilson, capital and conflicts appellate defender, of Capital Appeals and Conflicts Office, argued the cause, and *Reid T. Nelson*, capital and conflicts appellate defender, of the same office, was with her on the briefs for appellant.

Kim T. Parker, deputy district attorney, argued the cause, and *Debra S. Peterson*, special prosecutor, *David Lowden*, chief attorney, *Lesley A. Isherwood*, assistant district attorney, *Nola Tedesco Foulston*, former district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, were on the briefs for appellee.

The opinion of the court was delivered by

Per Curiam: Defendant Reginald Dexter Carr, Jr., and his brother, Jonathan D. Carr, were jointly charged, tried, convicted, and sentenced for crimes committed in a series of three incidents in December 2000 in Wichita. This is R. Carr's direct appeal from his 50 convictions and 4 death sentences.

In the first incident on December 7 and 8, Andrew Schreiber was the victim. The State charged R. Carr and J. Carr with one count of kidnapping, one count of aggravated robbery, one count of aggravated battery, and one count of criminal damage to property. The jury convicted R. Carr on all counts and acquitted J. Carr on all counts.

In the second incident on December 11, Linda Ann Walenta was the victim. The State charged R. Carr and J. Carr with one count of first-degree felony murder. The jury convicted both men.

In the third incident on December 14 and 15, Heather M., Aaron S., Brad H., Jason B., and Holly G. were the victims of an invasion at the men's Birchwood Drive home that led to sex crimes, kidnappings, robberies, and, eventually, murder and attempted murder. The State charged R. Carr and J. Carr with eight alternative counts of capital murder, four based on a related sex crime under K.S.A. 21-3439(a)(4) and four based on multiple first-degree premeditated murders under K.S.A. 21-3439(a)(6); one count of attempted first-degree murder; five counts of aggravated kidnapping; nine counts of aggravated robbery, eight of which were alternatives, four based on use of a dangerous weapon and four based on infliction of bodily harm; one count of aggravated burglary; 13 counts of rape, eight of which were based on coerced victim-on-victim sexual intercourse and one of which was based on a victim's coerced self-penetration; three counts of aggravated criminal sodomy, two of which were based on coerced victim-on-victim oral sex; seven counts of attempted rape, six of which were based on coerced victim-on-victim overt acts toward the

perpetration of sexual intercourse; one count of burglary; and one count of theft. The State also charged R. Carr and J. Carr with one count of cruelty to animals because of the killing of Holly G.'s dog. The jury convicted R. Carr and J. Carr on all of the charges arising out of the Birchwood incident.

In connection with the three incidents, the State also charged R. Carr alone with three counts of unlawful possession of a firearm. The jury convicted him on these three counts as well.

In the separate capital penalty proceeding that followed, R. Carr and J. Carr were sentenced to death for each of the four capital murders committed on December 15. They each received a hard 20 life sentence for the Walenta felony murder. J. Carr received a controlling total of 492 months' imprisonment consecutive to the hard 20 life sentence, and R. Carr received a controlling total of 570 months' imprisonment consecutive to the hard 20 life sentence for the remaining nondeath-eligible crimes.

In his briefs, R. Carr raises 21 issues tied to the guilt phase of his prosecution and 19 issues tied to the death penalty phase of his prosecution. In addition, because this is a death penalty case, this court is empowered to notice and discuss unassigned potential errors under K.S.A. 2013 Supp. 21-6619(b), which we do. R. Carr does not challenge the sentences he received for the Schreiber crimes; for the Walenta felony murder; for the crimes in which Heather M., Aaron S., Brad H., Jason B., and Holly G. were the victims that were not eligible for the death penalty; or for the cruelty to animals conviction.

Both sides sought many extensions of time to file briefs in this appeal and in J. Carr's separate appeal. In R. Carr's case, all of these extension requests were unopposed by the other side of the case. After completion of briefing, this court heard oral argument on December 17, 2013.

After searching review of the record, careful examination of the parties' arguments, extensive independent legal research, and lengthy deliberations, we affirm 32 of R. Carr's 50 convictions, including those for one count of capital murder of Heather M., Aaron S., Brad H., and Jason B. under K.S.A. 21-3439(a)(6); for the felony murder of Walenta; and for all of the crimes against Schreiber. We reverse the three remaining convictions for capital murder because of charging and multiplicity errors. We also reverse his convictions on Counts 25, 26, 29 through 40, and 42 for coerced sex acts for similar reasons. We affirm the convictions based on Counts 2, 9 through 24, 27, 28, 41, and 43 through 58.

We vacate R. Carr's death sentence for the remaining capital murder conviction, because the district judge refused to sever the defendants' penalty phase trials. We remand to the district court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND FOR GUILT PHASE ISSUES

Resolution of R. Carr's claims on this appeal demands a comprehensive review of the disturbing facts underlying his convictions and sentences. It also requires discussion of the actions now attributed to J. Carr, as the defendants' cases were joined at the hip

until appeal and their challenges to their convictions and death sentences are necessarily intertwined.

The Schreiber Incident and Investigation

The first incident began when Schreiber went to a convenience store at 21st and Woodlawn at 10:45 p.m. on December 7, 2000. He parked his 1998 Ford Expedition on the side of the building and went inside to make a purchase. Just after he returned to his car and sat down in the driver's seat, a man holding a small, black, semi-automatic handgun palm down approached and placed the gun's barrel against the glass of the window in the driver's door. The man ordered Schreiber to move over to the front passenger seat.

As Schreiber followed the order and the man climbed into the driver's seat, the man hit Schreiber in the back of the head with the gun and told him to hurry up. Once both were situated, the man backed the Expedition out of the parking lot and drove away. As he was driving, he asked Schreiber if he had any money. Schreiber said yes and handed over his wallet.

The man pulled into a nearby alley, and a second man came up to the front passenger window and pointed another gun at Schreiber. The driver ordered Schreiber to let the other man into the front passenger seat and then get into a middle seat behind the front seat of the Expedition. As the second man got into the car, he hit Schreiber in the head with his gun and told Schreiber not to look at him.

The two men asked Schreiber if he had an ATM card, remarking that someone who drove a car like the Expedition must have money. When Schreiber said he

had an ATM card, the driver gave Schreiber his wallet and had him get his ATM card out. Schreiber then handed the wallet back to the driver.

The driver went to a nearby ATM, pulling up beside it so that Schreiber could access the machine through the rear passenger window. Schreiber told the men that he could withdraw only $300 at a time. They instructed him to withdraw $300, and, as the machine dispensed the money, the men told Schreiber to hand it over his shoulder without looking at them, which he did. The passenger grabbed the money. The two men then told Schreiber to hand them the receipt, which he did in the same way. When the passenger determined from the receipt that Schreiber still had money, he said they were not done yet.

The driver went to a second ATM, where Schreiber again withdrew the maximum of $300. Again, the men asked for the receipt, and, after determining that Schreiber still had money in his account, they again said they were not done.

At a third ATM, Schreiber tried to withdraw $300, but there were insufficient funds to cover that amount. The men told Schreiber to try to get $200, and the transaction processed successfully. Schreiber handed the passenger the money and the receipt in the same way that he did at the first and second ATMs. When the passenger looked at the third receipt, he said they were going to leave Schreiber with 8 dollars and some change, which the two men appeared to find funny.

During the entire time the two men took Schreiber from ATM to ATM, the second man held a gun to Schreiber's head. Schreiber described the passenger's

gun as a dark semi-automatic handgun. During the episode, including a stretch of driving when the Expedition moved north of the convenience store and then west on Kansas Highway 96, the men demanded that Schreiber remove any jewelry and give it to them. Schreiber handed over a silver Guess watch with a blue face. While he was removing the watch, he turned his head and was again hit on the head and told not to look at the two men.

The men also discussed what they were going to do with Schreiber, including the possibility of dropping him off on a dirt road. After driving on several dirt roads bordered by open fields, however, the men determined that the locations were not remote enough for their purposes. The men also discussed the Expedition, the driver commenting on how much he liked it and wanted one. The passenger said at one point that he planned to take Schreiber's pants and shoes when they dropped him off, because it was so cold outside. The passenger appeared to be amused by his own remark.

Eventually, the men took Schreiber back into town and stopped at a car wash near Windsor at Woodgate Apartments on East 21st Street. There, after two switches between the positions of the passenger and Schreiber, they told Schreiber to lie face down on the floor in front of the middle seat. They also discussed dropping the second man off at their car.

After leaving the car wash, the driver stopped the Expedition again and the passenger got out of the car. As he left, he reminded the driver to be sure to wipe down the Expedition. The driver told the passenger to follow him. Schreiber heard another vehicle. Both cars

were driven for several more minutes and then stopped. The driver told the other man that they had not arrived at the right spot and that the second man should continue to follow.

The two cars were driven for another 5 to 10 minutes before they were stopped again. Schreiber could tell that this time the cars had left the paved road. Schreiber heard the driver turn off the ignition and then wipe the surfaces in the Expedition.

The driver then got out of the Expedition and had a discussion with the second man about whether they were going to leave Schreiber's keys behind. The second man then told Schreiber that the two men were going to put the keys in the street. The driver asked Schreiber if he had a spare tire and Schreiber said that he did. The driver said he was going to slash the tires. Schreiber then heard someone fire three shots.

The driver instructed Schreiber to wait 20 minutes before leaving the scene. Schreiber heard the men get into the other car and drive away. As they did so, he peeked out of a window of the Expedition and saw the receding square taillights of the other car.

Schreiber found his keys. One of the Expedition's tires had three holes in it, but he was able to maneuver the car back onto the paved road near 43rd Street and Webb Road and drive home, where he called 911.

When law enforcement responded to Schreiber's call, he told police that the driver who accosted him was a black male in his 20s, approximately 5 feet 9 inches or 5 feet 10 inches tall and with a medium build. Schreiber said the driver was wearing a beanie or stocking cap of some type, blue jeans, and a

long-sleeved dark t-shirt or sweatshirt. The driver had some facial hair but not a full mustache or a full beard. Schreiber described the second man as a black male who was taller than the driver, and who was wearing a winter jacket or parka.

The Walenta Incident and Investigation

The second incident, at about 9:40 p.m. on December 11, 2000, took place in the driveway of Walenta's home on Dublin Court in east Wichita.

Walenta, who was a cellist with the Wichita Symphony, was arriving home from practice in her 2000 GMC Yukon. As she turned into one of the side streets near her home, she noticed a newer, light-colored, four-door Honda-type vehicle turn behind her.

The car continued to follow Walenta's Yukon as she turned into her street, a dead end with a cul-de-sac. As Walenta approached her house, she noticed that the car had stopped in front of the residence directly south of hers. And, when she pulled into her driveway, she saw a black male get out of the front passenger side of the car and begin walking toward the driver's side of her Yukon.

As the man approached, he said he needed help. Walenta rolled her window down a few inches, and the man immediately pointed a handgun through the window, palm down and at her head. Walenta tried to start her Yukon, which ground the starter gear because the car was already running. The man then told Walenta not to move the Yukon, but Walenta shifted into reverse. When she did, the man shot her.

The gunman began to run away, and, as he did, the other car appeared to be leaving. Walenta was not sure whether the gunman may have been left behind by whoever was driving the car that had followed her.

After Walenta had been shot, her across-the-street neighbor, Anna Kelley, heard a car horn honking. When Kelley looked outside, she realized that the honking was coming from Walenta's Yukon, and that the Yukon's lights were flashing. When Kelley opened her front door, Walenta began calling to her for help. Kelley's husband called police as Kelley ran to Walenta's car. The Yukon was still running; its driver's window had shattered; and Walenta was slumped backward in the driver's seat.

While waiting for police to arrive, Walenta told Kelley she had been shot by a black man with wiry hair. She also said that a light-colored car had followed her into her street.

Once transported to the hospital, Walenta provided somewhat more detailed descriptions of the gunman, although they varied in certain respects from one another. She described the gunman as a black male in his 30s with a medium build. She said his hair was long, straight, and wiry, and described it as shoulder-length with corkscrews. At different points, she estimated his height at between 5 feet 7 inches and 6 feet; as between 5 feet 9 inches and more than 6 feet; and as approximately 6 feet. The only description she was able to give of the gunman's clothing was that he might have been wearing a beige trench coat.

Walenta suffered three gunshot wounds, and one of the bullets severed her spinal cord, rendering her

paraplegic. But she began recovering during her stay in the hospital and was scheduled to be transferred to a rehabilitation facility on January 2, 2001. That day, however, Walenta suffered a pulmonary embolus—a complication of her paralysis—and died.

The Quadruple Homicide and Crimes Leading to It

The third incident began on December 14, 2000, at a home shared by Aaron S., Brad H., and Jason B. at 12727 Birchwood, the middle unit of a triplex at the intersection of 127th and Birchwood.

Holly G., who was the girlfriend of Jason B., was with Jason B. at the home. Holly G. had her dog with her as well. Aaron S. and his friend, Heather M., also were at the home, as was Brad H.

As Holly G. and Jason B. began getting ready for bed at about 10:30 p.m., Holly G. pulled her hair back and fastened it with a plastic clip. Jason B. turned off the front porch light, made sure the front door was locked, and then came to bed. Holly G.'s dog was in Jason B.'s bedroom with Holly G. and Jason B.

A few minutes later, the porch light came on again. Holly G. heard Aaron S. talking to someone whose voice she did not recognize. Then Jason B.'s bedroom door burst open, and a tall black man with a gun came through the doorway. Jason B. screamed as the gunman yanked the covers off of the bed. A second black man, holding onto Aaron S. by the shirt, came into the room and pushed Aaron S. onto the bed with Holly G. and Jason B. The man also was armed.

The two intruders asked if anyone else was in the house and were told Brad H. was downstairs. One of

the intruders went downstairs to get Brad H. while the other stayed in the bedroom. The intruder who stayed upstairs kept demanding to know if there was anyone else in the house, saying, "[D]on't lie, don't lie." Aaron S. eventually told him that Heather M. was in the other upstairs bedroom. When the intruder who had gone downstairs returned to the bedroom with Brad H., he was carrying a golf club, and he ordered Brad H. onto the floor at the foot of the bed. One of the intruders retrieved Heather M. from the other bedroom and told her to get on the floor in Jason B.'s bedroom as well.

The intruders demanded to know where the phones in the house were and whether there was a safe. One of them was shouting, "Where's the safe? A house this fucking nice[,] there's got to be a safe!" One looked around the house while the other stood guard over the five friends. At one point, the intruders also said that someone needed to "shut . . . up" Holly G.'s dog or they would shoot it. Eventually the dog was muzzled.

The intruders also demanded to know who among Heather M., Aaron S., Brad H., Jason B., and Holly G. had money. When none had any cash, the intruders asked who had ATM cards. Each raised his or her hand, and the intruders asked each how much money he or she had in the bank. After obtaining this information, the intruders had a whispered discussion. They then ordered the five victims to remove their clothes. The intruders then pulled all of the clothes out of the closet in Jason B.'s bedroom, ordered the five into the closet, and told them to sit down. They were threatened not to speak to each other.

The intruders then conversed about wanting to watch two women engage in sex acts and ordered Holly G. and Heather M. to go to the bar area outside of Jason B.'s bedroom. They told the women to "suck that pussy." Holly G. and Heather M. complied; Holly G. performed oral sex on Heather M., and then Heather M. performed oral sex on Holly G. The intruders also demanded that the two women use their fingers to penetrate each other's vaginas; again, the women complied. During these acts, both intruders watched and made further demands, telling the women again to "suck that pussy" and "do it deeper." When Heather M. was performing oral sex on Holly G., one of the intruders hit Holly G.'s knee so that he could get a better view of what was happening.

Next, the intruders brought each of the three male victims out to the bar area one at a time and ordered each to have sexual intercourse with Holly G. Although one of the intruders had thrown a shirt or other piece of clothing over Holly G.'s face, she remained able to see her feet and distinguish between the three male victims during these acts. The first was Brad H.; the second, Jason B.; the third, Aaron S. At some point during these acts, Heather was moved from beside Holly G. to the closet.

Neither Brad H. nor Jason B. was able to achieve an erection, but penetration of Holly G. nevertheless occurred. The intruders made comments about "popping" someone's "ass," if the absence of an erection prevented fulfillment of their demands. Aaron S. initially defied the intruders, saying, "[N]o, I don't want to do this." One of the intruders then became angry and hit Aaron S. in the back of the head with something

hard, causing him to cry out in pain. Aaron S. then attempted to comply by having intercourse with Holly G.

After these acts, the intruders ordered Holly G. back into the closet in Jason B.'s bedroom and brought Heather M. from the closet out to the bar area. They then commanded Aaron S., Jason B., and Brad H., in that order, to have sexual intercourse with Heather M.

During these events, the intruders threatened to shoot if one of the men did not achieve an erection. Holly G. heard one of them say words to the effect of: "[I]t's 11:53, it's 11:54, somebody better get their dick hard, get a hard on." Holly G. heard Heather M. moaning in pain when each of the three men was outside of the closet. When Aaron S. was in the bar area with Heather M., Holly G. heard Aaron S. say again that he did not want to do what he was being ordered to do.

By this time, about midnight, Holly G. had seen enough of the two intruders that she was able to differentiate between them. The one she referred to as the first was a taller, thinner, black male who was wearing an orange and black sweater with the word "FUBU" on it, black jeans, a leather coat, and some kind of boots. The intruder Holly G. referred to as the second was stockier than the other and was wearing a black leather coat.

After the coerced victim-on-victim sex acts, the stockier of the two intruders took Brad H. to a series of ATMs. Before they could leave, there was a problem finding car keys, which caused the intruders to say that

someone had better find his or her "fucking keys" or someone would be shot.

While Brad H. was gone with the stockier intruder, the taller, thinner intruder ordered Holly G. out of the closet. He ordered her to get on all fours and get herself "wet." To comply, Holly G. placed her finger in her vagina. The intruder then vaginally raped her from behind. During the rape, Holly G. was able to see that the intruder had laid a small, silver handgun on the floor. The gun was 4 inches to 5 inches long and was not a revolver. The other gun Holly G. had seen that night was black.

When the taller, thinner intruder returned Holly G. to the closet, he ordered Heather M. out of it and raped or attempted to rape her. From inside the closet, Holly G., Jason B., and Aaron S. could hear Heather M. moaning. Aaron. S., in particular, was crying and saying, "[T]his shouldn't happen this way." Heather M. was never put back into the closet.

Brad H. and the stockier intruder were away from the home about 30 minutes. The stockier intruder then took Jason B. to two ATMs. Jason B. and the intruder were gone about 20 minutes.

There followed a discussion about which of the remaining victims would leave next with the stockier intruder. Holly G. said she would go. She got out of the closet, put on a white sweatshirt, and took her ATM card out of her purse. The stockier intruder took her through the front door to the outside and told her to get into the driver's side of Jason B.'s silver Dodge Dakota pickup truck. The intruder sat slouched back in the

corner of the passenger seat with what Holly G. believed to be a gun in his hand.

At the Commerce Bank ATM to which Holly G. drove at the stockier intruder's direction, Holly G. withdrew $350, the maximum amount allowed in one withdrawal. She then unsuccessfully attempted a $200 withdrawal and then successfully made a $150 withdrawal. This exhausted her available money. When she leaned out of the truck to take the cash out of the machine, the stockier intruder groped her vagina with his gloved hand.

At one point during this trip, Holly G. asked the stockier intruder if he was going to shoot her and the other victims. He said no. She then asked him if he promised not to shoot them, and he said, "Yeah, I'm not going to shoot you."

Also during the trip to the ATM, the stockier intruder asked Holly G. if the other intruder had had intercourse with her. When Holly G. said that he had, the stockier intruder wanted to know if she had enjoyed it. To appease him, Holly G. said yes. She had seen what she believed to be a gun in his lap. The stockier intruder also asked if she had ever had sex with a black person and if it was better with the taller, thinner intruder than with her boyfriend.

When Holly G. and the stockier intruder were walking back into the house, he told her it was too bad they had not met under other circumstances because she was kind of cute and they could have dated. She replied, "[K]ind of, yeah." He then asked, "[W]hat does that mean?" Holly G. responded that she wasn't really having a good time.

When Holly G. returned to the closet, she told Aaron S., Brad H., and Jason B.: "I think we're all going to be okay. I asked him, he said he's not going to shoot us."

Aaron S. was the next to leave the home with the stockier intruder. Holly G. thought Aaron S. put on pants and a shirt before they left.

While Aaron S. was gone, the taller, thinner intruder opened the closet door and offered the remaining victims a glass of whiskey, which they refused. Holly G. then heard someone handling a popcorn tin and a change jar. She heard the taller, thinner intruder ask Heather M., who was outside of the closet at the time: "[W]hose is this?" Heather M. said she did not know, but it was probably Holly G.'s. He then asked which of the male victims was Holly G.'s boyfriend, and Heather M. said Jason B. The taller, thinner intruder then opened the closet door and asked for Jason B. When Jason B. identified himself, the intruder asked him if the item that had been found was the only one of its kind. Jason B. said yes. The item was an engagement ring Jason B. had purchased for but not yet given to Holly G.

When Aaron S. returned, the stockier intruder told Holly G. to leave the closet and pushed her into the dining room by jabbing her in the back with something she assumed was a gun. He said, "Don't worry[.] I'm not going to shoot you yet." The stockier intruder then made Holly G. get down onto all fours and vaginally raped her from behind. He then grabbed her, turned her around, ejaculated into her mouth, and ordered her to swallow. Holly G. was able to see the stockier intruder's face at this point.

Holly G. went to the bathroom, but, when she opened the bathroom door, she saw the taller, thinner intruder raping Heather M. from behind. Heather M. was on all fours, and the taller intruder was on his knees. The bathroom light was on, and the second intruder was only 2 feet to 3 feet in front of Holly G.; so she was able to see his face. The taller intruder shut the door, telling Holly G. he was not finished yet.

Holly G. waited outside the bathroom door for a few minutes and then opened it again. The taller intruder then directed Holly G. to get down on all fours. She complied and he again vaginally raped her from behind. After he stopped, Holly G. heard what sounded like a condom being removed, and then the toilet was flushed.

Holly G. was then directed back to the bar area, where Heather M. was already sitting. The three male victims remained in the closet in Jason B.'s bedroom. The women were cold and Holly G. put on a sweater. The two intruders were talking to each other, and then the stockier one went downstairs. When he came back upstairs, Holly G. heard him say something about a big screen television. Brad H. had a big screen television in his downstairs bedroom.

Holly G. also was able to get a better look at the stockier intruder at that time. She saw his face and noted that his hair was close to his head and not sticking out like the thinner intruder's hair.

At some point, the intruders used cleaning solution to wipe various surfaces and things in the house. When they had finished this task, all five victims were taken to the garage. Holly G. and Heather M. were wearing

nothing but sweaters. Aaron S. was still wearing pants and a shirt. Brad H. and Jason B. were naked.

Holly G. and Heather M. were directed to get into the trunk of a beige Honda Civic belonging to Aaron S. The intruders then tried to get all three of the men into the trunk, but they could not fit. Holly G. and Heather M. were then put into the back seat of the Honda, and the men were put into the trunk. Holly G. was then directed to get into the passenger side of Jason B.'s truck. After some discussion between the intruders, as the stockier intruder was taking Holly G. to the truck, the taller, thinner intruder said, "If she gives you any trouble . . . let me know and we'll take care of that."

The taller, thinner intruder drove away from the Birchwood home first in the Civic, followed by the stockier intruder driving the truck. As she rode with the stockier intruder, Holly G. asked him where they were going. He said they were going somewhere to drop the five victims off—away from their cars and the home. Again, Holly G. was able to see the stockier intruder's face; at this point, he was making no effort to keep her from looking at him. Holly G. noted that the clock in the truck showed it was 2:07 a.m.

The Honda and the truck were driven to a soccer field at 29th Street and Greenwich Road, and the intruders got out. Holly G. was ordered to get into the driver's seat of the Civic. The two intruders talked to each other for a couple of minutes, and then the male victims were brought out of the trunk and made to kneel in front of the Civic.

At this point, Holly G. turned to Heather M. and said, "Oh my God, they're going to shoot us." She and

Heather M. were then directed to get out of the car. Holly G. knelt by Jason B., and Heather M. knelt by Aaron S.

Holly G. saw that the two intruders were standing fairly close together. She then heard a shot, and everyone started screaming. Aaron S. was pleading, "Please, no" and used the word, "sir." Holly G. heard three more shots.

Holly G. then felt an impact on the back of her head and everything went gray. She remained kneeling, but then she was kicked over and fell forward. She heard talking, heard one of the truck's doors shut, heard its engine start, and then felt another impact. She thought she had been run over. She heard the truck drive away after pausing for a moment, and she waited until she could no longer hear it before she looked to see if the intruders and the truck were gone. She saw the truck go south on Greenwich Road and, when its lights disappeared, she got up and began checking to see if any of the four other victims was still alive.

Holly G. looked at Jason B. first. She rolled him over and saw blood coming from one of his eyes. She took her sweater off and tied it around Jason B.'s head to try to stop the bleeding. After looking at the others, Holly G. decided she needed to get help. Looking for the nearest safe place, she spotted a house with white Christmas lights in the distance. Now naked and barefoot, Holly G. ran more than a mile through snow, crossing several fences, some with barbed wire, to get to that house.

It was approximately 2:15 a.m. on December 15, when Steve Johnson and his wife heard someone

pounding loudly on their front door and ringing their doorbell. Johnson looked outside and saw a naked woman at his door. He opened the door and the woman, Holly G., told him that she and four friends had been abducted, taken to a nearby field, and shot. Holly G. had blood on her back, and her hair was matted as a result of some type of wound. The Johnsons let Holly G. inside, gave her blankets, and called 911.

Investigation Leading to R. Carr's Arrest and Discovery of Evidence

Sedgwick County Emergency Communications dispatch received the Johnsons' call at 2:37 a.m. Johnson tried to convey everything Holly G. was telling him to the 911 operator, but he ultimately handed the phone to Holly G. because she was giving him information too fast for him to pass it on. Holly G. was afraid she was not going to survive and wanted the police to know everything that she knew about the Birchwood crimes.

Holly G. told the 911 operator that two black men broke into the Birchwood home at 11 p.m. She said the two intruders put her and her four friends in a closet, took turns raping her and the other woman who was at the house, and took them one-by-one to ATMs to make them withdraw money from their bank accounts. She said the two men then took two of their vehicles, a silver Dodge Dakota pickup truck and a beige Honda Civic, and drove them to a field on Greenwich Road past 37th Street. There, the two men made them get on their knees and then shot all five of them in the back of the head. The two intruders then drove away in the truck.

Holly G. also gave a description of her attackers to the dispatcher. She said one of the men was tall and skinny, about 6 feet tall, had hair like "Buckwheat," and was wearing an orange and black sweater and black "jean-type" pants. The other had a heavier build, was also about 6 feet tall, and was wearing a black leather coat.

While Holly G. was being treated in a local hospital emergency room, officers obtained additional information from her. She said the intruder with the orange and black sweater was in his early 20s; was about 6 feet tall and weighed 175 pounds; had a bushy afro that stuck out about 2 inches; and was wearing black leather gloves and blue jeans. The other intruder was in his early 20s; was about 6 feet tall and weighed 190 to 200 pounds; and was wearing a black leather coat, black leather gloves, blue jeans, and boots. She said both men were carrying small semi-automatic handguns.

Holly G. had suffered a gunshot wound to the back of her head. The impact fractured her skull; but the bullet did not penetrate into her brain, apparently because it had been deflected by the plastic hair clip she was wearing. Holly G. also had other injuries, including bruises to her face and frostbite to her feet.

While Holly G. was transported and treated at the hospital, law enforcement found Aaron S.'s Honda Civic and the bodies of the four other victims lying in a road at the snow-covered soccer field where they had been shot. Sheriff's Deputy Matthew Lynch was first on the scene. He detected no pulse in Heather M. Aaron S. appeared to be attempting to breathe, as did Brad H. Jason B. did not appear to be breathing and had no

pulse. Lynch advised dispatch that there were four "code blue" victims, meaning each was at least in cardiac arrest. EMS arrived on the scene at 2:54 a.m.

Officers collected spent cartridge casings, a bullet fragment, an ATM receipt reflecting a withdrawal on December 15 at 1:17 a.m., and pieces of Holly G.'s plastic hair clip at the soccer field.

Meanwhile, Wichita Police Officer Michael Dean was dispatched to the Birchwood home. He arrived at approximately 3 a.m. About that same time, Sergeant John Hoofer also was dispatched to the home. On his way there, Hoofer saw a Dodge Dakota pickup passing him in the opposite direction at about 127th Street. Because the vehicle matched a description that had been put out over the police radio, he turned around to pursue it. In the process, he lost track of it.

Hoofer arrived at the Birchwood home at 3:19 a.m., and he and Dean went inside. The home appeared to have been ransacked. In the bedrooms, dresser drawers had been pulled out; clothes were strewn all over; and the beds had been stripped of their linens. In the living room, an entertainment center had an open space where a television would have been, and a coaxial cable had been pulled through the open space and was lying on the floor. Downstairs, there was a computer desk with no computer. In what law enforcement would later learn was Jason B.'s bedroom, there was a large pool of blood on the corner of the mattress and what appeared to be a bullet hole. On the floor below that part of the mattress was a dead dog. The two officers then went back outside and secured the home as a crime scene.

A short while later, Dean was standing by his patrol vehicle when he saw an older white Plymouth come down 127th Street and drive by the Birchwood residence. He thought this was unusual, because it was 4 a.m. in a secluded residential area where there had been very little traffic, and the streets were snow-packed, making driving conditions hazardous. It was just a few minutes later when Dean saw the same vehicle coming down Birchwood. As the car drove past, Dean saw that the driver was a black male wearing a stocking cap. The driver stared straight ahead as the car passed, never acknowledging the officer or looking at what was now an obvious crime scene surrounded by police tape. Dean thought this was highly unusual and noted the car's Ford County license plate number. He watched as the vehicle turned onto 127th Street and headed back in the direction from which it had come the first time he saw it. He notified Hoofer that he needed to stop the vehicle and identify the driver.

At 4:13 a.m., Hoofer stopped the white Plymouth, a 1988 model, as it was driving away from the area of the Birchwood residence on 127th Street. He noticed a black leather coat on the back seat. The driver was R. Carr. He showed Hoofer a piece of paper identifying him and listing a Dodge City address. R. Carr told Hoofer he was driving to the apartment of his girlfriend, Stefanie Donley. From R. Carr's description, Hoofer recognized the apartment's location as the 5400 block of East 21st Street, the address of the Windsor at Woodgate complex. At some point after R. Carr identified himself, the encounter with Hoofer ended; and R. Carr drove away.

At about 4:30 a.m., R. Carr arrived at Donley's apartment. He stayed approximately 15 minutes and left again, returning about 45 minutes later.

About the same time R. Carr returned to the apartment complex, Christian Taylor, another resident of Windsor at Woodgate, was watching the local news as he got ready for work. He saw a report on a quadruple homicide during the previous night and noted that police were looking for a gray or silver Dodge Dakota pickup truck. As Taylor left his apartment to go to his car about 6:25 a.m., he saw a Dodge Dakota pickup truck fitting the description parked on the other side of an empty spot next to his car. The truck was backed in so that its tailgate was facing a fence; the tailgate was down. A large TV was in the bed of the truck. He then saw a black man, later identified as R. Carr, appear from behind the truck. Taylor described the man as in his 20s or 30s, with a few days' growth of facial hair, wearing blue jeans and a black or brown leather jacket, and with a scarf or hood covering his head.

Thinking the truck and the man he saw might have something to do with the quadruple homicide, Taylor got into his car, drove out of the parking lot, and headed to the nearest police station to report what he had seen.

Meanwhile, sometime after 6 a.m., Riwa Obel Nsangalufu, another resident of the Windsor at Woodgate complex, left his apartment to start his car and let it warm up. As he walked, he saw a man, later identified as R. Carr, trying to drag a large television on a blanket toward Building 8. Obel noticed a silver Dodge Dakota that was backed up against the fence

with its tailgate down. R. Carr asked Obel to help, explaining he was moving in. After several requests, Obel agreed.

Obel helped R. Carr get the television up a set of stairs to Apartment 819. At that point, R. Carr told Obel that he could get the television inside by himself. R. Carr offered Obel a tip for helping him and displayed some folded bills. Obel refused the money.

R. Carr then knocked on the door of Apartment 819 and Donley came out. She asked R. Carr where he had been all night and said she had been waiting for him.

R. Carr told Donley that his sister had made him take his things out of her garage. He then began bringing various items into her apartment. He also had about $900 in cash that he took out of his pocket. R. Carr, according to Donley, was trying to reach J. Carr, and finally talked to him on the telephone at 5:30 a.m. to 5:45 a.m. R. Carr told Donley that J. Carr was seeing a married woman, that the woman's husband came home, that there was a shootout, and that J. Carr had run off.

A short while later, R. Carr took a shower, and Donley noticed that he removed a pair of red shorts he had been wearing under his pants the previous evening.

An officer investigating Taylor's report located the Dodge Dakota at the apartment complex parking lot and confirmed it had belonged to Jason B. The tailgate of the truck was down, and there were footprints and drag marks in the snow that led to a multicolored comforter on a sidewalk. On the other side of the fence behind the truck, the officer saw clothing that appeared

to have been thrown over the fence. There was also a blue-and-white-striped comforter in a trash dumpster next to the pickup truck. Law enforcement later confirmed that the bedding and clothing belonged to residents of 12727 Birchwood.

At about the time that the officer was observing the comforter in the dumpster, Obel was leaving the apartment complex to go to work. The officer stopped Obel, and Obel told the officer about helping a man move a large TV from the truck to an apartment in Building 8. Obel showed the officer Apartment 819.

Officer Jamie Crouch was among the law enforcement agents who responded to the Windsor at Woodgate apartments and he stationed himself outside the balcony of Apartment 819. He heard other officers knock on the apartment's door and announce their identity as police. A few seconds later, the apartment's sliding glass door onto the balcony opened. R. Carr emerged from the apartment; and he placed his hands on a balcony railing as if he were going to jump from the balcony to the ground.

When the officers knocking on the door entered the apartment, Officer Renay Bryand observed R. Carr coming back into the apartment from the balcony. R. Carr was arrested. On his person, officers found a gas card bearing Jason B.'s name; a watch that belonged to Heather M.; and $996, including 49 $20 bills.

Inside Apartment 819, officers also found numerous items belonging to the residents of 12727 Birchwood. These items included Brad H.'s large television, Jason B.'s checkbook, a garment bag with an identification tag for Aaron S., computer equipment belonging to

Aaron S., tools, electronic equipment, clothing and jewelry, and several travel bags. The officers also found a credit card belonging to Holly G. They also found Brad H.'s wallet and Schreiber's Guess watch in a bedroom, under letters addressed to R. Carr. Shorts and t-shirts belonging to R. Carr were recovered from a bathroom and a sofa in the apartment. The officer also found a stocking cap, dark leather gloves, and a dark leather coat. Inside the pocket of the leather coat were two Intrust Bank receipts from 12:06 that morning. The receipts showed balance inquiries made on checking and savings accounts belonging to Brad H.

Inside the Dakota pickup truck, officers found an ATM card bearing Jason B.'s name and a wallet containing his driver's license. They also found two Commerce Bank ATM receipts showing withdrawals that morning. One receipt showed a withdrawal of $200 at 12:31 a.m. from Jason B.'s bank account, and the other showed withdrawals of $350 and $150 at 12:53 a.m. from Holly G.'s bank account.

J. Carr's Movements and Arrest and Discovery of Evidence

While police were following up on Holly G.'s appearance at the Johnsons' door, J. Carr had called his friend, Tronda Adams, at 3:31 a.m. and said he missed a 2:30 a.m. train he had intended to take to Cleveland, Ohio. Adams granted J. Carr permission to spend the night at the home she shared with her mother, and he arrived there at approximately 3:45 a.m. He had driven Donley's Toyota Camry and was still wearing a brown leather jacket, an orange and black FUBU sweater, black pants, and brown or black boots—the same clothes he had been wearing the

previous evening when he said goodbye to Adams at 9:30 p.m. and left her home with his brother, R. Carr.

J. Carr asked Adams if she had a $20 bill for singles, and she observed that he had more than $500 in his pocket. Adams had never seen J. Carr with that amount of cash in the past. When she asked him where he had gotten the money, J. Carr said he had gone to the bank and withdrawn all of his funds before he was to leave town. Adams thought this was strange because J. Carr was unemployed and did not ordinarily reside in Wichita. Adams would eventually testify that her cell phone records showed that J. Carr made a call to Dodge City at 4:25 a.m. and a call to his sister at 4:26 a.m. She would also testify he woke her sometime between 4 a.m. and 5 a.m. to say that R. Carr was coming over to trade cars.

Later that morning, Adams saw news reports about the quadruple homicide. The reports said the police were looking for two suspects, one wearing an orange FUBU shirt. Adams woke J. Carr to tell him what had happened and to see how he would react to the news report. When she asked him if he had heard about four people getting killed, he said no. When she told him that the gunmen had taken the victims to ATMs and forced them to withdraw cash, J. Carr asked how the police knew that fact. Adams told him that one of the victims had survived.

Adams' mother, Toni Greene, was cleaning about 11 a.m. when she found a maroon jewelry box in one of the pockets of J. Carr's jacket. Inside the box was a diamond engagement ring. Thinking it must be intended for J. Carr's girlfriend in Ohio, she put the ring back where she found it.

About noon, Adams was watching the local television news while her mother and J. Carr were in the room with her. Adams saw video coverage of R. Carr being arrested and told J. Carr to go downstairs with her right away. Once downstairs, Adams asked J. Carr if he had seen the video of his brother being arrested. He said he did. When she asked him what had happened, he told her he was just hanging around drinking after he had missed his train, apparently at his sister's home. Adams told him that his story was not going to work: He had been wearing the orange FUBU sweater, and the police already had his brother. J. Carr became upset during this conversation and was crying.

While Adams and J. Carr were downstairs, Greene had continued watching the news. Although she did not recognize R. Carr as the person being arrested in the video, she learned that one of the items taken from the Birchwood residence was an engagement ring. She also learned that the police were looking for an older white Plymouth, and she had noticed a white Plymouth parked outside the house earlier that morning.

Greene checked outside to see if the Plymouth was still there. It was. She then called Adams upstairs and told her they needed to leave immediately. Greene told Adams that J. Carr was the person the police were trying to find. She specifically told Adams about the engagement ring she had seen in J. Carr's jacket pocket and the Plymouth that police were looking for parked outside. Adams and Greene went across the street to a neighbor's house, and Greene and the neighbor called the police.

Looking back toward her house, Adams saw J. Carr come to its front door and make an inquiring gesture in her direction. He was again wearing the FUBU sweater. When the police arrived, J. Carr moved away from the door and went back inside. And, a short while later, Adams saw J. Carr running through an alley. He had again removed the FUBU sweater.

After a foot chase, officers apprehended J. Carr. They found more than $1,000 in cash on his person.

Inside Adams' home, police found the orange and black FUBU sweater; leather gloves; and J. Carr's brown leather jacket. The jacket pocket still contained the engagement ring Jason B. had purchased for Holly G., as well as an identification card for J. Carr.

In addition, several items were collected from the white Plymouth. These items included two clocks belonging to Brad H.

While J. Carr was being driven to a hospital after his arrest, pursuant to a warrant for bodily specimens, he asked the transporting detective and officer about an earlier quadruple homicide in Wichita. When told the suspects had been arrested and charged with capital murder, he asked what capital murder was, how the death penalty was administered, and whether a person who received a lethal injection felt pain.

Additional Investigation and Evidence Identifications

Initially, Schreiber was not able to identify either of the men who kidnapped him by viewing photo arrays. However, on the morning of December 15, when Schreiber saw news footage of R. Carr's arrest, he believed R. Carr was one of the men. He called the

detective assigned to his case and said he was "about 90 percent sure that [R. Carr was] the person who abducted" him the week before.

Later, at preliminary hearing and trial, Schreiber identified R. Carr as the man who approached his car outside of the convenience store. He did not identify J. Carr as the second kidnapper at either preliminary hearing or trial.

Walenta was shown two photo arrays at approximately 7:15 p.m. on December 15. Walenta said that the first and second photographs in one array fit the general appearance of the person who shot her. She said the eyes of the person in the second photograph "represented what she remembered about the suspect who shot her." The person in the second photograph was R. Carr. The person in the first photograph was in prison at the time of the Walenta incident. Walenta was unable to identify anyone from the second array, which contained a photograph of J. Carr.

Holly G. had been shown two photo arrays at approximately 6:30 p.m. on December 15, and had been asked if she could identify "any of the people in the pictures as the intruders."

Holly G. said she thought the person in position number two in the first array, the same shown later to Walenta, was one of the men. That person was R. Carr. When asked why she thought the person in position number two was one of the men, Holly G. noted his eyes, his features, and his hair.

When she viewed the second array, Holly G. said she thought the other intruder was in position number one, based on her recognition of him and "similar hair

as to what [she] remembered," a "Buckwheat" hairdo standing off the head, kind of clumped together. The person in position number one was not R. or J. Carr and was in custody at the time of the Birchwood crimes. J. Carr was in position number four in the second array.

At preliminary hearing, Holly G. was not able to identify the second, stockier intruder at the Birchwood residence. By the time of the hearing, R. Carr had shaved his head, and he intermittently wore glasses. Holly G. was able to identify J. Carr as the first, taller intruder.

At trial, Holly G. identified both R. Carr and J. Carr—R. Carr as the second, stockier intruder and J. Carr as the first, taller intruder.

Autopsies

Heather M. died of a contact gunshot wound to her head. Her body showed bruising on her lower extremities. Injuries to her genital area were consistent with the application of force, and injuries to her knees were consistent with being placed on her hands and knees for the purpose of sexual intercourse.

Aaron S. died of a contact gunshot wound to his head. He sustained blunt trauma injuries to his head and neck; and his legs showed bruises, red discoloration, and scrapes. Injuries on his forehead and head were consistent with being hit with a golf club and the gun associated with the murders.

Jason B. died of an intermediate-range gunshot wound to his head. In addition, his body showed blunt

trauma injuries. An injury to his buttocks was consistent with being hit with a golf club.

Like Jason B., Brad H. died of an intermediate-range gunshot wound to his head. His face showed blunt trauma injuries.

All of the gunshot wounds to the four Birchwood murder victims were consistent with their bodies being in a kneeling position with their heads down when the bullets entered their skulls.

Holly G.'s dog sustained "severe injury and fracturing of the neck, almost to the point where the head had fallen down off of the support of the spinal cord and vertebrae." Testimony at trial established that the dog's injuries could have been caused by a golf club.

The dog also sustained a puncture wound to its neck.

DNA and Other Biological Evidence

Semen collected from the carpet in the dining room of the Birchwood home and a hair with attached root from Jason B.'s bedroom matched J. Carr's DNA.

J. Carr's DNA also was found in samples from Holly G.'s rape examination. Semen collected from Holly G.'s labia majora matched J. Carr's DNA; and a sample of Holly G.'s vaginal discharge was consistent with DNA from her and J. Carr, while all others at the Birchwood home were excluded as contributors. J. Carr was determined to be the major contributor to a mixed DNA profile found in semen from a swab of Holly G.'s lips, and all others at the home were excluded as contributors except for Holly G. and J. Carr.

A stain on J. Carr's boxer shorts matched Heather M.'s DNA. The results on a second stain on the boxer shorts excluded possible contributors other than Holly G., Heather M., and J. Carr.

Heather M.'s DNA was found in blood on the pair of R. Carr's red undershorts left on the bathroom floor when he took a shower at Donley's apartment on the morning of December 15. Heather M.'s DNA was also detected on a white t-shirt on the sofa in Donley's apartment. A test of DNA on a gray t-shirt from the sofa excluded everyone at the Birchwood residence except for Heather M. In addition, R. Carr's semen was found on a white muscle shirt, which he also left on Donley's bathroom floor.

Foreign material found on Holly G.'s thigh was tested and excluded everyone at the Birchwood residence except for her, R. Carr, and J. Carr.

An analysis of swabs from Heather M.'s vaginal entrance, clitoris, vagina, and vaginal vault was positive for the presence of seminal fluid. Blood also was detected on cervical swabs.

DNA samples from the penises of Aaron S., Brad H., and Jason B. also were tested. The sample from Aaron S. included him and Heather M. In addition to Brad H. himself, Holly G. could not be excluded on his sample. Jason B.'s sample was consistent with him, Holly G., and Heather M.

Testing was performed on three other hairs collected from the Birchwood residence.

A Wichita Police Department chemist trained in hair examination originally separated the total of four

hairs from other hairs and fibers collected from the Birchwood home. She testified that she performed the separation macroscopically and that she had labeled three of the hairs Negroid and a fourth as "possibly" so.

On further testing, one of the hairs produced no result and may have been a non-human animal hair. Another did not match either R. or J. Carr, both of whom are African-American; that hair was more typical of a Caucasian or a person with European ancestry. Mitochondrial DNA testing on the third hair, which had been collected from the floor of Jason B.'s bedroom, showed that neither R. Carr nor J. Carr could be excluded as the contributor. Persons within the same maternal line will have the same mitochondrial DNA; thus the two brothers would be expected to have the same mitochondrial DNA profile.

Blood on a golf club found at the Birchwood home was positively identified as nonprimate blood.

A law enforcement agent would eventually testify at trial that he observed warts on R. Carr's penis after R. Carr was arrested. Donley had also noticed lesions on R. Carr that she believed to be genital warts. Holly G. learned a few months after the Birchwood crimes that she had contracted HPV (Human papillomavirus), a virus that can cause genital warts.

Schreiber's Guess Watch also was tested for DNA, and the results were consistent with R. Carr.

Bank Account Transactions

Bank account records for Brad H., Jason B., Holly G., and Aaron S. showed the following chronology of transactions on December 14 and 15:

December 14, 2000:

Commerce Bank ATM

- 11:54 p.m. $350 withdrawal from Brad H.'s checking account
- 11:55 p.m. $350 withdrawal from Brad H.'s savings account
- 11:55 p.m. attempted $350 withdrawal from Brad H.'s account
- 11:56 p.m. attempted $350 withdrawal from Brad H.'s account

Prairie State Bank ATM

- 11:58 p.m. attempted $500 withdrawal from Brad H.'s account
- 11:58 p.m. attempted $350 withdrawal from Brad H.'s account
- 11:59 p.m. attempted $350 withdrawal from Brad H.'s account

December 15, 2000

Central Bank & Trust ATM

- 12:02 a.m. attempted $200 withdrawal from Brad H.'s account

Intrust Bank ATM

- 12:05 a.m. attempted $100 withdrawal from Brad H.'s account
- 12:06 a.m. balance inquiry on Brad H.'s account

Commerce Bank ATM

- 12:31 a.m. $200 withdrawal from Jason B.'s Prairie State Bank account

Prairie State Bank ATM

- 12:31 a.m. attempted $250 withdrawal from Jason B.'s Prairie State Bank account
- 12:31 a.m. attempted $200 withdrawal from Jason B.'s Prairie State Bank account
- 12:32 a.m. balance inquiry on Jason B.'s Prairie State Bank account
- 12:32 a.m. attempted $200 withdrawal from Jason B.'s Prairie State Bank account
- 12:32 a.m. attempted $100 withdrawal from Jason B.'s Prairie State Bank account
- 12:32 a.m. attempted $100 withdrawal from Jason B.'s Capitol Federal account
- 12:34 a.m. $80 withdrawal from Jason B.'s Capitol Federal account

Commerce Bank ATM

- 12:53 a.m. $350 withdrawal from Holly G.'s account
- 12:54 a.m. attempted $200 withdrawal from Holly G.'s account
- 12:54 a.m. $150 withdrawal from Holly G.'s account

- 1:17 a.m. $350 withdrawal from Aaron S'.s account

Central Bank & Trust ATM

- 1:21 a.m. attempted $200 withdrawal from Aaron S.'s account

Gun Evidence

Between December 10 and December 12, Adams saw J. Carr with two guns: a small, silver revolver and a black handgun.

On December 10, she was having problems with her boyfriend, and J. Carr gave her the small, silver gun to use for her protection. At 11:15 p.m. on December 11, J. Carr showed up at Adams' home after being dropped off by R. Carr. J. Carr asked Adams to give the small, silver gun back to him. In return, he gave her the black handgun, a semiautomatic.

The next evening, J. Carr told Adams that he needed the black gun back, and she gave it to him. He asked how she had been touching it and scolded her for doing so too much. J. Carr then thoroughly cleaned the gun. He wiped down the barrel and the grip and then he ejected the clip and removed the bullets and wiped down the clip and each bullet.

About 3 months after the quadruple homicide, on March 19, 2001, a Winfield Correctional Facility inmate on clean-up detail found a Lorcin .380 caliber handgun at the intersection of Kansas Highway 96 and Greenwich Road in Wichita. Ballistics testing demonstrated that all of the bullets, casings, and fragments associated with the Schreiber, Walenta, and

Birchwood incidents came from the Lorcin .380 handgun. This included a casing found at the scene where Schreiber was left by his abductors, bullets and casings from Walenta's Yukon, a bullet from Walenta's chest, casings and a bullet fragment found at 29th and Greenwich Road, and a bullet from the body of Aaron S. Adams identified the Lorcin as the black handgun that J. Carr had given her the evening of December 11 and that she had returned to him on December 12.

Shoeprints and Cigar Ash

A print from J. Carr's left Timberland shoe had the same size, shape, and sole design as a shoeprint found on a cardboard sunshade in the garage at 12727 Birchwood. A print from the left shoe of R. Carr's pair of Buffalino boots had the same characteristics as a lift taken from a box under Jason B.'s bed. A print from R. Carr's right Buffalino boot had the same class characteristics as a lift taken from a tarp under Jason B.'s bed. Investigators found ashes on a desk in the basement that were wider in diameter than those from a normal cigarette. There were no ashtrays, cigarettes, or any other kind of smoking material in the residence. Investigators collected the ashes because they found the presence of the ashes to be "unusual." A partially smoked cigar was recovered from R. Carr's leather coat and another from the dashboard of his white Plymouth.

Birchwood Neighbor

After work on December 14, the night the Birchwood incident began, Jean Beck went to The Grape, a restaurant at Central and Rock Road in Wichita. The restaurant was a short distance from Walenta's home. Beck left at approximately 10:45 p.m.

in her 2000 BMW 323. As she was driving to her home at 12725 Birchwood, the triplex unit next door to 12727 Birchwood, she noticed a newer, tan Toyota four-door car behind her. As Beck turned off 13th Street into her residential area, the driver of the Toyota turned in behind her. Beck called her daughter and asked her to open the garage door at 12725 Birchwood; and, for safety, Beck stayed inside her car until the Toyota had passed her home. After the Toyota went by, it headed back toward 13th Street.

Defense Evidence

R. Carr put on a competing ballistics expert, who testified that his test firings from the Lorcin .380 were inconclusive in terms of a match to bullets and casings recovered from the crime scenes and bodies of the victims. However, the expert, Richard Ernest, admitted that he did not clean the gun before conducting the test firings and that the gun had significantly degraded by that time. He conceded that his conclusion could have been different if he had fired the Lorcin in the same condition as it was when the State's expert fired it.

J. Carr introduced an exhibit confirming his purchase of an Amtrak passenger train ticket from Newton to Cleveland, to depart at 2:40 a.m. on December 15, 2000.

Additional facts necessary to resolution of particular legal issues will be discussed below.

Renumbering of Counts in Jury Instructions and Capital Murder Theories

In its instructions to the jury and in the verdict forms, the alternative capital murder counts set forth

in Counts 1 through 8 of the amended complaint were combined into Counts 1 through 4 of capital murder—one for each of the four Birchwood killings—based on alternate theories of guilt under K.S.A. 21-3439(a)(4) (underlying sex crime) or K.S.A. 21-3439(a)(6) (multiple first-degree premeditated murders). At an instructions conference, the State had asserted that it did not matter if the jury was not unanimous on the theory as long as it was unanimous on guilt. A similar combining and renumbering occurred for the alternative counts of aggravated robbery set out in Counts 15 through 22 of the amended complaint. The remaining counts in the amended complaint were renumbered accordingly in the instructions and verdict forms. Accordingly, the 58 charges in the amended complaint were reduced to 50 possible crimes of conviction. For clarity, this opinion consistently uses the count numbers from the amended complaint.

GUILT PHASE ISSUES AND SHORT ANSWERS

We begin our discussion by setting out the questions we answer on the guilt phase of R. Carr's trial. Many of these are also raised by or applicable to J. Carr. We have taken the liberty of reformulating certain questions to focus on their legally significant aspects or effects. We also have reordered questions raised by the defense and have inserted among them unassigned potential errors noted by us, because we believe this organization enhances clarity. We number all questions consecutively, 1 through 27, despite occasional intervening subheadings.

Our statement of each question is followed by a brief statement of its answer.

Issues Affecting All Incidents

1. Did the district judge err in refusing to grant defense motions for change of venue? A majority of six of the court's members answers this question no. One member of the court dissents and writes separately on this issue and its reversibility, standing alone.

2. Did the district judge err in refusing to sever the guilt phase of defendants' trial? A majority of six members of the court answers this question yes. One member of the court dissents and writes separately on this issue. A majority of four members of the court agrees that any error on this issue was not reversible standing alone. Three members of the court dissent, and one of them writes separately for the three on the reversibility question, standing alone.

3. Was it error for the State to pursue conviction of R. Carr for all counts arising out of the three December 2000 incidents in one prosecution? The court unanimously answers this question no.

4. Did the district judge err (a) by excusing prospective juror M.W., who opposed the death penalty, for cause, (b) by failing to excuse allegedly mitigation-impaired jury panel members W.B., D.R., D.Ge., and H.Gu. for cause, or (c) by excusing prospective jurors K.J., M.G., H.D., C.R., D.H., and M.B., who expressed moral or religious reservations about the death penalty, for cause? The court unanimously agrees there was no error on any of these bases.

5. Did the district judge err by rejecting a defense challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct 1712, 90 L. Ed. 2d 69 (1986), to the State's

peremptory strike of juror and eventual foreperson W.B.? The court unanimously answers this question yes. A majority of four members of the court agrees that any error on this issue was not reversible standing alone. Three members of the court dissent, and one of them writes separately for the three on the reversibility question, standing alone.

Issues Specific to Walenta Incident

6. Was the district judge's admission of statements by Walenta through law enforcement error under the Sixth Amendment and *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)? The court unanimously answers this question yes. The court unanimously agrees that this error was not reversible standing alone.

7. Was the evidence of attempted aggravated robbery of Walenta sufficient to support R. Carr's felony murder conviction? A majority of four of the court's members answers this question yes. Three members of the court dissent, and one of them writes separately for the three on this issue and its reversibility, standing alone.

8. Did the district judge err by failing to instruct the jury on second-degree murder as a lesser included offense of felony murder of Walenta? The court unanimously answers this question no.

Issues Specific to Quadruple Homicide and Other Birchwood Crimes

9. Did faulty jury instructions on all four K.S.A. 21-3439(a)(4) sex-crime-based capital murders and a multiplicity problem on three of four K.S.A.

21-3439(a)(6) multiple-death capital murders combine to require reversal of three of R. Carr's death-eligible convictions? The court unanimously answers this question yes.

10. Was a special unanimity instruction required for Counts 1, 3, 5, and 7 because of proof of multiple sex crimes underlying each count? The court declines to reach the merits of this issue because it is moot.

11. Must sex crime convictions underlying capital murder Counts 1, 3, 5, and 7 be reversed because they were lesser included offenses of capital murder under K.S.A. 21-3439(a)(4)? The court declines to reach the merits of this issue because it is moot.

12. Was the State's evidence of aggravated burglary sufficient? The court unanimously answers this question yes.

13. Did the State fail to correctly charge and the district judge fail to correctly instruct on coerced victim-on-victim rape and attempted rape, as those crimes are defined by Kansas statutes, rendering R. Carr's convictions on those offenses void for lack of subject matter jurisdiction? The court unanimously answers this question yes.

14. Was the State's evidence of R. Carr's guilt as an aider and abettor on Count 41 for Holly G.'s digital self-penetration sufficient? A majority of four of the court's members answers this question yes. Three members of the court dissent and one of them writes separately for them on this issue and its reversibility.

15. Were Count 41 and Count 42 multiplicitous? The court unanimously answers this question yes. The

court unanimously agrees that this error requires reversal of R. Carr's conviction as an aider and abettor on Count 42.

16. Was the evidence of R. Carr's aiding and abetting of J. Carr's rape of Holly G. and attempted rape and rape of Heather M. sufficient? The court unanimously answers this question yes.

17. Did Count 43 of the charging document confer subject matter jurisdiction to prosecute R. Carr for attempted rape of Heather M.? The court unanimously answers this question yes.

18. Did the district judge misapply the third-party evidence rule and hearsay exceptions, preventing R. Carr from presenting his defense? The court unanimously answers this question yes. The court unanimously agrees that any error on this issue was not reversible standing alone.

19. Was evidence of results from mitochondrial DNA testing of hairs found at the Birchwood home erroneously admitted? The court unanimously answers this question no.

20. Did the district judge err by denying R. Carr's motion for mistrial after evidence developed at trial that R. Carr had genital warts and that the surviving victim, Holly G., contracted HPV after the second intruder she identified as R. Carr raped her? The court unanimously answers this question no.

21. Did the district judge err by failing to instruct on felony murder as a lesser included crime of capital murder? The court unanimously answers this question no.

Other Evidentiary Issues

22. Did the district judge err by automatically excluding eyewitness identification expert testimony proffered by the defense? The court unanimously answers this question yes. The court unanimously agrees that any error on this issue was not reversible standing alone.

23. Did the district judge err by permitting a jury view of locations referenced in evidence, in violation of the defendants' right to be present, right to assistance of counsel, and right to a public trial? The court unanimously answers this question no.

Other Instructional Issues

24. Did the district judge err by failing to include language in the instruction on reliability of eyewitness identifications to ensure that jurors considered possible infirmities in cross-racial identifications? The court unanimously answers this question no.

25. Was the instruction on aiding and abetting erroneous because (a) it permitted jurors to convict the defendants as aiders and abettors for reasonably foreseeable crimes of the other, regardless of whether the State proved the aider and abettor's premeditation, (b) it failed to communicate expressly that an aider and abettor had to possess premeditated intent to kill personally in order to be convicted of capital murder, or (c) it omitted language from K.S.A. 21-3205(2)? The court unanimously answers the first question yes. The court unanimously answers the second question no. The court unanimously answers the third question no. The court unanimously agrees that the error on the first question was not reversible standing alone.

Prosecutorial Misconduct

26. Did one of the prosecutors commit reversible misconduct by telling jurors to place themselves in the position of the victims? The court unanimously answers this question no.

Cumulative Error

27. Did cumulative error deny R. Carr a fair trial on his guilt? A majority of four of the court's members answers this question no. Three members of the court dissent, and one of them writes separately for them on this issue.

1. VENUE

The defendants argue that pretrial publicity was so pervasive and prejudicial in Sedgwick County that it prevented trial by a fair and impartial jury, violating their rights under the Sixth and Fourteenth Amendments to the United States Constitution and Section 10 of the Kansas Constitution Bill of Rights, and that District Court Judge Paul Clark abused his discretion by refusing to transfer this case to another county under K.S.A. 22-2616(1). To the extent only one defendant has explicitly raised a particular argument, we consider it on behalf of the other defendant as well under the authority of K.S.A. 21-6619(b).

Additional Factual and Procedural Background

The defendants first moved for a change of venue in March 2002. At a May 28, 2002, evidentiary hearing on their motion, they presented a spring 2002 venue study to demonstrate the depth of media saturation about this case in Sedgwick County.

The study was based on two telephone surveys, one of 401 Sedgwick County residents and one of 200 Wyandotte County residents. Lisa Dahl of Litigation Consultants, Inc., who conducted the surveys, testified that Wyandotte County served as a control county. It was selected because local media coverage of the case had been limited and it was a metropolitan area similar to Sedgwick County in demographic makeup, economy, and crime rates. At the time of the surveys, Sedgwick County had 452,000 residents and Wyandotte County had about 157,000 residents.

The Sedgwick County response rate was 80 percent. Dahl testified that, although the Wyandotte County response rate was lower at 62.89 percent, it nevertheless fell within a range sufficient to provide an accurate representation of the views of the community at large.

The survey showed that 96 percent of the respondents in Sedgwick County were aware of this case, as compared to 29.5 percent in Wyandotte County. Further, 74.1 percent of those surveyed in Sedgwick County held an overall opinion that the defendants were guilty. Approximately half of these respondents said the defendants were "definitely guilty," and the other half said they were "probably guilty." In contrast, 22 percent of the Wyandotte County respondents believed the defendants were "definitely" or "probably" guilty, according to Dahl. Addressing their understanding of the quality of the evidence, 72.3 percent of the Sedgwick County respondents believed it to be "overwhelming" or "strong." Only 16 percent of the Wyandotte County respondents believed likewise.

Personal discussions about this case correlated with more widespread beliefs on the defendants' guilt. Of the 59.1 percent of respondents in Sedgwick County who had engaged in such personal discussions, 86 percent believed that the defendants were "definitely" or "probably" guilty. And, of the 56.4 percent of respondents who had merely overheard such discussions, 82 percent believed the defendants were "definitely" or "probably" guilty.

Dahl also compiled extensive examples of news media coverage of this case, which included both print and online newspaper articles; internet coverage from websites other than those whose content was generated by newspapers; radio coverage, including audio, transcripts and notes from broadcasts, and printouts of stories on their websites; and television footage. Much of the coverage was, not surprisingly, unfavorable to the defendants.

The existence of unfavorable media coverage had been demonstrated in a hearing nearly a year before on the defendants' motion to close proceedings to the media and the Wichita Eagle newspaper's and KWCH-TV's motion to intervene. Thomas David Beisecker, a professor of communication studies at the University of Kansas and president of Advocacy Research Associates, had testified about the content of media coverage in the first few months after the crimes. In addition to describing facts of the crimes and the legal proceedings, Beisecker said, the coverage included discussion of the good character of the victims, R. Carr's parole status and criminal history, and the community's fear and insecurity stemming from the crimes.

Coverage of the crimes in this case was especially intense immediately after the Birchwood crimes and the defendants' arrests. Within 2 days of the crimes the Wichita Eagle had published a story about R. Carr's recent release from jail after his parole violation and detailing his criminal history. The funerals of Heather M., Aaron S., Brad H., and Jason B. were covered extensively. Press coverage and public response to it also focused on fear among Wichita citizens as a result of the string of crimes attributed to the defendants.

Press coverage spiked again when Walenta died on January 2, 2001, and when the amended complaint was filed against the defendants 2 days later. In the months following, various pretrial proceedings such as the April 2001 preliminary hearing and the discovery of the gun used in the crimes prompted additional stories. The 1-year anniversary of the quadruple homicide also prompted media stories.

Measurement of intensity of community opinion was another feature of Dahl's surveys. She testified that the surveys were done more than a year after the crimes and that, if the opinions of members of the public were going to dissipate, they would have done so by the time the telephone calls were placed. Because they had not, she expected that there would be little movement in the opinions evident from the survey results between the time of the survey and the start of the defendants' trial a few months later.

Dahl admitted that her surveys did not explore the question of impartiality and that she was not aware of any studies in her field conclusively establishing that participants in such surveys who voiced opinions on guilt could not ultimately serve as impartial jurors.

After the evidentiary hearing on the motion to change venue, Judge Clark said that he would hear closing arguments from counsel after he had had an opportunity to review the exhibits.

Closing arguments were held on June 13, 2002. Immediately upon the completion of the arguments, Judge Clark spoke. He first found that Dahl was qualified to render an expert opinion and that the venue study was scientifically valid. He then ruled:

> "The argument then comes to the emotionally biasing publicity. The purpose in selecting a jury is not to find a jury free of knowledge. It is to find a jury free of bias and prejudice. The study shows and the evidence shows and experience shows that in this particular case, having reviewed the material furnished, the law[,] and the argument of counsel, that the venue in which the defendants will be assured of the greatest number of venire persons free of bias or prejudice from whom a jury may be selected to decide the case solely on the facts in evidence, viewed by the light of the instruments of law, is Sedgwick County, Kansas. The motion is overruled for both defendants."

In late July 2002, a political committee ran an advertisement on local Wichita television stations supporting the candidacy of Phill Kline for Kansas Attorney General. The advertisement identified R. Carr and labeled him a murderer. Although the advertisement had run in at least one other Kansas media market, it did not identify R. Carr by name in that market.

The ads and reaction to them generated days of coverage on local television news in Wichita and in the Wichita Eagle. Among others quoted was Sedgwick County District Attorney Nola Foulston, the lead prosecutor on the case. She said that "placing this ad in front of a constituency of individuals in our community that are the same people that are going to form a jury pool could have a devastating effect."

The Kline ad and related media prompted the defendants to renew their motion to change venue, and Judge Clark held another hearing on the subject on August 2, 2002. Again, he rejected the defendants' arguments.

Judge Clark's second oral ruling was even more brief than his first: "I . . . know that on venue and fair trial and the ability to have a jury that will be fair, that's determined by a questioning process we will try here first. I will overrule the motion. If it can't be done, we will have a fair trial before this is over, one way or the other. That's all I have on the motions." His written order denying the renewed motion said that he found the evidence was "not clear that a fair, impartial jury cannot be selected."

In the month voir dire was to begin in September 2002, prospective jurors completed sworn questionnaires that inquired about their exposure to pretrial publicity and whether any opinions they held on the case were so set that they would not be able to set them aside. According to the questionnaire responses, 92 percent of the prospective jurors had been exposed to pretrial publicity on this case.

Judge Clark began voir dire on September 9, 2002, prepared to examine up to nine panels of 20 prospective jurors each until 60 were qualified for final selection. He began by excusing a handful of prospective jurors based on their questionnaire responses. He then conducted general voir dire, excusing several prospective jurors for reasons unrelated to pretrial publicity.

At the conclusion of general voir dire, Judge Clark permitted individual voir dire on the subjects of racial prejudice, pretrial publicity, and the death penalty. After individual voir dire of 86 prospective jurors, a panel of 60, plus a panel of 8 prospective alternates, was established.

Nearly all 86 prospective jurors examined individually had been exposed to at least some publicity regarding the case. Several mentioned seeing articles about the case within days before the beginning of jury selection.

Fifty-two of the 86 said they had formed no opinion about the case. Of the 34 who said they had formed opinions about the case, all but three said they could set them aside, presume the defendants' innocence, and decide the case only on the evidence.

The defendants challenged 11 of the 86 prospective jurors for cause in whole or in part because of preconceived opinions of guilt. Judge Clark overruled 10 out of 11 of these challenges, relying on the prospective jurors' statements that they could set their opinions aside and decide the case impartially on the evidence presented.

Jury selection lasted 19 days.

Of the 12 jurors seated after the parties exercised their peremptory challenges, 11 had been exposed to some degree of pretrial publicity; 5 of the 11 said that their exposure was minimal.

Eight of the 12 said they had formed no opinion on the defendants' guilt; 4 had admitted during individual voir dire that they believed the defendants were guilty based on pretrial publicity: D.G., D.M., T.N., and J.S.

The defense had unsuccessfully challenged D.G. for cause. D.G. said that he had heard about the case from television and the newspaper. He had some difficulty recalling the details of the media coverage because of the passage of time since the crimes. Based on how the events were portrayed in media coverage, it appeared to him that the defendants were guilty. He continued to believe that until he was called to jury duty and asked whether he could keep an open mind. In his responses to the questionnaire, D.G. said without equivocation that he could set his opinion aside. During individual voir dire, one of the prosecutors asked him if he understood that it would be improper for a juror to consider outside information when deciding the case, and D.G. responded, "Hopefully, I can separate the two and just try to hear the facts and evidence presented." The prosecutor suggested that D.G.'s use of the word "hopefully" might cause some to question the strength of his conviction and then asked D.G. a series of follow-up questions. D.G. said he agreed that the defendants were entitled to an impartial jury; acknowledged he would have to base his decision on the evidence, even if it conflicted with information from pretrial publicity; and said he would have no problem doing so. Several of D.G.'s statements were made in

response to leading questions, such as this from the prosecution: "And you would agree with me that the defendants . . . are entitled to a jury that could decide their case based upon what is presented here in court?" In response to questioning from R. Carr's counsel, D.G. confirmed his ability to consider only admitted evidence. But, later in the questioning, he occasionally said he would "hope" and "try" to set aside what he had learned from pretrial publicity.

The defense had also unsuccessfully challenged D.M. for cause. D.M. was exposed to television and newspaper coverage. Based on the coverage, D.M. said that he "suppose[d]" he had an opinion that would "lean toward guilt." He said that he understood it would be improper to rely on information from outside the courtroom in making a decision. Then the prosecution asked: "And so you wouldn't do that, would you?" And D.M. said that he "hopefully [would] not" do so. Again, the prosecutor explained that "hopefully" might not be good enough and that justice required a definitive answer. At that point, D.M. said, "Ah, yes. I believe I could put it aside, yes—what I've heard." D.M. agreed that media coverage could be incomplete or inaccurate and that it would be unfair to find a defendant guilty on such information. In response to questions from defendants' counsel, D.M. again confirmed his ability to set aside his previous opinion.

The defense had passed T.N. for cause. T.N said she believed R. Carr and J. Carr were guilty based on coverage in the newspaper. She expressed confidence she could set that opinion aside and said she would not convict someone based on information she read in the press. She said she understood that the media may not

be privy to all of the facts and that it would be unfair to base her decision on such information. Some of T.N.'s statements responded to leading questions, such as this from the prosecution, "So you will not convict somebody based on what you may have read in the newspaper?" In response to questions from defense counsel, T.N. again confirmed that she could set aside her opinion and the information she acquired from pretrial publicity.

The defense had unsuccessfully challenged J.S. for cause. J.S. was exposed to pretrial publicity about the time the defendants were arrested. When asked whether he had formed an opinion of guilt based on the coverage, J.S. said, "Well, yeah, not really based on anything, just, you know, kind of the idea that . . . somebody gets arrested . . . there is bound to be evidence against them." J.S. said that he understood not all persons arrested are guilty—an awareness that would make it easier for him to set his opinion aside. J.S. said that he would make a decision based solely on the evidence.

After voir dire was completed, the defendants orally renewed their motion for change of venue once more, arguing that the process of jury selection demonstrated that pretrial publicity had tainted the pool. Judge Clark overruled the motion, saying that jury selection confirmed "the contrary."

The trial was televised, but Judge Clark restricted media access to evidence, made sure that microphones would not pick up the defendants' confidential discussions with counsel, and allowed witnesses to decide whether their voices or images could be published or broadcast. The judge reserved six seats

inside the courtroom for members of the press. He admonished jurors not to pay attention to any of the publicity surrounding the case during jury selection and again at trial. The record does not suggest that the media created any disruption or otherwise interfered with the judge's conduct of the proceedings.

Items identified during testimony as belonging to the victims included Aaron S.'s Koch Industries business card; a ring that Heather M., a teacher, had bought while on a choir tour in Europe; Heather M.'s Catholic Family Credit Union debit card; and Brad H.'s Koch identification card. In describing the state of Aaron S.'s ransacked bedroom, an investigator testified that she had seen an envelope containing cash and checks "that were meant for a ski trip that he was planning for the youth organization in church." Next to a toppled clock were some prayer books and religious material.

The jury knew that R. Carr was charged with three counts of criminal possession of a firearm for possessing a gun within 10 years after being convicted of a felony. Donley testified that he was unemployed and made money fighting his dog. In addition, R. Carr's attorney elicited testimony from Donley that R. Carr sold illegal drugs.

General Legal Framework and Standards of Review

The defendants argue that Judge Clark's refusal to grant a change of venue violated their right to an impartial jury under the Sixth and Fourteenth Amendments of the United States Constitution and under Section 10 of the Kansas Constitution Bill of Rights. They also argue that the judge abused his

discretion under the Kansas statute governing change of venue, K.S.A. 22-2616(1).

The Sixth Amendment guarantees an accused "[i]n all criminal prosecutions" the right to a trial by "an impartial jury." U.S. Const. amend. VI. This protection is incorporated into and made applicable to the states through the due process provision of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

The Kansas Constitution includes a similarly worded guarantee for its citizens in Section 10 of the Bill of Rights, which recognizes a defendant's right to a speedy and public trial "by an impartial jury of the county or district in which the offense is alleged to have been committed." We have not previously analyzed our state constitutional language differently from the federal provision. See *State v. Hall*, 220 Kan. 712, 714, 556 P.2d 413 (1976). And neither the defendants nor the State urge us to do so today.

In addition, K.S.A. 22-2616(1) gives Kansans a vehicle to obtain a change of venue to prevent a local community's hostility or preconceived opinion on a defendant's guilt from hijacking his or her criminal trial:

> "In any prosecution, the court upon motion of the defendant shall order that the case be transferred as to him to another county or district if the court is satisfied that there exists in the county where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that county."

The United States Supreme Court has examined Sixth Amendment venue challenges based on pretrial publicity in two contexts. *Goss v. Nelson*, 439 F.3d 621, 628-29 (10th Cir. 2006) (citing *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 [1963] [presumed prejudice]; *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 [1961] [actual prejudice]).

"The first context occurs where the pretrial publicity is so pervasive and prejudicial that we cannot expect to find an unbiased jury pool in the community. We 'presume prejudice' before trial in those cases, and a venue change is necessary." 439 F.3d at 628. "In such cases, a trial court is permitted to transfer venue without conducting voir dire of prospective jurors." *House v. Hatch*, 527 F.3d 1010, 1023-24 (10th Cir. 2008).

The second context, "actual prejudice," occurs "where the effect of pretrial publicity manifested at jury selection is so substantial as to taint the entire jury pool." *Goss*, 439 F.3d at 628; see *Gardner v. Galetka*, 568 F.3d 862, 888 (10th Cir. 2009). "In cases of actual prejudice, 'the voir dire testimony and the record of publicity [must] reveal the kind of wave of public passion that would have made a fair trial unlikely by the jury that was impaneled as a whole.' [Citation omitted.]" *Hatch*, 527 F.3d at 1024.

As Professor Wayne R. LaFave and his colleagues have written, a claim that pretrial publicity has so tainted prospective jurors as to make a fair trial impossible cannot be "determined solely by the standards prescribed in the venue change statute or court rule. The federal constitution may also play a significant role." See 6 LaFave, Israel, King, & Kerr

Criminal Procedure, § 23.2(a) (3d ed. 2007). And, when in conflict, even constitutionally based provisions on the location of criminal trials must yield to those establishing a defendant's right to an impartial jury. *Skilling v. United States*, 561 U.S. 358, 378, 130 S. Ct. 2896 177 L. Ed. 2d 619 (2010) ("The Constitution's place-of-trial prescriptions . . . do not impede transfer of the proceedings to a different district at the defendant's request if extraordinary local prejudice will prevent a fair trial."); *United States v. McVeigh*, 918 F. Supp. 1467, 1469 (W.D. Okla. 1996) ("right to an impartial jury in the Sixth Amendment . . . will override the place of trial provisions in both Article III and the Sixth Amendment in extraordinary cases"). The same certainly is true about the relationship between the fair trial provisions of the federal Constitution on the one hand and state constitutional and statutory provisions prescribing the ordinary venue for criminal trials, see, *e.g.*, Kan. Const. Bill of Rights, § 10 (granting right to speedy public trial by impartial jury of county, district where offense allegedly committed), on the other hand. The federal Constitution is supreme.

The defendants invoke both presumed prejudice and actual prejudice in this case. They agree with the State that our traditional standard of review on denial of a motion to change venue has been abuse of discretion. See *State v. Higgenbotham*, 271 Kan. 582, 591, 23 P.3d 874 (2001) (citing *State v. Cravatt*, 267 Kan. 314, 336, 979 P.2d 679 [1999]). But they also urge us to consider whether an unlimited standard of review may be appropriate under S*heppard v. Maxwell*, 384 U.S. 333, 362, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966) ("trial courts must take strong measures to ensure" that

defendants tried by impartial jury free from outside influences; appellate courts "have the duty to make an independent evaluation of the circumstances"), and our statutory duty to determine whether a sentence of death "was imposed under the influence of passion, prejudice or other arbitrary factor," K.S.A. 2013 Supp. 21-6619(c)(1).

Because we have not previously been precise about how analysis of presumed prejudice differs from analysis of actual prejudice, about how the two theories are supported by and applied under the federal and state constitutions and in concert with our state venue change statute, or about how our standard of review on appeal may be affected, we begin our discussion of the defendants' venue challenge by tearing apart and then reassembling these concepts.

We follow many of our sister state courts into this particular breach. See *Crowe v. State*, 435 So. 2d 1371, 1376 (Ala. Crim. App. 1983) (pretrial publicity warrants venue change when defendant can show presumed, actual prejudice); *State v. Atwood*, 171 Ariz. 576, 631, 832 P.2d 593 (1992) (prejudice from publicity may be presumed in rare instances); *People v. Loscutoff*, 661 P.2d 274, 276 (Colo. 1983) (identifying actual, presumed prejudice as alternative theories warranting venue change); *State v. Sostre*, 48 Conn. Supp. 82, 85, 830 A.2d 1212 (Super. Ct. 2002) (same); *Sykes v. State*, 953 A.2d 261, 272 (Del. 2008) (relief under venue statute may be satisfied under either presumed, actual prejudice theory); *Noe v. State*, 586 So. 2d 371, 379 (Fla. Dist. App. 1991) (recognizing presumed, inherent prejudice as basis for venue change); *Isaacs v. State*, 259 Ga. 717, 726, 386 S.E.2d

316 (1989) (analyzing presumed prejudice as basis for venue change); *State v. Fee*, 124 Idaho 170, 175, 857 P.2d 649 (Ct. App. 1993) (recognizing separate theories of presumed, actual prejudice available to demonstrate grounds for requested venue change); *State v. Gavin*, 360 N.W.2d 817, 819 (Iowa 1985) (same); *Watkins v. Commonwealth*, 2008-SC-000798-MR, 2011 WL 1641764, at *13 (Ky. 2011) (unpublished opinion) (same), *cert. denied* 132 S. Ct. 1580 (2012) (showing of actual prejudice unnecessary when prejudice can be presumed); *State v. Goodson*, 412 So. 2d 1077, 1080 (La. 1982) (reviewing statutory venue challenge under federal standards established for actual, presumed prejudice); *State v. Chesnel*, 1999 Me. 120, 734 A.2d 1131, 1134 (1999) (recognizing actual, presumed prejudice as separate theories); *Commonwealth v. Toolan*, 460 Mass. 452, 462, 951 N.E.2d 903 (2011) (same); *State v. Everett*, 472 N.W.2d 864, 866 (Minn. 1991) (analyzing evidence for presumed, actual prejudice); *State v. Kingman*, 362 Mont. 330, 344, 264 P.3d 1104 (2011) ("As the basis of a motion for change of venue, the defendant may allege presumed prejudice, actual prejudice, or both."); *State v. Smart*, 136 N.H. 639, 647, 622 A.2d 1197 (1993) (same); *State v. Biegenwald*, 106 N.J. 13, 33, 524 A.2d 130 (1987) (applying different standards to claims of presumed, actual prejudice); *State v. House*, 127 N.M. 151, 166, 978 P.2d 967 (Ct. App. 1999) (recognizing distinction between actual, presumed prejudice); *State v. Knight*, 81AP-257, 1981 WL 11437 (Ohio App. 1981) (unpublished opinion) (describing evidentiary standard for presumed prejudice claims); *State v. Fanus*, 336 Or. 63, 78, 79 P.3d 847 (2003) (citing United States Supreme Court authority for presumed, actual prejudice); *Commonwealth v. Briggs*, 608 Pa. 430, 468,

12 A.3d 291 (2011), *cert. denied* 132 S. Ct. 267, 181 L. Ed. 2d 157 (2011) (acknowledging doctrine of presumed prejudice as alternative to actual prejudice); *Crawford v. State*, 685 S.W.2d 343, 350 (Tex. App. 1984), *aff'd and remanded* 696 S.W.2d 903 (Tex. Crim. 1985) ("Pretrial publicity will entitle a defendant to a venue change if he can show either (1) news media coverage so damaging that it must be presumed no unbiased jury could be selected, or (2) from the totality of circumstances, actual prejudice."); *McBride v. State*, 477 A.2d 174, 185 (Del. 1984) (same); *State v. Snook*, 18 Wash. App. 339, 349, 567 P.2d 687 (1977) (actual prejudice need not be shown where inherent, presumed prejudice exists); *Sanchez v. State*, 142 P.3d 1134, 1139 (Wyo. 2006) (recognizing presumed prejudice rarely invoked, applicable only in extreme circumstances).

Presumed Prejudice

The presumed prejudice doctrine originated in *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963).

In *Rideau*, law enforcement filmed the confession of defendant Wilbert Rideau to a bank robbery, kidnapping, and murder in Calcasieu Parish, a community of approximately 150,000. Local television stations broadcast the confession, reaching approximately 24,000 people in the community the first day, 53,000 the following day, and 29,000 the day after that. Rideau was convicted at a jury trial and sentenced to death. His jury included three persons who had seen the confession on television and two deputy sheriffs from Calcasieu Parish. 373 U.S. at 723-25.

The Court presumed the existence of prejudice necessitating reversal of Rideau's convictions without considering what was said by panel members during voir dire.

> "For anyone who has ever watched television[,] the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.
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> . . . .
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> "'[N]o such practice as that disclosed by this record shall send any accused to his death.'" *Rideau*, 373 U.S. at 726-27 (quoting *Chambers v. Florida*, 309 U.S. 227, 241, 60 S. Ct. 472, 84 L. Ed. 716 [1940]).

The Court invoked the doctrine of presumed prejudice again in *Estes v. Texas*, 381 U.S. 532, 538, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965), when extensive publicity before trial swelled into excessive media involvement and exposure during preliminary court proceedings. Reporters and television production crews overran the courtroom and bombarded the viewing public with the sights and sounds of the hearing. These led to disruption during proceedings and, according to the Court, denied defendant Billie Sol Estes the "judicial serenity and calm to which [he] was entitled." 381 U.S. at 536.

In *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966), the Supreme Court

presumed prejudice after pervasive, highly prejudicial publicity combined with a circus-like environment during the trial of defendant Samuel H. Sheppard, who was accused of bludgeoning his pregnant wife to death.

The media assumed an intensively active role from the outset of the sensational *Sheppard* case. Before trial, the press reported on the defendant's refusal to take a lie detector test or be injected with a "truth serum." 384 U.S. at 338-39. At trial, the courtroom overflowed with members of the press. Their presence inside the bar limited Sheppard's ability to engage in confidential discussions with his counsel, and they roamed freely around the courtroom, at times creating so much noise that the presiding judge and the jury could not hear witnesses' testimony. 384 U.S. at 344. The judge permitted the local newspaper to publish the names and addresses of each juror, exposing them "to expressions of opinion from both cranks and friends." 384 U.S. at 353. The judge's admonitions to jurors was better characterized as "suggestions" or "requests" to avoid exposure to press coverage, and "bedlam reigned," the Court said, thrusting jurors "into the role of celebrities." 384 U.S. at 353, 355.

In reversing Sheppard's murder conviction, the Court stated that publicity alone may not be sufficient to warrant relief, but, when it combines with a judge's inability or lack of desire to control courtroom proceedings, violation of a defendant's right to a fair trial is readily apparent. 384 U.S. at 354-58.

Since *Sheppard*, federal courts have refined the parameters of presumed prejudice claims, setting an extremely high standard for relief. *United States v. McVeigh*, 153 F.3d 1166, 1181 (10th Cir. 1998),

disapproved on other grounds by Hooks v. Ward, 184 F.3d 1206 (10th Cir. 1999). A "court must find that the publicity in essence displaced the judicial process, thereby denying the defendant his constitutional right to a fair trial." *McVeigh*, 153 F.3d at 1181. Reversal of a conviction will occur only "where publicity 'created either a circus atmosphere in the court room or a lynch mob mentality such that it would be impossible to receive a fair trial.'" *Goss v. Nelson*, 439 F.3d 621, 628 (10th Cir. 2006), (quoting *Hale v. Gibson*, 227 F.3d 1298, 1332 [10th Cir. 2000]); *McVeigh*, 153 F.3d at 1181.

For its part, in its most recent review of a presumed prejudice question, the United States Supreme Court has identified seven relevant factors to be evaluated: (1) media interference with courtroom proceedings; (2) the magnitude and tone of the coverage; (3) the size and characteristics of the community in which the crime occurred; (4) the amount of time that elapsed between the crime and the trial; (5) the jury's verdict; (6) the impact of the crime on the community; and (7) the effect, if any, of a codefendant's publicized decision to plead guilty. See *Skilling v. United States,* 561 U.S. 358, 381-85, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010); *United States v. Mitchell*, 752 F. Supp. 2d 1216, 1220 (D. Utah 2010) (recognizing, applying *Skilling* factors).

The federal appellate courts have been split on the appropriate standard of review for presumed prejudice claims.

The Tenth and Fifth Circuits apply de novo review, based on the directive from *Sheppard* relied upon by defendants here: appellate courts must conduct an

"independent evaluation" of the circumstances. See *McVeigh*, 153 F.3d at 1179; *United States v. Skilling*, 554 F.3d 529, 557-58 (5th Cir. 2009), *aff'd in part, vacated in part, and remanded by* 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010).

But a majority of the federal circuits, all but one in an opinion filed before *Skilling* was decided by the United States Supreme Court, have reviewed presumed prejudice claims for abuse of discretion. See *United States v. Misla-Aldarondo*, 478 F.3d 52, 58-59 (1st Cir. 2007); *United States v. Sabhnani*, 599 F.3d 215, 232-34 (2d Cir. 2010); *United States v. Inigo*, 925 F.2d 641, 654-55 (3d Cir. 1991); *United States v. Higgs*, 353 F.3d 281, 307-09 (4th Cir. 2003); *United States v. Jamieson*, 427 F.3d 394, 412-13 (6th Cir. 2005); *United States v. Nettles*, 476 F.3d 508, 513-15 (7th Cir. 2007); *United States v. Rodriguez*, 581 F.3d 775, 784-86 (8th Cir. 2009); *United States v. Collins*, 109 F.3d 1413, 1416 (9th Cir. 1997); *United States v. Langford*, 647 F.3d 1309, 1319, 1332-34 (11th Cir. 2011).

The Montana Supreme Court recently addressed the standard of review question in *State v. Kingman*, and it elected to follow the abuse-of-discretion majority. 362 Mont. 330, 347, 264 P.3d 1104 (2011). The court acknowledged the position of the Tenth and Fifth Circuits, but it held that they failed to offer a "satisfactory explanation for why a trial court is accorded greater deference in evaluating actual prejudice than it is accorded in evaluating presumed prejudice." 362 Mont. at 346. It reasoned that an abuse of discretion standard is more appropriate than de novo review because the "trial judge is uniquely positioned

to assess whether a change of venue is called for due to prejudice in the community." 362 Mont. at 347.

We disagree with the Montana Supreme Court and the apparent majority among the federal appellate courts; we do see room for difference in the standard of review applied to presumed prejudice and actual prejudice claims, because presumed prejudice does not consider voir dire conducted in the presence of the trial judge. But we also disagree with the Tenth and Fifth Circuits.

In our view, a mixed standard of review must apply to a presumed prejudice challenge on appeal. The factors enumerated by the United States Supreme Court in *Skilling* require fact findings, whether explicit or necessarily implied, that we must review for support by substantial competent evidence in the record. If such evidence exists, we defer on the fact finding. However, overall weighing of the factors calls for a conclusion of law, and we must review the conclusion of law under a de novo standard.

We hasten to note that this pattern of review is far from revolutionary. Such a mixed standard is commonplace. It governs our evaluation of the voluntariness of a criminal defendant's confession and the existence of probable cause or reasonable suspicion, for example. Moreover, it is a close analytical relative of the way in which our examination of district court judge decisions for abuse of discretion has evolved:

> "Judicial discretion is abused if judicial action (1) is arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court; (2) is based on an

> error of law, *i.e.*, if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, *i.e.*, if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based." *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594, 182 L. Ed. 2d 205 (2012) (citing *State v. Gonzalez*, 290 Kan. 747, 755-56, 234 P.3d 1 [2010]).

In other words, even our deferential abuse of discretion standard presupposes unlimited review of any legal conclusion upon which a discretionary ruling is based. See *Gonzalez*, 290 Kan. 747, Syl. ¶ 3; see also *State v. Shopteese*, 283 Kan. 331, 340, 153 P.3d 1208 (2007) (discretionary decision must be within trial court's discretion, take into account applicable legal standards); *State v. White*, 279 Kan. 326, 332, 109 P.3d 1199 (2005) (application of abuse of discretion standard of review does not make mistake of law beyond appellate correction).

We now turn to examination of the *Skilling* presumed prejudice factors in this specific case, as of the three points in time when Judge Clark rejected a defense motion for change of venue.

First Motion for Change of Venue

Judge Clark's rulings on the three motions for change of venue were nothing if not pithy. He did not expressly mention the possibility of presumed prejudice rather than actual prejudice, and he made no discrete factual findings in support of any decision on presumed prejudice.

But, on the record before us, defendants never sought a more complete recitation or writing to explain Judge Clark's venue rulings; and, if they thought the findings were insufficient for appellate review, they had an obligation to do so. See *Fischer v. State*, 296 Kan. 808, 825, 295 P.3d 560 (2013) (Notwithstanding district judge's duties under Supreme Court Rule 165 [2013 Kan. Ct. R. Annot. 265], "a party also has the obligation to object to inadequate findings of fact and conclusions of law in order to preserve an issue for appeal because this gives the trial court an opportunity to correct any findings or conclusions that are argued to be inadequate."). We therefore assume that Judge Clark made the necessary factual findings to support his decision to deny a change of venue on any and all theories. See *O'Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318, 361, 277 P.3d 1062 (2012) (when party fails to object to adequacy of district judge's findings, conclusions, appellate court can presume judge found all facts necessary to support judgment).

The first factor to be examined for presumed prejudice under *Skilling* is media interference with courtroom proceedings. As mentioned above, there is no suggestion in the record that any media representative interfered with courtroom administration in this case at any time, including the period leading up to Judge Clark's consideration of the first motion for change of venue. In each of the cases in which the United States Supreme Court has presumed prejudice and overturned a conviction, it did so in part because the prosecution's "'atmosphere . . . was utterly corrupted by press coverage.'" *Skilling*, 561 U.S. at 380. There was no such atmosphere here and this factor weighed against

presuming prejudice at the time of the ruling on the defendants' first motion.

The second *Skilling* factor is the magnitude and tone of the coverage. The magnitude of the coverage of the crimes and this prosecution was extremely high. But the Sixth Amendment does not demand juror ignorance. *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); *Goss,* 439 F.3d at 627. "[S]carcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." *Irvin*, 366 U.S. at 722. For these reasons, "[e]xtensive pretrial media coverage of a crime alone has never established prejudice per se." *State v. Dunn*, 243 Kan. 414, 424, 758 P.2d 718 (1988) (citing *State v. Ruebke*, 240 Kan. 493, 500, 731 P.2d 842 [1987]; *State v. Porter*, 223 Kan. 114, 117, 574 P.2d 187 [1977]). "'[P]retrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial.'" *Skilling*, 561 U.S. at 384 (quoting *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 554, 96 S. Ct. 2791, 49 L. Ed. 2d 683 [1976]).

Our review of the tone of at least the mainstream press coverage likely to reach a wide audience leads us to the conclusion that it was more factual than gratuitously lurid. See *United States v. Angiulo*, 897 F.2d 1169, 1181 (1st Cir. 1990) (where media coverage tends to be more "factual as opposed to inflammatory or sensational, this undermines any claim for a presumption of prejudice"). Although the coverage occasionally disclosed facts that would be inadmissible at trial, the State argues persuasively that some evidence of the victims' good character and community involvement and of R. Carr's criminal behavior would

later be properly admitted—for example, the teaching and youth leadership of Heather M., Aaron S., Jason B., and Holly G. and the dog fighting and drug sales of R. Carr. Further, the United States Supreme Court has clarified that the presumed prejudice doctrine "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." *Murphy v. Florida*, 421 U.S. 794, 799, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975); see *Stafford v. Saffle*, 34 F.3d 1557, 1566 (10th Cir. 1994) (pervasive pretrial publicity relating to defendant's prior conviction for killing six people during armed robbery not presumptively prejudicial; "nothing in the record to suggest that this publicity was anything other than factual reporting"); *United States v. Abello-Silva*, 948 F.2d 1168, 1177 (10th Cir. 1991) (no prejudice presumed when press coverage consisted primarily of facts gathered from public records, pretrial hearings); *United States v. Flores-Elias*, 650 F.2d 1149, 1150 (9th Cir. 1981) (fact-based publicity focusing largely on victims, their unfortunate plight did not establish prejudice against defendant so great that fair, impartial trial not possible).

Finally, as we have observed many times when considering a defendant's challenge to the admission of gruesome photographs of a crime scene or an ensuing autopsy of a victim into evidence, gruesome crimes give rise to gruesome photographs. See, *e.g.*, *State v. Green*, 274 Kan. 145, 148, 48 P.3d 1276 (2002) ("Gruesome crimes result in gruesome photographs."). Likewise, a quadruple execution-style homicide and an attempted first-degree premeditated murder preceded by hours of

coerced sex acts and robberies naturally gives rise to press coverage that some may fairly characterize as at least occasionally sensational. It can hardly help but be so. See *State v. Ruebke*, 240 Kan. at 500-01 (court unwilling to adopt pretrial publicity rule that individual can commit crime so heinous "that news coverage generated by that act will not allow the perpetrator to be brought to trial"). Yet, overall, we conclude that the primarily factual tone of the press coverage reviewed by Judge Clark at the time of the defendants' first motion compensated for its sheer magnitude, and the second *Skilling* factor did not weigh in favor of presumed prejudice.

The third *Skilling* factor, the size and characteristics of the community in which the crimes occurred, did not weigh in favor of granting the defendants' first motion for change of venue on the ground of presumed prejudice. Laying claim to 452,000 residents and the largest city in Kansas, Sedgwick County had the largest population in the state from which to draw potential jurors. Compare *Skilling*, 561 U.S. at 382 (large Houston population, with 4.5 million potential jurors, minimized potential for presumed prejudice) and *Mu'Min v. Virginia*, 500 U.S. 415, 429, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991) (potential for prejudice mitigated by size of metropolitan Washington, D.C., statistical area; population of more than 3 million among whom hundreds of murders committed each year), with *Rideau*, 373 U.S. at 724-25 (recognizing greater potential for prejudice in parish with 150,000 residents, where confession broadcast to audience of nearly 100,000 over 3-day period). The United States Supreme Court and at least one federal district court and one state supreme court have noted

population sizes similar to Sedgwick County on the way to concluding that the risk of prejudice was diminished. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1044, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991) (reduced likelihood of prejudice when venire drawn from pool of more than 600,000); *United States v. Diehl-Armstrong*, 739 F. Supp. 2d 786, 793-94, 807 (W.D. Pa. 2010) (no presumed prejudice, in part because jury drawn from community with total population of 545,615); *State v. Gribble*, 165 N.H. 1, 19-20, 66 A.3d 1194 (2013) (potential for prejudice mitigated by jury pool of more than 400,000 residents).

The fourth *Skilling* factor is the time that elapsed between the crime and the trial. At the time the first motion to change venue was ruled upon, 17 months had passed since the crimes were committed. Approximately 3 and 1/2 months remained before voir dire would begin. In the ordinary case, one might expect these time frames to mean that public interest in the crimes and the defendants had begun to wane and that it would continue to do so. See *United States v. Lehder-Rivas*, 955 F.2d 1510, 1524 (11th Cir. 1992) ("The substantial lapse of time between the peak publicity and the trial also weighs against a finding of prejudice.") (citing *Nebraska Press Ass'n*, 427 U.S. at 554); *State v. Sanger*, 108 Idaho 910, 913, 702 P.2d 1370, 1373 (Ct. App. 1985) (lapse of 17 months substantially minimizes prejudice). But Dahl testified about the staying power of the relevant press coverage and the extreme public opinions it fostered. Although she expected her surveys to demonstrate marked dissipation by spring 2002, she found less than expected. We consider this factor inconclusive on

presumed prejudice at the time Judge Clark ruled on the defendants' first motion for change of venue.

The jury's verdict is the fifth *Skilling* factor. It was unknown at the time that Judge Clark ruled on the defendants' first motion for change of venue.

The sixth *Skilling* factor is the impact of the crimes on the community.

The defendants' evidence in support of their first motion included strongly hostile statements by members of the public in response to press coverage of the crimes and the prosecution, typically appearing in reader comments sections or on websites, at least some of which appear to have been sponsored by extreme and/or racist groups. It is difficult to extrapolate from these individual comments to the impact on the public as a whole. See *Gribble*, 66 A.3d at 1208 (defendant's reliance on articles quoting residents who expressed anger, bewilderment, heartbreak over crimes "fails to demonstrate. . . how the sentiment expressed by a small number of residents in a county with over 400,000 residents is indicative of presumed prejudice in the potential jury pool"). And the Supreme Court has observed that venue changes have been granted in highly charged cases like "the prosecution arising from the bombing of the Alfred P. Murrah Federal Office Building in Oklahoma City," while courts have properly denied such requests in other "cases involving substantial pretrial publicity and community impact, for example, the prosecutions resulting from the 1993 World Trade Center bombing . . . and the prosecution of John Walker Lindh, referred to in the press as the American Taliban." *Skilling*, 561 U.S. at 378 n.11.

Still, certain press stories collected by Dahl and entered as exhibits in the evidentiary hearing on the defendants' first motion documented more widespread public reaction to the crimes. For example, the Wichita Eagle reported on increased numbers of security system purchases in the wake of the Birchwood home invasion. We conclude that this sixth factor weighed in favor of presumed prejudice at the time Judge Clark considered the defendants' first motion for change of venue.

The seventh *Skilling* factor, publicity given to a codefendant's confession, would never be applicable in this case, because neither defendant confessed to any of the crimes with which they were jointly charged. The pretrial publicity before Judge Clark at the time of the first motion thus lacked the smoking-gun type of information the Supreme Court has found to be uniquely prejudicial. See *Rideau*, 373 U.S. at 726 (publicity given to filmed confession "in a very real sense was Rideau's trial—at which he pleaded guilty"); *Sheppard v. Maxwell*, 384 U.S. 333, 338-39, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966) (discussing impact of reports of defendant's refusal to take lie detector test); *Irvin v. Dowd*, 366 U.S. 717, 725-26, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961) (discussing prejudice from defendant's offer to plead guilty to avoid death penalty). The absence of publicity about smoking-gun evidence weighed against presumed prejudice at the time the defendants' first motion was considered. See *Skilling*, 561 U.S. at 382-83 (lack of smoking-gun type of evidence in pretrial coverage made it less memorable, mitigated prejudgment).

Our review of all of the *Skilling* factors at the time of the first motion leads us to conclude that, on balance, there was no presumed prejudice compelling Judge Clark to transfer venue of this case to another county.

We are not persuaded by the defendants' reliance upon *Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005), to support their argument for presumed prejudice. In that case, two law enforcement officers, Dennis Doty and Phil Trust, were shot and killed while attempting to execute an arrest warrant for defendant Jackson Chambers Daniels, Jr.

> "The murders of Doty and Trust generated extensive and nearly continuous publicity immediately after the shootings and again before Daniels's trial. [Citation omitted.] Articles described SWAT team searches of the neighborhood where Daniels was hiding. "News accounts described the perpetrator as a Black paraplegic, and Daniels was identified in press accounts as the killer from the very beginning.
>
> "Although the publicity diminished after Daniels's arrest, it resumed as trial approached. Three months before the trial, news articles covered the local school board's proposal to rename its football stadium in honor of officer Doty. One month before Daniels's trial was to begin, on the anniversary of the killings, a statue commemorating fallen police officers was unveiled by the county. The publicity surrounding the memorial and its unveiling ceremony largely referred to officers Trust and Doty. The memorial statue, standing nine feet

tall, was located across the street from the Riverside County courthouse where Daniels was tried.

"Based on our review of the California Supreme Court's findings, the public's response to this publicity clearly amounted to a 'huge' wave of public passion. As the California Supreme Court described it, police stations were 'deluged' with calls from citizens offering tips on the investigation and offering to establish a memorial fund. In addition, local newspapers printed numerous letters from readers calling for Daniels's execution. The officers were turned into 'posthumous celebrities,' and approximately three thousand people attended their funerals. That the news coverage saturated the county is reflected in the fact that eighty-seven percent of the jury pool recognized the case from the media coverage. Two-thirds of those empaneled remembered the case from the press accounts-some recalled that the suspect was a Black paraplegic, others recalled that police officers were shot, and two jurors remembered Daniels by name.

"The press accounts did not merely relate factual details, but included editorials and letters to the editor calling for Daniels's execution. In addition, news articles reflected the prosecution's theory of the case by attributing the killings to Daniels's desire to escape justice. Also well-publicized by the press was Daniels's past criminal offenses, including an arrest for shooting at a police officer. Such

> information was highly prejudicial and would not have been admissible at the guilt phase of Daniels's trial." 428 F.3d 1211-12.

Based on these facts, the Ninth Circuit presumed prejudice and held that "[t]he nature and extent of the pretrial publicity, paired with the fact that the majority of actual and potential jurors remembered the pretrial publicity, warranted a change of venue," and the refusal to transfer the case "violated Daniels's right to a fair and impartial jury and thus, his right to due process." 428 F.3d at 1212.

The defendants are correct that their case and *Daniels* shared certain characteristics—extensive coverage and citizen awareness; publication of reader viewpoints, some of which demanded vengeance for the victims' murders; and reporting of some facts that would be inadmissible at trial. But the impact on and response from the community was considerably greater in *Daniels*, where the victims were police officers killed in the line of duty, and community sentiment was so strong that monuments were constructed in their honor.

We also are not persuaded by *Daniels* because it appears to be somewhat behind the United States Supreme Court's most recent discussion of presumed prejudice in *Skilling*. Had the judges who decided *Daniels* had the benefit of *Skilling* at the time they filed their opinion, they may not have relied so heavily on extensive media coverage and a high level of community familiarity to reach their result. *Skilling* makes clear that more is needed before the Sixth Amendment requires a change of venue because of presumed prejudice.

Daniels also appears to be out of step among other Ninth Circuit decisions. See *Hayes v. Ayers*, 632 F.3d 500, 509 (9th Cir. 2011) (no presumed prejudice even though "stories about [defendant Royal Kenneth] Hayes were unflattering and included inadmissible evidence"; stories "contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight"); *Ainsworth v. Calderon*, 138 F.3d 787, 795 (9th Cir. 1998) (no presumed prejudice in death penalty case despite stories portraying victim as sympathetic, disclosing defendant's criminal history; coverage accurate, factual); *Harris v. Pulley*, 885 F.2d 1354 (9th Cir. 1988) (no presumed prejudice in death penalty case despite media coverage of defendant's confession, prior conviction for manslaughter, parole violations; editorials, letters called for defendant's execution). At least one district court in the Ninth Circuit has categorized *Daniels* as an "extreme case likely to invoke strong and lasting impressions" of the defendant because he was "a cop killer, he was hunted by a SWAT team, and one of the men he killed was such an outstanding police officer that his name warranted special public recognition." *United States v. Celestine*, 3:09-CR-00065 JWS, 2009 WL 3676497, at *5 (D. Alaska 2009) (unpublished opinion).

The pretrial publicity at the time of the defendants' first motion, although sustained and unflattering to the defendants, had not made the prosecution into a circus or created a lynch mob mentality. See *Stafford*, 34 F.3d at 1566 (presumed prejudice appropriate only when publicity created circus-like atmosphere, created lynch mob mentality throughout venire). There was no error in Judge Clark's failure to grant the defendants' first

motion for change of venue on a presumed prejudice basis.

Second Motion for Change of Venue

Our evaluation of presumed prejudice from the vantage point of the second motion for change of venue—considered by Judge Clark in early August 2002 after several television stations aired the Kline ad and secondary coverage of the controversy it generated—changes little. We need only reexamine the second and fourth *Skilling* factors, the magnitude and tone of coverage and the timing of the crime and trial.

We acknowledge that these two factors were affected by the advertisement and resulting coverage, but, we think, only marginally. Although responsible press outlets had refrained from referring to either of the defendants as a murderer before the ad ran, we are confident that the ad's photograph and reference to R. Carr by name as the murderer of the quadruple homicide victims would have been recognized by the vast majority of potential jurors as the overheated campaign pitch it was. There was minimal danger of it being regarded as reliable journalism. As counsel for R. Carr asserted during the hearing on the second motion, the ad was a poor excuse for political speech; but reasonably discerning potential jurors would have recognized that as well.

On the fourth *Skilling* factor, the timing of the crime and trial did not change. However, the ad and stories about its effect on the case and on the primary race fell 2 months closer to the beginning of jury selection than the hearing on the first motion. Although they may have ratcheted up public

anticipation of the trial somewhat sooner than could have been expected in the ordinary course, eventually the ordinary course was bound to be followed. Again, sensational crimes inevitably produce at least some breathless press, but the amount attributable to the Kline ad and its secondary coverage was negligible in the grand scheme before us.

There was no presumed prejudice for Judge Clark to recognize by granting the defendants' second motion for change of venue.

Third Motion for Change of Venue

The defendants' third motion came after the completion of jury selection. In the defendants' view, the process of general and individual voir dire, the strikes for cause and the peremptory strikes, although executed in an orderly fashion, had confirmed their worst fears. They contended they were in the center ring at the circus, where a fair trial would be impossible.

This is the essence of the doctrine of presumed prejudice. If it exists, then, by definition, the problem of damning pretrial publicity and the public opinions on guilt it has spawned are not amenable to correction. No amount of juror education or admonition or instruction will fix them. No number of seemingly sincere assurances by a venire member that he or she can and will put aside preconceived ideas about the defendants' culpability can be believed.

We simply cannot go there. When we reexamine the seven *Skilling* factors as of the time of the defendants' third motion, again, we do not believe that Judge Clark erred because prejudice should have been presumed.

The press still was not running amok in the courtroom. Judge Clark maintained appropriate control. Although the jury questionnaire responses and the content of individual voir dire confirmed Dahl's earlier surveys showing that familiarity with pretrial publicity was wide and deep, defendants did not even claim that the tone of the coverage had altered in any significant way to their detriment. The other *Skilling* factors, on the record before us, also were static or remained inapplicable. The defendants and their counsel did not show that "an irrepressibly hostile attitude pervaded the community," *Stafford*, 34 F.3d at 1566, requiring Judge Clark to transfer the case to a different county.

Even now, with the benefit of the full record of the trial, including the verdict, we cannot say that prejudice should be presumed. In *Skilling*, the Court observed that the jury's acquittal of the defendant on several insider-trading charges was of "prime significance," weighing heavily against such prejudice. 561 U.S. at 383. Here, the jury acquitted R. Carr's codefendant, J. Carr, of all charges stemming from the Schreiber incident despite media coverage connecting both defendants to all three incidents. "It would be odd for an appellate court to presume prejudice in a case in which jurors' actions run counter to that presumption." *Skilling*, 561 U.S. at 383-84 (citing *United States v. Arzola-Amaya*, 867 F.2d 1504, 1514 [5th Cir. 1989]). We agree.

Actual Prejudice

We now turn to actual prejudice, also a constitutional concern under the Sixth and Fourteenth Amendments and § 10 of the Kansas Constitution Bill of Rights.

"In reviewing for actual prejudice, we examine . . . 'whether the judge had a reasonable basis for concluding that the jurors selected could be impartial.'" *McVeigh*, 153 F.3d 1166, 1183 (10th Cir. 1998) (quoting *United States v. Abello-Silva*, 948 F.2d 1168, 1177-78) (10th Cir. 1991). The crucible for determination of actual prejudice is voir dire. *Foley v. Parker*, 488 F.3d 377, 387 (6th Cir. 2007) "The court must review the media coverage and the substance of the jurors' statements at voir dire to determine whether a community-wide sentiment exists against the defendant." 488 F.3d at 387.

The appellate standard of review of a district judge's decision on actual prejudice is abuse of discretion. Jury selection is a task "particularly within the province of the trial judge." *Ristaino v. Ross*, 424 U.S. 589, 594-595, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (1976). Thus, when a district judge rules that a juror can set aside pretrial publicity and decide the case on the evidence, his or her ruling is entitled to special deference:

> "Appellate courts making after-the-fact assessments of the media's impact on jurors should be mindful that their judgments lack the on-the-spot comprehension of the situation possessed by trial judges.
>
> "Reviewing courts are properly resistant to second-guessing the trial judge's estimation of a juror's impartiality, for that judge's appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record—among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty. [Citation omitted.] In

> contrast to the cold transcript received by the appellate court, the in-the-moment voir dire affords the trial court a more intimate and immediate basis for assessing a venire member's fitness for jury service. We consider the adequacy of jury selection . . . therefore, attentive to the respect due to district-court determinations of juror impartiality and of the measures necessary to ensure that impartiality." *Skilling*, 561 U.S. at 386-87.

"Negative media coverage by itself is insufficient to establish actual prejudice." *Foley*, 488 F.3d at 387. And the fact that jurors entered the box with preconceived opinions of guilt alone does not overcome a presumption of juror impartiality. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 722-23, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). "The relevant question is not whether the community remembered the case, but whether the jurors at . . . trial had such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton v. Yount*, 467 U.S. 1025, 1035, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984); *Goss v. Nelson*, 439 F.3d 621, 627 (10th Cir. 2006) (defendant's right to impartial tribunal satisfied when jurors can base decision on evidence).

In this case, although Judge Clark was brief in his ruling on the defendants' third motion for change of venue, advanced at the conclusion of jury selection, his statement referenced his assessment that, despite widespread pretrial publicity, an unbiased jury had been selected in Wichita. Eight of the 12 jurors

eventually seated in the defendants' trial held no prior opinions on guilt. The four who admitted to forming such opinions ultimately said that they could set their opinions aside. See *Hale v. Gibson*, 227 F.3d 1298, 1320 (10th Cir. 2000) (defendants must show more than juror's preconceived notion; defendant must show juror's notion fixed). On their face, these voir dire responses provided Judge Clark with a reasonable basis for his ruling. See *Gardner v. Galetka*, 568 F.3d 862, 890 (10th Cir. 2009) (no actual prejudice despite 55 percent of prospective jurors with previous opinion on guilt, including four of 12 seated; court spent 5 days examining prospective jurors about knowledge of facts, ability to set aside opinions of guilt).

The defendants argue, nevertheless, that neither Judge Clark nor we can rely on the jurors' declarations of impartiality, and there is some authority for setting aside juror declarations of impartiality in extreme cases.

In *Irvin*, the United States Supreme Court recognized that adverse pretrial publicity can create so much prejudice in a community that juror declarations of impartiality cannot be credited. *Irvin* involved a situation in which headlines before defendant Leslie Irvin's trial "announced his police line-up identification, that he faced a lie detector test, had been placed at the scene of the crime and that the six murders were solved but petitioner refused to confess." 366 U.S. at 725. On the day immediately before trial began, newspapers carried a story "that Irvin had orally admitted the murder of . . . (the victim in this case) as well as 'the robbery-murder of Mrs. Mary Holland; the murder of Mrs. Wilhelmina Sailer in

Posey County, and the slaughter of three members of the Duncan family in Henderson County, Ky.'" 366 U.S. at 726. The press also reported that Irvin had offered to plead guilty in exchange for a sentence other than death. In addition, the record in *Irvin* evidenced difficulty in impaneling his jury. The court was forced to excuse 268 of 430 potential jurors because they expressed immovable opinions on Irvin's guilt. 366 U.S. at 727. Of the jurors ultimately seated, eight of 12 had admitted to possessing some preconceived opinion on his guilt. Under these circumstances, the Court held that the trial judge erred in accepting the jurors' representations about their ability to be impartial:

> "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man. [Citation omitted.] Where one's life is at stake—and accounting for the frailties of human nature—we can only say that in the light of the circumstances here the finding of impartiality does not meet constitutional standards. Two-thirds of the jurors had an opinion that petitioner was guilty and were familiar with the material facts and circumstances involved, including the fact that other murders were attributed to him, some going so far as to say that it would take evidence to overcome their belief. One said that he 'could not . . . give the defendant the benefit of the doubt that he is innocent.' Another stated that he had a 'somewhat' certain fixed opinion as to petitioner's guilt. No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact

> requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, 'You can't forget what you hear and see.' With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt." 366 U.S. 727-28.

Since *Irvin*, the Supreme Court has twice considered whether a juror's declaration of impartiality should be discounted.

In *Patton v. Yount*, 467 U.S. 1025, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984), the jury convicted defendant Jon E. Yount of first-degree premeditated murder and rape of one of his female students. On direct appeal, the state court reversed Yount's conviction and remanded for a new trial. He was again convicted after retrial, and he claimed that pretrial publicity deprived him of his right to trial by a fair and impartial jury. The publicity leading up to his second trial disclosed the result of his first trial, his confession, and his earlier plea of temporary insanity—all information not admitted into evidence at the second trial. Voir dire demonstrated that all but 2 of 163 veniremen had heard of the case, and that 126 of the 163 would carry an opinion of guilt into the jury box. 467 U.S. at 1029. Eight of the 14 seated jurors and alternates admitted that they had formed an opinion of guilt. 467 U.S. at 1029-30. Nevertheless, the Court distinguished *Irvin*

and affirmed Yount's conviction, because jurors' opinions of guilt had weakened considerably in the 4 years that passed between the first trial and the second. "Many veniremen, of course, simply had let the details of the case slip from their minds," the Court said. 467 U.S. at 1033. For others, "time had weakened or eliminated any conviction they had had . . . ." Ultimately, "the voir dire resulted in selecting those who had forgotten or would need to be persuaded again." 467 U.S. at 1033-34.

Likewise, in *Murphy v. Florida*, 421 U.S. 794, 800-01, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975), the Supreme Court refused to set aside juror declarations of impartiality when voir dire responses did not reflect the wave of community hostility present in *Irvin*.

Relying on this authority, the Tenth Circuit also has refused to set aside juror declarations of impartiality. In *Hale v. Gibson*, 227 F.3d 1298, 1333 (10th Cir. 2000), 6 of 12 jurors seated had held some opinion of the defendant's guilt. 227 F.3d at 1333. But all confirmed their ability to be fair and impartial in response to inquiry from the trial court. 227 F.3d at 1332. The panel distinguished *Irvin*, observing that voir dire did not uncover "an atmosphere of hostility toward the defendant, nor did the trial court have a difficult time in seating the jury." 227 F.3d at 1333.

The Tenth Circuit reached the same result in *Gardner*, where 4 of 12 jurors had earlier formed an opinion of guilt. 568 F.3d at 887-90. The panel again distinguished *Irvin*, in part because protective measures taken by the trial court judge during jury selection bolstered the credibility of juror declarations of impartiality. *Gardner*, 568 F.3d at 889-90.

We are satisfied that this case is not as extreme as *Irvin*, and we decline the defendants' invitation to second-guess jurors' assurances that they could disregard pretrial publicity and their previous impressions. As discussed in relation to presumed prejudice, there was no smoking-gun reporting in this case. The jury pool here was far less polluted by preconceptions on guilt; in *Irvin,* 90 percent of potential jurors believed the defendant was guilty. Here, Judge Clark was not forced to excuse 60 percent of the jury pool at the outset. The number of jurors ultimately seated who had to set aside their earlier opinions was half of that who would have had to do so in *Irvin*; and none of them expressed community outrage. We also are reassured here by the protective measures taken by Judge Clark, including use of jury questionnaires and individual voir dire.

We do find it necessary to express a word of caution on the conduct of sound voir dire before leaving the subject of actual prejudice. Our review of the individual voir dire in this case reveals several instances when Judge Clark appeared to have taken it upon himself to rehabilitate a venire panel member. This effort typically took the form of summarizing the panel member's previous responses to questions in a way that would minimize evidence of bias and then asking for confirmation. In addition, the questioning prosecutor used leading questions on several occasions to induce panel members to voice their ability to be impartial. These behaviors by a judge or a prosecutor cloud appellate evaluation of the record on the actual prejudice, particularly the difficulty of finding unbiased jurors, because we must be mindful of the unintended influence a trial judge and a lawyer for the State may

have over lay jurors intimidated by the possibility of participation in deciding a difficult case in an unfamiliar environment. See *Skilling*, 561 U.S. at 455-56 (Sotomayor, J., concurring and dissenting) (criticizing trial judge for addressing topics of juror bias in cursory fashion, failing to use probing, open-ended questions about jurors' opinions, beliefs).

We urge our district judges and all counsel to refrain from suggesting panel member answers that will defeat challenges for cause. Avoidance of these sorts of interactions is necessary to merit the deference inherent in our abuse of discretion review of a judge's ultimate decision on actual prejudice. See *Skilling*, 561 U.S. at 447 (Sotomayor, J., concurring and dissenting) ("In particular, reviewing courts are well qualified to inquire into whether a trial court implemented procedures adequate to keep community prejudices from infecting the jury. If the jury selection process does not befit the circumstances of the case, the trial court's rulings on impartiality are necessarily called into doubt.").

Statutory Claims

We have previously interpreted our state venue change statute to say that the "burden is on the defendant to show prejudice exists in the community, not as a matter of speculation, but as a demonstrable reality." *State v. Anthony*, 257 Kan. 1003, 1013, 898 P.2d 1109 (1995).

The first statutory claim by the defense is that we have interpreted and applied K.S.A. 22-2616(1) in an unconstitutional manner. The second is that Judge Clark abused his discretion in denying the defendants'

repeated K.S.A. 22-2616(1) motions for change of venue.

On the constitutional challenge to our interpretation and application of the statute, J. Carr has relied on language from *Sheppard*: "[T]here is nothing that proscribes the press from reporting events that transpire in the courtroom. But *where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial,* the judge should . . . transfer it to another county not so permeated with publicity." *Sheppard v. Maxwell*, 384 U.S. 333, 362-63, 86 S. Ct. 1507, 16 L. Ed. 600 (1966). He argues that this language establishes a standard of proof of "reasonable likelihood" of unfair trial under the Sixth Amendment. In contrast, he asserts, Kansas courts have elevated the statutory standard of proof from "reasonable likelihood" to "absolute certainty."

We disagree. The standard of proof in our precedent is "reasonable certainty" that the defendant cannot obtain a fair trial in the ordinary venue. *Anthony,* 257 Kan. at 1013; see *State v. Lumbrera*, 252 Kan. 54, 57, 845 P.2d 609 (1992); *State v. Ruebke*, 240 Kan. 493, 499, 731 P.2d 842 (1987).. This is wholly consistent with that part of federal constitutional law on which J. Carr focuses. See *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir. 1980) (Supreme Court decisions create standard by which Sixth Amendment compels change of venue when party "adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from that community"); *Williams v. Vasquez*, 817 F. Supp. 1443, 1473 (E.D. Cal. 1993), *aff'd.*

Williams v. Calderon, 52 F.3d 1465 (9th Cir. 1995) (Sixth Amendment due process considerations require change of venue if trial court is "unable to seat an impartial jury because of pretrial publicity"); *United States v. Campa*, 459 F.3d 1121, 1143 (11th Cir. 2006) (venue change warranted only upon showing by defendant that widespread, pervasive pretrial publicity saturates community, "reasonable certainty that such prejudice will prevent him from obtaining a fair trial by an impartial jury"); see also Fed. R. Crim. P. 21(a) ("[T]he court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there."); 33 A.L.R.3d 17, § 3(a) (numerous federal, state courts hold change of venue required only when "the prospects of the defendant not receiving a fair and impartial trial are "reasonably certain," or "likely").

Moving to the abuse of discretion claim, we have established a pattern of evaluating whether the level of prejudice warrants a venue change under the statute by examining nine factors. *State v. McBroom*, 299 Kan. __, ___, 325 P.3d 1174 (2014) (slip op. at 25). Several of the factors are similar to those set out in *Skilling* for presumed prejudice analysis. We review:

> "[1] the particular degree to which the publicity circulated throughout the community; [2] the degree to which the publicity or that of a like nature circulated to other areas to which venue could be changed; [3] the length of time which elapsed from the dissemination of the publicity to the date of trial; [4] the care exercised and the

> ease encountered in the selection of the jury; [5] the familiarity with the publicity complained of and its resultant effects, if any, upon the prospective jurors or the trial jurors; [6] the challenges exercised by the defendant in the selection of the jury, both peremptory and for cause; [7] the connection of government officials with the release of the publicity; [8] the severity of the offense charged; and [9] the particular size of the area from which the venire is drawn." *State v. Higgenbotham*, 271 Kan. 582, 592, 23 P.3d 874 (2001) (citing *State v. Jackson*, 262 Kan. 119, 129, 936 P.2d 761 [1997]).

This court originally adopted these factors from an A.L.R. report published in 1970, which examined pretrial publicity as grounds for a venue change. See *State v. Ruebke*, 240 Kan. at 499-500 (citing 33 A.L.R.3d 17, § 2[a]). It has continued to employ them as recently as a few weeks ago. See *McBroom*, 299 Kan. at __ (slip op. at 25).

On the record before us, the first, second, fifth, and eighth factors favored transfer of venue out of Sedgwick County.

On the first factor, Dahl's compilation of press and online publications supported the existence of a high degree of negative publicity circulated throughout the community. The July 2002 Kline advertisement and resulting coverage added to it. On the second factor, Dahl's comparative telephone surveys demonstrated that the effects from pretrial publicity about the crimes and this case were considerably less pronounced in Wyandotte County. And the Kansas City version of the Kline ad did not name R. Carr or call him a murderer.

On the fifth factor, Dahl's research also showed that a significant percentage of the Sedgwick County jury pool was affected by what they read and heard about the defendants; and four of the trial jurors admitted that they came to the courtroom with opinions favoring guilt. On the eighth factor, the most serious charged offenses could not have been more severe or their potential consequences more irreversible.

The five other factors enumerated for the first time in *Ruebke* favored denial of the defendants' motions.

On the third factor, 21 months elapsed between the first rush of publicity in the immediate aftermath of the crimes and the defendants' arrests and the beginning of jury selection. Although other spikes in publicity occurred in the interim, it is plain that none ever matched the breadth and intensity of early coverage. On the fourth factor, Judge Clark employed jury questionnaires and individual voir dire, both of which had a natural tendency to encourage candor from prospective jurors asked about sensitive subjects. A preliminarily qualified group of 60 prospective jurors was assembled without the necessity of examination of the nine panels of 20 Judge Clark was prepared to call. On the sixth factor, venire panel members who were unable or unwilling to set aside negative publicity about the defendants or any opinion of guilt such publicity had a role in inducing were excused. On the seventh factor, nothing in the record would support an assertion that representatives of the State had any particular role in publicizing information about the crimes or the case, and the defendants have wisely conceded the point. And, finally, as discussed in relation to the *Skilling* presumed prejudice factors, the

ninth factor of size of the community cut against venue transfer. Wichita exceeds other Kansas cities in population.

Our case precedents also provide useful parallels for this case. See *McBroom*, 299 Kan. at __ (slip op. at 26) (no error to deny venue change despite survey showing 69.3 percent of respondents believed defendant "probably," definitely" guilty); *Higgenbotham*, 271 Kan. at 593-95 (no error to deny motion to change venue despite defendant's venue survey of Harvey county residents showing 95.7 percent of respondents recall case with minimal prompting, 60.6 percent of respondents believed defendant "definitely," "probably" guilty); *Jackson*, 262 Kan. at 129-32 (no error to deny venue change despite defendant's survey confirming 89.7 percent of respondents recalled case, 60 percent had already decided defendant "definitely," "probably" guilty); *State v. Anthony*, 257 Kan. 1003, 1007, 1014-15, 898 P.2d 1109 (1995) (no error to deny motion to change venue despite defendant's public opinion poll of Salina residents showing 97.5 percent had heard of case, 63.8 percent believed evidence strong); *State v. Swafford*, 257 Kan. 1023, 1035-36, 897 P.2d 1027 (1995) (companion case to *Anthony*; same).

The defendants' attempt to distinguish these cases because the defendants were not being tried under threat of the death penalty is undercut by our decision in *State v. Verge*, 272 Kan. 501, 34 P.3d 449 (2001). *Verge* was a death penalty prosecution.

In that case, defendant Robert L. Verge was convicted of one count of capital murder for the premeditated killings of Kyle and Chrystine Moore in Dickinson County. The defense had engaged Litigation

Consultants, Inc., the same firm that prepared the venue survey in this case, to compare potential jurors in Dickinson County to those in Sedgwick County. The results showed 96.7 percent of the Dickinson County respondents could recall the case; 71.7 percent had talked about it; and 64 percent believed Verge was either "definitely" or "probably" guilty. 272 Kan. at 505. These results were similar to those reported in this case—96 percent of Sedgwick County respondents recalled the case and 74 percent held opinions on guilt. In *Verge*, we affirmed the district judge's decision not to transfer venue.

Here, given the mix of evidence on the nine factors we use to apply K.S.A. 22-2616(1) and our consistent caselaw handed down over more than two decades, we cannot say that "no reasonable person" would have agreed with Judge Clark's decisions on the defendants' motions for change of venue. See *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011) ("Judicial discretion is abused if judicial action (1) is arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court.").

The defendants' statutory claims are without merit.

2. SEVERANCE

R. Carr challenges the district court's repeated refusals to sever the guilt phase of the defendants' cases, arguing that the error deprived him of his constitutionally protected right to a fair trial.

Additional Factual and Procedural Background

Defendants requested severance of their cases for preliminary hearing. The State opposed severance,

saying there was no reason to think at that point that R. Carr and J. Carr would mount antagonistic defenses and that there were no problems with one of them making an incriminating statement that would affect the other. See *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (codefendant's confession inculpating accused inadmissible against accused; Confrontation Clause requires defendant charged with crime to have opportunity for cross-examination of declarant). Judge Clark V. Owens II, who was handling the defendants' case at the time, denied the severance request at the April 6, 2001, hearing on the motion. He said it was important to consider whether Holly G. would have to testify "twice or once." He also said that analysis of whether the cases should be severed for trial would be "a totally separate issue," inviting the defense to renew its motion before trial if it still believed severance was necessary and differentiating between the ability of a judge presiding over a preliminary hearing to analyze evidence and that of a jury at trial.

R. Carr filed another motion to sever trial on March 22, 2002. In a supplement to his memorandum in support of the motion filed under seal the same day, he outlined the theory of his defense. The State did not get a copy of this supplement, which stated:

> "2. On the evening of December 14, 2000, Reginald Dexter Carr, Jr., and his brother, Jonathan Carr, met at the home of Tronda Adams and Toni Green. Reginald and Jonathan Carr were both traveling in a beige Toyota Camry belonging to Stephanie Donnelly.

"3. After leaving the Green residence together, Reginald Dexter Carr, Jr. and Jonathan Carr traveled to the apartment complex located at 5400 E. 21st Street in Wichita . . . . Jonathan Carr dropped off Reginald Dexter Carr, Jr. and left in the beige Toyota. Reginald Dexter Carr, Jr., not wanting to alert Stephanie Donnelly that he had loaned her car to his brother, left in his (Reginald's) white Plymouth Fury . . . . Mr. Reginald Dexter Carr, Jr., traveled around the northern part of Wichita . . . and attempted to sell drugs.

"4. Mr. Jonathan Carr met another individual . . . and . . . went to 12727 East Birchwood and committed the crimes more fully set out in the Amended Complaint/Information . . . .

"5. Sometime after the commission of the crimes . . . Jonathan Carr located his brother . . . and made arrangements for Reginald Dexter Carr, Jr., to store the property taken from the Birchwood address in Stephanie Donnelly's apartment at 5400 E. 21st Street, Apt. 819. **Prior to the commission of the crimes at the Birchwood address, Reginald Dexter Carr, Jr. had no knowledge of the facts that were about to unfold, nor did he participate in any preparation or plan to effect the same.**.

. . .

"8. . . . Reginald Dexter Carr, Jr., . . . submits there is no forensic evidence that links him to the Dodge Dakota pickup truck, no conclusive

> forensic evidence that links him to the scene at 12727 Birchwood, no eyewitness accounts that place him at the Birchwood scene or the scene on Greenwich Road where the bodies were discovered.
>
> "9. In contrast, . . . Jonathan Carr is identified by H.G. as being at both the Birchwood address and the scene on Greenwich Road. He is linked to the scene at Birchwood by forensic DNA evidence and implicated by his own statements to Tronda Adams.
>
> "10. Accordingly, . . . should the Defendants . . . be tried together, Mr. Reginald Dexter Carr, Jr.'s defense will . . . be antagonist[ic] to any defense propounded by his brother, Jonathan Carr."

At a motions hearing on April 23, 2002, the State requested copies of all documents filed in support of the motion, including the sealed supplement. R. Carr objected to disclosure of the supplement; his counsel said he would rather withdraw it than prematurely disclose his theory of defense to the State, even if nondisclosure meant he was left without a factual basis to support the motion to sever. The district judge ultimately ruled that the defense did not have to disclose the supplement, but he did not consider it in support of the motion.

During argument on the motion, R. Carr's counsel observed that the failure to sever created a *Bruton* issue because Tronda Adams would testify regarding statements J. Carr made to her about R. Carr. Counsel further argued, without discussing particulars, that the

defendants would advance antagonistic defenses. J. Carr's counsel, Ronald Evans, confirmed that his client's defense would be antagonistic to R. Carr:

> "Judge, there is no way if this case proceeds the way it is now with these brothers being tried together that I cannot prosecute Reginald Carr. That's true in the first stage, but it's absolutely true in the second stage . . . .
>
> ". . . I have to be Reginald's prosecutor. That adds another prosecutor in the room. There is no way that doesn't prejudice Reginald.
>
> ". . . We're going to get into things on Reginald that there's no way the State would get to introduce into evidence against him if he was sitting there by himself."

The prosecutor recognized the danger for prejudice in a joint trial and suggested that two juries could be impaneled.

Regarding Adams' testimony specifically, the State said that it could easily avoid eliciting objectionable testimony from her. But counsel for J. Carr argued that he would nevertheless need to elicit the objectionable testimony from Adams in furtherance of his client's defense.

The prosecutor then elaborated on the two-jury suggestion, stating that one jury could be removed from the courtroom for testimony that might be prejudicial to the defendant it was assigned, and then, if the defendants were found guilty of at least one capital crime, their juries could be separated to hear severed penalty phase trials. She said her proposal would solve

the problem of how much "time and effort that all would have to place in this case and . . . assure that the rights of the victims are protected as well as the rights of the defendant[s]."

R. Carr's counsel opposed the district attorney's proposal. J. Carr's counsel said that he was not opposed to the suggestion, but he would have to see the proposal in writing. He also said that "trying to do two juries is going to be more work than severing the case and just doing two trials."

After a break, the district attorney repeated her proposal but said she was not advocating for severance. "[W]e could adequately, more than adequately, constitutionally protect the rights of the defendants and entitle the State to a fair trial without the necessity for severance," she said.

The district judge denied the severance motion with leave to refile it if the situation warranted, "especially when all the discovery is closed . . . ."

J. Carr filed another motion for severance on July 30, 2002, which R. Carr joined. At an August 9, 2002, pretrial conference, Judge Clark heard argument on the motion. Counsel for J. Carr first outlined J. Carr's theory of defense:

> "Number one, the defendants have an antagonistic defense. Judge, the clearest way I can put Jonathan Carr's defense right now is he denies categorically his participation in the events he's accused of. His defense will be he was in Tronda Adams' house early the morning of December 15th. His big brother Reggie brought items over, cash, a ring, left those items

> with him. He was not told of the crime. He did not participate in the crime. He is prepared to present an alibi to the jury.
>
> "Now, that is as clear as I can make our defense. I can't think of a way to put it that doesn't put the State on notice of where we're going."

Counsel said that he had not been told the details of R. Carr's planned defense, but R. Carr's counsel confirmed his client intended to assert his innocence at trial and to point the finger at J. Carr.

The State argued that the parties had to demonstrate actual prejudice, not mere speculation, to be entitled to severance and demanded both defendants identify specific evidence or make proffers that would demonstrate actual prejudice.

R. Carr cited Adams' testimony about statements made by J. Carr that would prejudice his client. One of the prosecutors acknowledged that this testimony would constitute a problem under *Bruton*, 391 U.S. 123. But she argued the State would not be able to introduce the statements at either a joint or separate trial because, absent a waiver, R. Carr's Fifth Amendment rights would prevent it from doing so. Neither defense counsel responded to this assertion.

J. Carr's counsel said that, in addition to sponsoring Adams' testimony, he had planned to put on evidence of R. Carr's prison record. However, because the court granted R. Carr's motion in limine to exclude evidence of his record, after the State responded to the limine motion by saying it did not intend to introduce R. Carr's criminal history under K.S.A. 60-455, J. Carr

could not do so in the joint trial. J. Carr's counsel also said there would be no way relatives of the brothers could testify in a joint trial about which brother was the leader and which the follower.

Again, Judge Clark refused to sever the proceedings, "for the same reasons . . . stated when it was first raised."

The State filed successful pretrial motions in limine to prevent defendants from introducing out-of-court statements made by either one of them unless a hearsay exception applied. The State also moved successfully to prevent defendants from introducing evidence of any third party's guilt for the crimes charged as a result of the Birchwood incident, arguing that Kansas' third-party evidence rule prohibited a defendant from introducing circumstantial evidence of another's guilt when the State's case against the defendant was based on direct evidence. The flaws in these rulings are fully discussed in Section 18 of this opinion.

At trial, J. Carr's defense was simply to hold the State to its burden of proof and to argue that any crimes proven were committed under the control and influence of his brother, R. Carr. J. Carr did not advance an alibi theory on any of the three incidents that formed the basis of the charges.

On the other hand, R. Carr sought to defend on the basis that his brother had committed the Birchwood crimes with someone else.

During opening statements, R. Carr began his attack on J. Carr. His counsel conceded that R. Carr was guilty of possessing stolen property from the

Birchwood home and victims, but he said the evidence would show R. Carr was not guilty of the many Birchwood crimes charged. Instead, he asserted, J. Carr and an unidentified, uncharged black male were present at the Birchwood home while R. Carr was not. R. Carr "spent the . . . late night hours of the 14th and the early morning hours of the 15th of December selling drugs in Wichita." Counsel continued:

> "He was not . . . with his brother until sometime in the neighborhood of 5:00 or 5:30. He, Reginald Carr, learned that Jonathan Carr was located near Tronda Adams' house, he went there to help his brother, who was in trouble. While there he saw the Dodge Dakota truck, filled with items that had been stolen.
>
> "In an attempt to help his brother, Reginald Carr took those items—he didn't get into the Dodge Dakota truck, the evidence will be that he's never been inside the Dodge Dakota truck. The Dodge Dakota truck was driven to Stephanie Donley's apartment complex, not by Reginald, not by Jonathan, but by a third black male."

J. Carr's counsel objected to this as "argumentative, unsupported by the evidence," but Judge Clark overruled the objection.

Later that day, during a break in testimony, J. Carr's counsel moved for a mistrial, arguing that the "opening statements illustrate an argument that we've made many times early on in this case as to why we needed to be severed from this matter and have a

separate trial from Reginald Carr," and again moved for severance.

Judge Clark overruled the motion for mistrial and did not separately address the renewed motion for severance.

Each defendant continued to push for severance when evidence that pointed to the other defendant was admitted. J. Carr renewed the motion when the State moved the admission of photographs of the victims' property found in R. Carr's possession, including photographs of Schreiber's watch, Brad H.'s wallet, and Aaron S.'s television. J. Carr also renewed the severance motion when the State admitted evidence of R. Carr's Buffalino boots, a wallet containing R. Carr's birth certificate, and a witness statement law enforcement completed while interviewing Walenta's husband. J. Carr renewed the motion again when he believed R. Carr opened the door for the State to introduce autopsy photographs of Heather M. R. Carr renewed the severance motion when a State expert witness testified to a DNA match between J. Carr and samples recovered from carpet at the Birchwood home.

Judge Clark rejected all of these renewed motions.

J. Carr also renewed the severance motion when the State's witness discussed procedures for handling consumable DNA samples associated with R. Carr, and again when the State moved to admit the engagement ring recovered from J. Carr. Again, Judge Clark rejected the idea of severance.

During the State's case, J. Carr contributed to the evidence tending to prove R. Carr's guilt. During his cross-examination of Officer James Espinoza, for

example, J. Carr focused the jury's attention on property from the Birchwood residence found in R. Carr's possession. During cross-examination of Schreiber, J. Carr emphasized that Schreiber could identify only R. Carr as one of the men who kidnapped and robbed him.

> "Q. But one thing you are certain of, Mr. Schreiber, let me get this clear. You've been certain about this over the last 20 months is Reginald Carr was the driver, is that correct?
>
> "A. Yes.
>
> "[J. Carr's Counsel:] Q. Okay. No further questions. Thank you very much."

Before Adams took the stand, J. Carr's counsel reminded Judge Clark out of the hearing of the jury that R. Carr filed a motion in limine pretrial to exclude certain testimony about him from Adams. J. Carr's counsel requested "guidance from the Court" about the permissible scope of his cross-examination of Adams.

One of the prosecutors informed the judge that there were two separate areas on which she had instructed Adams. One had to do with ownership of a weapon given to Adams; J. Carr had mentioned that it belonged to R. Carr. The other area concerned a remark Adams had overheard J. Carr make during a telephone conversation on the morning of December 15: "[W]hat's Smoke got me into now?" "Smoke" was a nickname used by R. Carr. The prosecutor said she planned to put on evidence about the gun and telephone calls but "not the statement[s] that [J. Carr] made that would in any way implicate Reginald Carr."

Judge Clark said that evidence from Adams on J. Carr's statements about R. Carr remained inadmissible.

J. Carr's counsel made a proffer of Adams' excluded testimony by examining her outside the presence of the jury. Adams said J. Carr initially provided her with a silver gun. When J. Carr came to her home on December 11, 2000, he had a black gun, gave it to Adams, and took back the silver gun. He told Adams that the black gun belonged to "Smoke" and the silver gun belonged to him. On December 13, 2000, Adams said J. Carr came over and took the black gun back. Adams also said that she overheard J. Carr say while on the telephone early on December 15: "[W]hat has Smoke got me into?"

J. Carr's counsel renewed the severance motion again when Judge Clark ordered R. Carr to wear leg and hand restraints in the courtroom during the guilt phase of the trial. That morning, R. Carr had refused to come to trial. And the Sheriff's Department reported that he was making threats to sheriff's officers. J. Carr's counsel argued that R. Carr's misconduct would prejudice his client. He said that Judge Clark was "probably tired of hearing it, but Reginald Carr continues to infect our right to a fair trial."

One of the prosecutors then brought up examples of bad behavior by R. Carr in the courtroom the day before, "one of which was when [R. Carr's counsel] got up to look at a video, the defendant, Reginald Carr, took his chair, pushed [his counsel's] chair by the court guards, physically moved his chair knee-to-knee contact with me in the courtroom." This required court guards "to get up and move him," she said.

Judge Clark said he had seen R. Carr do nothing in the courtroom "that seems disruptive to the process." But he ordered the leg and hand restraints as security measures, making provision to shield them from the view of the jury. He again made no ruling on the renewed motion for severance.

Later that afternoon, Donley took the stand. During R. Carr's cross-examination, counsel attempted to elicit statements R. Carr had made to her about J. Carr the morning of December 15, 2000. J. Carr's counsel objected on hearsay and *Bruton* grounds and renewed his motion for severance. Judge Clark sustained the objections, instructed R. Carr's counsel to avoid the line of questioning, but overruled the motion.

The defendants again argued unsuccessfully that Judge Clark should have severed their prosecutions when they moved for judgment of acquittal at the close of the State's evidence. They did so again, unsuccessfully, at the close of all evidence admitted in the guilt phase.

J. Carr's counsel devoted a significant portion of his closing argument on the evidence supporting R. Carr's guilt. He reminded the jury that Schreiber identified only R. Carr and that Schreiber's watch was found in R. Carr's possession. With regard to the Walenta murder, J. Carr defended the reliability of Walenta's photo array identification of R. Carr.

Earlier in trial, when J. Carr had cross-examined the coroner on the Birchwood crimes, he attempted to establish that only one man fired the shots that killed the Birchwood victims.

> "Q. Based on this, in your opinion, would it not be consistent with one shooter moving down the line shooting Heather and shooting Aaron, then shooting Brad and finally shooting Jason?
>
> "A. I can't comment on that. I can only tell you about the injuries that I found at autopsy."

J. Carr's counsel argued during closing that there was only one gun and one shooter:

> "And that evidence shows who shot and killed four individuals. That person is Reginald Carr with that .380 black Lorcin handgun. Reginald Carr was not alone. But the evidence will show who was playing the lead role that night directing things, taking most of the things. That person again was Reginald Carr."

He also reinforced the reliability of Holly G.'s in-court identification of R. Carr:

> "[Holly G.]'s eyewitness identification of Reginald Carr is consistent and it's solid. If you go chronologically through the order in which she talks to law enforcement, you will see the same description over and over again."

And he attempted to explain Holly G.'s failure to identify R. Carr at preliminary hearing:

> "Now, at the preliminary hearing she identified Jonathan as the person she picked out of the photo array, not Reginald. But we know Reginald shaved his head and was wearing eyeglasses at the preliminary hearing. And at

> the time of trial she makes that correction[] and makes the identification."

J. Carr's counsel also argued that the property found in R. Carr's possession and law enforcement's stop of his Plymouth near the Birchwood residence corroborated other evidence of R. Carr's involvement in the Birchwood crimes. He then highlighted the State's DNA evidence, cigar ash evidence, and Holly G's contraction of HPV.

J. Carr's counsel also argued that the black handgun connected to all three incidents belonged to R. Carr.

At the conclusion of his argument, counsel for J. Carr admitted to J. Carr's involvement in some of the charged crimes, but he placed the bulk of moral responsibility on his codefendant brother:

> "Please remember that some of these crimes do remain unproven as to Jonathan Carr's guilt. Some of them he is actually innocent of. Now, just because the codefendant Reggie is guilty of all of the charges, just because the evidence shows regarding Jonathan some involvement on some of the counts, don't go back there and just check the box guilty all of the above. Please give Jonathan separate consideration on each count. Please consider his guilt or innocence separate from damning evidence against his brother Reginald. It shouldn't be guilt by association. It should be guilt beyond a reasonable doubt. Remember the testimony and our sole admitted exhibit showed Jonathan was supposed to be on a train to Cleveland from Newton in the early

> morning hours of the 15th of December. . . . A train that would have taken him back to his family and friends, but a train he never made because of Reggie."

Standard of Review and Legal Framework

The decision whether to sever a trial is one within the trial court's discretion. *State v. Reid*, 286 Kan. 494, 519, 186 P.3d 713 (2008) (citing *State v. White*, 275 Kan. 580, 589, 67 P.3d 138 [2003]).

Judicial discretion is abused if judicial action is arbitrary, fanciful or unreasonable, or based on an error of law or fact. *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011).

Under Kansas law, "[t]wo or more defendants may be charged in the same complaint, information or indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting the crime or crimes." K.S.A. 22-3202(3). However, "[w]hen two or more defendants are jointly charged with any crime, the court may order a separate trial for any one defendant when requested by such defendant or by the prosecuting attorney." K.S.A. 22-3204.

"[S]everance should be granted when it appears necessary to avoid prejudice and ensure a fair trial to each defendant." *State v. Davis*, 277 Kan. 231, 239, 83 P.3d 182 (2004) (citing *State v. Aikins*, 261 Kan. 346, 360, 932 P.2d 408 [1997]); see *Zafiro v. United States*, 506 U.S. 534, 539, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993) (district court should grant severance if there is serious risk that joint trial "would compromise a specific trial right of one of the defendants, or prevent

the jury from making a reliable judgment about guilt or innocence"). Although a single trial may serve judicial economy and ensure consistent verdicts, the right of a defendant to a fair trial must be the overriding consideration. *State v. Martin*, 234 Kan. 548, 550, 673 P.2d 104 (1983).

We have employed several factors to determine whether there was sufficient prejudice to mandate severance. *Davis*, 277 Kan. at 240 (quoting *State v. Butler*, 257 Kan. 1043, 1063, 897 P.2d 1007 [1995], *modified on other grounds* 257 Kan. 1110, 916 P.2d 1 [1996]). We consider:

> "'(1) that the defendants have antagonistic defenses; (2) that important evidence in favor of one of the defendants which would be admissible on a separate trial would not be allowed on a joint trial; (3) that evidence incompetent as to one defendant and introducible against another would work prejudicially to the former with the jury; (4) that the confession by one defendant, if introduced and proved, would be calculated to prejudice the jury against the others; and (5) that one of the defendants who could give evidence for the whole or some of the other defendants would become a competent and compellable witness on the separate trials of such other defendants.'" 277 Kan. at 240 (quoting *Butler*, 257 Kan. at 1063).

The party moving for severance has the burden to demonstrate actual prejudice to the district court judge. *State v. Hunter*, 241 Kan. 629, 633, 740 P.2d 559 (1987). But the United States Supreme Court has said that a trial judge "has a continuing duty at all stages of

the trial to grant a severance if prejudice does appear." *Schaffer v. United States*, 362 U.S. 511, 516, 80 S. Ct. 945, 4 L. Ed. 2d 921 (1960); see *United States v. Peveto*, 881 F.2d 844, 857 (10th Cir. 1989).

On appeal from a denial of severance, the party claiming error has the burden to establish a clear abuse of discretion. *State v. White*, 275 Kan. 580, 589, 67 P.3d 138 (2003). We also have held: "When a decision is made regarding joinder or severance, even if it is determined that there was an abuse of discretion, the defendant has the burden of showing prejudice requiring reversal." *State v. Boyd*, 281 Kan. 70, 80, 127 P.3d 998 (2006) (citing *State v. Crawford*, 255 Kan. 47, 54, 872 P.2d 293 [1994]). But evolving caselaw generally places the burden of demonstrating harmlessness on the party benefitting from the error. See *Ward*, 292 Kan. at 568-69. We apply that general rule in the severance context today.

Evaluation of Factors

In the guilt phase of this trial, there is no question that the defendants had antagonistic defenses, and the State concedes this point.

R. Carr argued that J. Carr committed the Birchwood crimes with another person. J. Carr's counsel emphasized the relative weakness of the evidence against his client in the Schreiber and Walenta incidents and consistently stressed the evidence of R. Carr's guilt in the Birchwood incident. Each defendant did his best to deflect attention from himself on the Birchwood crimes by assisting in the prosecution of the other. R. Carr insisted he was not involved at all until a temporary storage arrangement

was needed for the stolen property, and J. Carr essentially conceded guilt of both defendants but set up R. Carr as the leader, and thus the more culpable, of the pair. See *White*, 275 Kan. at 590 (quoting *State v. Pham*, 234 Kan. 649, 655, 675 P.2d 848 [1984]) (classic example of "intrinsically antagonistic defenses is where both defendants blame each other for the crime while attempting to defend against the State's case"); see also *Zafiro*, 506 U.S. at 539 (interpreting federal rule on severance similar to Kansas statute: "When many defendants are tried together in a complex case and they have markedly different degrees of culpability, . . . risk of prejudice is heightened", citing *Kotteakos v. United States*, 328 U.S. 750, 774-75, 66 S. Ct. 1239, 90 L. Ed. 1557 [1946]).

On the second factor, R. Carr contends that the denial of severance forced exclusion of testimony from Donley that was exculpatory to him but would have violated Jonathan's Sixth Amendment confrontation rights under *Bruton v. United States*, 391 U.S. 123, 137, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). See *State v. Rodriquez*, 226 Kan. 558, 561, 601 P.2d 686 (1979) (following *Bruton*).

On the second factor, it is also important for us to consider that each defendant apparently made at least one personally incriminating statement about being the one who fired the shots that killed Heather M., Aaron S., Brad H., and Jason B. Both of these statements were referenced during the penalty phase. Temica, the defendants' sister, testified that R. Carr told her he shot the four friends. One of the prosecutors referenced a similar statement by J. Carr, apparently made to fellow prisoners while he was in jail awaiting trial.

When the State argued to Judge Clark pretrial that an incriminating statement such as these by one defendant that implicated the other—in that instance, J. Carr's "[W]hat's Smoke got me into?" remark within earshot of Adams—would not have been admissible in a separate trial, it was plainly wrong. J. Carr's remark about "Smoke," given the context in which it was uttered, could have come in at a separate trial of R. Carr through J. Carr himself. It also qualified as a declaration against interest under K.S.A. 60-460(j), if it had to be admitted in a separate trial of either defendant through Adams or the person on the other end of J. Carr's telephone call. In the case of each of the defendant's statements about being the Birchwood shooter, no evidence of either statement could be admitted in the guilt phase of a joint trial under *Bruton*, 391 U.S. 123, because one defendant's confession to that act inevitably incriminated the other as the aider and abettor of that act. But each defendant's statement could have been admitted—and undoubtedly both would have been admitted by the State—in that defendant's separate trial. Each statement could have come into evidence through its hearer or as a declaration against interest under K.S.A. 60-460(j) or as a confession under K.S.A. 60-460(f). And R. Carr could have tried to use J. Carr's statement claiming personal responsibility for the shooting in the soccer field to bolster his "J. Carr-plus-third-person" defense.

This evidence that was inadmissible in a joint trial because of *Bruton*, 391 U.S. 123, but that would have been admissible at a separate trial of R. Carr, also includes R. Carr's eventually proffered own testimony about what J. Carr said to him during three telephone

calls and in person on the night of the Birchwood crimes. Judge Clark ruled erroneously, as fully discussed in Section 18 of this opinion, that these portions of R. Carr's proffer must be excluded under Kansas' third-party evidence rule and as hearsay. Had he not made these erroneous rulings, he would have had to consider the effectiveness of severance to enable R. Carr to get his defense before the jury that would determine his guilt alone.

The third factor from our precedent on severance is not applicable. The fourth factor cut in favor of the State because apparent confessions by each defendant could have come in at separate trials, as discussed above. The fifth factor would be inapplicable unless we assume that the State was willing to grant immunity to one brother to force him to testify against the other in the other's separate trial. This seems unlikely to have happened.

We conclude that Judge Clark's repeated refusal to sever the guilt phase of the prosecution against defendants for trial was an abuse of the judge's discretion.

To begin with, two mistakes of law are immediately recognizable. See *Ward*, 292 Kan. at 550 (judge abuses discretion by making mistake of law). Judge Clark failed to do the necessary analysis when he ruled against severance at the pretrial hearing on August 9, 2002, "for the same reasons . . . stated when it was first raised." There were three reasons stated when the subject of severance first arose: the absence of antagonistic defenses, the absence of an incriminating statement from either defendant, and the desire to

avoid putting Holly G. through two trials. The first of these reasons no longer applied.

The second mistake was Judge Clark's apparent willingness to follow the State's misstatement of the law during the same pretrial hearing about the continued inadmissibility of Adams' testimony about J. Carr's "[W]hat's Smoke got me into?" statement in separate trials.

Furthermore, we see an abuse of discretion in the dearth of record support for Judge Clark's virtually indistinguishable, nearly completely unexplained rulings over time, even though the conflict between the defendant's theories became more and more clear and the pile of evidence that would be excluded because of the joint trial grew ever taller. Given Judge Clark's continuing duty to carefully consider severance to avoid prejudice to a defendant, and the overriding status of the defendant's right to fair trial, Judge Clark's decisions were progressively unreasonable.

Prejudice

R. Carr urges us to conclude that Judge Clark's abuse of discretion led not just to prejudice but to prejudice requiring reversal.

R. Carr argues that the State's evidence against J. Carr for the Birchwood crimes was strong, far stronger than its evidence against him. The hair root recovered at the Birchwood home, matching semen samples from the victims, and test results confirming that bloodstains on J. Carr's clothing matched or could not exclude victims Heather M. and Holly G. placed J. Carr at the scene as one of the intruders, and J. Carr failed to contest this in any meaningful way. Because

J. Carr, as one of the perpetrators, had to know the identity of the second perpetrator, when J. Carr launched his trial strategy of minimizing his own role in these offenses and emphasizing Reginald's predominant one, a vouching dynamic similar in force to inculpatory accomplice testimony was created, adding credence to the State's case against R. Carr. Meanwhile, *Bruton* combined with Judge Clark's erroneous rulings on the third-party evidence and hearsay to prevent R. Carr from using the State's and his own evidence against J. Carr to even the playing field.

R. Carr suggests that this skewed the appropriate burden of proof and that it means we cannot know whether the jury convicted him based on the State's evidence, Jonathan's vouching, or a combination of the two—rendering the verdict unreliable. See *Zafiro*, 506 U.S. at 543-44 ("Joinder is problematic in cases involving mutually antagonistic defenses because it may operate to reduce the burden on the prosecutor, in two general ways. First, joinder may introduce what is in effect a second prosecutor into a case, by turning each codefendant into the other's most forceful adversary. Second, joinder may invite a jury confronted with two defendants, at least one of whom is almost certainly guilty, to convict the defendant who appears the more guilty of the two regardless of whether the prosecutor has proven guilt beyond a reasonable doubt as to that particular defendant."); *State v. McQueen*, 224 Kan. 420, 425, 582 P.2d 251 (1978) ("[W]hen the evidence is clear and convincing as to one defendant and not so as to the other, failure to sever may well cause prejudice which will result in manifest injustice in violation of constitutional due process."); but see

State v. Holley, 238 Kan. 501, 508, 712 P.2d 1214 (1986) ("claim of disparate evidence justifies severance in only the most extreme cases") (citing *United States v. Bolts*, 558 F.2d 316 [5th Cir. 1977]).

The State's first response is that the strength of its case against R. Carr demonstrates the reliability of the jury's verdict. It is correct that its independent case against R. Carr was overwhelming. See *McQueen*, 224 Kan. at 425 ("When the evidence of participation and identity of those charged is clear and convincing, prejudice from a joint trial may not be great.")

Schreiber, Walenta, and Holly G. all identified R. Carr. Nuclear DNA testing implicated R. Carr as well as J. Carr, specifically blood from R. Carr's shirts and shorts that matched Heather M. and foreign material recovered from Holly G.'s thigh that excluded all known contributors other than him and his brother. DNA from Schreiber's watch was generally consistent with R. Carr's genetic markers. Mitochondrial DNA testing pointed to R. Carr as a possible contributor of one hair collected from the Birchwood home. The State's ballistics expert testified that the black Lorcin was used in all three incidents, and that gun was linked to R. Carr by the eyewitness identifications of him using a similar black gun. Two shoeprints observed at the Birchwood home were consistent with R. Carr's Buffalino boots. Testimony from law enforcement personnel involved in R. Carr's arrest tended to show he attempted to flee by preparing to jump off Donley's balcony, and he gave an alias rather than his correct name. See *State v. Phillips*, 295 Kan. 929, 949, 287 P.3d 245 (2012) (evidence of flight, use of alias is probative of consciousness of guilt); *State v.*

Ross, 280 Kan. 878, 881, 127 P.3d 249, *cert. denied* 548 U.S. 912 (2006) (citing *State v. Walker*, 226 Kan. 20, 21, 595 P.2d 1098 [1979]) (same). R. Carr had genital warts, and Holly G. learned a few months after her sexual assault that she had contracted HPV, the virus that causes genital warts. Investigators collected larger-caliber ashes, consistent with those from a cigar, inside the Birchwood home. No other ashtrays, cigarettes, or other smoking materials were found in the home. When arrested, a partially smoked cigar with a plastic tip and a cigar box lid were recovered from the pockets of the leather coat Holly G. testified that R. Carr wore during the crimes. After R. Carr's arrest, law enforcement recovered numerous pieces of property owned by the Birchwood victims and Schreiber, as well as other highly incriminating evidence such as ATM receipts connected to the Birchwood victims' accounts, from R. Carr's person, from his girlfriend's apartment, and from the area and vehicles around it.

The State's evidence also challenged the credibility of R. Carr's defense, to the extent he was able to advance it.

The State's witnesses placed R. Carr near the scene of the Birchwood crimes shortly after they were reported. Holly G. testified that R. Carr drove Jason B.'s truck when the group traveled to the soccer field shortly after 2 a.m. Both intruders left together in the truck after the shootings. Sergeant John Hoofer testified about seeing a truck similar to Jason B.'s in the vicinity of the Birchwood home shortly after 3 a.m. About an hour later, Hoofer stopped R. Carr in his white Plymouth, after he had twice driven by the

Birchwood home. R. Carr said he was on his way to Donley's apartment. Donley confirmed R. Carr arrived at her apartment about 4:30 a.m.

Our review of the record persuades us that this was far from a case in which the State, by way of a joint trial, set the defendants upon each other and then coasted. Although its path to R. Carr's convictions was made somewhat smoother and straighter by the judge's related guilt phase errors on severance and on third-party evidence and hearsay, the State presented compelling evidence of R. Carr's guilt, all of which would have been admissible in a severed trial. See *State v. Pham*, 234 Kan. 649, 654, 675 P.2d 848 (1984) ("When the evidence of participation and identity of those charged is clear and convincing, prejudice from a joint trial may not be great."; citing *McQueen*, 224 Kan. at 425).

On the record before us, we hold that R. Carr is not entitled to reversal on this issue.

3. JOINDER OF NONCAPITAL COUNTS

R. Carr challenges the joinder for trial of the noncapital and capital charges against him. His November 19, 2001, motion to sever the charges was denied.

Kansas' criminal statute on joinder of charges and defendants provides:

> "Two or more crimes may be charged against a defendant in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors or both, are of the same or

> similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." K.S.A. 22-3202(1).

"Whether a defendant will be tried on all separate charges in a single trial is a matter within the discretion of the trial court, and its decision will not be disturbed on appeal unless there is a clear showing of abuse of discretion." *State v. Bunyard*, 281 Kan. 392, Syl. ¶ 2, 133 P.3d 14 (2006).

R. Carr argues that Judge Clark erred in denying his motion because the noncapital and capital charges in the amended complaint cannot be "of the same or similar character" because they are not subject to the same punishment. He further argues that the error requires reversal because it is possible that the jury considered or relied upon evidence pertaining to the Schreiber and Walenta incidents in deciding to impose a sentence of death, in violation of his rights under the Eighth and Fourteenth Amendments.

The State supports Judge Clark's decision as legally appropriate, contending that similarity of punishment is merely one of several factors the court may consider in deciding whether offenses are "of the same or similar character." It is not, the State asserts, a condition that must be satisfied before a district judge can exercise discretion to consolidate charges for trial. Should we reach a harmlessness inquiry, the State argues that R. Carr suffered no prejudice from any joinder error because the statutory capital sentencing scheme in Kansas combined with the judge's instructions properly limited the evidence the jury could consider on

aggravating circumstances justifying imposition of the death penalty.

We have previously identified factors relevant to determining whether crimes qualify as "of the same or similar character." Offenses that have general similarities, that "require the same mode of trial and the same kind of evidence, and occur in the same jurisdiction" are sufficiently alike to be tried together. See *State v. Crawford*, 255 Kan. 47, 53, 872 P.2d 293 (1994) (citing *State v. Ralls*, 213 Kan. 249, 256-57, 515 P.2d 1205 [1973]). We have also looked to similarity of punishment as another factor to consider. *State v. Barksdale*, 266 Kan. 498, 507, 973 P.2d 165 (1999).

The governing statute does not expressly require that joined offenses share common punishments. *Crawford*, 255 Kan. at 53. And we are loath to add a requirement not set out by the legislature. See *State v. Hendrix*, 289 Kan. 859, 862, 218 P.3d 40 (2009) (when statutory language plain, unambiguous, no need to resort to statutory construction; appellate court merely interprets language as it appears, does not speculate, read into statute language not readily found).

Indeed, the plain language of the statute explicitly provides that offenses with different punishments may be joined for trial. Joinder of offenses, "whether felonies or misdemeanors or both," is permitted under K.S.A. 22-3202(1). And the punishments for felonies and misdemeanors are, without question, widely divergent. Compare K.S.A. 2013 Supp. 21-6804 and 6805 (Sentencing Guidelines Act grids for nondrug, drug felonies) with K.S.A. 2013 Supp. 21-6602 (defining classes of misdemeanors, setting out permissible terms of confinement).

This court embraced such an analysis in *State v. Cromwell*, 253 Kan. 495, 856 P.2d 1299, *holding modified by State v. Willis*, 254 Kan. 119, 864 P.2d 1198 (1993), where we examined whether a district judge abused his discretion by refusing to sever the trial of two sets of charges for rape, robbery, and murder committed on two separate occasions. The defendant argued that a difference in the ages of the two victims, a lapse of 4 years between the two crimes, and the applicability of a hard 40 sentence to one incident but not the other, rendered the sets of charges sufficiently dissimilar to require that they be tried separately. 253 Kan. at 511.

On the subject of punishment similarity, we said:

> "The application of the 'hard 40' sentence to [one murder] but not to the [other murder] is not material. The legislature did not consider differences in sentences to be dispositive because K.S.A. 22-3202(1) speaks of the similarities of the crimes, not the sentences, and contemplates potential trial of felonies and misdemeanors together. Moreover, while the consideration of aggravating factors may distinguish the hard 40 from other sentences, the jury considers whether to impose the hard 40 in a separate proceeding after the guilt phase of the trial is complete. Thus, evidence of and argument about aggravating factors need not taint the guilt phase of the trial." 253 Kan. at 511.

This language from *Cromwell* is on point and persuasive. This court's decision in *State v. Thomas*, 206 Kan. 603, 608, 481 P.2d 964 (1971), cited by R. Carr, is not.

The *Thomas* opinion mentioned the dissimilarity of murder and forgery punishments incidentally in its discussion on whether the crimes could be joined for trial as "of the same or similar character." But a careful review of its language demonstrates that the court's primary focus was a complete lack of relationship between the two crimes and the evidence it would take to prove them:

> "Testing the offenses consolidated here, against the standards referred to, it cannot be said that murder and forgery are of the same general character; nor is the same kind of punishment required. As we have already observed, the murder evidence was totally unrelated to the forgery evidence—the evidence establishing one offense was no proof of any element of the other offense. The murder evidence was largely circumstantial, while that of forgery was documentary and eyewitness testimony. Except for police officers, who investigated aspects of both cases, the witnesses were separate and distinct with respect to each case." 206 Kan. at 608.

This case is different from *Thomas*. The three December 2000 incidents giving rise to the noncapital and capital charges against R. Carr are related in several important ways. The victims of the crimes identified one or both defendants as the perpetrators. There was evidence that each incident had a gun in common. Certain aspects of the perpetrators' modus operandi were consistent, at least between pairs of incidents—*e.g.*, one of the perpetrators held a black gun palm down in both the Schreiber and Walenta

incidents, the victims in both the Schreiber and Birchwood incidents were forced to drive to ATMs and withdraw money from their bank accounts, a light-colored car followed a woman driving home at night in the lead-up to both the Walenta and Birchwood incidents. Belongings of Schreiber and the Birchwood victims were discovered together. All of the incidents occurred within a few days of each other.

These multiple connecting points were more than enough to justify trying all of the charges arising out of the three incidents together. Identity of possible punishment between the noncapital and capital charges was not required under the plain language of the statute or our caselaw applying it. Judge Clark did not abuse his discretion in denying R. Carr's motion to sever the noncapital and capital counts for trial.

4. JURY SELECTION

R. Carr contends that Judge Clark erred in three ways on the parties' challenges for cause: (a) by excusing prospective juror M.W., who opposed the death penalty; (b) by failing to excuse allegedly mitigation-impaired jury panel members W.B., D.R., D.Ge., and H.Gu.; and (c) by excusing prospective jurors K.J., M.G., H.D., C.R., D.H., and M.B., who expressed moral or religious reservations about the death penalty. The State responds that all of these rulings by Judge Clark are supported by the record and that he properly exercised his discretion.

Excuse of M.W. for Cause

Additional Factual and Procedural Background

The defendants attempt to demonstrate that Judge Clark erred in excusing M.W. on the State's challenge for cause, based on M.W.'s death penalty view, by comparing the record of his questionnaire responses and voir dire to those of 11 other prospective jurors whom the defense challenged unsuccessfully. We therefore summarize what we know about M.W. and the 11 panel members to whom the defendants compare him.

M.W.

M.W. said in his responses to the questionnaire that he was morally opposed to the death penalty and could not vote to impose it under any circumstances.

During the State's voir dire, M.W. confirmed that he could never sentence a person to death, even if the court instructed him to do so. M.W. explained that his moral objection was founded on Biblical grounds and that his belief was firmly held and would not change. At times during defense voir dire, however, M.W. vacillated. He declared his ability to impose the death penalty if forced to do so by law and confirmed that his "moral, philosophical, or religious beliefs" would not prevent him "from following the law in this case and doing [his] job as a juror." Still, when counsel for R. Carr asked M.W. if he could sentence defendants to death, "[d]espite what the Bible says," M.W. responded, "The [B]ible comes first."

When the State challenged M.W. for cause because of his conflicting statements, Judge Clark inquired further on M.W.'s death penalty opposition:

> "[W]hat I heard you say is you could do your job every step of the way of being a juror, but the good book comes above all in your mind and it says thou shalt not kill and vengeance belongs to the Lord and you could not cast a vote against the Bible; that is, to impose death on another human being."

M.W. said, "Yes, sir", confirming that Judge Clark had summarized his position accurately, and he was excused.

J.R.

In his questionnaire, J.R. expressed strong support of the death penalty and said he had difficulty understanding how mitigating circumstances could justify a different sentencing outcome.

However, during the State's voir dire, J.R. said he would not support the death penalty in every case without regard to the particular facts. He agreed "absolutely" that the State should be required to prove that there were circumstances sufficient to warrant imposition of capital punishment, and he said he would consider mitigation evidence in this case.

J.R.'s statements during his voir dire by the defense were less than categorical. When asked whether he could truly give fair consideration to mitigating circumstances, J.R. responded, "I believe I could be fair. I will admit that I have a problem—I have a problem with" age as a mitigating circumstance. The defense asked, "Now by being fair, does that mean that if we

get to the second stage is your mind going to already be made up that it's death before we even present any evidence on mitigator[s] or are you going to keep an open mind?" J.R. responded, "I would say I'd have to keep an open mind," and he declared his ability to do so. Later, when defense counsel asked J.R. whether he would be leaning toward a sentence of death if the defendants were convicted of capital murder, J.R. said "[i]t would depend on the evidence." When counsel pushed for a clearer response, J.R. said that he "would probably be leaning toward death."

When the defense challenged J.R. for cause, Judge Clark asked several follow-up questions, some of which were leading. For example, after J.R. expressed some difficulty accepting age as a mitigating factor, Judge Clark inquired, "Even under instruction of law that that's one of the things you have to give consideration to?" J.R. confirmed that he could enter the sentencing phase of this case, if any, with an open mind and could set aside his personal views about the death penalty. The judge rejected the challenge for cause.

D.Gr.

D.Gr. was another prospective juror who favored the death penalty. But he said during voir dire that it would not be difficult for him to set aside his personal view and that he would consider evidence of mitigating circumstances fairly. He expressed his understanding that the law (as of the time of trial in this case, see *State v. Kleypas*, 272 Kan. 894, 1015-19, 40 P.3d 139 [2001], *cert. denied* 537 U.S. 834 [2002], *later overruled by Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 [2006]), required him to impose a life sentence if the State failed to prove aggravating

circumstances outweighed mitigating circumstances, and he confirmed that he would follow the law. He agreed further that the death penalty would not be imposed automatically upon conviction for capital murder and that he would be required to consider aggravating and mitigating circumstances to decide the appropriate penalty. Some of D.Gr.'s statements responded to leading questions from the prosecutor, such as "you're not of the frame of mind to just say okay, I've found them guilty of capital murder and it's over and I'm just going to impose the death penalty?"

During R. Carr's questioning, D.Gr. confirmed that in questionnaire responses he said that "the crime was too great, prison is not the answer." When R. Carr's counsel asked, "given the fact that you think the crimes committed were too great and that prison is not the answer, are you not, in fact, predisposed to vote for death if the State proves any of the aggravating circumstances that they've alleged?" D.Gr. responded, "If they're proven, I would have to vote for the death penalty." But, in responding to counsel's follow-up question, D.Gr. agreed that if any mitigator is found to equal the aggravators that he would be required to vote for life. D.Gr. said that his personal opinions would not impair his ability to consider mitigating circumstances as support for a life sentence and that he would consider mitigators even if convinced beyond a reasonable doubt that the crimes were committed in an especially heinous, atrocious, or cruel manner. D.Gr. again confirmed his willingness and ability to give meaningful consideration to mitigation evidence in response to questions from J. Carr's counsel. The judge rejected the defense challenge for cause.

D.Ge.

In questionnaire responses, D.Ge expressed strong support for the death penalty but also said that he neither favored nor opposed the penalty as a punishment; instead, he said, he would base his decision on the facts and law.

During the State's voir dire, D.Ge. confirmed his understanding that a juror cannot impose the death penalty automatically upon conviction. D.Ge. also declared that he would apply the law and could impose a life sentence if the evidence and law supported that outcome. Several of D.Ge's statements responded to leading questions from the prosecution, including the following exchange:

> "[PROSECUTION]: Now, you understand now that just because they're found guilty of the most severe crime doesn't mean that they're automatically given the death penalty. You agree with that now?
>
> "[D.GE]: Yes, I agree with that."

During questioning from R. Carr's counsel, D.Ge. confirmed that he could not impose a sentence of death if the State failed to carry its burden to prove aggravating circumstances outweighed mitigating circumstances. He strongly supported the death penalty in cases of multiple murders and when a murder was committed in an especially cruel and heinous way. In such situations, he was unsure whether any mitigation could warrant a sentence other than death. D.Ge. confirmed, however, that he would first get the facts from both sides and weigh the evidence before arriving at his sentencing decision and

that his personal beliefs would not interfere with his ability to do so.

S.T.

The defense challenged S.T. for cause because they believed her questionnaire responses demonstrated that she would automatically impose the death penalty. But S.T. said during voir dire that, when she answered the questionnaire, she was under the impression that the judge would impose the death penalty if the defendants were found guilty of capital murder; she was not aware of the jury's role in sentencing. Once the process was explained, S.T. said she would not impose the death penalty automatically in the event the defendants were convicted. She confirmed her willingness to consider the defendants' mitigation case fairly and to impose a life sentence if the State failed to prove that aggravating circumstances outweighed mitigating circumstances, and the judge rejected the challenge for cause.

R.P.

R.P. said that he would "go with the death penalty" if the defendants were found guilty beyond a reasonable doubt. On voir dire, R.P. explained, "[W]ell, heck, I just can't really consider after what has happened here or in any murder when somebody takes a human life why you wouldn't be in favor of [the death penalty]," and he expressed doubt whether mitigating circumstances could excuse the conduct alleged in this case. But R.P. also said that he would enter the sentencing phase with an open mind and that he would base his sentencing decision on the facts and law. He also said repeatedly during voir dire that he was

committed to following the law, and his questionnaire responses indicated he was willing to consider sentences other than death if various mitigating circumstances were presented. He did not believe that his personal views substantially impaired his ability to serve as a juror.

Counsel for J. Carr asked R.P. whether, given his personal views, he would be coming in to the sentencing phase leaning toward death if the jury had just convicted the defendants of killing five people. R.P. responded, "No, it's not—no I haven't. I haven't decided yet." Counsel continued to press the issue: "At that stage—before you heard any of the aggravators or mitigators, are you leaning one way or another of life or death after having been convicted of capital murder?" R.P. said, "No, I haven't really even considered it one way or the other yet. I'm just going to have to do it all when we get all the evidence."

When counsel for J. Carr challenged R.P. for cause, counsel appeared to recognize that, once the parties had explained the jury's role in the sentencing phase, R.P. had clarified his willingness to consider and impose a sentence other than death.

Judge Clark responded to the challenge by asking R.P.:

> "Mr. [P.], what I've heard you saying on those aggravators and mitigators—especially on [J. Carr's counsel's] questions—is if the State failed to prove, and you were saying not guilty, but if they failed to prove any aggravating circumstances or if the mitigating circumstances that the defendants put forward outweighed

those aggravators, then you'd vote for life. Isn't that what you said?"

R.P. replied, "Yes, sir."

This apparently satisfied the judge that R.P. would be willing to consider evidence supporting aggravating and mitigating circumstances and would sentence to life imprisonment if the State failed to carry its burden of proof. The judge rejected the defense challenge for cause.

B.Mc.

Counsel for R. Carr asked B.Mc. whether there was "any verdict other than death that is appropriate if an accused is convicted of capital murder." She responded: "If that's the only evidence that was presented and they were convicted of capital murder, no, it would be the death penalty, if that was the only evidence and that's the only decision that was made." Counsel then asked about aggravating and mitigating circumstances, and B.Mc. expressed her willingness to give fair consideration to mitigation evidence. She also said that, even if the State proved the crimes were committed in an especially heinous, atrocious, or cruel manner, she would "have to really consider" a defendant's lack of criminal history as a mitigating circumstance. B.Mc. said that, even though she personally supported the death penalty, she would set that aside, listen to all of the evidence, and weigh it in a manner consistent with the law as instructed.

R. Carr's counsel explained the state of the law on weighing of aggravating and mitigating circumstances, telling B.Mc. that, if the State failed to prove aggravators outweighed mitigators, then the jury

would be obligated to impose a sentence of life imprisonment. Asked if she was comfortable with that concept, B.Mc. said, "Yes. I would obey the law in whatever was set before me." In response to questions from J. Carr's counsel, B.Mc. agreed that her personal belief in capital punishment would not "substantially impair [her] ability to consider evidence in mitigation."

Judge Clark rejected the defense challenge to B.Mc. for cause, saying, "I hear her saying she'll consider all the factors present and make a decision based on the evidence and the law."

S.W.

S.W. responded to the questionnaire in a way that suggested he would vote to impose the death penalty automatically. But, like S.T., S.W. explained that he had completed the questionnaire without a full understanding of the capital sentencing process. Once Judge Clark and the parties explained the process, S.W. said it became clear that defendants are not to be sentenced to death automatically at the time of conviction, and he said he was committed to follow the law. Judge Clark rejected the defense challenge.

M.P.

M.P. was a criminal defense lawyer in private practice in Sedgwick County at the time of the trial. In his questionnaire and during the State's voir dire, M.P. expressed his support for the death penalty but said he would not impose such a sentence automatically upon conviction. M.P. agreed to apply the law as instructed, not as he interpreted it or believed it should be. He also expressed his willingness to consider all mitigating

evidence in the event of a sentencing phase. Judge Clark rejected the defense challenge.

K.M.

K.M. favored the death penalty but said she would decide the appropriate sentence based on the facts and the law. And, after the State explained the statutory weighing of aggravators and mitigators, K.M. declared her willingness and ability to vote for a life sentence. She expressed far greater concern about her ability to live with a decision to end another person's life. She also said that she would consider mitigating circumstances, but she did not know how much weight she could give them.

Judge Clark made further inquiry.

> "I think the last question, Miss [M], was whether or not you think that everything you've stated here, and maybe it's been yes or no to long questions, based on everything you've heard . . . do you think your ability would be substantially impaired to give consideration to mitigating circumstances should you be selected to serve should the case reach that far?"

K.M. responded, "No." The judge rejected the defense challenge.

T.F.

T.F. said he personally believed that the death penalty was the only punishment appropriate for taking another person's life. However, after the judge and the prosecution elaborated on the duties and obligations of a juror in a capital trial, T.F. said he

could set his opinion aside and give fair consideration to all of the evidence. He said he would not be leaning toward death in the event of conviction. And he said that he could give fair consideration to evidence the defendants offered in mitigation. Judge Clark rejected the defense challenge.

T.W.

T.W. admitted to having formed an opinion on the defendants' guilt and said she did not believe it was acceptable that the defense did not have to prove mitigating factors beyond a reasonable doubt. Yet she said that her opinion on guilt was based on pretrial publicity and that she could set it aside and decide the case fairly on the evidence. She also said she was personally opposed to the death penalty but could apply it if the law required her to do so. T.W. said she could give fair consideration to mitigating evidence, even if the State proved the crimes were committed in an especially heinous, atrocious, or cruel manner. She also affirmed that she would hold the State to its burden on sentencing.

The defense challenged T.W. for cause, but not on her views on the death penalty. They challenged her because of her preconceived ideas about guilt.

Judge Clark rejected the challenge, ruling that T.W. had confirmed her ability to set those ideas aside and judge the case based on the evidence and law.

The Standard of Review and Legal Framework

K.S.A. 22-3410(2)(i) provides that a district judge may remove a prospective juror for cause where "[h]is [or her] state of mind with reference to the case or any

of the parties is such that the court determines there is doubt that he [or she] can act impartially and without prejudice to the substantial rights of any party." We have held

> "that challenges for cause are matters left to the sound discretion of the trial court, which is in a better position to view the demeanor of prospective jurors during voir dire. A trial court's ruling on a challenge for cause will not be disturbed on appeal unless it is clearly erroneous or amounts to an abuse of discretion." *Kleypas*, 272 Kan. at 991 (citing *State v. Dixon*, 248 Kan. 776, 788, 811 P.2d 1153 [1991]).

K.S.A. 22-3410 is designed to protect a criminal defendant's Sixth Amendment right to trial by an impartial jury, a right reinforced by the defendant's Fifth Amendment right to due process. See *Ristaino v. Ross*, 424 U.S. 589, 597-98, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (1976). These protections are incorporated into and made applicable to the states through the due process provisions of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145-149, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). When applied to the jury selection process in a capital trial, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. See *Witherspoon v. Illinois*, 391 U.S. 510, 521, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968). This right is balanced against the State's strong interest in seating jurors who are able to apply the sentence of capital punishment within the framework provided for by the federal Constitution and state law. 391 U.S. at 521.

In *Witherspoon*, decided in 1968, the United States Supreme Court struck a balance between the competing interests and held "'that a sentence of death could not be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.'" *Kleypas*, 272 Kan. at 991-92 (citing *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 [1985]). *Witherspoon* recognized a distinction of constitutional significance between prospective jurors who have strong opinions about the death penalty and those whose views would prevent them from applying the law; the former remain eligible to serve, while the latter must be excused. See 391 U.S. at 519-21. And the Court's 1985 *Witt* decision

> "clarified the standard for determining when a prospective juror may be excluded for cause because of his or her views on the death penalty. The Court stated that a prospective juror may be excluded for cause because of his or her views on capital punishment where 'the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."'" *Kleypas*, 272 Kan. at 991 (quoting *Witt*, 469 U.S. at 424).

See *Lockhart v. McCree*, 476 U.S. 162, 184, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986) ("the Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on

the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case").

In *Witt*, "The Court recognized that 'this standard likewise does not require that a juror's bias be proved with "unmistakable clarity."'" *Kleypas*, 272 Kan. at 991 (quoting *Witt,* 469 U.S. at 424).

On appeal, the question before us is not whether we would have agreed with a district judge's decision on a strike for cause prompted by a panel member's opinion on the death penalty but whether the district judge's decision is fairly supported by the record. *Witt*, 469 U.S. at 434; see *Darden v. Wainwright*, 477 U.S. 168, 176, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) (appellate courts must examine context surrounding prospective juror's exclusion, qualification). If the record contains conflicting or ambiguous information, the United States Supreme Court has expressed its belief that deference is owed to "the trial court, aided as it undoubtedly was by its assessment of [the prospective juror's] demeanor." *Witt*, 469 U.S. at 434.

Record Support for Judge Clark's Rulings

When we consider, as we must, the universe of information from the jury questionnaires and voir dire of M.W. and the 11 jurors the defendants compare to him in support of their argument on this issue, it is apparent that Judge Clark's rulings are fairly supported by the record. See *Brooks v. Armco, Inc.*, 194 S.W.3d 661, 664 (Tex. App. 2006) ("In reviewing the trial court's decision on challenges for cause, we must consider the entire examination, not just answers that favor one side over the other.").

With regard to M.W. specifically, his remarks in response to the questionnaire and to questions from counsel at voir dire were inconsistent. But he finally confirmed to the judge that he could never vote to impose a sentence of death. This response demonstrated that M.W. was not qualified to sit on the jury in this case under K.S.A. 22-3410(2)(i). And, even if it were less definite, we would defer to the district judge who was able to evaluate M.W.'s demeanor and nonverbal communication, here, whether he had stopped vacillating and given a clear answer. Although it would have been better, as mentioned in Section 1 of this opinion on venue, if the judge had gotten to his final destination on M.W. without asking a leading question, we are satisfied that he did not abuse his discretion in excusing M.W. See *State v. Johnson*, 253 Kan. 75, 85, 853 P.2d 34 (1993) (district judge did not abuse discretion in excusing juror, despite declaration of ability to be fair to both sides, understanding that personal experiences not to be taken into account; panel member acknowledged four times that friends' negative experiences with law enforcement might interfere with her obligations as juror); see also *People v. Ayala*, 24 Cal. 4th 243, 275, 99 Cal. Rptr. 2d 532, 6 P.3d 193 (2000) (trial judge properly exercised discretion to remove prospective juror for cause after she said she did not believe she had strength to sentence another person to die; reviewing courts should defer to trial court when prospective juror unclear); *Humphreys v. State*, 287 Ga. 63, 72, 694 S.E.2d 316 (2010) (appellate court refuses to substitute its judgment for trial court's when three prospective jurors' statements equivocal, contradictory about ability to give meaningful consideration to three sentencing options); *Russeau v. State*, 171 S.W.3d 871,

879 (Tex. Crim. 2005) ("When a prospective juror's answers are vacillating, unclear, or contradictory, we accord deference to the trial court's decision. We will not second-guess the trial court when the prospective jurors are persistently uncertain about their ability to follow the law.").

Furthermore, we are not persuaded otherwise by the defendants' insistence that Judge Clark applied a differential standard as between M.W. and the 11 persons to whom M.W. is compared. Each of the 11 assured the judge that he or she could put aside personal opinions and decide this case on the evidence and the law. The fact that many of them shared one characteristic with M.W.—intermittent equivocation on whether he or she could do what would be asked of him or her—does not change the other, more salient fact: The 11 ultimately professed ability and willingness to discharge their duties as jurors. One did not—M.W. Again, we see no abuse of discretion by Judge Clark. See *State v. Nix*, 215 Kan. 880, 882-83, 529 P.2d 147 (1974) (no abuse of discretion to deny challenge for cause; prospective juror confirmed ability to listen to evidence, decide case on evidence, court's instructions).

Failure to Excuse W.B., D.R., D.Ge, and H.Gu. for Cause

The defendants argue that Judge Clark abused his discretion by denying their challenges against jurors W.B., D.R., D.Ge., and H.Gu for cause because these panel members' voir dire responses established that they would impose a sentence of death automatically upon conviction or could not consider and give effect to mitigating evidence, *i.e.*, they were "mitigation impaired."

The State responds that each of the four prospective jurors stated unequivocally that he or she would follow the court's instructions, even if they required a life sentence.

Additional Factual and Procedural Background

W.B.

W.B. expressed his support for the death penalty in his responses to the questionnaire. However, during the State's voir dire, W.B. said he could give fair consideration to the evidence and apply the law. He said he understood a juror's statutory duty to weigh aggravating circumstances against mitigating circumstances, and he expressed no objection to or concern with voting for a life sentence if the law required that result.

Under questioning by counsel for R. Carr, W.B. said that he had supported the death penalty "for almost forever." When counsel for J. Carr asked why, W.B. said, "[W]hy not?" He then said that he supported the death penalty because it was the law of Kansas and served a societal purpose.

During continued voir dire by J. Carr's counsel, Ron Evans, the following exchange occurred:

> "J. Carr's Counsel: Do you think after you convicted them, if you convict them, after you convict them of capital murder you would be leaning toward a death sentence?
>
> "W.B.: According to the law, yes.
>
> "J. Carr's Counsel: What if the Judge instructed you that you have to have an open mind, even

> after you've convicted them of capital murder, as to what sentence you should impose?
>
> "W.B.: I'm pretty sure the Judge would give us some kind of parameter of how open your mind should be.
>
> "J. Carr's Counsel: It should be completely open, as relates to—to the sentence.
>
> "W.B.: To the sentence, it would still be death.
>
> "J. Carr's Counsel: You would lean toward death based on your conviction of capital murder?
>
> "W.B.: Right.
>
> "J. Carr's Counsel: That scale that's on the judge's desk, you're saying that that scale, after you convicted them of capital murder, would be tilting toward death?
>
> "W.B.: Yes."

Counsel for J. Carr suggested to W.B. that such a position was likely to interfere with his ability to consider mitigating circumstances. W.B. disagreed, saying, "[Y]ou have to weigh it, you have to measure it, there has to be some storybook, you have to hear the evidence[;] you've got to know the facts." W.B. then said he held no opinion on whether the death penalty should be applied in this case.

The defense challenged W.B. for cause, asserting that he was mitigation impaired.

Before ruling on the challenge, Judge Clark said, "I don't hear [him] saying that. I hear him saying he would be willing to follow the instructions of law,

weighing mitigators and aggravators and make a decision in his best judgment as he sees the facts in light of the law." He then asked W.B. whether that was an accurate interpretation of his testimony. W.B. said it was.

Judge Clark rejected the defense challenge.

D.R.

D.R. expressed strong support for the death penalty in her questionnaire responses. Yet she agreed in voir dire that the death penalty should not be imposed automatically upon conviction and that the State would need to prove that it was an appropriate sentence. D.R. identified several mitigating circumstances set out in the questionnaire as aggravating circumstances, but she said in voir dire that those responses were based on an incomplete understanding of the capital sentencing process. Once she became aware of the sentencing phase, she expressed her willingness and ability to consider all mitigation evidence.

During voir dire by counsel for R. Carr, D.R. said she would listen and give fair consideration to his mitigation evidence. But she expressed doubt that certain mitigators, such as the age of a defendant or the defendant's minor role in the offense could excuse or justify the crimes that formed the basis of the charges.

Judge Clark made further inquiry of D.R.:

> "THE COURT: I think Miss R. is misunderstanding the questions being put in such a way. Let me say this: Should you be chosen to serve on the jury, you will receive a

very detailed set of instructions rather than just two, and whether or not one aided or assisted or abetted in a crime would be determined in the guilt part.

"If your guilt was not as great, that might be determined, but if there is a possibility that the jury would say it doesn't make any difference on participation, he's guilty of capital murder, then you would take that evidence that the participation was relatively minor. Then you make a decision as to what would be the proper penalty under the facts for the individual who had a relatively minor role, whether it be the getaway man or didn't know anybody was going to be killed, whatever the situation, you would consider it but you would consider it for a different reason when you are trying to figure out what the proper penalty is to be assessed against that individual under this set of facts.

"D.R.: Right.

"THE COURT: There's probably been 20 years of litigation up in the Supreme Court of the United States and the State of Kansas. I think what you are confusing is these two parts. As you just said awhile ago, you didn't know any of that August 28th and here it's given to you this morning in a brief set and asked questions about it, and if you are saying that under no circumstances at all would you consider these mitigating factors. . . . If there is no set of facts that would influence you to consider age or what part somebody played in a crime going forward, should a

sentence of less than death be imposed, you are not a proper person for this jury.

"But if you are saying that you can consider anything they bring forward and you'll look at it and you'll weigh it if they prove any aggravating factors, you'll weigh it and make your decision by weighing what you think the mitigators and the aggravators are worth and listen to one of these and make a decision on what is the proper penalty to be imposed on that individual under this set of facts. Is that what you are saying?

"D.R.: Yes.

"THE COURT: Okay."

Still later, during voir dire by counsel for R. Carr, when asked whether she could follow the law, D.R. said, "I'll do what the Judge tells me." Counsel said that people sometimes want to follow the law but cannot because of their beliefs; he asked whether D.R. agreed with this observation. D.R. replied, "You can't step outside the law. You have to follow the law." Then counsel asked D.R. if she could set aside her beliefs and follow the law. D.R. answered, "I can try. That is all I can say. I'm sorry."

The defendants challenged D.R. for cause, arguing that she "cannot tell us that she can follow the law. She says she will try but that's no assurance."

Again, Judge Clark spoke directly to D.R.:

"THE COURT: I don't think that was the question. The answer was I'll try. Will you follow the law that I say applies in the case?

"D.R.: Yeah.

"THE COURT: Will you base your decision on the evidence in the case and not on any preconceived notions or anything?

"D.R.: Yeah, because I only read the silly headlines anyway. They don't say much.

"THE COURT: Well, I think they were talking more about the preconceived notion about what you thought concerning the death penalty, what ought to happen concerning the death penalty.

"D.R.: No. Whatever you tell me, I'll follow the law."

The judge then rejected the defendants' challenge.

D.Ge.

D.Ge., discussed above as a comparison prospective juror for M.W., at times expressed unwillingness to consider a sentence other than death in the face of certain aggravating circumstances. But D.Ge. said on voir dire by the State that he understood a jury could not impose the death penalty automatically upon conviction. He also said that he would apply the law and could impose a life sentence if the evidence and law supported that outcome. D.Ge. confirmed that he could not impose a sentence of death if the State had failed to carry its burden to prove aggravating circumstances outweighed mitigating circumstances.

The defense challenged D.Ge. for cause, and Judge Clark rejected the challenge.

H.Gu.

During voir dire by counsel for R. Carr, H.Gu. was asked what sentence she would support, assuming the defendants were convicted of the capital murder charges. She initially said she would need to be "convinced" that a sentence other than death was appropriate. Explaining herself later in voir dire, H.Gu. said that she had been confused by the question; she thought counsel for R. Carr was asking about the verdict on the guilt phase, not about the sentencing phase. After counsel for R. Carr and Judge Clark clarified the law governing capital sentencing proceedings, H.Gu. said without equivocation that she would set aside her personal beliefs and apply the law as instructed. She also said she would give fair consideration to the defendants' mitigation case.

The defense challenged H.Gu. for cause, and Judge Clark rejected the challenge.

The Standard of Review and Legal Framework

The same standard of review and legal framework applicable to a district judge's decision to excuse a prospective juror who cannot set aside his or her objection to the death penalty applies equally to decisions not to excuse prospective jurors challenged for cause based on their inability to consider a sentence other than death. See *Morgan v. Illinois*, 504 U.S. 719, 728-29, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992) (applying *Witherspoon*, 391 U.S. at 518, and *Witt*, 469 U.S. at 423-24). The United States Supreme Court has explained:

> "A juror who will automatically vote for the death penalty in every case will fail in good faith

> to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empanelled and the death sentence is imposed, the State is disentitled to execute the sentence." *Morgan*, 504 U.S. at 729.

In addition to a defendant's rights under the Sixth Amendment and the Fifth Amendment's Due Process Clause, the Eighth Amendment right not to be subjected to cruel and unusual punishment requires jurors in a death penalty case to be able to give consideration to evidence of mitigating circumstances. See *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (sentencer, in all but rarest capital case, must not be precluded from considering, as mitigating factor, any aspect of defendant's character, record, or circumstances of offense).

Record Support for Judge Clark's Rulings

The defendants assert that these four prospective jurors should have been removed for cause because they were mitigation impaired. In their view, these four prospective jurors confirmed that they would impose a sentence of death automatically upon conviction and/or they confirmed they could not fairly consider mitigating circumstances.

The defendants are correct that selected passages from the questionnaire and voir dire responses of these four prospective jurors yield cause for concern, but the entirety of the record on them convinces us that it fairly supports Judge Clark's rulings. Again, our resolution of this issue has been complicated by the judge's use of leading questions, particularly glaring in his rehabilitation of W.B. and his rehabilitation—twice —of D.R. But all four jurors eventually professed understanding of and fidelity to the law governing the jury's role and function in capital sentencing. Thus we conclude that Judge Clark did not abuse his discretion in refusing to excuse them for cause. See *Reaves v. State*, 639 So. 2d 1, 4 (Fla. 1994) (no error in denial of challenge to four prospective jurors who suggested they would vote automatically for death penalty in event of conviction; record contained evidence prospective jurors rehabilitated); *Brockman v. State*, 292 Ga. 707, 739 S.E.2d 332, 347 (2013) (trial court did not err by rejecting challenges for cause; "When viewed as a whole, the voir dire of [two jurors] shows that, while they indicated a leaning toward the death penalty, they would listen to all the evidence and would fairly consider both sentencing options."); *Humphreys v. State*, 287 Ga. 63, 72, 694 S.E.2d 316 (2010) (no abuse of discretion when trial court denied challenges on six panel members; all six jurors "expressed a leaning toward the death penalty, [but] they all stated that they would listen to and consider mitigating evidence and that they could give fair consideration to and vote for each of the three sentencing options"); *State v. Odenbaugh*, 82 So. 3d 215, 238-241 (La. 2011), *cert. denied* 133 S. Ct. 410 (2012) (no abuse of discretion to deny challenge for cause, although juror repeatedly stated death penalty justified in circumstances like

those at issue in case, could not find situation in which life sentence would be proper under similar facts; juror did not suggest he would automatically impose death penalty upon conviction); *Leatherwood v. State*, 435 So. 2d 645, 654 (Miss. 1983) (no abuse of discretion in denying challenge for cause when prospective jurors strongly supported death penalty; "[w]hen questioned by counsel both jurors said that they could put aside their personal feelings, follow the law and instructions of the court[,] return a verdict based solely upon the law and the evidence[,] and not vote for the death penalty unless the evidence warranted it."); *State v. Braden*, 98 Ohio St. 3d 354, 360, 785 N.E.2d 439 (2003) (trial court in capital murder prosecution not required to grant challenge for cause to prospective juror who stated he would automatically go to death sentence upon finding defendant guilty; prospective juror stated he would have to hear all facts before making decision, would have to consider the alternatives, would have to weigh mitigating factors; other responses showed commitment to being fair-minded); *Moore v. State*, 999 S.W.2d 385, 400 (Tex. Crim. 1999) ("When the record reflects that a venireman vacillates or equivocates on his ability to follow the law, the reviewing court must defer to the trial court.").

Violation of Section 7 of the Kansas Constitution Bill of Rights

R. Carr also argues on this appeal that Judge Clark violated Section 7 of the Kansas Constitution Bill of Rights by excusing six prospective jurors—K.J., M.G., H.D., C.R., D.H., and M.B.—based on their religious opposition to the death penalty.

Additional Factual and Procedural Background

Judge Clark excused these jurors because they said they could not impose the death penalty under any circumstance. K.J. said that her objection to the death penalty was "[n]ot only religious. There are other beliefs also that I feel that way." M.G. relied on religious beliefs and general beliefs that the death penalty was morally unjust and humans should not be killing other humans. H.D. said she objected to the death penalty on moral and religious grounds; she said the two could not be separated easily because her moral code was founded upon or influenced by her religion. C.R. testified that her own personal moral code prevented her from imposing the death penalty under any circumstance. D.H. expressed moral and religious opposition to the death penalty, which would prevent him from supporting any sentence other than life imprisonment. M.B. stated that his religious views, life experience, upbringing, and personal moral code would prevent him from supporting a sentence of death under any circumstance.

The Standard of Review and Legal Framework

Section 7 of the Kansas Bill of Rights provides that "[n]o religious test or property qualification shall be required for any office of public trust." We have held that this section "does not provide any greater limitation than already provided under K.S.A. 43-156," *Kleypas*, 272 Kan. at 993, which provides that "[n]o person shall be excluded from service as a grand or petit juror in the district courts of Kansas on account of . . . religion . . . ."

Meanwhile, K.S.A. 22-3410(2)(i) provides that a prospective juror may be challenged for cause as unqualified to serve when he or she is partial or biased. A person who admits that he or she cannot follow the law requiring imposition of the death penalty in specific situations is, by definition, unqualified by partiality. See *State v. Campbell*, 217 Kan. 756, 765, 539 P.2d 329 (1975) (allegation of discrimination in selection of jury necessarily requires showing recognizable, identifiable class of persons, otherwise entitled to be jury members, purposefully, systematically excluded) (citing *Brown v. Allen*, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469 [1953]).

We recognize and acknowledge the existence of some tension between these statutes. The necessity of and process to achieve "death qualification" of jurors under K.S.A. 22-3410(2)(i) butts up against K.S.A. 43-156 when the reason a prospective juror can never participate in imposition of the death penalty, compelling removal of that person for cause, has a basis in a religious code.

This tension is resolved with a fine distinction with its roots in family law. We recently decided *Harrison v. Tauheed*, 292 Kan. 663, 256 P.3d 851 (2011), a case involving parents in conflict over custody of their child because of the mother's religious faith and related practices. In *Tauheed*, we drew a line between belief and behavior. We cautioned district judges resolving such disputes, instructing them to avoid discrimination between parents on the basis of religious belief or lack of belief but to act as required when behavior prompted by the belief or lack of belief was incompatible with the best interests of the child. 292 Kan. at 683-84.

Like parents, jurors cannot be discriminated against on the basis of their religious belief or lack of belief. But they can be excluded from jury service when their belief or nonbelief makes it impossible for them to act in conformance with the signature requirement of that service: impartiality under the rule of law.

Judge Clark did not abuse his discretion or violate Section 7 of the Kansas Constitution Bill of Rights or K.S.A. 43-156 when he excused K.J., M.G., H.D., C.R., D.H., and M.B. for cause. See *Kleypas*, 272 Kan. at 993 (no violation of Kansas Constitution Bill of Rights, statute when prospective jurors excused for inability to be impartial, follow oath).

5. Reverse *Batson* Challenge to Peremptory Strike

R. Carr argues that Judge Clark failed to follow the three steps required under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), when he refused to permit the defense to exercise a peremptory challenge to remove W.B from the jury. W.B., like the defendants, is a black man. R. Carr argues further that Judge Clark's error was structural and entitles him to reversal of all of his convictions on all counts. The State responds that Judge Clark did not err, and, in the alternative, that any error was harmless.

Additional Factual and Procedural Background

Of the panel of 60 prospective jurors qualified for final selection in this case, 3 were black, C.B., D.M., and W.B.

During individual voir dire, the defendants passed C.B. and D.M. for cause. The State challenged D.M. for cause based on his death penalty views. The defense successfully rehabilitated D.M., and the trial court rejected the State's for-cause challenge. The State later exercised peremptory challenges to remove both C.B. and D.M. The defendants lodged an unsuccessful *Batson* challenge to the State's strike of C.B. The defendants were successful in keeping D.M. on the jury.

The defendants had challenged W.B. for cause unsuccessfully, as discussed in Section 4 of this opinion. Then R. Carr attempted to exercise his 12th, and last, peremptory strike against W.B.; and the State lodged a *Batson* challenge, arguing that the defense was striking "one of the remaining black males that we have." Counsel for R. Carr replied:

> "First, Your Honor, I think they have to make the prima [facie] case that I have engaged in a pattern of challenging based on race. I don't think they've done that.
>
> "Secondly, with the number of jurors having—I have to shepherd my peremptory challenges and not use them promiscuously. [W.B.] based on an answer on voir dire is one of the mitigation-impaired jurors we have. He told us he was in favor of death on most, if not all, of the mitigating circumstances. He left blank—he gave inconsistent answers with regard to the same. After being questioned, rehabilitated and questioned again, he indicated on the record that after a conviction he would be leaning towards death.

> "Lastly, in response to Mr. Evans' question, why are you in favor of the death penalty, based on my listening to [W.B.], he answered in a sarcastic and contemptuous manner, ['] why not['] . This is not a racial challenge—there is not a racial reason for my challenge of [W.B.]"

Judge Clark sought no more comment from the prosecution. Then he said:

> "To me it works both ways. Once it's raised, then the reason that's adequate under law must be stated. I find that the reason stated might be supported under a certain interpretation but they are not adequate under the law. I will sustain the *Batson* challenge."

Counsel for J. Carr then announced that he too would exercise his final peremptory challenge to remove W.B. Anticipating the State would reassert its objection to the strike under *Batson*, counsel spoke, first referencing W.B.'s responses on the jury questionnaire:

> "Our reasons for exercising a preempt on W.B. have absolutely nothing to do with his color. When I—when I got these questionnaires, obviously we didn't know the color of W.B. and I had him rated at the very—as one of the very worst jurors of the first panel. I rated this based on his answers. On his marking 5 on the death penalty scale, that didn't make him one of the worst, but it started making me think that perhaps he would not be a favorable juror, especially on a death penalty case. He circled 'D,' in favor, based on the law and the facts. It's

another factor, though, that I look at in trying to rate the jurors. I still don't know whether he's white or black.

"I come down, I look at his markings on the aggravators and mitigators. He thinks that the defendant not having a significant history of prior criminal activity is an aggravator. He marked 'F.' He also marked 'F,' in favor of the death penalty, on the mitigator and statutory mitigator 'E.' He marked 'F' on a third statutory mitigator, 'I' the defendant acted under extreme distress or substantial domination of another person. He also marked 'F' on that statutory mitigator. He left 'M,' that's the age mitigator, blank. It is my memory, and I don't have any notes on this, it seems like someone asked him about that and I don't think he expressed any interest in that being any sort of mitigation, the age of the defendant.

"Based on those answers, I had W.B. rated, at least from Jonathan Carr's perspective, as a very poor juror. And it surprised me when, frankly, it probably shouldn't have, it surprised me when he hit the juror box and I saw he was an African-American man.

"When he was questioned, I didn't—didn't take his answers to be favorable to us at all. And I would reiterate the reasons stated by [R. Carr's counsel]. It's my memory when we asked him those questions about which way he was leaning, if they found Jonathan Carr guilty of capital murder, he said he would be leaning toward death. And I was the one questioning

him and I was looking him right in his eye when I asked him, why are you for death. And it was me that he focused with his eyes, and I took it to be part sarcasm, and I saw some contempt in his eyes when he said to me, why not. And I gave him the laundry list of reasons why, you know, the - of why people are for the death penalty. And again, when he answered that, when I was trying to help him, give him a reason, I found his answer very unsatisfactory. Not a thoughtful answer.

"And last, but certainly not least, Judge, we voted to strike W.B. for cause. We think that he—you know, with all due respect to you, Judge, I respect your ruling, but we moved for you to excuse him for cause because we think he's mitigation impaired. I don't think we have any choice but at least to move him excused—certainly peremptory challenge or we waive that error. I mean he is as bad a juror from a death perspective. I think he is the worst juror from a death perspective Jonathan Carr could possibly have that's left on the panel. And that has nothing—nothing to do with the fact he's an African-American man. I would have been for striking him regardless of his race based on his answers. So those are my racially neutral reasons. It has nothing to do with the fact W.B. is an African-American. We move—he's our 12th challenge."

Judge Clark confirmed that the State intended to challenge the exercise of J. Carr's peremptory strike of

W.B. and, without hearing further argument, sustained the challenge.

Judge Clark seated W.B. on the jury, and W.B. was elected Presiding Juror.

Batson*'s Requirements and Standards of Review*

Batson's central teaching is that the Equal Protection Clause of the Fourteenth Amendment forbids the prosecution from engaging in purposeful discrimination on the basis of race when it exercises peremptory challenges. 476 U.S. at 89; *State v. Hood*, 242 Kan. 115, 123, 744 P.2d 816 (1987) (adopting *Batson* framework). This prohibition was extended to a criminal defendant's use of peremptory challenges in *Georgia v. McCollum*, 505 U.S. 42, 46-55, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992). When the State challenges a peremptory strike under *McCollum*, such a challenge has come to be known as a "reverse *Batson*" challenge. *United States v. Thompson*, 528 F.3d 110, 115 (2d Cir. 2008).

A district judge's handling of a *Batson* or reverse *Batson* challenge involves three steps, each subject to its own standard of review on appeal. See *State v. McCullough*, 293 Kan. 970, 992, 270 P.3d 1142 (2012) (citing *State v. Hill*, 290 Kan. 339, 358, 228 P.3d 1027 [2010]; *State v. Pham*, 281 Kan. 1227, 1237, 136 P.3d 919 [2006]).

"Under the first step, the party challenging the strike must make a prima facie showing that the other party exercised a peremptory challenge on the basis of race." *McCullough,* 293 Kan. at 992. "Appellate courts utilize plenary or unlimited review over this step." 293 Kan. at 992 (citing *Hill*, 290 Kan. at 358).

"[I]f [a] prima facie case is established, the burden shifts to the party exercising the strike to articulate a race-neutral reason for striking the prospective juror. This reason must be facially valid, but it does not need to be persuasive or plausible. The reason offered will be deemed race-neutral unless a discriminatory intent is inherent in the explanation. The opponent of the strike continues to bear the burden of persuasion." *McCullough*, 293 Kan. at 992 (citing *Hill*, 290 Kan. at 358). The scope of review on a district judge's ruling that the party attempting the strike has expressed racially neutral reasons is abuse of discretion. *State v. Sledd*, 250 Kan. 15, 21, 825 P.2d 114 (1992) (citing *Smith v. Deppish*, 248 Kan. 217, 807 P.2d 144 [1991]).

In the third step, the district judge determines whether the party opposing the strike has carried its burden of proving purposeful discrimination. "This step hinges on credibility determinations because usually there is limited evidence on the issue, and the best evidence is often the demeanor of the party exercising the challenge. As such, it falls within the trial court's province to decide, and that decision is reviewed under an abuse of discretion standard." *McCullough*, 293 Kan. at 992 (citing *Pham*, 281 Kan. at 1237; *Hill*, 290 Kan. at 358-59). As set forth above, judicial discretion is abused if judicial action is arbitrary, fanciful, or unreasonable; or based on an error of law or fact. *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011).

Preservation

The State asserts that the defendants waived their right to pursue this issue on appeal by failing to object to the judge's procedure in district court. Although there may be a debatable fact question on this point,

because this is a death penalty case, K.S.A. 2013 Supp. 21-6619(b) makes this preservation attack beside the point. The statute requires us to consider all errors asserted on appeal in a death-penalty case. See *State v. Cheever*, 295 Kan. 229, 241, 284 P.3d 1007, *cert. granted in part* 133 S. Ct. 1460 (2013), *vacated and remanded on other grounds* 134 S. Ct. 596 (2013).

Judge Clark's Error

We have no hesitation in ruling that Judge Clark erred in his consideration and grant of the State's reverse *Batson* challenge to each of the defendants' peremptory strikes of W.B.

The record establishes that, after the State raised its objections to the defendants' strikes of W.B.—merely pointing out on R. Carr's strike that W.B. was "one of the remaining black males that we have" in the venire and merely answering, "Yes, your honor," when the judge asked if the prosecution intended to renew its objection on J. Carr's strike—Judge Clark did not make a finding on the record that the State had established a prima facie case of discrimination. Moreover, defense counsel for R. Carr and J. Carr each articulated more than one race-neutral reason for striking W.B., including his demeanor and death penalty views. See *State v. Angelo*, 287 Kan. 262, 274-75, 197 P.3d 337 (2008) (recognizing this court has upheld peremptory strikes based on counsel's intuition, interpretation of juror demeanor, body language); *Smith v. Deppish*, 248 Kan. 217, 229, 807 P.2d 144 (1991) (characteristics of juror's nonverbal communication, demeanor race-neutral); see also *United States v. Barnette*, 644 F.3d 192, 215 (4th Cir. 2011) *cert. denied* 132 S. Ct. 1740 (2012) (wavering

personal view of death penalty race-neutral basis for strike under *Batson*); *Berry v. State*, 802 So. 2d 1033, 1042 (Miss. 2001) ("A challenge . . . based upon a juror's views on the death penalty is an acceptable race neutral reason."). Again, Judge Clark did not articulate why the reasons given by the defense in the second *Batson* step were inadequate; he did not hear any argument from the State on why the reasons stated by defense counsel should be dismissed as pretextual. Then Judge Clark simply sustained the State's challenges, gliding by the third step under *Batson* entirely.

The State's reliance on our decision in *Angelo*, 287 Kan. 262, to persuade us otherwise is misplaced. *Angelo* is distinguishable from stem to stern.

First, in that case, we reviewed an unsuccessful *Batson* challenge by the defense; it did not review a successful reverse *Batson* challenge by the State. In addition, the record was clear in that case that the district judge heard argument from the parties on each step of the required analysis before ruling. This court noted: "Specifically, after initially stating that it had not detected a pattern of discrimination, [the district judge] heard the State's reasons and supporting information for striking the jurors and then asked for, and received, [the defendant's] responses." 287 Kan. at 274. This directly enabled our holding that the district judge had considered all of the information and "impliedly held [the defendant] failed to prove that the State's reasons were pretextual and that he therefore failed in his ultimate burden to prove purposeful discrimination." 287 Kan. at 275. What happened in

Angelo did not happen here, and it is not persuasive authority.

An exercise of discretion built upon an error of law qualifies as an abuse of that discretion. See *State v. White*, 279 Kan. 326, 332, 109 P.3d 1199 (2005) ("[A]buse-of-discretion standard does not mean a mistake of law is beyond appellate correction. A district court by definition abuses its discretion when it makes an error of law."). Judge Clark abused his discretion on the State's reverse *Batson* challenge to the defendants' peremptory strikes of W.B.

Harmlessness

R. Carr argues that Judge Clark's error was structural. The State urges us to apply harmless error analysis.

Our examination of these opposing viewpoints begins with a review of the United States Supreme Court's decision in *Rivera v. Illinois*, 556 U.S. 148, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009).

In *Rivera*, the Court held that state courts have the authority to determine the appropriate remedy when a trial court judge erroneously denies a defendant's peremptory challenge in good faith. Defendant Michael Rivera attempted to exercise a peremptory challenge against a Hispanic juror. 556 U.S. at 152-53. The trial court erroneously denied Rivera's peremptory strike, exercising a *sua sponte* reverse *Batson* challenge. The juror eventually was elected foreperson of the jury, and Rivera was found guilty. 556 U.S. at 153-54. The Illinois Supreme Court agreed that the trial judge erroneously granted the reverse *Batson* challenge, but it rejected the notion that such error was reversible

absent a showing of prejudice. 556 U.S. at 155. The United States Supreme Court granted certiorari "to resolve an apparent conflict among state high courts over whether the erroneous denial of a peremptory challenge requires automatic reversal of a defendant's conviction as a matter of federal law." 556 U.S. at 156.

The Court first characterized the right to peremptory challenge as one that arises under state law without federal constitutional protection:

> "[T]his Court has consistently held that there is no freestanding constitutional right to peremptory challenges. [Citation omitted.] We have characterized peremptory challenges as 'a creature of statute,' [citation omitted] and have made clear that a State may decline to offer them at all. [Citations omitted.] When States provide peremptory challenges (as all do in some form), they confer a benefit beyond the minimum requirements of fair [jury] selection, [citation omitted] and thus retain discretion to design and implement their own systems [citation omitted].
>
> "Because peremptory challenges are within the States' province to grant or withhold, the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution. 'A mere error of state law,' we have noted, "is not a denial of due process." [Citations omitted.] The Due Process Clause, our decisions instruct, safeguards not the meticulous observance of state procedural prescriptions, but 'the fundamental elements of fairness in a criminal trial.' [Citations omitted.]" 556 U.S. at 157-58.

Accordingly, the Court left the duty to tailor appropriate relief for deprivations of this state law right to the state courts:

> "Absent a federal constitutional violation, States retain the prerogative to decide whether such errors deprive a tribunal of its lawful authority and thus require automatic reversal. States are free to decide, as a matter of state law, that a trial court's mistaken denial of a peremptory challenge is reversible error per se. Or they may conclude, as the Supreme Court of Illinois implicitly did here, that the improper seating of a competent and unbiased juror does not convert the jury into an ultra vires tribunal; therefore the error could rank as harmless under state law." 556 U.S. at 161-62.

Under *Rivera*, the first issue we must decide is whether Judge Clark acted in good faith. If not, his error offends Fifth and Fourteenth Amendment due process protections and may require automatic reversal of all of R. Carr's convictions. See *Bell v. Jackson*, 379 F. Appx. 440, 445 (6th Cir. 2010) ("*Rivera* leaves open the possibility that a *Batson* error might require reversal as a matter of due process if the trial judge repeatedly or deliberately misapplie[s] the law or act[s] in an arbitrary or irrational manner."). If, on the other hand, Judge Clark acted in good faith, his error does not implicate federal constitutional guarantees, and the decision on its remedy is a matter of state law.

At least two courts have considered a trial judge's good and bad faith and their effects since *Rivera*.

In *Pellegrino v. AMPCO System Parking*, 785 N.W.2d 45 (Mich. 2010), the Michigan Supreme Court considered a trial court's ruling on a reverse *Batson* challenge in a civil action. The court first observed that *Rivera* "contrasted a judge's good-faith mistake with one arising because the judge deliberately misapplied the law or because the judge had acted in an arbitrary or irrational manner." 486 Mich. at 350. The court determined that the trial judge "deliberately refused to follow the three-step process required under *Batson* because [the judge] thought that process required the court to 'indulge' in 'race baiting.'" 486 Mich. at 351. Despite never finding a *Batson* problem in the first place, the judge "arbitrarily proceeded" as if the State had established such a violation and disallowed the defendant's peremptory strike. 486 Mich. at 350-51. This required automatic reversal of the Court of Appeals decision, remand to the district court, and a new trial before a different judge. 486 Mich. at 354.

In *Chinnery v. Virgin Islands*, 55 V.I. 508, 2011 WL 3490267 (V.I. 2011), the Supreme Court of the Virgin Islands held that the trial judge erred in sustaining the prosecution's reverse *Batson* challenge, and the prosecution argued that the error should be deemed harmless. The court recognized that *Rivera* granted it the authority to decide the standard of reversibility or remedy in such a situation, as long as the judge's error was made in good faith. But this error was not made in good faith. During jury selection, the prosecution had challenged two of defendant's peremptory strikes under *Batson*. Defense counsel explained that the strikes were based on the jurors' social class and how they had looked at him. The judge responded: "I don't do that," and sustained the reverse *Batson* challenge. 2011 WL

3490267, at *7. Still, the judge allowed the defendant to use his peremptory challenge to remove one of the two jurors. The Virgin Islands Supreme Court reacted to this behavior by the trial judge:

> "[T]he Superior Court, like the judge in *Pellegrino*, denied [the defendant] his right to exercise his peremptory challenges based on its own personal preferences rather than a good-faith attempt to follow *Batson*. Moreover, even if the Superior Court initially acted in good-faith—which we have no reason to doubt—its ultimate decision to nevertheless allow [the defendant] to choose to strike one of the two prospective jurors—notwithstanding the fact that it had rejected [the defendant's] race-neutral explanation and upheld the People's *Batson* challenge with respect to both jurors—was inherently arbitrary and irrational." 2011 WL 3490267, at *7.

The court reversed and remanded for new trial, because the absence of good faith meant that the error rose to the level of a deprivation of due process. 2011 WL 3490267, at *7.

Here, the defense argument that Judge Clark's error was not made in good faith rests entirely on the fact that his application of the three steps of *Batson* was incomplete. But acceptance of this argument would tend to elevate every *Batson* error to one made in bad faith, and we are unwilling to take the first step in that direction. See *Bell*, 379 F. Appx. at 445 ("But aside from the brevity with which the trial court addressed his objections, [the defendant] offers nothing to show that any error was more than" one made in good faith).

Instead, we have carefully examined the entire record to determine whether Judge Clark's conduct on the reverse *Batson* challenge was part of a pattern of hostile behavior toward the defense. As discussed throughout this opinion, although we have identified isolated instances in which Judge Clark's performance might have been improved, the record does not demonstrate that either his general performance or his specific decision on this reverse *Batson* challenge is deserving of the perverse distinction of a bad faith label. This case is different from *Pellegrino* and *Chinnery*, in which trial judges defied or refused to apply *Batson* analysis or appeared to reverse themselves in midstream. The record discloses no such deliberate or erratic conduct on the part of Judge Clark.

We turn now to the question of the remedy for a good faith mistake, a question delegated to us for decision by *Rivera*. A review of the positions taken by other state and federal courts reveals a split of authority.

Several states have concluded that reversal is automatically required when a trial court erroneously denies a defendant his or her right to exercise a peremptory challenge. The Iowa Supreme Court's decision in *State v. Mootz*, 808 N.W.2d 207 (Iowa 2012), outlines the arguments commonly advanced in support of a structural error approach well.

In *Mootz*, the defendant appealed his conviction for assault on a law enforcement officer resulting in bodily injury. During voir dire, the defense sought to use a peremptory strike to remove a Hispanic member of the venire, and the trial judge prevented it from doing so.

The judge ruled erroneously that the strike was based on the venire member's race, and he was seated on the jury and elected foreperson.

At the Iowa Court of Appeals level, the panel held that the trial judge erred by denying the defendant his right to exercise the peremptory strike, but it treated the mistake as harmless error. 808 N.W.2d at 214. The panel analogized to *State v. Neuendorf*, 509 N.W.2d 743, 747 (Iowa 1993), in which the Iowa Supreme Court had held that prejudice would not be presumed when a defendant was forced to "waste" a peremptory challenge to correct an erroneous denial of a challenge for cause. *Mootz*, 808 N. W. 2d at 221.

On review of the court of appeals decision, the Iowa Supreme Court distinguished *Neuendorf* and its more recent holding in *Summy v. City of Des Moines*, 708 N.W.2d 333, 340 (Iowa 2006) (prejudice will not be presumed when court erroneously grants litigant's challenge for cause), because the *Mootz* venire member ultimately was seated on the jury, whereas prospective jurors in *Neuendorf* and *Summy* ultimately were not. The court also said it had limited ability to assess accurately what impact the objectionable juror had on the proceedings. 808 N.W.2d at 225. "A defendant could only show prejudice by showing that the juror he sought to remove was biased. However, if the juror were biased, then the juror would be removable for cause, and the question regarding the peremptory challenge would become moot." 808 N.W.2d at 225. The Iowa Supreme Court found it unacceptable that a defendant could be left with no remedy for a reverse *Batson* error, and it imagined the drafters of the state

rule governing peremptory strikes would feel the same. 808 N.W.2d at 225-26.

Appellate courts in Alabama, California, Connecticut, Florida, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, New York, South Carolina, Vermont, Washington, and Wisconsin are in accord with Iowa in holding that reverse *Batson* error committed by a trial judge in good faith is structural; seven of them arrived at the position after *Rivera* was handed down, and eight before. See *Zanders v. Alfa Mut. Ins. Co.*, 628 So. 2d 360, 361 (Ala. 1993) (reversing judgment and remanding for new trial in *civil* action); *People v. Gonzales*, B224397, 2012 WL 413868 (Cal. Ct. App. 2012) (unpublished opinion) (where defendant forced to go to trial with a juror that they could not excuse due to an erroneously granted *Batson/Wheeler* [*People v. Wheeler*, 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978)] motion, error requires reversal); *State v. Wright*, 86 Conn. App. 86, 97-98, 860 A.2d 278 (2004) (reversing and remanding for new trial); *Elliott v. State*, 591 So. 2d 981, 987 (Fla. Dist. App. 1991) (reversing and remanding for a new trial); *Jackson v. State*, 265 Ga. 897, 899, 463 S.E.2d 699 (1995) (granting new trial without conducting harmless error analysis); *State v. Pierce*, 131 So. 3d 136, 144 (La. App. 2013) (denial of peremptory through erroneous Batson ruling "implicates a constitutional right guaranteed to the defendant by the State of Louisiana; thus, a harmless error analysis is inappropriate"); *Parker v. State*, 365 Md. 299, 311, 778 A.2d 1096 (2001) (granting new trial where trial judge erred in deeming the facially-valid, race-neutral reasons "unacceptable" and in reseating stricken jurors); *Commonwealth v. Hampton*, 457 Mass. 152,

164-65, 928 N.E.2d 917 (2010) ("We continue to adhere to the view [post-*Rivera*] that, for purposes of State law, the erroneous denial of a peremptory challenge requires automatic reversal, without a showing of prejudice."); *State v. Campbell*, 772 N.W.2d 858, 862 (Minn. App. 2009) (confirming structural error approach of Minnesota Supreme Court in *State v. Reiners*, 664 N.W.2d 826, 835 [Minn. 2003], will continue to be applied post-*Rivera*); *Hardison v. State*, 94 So. 3d 1092, 1101-02 (Miss. 2012) (follows lead of Iowa, Massachusetts, Minnesota, New York, Washington; post-*Rivera* "a trial court cannot deprive defendants of their right to a peremptory strike unless the trial judge properly conducts the analysis outlined in *Batson* . . . . when a trial judge erroneously denies a defendant a peremptory strike by failing to conduct the proper *Batson* analysis, prejudice is automatically presumed, and we will find reversible error"); *People v. Hecker*, 15 N.Y.3d 625, 662, 917 N.Y.S.2d 39, 942 N.E.2d 248 (2010) (refusing to depart from pre-*Rivera* precedent establishing automatic reversal as proper remedy when trial judge erroneously sustains reverse *Batson* challenge); *State v. Short*, 327 S.C. 329, 489 S.E.2d 209 (Ct. App. 1997), *aff'd* 333 S.C. 473, 511 S.E.2d 358 (1999) (automatic reversal proper remedy); *State v. Yai Bol*, 190 Vt. 313, 323, 29 A.3d. 1249 (2011) (reversal automatic where defendant "compelled to abide a juror not to his liking" as a result of erroneous *Batson* ruling); *State v. Vreen*, 143 Wash. 2d 923, 931, 26 P.3d 236 (2001) (erroneous denial of peremptory strike requires automatic reversal); *State v. Wilkes*, 181 Wis. 2d 1006, 513 N.W.2d 708 (Wis. App. 1994) (same) (unpublished opinion).

Several other states have chosen the path of the Illinois Supreme Court in *Rivera*—applying harmlessness analysis to reverse *Batson* errors made in good faith. For the most part, these courts reason that the primary purpose of statutory peremptory strikes is to ensure a defendant's right to trial by a fair and impartial jury. And, as long as all seated jurors are qualified and impartial, a defendant has suffered no constitutional injury and any error can be deemed harmless. See *State v. Darnell*, 209 Ariz. 182, 98 P.3d 617, 621 (Ct. App. 2004), *rev. denied and ordered depublished* 210 Ariz. 77, 107 P.3d 923 (2005) (harmless error review applies when trial court wrongly grants *Batson* challenge to defendant's use of peremptory strike); *Pfister v. State*, 650 N.E.2d 1198, 1200 (Ind. App. 1995) (harmless error applies; error in case could not be deemed harmless); *Moore v. Commonwealth*, 2011-SC-000700-MR, 2013 WL 1790303, at *4 (Ky. 2013) (unpublished opinion) (preserved *Batson* error subject to usual standards of harmless error analysis); *State v. Letica*, 356 S.W.3d 157, 165-66 (Mo. 2011) (erroneous *Batson* ruling resulting in denial of peremptory challenge subject to harmless error analysis; error harmless under facts); *Cudjoe v. Commonwealth*, 23 Va. App. 193, 203-04, 475 S.E.2d 821 (1996), *overruled on other grounds by Roberts v. CSX Transp., Inc.*, 279 Va. 111, 688 S.E.2d 178 (2010) (statutory harmless error statute supplants structural error; on record, unable to conclude error did not affect verdict).

In federal appellate courts, before *Rivera* was decided, the majority rejected harmlessness analysis when a trial judge erroneously prevented a defendant's peremptory challenge. See *Tankleff v. Senkowski*, 135

F.3d 235, 248 (2d Cir. 1998); *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 159 (3d Cir. 1995); *United States v. Hall*, 152 F.3d 381, 408 (5th Cir. 1998); *United States v. McFerron*, 163 F.3d 952, 955-56 (6th Cir. 1998); *United States v. Underwood*, 122 F.3d 389, 392 (7th Cir. 1997), *cert. denied* 524 U.S. 937 (1998); *Ford v. Norris*, 67 F.3d 162, 170 (8th Cir. 1995); *United States v. Annigoni*, 96 F.3d 1132, 1143 (9th Cir. 1996) (en banc).

But these opinions were largely dependent upon language from *Swain v. Alabama*, 380 U.S. 202, 219, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965): "The denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice." And the United States Supreme Court has now called this language into question.

In *United States v. Martinez-Salazar*, 528 U.S. 304, 120 S. Ct. 774, 782, 145 L. Ed. 2d 792 (2000), the Ninth Circuit had relied on *Swain* to support its holding that the trial court's erroneous denial of peremptory challenges required automatic reversal. The United States Supreme Court did not address this aspect of the Ninth Circuit's decision because it found no error, but it observed in dicta that "the oft-quoted language in *Swain* was not only unnecessary to the decision in that case—because *Swain* did not address any claim that a defendant had been denied a peremptory challenge—but was founded on a series of our early cases decided long before the adoption of harmless-error review." 528 U.S. at 317 n.4.

The Court took another swipe at the *Swain* language in *Rivera*, when it said that the language had

been "disavowed" in *Martinez-Salazar* and further observed that it

> "typically designate[s] an error as 'structural,' therefore 'requir[ing] automatic reversal,' only when 'the error necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.' [Citation omitted.] The mistaken denial of a state-provided peremptory challenge does not, at least in the circumstances we confront here, constitute an error of that character." *Rivera*, 556 U.S. at 160.

Since *Rivera*, the Ninth Circuit has abandoned its earlier practice of treating a trial judge's erroneous denial of a defendant's peremptory challenge as structural error. See *United States v. Lindsey*, 634 F.3d 541, 544 (9th Cir. 2011) *cert. denied* 131 S. Ct. 2475 (2011). Other federal circuits have followed suit. *United States v. Gonzalez-Melendez*, 594 F.3d 28, 33-34 (1st Cir. 2010); *Jimenez v. City of Chicago*, 732 F.3d 710, 715 (7th Cir. 2013) *cert. denied* 134 S. Ct. 1797 (2014); *Avichail ex rel. T.A. v. St. John's Mercy Health Sys.*, 686 F.3d 548, 552-53 (8th Cir. 2012).

Kansas does not have a post-*Rivera* case on point.

Sixteen years before *Rivera* was decided, one Court of Appeals panel reversed a conviction when the trial judge erroneously interfered with a defendant's right to exercise a race-neutral peremptory challenge under K.S.A. 22-3412. *State v. Foust*, 18 Kan. App. 2d 617, 624, 857 P.2d 1368 (1993). The panel said: "Although it may seem minimal, the deprivation of even one valid

peremptory challenge is prejudicial to a defendant and may skew the jury process." 18 Kan. App. 2d at 624.

In this court's opinion in *State v. Heath*, 264 Kan. 557, 588, 957 P.2d 449 (1998), the defendant argued that the district judge's error in failing to remove an unqualified juror for cause deprived him of his statutory right to exercise one of his peremptory challenges. The defendant used a peremptory strike to correct the judge's mistake on the challenge for cause. We held any error was harmless, reasoning that "[t]he whole purpose of peremptory challenges is as a means to achieve an impartial jury . . . [t]here is no evidence that the jury constituted was not impartial." 264 Kan. at 588.

In fact, this court long treated the Kansas peremptory challenge statute as little more than a procedural device to ensure compliance with a defendant's constitutional right to trial by a fair and impartial jury:

> "The constitutional guaranty is that an accused shall be tried by an impartial jury. The matter of peremptory challenges is merely statutory machinery for carrying out and securing the constitutional guaranty. Error in overruling a challenge to a juror is not ground for reversal unless the accused was prejudiced thereby. The real question is—'Was the jury which tried defendant composed of impartial members?' In the absence of any objection on the part of defendant to any member as it was finally drawn to try him we cannot say it was not impartial." *State v. Springer*, 172 Kan. 239, 245, 239 P.2d 944 (1952).

Although there are authorities from our sister states and the federal courts that come down gracefully on both sides of the issue, we are persuaded that an error such as the one committed in this case should be subject to harmlessness review. The mistake was made in good faith, and our Kansas precedent, although sparse, favors the view that a peremptory challenge is simply a procedural vehicle for vindication of a defendant's right to an impartial jury. The erroneous denial of a peremptory challenge does not require automatic reversal. This holding is not only permissible under *Rivera*, but also consistent with this court's development of harmless error review in recent years and the legislature's expressed preference for the same. See *Pabst v. State*, 287 Kan. 1, 13, 192 P.3d 630 (2008) (vast majority of errors fall within category of "trial error[s]" subject to harmless error review); K.S.A. 60-261 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."); K.S.A. 60-2105 (appellate courts shall disregard "mere technical errors and irregularities" not affecting substantial rights).

Having already decided in the previous section that there was no error in denying the defense challenge for cause to W.B., we see no prejudice from his ultimate seating on the jury. R. Carr is not entitled to reversal of any of his convictions because of Judge Clark's error on the reverse *Batson* challenge. See *State v. McCullough*, 293 Kan. 970, 983, 270 P.3d 1142 (2012) (no reasonable probability that such error affected the outcome of the trial in light of the entire record).

6. CONFRONTATION AND ADMISSION OF WALENTA STATEMENTS

R. Carr argues that admission of statements made by Walenta violated his Sixth Amendment right to confront the witnesses against him and requires reversal of his felony murder conviction.

All parties agree that our review of this constitutional question is unlimited. See *State v. Belone*, 295 Kan. 499, 502-03, 285 P.3d 378 (2012) (citing *State v. Bennington*, 293 Kan. 503, 507, 264 P.3d 440 [2011]; *State v. Marquis*, 292 Kan. 925, 928, 257 P.3d 775 [2011]; *State v. Leshay*, 289 Kan. 546, 547, 213 P.3d 1071 [2009]; *State v. Ransom*, 288 Kan. 697, 708-09, 207 P.3d 208 [2009]); see also *State* v. *Brown,* 285 Kan. 261, 282, 173 P.3d 612 (2007) (confrontation issues under both federal and state constitutions raise questions of law subject to unlimited appellate review).

All parties also agree that our analysis of the merits of this issue should be guided by *Crawford v. Washington*, 541 U.S. 36, 56, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). *Crawford*, a 2004 United States Supreme Court decision on the Confrontation Clause, has superseded *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), which guided Judge Clark's rulings at the time of the defendants' trial.

Additional Factual and Procedural Background

During the several weeks that Walenta survived after she was shot, she made several statements about the crime and her attacker. Her initial statements were made to her neighbor Kelley, who came to Walenta's assistance within minutes of the shooting. Walenta also was interviewed by several law enforcement

investigators while in the hospital. One of the statements she gave to investigators included her tentative identification of R. Carr from a photo array. This conversation took place in the presence of Walenta's husband.

No representative of the defendants was able to question Walenta before she died.

R. Carr filed a pretrial motion in limine to exclude any statement Walenta made to Detective Randall Reynolds. At a hearing on the unsuccessful motion, counsel clearly based the objection to Reynolds' testimony on this subject on the federal Confrontation Clause.

At trial, neither R. Carr's counsel nor J. Carr's counsel objected to Kelley's testimony about Walenta's statements until after Kelley had testified that Walenta told her the person who shot her was a black man with wiry hair. At that point, the following exchange occurred:

> "[J. Carr's counsel]: Your Honor, at this time we're going to go ahead and make an objection based on hearsay. There was an argument in a previous pretrial motion in this regard and we would ask that it be a continuous objection to anything Miss Walenta said.
>
> "[R. Carr's counsel]: Join, Your Honor.
>
> "THE COURT: I'll overrule the objection, but I'll give you a continuing one to the line of testimony."

After the continuing objection was granted, Kelley also testified that Walenta had told her she was shot three times and that a light-colored car had followed her onto her street.

Wichita Police Officer Joshua Lewis and Detective James Whittredge testified about statements Walenta made to them. Lewis testified that, on December 11, Walenta described her attacker as a black male about 6 feet tall, approximately 30 years old, with long black hair. She also told Lewis and Whittredge that she had been followed by a light-colored four-door vehicle. Whittredge testified that Walenta told him she did not know the gunman and that he had not tried to rob her but had indicated he needed help. Walenta also told Whittredge that the gunman—a black male in his 30s, 5 feet 7 inches to 6 feet tall, with long straight wiry—hair disappeared very quickly after the shooting. Walenta associated the gunman with the light-colored four-door vehicle that had been following her.

Reynolds testified that he spoke with Walenta about the crime on December 13 and 15. Among other things, during the first interview, Walenta told Reynolds that the man who shot her got out of the passenger side of the vehicle and that he held his gun palm down. She also told Reynolds that the man ran immediately after he shot her, and, at the same time, she noticed that the car that had followed her started to pull away. She was unsure whether the shooter was left behind.

Reynolds testified that he returned to the hospital to show Walenta photo arrays containing pictures of R. Carr and J. Carr after their arrests on December 15. Walenta said that a photo of R. Carr in the second position and a photo of another individual in the first

position in one array fit her attacker's general appearance. But she said that the photo of R. Carr had eyes matching what she remembered. Reynolds had Walenta write this information on the photo array containing R. Carr's picture. Walenta could not select anyone who looked familiar from the array containing J. Carr's photo. Reynolds also testified that, after Walenta died, he asked her husband to help him decipher Walenta's handwritten notes on the photo array containing R. Carr's picture.

Defense counsel lodged several objections during the testimony of the three law enforcement officers about Walenta's statements. Judge Clark overruled all of the specific objections but twice granted additional continuing objections to such testimony.

Walenta's husband, Donald, testified that he was present during most of the law enforcement interviews with his wife, including the one in which Reynolds showed his wife the photo arrays. Donald heard the words his wife spoke to Reynolds and observed her write on the photo array. He did not actually see what she had written until Reynolds spoke to him after Walenta's death. Looking at the array while on the stand at trial, Donald testified that his wife wrote: "No. 1 and No. 2 represent the man who assaulted me. The general appearance of No. 1 . . . fits the assailant but the eyes, eye set of No. 2 also represents what I remember." Neither defendant objected to Donald's testimony.

Preservation of the Confrontation Clause Issue for Appeal

Because the Walenta felony murder was not subject to the death penalty, we do not apply K.S.A. 21-6619(b), which requires us to overlook a preservation problem in the review and appeal from a judgment of conviction resulting in a sentence of death.

The State suggests that the defendants failed to preserve any Confrontation Clause issue on Walenta's statements for our review.

We agree with the State as to the part of Kelley's testimony that preceded Judge Clark's granting of a continuing objection. The defense objections to Kelley's testimony that Walenta told her a black man with wiry hair was the gunman came too late.

We disagree with the State that lack of preservation bars our consideration of the Confrontation Clause issue as to the three law enforcement witnesses. The record reflects multiple defense objections during their testimony, at least one referencing the Confrontation Clause objection raised pretrial and at least two leading to more continuing objections being granted by Judge Clark.

We agree with the State that there is a preservation problem with a Confrontation Clause issue on the testimony from Walenta's husband about what his wife said to and wrote for Reynolds in his presence. See K.S.A. 60-404 (contemporaneous objection rule); see also *State v. McCaslin*, 291 Kan. 697, 706, 245 P.3d 1030 (2011) (application of contemporaneous objection rule when Confrontation Clause objection not specific in district court).

It is true that we have made an exception to the general contemporaneous objection rule to consider Confrontation Clause arguments raised by defendants tried before *Crawford* was decided. See *State v. Brown*, 285 Kan. 261, 281, 173 P.3d 612 (2007) (citing *State v. Miller*, 284 Kan. 682, 709, 163 P.3d 267 [2007]). But doing so in this case would be inappropriate. Here, defense counsel repeatedly exhibited full awareness of the potential of a Confrontation Clause violation; they registered numerous objections to the testimony from Kelley and the law enforcement witnesses about what Walenta communicated to them. The total absence of a defense objection during Donald's testimony looks far more like strategy than ignorance.

Violation of Sixth Amendment

Crawford, 541 U.S. at 53-54, established that the Sixth Amendment Confrontation Clause prevents out-of-court statements that are testimonial in nature from being introduced against a criminal defendant unless the declarant is unavailable and the defendant has had a previous opportunity to cross-examine him or her.

> "The Confrontation Clause of the Sixth Amendment provides: 'In 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, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), we held that this provision bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Davis v.*

> *Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

This brings us to other points of agreement among the parties.

First, the State and the defendants agree that, under the standards set out by the United States Supreme Court in *Davis*, and by this court in *Brown*, 285 Kan. at 291, Walenta's statements presented through Kelley were not testimonial. They also agree that Walenta's statements to the three law enforcement officers—Lewis, Whittredge and Reynolds—were testimonial.

> "Statements . . . made in the course of police interrogation . . . are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822.

The State and the defendants also agree as a general matter that, despite the general *Crawford* rule, testimonial statements of an absent declarant who has never been cross-examined by the defense may be admitted under the doctrine of forfeiture by wrongdoing. The doctrine applies when the declarant's absence is attributable to wrongdoing by a defendant specifically intending to prevent the declarant from testifying. See *Giles v. California*, 554 U.S. 353, 388, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008) (in order to apply doctrine, State must prove by preponderance of evidence that defendant's wrongdoing specifically intended to prevent testimony); *State v. Belone*, 295

Kan. 499, 504, 285 P.3d 378 (2012) (district judge erred by admitting victim's testimonial statements to police when defendants' intent to prevent testimony not shown); *State v. Jones*, 287 Kan. 559, 567-68, 197 P.3d 815 (2008) (same).

That is the point at which the parties' agreement ends. The State invokes the doctrine to save the testimony from the three law enforcement officers, and the defense argues that the doctrine was inapplicable. We need not settle this dispute because we are persuaded that answering the question of whether any error on this issue was harmless is dispositive.

Harmlessness

Harmless error analysis applies to errors under *Crawford. Belone,* 295 Kan. at 504-05; see *Lilly v. Virginia,* 527 U.S. 116, 139-40, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999) (Confrontation Clause violation subject to harmless error review). A Kansas court cannot declare an error implicating a right guaranteed by the United States Constitution harmless unless it is persuaded beyond a reasonable doubt that there was no impact on the trial's outcome, *i.e.,* that the error did not contribute to the verdict. *State v. Trujillo*, 296 Kan. 625, 631, 294 P.3d 281 (2013); *State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2011) (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 [1967]), *cert. denied* 132 S. Ct. 1594 (2012). The State, as the party benefiting from any error here, bears the burden to establish that any Confrontation Clause error was harmless. *Ward*, 292 Kan. at 568-69.

The State can bear its burden here. The nontestimonial statements of Walenta to Kelley to

which she testified and the statements and actions of Walenta in her husband's presence to which he testified without objection make the law enforcement testimony harmless, because they covered much of the same ground. Walenta had told Kelley about the black man with wiry hair who shot her three times and about a light-colored car that followed her home, and Kelley passed this information on to the jury. Walenta's husband was able to tell the jury about what was probably Walenta's biggest contribution to the law enforcement investigation, her writing on the photo array containing R. Carr's picture. Reynolds' testimony about the composition of the photo array, including designation of R. Carr's picture as "No. 2" had been properly admitted without any violation of *Crawford*. These facts were not communicated by Walenta at all.

In contrast, the only items of evidence drawn from Walenta's statements that the three law enforcement witnesses may have added to the mix were her various and vague estimates of the perpetrator's height and age, the fact that he held his gun palm down, and the fact that he ran away as the light-colored car appeared to be leaving immediately after the shooting. The specific way the gun was held was the only directly incriminating item against R. Carr among these, because Schreiber testified that the first man who approached him held his gun in the same way. Walenta's age and height estimates were too vague to have much practical impact on the jury's consideration. And the description of the light-colored car's departure was no more significant, and probably less significant, than the circumstances of its arrival just behind Walenta's Yukon on her dead-end street, a fact about which Kelley had already testified. As to J. Carr, the

only other piece of incriminating information that came from one of the three officers was that the gunman exited the passenger side of the light-colored car. Like the car's departure, this tended to show the involvement of a second perpetrator. But the idea that two people participated in the Walenta incident was testified to without objection by a different law enforcement witness.

Under these circumstances, we deem any error in admitting Walenta's statements through the three law enforcement witnesses harmless beyond a reasonable doubt.

7. Sufficiency of Evidence on Walenta Felony Murder

R. Carr argues that his felony murder conviction for the killing of Walenta must be reversed because the State failed to present sufficient evidence of the underlying attempted aggravated robbery.

Additional Factual and Procedural Background

There were no eyewitnesses to Walenta's shooting who testified at trial. Walenta was alone when she was shot in the driver's seat of her Yukon in her driveway and died a few weeks later.

Several other witnesses were permitted to testify to what Walenta told them about the crime before she died. Their information included the following: Walenta noticed a light-colored car following her as she drove home. When she pulled into her driveway, she saw the car park. A black male got out of the passenger side of the car, approached the driver's side of her Yukon. Walenta said that the man did not try to rob her but

instead indicated that he needed help. When Walenta rolled down her window a few inches, the man immediately stuck a handgun into the opening, holding it palm down and pointing it at her head. When she turned the ignition, the Yukon's starter made a grinding sound because the car was already running. The man told her not to move the car. When she nevertheless shifted into reverse, the man shot her three times. Then he ran. Walenta saw the light-colored car begin to move away after the shots were fired, and it possibly left the gunman behind.

Evidence at trial also showed several common elements among the three incidents that gave rise to the charges against the defendants.

The gun used to shoot out one of Schreiber's tires, to shoot Walenta, and to shoot at least Aaron S. in the soccer field after the crimes at the Birchwood residence was the black Lorcin seen in the possession of J. Carr by Adams on the night of Walenta's shooting. A light-colored car followed Walenta home on the night she was shot, and a similar car followed a female next-door neighbor of the three friends who lived in the Birchwood triplex when she drove home alone shortly before the home invasion. The Schreiber and Birchwood incidents involved two black men, one of whom was identified by a victim as R. Carr. Walenta also picked R. Carr's picture out of a photo array as the person whose eyes most resembled those of her attacker. The Schreiber crime began with a man identified as R. Carr approaching Schreiber's driver's side window. Both Schreiber and four of the Birchwood victims were taken to ATMs to withdraw money from their bank accounts, and the perpetrators took other

property from them. All three incidents occurred within days of each other in the northeast part of Wichita: the Schreiber incident began on December 7; the Walenta incident occurred on December 11; the Birchwood crimes occurred on December 14 and 15.

During an instructions conference at the defendants' trial, the State requested an instruction telling jurors they could consider evidence related to the Schreiber and Birchwood incidents "for the limited additional purpose of determining the intent, identity, and motive of the defendant as alleged in the counts involving [Walenta] as an alleged victim." R. Carr's counsel objected to the instruction, and Judge Clark denied the State's request. The jury did receive an instruction telling it that each charged crime was a separate and distinct offense and that the jury "must decide each charge separately on the evidence and law applicable to it, uninfluenced by your decision as to any other charge." Judge Clark also informed the jury that, in order to find R. Carr guilty of felony murder, the State had to prove beyond a reasonable doubt that the killing of Walenta "was done while in the commission of or attempting to commit aggravated robbery."

Evaluation of Evidence

When the sufficiency of the evidence is challenged in a criminal case,

> "the standard of review is whether, after reviewing all the evidence in a light most favorable to the prosecution, the appellate court is convinced a rational factfinder could have found the defendant guilty beyond a reasonable doubt. Appellate courts do not reweigh evidence,

> resolve evidentiary conflicts, or make witness credibility determinations. *State v. McCaslin*, 291 Kan. 697, 710, 245 P.3d 1030 (2011)." *State v. Qualls*, 297 Kan. 61, 66, 298 P.3d 311 (2013).

A conviction for felony murder cannot stand without sufficient evidence of one of the enumerated inherently dangerous felonies listed in K.S.A. 21-3436. See *State v. Williams*, 229 Kan. 290, 300, 623 P.2d 1334 (1981). Sufficient evidence, even for the gravest of offenses, may consist entirely of circumstantial evidence. *State v. Ward*, 292 Kan. 541, Syl. ¶ 13 (2011).

R. Carr does not argue that we are prohibited from reviewing all evidence, including inadmissible evidence, to determine sufficiency of the evidence on his felony murder conviction. That we assumed error on the admissibility of law enforcement statements in the previous section is no barrier to consider those same statements here. See *State v. Jefferson*, 297 Kan. 1151, 1166, 310 P.3d 331 (2013) (reviewing court considers erroneously admitted evidence in reviewing sufficiency of evidence).

When the evidence of the Walenta felony murder is considered in isolation, we agree with R. Carr that it was insufficient to support his conviction of aggravated robbery or attempted aggravated robbery. There simply was nothing to support an inference that the man who shot Walenta took property or intended to take property from her. *Cf. State v. Calvin*, 279 Kan. 193, 200, 105 P.3d 710 (2005) (felony murder conviction affirmed based on underlying felony of attempted aggravated robbery; testimony offered indicating defendant intended to rob murder victim). The State's case was just as consistent with an intention to commit

other crimes—*e.g.*, aggravated assault, attempted rape or other sex crimes, attempted aggravated kidnapping.

But our agreement with R. Carr on this point does not entitle him to reversal.

We have recently decided in another case that jurors may consider evidence from a string of residential burglaries on the issue of whether one of the perpetrators of those burglaries was present and participating in yet another burglary in the string, one that ended in murder of the homeowner. See *McBroom*, 299 Kan. __, 325 P.3d 1174 (2014) (slip op. at 33-34).

Likewise, the jury in this case could consider evidence against R. Carr on the joined charges arising from the Schreiber and Birchwood crimes when deciding whether to find him guilty or not guilty on the Walenta felony murder. The Schreiber and Birchwood evidence did not qualify as suspect other crimes propensity evidence under K.S.A. 60-455 and did not require a limiting instruction. See *State v. Cromwell*, 253 Kan. 495, 509, 856 P.2d 1299 (1993). In addition, the instruction given on the jury's duty to consider each charge "separately on the evidence and law applicable to it, uninfluenced by [the jury's] decision as to any other charge" did not prevent jurors from considering all of the evidence admitted in this joint trial. Under *McBroom*, some of the evidence supporting the Schreiber and Birchwood charges also supported or was, in the words of the instruction, "applicable" to the Walenta charge.

With these rules established, the jury in this case was free to take into account that the three incidents giving rise to the charges against R. Carr were close

together in time. Both Schreiber and Holly G. identified R. Carr as one of their assailants, and Walenta selected R. Carr's picture from a photo array as the one in which the eyes most resembled her attacker. Ballistics testing showed that the gun used in all three incidents was the same. Schreiber described the man who approached him in the driver's seat of his car as holding that gun palm down, which was the same as Walenta's description of her attacker. The Schreiber and Birchwood crimes definitely involved two men, who committed multiple aggravated robberies, and the Walenta crime appeared to involve a confederate of the gunman who waited in the light-colored car that followed Walenta home. A light-colored car also made a similar pass on the street of the Birchwood triplex just before the home invasion and its aftermath. As with Walenta, the person driving the car had followed a female neighbor going home alone in the late evening.

Because all of this evidence could be considered in conjunction with Walenta's communicated recollections of the circumstances surrounding her shooting—and because this evidence included multiple aggravated robberies facilitated by similar perpetrators using similar tactics and the same gun—we reject R. Carr's challenge to the sufficiency of the evidence to convict him of Walenta's felony murder based on aggravated robbery. A rational factfinder could have found R. Carr guilty of this murder beyond a reasonable doubt.

8. Lesser Included Offense Instructions for Felony Murder

R. Carr did not request any lesser included offense instructions for felony murder at trial. During deliberations, the jury asked: "Can a lesser count be

considered for a defendant on [the Walenta killing]?" Judge Clark responded: "The answer is no."

Because R. Carr sought no lesser included offense instructions, we review his assertion that Judge Clark nevertheless should have given them for clear error. K.S.A. 22-3414(3); *State v. Briseno*, 299 Kan. __, 326 P.3d 1074 (2014); *State v. Williams*, 295 Kan. 506, Syl. ¶ 3, 286 P.3d 195 (2012).

> "To determine whether an instruction or a failure to give an instruction was clearly erroneous, the reviewing court must first determine whether there was any error at all. To make that determination, the appellate court must consider whether the subject instruction was legally and factually appropriate, employing an unlimited review of the entire record."
>
> "If the reviewing court determines that the district court erred in giving or failing to give a challenged instruction, then the clearly erroneous analysis moves to a reversibility inquiry, wherein the court assesses whether it is firmly convinced that the jury would have reached a different verdict had the instruction error not occurred. The party claiming a clearly erroneous instruction maintains the burden to establish the degree of prejudice necessary for reversal." *Williams*, 295 Kan. 506, Syl. ¶¶ 4-5.

Under K.S.A. 22-3414(3), a district judge must give lesser included offense instructions "where there is some evidence that would reasonably justify a conviction of some lesser included crime." At the time of the trial in this case, felony murder was excepted

from application of K.S.A. 22-3414(3) under a court-made rule. See *State v. Becker*, 290 Kan. 842, 856-57, 235 P.3d 424 (2010) (lesser included offense instructions need not be given in felony murder case unless evidence of underlying felony weak, inconclusive, conflicting).

In *State v. Berry*, 292 Kan. 493, Syl. ¶ 6, 254 P.3d 1276 (2011), this court abandoned the court-made exception to K.S.A. 22-3414(3). And we said that the holding of *Berry* would apply to all cases then pending on direct appeal, which would include this one. 292 Kan. at 514.

After *Berry* was decided, the legislature eliminated all lesser included offenses of felony murder. See L. 2012, ch. 157, sec. 2; see also K.S.A. 2012 Supp. 21-5109(b)(1).

In *State v. Wells*, 297 Kan. 741, Syl. ¶ 8, 305 P.3d 568 (2013), we examined the legislature's action and held that it "was not merely procedural or remedial but substantive," which meant the new legislation was not retroactive and would not cover this case.

The 2013 legislature acted again in reaction to *Wells*, making explicit its intention that the abolition of lesser included offenses of felony murder be retroactive. See L. 2013, ch. 96, sec. 2 (adding subsections [d], [e] to K.S.A. 2012 Supp. 21-5402; [d] reiterates abolition; [e] expresses retroactive intention).

In light of these legal developments, this court ordered the parties to submit supplemental briefing. They did so. Those supplemental briefs do not address the prerequisites that a lesser included offense instruction be factually and legally appropriate, and,

for purposes of argument, we assume that at least second-degree murder would have met those criteria under the *Berry* rule. The outcome on this issue then turns only on whether the 2013 statutory amendments eliminating lesser included offenses for felony murder apply in this case.

R. Carr argues that the amendments cannot apply without violation of the Ex Post Facto Clause. We have now decided this issue adversely to him in *State v. Todd*, 299 Kan. 263, Syl. ¶ 4, 323 P.3d 829 (2014), and do not revisit the rule or rationale of that case here.

R. Carr does not make an explicit due process argument to defeat application of the amended statutes eliminating lesser included offenses to felony murder. But he does assert that a defendant's theory that the State has overcharged and he or she should be convicted instead of a lesser included offense is a type of defense to the more serious charge. See *State v. Plummer*, 295 Kan. 156, 159, 168, 283 P.3d 202 (2012) (defendant's theory of defense on aggravated robbery commission of theft followed by scuffle with security guard trying to prevent escape of suspect; district judge erred in refusing to instruct on theft). And a criminal defendant's right to present a defense and have jury instructions supporting the defense given is based in due process principles. See *State v. McIver*, 257 Kan. 420, Syl. ¶ 1, 902 P.2d 982 (1995); *State v. Wade*, 45 Kan. App. 2d 128, 135, 245 P.3d 1083 (2010). Thus, to the extent R. Carr relies on due process, we dispose of that argument as well by observing that we have now decided this issue against his position. See *State v. Gleason*, No. 97,296, 299 Kan. ___, ___ P.3d ___ (filed July 18, 2014).