No. 14-449, 450

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

JONATHAN D. CARR AND
REGINALD DEXTER CARR, JR.,

Respondents.

On Writ of Certiorari to the Supreme Court of Kansas

REPLY BRIEF FOR PETITIONER

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SUMMARY OF ARGUMENT[1]

The "severance" issue distills down to one fundamental legal question: Does the Eighth Amendment require that courts apply a different standard than the traditional one (*i.e.*, that joinder will create a serious risk of compelling, specific, and actual prejudice) for determining whether severance is appropriate in capital penalty phase proceedings? Although each Carr ostensibly disavows arguing for an automatic rule of severance for capital sentencing proceedings, their arguments, if followed, effectively would impose a *per se* requirement.

Jonathan Carr argues that severance is required if there is "any reasonable risk" of prejudice, and Reginald Carr argues for a standard of "substantial risk" of prejudice. Both find their novel standards easily satisfied here on the basis of the flimsiest of evidence. In fact, both Carrs rely on circumstances so weak here–where the brothers presented virtually identical mitigation cases–that in application their proposed standards would result in automatic severance.

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[1] Because the Court desires to address the "mitigation instruction" question in the first hour of oral argument and the "severance" question in the second hour on October 7, Kansas has filed a reply brief in *Kansas v. Gleason*, No. 14-452, that addresses the mitigation instruction arguments made by Respondents Gleason, J. Carr, and R. Carr. This brief addresses only the severance question. By this footnote, Kansas respectfully incorporates by reference the mitigation instruction arguments from its reply in *Kansas v. Gleason*.

There is no reason for this Court to create a severance standard unique to capital cases; instead, there are very good reasons not to do so. Joint criminal trials, a feature of American jurisprudence since the founding era, serve many valuable purposes. This case is a perfect example of how the reliability of the jury's decisions likely was enhanced by hearing *more* information and being able to compare the moral culpability and mitigation evidence of both Carrs simultaneously. Joinder often may further the modern Eighth Amendment "individualized sentencing" principle better than would severed proceedings.

Joinder was proper here, and did not create a "serious risk of compelling, specific, and actual prejudice" to either Reginald or Jonathan. *First*, the Kansas Supreme Court erred in disregarding the presumption that jurors follow their instructions. The jury here was instructed explicitly to consider each brother individually, to consider as aggravation only the four factors specifically set out in the instructions, and the jury completed separate, detailed verdict forms for each Carr. Both Jonathan and Reginald argue that the presumption should not apply, but their argument flies in the face of the Court applying this bedrock principle in prior capital cases. *See, e.g.*, *Romano v. Oklahoma*, 512 U.S. 1, 13 (1994); *Jones v. United States*, 527 U.S. 373, 394 (1999).

Second, the Carrs presented virtually identical mitigation cases, with evidence that was mutually reinforcing, as even they acknowledge in their briefs. Reginald and Jonathan called many of the same mitigation witnesses, RC Br. 3, with the vast bulk of their mitigation evidence focusing on their shared

family history and asserted mental health issues resulting from that history. Rather than presenting antagonistic mitigation cases, overall the brothers offered synergistic and complementary evidence and arguments.

Jonathan complains that Reginald's antisocial personality disorder diagnosis (in lay terms, sometimes described as "sociopathy") was somehow imputed to Jonathan, and that Reginald's refusal to conceal his shackles during the penalty phase prejudiced Jonathan. JC Br. 15-16. Jonathan, however, presented evidence that, like Reginald, he had mental health issues attributable to his family history and numerous risk factors for violence. He also argued he was distinguishable from Reginald because Jonathan had no serious prior criminal record, was relatively young, and demonstrated good behavior during trial. Jonathan's evidence and arguments thus either echoed and reinforced Reginald's arguments or served to distinguish Jonathan from Reginald. Indeed, Jonathan's complaints illustrate the benefits of permitting the jury to compare him to Reginald in a joint proceeding.

Reginald's only complaint is that there was some evidence he was a "corrupting influence" on Jonathan—evidence provided by their mother, sister, and a forensic psychologist Jonathan called, RC Br. 17-19—and that such evidence may have been improperly considered as an aggravating circumstance against him. Even if such evidence would not have been admitted in a severed proceeding, its admission did not violate the Eighth Amendment, *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994), nor did it so infect the proceeding

that he was deprived of due process. It strains credulity to believe—in a case involving sexual torture and quadruple brutal murders—that the jury put great weight on the self-evident proposition that Reginald was not an ideal big brother to Jonathan. Reginald's complaint hardly rises to the level of "a serious risk of compelling, specific, and actual prejudice" in light of the record as a whole.

In the end, Jonathan's and Reginald's claims fall flat. Their claims fail as a constitutional matter because the Eighth Amendment neither mandates automatic severance in capital sentencing proceedings, nor alters the traditional standard for severance determinations. The trial court did not abuse its discretion or violate the Eighth Amendment here when it declined to sever the penalty phase proceedings.

Lastly, even if the Court were to assume error, any error necessarily was harmless. Jonathan obtained many tactical advantages from Reginald's presence and behavior, and yet the jury still sentenced him to death. Reginald's weak complaint about evidence that might not have been admissible in severed proceedings pales in comparison to the undisputed evidence of his depraved crimes.

Ultimately, if any capital defendants in Kansas were ever going to receive a death sentence, it was Jonathan and Reginald Carr, each of whose horrific crimes have no equal in Kansas history. Their individual death sentences—carefully rendered after a full day of jury deliberations, as Reginald acknowledges, RC Br. 6—were imposed on *each* brother, precisely because *each* of them independently and fully deserved such a sentence under Kansas law

and the evidence presented. There is no reasonable doubt on that point.

ARGUMENT

I. The Eighth Amendment Does Not Mandate Automatic Severance In Capital Cases, Nor Does It Impose A Unique Standard. To The Contrary, There Often Are Strong Reasons For Joinder In Capital Proceedings.

Joint criminal trials are an established feature of American jurisprudence. The Court has endorsed joint trials since at least 1827, including in capital cases, *United States v. Marchant & Colson*, 25 U.S. (12 Wheat.) 480 (1827); *Ball v. United States*, 163 U.S. 662 (1896), and state and federal law overwhelmingly continue to provide for joint trials, including in capital cases. See U.S. Br. 19-20 & nn. 6-7.

Joint trials play an important role in our criminal justice system, and are beneficial both to defendants and to society for a number of reasons: "Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit." *Richardson v. Marsh*, 481 U.S. 200, 210 (1987). Moreover, "[e]ven apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Id*. Joint trials permit juries to make consistent and fully informed decisions, particularly in a capital penalty phase proceeding where a jury can compare the defendants' culpability and mitigation cases. Thus, it would be counter-

intuitive to eliminate or sharply limit joinder in capital penalty phase proceedings, where "individualized" sentencing is an Eighth Amendment tenet.

A. Joint Penalty Phase Proceedings In Many Instances, Including This Case, Promote Individualized Sentencing.

Joint penalty phase proceedings not only are compatible with but actively further the "individualized sentencing" principle, because the jury can obtain the fullest possible picture of the codefendants and their relative culpability. Going back to *Gregg v. Georgia*, members of the Court have recognized that in capital cases it is proper and desirable for a jury to "have as much information before it as possible when it makes the sentencing decision …." 428 U.S. 153, 203-204 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

Mandating separate proceedings in capital penalty phase proceedings would permit some defendants to preview the penalty phase evidence and arguments, thus increasing the possibility of inconsistent and inequitable verdicts. Different juries might consider intangibles such as "mercy" differently, resulting in equally culpable defendants with virtually identical mitigation cases receiving different sentences, as would have been possible here. Separate, repetitive proceedings also could require traumatized victims to testify multiple times, greatly increase the time commitment of jurors (or at least the number of jurors required to conduct the proceedings), and in general require governments to expend considerably more resources than they already do to try capital cases.

Here, the joint penalty proceeding avoided the need for the brothers' multiple overlapping witnesses to testify twice, avoided having different juries possibly assign varying weight to essentially the same evidence, gave jurors a fuller and more complete picture of each Carr's culpability and his mitigation case, and precluded either Carr from obtaining a tactical advantage by previewing evidence and argument regarding the other.

Importantly, a joint proceeding permitted the jury to evenhandedly consider "mercy" for each Carr, as Kansas law expressly permits. Conducting separate penalty phase proceedings with different juries would invite inconsistent sentences because different juries might well give "mercy" different weight as a sentencing consideration.

Ultimately, this case presents a compelling example for joinder, given that each Carr participated in the same horrific crimes and presented virtually identical mitigation cases. Joinder here ensured that these similarly situated capital defendants were not treated differently in arbitrary ways by two separate juries.

B. The Presumption That Jurors Follow Their Instructions Applies With Full Force In Capital Penalty Phase Proceedings.

Another important reason no mandatory or unique Eighth Amendment standard is appropriate or required in this context is the bedrock presumption that jurors follow their instructions. Instructions directing jurors to consider each defendant individually and to consider in aggravation only the factors specified in the instructions are generally sufficient to cure any

risk of prejudice from joinder. *Zafiro v. United States*, 506 U.S. 534, 540-541 (1993). Here, the jury was given precisely such instructions.

The Court long has embraced and emphasized the presumption that juries follow their instructions, including in capital cases. *See, e.g.*, *Romano v. Oklahoma*, 512 U.S. 1, 13 (1994) ("if the jurors followed the trial court's instructions, which we presume they did, this evidence should have had little–if any–effect on their deliberations."); *Jones v. United States*, 527 U.S. 373, 394 (1999) ("jurors are presumed to have followed these instructions."); *Blueford v. Arkansas*, 132 S. Ct. 2044, 2051 (2012).

Ultimately, the Court has expressed a strong "preference," *Zafiro*, 506 U.S. at 537, for joint trials in general, and has never reversed a death sentence for failure to sever, nor indicated that a special severance rule applies in capital cases. Respondents' novel suggestions to the contrary find no support in the Eighth Amendment, the Court's precedents, or in our nation's history and practice. Indeed, no federal Circuit has reversed a federal district court's decision not to sever capital penalty phase proceedings. See U.S. Br. 20 n. 6 (citing cases).[2] There is no reason for this Court

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[2] Amicus Promise of Justice Initiative (PJI) asserts a "clear trend away from joint trials" (Br. 13) but relies principally on States that have abolished the death penalty, evidence which does not reflect a judgment that joint capital sentencing trials are improper. PJI suggests (Br. 16) the United States "omit[s] a number of cases involving joined cases as well as those where severance has appeared to be granted," but the United States listed cases *since 2000*, which eliminates thirteen of the eighteen cases PJI cites; three others were not cases where joint or separate capital trials

to become the first federal court to reverse a death sentence because the penalty phase proceedings were not severed.

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occurred, *United States* v. *Bodkins*, No. 04-Cr-70083 (W.D. Va. 2004), Dkt. No. 586 (Sept. 8, 2005) (death notices were withdrawn); *United States* v. *Cruz*, No. 8:05-Cr-00393 (D. Md. 2005), Dkt. Nos. 1391 (Sept. 1, 2009) and 1642 (Aug. 6, 2010) (a single capital trial was conducted; remaining capital defendants pleaded guilty); *United States* v. *Aquart*, 3:06-Cr-160 (D. Ct. 2006), Dkt. No. 959 (Aug. 26, 2011) (a single capital trial was conducted; death notice was withdrawn for the additional capital defendant); and a fourth was included in the charts, *United States* v. *Mikhel*, No. 02-Cr-00220 (C.D. Cal. 2007), Dkt. Nos. 1066 (June 26, 2006), and 1560 (Feb. 13, 2007) (case proceeded to trial with two capital defendants, a third was severed for attorney's medical reasons).

II. Jointly Conducting The Sentencing Proceedings Did Not Violate The Eighth Amendment Because The Carrs Presented Virtually Identical Mitigation Cases, And The Jury Was Properly Instructed. Even If The Court Assumed Error, Any Error Necessarily Was Harmless.

A. There Was No Constitutional Error In Declining To Sever The Carrs' Sentencing Proceedings.

1. The Eighth Amendment Does Not Create Evidentiary Rules For Capital Sentencing Proceedings. Instead, The Standard For Any Error In Admitting Evidence Is Whether The Evidence So Infected The Proceeding With Unfairness As To Make The Resulting Sentence A Denial Of Due Process.

Reginald's primary complaint about joinder is that Jonathan allegedly attempted to portray Reginald as a negative influence in Jonathan's life. RC Br. 17. Jonathan's primary complaint is that testimony opining that Reginald has antisocial personality disorder may have been imputed to Jonathan because he and Reginald share the same DNA. JC Br. 26. Each brother asserts the evidence about which he complains would not have been introduced in separate sentencing proceedings. In other words, a proceeding for only Reginald would not have included "bad influence" evidence, and a proceeding for only Jonathan would not have included the "antisocial personality disorder / sociopath / DNA" evidence.

In *Romano v. Oklahoma*, 512 U.S. 1 (1994), the jury in a capital sentencing proceeding improperly heard evidence that the defendant was subject to a death sentence in a separate case. That evidence should not have been admitted against the defendant under Oklahoma law. The defendant argued the error violated the Eighth Amendment and required reversal of his death sentence.

The Court rejected the claim because the admission of evidence which "may have been irrelevant [to the defendant's death sentence] as a matter of state law" does not in turn "render[] its admission federal constitutional error." 512 U.S. at 10 (citing *Estelle v. McGuire*, 502 U.S. 62, 67 (1991)). Rather, the admission of evidence in a capital sentencing proceeding violates the Eighth Amendment only when the evidence involves "constitutionally protected conduct" (such as freedom of speech). *Id*. at 11. Thus, the Court rejected any notion that its cases "stand for the proposition that the mere admission of irrelevant and prejudicial evidence requires the overturning of a death sentence." *Id*.

The Court also rejected the position Respondents effectively appear to be asserting here—that the admission of evidence that may be inadmissible (under state law) in a penalty phase proceeding violates the Eighth Amendment:

> Petitioner's argument, pared down, seems to be a request that we fashion general evidentiary rules, under the guise of interpreting the Eighth Amendment, which would govern the admissibility of evidence at capital sentencing proceedings. We have not done so in the past,

> however, and we will not do so today. The Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings.

512 U.S. at 11-12.

Instead, the *Romano* Court addressed the defendant's claim through a due process lens, emphasizing that "the proper analytical framework in which to consider this claim" is whether the error "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" 512 U.S. at 12 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Applying this standard, the Court found no due process violation. The Court acknowledged the evidence was not admissible under Oklahoma law, but nonetheless found no federal constitutional error because, "if the jurors followed the trial court's instructions, which we presume they did, this evidence should have had little—if any—effect on their deliberations." 512 U.S. at 13. The instructions "explicitly limited the jurors' consideration of aggravating factors to the four which the State sought to prove." *Id*. Further, the "instructions did not offer the jurors any means by which to give effect to the" improper evidence, *id*., "and the other relevant evidence presented by the State was sufficient to justify the imposition of the death sentence in this case." *Id*.[3]

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[3] *See also Estelle v. McGuire*, 502 U.S. 62, 67, 72, 75 (1991) (rejecting the argument that because evidence in a capital case was incorrectly admitted under California law it resulted in a federal constitutional error, instead finding no federal violation).

The same holds true here. Reginald is claiming that evidence Jonathan introduced was irrelevant and inadmissible with respect to Reginald, and Jonathan is making the same claim. Such complaints do not result in a federal constitutional violation, unless the admission of such evidence "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." Here, as throughout these cases, "[s]tate law does not define the scope of federal constitutional guarantees." *State v. Gleason*, 299 Kan. 1127, 1212 (2014) (Biles, J, dissenting). Moreover, just as in *Romano*, the jury instructions here expressly limited the jurors' consideration of aggravating circumstances to the four statutory factors on which the State relied, the instructions did not give the jury any means by which to give the complained of evidence improper effect, and the relevant and admissible evidence on which the State relied (from the guilt phase) was more than sufficient to justify the death sentences.

Presuming the jurors followed their instructions, which the Court must, there is no basis for finding an Eighth Amendment (or a due process) violation. Even considering the precise details of each brother's complaints, as the State does in the following sections, the joinder of their penalty phase proceedings did not violate the Constitution.

2. Reginald And Jonathan Presented Virtually Identical Mitigation Cases.

Reginald and Jonathan each presented substantially similar evidence of their childhoods and family circumstances. RC App. 382-391, 394-400. Each brother emphasized parental abandonment,

inappropriate sexual exposure and conduct at an early age, and emotional and physical abuse by their parents. RC App. 396-399. Most of this evidence was presented through testimony of their mother, sister, and aunt; each brother relied heavily on these witnesses. RC Br. 4-5. In their briefs, each brother again emphasizes this same evidence, and relies upon it as the primary support for their mitigation cases. RC Br. 32-33; JC Br. 7-11.

Nonetheless, Reginald and Jonathan each point to alleged differences in their mitigation cases to claim they presented antagonistic cases and arguments. Their complaints, however, fall short of the mark, and fail to overcome the presumption that the jurors here followed their instructions to consider and assess each brother individually, to consider only the aggravating factors on which the State relied, and to impose a sentence solely on the basis of the evidence against *each* brother. It is not plausible to suggest—in a case involving unspeakable sexual torture and cold-blooded quadruple murder—the jurors would have focused on minimal evidence that Reginald was not an ideal big brother to Jonathan (a self-evident proposition), or would have imputed Reginald's mental health evidence to Jonathan because the two brothers shared the same DNA.

Notably, in the penalty phase proceeding no party—not the State, not Reginald, and not Jonathan—made any arguments to the jury that Reginald was a negative influence on Jonathan, or that Reginald's mental health issues should be imputed to Jonathan (who presented considerable mental health evidence of his own). Instead, these claims are post-

trial attempts to manufacture antagonistic defenses where none existed.

The brothers' virtually identical mitigation cases strongly reinforced each other's claims of a bad family history, including mental health issues. Thus, if anything, joinder likely made each of their mitigation cases stronger than had they proceeded separately. In any event, neither Reginald nor Jonathan ultimately can demonstrate a serious risk of compelling, actual, and specific prejudice from joinder.

a. Reginald was not prejudiced by Jonathan's "negative influence" evidence.

Reginald argues that Jonathan's evidence suggested "Reginald had turned his younger brother into a murderer and ruined his life," RC Br. 33, but that assertion is not supported by the record. To the contrary, each brother relied primarily on the mitigating evidence that their largely shared childhood had created risk factors leading to their violent crimes. That Reginald was not an outstanding role model for Jonathan reinforced rather than rebutted Reginald's mitigation evidence. Indeed, each brother's family history evidence effectively corroborated the other's evidence.

Reginald also relied on expert testimony in an attempt to establish that his childhood caused him developmental trauma that led to problems like impaired sexual impulse control and deficient identification with social ideals. RC App. 396-397. Any evidence that Reginald was not a positive influence on Jonathan supported rather than refuted such claims.

The allegedly antagonistic evidence in fact was mutually reinforcing, and supported Reginald's arguments that his childhood experiences should be considered mitigating.

Using common sense, the jury was unlikely to believe Reginald was the sole or even a primary cause of Jonathan's horrific crimes. The guilt phase evidence proved that Jonathan raped Holly G. and raped or attempted to rape Heather M. while Reginald was not even present in the house (because Reginald was taking other hostages to withdraw money from their bank accounts at ATMs). RC App. 38-39, 61. Thus, the jury was well aware that Jonathan was quite capable of committing terrible crimes without Reginald's influence or presence.

Moreover, the jury decided that Jonathan, too, deserved a death sentence. The jury did not spare Jonathan and sentence only Reginald to death. As the dissent below aptly put it, "the negligible impact of Jonathan Carr's mitigating evidence suggesting his brother had been a negative influence in his life is obvious from the jury's refusal to declare mercy and spare Jonathan instead of dealing him the same punishment as his brother." JA 493 (Moritz, J., dissenting). In light of the entire sentencing phase record, any "negative influence" evidence did not create the serious risk of compelling, specific, and actual prejudice necessary to require severance.

b. Jonathan was not prejudiced by Reginald's mental health evidence.

Jonathan's argument that Reginald's mental health diagnosis and evidence prejudiced Jonathan fails. The State pointed out that neither brother had expressed or presented evidence of remorse, and in making that point the State discussed Reginald's mental health evidence suggesting he was opportunistic and self-indulgent. JA 437. The State did not argue Jonathan had antisocial personality disorder, nor did it argue that Jonathan was "dangerous by association" because Reginald had such a diagnosis. There is no reason the jury would have imputed Reginald's specific diagnosis to Jonathan, or used that evidence to conclude Jonathan was more dangerous than the trial evidence already had established.

Further, Jonathan made the family's mental health issues part of his own mitigation case, JA 428, relying on that history, including his own depression and risk factors for violence. Indeed, in some respects, Jonathan's evidence played up his potential for violence. JA 430. That each brother presented evidence of mental health issues resulting from their largely shared childhood experiences (or DNA) was mutually reinforcing, and *each* presented evidence that he demonstrated numerous risk factors for violence.

Ultimately, there was no serious risk of compelling, specific, and actual prejudice to either brother from the presentation of their virtually identical family history and their mutually reinforcing mental health evidence. For Jonathan now to complain about evidence of Reginald's mental health when Jonathan himself offered extensive evidence that his own similar mental

health issues and risk factors should be considered mitigation, is disingenuous. The brothers did not present antagonistic defenses, and severance was not required.

3. Reginald's refusal to conceal his shackles did not prevent the jury from giving Jonathan individualized consideration.

There is no question Reginald was properly shackled for the penalty phase of the trial, and he does not argue otherwise, nor does Jonathan. The sole dispute regarding Reginald's shackling is whether his willful refusal to conceal his shackles from the jury's view resulted in prejudice to Jonathan. In considering Jonathan's arguments on this point, the Court should be mindful that Jonathan took advantage of Reginald's behavior in the sentencing proceeding. Indeed, in closing argument, Jonathan's counsel stressed Jonathan's good behavior in the courtroom, contrasting it with Reginald's behavior. JA 43. Thus, during the penalty phase proceeding, Jonathan actually drew the jury's attention to Reginald's courtroom conduct, apparently as a strategic choice. Yet now he complains there was prejudice to him from that very same conduct.

Jonathan cites a number of guilt phase decisions discussing the concept of "guilt by association" in arguing Reginald's visible shackles prevented the jury from giving Jonathan individualized consideration. Those cases are not directly relevant, however, because here both brothers' *guilt* already had been determined, and neither Jonathan nor Reginald contested their

guilt during the sentencing phase. *Guilt* by association was not a risk during the penalty phase.

Jonathan cites *Deck v. Missouri*, 544 U.S. 622, 624 (2005), as supporting his "dangerous by association" argument. *Deck*, however, has limited relevance here, both because it was not an Eighth Amendment case and because it did not involve a joint penalty phase proceeding. Although *Deck* held due process prohibits routine, visible shackling in the penalty phase of a capital proceeding, *id*. at 633, *Deck* does not addresses the issue here: whether the proper shackling (for legitimate reasons[4]) of one defendant requires severance of a codefendant. No court has ever held the proper shackling of one defendant in a joint penalty phase proceeding results in presumptive prejudice to a codefendant. *Deck* does not adopt or even discuss Jonathan's "dangerous by association" theory, nor does *Deck* suggest there was a constitutional violation here.

The Court should not adopt a "dangerous by association" presumption, nor should it find prejudice to Jonathan on this record. As an overarching consideration, adopting a presumption and requiring severance in this circumstance would give defendants an incentive to misbehave and disrupt penalty phase proceedings precisely in order to compel severance of those proceedings. Instead, curative jury instructions can address possible prejudice from behavior such as

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[4] The *Deck* Court recognized due process "permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling. In so doing, it accommodates the important need to protect the courtroom and its occupants." 544 U.S. at 633.

Reginald's, if a co-defendant requests an instruction. Here, Jonathan did not request an instruction about Reginald's shackles. His decision not to do so appears to have been trial strategy. Far from suggesting Reginald's conduct was irrelevant to Jonathan, counsel for Jonathan drew attention to Reginald's conduct, arguing that Jonathan's superior conduct during trial weighed in favor of leniency. Jonathan should not now be permitted to have it both ways.

Further, Reginald's visible shackling more likely aided (rather than prejudiced) Jonathan's mitigation case. The State could not and did not rely on future dangerousness as an aggravating circumstance. RC App. 505-506. Instead, Reginald's shackling was at most relevant to the mitigating factor of whether imprisonment would be "sufficient to defend and protect the people's safety from the defendant." RC App. 508. If anything, the jury viewing Reginald in shackles—but not Jonathan—might have caused the jury to distinguish the two in a way *beneficial* to Jonathan's mitigation case. Reginald's visible shackles did not create a serious risk of compelling, specific, and actual prejudice to Jonathan.

4. The record establishes the jury considered and sentenced each brother individually.

That the State argued Jonathan and Reginald both deserved a death sentence—based on their individual and joint actions in this case—does not mean the jury was somehow prevented from giving each brother individualized consideration. To the extent the State discussed the brothers together, that treatment derived from the irrefutable proof they jointly participated in

many horrible crimes. There is no Eighth Amendment requirement that the State identify one codefendant as more (or less) culpable than another, or one as more (or less) deserving of a death sentence than another. That is especially so in a case like this, where each brother was both individually and jointly responsible for numerous horrific acts, and where neither brother showed any remorse for his actions.

The trial court did not instruct the jury to view the brothers as an inseparable unit for sentencing purposes; instead, the jury was expressly instructed to "give separate consideration to each defendant," and to "consider[] an individual defendant…" RC App. 501, 509. The jury also received separate instructions for each defendant's mitigating and aggravating circumstances, and a separate, detailed verdict form for each defendant. RC App. 502-503, 505-506; JA 461-492. Nothing in the jury instructions suggested the jury should treat the brothers as a team, or do anything other than give them individual consideration.

Nothing in the State's arguments suggested the jury should treat the brothers as a unit, or that the jury should not consider any mitigating evidence that was unique to one or the other brother. JA 391-392 ("You completed the first phase, the guilt phase, with the determination of as to the culpability of the individual defendants…"); JA 394 ("we point to each defendant, two defendants, two brothers, two culprits, two criminals, two individuals all found to be culpable of capital murders of four people."); JA 398 ("These are individuals who lead and led their lives with the reckless disregard for the rights of others….[T]here are not enough words to describe how vial [sic] and

despicable what these two individuals did to those young people in that field."); JA 398-399 ("These two individuals came from a family where some of their members of the family all from major lineal line, all sharing DNA, all from the scientific issues, these two individuals came from a family where some people worked for a living. Like their mom."); JA 401 ("And I certainly ask you to reflect on the abilities of these two gentlemen here. These two individuals, their acts.").

Of course the State argued each brother, convicted of capital murder for horrific crimes, deserved a death sentence. But the State never suggested or even implied the jury should deny each brother careful, individual consideration. Indeed, given the brothers' joint participation in these crimes and their virtually identical mitigation cases, it would have been surprising (and perhaps impermissibly arbitrary) had the State *not* argued for the same sentences. In cases such as this, where the defendants have committed the same crimes and offered the same mitigation cases, joinder is particularly appropriate in order to ensure that similarly situated defendants are treated the same.

Moreover, each brother had an unrestricted opportunity to present evidence and make arguments unique to himself. Reginald, for example, pointed to evidence that he tries to be a good father and that his children love him. JA 418. He also asked the jury to spare his life so he could maintain a relationship with those children. JA 423. Jonathan has no children and could make no such arguments.

Similarly, Jonathan's trial counsel emphasized Jonathan's lack of a serious prior criminal record,

Jonathan's relative youth, and Jonathan's good behavior during trial, JC Br. 11, 16, all factors unique to Jonathan, and repeated the same themes in his closing argument. JA 427, 430-431. Additionally, Jonathan offered witnesses who testified that they considered Jonathan a good person when they knew him. Jonathan also presented his own mental health evidence, regarding his depression and suicide attempts. JA 427-428, 431-432.

Thus, the jury's instructions, the parties' closing arguments, and the evidence all demonstrate Jonathan and Reginald both had every opportunity to make individualized arguments and receive an individualized sentencing determination. The jury's day-long deliberations, R. Br. 6; JA 448, further show that the jury took seriously its role to provide individualized consideration. Moreover, in the guilt phase, this same jury demonstrated its ability to consider Jonathan and Reginald individually when it acquitted Jonathan of certain crimes of which it convicted Reginald.

Here, Jonathan and Reginald Carr received death sentences because a fair, impartial, and thoughtful jury determined that each brother individually deserved that sentence; the brothers were not sentenced to death "as a team" and their joint penalty phase proceeding did not violate the Eighth Amendment.

B. Any Error Necessarily Was Harmless.

Even if the Court were to find error here, any such error necessarily would be harmless under any standard. The jury explicitly found *four* aggravating circumstances proven beyond a reasonable doubt for both Jonathan and Reginald. JA 461, 477. The proof

and strength of the aggravating circumstances in this case were overwhelming—so overwhelming that neither Jonathan nor Reginald even attempts to refute *any* of the aggravating circumstances. Even if the trial court had conducted separate penalty phase proceedings, all four aggravating factors were proven beyond a reasonable doubt against each brother in the guilt phase.

Any minimal differences in the mitigating evidence could not have made a difference in the ultimate outcome had the proceedings been severed. *First*, as already explained, each brother's mitigating evidence of family history, childhood experiences, and mental health issues was either virtually identical or mutually reinforced and corroborated the other brother's evidence. Thus, each brother benefitted in significant ways from the joint proceeding.

Second, any mitigating circumstances the jury found to exist here necessarily paled in comparison to the proof and strength of the aggravating circumstances. The dissenting Justice in the Kansas Supreme Court captured well why any error in failing to sever had to be harmless by any standard. Pet. Br. 50-53. Kansas will not repeat her observations in full here but, highly summarized, the record irrefutably demonstrates each brother participated in sexually torturing the four capital murder victims and the surviving fifth victim for more than three hours. Reginald took several victims to ATMs and forced them to withdraw cash from their bank accounts, while Jonathan remained in the house raping the female victims.

When Reginald and Jonathan tired of their depraved sexual torture and apparently decided they had obtained sufficient cash from the victims, they drove the five young adults to a field, forced them to kneel naked or partially clothed in below freezing temperatures, and shot each of the five victims in the back of the head, one-by-one, resulting in the execution of the four capital murder victims. But even that did not end the horrific acts of that evening. Instead, Reginald and Jonathan drove a vehicle over the victims' bodies before returning to the victims' home. The brothers then looted the home for valuables (including an engagement ring one victim had planned to give another), and gratuitously beat to death the dog of the sole surviving victim. Pet. Br. 50-53.

In light of the overwhelming, uncontested aggravating circumstances and both brothers' virtually identical but weak mitigation cases, it is not surprising the jury rejected Jonathan's and Reginald's pleas for mercy. Severing the penalty phase proceeding would not have changed the result. These individual sentences, beyond any doubt, were warranted under Kansas law on the record here.

CONCLUSION

The State of Kansas respectfully requests that the Kansas Supreme Court's decision be reversed.

Respectfully submitted,

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