FILED

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

APP DOCKET NO. MB

2015 DEC 23 P 2:44

CLERK OF THE DISTRICT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KANSAS
MB

THE STATE OF KANSAS, Plaintiff	)	
vs.	)	CASE#09CR1462
SCOTT P. ROEDER, Defendant	)	

MOTION FOR DETERMINATION THAT MANDATORY MINIMUM SENTENCES SET FORTH IN K.S.A. 21-6620 [FORMERLY K.S.A. 21-4635 et seq.] ARE DISPROPORTIONATE AND VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS AND SECTION 9 OF THE KANSAS BILL OF RIGHTS

Now comes the Defendant, SCOTT P. ROEDER, by defendant's attorneys, Mark T. Rudy, Chief Public Defender, Taryn Locke, Assistant Public Defender, and Jason Smartt, Assistant Public Defender, and petitions this Court to make the finding as above captioned because K.S.A. 21-6620 [formerly 21-4635 et seq.] violates both the Eight and Fourteenth Amendment of the United States Constitution and Section 9 of the Kansas Constitution—in that it is cruel and /or unusual punishment and is disproportionate.

In support of this motion, defendant states as follows:

FACTUAL ASSERTIONS

1. It is alleged that the defendant, Scott P. Roeder, put an end to the abortion practice of Dr. George R. Tiller, by killing him May 31, 2009.

2. It is alleged that in the course of committing the alleged murder, the defendant also committed aggravated assault against both Gary Hoepner and Keith Martin.

DC18

PROCEDURAL HISTORY

3. Defendant was arrested May 31, 2009 and taken into custody

4. A first appearance occurred June 2, 2009.

5. The defendant was accused of murder in the first degree [K.S.A. 21-3401(a); OGPF], and two counts of aggravated assault [K.S.A. 21-3410(a); SL7PF].

6. An order for a DNA sample of the defendant was granted July 2, 2009.

7. A preliminary hearing occurred on July 28, 2009; whereupon the defendant was arraigned and the case was set for jury trial.

8. Numerous pretrial and trial motion were filed, argued, and heard.

9. The case proceeded to jury trial.

10. The defendant was convicted on January 29, 2010 of murder in the first degree [K.S.A. 21-3401(a); OGPF], and two counts of aggravated assault [K.S.A. 21-3410(a); SL7PF].

11. On March 11, 2010, the prosecution filed notice of its intent to seek a fifty year term of imprisonment, pursuant to K.S.A. 21-4635 et seq. The basis was due to two aggravating factors:

a) "Pursuant to K.S.A. 21-4636(b), the defendant knowingly or purposely created a great risk of death to more than one person."

b) "Pursuant to K.S.A. 21-4636(f), the defendant committed the crime in an especially heinous, atrocious or cruel manner."

12. Defendant was sentenced April 1, 2010. The sentence was a bench sentencing—and not determined in the presence or with the involvement of the jury. Judge Wilbert imposed a sentence for murder in the 1st degree (Count 1) of life / Hard 50. The aggravated assault convictions (Counts 2 and 3) were sentenced as 12 months each, with all counts consecutive. The Judge made findings pursuant to K.S.A. 21-4636 – K.S.A. 21-4638 and incorporated those

in the Court's Written Findings of Aggravating Circumstances as Required by K.S.A. 21-4635(d).

SENTENCING PHASE JURY TRIAL

13. The defense previously filed a **Motion to Challenge the Sentencing Statute as Violative of Right to a Jury Trial** (filed March 25, 2010).

14. In Kansas v. Scott Roeder, 336 P.3d 831, 300 Kan. 901 (Kan., 2014), the Court considered the proceedings at the District Court:

> "Premeditated first-degree murder carries a life sentence with a mandatory *858 minimum of 25 years before the defendant becomes parole eligible unless the State establishes that the defendant qualifies for an enhanced minimum sentence, here 50 years. State v. Nelson, 291 Kan. 475, 486, 243 P.3d 343 (2010) (citing K.S.A. 21–4635; K.S.A. 22–3717[b][1]). At the time Roeder was sentenced, the district court had to find by a preponderance of the evidence that one or more of the aggravated circumstances enumerated in K.S.A. 21–4636 existed and that they were not outweighed by any mitigating factors in order to enhance the minimum sentence. K.S.A. 21–4635(d); Nelson, 291 Kan. at 486–88, 243 P.3d 343."

15. Based on the opinion of the Kansas Supreme Court in Kansas v. Scott Roeder, 336 P.3d 831, 300 Kan. 901 (Kan., 2014), the conviction has been affirmed—but a new sentencing has been granted.

REQUESTED FINDINGS

16. The defense requests the Court make findings that pursuant to the Kansas Constitution, and United States Constitution, that sentencing under the Kansas statutory scheme applicable would be cruel and unusual, and disproportionate, and therefore unconstitutional as applied to the defendant and under the specific facts of this case.

APPLICABLE SENTENCING STATUTE

17. K.S.A. 21-6620(e) [formerly sentenced under K.S.A. 21-4635 et seq.] sets out the relevant statutory language regarding sentencing applied and potentially to be applied by the Court for sentencing.

LEGAL AUTHORITIES

18. The Eighth Amendment, applicable to the States through the Fourteenth Amendment, 1 provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amends. VIII, XIV.

19. Section 9 of the Kansas Bill of Rights also prohibits infliction of "cruel or unusual punishment." Kan. Const. Bill of Rights, §9.

CASE LAW FOR FEDERAL ANALYSIS

20. Terrance Graham v. Florida, 560 U.S. 48 (2010) can be summarized as a case where the Justices determined that life without parole in a juvenile non-homicide case was unconstitutional. That case sets out the several paths of analysis for dis-proportionality and cruel and unusual challenges.

21. Terrance Graham v. Florida, indicates the following basic background regarding the Eighth Amendment:

> "[1][2] The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to " 'the evolving standards of decency that mark the progress of a maturing society.' " Estelle v. Gamble, 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion)). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.' " Kennedy v. Louisiana, 554 U.S. 407, ––––, 128 S.Ct. 2641, 2649, 171 L.Ed.2d 525 (2008) (quoting Furman v. Georgia, 408 U.S. 238, 382, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Burger, C.J., dissenting)).
>
> [3][4][5] The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances. See, e.g., Hope v. Pelzer, 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). "[P]unishments of torture," for example, "are forbidden." Wilkerson v. Utah, 99 U.S. 130, 136, 25 L.Ed. 345 (1879). These cases underscore the essential principle that, under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes."

22. Terrance Graham v. Florida, indicates an alternative theory for cruel and unusual punishment jurisprudence—proportionality; and two paths of analysis for proportionality challenges:

> "[6][7] For the most part, however, the Court's precedents consider punishments challenged not as inherently barbaric but as disproportionate to the crime. The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitu-tion's ban on cruel and unusual punishments is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." Weems v. United States, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910).
>
> The Court's cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty."

23. Terrance Graham v. Florida, indicates the following basic outline for proportionality analysis of challenges to a length of term of years given all circumstances in a particular case:

> "[8] In the first classification the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive. Under this approach, the Court has held unconstitutional a life without parole sentence for the defendant's seventh nonviolent felony, the crime of passing a worthless check. Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). In other cases, however, it has been difficult for the challenger to establish a lack of proportionality. A leading case is Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), in which the offender was sentenced under state law to life without parole for possessing a large quantity of cocaine. A closely divided Court upheld the sentence. The controlling opinion concluded that the Eighth Amendment contains a "narrow proportionality principle," that "does not require strict proportionality between crime and sentence" but rather "forbids only extreme sentences that are 'grossly disproportionate' to the crime." Id., at 997, 1000–1001, 111 S.Ct. 2680 (KENNEDY, J., concurring in part and concurring in judgment). Again closely divided, the Court rejected a challenge to a sentence of 25 years to life for the theft of a few golf clubs under California's so-called three-strikes recidivist sentencing *2022 scheme. Ewing v. California, 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003); see also Lockyer v. Andrade, 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003). The Court has also upheld a sentence of life with the possibility of parole for a defendant's third nonviolent felony, the crime of obtaining money by false pretenses, Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980), and a sentence of 40 years for possession of marijuana with intent to distribute and distribution of marijuana, Hutto v. Davis, 454 U.S. 370, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982) (per curiam).

The controlling opinion in Harmelin explained its approach for determining whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime. A court must begin by comparing the gravity of the offense and the severity of the sentence. 501 U.S., at 1005, 111 S.Ct. 2680 (opinion of KENNEDY, J.). "[I]n the rare case in which [this] threshold comparison ... leads to an inference of gross disproportionality" the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. Ibid. If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate," the sentence is cruel and unusual. Ibid."

24. Terrance Graham v. Florida, indicates the following basic background regarding proportionality analysis of categorical restrictions:

"The second classification of cases has used categorical rules to define Eighth Amendment standards. The previous cases in this classification involved the death penalty. The classification in turn consists of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender. With respect to the nature of the offense, the Court has concluded that capital punishment is impermissible for nonhomicide crimes against individuals. Kennedy, supra, at ——, 128 S.Ct., at 2660; see also Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). In cases turning on the characteristics of the offender, the Court has adopted categorical rules prohibiting the death penalty for defendants who committed their crimes before the age of 18, Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), or whose intellectual functioning is in a low range, Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). See also Thompson v. Oklahoma, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988).

[9] In the cases adopting categorical rules the Court has taken the following approach. The Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. Roper, supra, at 572, 125 S.Ct. 1183. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," Kennedy, 554 U.S., at ——, 128 S.Ct., at 2650, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution. Roper, supra, at 572, 125 S.Ct. 1183."

25. While Terrance Graham v. Florida is a categorical style proportionality challenge, Ronald Harmelin v. Michigan and Gary Ewing v. California are both cases involving gross proportionality challenge to a particular defendant's sentence.

26. After looking at the Kansas state law precedents, the analysis begins with the Freeman considerations as applied to the defendant, and a proportionality analysis of challenges to a length of term of years given all circumstances in a particular case.

CASE LAW FOR STATE ANALYSIS

27. "Section 9 of the Kansas Bill of Rights may be invoked against an excessive or disproportionate sentence. The nature of a sentence as cruel or unusual encompasses duration." Kansas v. McDaniel, 228 Kan. 172 at 185, 612 P.2d 123 (1980).

28. Pursuant to Kansas v. Nicholas Florentin, 2013 WL2712238 (Kan. 2013), the analysis of Kansas state constitutional challenges under Section 9 of the Bill of Rights, are distinct from challenges under the Eighth Amendment:

> "*8 Next, Florentin argues for the first time on appeal that his hard 25 life sentence violates the Eighth Amendment to the United States Constitution and § 9 of the Kansas Constitution Bill of Rights because the sentence is a disproportionate punishment for his crime. In making this argument, Florentin solely focuses on a categorical dispropor-tionality analysis and relies on the decision in Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).
>
> [12] In limiting his argument to a reliance on Graham and categorical disproportionality, Florentine has failed to preserve two potential cruel and/or unusual punishment arguments. First, he has not made a case-specific challenge, another type of Eighth Amendment challenge recognized by the United States Supreme Court and discussed in Graham. See Graham, 560 U.S. 48, 130 S.Ct. 2011, 2021–22, 2037–38, 176 L.Ed.2d 825 (Roberts, C.J., concurring). This distinction is important because "case-specific and categorical challenges are analytically independent of each other." State v. Seward, 296 Kan. 979, 985, 297 P.3d 272 (2013). Second, although Florentin has cited to § 9 of the Kansas Constitution Bill of Rights, he has not discussed the factors that must be analyzed to determine the validity of such a claim. Those factors were defined in State v. Freeman, 223 Kan. 362, 367, 574 P.2d 950 (1978), and we have held that the Freeman analysis is distinct from an Eighth Amendment case-specific analysis. See, e.g., Mossman, 294 Kan. at 922–25, 281 P.3d 153 (discussing and applying Freeman and Graham and noting differences between Gra-ham's framework for an Eighth Amendment case-specific challenge and the Freeman analysis).
>
> Consequently, Florentin has waived or abandoned both an Eighth Amendment case-specific challenge and a § 9 challenge. See State v. Anderson, 291 Kan. 849, 858, 249 P.3d 425 (2011) (points raised incidentally in a brief and not argued therein are deemed abandoned); State v. Conley, 287 Kan. 696, 703,

197 P.3d 837 (2008) (failure to support point with pertinent authority or show why it is sound despite lack of supporting authority or in face of contrary authority is akin to failing to brief issue)."

29. According to Kansas v. Freeman, 223 Kan. 362, 367, 574 P.2d 950 (1978), sentence dis-proportionality and cruel and unusual considerations should be reviewed as follows:

> "*367 [1] Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity. State v. Coutcher, 198 Kan. 282, 287, 424 P.2d 865; Cipolla v. State, supra, 207 Kan. pp. 824-25, 486 P.2d 1391; Anno: Cruel Punishment Length of Sentence, 33 A.L.R.3d 335.
>
> [2][3][4] In determining whether the length of a sentence offends the constitutional prohibition against cruel punishment three techniques should be considered:
>
> (1) The nature of the offense and the character of the offender should be examined with particular regard to the degree of danger present to society; relevant to this inquiry are the facts of the crime, the violent or nonviolent nature of the offense, the extent of culpability for the injury resulting, and the penological purposes of the prescribed pun-ishment;
>
> (2) A comparison of the punishment with punishments imposed in this jurisdiction for more serious offenses, and if among them are found more serious crimes punished less severely than the offense in question the challenged penalty is to that extent suspect; and
>
> (3) A comparison of the penalty with punishments in other jurisdictions for the same offense."

30. The Freeman factors appear similar to the three factors noted in Solem v. Helm, and the other proportionality cases that pose challenges to a length of term of years given all circumstances in a particular case.

31. Freeman appears to remain valid in substance, though Kansas v. Raymore Levy, 292 Kan. 379, 253 P.3d 341 (Kan., 2011) appears to modify Freeman in making advocacy and the role of the Court at the District Court level, more significant (rather than allowing such issues to be raised for the first time on appeal).

32. Of note in Kansas v. Andray Cameron, 294 Kan. 884, 281 P.3d 143 (2012) is how the Court balances the weight of each of the Freeman factors independently and against each other.

33. Additionally, the District Court must make factual findings and draw conclusions of law regarding each of the Freeman factors, in order for there to be meaningful appellate review. Kansas v. Seward, 296 Kan. 979, 297 P.3d 272 (2013), Kansas v Sergio Cervantes-Puentes, 2013WL2712134 (Kan., 2013). This is specifically requested by the defense.

34. Kansas appellate decisions have previously addressed constitutionality challenges—and have reached decisions adverse to the defense. See for example Kansas v. Monty Rogers, 298 P.3d 325 (Kan., 2013), and Kansas v. Zachary Toahty-Harvey, 298 P.3d 338 (Kan., 2013), and Kansas v. Andray Cameron, 294 Kan. 884, 281 P.3d 143 (2012) where the Freeman factors and several arguments similar to those herein were carefully considered, as well as other cases cited herein.

ASSERTIONS & ARGUMENTS: ANALYSIS OF FIRST FREEMAN FACTOR

35. Pursuant to Freeman, the first factor for consideration is:

> (1) The nature of the offense and the character of the offender should be examined with particular regard to the degree of danger present to society; relevant to this inquiry are the facts of the crime, the violent or nonviolent nature of the offense, the extent of culpability for the injury resulting, and the penological purposes of the prescribed punishment.

36. The offenses in this case were motivated by Scott Roeder's desire to save the lives of innocent unborn children.

37. Scott Roeder caused the absolute minimum of harm necessary to accomplish his goal of stopping abortions by Goerge Tiller.

38. Scott Roeder has been making productive use of his time in prison.

39. There is no penological purpose that can be discerned, or additional penolgoical value, which distinguishes a 25 year prison sentence from a 50 year prison sentence.

40. The defense hopes the Court will pay careful attention to the character of the defendant—as indicated by facts of good behavior of the defendant at trial and anticipated at sentencing, as well as the mitigation presented at sentencing and to be presented at re-sentencing.

ASSERTIONS & ARGUMENTS: ANALYSIS OF SECOND FREEMAN FACTOR

41. Pursuant to Freeman, the second factor for consideration is:

> (2) A comparison of the punishment with punishments imposed in this jurisdiction for the more serious offenses, and if among them are found more serious crimes punished less severely than the offense in question the challenged penalty is to that extent suspect.

42. Under the second prong of the Freeman analysis, this Court must make a "comparison of the punishment with punishments imposed in this jurisdiction for more serious offenses, and if among them are found more serious crimes punished less severely than the offense in question the challenged penalty is to that extent suspect." Freeman, 223 Kan. at 367.

43. Punishing defendant's conduct more severely than in certain other homicide offenses is arguably an indicator of disproportionality.

ASSERTIONS & ARGUMENTS: ANALYSIS OF THIRD FREEMAN FACTOR:

44. Pursuant to Freeman, the third factor for consideration is:

> (3) A comparison of the penalty with punishments in other jurisdictions for the same offense.

45. In some States, first degree murder may merit a range of punishments, including life without parole.

46. In other States, the sentence for first degree murder may range down to a life sentence with parole eligibility within as little as 15, 20, or 35 years.

47. Defendant believes this reaches the threshold of Cruel and Unusual Punishment as set out in Section 9 of Kansas Constitution and the Eighth Amendment of the United States Constitution.

WHEREFORE, defendant petitions this Court to make the finding as above captioned because K.S.A. 21-6620 [formerly 21-4635 et seq.] violates both the Eight and Fourteenth Amendment of the United States Constitution and Section 9 of the Kansas Constitution—in that it is cruel and /or unusual punishment and is disproportionate.

Respectfully submitted,

Jason Smartt #19510 for:

Mark T. Rudy #23090
Chief Public Defender
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604 North Main, Suite D
Wichita, Kansas 67203
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion was delivered in person to the Sedgwick County District Attorney's office this filing date.

Jason Smartt
Assistant Public Defender

NOTICE OF HEARING

Please take notice and be advised that the foregoing Motion will be heard at 9 on the 3/23/16, before Judge Wilbert.

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THE STATE OF KANSAS,

Plaintiff

vs. CASE#09CR1462

SCOTT P. ROEDER,

Defendant

MOTION TO CHALLENGE THE MANDATORY PENALTY STATUTE AS A VIOLATION OF CONSTITUTIONAL NORMS AND PUBLIC POLICY

Now comes the Defendant, SCOTT P. ROEDER, by defendant's attorneys, Mark T. Rudy, Chief Public Defender, Taryn Locke, Assistant Public Defender, and Jason Smartt, Assistant Public Defender, and moves this Court to determine that a mandatory penalty statute, K.S.A. 21-4635 *et seq*, and now K.S.A. 21-6620, sentence should not be imposed.

In support of this motion, defendant states as follows:

FACTUAL ASSERTIONS

1. It is alleged that the defendant, Scott P. Roeder, put an end to the abortion practice of Dr. George R. Tiller, by killing him May 31, 2009.

2. It is alleged that in the course of committing the alleged murder, the defendant also committed aggravated assault against both Gary Hoepner and Keith Martin.

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3. Defendant was arrested May 31, 2009 and taken into custody

4. A first appearance occurred June 2, 2009.

5. The defendant was accused of murder in the first degree [K.S.A. 21-3401(a); OGPF], and two counts of aggravated assault [K.S.A. 21-3410(a); SL7PF].

6. An order for a DNA sample of the defendant was granted July 2, 2009.

7. A preliminary hearing occurred on July 28, 2009; whereupon the defendant was arraigned and the case was set for jury trial.

8. Numerous pretrial and trial motion were filed, argued, and heard.

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11. On March 11, 2010, the prosecution filed notice of its intent to seek a fifty year term of imprisonment, pursuant to K.S.A. 21-4635 et seq. The basis was due to two aggravating factors:

a) "Pursuant to K.S.A. 21-4636(b), the defendant knowingly or purposely created a great risk of death to more than one person."

b) "Pursuant to K.S.A. 21-4636(f), the defendant committed the crime in an especially heinous, atrocious or cruel manner."

12. Defendant was sentenced April 1, 2010. The sentence was a bench sentencing—and not determined in the presence or with the involvement of the jury. Judge Wilbert imposed a sentence for murder in the 1st degree (Count 1) of life / Hard 50. The aggravated assault convictions (Counts 2 and 3) were sentenced as 12 months each, with all counts consecutive. The Judge made findings pursuant to K.S.A. 21-4636 – K.S.A. 21-4638 and incorporated those in the Court's Written Findings of Aggravating Circumstances as Required by K.S.A. 21-4635(d).

SENTENCING PHASE JURY TRIAL

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14. In Kansas v. Scott Roeder, 336 P.3d 831, 300 Kan. 901 (Kan., 2014), the Court considered the proceedings at the District Court:

> "Premeditated first-degree murder carries a life sentence with a mandatory *858 minimum of 25 years before the defendant becomes parole eligible unless the State establishes that the defendant qualifies for an enhanced minimum sentence, here 50 years. State v. Nelson, 291 Kan. 475, 486, 243 P.3d 343 (2010) (citing K.S.A. 21–4635; K.S.A. 22–3717[b][1]). At the time Roeder was sentenced, the

> district court had to find by a preponderance of the evidence that one or more of the aggravated circumstances enumerated in K.S.A. 21–4636 existed and that they were not outweighed by any mitigating factors in order to enhance the minimum sentence. K.S.A. 21–4635(d); Nelson, 291 Kan. at 486–88, 243 P.3d 343."

15. Based on the opinion of the Kansas Supreme Court in Kansas v. Scott Roeder, 336 P.3d 831, 300 Kan. 901 (Kan., 2014), the conviction has been affirmed—but a new sentencing has been granted.

STATUTE AND CONSTITUTIONAL LAW

16. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." United States Constitution, Bill of Rights, Eighth Amendment.

17. "All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." Kansas Constitution, Bill of Rights, Section Nine.

18. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." United States Constitution, Bill of Rights, Fifth Amendment.

19. "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." Kansas Constitution, Bill of Rights, Section Eighteen.

20. K.S.A. 21-4601 indicates the following critical language that should be considered in sentencing the defendant, "This article shall be liberally construed to the end that persons convicted of crime shall be dealt with in accordance with their individual characteristics,

circumstances, needs, and potentialities as revealed by case studies; that dangerous offenders shall be correctively treated in custody for long terms as needed; and that other offenders shall be dealt with by probation, suspended sentence, fine or assignment to a community correctional services program whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the offender, or shall be committed for at least a minimum term within the limits provided by law."

21. Though not applicable as binding law on crimes committed on or after July 1, 1993 (subpart c), K.S.A. 21-4606 also provides valuable policy considerations for a sentencing Court, when a defendant may be sentenced to prison:

> "(a) In sentencing a person to prison, the court, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, shall fix the lowest minimum term which, in the opinion of such court, is consistent with the public safety, the needs of the defendant, and the seriousness of the defendant's crime.
>
> (b) The following factors, while not controlling, shall be considered by the court in fixing the minimum term of imprisonment:
>
> (1) The defendant's history of prior criminal activity;
>
> (2) The extent of the harm caused by the defendant's criminal conduct;
>
> (3) Whether the defendant intended that the defendant's criminal conduct would cause or threaten serious harm;
>
> (4) The degree of the defendant's provocation;
>
> (5) Whether there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;
>
> (6) Whether the victim of the defendant's criminal conduct induced or facilitated its commission;
>
> (7) Whether the defendant has compensated or will compensate the victim of the defendant's criminal conduct for the damage or injury that the victim sustained."

22. These policy considerations, found in statute, provide a supplement to the considerations of the balance between aggravating and mitigating factors.

PROSECUTION ADVOCACY

23. In addition to the mandatory penalty statute itself, the Court has been asked by the State to consider making a policy statement, and to do so in the advancement of deterrence.

POLICY CONSIDERATIONS

24. Balancing between the concerns about mandatory sentences, and the erroneous justifications for their use, should give the Court pause in sentencing under a mandatory penalty statute, when an equally valid, and justified alternative exists.

ARGUMENT

25. The imposition of a sentence under the "hard 50" statute would be cruel and unusual punishment in violation of the Federal and State Constitutions. Defendant should be sentenced in a manner that considers all relevant factors, and proper basis of public policy in sentencing.
26. The imposition of a sentence under the "hard 50" statute would be contrary to due process in violation of the Federal and State Constitutions. Defendant should be sentenced in a manner that considers all relevant factors, and proper basis of public policy in sentencing.
27. The imposition of a sentence under the "hard 50" statute would be contrary to public policy.
28. Factoring deterrence into the mandatory sentencing, without evidence that such a sentence will have a deterrent effect, cannot be permissible.
29. Using the sentencing of the defendant to make a statement (to others who would oppose abortion through violent means) is not a permissible basis for a sentence.

WHEREFORE, the defendant requests this Court to determine that a mandatory penalty statute, K.S.A. 21-4635 *et seq*, and now K.S.A. 21-6620, sentence should not be imposed.

#19510
Jason Smith for:

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion was hand delivered to the Sedgwick County District Attorney's office this filing date.

Jason Smart
Assistant Public Defender

NOTICE OF HEARING

Please take notice and be advised that the foregoing Motion will be heard at 9 on the 3/23/16, before Judge Wilbert.

FILED

PP DOCKET NO. MB

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

2015 DEC 23 P 2:38

CLERK OF THE DISTRICT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KANSAS

THE STATE OF KANSAS, Plaintiff vs. SCOTT P. ROEDER, Defendant	)	CASE#09CR1462

BRIEF REGARDING PROSECUTION JURY SELECTION BASED ON VIOLATION OF BATSON V. KENTUCKY, 476 U.S. 79 (1986)

PRELIMINARY STATEMENT

Now comes the Defendant, SCOTT P. ROEDER, by defendant's attorneys, Mark T. Rudy, Chief Public Defender, Taryn Locke, Assistant Public Defender, and Jason Smartt, Assistant Public Defender, and submits this brief in support of the defense motion(s).

QUESTION PRESENTED

1. Whether the use of peremptory jury strikes by the prosecution, on the basis of a panelist's beliefs and actions as religious, pro-life, or pro-abortion, would be a violation of Batson v. Kentucky.
2. Whether the use of peremptory jury strikes by the prosecution, on the basis of a panelist's status as a woman, or a racial / ethnic minority, in conjunction with beliefs and actions as religious, pro-life, or pro-abortion, would be a violation of Batson v. Kentucky.

CASE LAW: BATSON V. KENTUCKY, KANSAS, AND THE 10TH CIRCUIT

3. Batson v. Kentucky, 476 U.S. 79 (1986) is the hallmark case standing for the proposition that race based equal protection violations cannot be part of the jury selection process.
4. J.E.B. v. Alabama, 511 U.S. 127 (1994) extends the proposition of Batson to prohibit similar discrimination on the basis of gender.

DC 18

5. State v. Bradford, 272 Kan. 523, 34 P.3d 434 (Kan. Nov 16, 2001) finds the Court revisiting old decisions for standards about Batson challenges.

> "We recited our standard of review of Batson challenges in State v. Pink, 270 Kan. 728, 731-32, 20 P.3d 31 (2001):
> "A three-step analysis applies to a Batson challenge. The defendant must first make a prima facie showing that the prosecution has used a peremptory challenge on the basis of race. Next, if a showing is made, the burden shifts to the prosecution to articulate a race-neutral reason for striking a juror, and, finally, the court then decides whether the defendant has carried the burden of establishing purposeful discrimination. See State v. Edwards, 264 Kan. 177, 192, 955 P.2d 1276 (1998).
> "In State v. Alexander, 268 Kan. 610, 619, 1 P.3d 875 (2000), we stated: 'Because the trial judge's findings in the context under consideration turn on evaluation of the credibility of the prosecutor, a reviewing court should give those findings great deference. State v. Walston, 256 Kan. 372, 378, 886 P.2d 349 (1994) (referring to Batson).' " In Walston, we further stated:
> " 'In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge ... [the evaluation of which] lies 'peculiarly within a trial judge's province.' [Citations omitted.]' " 256 Kan. at 379, 886 P.2d 349.
> "Judicial discretion is abused only when exercised in an arbitrary, fanciful, or unreasonable manner. State v. Gardner, 264 Kan. 95, 103-04, 955 P.2d 1199 (1998)."

The Court accepted the prosecution's race neutral explanation of striking the Hispanic juror as unfavorably disposed to the prosecution.

6. The three step process of making and responding to a Batson challenge was elaborated upon in State v. Vargas, 260 Kan. 791, 926 P.2d 223 (1996).

7. The nature of burden shifting between the assertion of a Batson violation by the defense, and the need to elaborate a neutral reason by the prosecution, is set out at State v. Foust, 18 Kan.App.2d 617, 857 P.2d 1368 (1993).

8. Whisler v. State, 272 Kan. 864, 36 P.3d 290 (Kan. Dec 14, 2001) discusses two cases, Teague, [Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)] and Allen, [Allen v. Hardy, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986)] for the proposition (by way of dicta) that Batson, "would not be applied retroactively to cases on collateral review." Whisler. The case is focused primarily on the retroactivity of law issue.

9. Alires v. State, 21 Kan.App.2d 676, 906 P.2d 172 (Kan.App. Nov 22, 1995) is a decision in which the Court acknowledges Batson being extended by Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), to permit a criminal defendant to challenge a strike of even a person not of the defendant's own race. The Alires retroactivity issues are elaborated upon in Easterwood v. State, 273 Kan. 361, 44 P.3d 1209 (Kan. Apr 19, 2002).
10. There appear to be no 10th Circuit cases, in Kansas, that flow from Batson (at least not uncovered within a significant research site). However, there are 4 10th Circuit cases on point.
11. U.S. v. Martinez-Nava, 838 F.2d 411, 24 Fed. R. Evid. Serv. 863 (10th Cir.(N.M.) Jan 27, 1988) involved a Native American panelist being stricken due to the travel distance involved in jury service. This was accepted as a racially neutral explanation by the Court, and not a violation of Batson.
12. In Beachum v. Tansy, 903 F.2d 1321 (10th Cir.(N.M.) May 22, 1990), a juror was struck by the trial judge for tardiness and other reasons. The Circuit upheld the strike as not a Batson violation. The Court emphasized the merit of seeking an impartial, rather than representative jury.
13. U.S. v. Green, 115 F.3d 1479, 97 CJ C.A.R. 1058 (10th Cir.(Okla.) Jun 18, 1997) featured the Circuit upholding a prosecution strike as distinguishable from a Batson violation. "The juror was not challenged because he was Afro-American, but because of his answers on voir dire concerning his sons' brushes with the law." Green.
14. House v. Hatch, 527 F.3d 1010 (10th Cir.(N.M.) May 06, 2008), involved a defense challenge to transfer of venue between counties, as a violation of equal protection and Batson because the new venue would deprive the defendant of Native American jurors. The Circuit Court rejected the use of Batson for such a challenge.

CASE LAW RELATED TO BATSON V. KENTUCKY

15. Murchu v. United States, 926 F.2d 50 (1991) involved a Court denying a challenge of the Prosecution's peremptory strikes on the alleged basis that the strikes were geared toward Americans of Irish ancestory.

> "To establish membership in a "cognizable group" for Batson purposes, a defendant must show that (1) the group is definable and limited by some clearly identifiable factor, (2) a common thread of attitudes, ideas or experiences runs through the group, and (3) a community of interests exists among the group's members, such that the group's interest cannot be adequately represented if the group is excluded from the jury selection process. A further ingredient of cognizability is that the group be one the members of which are experiencing unequal, i.e. discriminatory, treatment, and needs protection from community prejudices. United States v. Bucci, 839 F.2d at 833 & n. 11a ("The important consideration for equal protection purposes is not whether a number of people see themselves as forming a separate group, but whether others, by treating those people unequally, put them in a distinct group.") See also United States v. DiPasquale, 864 F.2d 271, 275-77 (3d Cir.1988), cert. denied, 492 U.S. 906, 109 S.Ct. 3216, 106 L.Ed.2d 566 (1989),FN6 United States v. Angiulo, 847 F.2d 956, 984 (1st Cir.1988), cert. denied, 488 U.S. 928, 109 S.Ct. 314, 102 L.Ed.2d 332 (1988), United States v. Dennis, 804 F.2d 1208, 1210 (11th Cir.1986), cert. denied, 481 U.S. 1037, 107 S.Ct. 1973, 95 L.Ed.2d 814 (1987) (rejecting defendant's Batson claim for failure to prove that black males were singled out for different treatment from blacks generally). Once the defendant proves cognizability, he must next show that the government exercised its peremptory challenges so as to exclude the members of his group. Batson, 476 U.S. at 96, 106 S.Ct. at 1722. Finally, "the defendant must show that these facts and any other relevant circumstances*55 raise an inference that the prosecutor used that practice to exclude veniremen from the petit jury on account of their" membership in the group. Id. Once a defendant has made such a showing, the government must articulate clear, reasonably specific, neutral reasons related to the case to be tried for exercising its peremptory challenges. Batson, 476 U.S. at 98 & n. 20, 106 S.Ct. at 17 & n. 20." Murchu.

16. Love v. Yates, 586 F.Supp.2d 1155 (2008) examines the issue of peremptory strikes and the reasons cited—which are determined to be pre-textual and thus prohibited.

> "This case turns primarily on the third prong of Batson analysis: whether the defendant has shown "purposeful discrimination." Batson, 476 U.S. at 98, 106 S.Ct. 1712; Wade, 202 F.3d at 1195.FN9 After the prosecution sets out a race-neutral reason, the court must decide whether that reason should be believed. *1169 Hernandez v. New York, 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion). "In deciding if the defendant has carried his burden of persuasion, a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Green v. LaMarque, 532 F.3d 1028, 1030 (9th Cir.2008), quoting Batson, 476 U.S. at 93, 106 S.Ct. 1712. It must evaluate the prosecutor's proffered reasons and credibility under the

"totality of the relevant facts," using all the available tools including its own observations and the assistance of counsel. Mitleider v. Hall, 391 F.3d 1039, 1047 (9th Cir.2004), cert. denied, 545 U.S. 1143, 125 S.Ct. 2968, 162 L.Ed.2d 895 (2005); Lewis v. Lewis, 321 F.3d 824, 831 (9th Cir.2003). For example, the court can evaluate the persuasiveness of the justification: "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." Purkett v. Elem, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam). Where the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised. McClain, 217 F.3d at 1221."

17. McKinney v. Walker, 394 F. Supp 1015 (1973) featured a District Court considering peremptory strikes by the prosecution against African American panelists for an African American panelist. The Court upheld the strikes as being valid for the reason of excluding jurors who could be potentially partial in favor of the defendant—due to race.

POLICY RESEARCH

18. Attached as Exhibit A is a public policy research study. The Pew Research Center-for the People and the Press, Support for Abortion Slips, Results from the 2009 Annual Religion and Public Life Survey.

CONCLUSION

19. The use of peremptory jury strikes by the prosecution, on the basis of a panelist's beliefs and actions as religious or pro-life, could be a violation of Batson v. Kentucky.

20. The use of peremptory jury strikes by the prosecution, on the basis of a panelist's gender or racial / ethnic minority status, in conjunction with beliefs and actions as religious or pro-life, could be a violation of Batson v. Kentucky.

Respectfully submitted,

Jason SMART #19510 for:

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief was delivered in person to the Sedgwick County District Attorney's office this filing dat.

JASON SMART
Assistant Public Defender

NOTICE OF HEARING

Please take notice and be advised that the foregoing Brief is addressed to accompany the motion entitled: Motion re: Batson.

THE PEW FORUM ON RELIGION & PUBLIC LIFE

THE PEW RESEARCH CENTER
For The People & The Press

Issue Ranks Lower on the Agenda
SUPPORT FOR ABORTION SLIPS

Results from the
2009 Annual Religion and Public Life Survey

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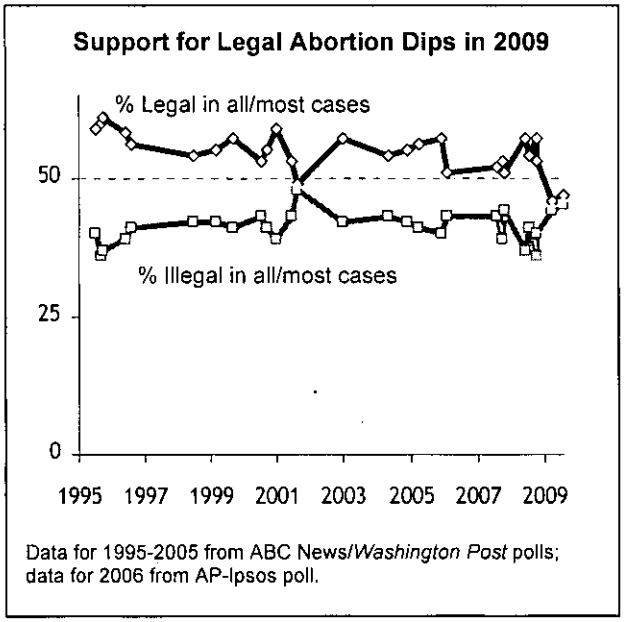
Issue Ranks Lower on the Agenda
SUPPORT FOR ABORTION SLIPS

Polls conducted in 2009 have found fewer Americans expressing support for abortion than in previous years. In Pew Research Center polls in 2007 and 2008, supporters of legal abortion clearly outnumbered opponents; now Americans are evenly divided on the question, and there have been modest increases in the numbers who favor reducing abortions or making them harder to obtain. Less support for abortion is evident among most demographic and political groups.



The latest Pew Research Center survey also reveals that the abortion debate has receded in importance, especially among liberals. At the same time, opposition to abortion has grown more firm among conservatives, who have become less supportive of finding a middle ground on the issue and more certain of the correctness of their own views on abortion.

No single reason for the shift in opinions is apparent, but the pattern of changes suggests that the election of a pro-choice Democrat for president may be a contributing factor. Among Republicans, there has been a seven point decline in support for legal abortion and a corresponding six point increase in opposition to abortion. But the change is smaller among Democrats, whose support for legal abortion is down four points with no corresponding increase in pro-life opinion. Indeed, three groups of President Obama's strongest supporters – African Americans, young people and those unaffiliated with a religion – have not changed their views on abortion at all. At the same time, fully half of conservative Republicans (52%) – the political group most opposed to abortion – say they worry Obama will go too far in supporting abortion rights.

The shift in opinion is broad-based, appearing in most demographic groups in the population. One of the largest shifts (10 points) has occurred among white, non-Hispanic Catholics who attend Mass at least weekly. Substantial change has also occurred among Democratic men (with support for abortion down nine points), but not among Democratic women.

This shift in attitudes is also evident on other measures of public opinion about restrictions on abortion. For instance, four-in-ten Americans (41%) now say they favor making it more difficult to obtain an abortion, up six points from 35% in 2007. Similar movement is seen on the question of whether it would be good to reduce the number of abortions in this country; in 2005, 59% of respondents agreed it would be good to reduce abortions. Today 65% take this view, an increase of six points. And three-quarters (76%) continue to favor requiring minors to obtain the permission of a parent before having an abortion.

Declining Support for Legal Abortion

Abortion should be...	Aug 2008	Aug 2009	*Change*
Illegal in all/most cases	41	45	*+4*
Legal in all/most cases	54	47	*-7*
Make abortion more difficult?	Jan 2007	Aug 2009	
Favor	35	41	*+6*
Oppose	56	50	*-6*
Good to reduce # of abortions?	Jul 2005	Aug 2009	
Yes	59	65	*+6*
No	33	26	*-7*

The latest national survey by the Pew Research Center for the People & the Press and the Pew Forum on Religion & Public Life, conducted Aug. 11-27 among 4,013 adults reached on both landlines and cell phones, also finds that fewer people say abortion is a critical issue today (15%) compared with 2006, when 28% described abortion as a critical issue facing the country.

There are, however, important political differences in these attitudes. The poll shows evidence of significant weakening in the level of concern about the abortion issue among liberal Democrats, while conservative Republicans appear more entrenched in their positions and less willing to compromise on this issue.

Liberals Relax, Conservatives Retrench

% saying abortion is critical issue	Mar 2006 %	Aug 2009 %	*06-09 Change* %
Total	28	15	*-13*
Conserv Rep	35	26	*-9*
Mod/Lib Rep	24	12	*-12*
Independent	24	13	*-11*
Cons/Mod Dem	27	12	*-15*
Liberal Dem	34	8	*-26*
% saying country should find middle ground	Jul 2006 %	Aug 2009 %	*06-09 Change* %
Total	66	60	*-6*
Conserv Rep	56	44	*-12*
Mod/Lib Rep	73	71	*-2*
Independent	66	61	*-5*
Cons/Mod Dem	71	64	*-7*
Liberal Dem	71	71	*0*
% ever wonder about abortion view	Jul 2006 %	Aug 2009 %	*06-09 Change* %
Total	30	26	*-4*
Conserv Rep	30	19	*-11*
Mod/Lib Rep	26	26	*0*
Independent	29	26	*-3*
Cons/Mod Dem	33	32	*-1*
Liberal Dem	33	28	*-5*

For example, there has been a 26-point drop since 2006 in the proportion of liberal Democrats who say abortion is a critical issue, from 34% to 8%. But among conservative Republicans, the decline has been much smaller (nine points, from 35% to 26%). Additionally, support for finding a middle ground on the abortion issue is down 12 points among conservative Republicans (44% now say the country needs to find a middle ground on the issue, compared with 56% in 2006), while liberal Democrats have not moved on this question. And the percentage of conservative

Republicans who say they ever wonder whether their position is right has dropped 11 points (from 30% in 2006 to 19% now), while the figure among liberal Democrats has been relatively stable.

The timing of this shift in attitudes on abortion suggests it could be connected to Obama's election. The decline in support for legal abortion first appeared in polls in the spring of 2009. Overall, roughly three-in-ten (29%) think Obama will handle the abortion issue about right as president. One-in-five Americans (19%) worry that Obama will go too far in supporting abortion rights, while very few (4%) express the opposite concern that Obama will not go far enough to support abortion rights. Concern about Obama's handling of abortion is especially evident on the right; fully half of conservative Republicans (52%) worry that Obama will go too far in supporting abortion rights. However, nearly one-in-five political independents (18%) also worry that Obama will go too far in support of abortion rights.

Concern on the Right Over Obama's Support for Abortion Rights

	Will Obama ... Go too far	Not go far enough	Handle about right	DK	Don't know Obama pro-choice
	%	%	%	%	%
Total	19	4	29	6	42=100
Conserv Rep	52	7	10	6	25=100
Mod/Lib Rep	19	6	33	7	36=100
Independent	18	4	29	7	42=100
Cons/Mod Dem	7	3	36	4	51=100
Liberal Dem	4	6	55	3	32=100

Q135 & Q136. Respondents were first asked if Obama's views are pro-choice or pro-life; those answering pro-choice were then asked how they think Obama will handle the abortion issue. Results based on total.

The poll finds that four-in-ten Americans are unaware of Obama's position on the abortion issue. Conservative Republicans, however, are more likely than any other group to know Obama's position, with 75% correctly identifying him as "pro-choice" rather than "pro-life."

In spite of the small shift toward opposition to legal abortion, the basic contours of the debate are still intact, with most major groups lining up on the same side of the issue as they have in the past. For example, most people who regularly attend religious services continue to come down in opposition to abortion, while the large majority of those who rarely or never attend religious services still support legal abortion.

The survey also reveals continued polarization over abortion. Even as the public expresses support for finding a middle ground, most Americans are quite certain that their own position on abortion is the right one, with only a quarter (26%) saying they ever wonder about their views on the issue. This is a slight decline since 2006, when 30% expressed doubts about their own view on abortion. Furthermore, many people on both sides of the issue say that the opposite point of view on abortion is not a "respectable" opinion for someone to hold. Nearly half of abortion opponents (47%), including 62% of those who say abortion should be illegal in

all cases, say that a pro-choice view is not a respectable opinion for someone to hold. On the other side, 42% of abortion supporters (including 54% of those who want abortion to be legal in all cases) say the pro-life point of view is not respectable.

Broad-based Decline in Support for Legal Abortion

Recently, Americans have become more opposed to legal abortion. New analysis of combined Pew Research Center surveys conducted over the past three years shows that in 2007 and 2008, supporters of abortion rights clearly outnumbered opponents of abortion (those saying it should be illegal in most or all cases) by a 54%-40% margin. By contrast, in two major surveys conducted in 2009 among a total sample of more than 5,500 adults, views of abortion are about evenly divided, with 47% expressing support for legal abortion and 44% expressing opposition.

Republicans and Republican-leaning political independents have each become less pro-choice and more pro-life in recent polling. Democrats have also become less pro-choice, though by a somewhat smaller margin (four points less supportive of legal abortion). Democrats have not become more opposed to abortion; rather, they are now more likely to be undecided about the issue as compared with 2007/2008.

The 2009 polls find that gender differences now exist among Democrats. Among Democratic men, support for legal abortion has dropped nine percentage points from 2007/2008 to 2009 (62% to 53%) while support is unchanged among Democratic women (65% in 2007/2008 vs. 64% in 2009). This means that a significant gender gap over abortion now exists among Democrats, with Democratic women expressing more support for abortion rights than Democratic men (64% vs. 53%).

Among religious groups, observant white mainline Protestants and white Catholics (i.e., those who attend worship services at least weekly) each exhibit double-digit declines in support for legal abortion, as do Jews and less-observant white evangelical Protestants. By contrast, the views of black Protestants and the religiously unaffiliated have held steady.

Declines in support for legal abortion are seen among a wide variety of demographic groups. For example, both men and women currently express less support for legal abortion than they did in 2007/2008. Similarly, both whites and Hispanics have become significantly less pro-choice. But while whites have become significantly more pro-life, the movement among Hispanics has been primarily into the undecided camp.

Small but Widespread Decline in Support for Legal Abortion

	---2007/2008*---			----2009*----			Change	Change	Change	N	N
	Legal	Illegal	DK	Legal	Illegal	DK	legal	illegal	DK	07/08	2009
	%	%	%	%	%	%					
Total	54	40	6	47	44	9	**-7**	**+4**	**+3**	14,317	5,534
POLITICAL GROUPS											
Republican	39	57	4	32	63	5	**-7**	**+6**	**+1**	4,075	1,473
Democrat	64	31	5	60	31	9	**-4**	*0*	**+4**	4,827	1,739
Independent	56	38	6	47	44	9	**-9**	**+6**	**+3**	4,556	2,006
Republican leaning	47	48	5	36	57	7	**-11**	**+9**	+2	1,459	761
Democratic leaning	66	30	5	62	32	7	-4	+2	+2	1,995	759
Conservative	37	58	5	30	63	7	**-7**	**+5**	**+2**	5,601	2,263
Moderate	61	33	6	55	37	9	**-6**	**+4**	**+3**	5,363	1,917
Liberal	75	21	4	70	23	7	**-5**	+2	**+3**	2,735	1,062
Conserv Rep	31	66	3	26	70	4	**-5**	**+4**	+1	2,809	1,042
Mod/Lib Rep	57	39	4	46	48	6	**-11**	**+9**	+2	1,209	394
Independent	56	38	6	47	44	9	**-9**	**+6**	**+3**	4,556	2,006
Cons/Mod Dem	57	37	6	53	38	9	**-4**	+1	**+3**	3,021	1,053
Liberal Dem	81	16	3	76	17	7	**-5**	+1	**+4**	1,648	615
RELIGIOUS GROUPS											
Protestant	48	47	6	39	52	9	**-9**	**+5**	**+3**	7,918	3,049
White evangelical	32	64	5	23	71	6	**-9**	**+7**	**+1**	3,125	1,266
Attend weekly	24	73	3	16	79	5	**-8**	**+6**	+2	2,051	842
Attend less	46	47	7	34	58	8	**-12**	**+11**	+1	1,063	419
White mainline	65	28	7	55	34	11	**-10**	**+6**	**+4**	2,970	1,116
Attend weekly	54	38	7	42	46	12	**-12**	**+8**	+5	806	310
Attend less	68	25	6	60	30	10	**-8**	**+5**	**+4**	2,140	796
Black Protestant	49	44	7	48	42	10	-1	-2	+3	1,114	386
Catholic	53	42	5	45	45	10	**-8**	+3	**+5**	3,139	1,199
White non-Hisp	53	41	6	47	44	9	**-6**	+3	**+3**	2,430	896
Attend weekly	36	57	6	26	67	8	**-10**	**+10**	+2	1,136	405
Attend less	65	30	5	62	29	9	-3	-1	**+4**	1,284	483
Hispanic**	44	53	3	39	48	13	-5	-5	**+10**	236	234
Jewish	86	10	4	76	18	6	**-10**	+8	+2	281	109
Unaffiliated	71	23	6	68	25	7	-3	+2	+1	1,969	807
Religious attendance											
Weekly or more	35	59	6	28	63	9	**-7**	**+4**	**+3**	5,771	2,279
Monthly/Yearly	61	33	6	53	38	9	**-8**	**+5**	**+3**	4,734	1,770
Seldom/Never	70	24	6	64	28	8	**-6**	**+4**	**+2**	3,632	1,419
OTHER DEMOGRAPHIC GROUPS											
Men	52	42	6	44	47	10	**-8**	**+5**	**+4**	7,007	2,494
Women	55	39	5	50	42	8	**-5**	**+3**	**+3**	7,310	3,040
White non-Hispanic	55	40	6	47	45	8	**-8**	**+5**	**+2**	10,976	4,238
Black non-Hispanic	51	42	7	50	40	10	-1	-2	+3	1,373	491
Hispanic**	47	49	4	39	50	10	**-8**	+1	**+6**	456	439
18-29	52	45	3	52	44	5	*0*	-1	**+2**	2,091	761
30-49	58	38	5	48	44	8	**-10**	**+6**	**+3**	4,518	1,627
50-64	56	38	6	48	42	10	**-8**	**+4**	**+4**	4,375	1,664
65+	45	44	11	37	51	12	**-8**	**+7**	+1	3,110	1,388
College grad+	63	32	5	57	36	8	**-6**	**+4**	**+3**	5,532	2,091
Some college	57	38	5	48	44	9	**-9**	**+6**	**+4**	3,538	1,393
HS or less	47	46	7	40	50	9	**-7**	**+4**	**+2**	5,154	2,014
Northeast	61	34	6	54	36	10	**-7**	+2	**+4**	2,695	1,039
Midwest	51	42	6	46	47	8	**-5**	**+5**	+2	3,520	1,402
South	49	46	6	41	50	9	**-8**	**+4**	**+3**	5,319	2,080
West	59	36	6	51	39	9	**-8**	+3	**+3**	2,783	1,013

*This table compares aggregated results from seven Pew Research Center surveys conducted in 2007 and 2008 with results from two Pew Research Center surveys conducted in 2009. Bold figures indicate statistically significant changes.
**Hispanic figures based only on those surveys conducted in both English and Spanish.

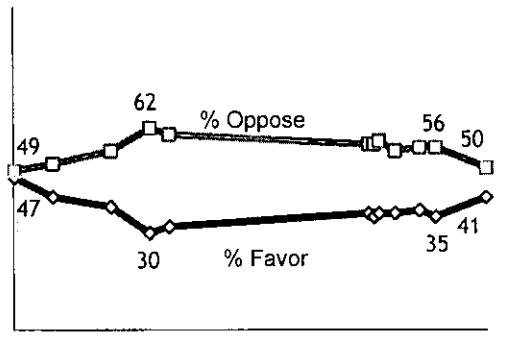
The analysis also shows that some groups that once clearly preferred keeping abortion legal are now divided over whether it should be legal or not. For instance, Pew Research Center surveys from 2007/2008 found that men, whites, those age 30-49, those with some college education, political independents, observant white mainline Protestants, Catholics and Midwesterners all clearly favored keeping abortion legal in most or all cases. Now, each of these groups is closely divided on the issue.

Similarly, several groups that were previously divided in their views on abortion now come down clearly on the pro-life side. Among Hispanics, seniors, those with a high school education or less, Southerners and less-observant white evangelicals, abortion opponents now outnumber supporters of abortion rights.

Other Restrictions on Abortion

The latest (August 2009) Pew Research Center survey also finds that four-in-ten Americans (41%) now favor making it more difficult for a woman to get an abortion, up six points from 2007 (35%) and the highest level of support in Pew Research Center surveys for increased restrictions since 1987. However, those who favor making it more difficult to obtain an abortion are still outnumbered by those who oppose making it more difficult (50% vs. 41%).

Support Rises for Making Abortion More Difficult



Q145b.

Support for putting up barriers to abortion varies substantially across political and religious groups. Fully 65% of conservative Republicans want to make abortions harder to get, but just 39% of independents and 19% of liberal Democrats say the same. Almost two-thirds of white evangelical Protestants (64%) back greater restrictions on abortion, but fewer than half as many white mainline Protestants (27%) and the religiously unaffiliated (23%) say the same. Catholics fall in between, with 44% in support of more restrictions on abortion.

Those who attend worship services more often are also more apt to favor restrictions on abortion. A slight majority of those who attend church at least weekly (53%) favor more restrictions, compared with 37% of those who attend monthly or yearly and 28% of those who seldom or never attend.

Making Abortion More Difficult

	Favor %	Oppose %
Total	41	50
Conserv Rep	65	28
Mod/Lib Rep	36	55
Independent	39	52
Cons/Mod Dem	39	53
Lib Dem	19	74
Protestant	45	44
White evangelical	64	28
White mainline	27	59
Black Protestant	37	53
Catholic	44	47
White non-Hisp	38	52
Unaffiliated	23	69
Attend services ...		
Weekly or more	53	35
Monthly/yearly	37	55
Seldom/never	28	64

Figures read across. Q145b.

When it comes to specific restrictions, Americans overwhelmingly support requiring women under age 18 to get the consent of at least one parent before having an abortion (76%), a figure that is largely unchanged in recent years. Large majorities of conservative Republicans (89%), white evangelicals (83%) and opponents of legal abortion (83%) express support for parental consent laws. But support for parental consent legislation is high even among those groups whose members are more supportive of abortion rights. For example, large majorities of the religiously unaffiliated (64%), mainline Protestants (77%) and Catholics (81%) favor requiring parental consent. Even among those who say abortion should be legal in most or all cases, 71% favor requiring parental consent.

Parental Consent for Minors

	Favor	Oppose
	%	%
Aug 2009	76	19
July 2005	73	22
18-29	68	29
30-49	80	15
50-64	78	18
65+	72	19
Conserv Rep	89	9
Mod/Lib Rep	83	13
Independent	75	19
Cons/Mod Dem	76	20
Liberal Dem	58	39
Protestant	77	16
White evangelical	83	11
White mainline	77	16
Black Protestant	72	25
Catholic	81	16
White non-Hisp	83	14
Unaffiliated	64	31
Abortion should be ...		
Legal	71	27
Illegal	83	13

Figures read across. Q145c.

Reducing the Number of Abortions

Apart from opinions on whether abortion should be legal, two-thirds of Americans (65%) say it would be good to reduce the number of abortions performed in the U.S., compared with 26% who say they don't feel this way. Support for reducing abortions is up from 2005, when 59% said they would like to see fewer abortions.

Reducing abortions is popular among groups who are least supportive of legal abortion, including 73% of conservatives, 78% of white evangelical Protestants and 72% of those who attend weekly religious services. But even among groups that generally favor legal abortion, most also say it would be good to reduce the number of abortions. This includes 57% of Democrats, 55% of those unaffiliated with a religion, 59% of those who rarely or never attend worship services and 51% of those who say that abortion should be legal in most or all cases.

Good to Reduce Number of Abortions?

	Yes	No	DK
	%	%	%
Aug 2009	65	26	10=100
July 2005	*59*	*33*	*8=100*
Republican	73	18	9=100
Democrat	57	33	10=100
Independent	68	24	8=100
Conservative	73	16	11=100
Moderate	63	30	7=100
Liberal	52	41	7=100
Protestant	68	20	12=100
White evangelical	78	13	9=100
White mainline	63	20	17=100
Catholic	67	25	8=100
White non-Hisp	69	24	7=100
Unaffiliated	55	38	7=100
Attend services...			
Weekly or more	72	16	11=100
Monthly/yearly	61	32	7=100
Seldom/never	59	31	10=100
Abortion should be...			
Legal	51	41	8=100
Illegal	82	12	7=100

Figures may not add to 100% because of rounding. Q151.

Liberals Less Engaged on Abortion Issue

Only a small minority of Americans (15%) say abortion is a critical issue facing the country today, down from 28% who said this in 2006. One-third says it is one important issue among many, while nearly half of the public (48%) says the issue of abortion is unimportant.

Analysis of the survey reveals that across all groups, relatively small numbers say that abortion is a critical issue. Yet there are also differences in the importance that different groups place on abortion.

Those who say abortion should be illegal are much more likely to see abortion as a critical issue (27%), or at least as one important issue among many (40%), with 30% expressing the view that abortion is not an important issue. By contrast, among those who say abortion should be legal, about two-thirds (65%) do not see abortion as an important issue, while only 6% see it as a critical issue.

Consistent with this, members of groups that are more opposed to abortion generally rate the abortion issue as more important than groups that support legal abortion. A quarter of conservative Republicans (26%) say it is a critical issue, compared to just 8% of liberal Democrats, 64% of whom say abortion is not an important issue.

Abortion Opponents Rate Issue as More Important

	Abortion issue is ... Critical issue	One among many	Not imp
	%	%	%
Aug 2009	15	33	48
March 2006	*28*	*38*	*32*
Abortion should be...			
Legal	6	27	65
Illegal	27	40	30
White	14	33	50
Black	14	32	50
Hispanic	25	35	35
Conserv Rep	26	43	31
Mod/Lib Rep	12	34	52
Independent	13	32	52
Cons/Mod Dem	12	35	50
Liberal Dem	8	26	64
Protestant	19	36	42
White evangelical	29	42	27
Attend weekly	35	42	21
Attend less	16	41	39
White mainline	7	29	60
Attend weekly	13	26	53
Attend less	6	30	62
Black Protestant	17	36	42
Catholic	15	36	46
White non-Hisp	11	36	51
Attend weekly	21	47	31
Attend less	4	29	64
Unaffiliated	7	21	70

Figures read across. Q242.

Among religious groups, white evangelicals (and especially those who attend services more often) see the abortion issue critically important (29% overall, and 35% among high attenders) or as one important issue among many (42% each). White mainline Protestants and the unaffiliated, by contrast, are the least likely to say the issue is a critical one (7% each), and most likely to say the issue is not important (60% and 70%). There is also a wide discrepancy between Catholics who attend Mass weekly and those who do not; among the former, 21% say abortion is critical, compared with 4% among those who attend less often. Black Protestants are less likely than white evangelicals to say abortion is critical (17% vs. 29%), but more likely than white mainliners (7%). A plurality of black Protestants (42%) say abortion is not an important issue.

Declines in the perceived importance of the issue of abortion have been broad-based, but there are major political differences. In 2006, one third of conservative Republicans and liberal Democrats alike rated abortion as a critical issue. Since then, the percentage of conservative Republicans who rate abortion as a critical issue has dropped nine points, to 26%. But the drop has been much sharper among liberal Democrats: only 8% now say the issue is critical, a decline of 26 percentage points.

Decline in Concern Especially Evident Among Liberals

% saying abortion is critical issue	Mar 2006 %	Aug 2009 %	*06-09 Change* %
Total	28	15	*-13*
Conserv Rep	35	26	*-9*
Mod/Lib Rep	24	12	*-12*
Independent	24	13	*-11*
Cons/Mod Dem	27	12	*-15*
Liberal Dem	34	8	*-26*
Protestant	30	19	*-11*
White evangelical	39	29	*-10*
White mainline	20	7	*-13*
Black Protestant	32	17	*-15*
Catholic	24	15	*-9*
White non-Hisp	20	11	*-9*
Attend weekly	22	21	*-1*
Attend less	20	4	*-16*
Unaffiliated	28	7	*-19*
Attend services ...			
Weekly or more	33	27	*-6*
Monthly/yearly	22	9	*-13*
Seldom/never	25	7	*-18*

Q242.

Among white Catholics who attend Mass weekly (most of whom oppose abortion), one-in-five continue to rate abortion as a critical issue, which is essentially unchanged since 2006. By contrast, among white Catholics who attend Mass less regularly (most of whom support legal abortion), the figure has dropped from 20% to 4%, a decline of 16 percentage points. Similarly, among the unaffiliated, there has been a 19-point drop, from 28% to 7%.

Worship service attendance overall is also linked with the change in the perceived importance of the abortion issue. Those who attend least regularly are now 18 points less likely to rate abortion as a critical issue, compared with a six-point drop among those who attend weekly and a 13-point drop among those who attend monthly or yearly.

Most Are Confident About Own Position on Abortion

Two-thirds of Americans say they never wonder whether their position on abortion is right or not. One quarter say they do sometimes wonder, down slightly from 30% three years ago.

Opponents of legal abortion are most certain of their position, with 73% saying they never wonder whether their own view is correct. This is especially true of those who are most opposed to abortion; among those saying abortion should be illegal in all cases, nearly eight-in-ten are fully convinced of the correctness of their view. But most supporters of legal abortion are also firmly convinced that their position is right, with nearly two-thirds of abortion rights supporters overall (63%) and three-quarters of those who think abortion should be legal in all cases (73%) saying they never wonder about their own position.

A similar pattern is seen among other groups as well. Certainty about one's position is high among all groups but is somewhat higher among the most pro-life groups, including conservative Republicans and evangelical Protestants, than among others.

Abortion Opponents More Certain of Own Position

Ever wonder if your position is right?	Yes %	No %
Aug 2009	26	66
July 2006	*30*	*66*
Abortion should be ...		
Legal	32	63
All cases	24	73
Most cases	36	57
Illegal	20	73
Most cases	24	69
All cases	14	78
Conserv Rep	19	77
Mod/Lib Rep	26	64
Independent	26	69
Cons/Mod Dem	32	58
Liberal Dem	28	68
Protestant	23	68
White evangelical	20	75
White mainline	25	66
Black Protestant	24	62
Catholic	31	61
White non-Hisp	28	65
Unaffiliated	28	67

Figures read across. Q241.

Traditionally conservative groups also stand out for having become more certain in their views. Conservative Republicans are now 11 percentage points less likely to say they ever wonder about their stance on abortion than they were in 2006, while opinion among other political groups has not changed significantly.

Abortion Views Harden Most Among Conservative Republicans

Ever wonder if your position is right?	Jul 2006 %	Aug 2009 %	*06-09 Change* %
Total	30	26	*-4*
Conserv Rep	30	19	*-11*
Mod/Lib Rep	26	26	*0*
Independent	29	26	-3
Cons/Mod Dem	33	32	*-1*
Liberal Dem	33	28	*-5*
Protestant	30	23	*-7*
White evangelical	32	20	*-12*
White mainline	27	25	*-2*
Catholic	31	31	*0*
White non-Hisp	30	28	*-3*
Attend services ...			
Weekly or more	32	21	*-11*
Monthly/yearly	33	30	*-3*
Seldom/never	24	29	*+4*

Q241.

A large decline in the number of people expressing doubts about their view on abortion is also evident among white evangelical Protestants, down from 32% to 20% (12 points). By contrast, the numbers of Catholics and white mainline Protestants expressing doubts about their abortion views are virtually unchanged. Similarly, those who attend services at least weekly are 11 points less likely than in 2006 to say they ever wonder about their position on abortion, while the certainty of those who attend less often has not moved significantly.

Half Respect Opposite View on Abortion

Americans who express a view on abortion are divided over whether the opposing view on abortion is a respectable opinion for someone to hold, with 47% saying the opposing view is respectable and 44% saying it is not. Half of those on the pro-choice side say they respect the view of those who think abortion should be illegal, slightly higher than the number who say they do not (42%). Among those on the pro-life side, 44% say that pro-choice views are respectable and 47% say they are not. Those with the most intense abortion opinions are least likely to express respect for the opposing view; among both those who say abortion should be legal in all cases and those who say it should be illegal in all cases, majorities say the opposing point of view on abortion is not respectable.

Many Lack Respect for Opposing Abortion Views

View that abortion should be illegal is...	Supporters of legal abortion %
Respectable	50
NOT respectable	42
Don't know	8
	100

View that abortion should be legal is...	Opponents of legal abortion %
Respectable	44
NOT respectable	47
Don't know	9
	100

Q243 & Q244.

Young people tend to be more tolerant of opposing viewpoints on abortion than their older counterparts. More than half of those under age 30 (57%) say the opposite view from their own is respectable. Among those age 65 and older, the reverse is true; seniors are much more likely to say it is *not* respectable to hold the view opposite from their own (51% not respectable vs. 34% respectable).

Most conservative Republicans say that opinions on abortion that differ from their own are not respectable. By contrast, most independents say that the opposing view on abortion is respectable. In other political and ideological groups and in most religious groups, people are divided over whether it is respectable for someone to hold an abortion opinion different than their own. The notable exception to this rule is white evangelical Protestants, among whom 53% say the opposing view is not respectable, while 37% say it is.

Other Abortion Position "Respectable"?

	Yes, respectable %	No, not respectable %	DK %
Total	47	44	9=100
Abortion should be...			
Legal in all cases	38	54	8=100
Legal in most cases	56	36	8=100
Illegal in most cases	55	36	9=100
Illegal in all cases	28	62	10=100
Men	51	42	7=100
Women	44	47	10=100
18-29	57	39	4=100
30-49	50	41	9=100
50-64	43	50	7=100
65+	34	51	15=100
Conserv Rep	41	52	7=100
Mod/lib Rep	46	48	6=100
Independent	52	40	9=100
Cons/Mod Dem	50	42	8=100
Liberal Dem	47	48	5=100
Protestant	45	45	10=100
White evangelical	37	53	10=100
White mainline	50	41	9=100
Black Protestant	49	42	9=100
Catholic	50	43	7=100
White non-Hisp	48	47	6=100
Unaffiliated	51	41	7=100
Attend services ...			
Weekly or more	41	48	11=100
Monthly/yearly	55	39	7=100
Seldom/never	47	46	7=100

Q243 & Q244. Based on those who gave an answer to whether abortion should be legal or illegal.

Those whose position on abortion goes against the grain of their party or religion are more respectful of views different from their own. For example, pro-choice Republicans are much more likely to say the opposing viewpoint is respectable (58%) than are pro-life Republicans (34%). And among pro-life Democrats, more say the opposing view is respectable than among pro-choice Democrats (55% vs. 44%).

A similar pattern exists with regard to religion: 52% of pro-choice evangelical Protestants express respect for the opposing view, compared with 32% of pro-life evangelicals. And among those who attend services weekly or more, those in the pro-choice camp are more likely to respect their opponents than those in the pro-life camp (49% vs. 37%).

Minority Views Linked With Greater Tolerance of Alternative Abortion Opinions

Respect opposing abortion view?	Yes %	No %
Republican		
Pro-choice	58	37
Pro-life	34	57
Democrat		
Pro-choice	44	48
Pro-life	55	38
Independent		
Pro-choice	53	39
Pro-life	51	41
White evangelical		
Pro-choice	52	38
Pro-life	32	58
White mainline		
Pro-choice	51	42
Pro-life	48	39
White non-Hisp Catholic		
Pro-choice	55	39
Pro-life	40	54
Attend services ...		
Weekly or more		
Pro-choice	49	36
Pro-life	37	53
Monthly/yearly		
Pro-choice	56	39
Pro-life	53	39
Seldom/never		
Pro-choice	45	49
Pro-life	52	38

Figures read across. Q243 & Q244. Based on those who gave an answer to whether abortion should be legal or illegal.

Most Want Middle Ground on Abortion

Though support for legal abortion has slipped and sizeable numbers of the public lack respect for opposing views on abortion, most Americans remain committed to the idea that the nation should find a way to compromise on abortion issues. Six-in-ten say the country needs to find a middle ground on abortion, down slightly since 2006 when 66% expressed this view. Roughly three-in-ten (29%) say there is no room for compromise on the abortion issue, the same proportion as three years ago.

Abortion Foes Less Amenable to Compromise

	Need to find middle ground	No room for compromise	DK
	%	%	%
Aug 2009	60	29	11=100
July 2006	*66*	*29*	*5=100*
Abortion should be ...			
Legal	72	19	9=100
Illegal	48	44	8=100
Conserv Rep	44	48	8=100
Mod/Lib Rep	71	20	9=100
Independent	61	27	11=100
Cons/Mod Dem	64	27	9=100
Liberal Dem	71	22	8=100
Protestant	54	33	13=100
White evangelical	40	49	11=100
Attend weekly	32	59	9=100
Attend less	54	33	13=100
White mainline	68	17	15=100
Attend weekly	61	21	19=100
Attend less	71	17	13=100
Black Protestant	58	25	17=100
Catholic	67	25	8=100
White non-Hisp	67	27	6=100
Attend weekly	55	41	4=100
Attend less	75	17	8=100
Unaffiliated	68	25	8=100

Q130.

Supporters of legal abortion are especially likely to say the country needs to find a middle ground (72%), while those who say abortion should be illegal in most or all cases are more divided on the issue, with 48% advocating a middle ground and 44% saying there is no room for compromise.

Groups traditionally opposed to legal abortion are also most wary of the idea of compromise. Among conservative Republicans, a 48% plurality says there is no room for compromise, with 44% saying the nation should find a middle ground. By contrast, a strong majority of moderate or liberal Republicans (71%) say the country should find a middle ground, while 20% say there is no room for compromise. In this regard, they resemble liberal Democrats, among whom 71% support finding middle ground.

Similarly, white evangelical Protestants – especially those who attend church on a weekly basis – stand out for saying there is no room for compromise on abortion (59% for weekly attenders vs. 49% of white evangelicals overall). Majorities of other religious groups, however, favor seeking a middle ground on abortion, including white mainline Protestants (68%) and Catholics (67%). Among these groups, regular attendance at church services is also related to less support for a middle ground; but even among weekly attenders in these groups, majorities still favor finding a middle ground.

The decline over time on support for a middle ground also reflects these divisions. Support for finding a middle ground is down 12 points among conservative Republicans, while liberal Democrats have not changed their views on this question.

Support for Middle Ground Drops Among Conservative Republicans

% saying country should find middle ground	Jul 2006 %	Aug 2009 %	*06-09 Change* %
Total	66	60	*-6*
Conserv Rep	56	44	*-12*
Mod/Lib Rep	73	71	*-2*
Independent	66	61	*-5*
Cons/Mod Dem	71	64	*-7*
Liberal Dem	71	71	*0*
Protestant	67	54	*-13*
White evangelical	61	40	*-21*
White mainline	76	68	*-8*
Catholic	63	67	*+4*
White non-Hisp	62	67	*+5*
Attend services ...			
Weekly or more	60	48	*-12*
Monthly/yearly	72	69	*-3*
Seldom/never	67	65	*-2*

Q130.

Among white evangelical Protestants, support for finding a middle ground on abortion has declined from 61% in 2006 to 40% today, a drop of 21 percentage points. Catholics are just as supportive of seeking a middle ground today as in 2006 (67% now vs. 63% in 2006).

Among those who attend religious services at least weekly, support for finding a middle ground has dropped 12 percentage points since 2006 (from 60% to 48%). By contrast, among those who attend services less often, opinion on this question has been more stable.

Obama and the Abortion Issue

Nearly six-in-ten Americans (58%) correctly describe Obama's position on abortion as pro-choice, while a sizeable minority either believe he is pro-life (14%) or say they don't know the president's position (28%). Nearly four-in-ten (38%) say that Obama thinks it would be good to reduce the number of abortions, while 44% say they do not know if Obama thinks it would be good to reduce the number of abortions and 19% say he does not think it would be good to reduce abortions.

Most Know Obama Supports Abortion Rights, Fewer Think He Favors Reducing Abortion

	Total
On abortion, Obama is...	%
Pro-choice/supports choice	58
Pro-life/restricting access	14
Don't know	28
	100
Does Obama think it would be good to reduce # of abortions...	
Yes	38
No	19
Don't know	44
	100

Q135 & Q152.

More Republicans (71%) than Democrats (54%) or independents (58%) know that Obama is pro-choice. However, on the question of whether or not Obama wants to reduce the number of abortions in the U.S., more Democrats than Republicans say he believes this is a good thing (46% vs. 27%, respectively). Among both groups, as many as four-in-ten say they do not know what Obama thinks about reducing the number of abortions.

Obama's Abortion Views?

	Obama... Is pro-choice	Thinks it's good to reduce # of abortions
	%	%
Total	58	38
18-29	57	51
30-49	60	40
50-64	59	29
65+	52	29
College grad	77	44
Some college	63	39
HS or less	45	34
Republican	71	27
Independent	58	38
Democrat	54	46
Protestant	58	33
White evangelical	69	29
White mainline	58	37
Catholic	58	43
White non-Hisp	65	39
Unaffiliated	53	47
Abortion should be ...		
Legal	59	44
Illegal	60	35

Q135 & Q152.

Majorities of all age groups know that Obama is pro-choice, although older Americans (those age 65 and older) are slightly less knowledgeable than those age 30-64. People under age 30 are significantly more likely than those over age 50 to say that Obama favors reducing the number of abortions: 51% of those under age 30 say this, compared with 29% of those age 50 and older.

Among religious groups, roughly two-thirds of white evangelical Protestants (69%) and white Catholics (65%) know that Obama is pro-choice, compared with 58% of white mainline Protestants and 53% of the religiously unaffiliated. On the question of whether or not Obama wants to reduce the number of abortions in this country, roughly half of the religiously unaffiliated (47%) say that Obama favors reducing the number of abortions, while white evangelicals are much more skeptical (29% say he holds this view).

Among people who know that Obama is pro-choice, a plurality (29% of the public overall) think that he will handle the issue about right. About one-in-five (19%) worry that Obama will go too far in supporting abortion rights, while very few (4%) worry that he will not go far enough in supporting abortion rights.

Concern on the Right Over Obama's Support for Abortion Rights

	Will Obama ... Go too far	Not go far enough	Handle about right	DK	Don't know Obama is pro-choice
	%	%	%	%	%
Total	19	4	29	6	42=100
Conserv Rep	52	7	10	6	25=100
Mod/Lib Rep	19	6	33	7	36=100
Independent	18	4	29	7	42=100
Cons/Mod Dem	7	3	36	4	51=100
Liberal Dem	4	6	55	3	32=100
Protestant	23	3	25	7	42=100
White evangelical	40	4	17	8	31=100
White mainline	14	3	32	9	42=100
Black Protestant	7	1	33	1	58=100
Catholic	19	4	30	5	42=100
White non-Hisp	21	4	36	4	35=100
Unaffiliated	8	6	34	6	47=100
Attend services ...					
Weekly or more	28	4	22	7	39=100
Monthly/yearly	16	4	32	5	43=100
Seldom/never	9	5	36	6	44=100
Abortion should be...					
Legal	5	4	45	5	41=100
Illegal	34	5	15	6	40=100

Q136.

There are stark differences of opinion along political and ideological lines as to how Obama will handle the issue of abortion as president. A majority of conservative Republicans (52%) say that Obama will go too far in supporting abortion rights, while just 10% think he will handle the issue about right. By contrast, a majority of liberal Democrats (55%) think he will handle the issue about right and just 4% say he will go too far. The views of independents mirror those of the public overall; three-in-ten independents (29%) think that Obama will strike the right balance and 18% think he will go too far in supporting abortion rights.

Not unexpectedly, those who believe that abortion should be illegal in most or all cases are more worried that Obama may go too far in supporting abortion rights than are Americans who believe abortion should be legal in most or all cases. One-third of abortion opponents (34%) worry that Obama will go too far in supporting abortion rights, while a plurality of supporters of legal abortion (45%) say Obama will handle the issue about right.

Among religious groups, white evangelicals are more concerned that Obama will take abortion rights too far than are other groups. Four-in-ten white evangelicals say that Obama will overreach on abortion rights, while just 19% of Catholics and 14% of white mainline Protestants agree.

Religious and Moral Influence on the Debate

One-third of Americans (32%) say their religious beliefs are the primary influence on their attitudes toward abortion. Roughly one-in-five cite their education (21%), and one-in-seven point to their personal experience (14%). Fewer say the views of their family and friends (6%) or what they have seen or read in the media (5%) are the main influences on their opinion about abortion, but a sizable proportion (21%) say there is something else that most informs their view.

Religious beliefs hold much stronger sway over those who oppose abortion than over those on the pro-choice side of the abortion issue. More than half of those who say abortion should be illegal (53%) cite religious beliefs as the primary influence on their views, compared with only 11% among supporters of legal abortion. Instead of religion, supporters of legal abortion are much more likely to cite their education (30%) or a personal experience (20%) as the primary influence on their views on abortion.

Plurality Cites Religious Beliefs As Main Influence on Abortion Opinion

	Relig. Beliefs	Educ-ation	Pers. exper.	Views of others	Media	Some-thing else
	%	%	%	%	%	%
Total	32	21	14	6	5	21
Abortion should be ...						
Legal	11	30	20	7	6	25
Illegal	53	12	9	5	4	16
Men	28	21	13	6	5	25
Women	36	20	16	6	5	17
18-29	25	25	12	11	5	20
30-49	27	21	19	6	5	22
50-64	38	20	13	4	4	19
65+	44	14	8	4	7	21
Conserv Rep	53	15	9	5	2	15
Mod/Lib Rep	22	27	18	6	4	19
Independent	26	24	16	5	5	26
Cons/Mod Dem	36	15	14	9	6	19
Liberal Dem	17	32	20	7	8	17
Protestant	39	16	15	5	5	18
White evangelical	58	11	10	3	2	14
Attend weekly	68	7	9	4	2	10
Attend less	42	17	13	3	3	21
White mainline	22	23	20	9	2	24
Attend weekly	41	23	14	7	1	12
Attend less	14	23	22	9	3	28
Black Protestant	33	17	18	3	13	13
Catholic	35	22	12	8	4	18
White non-Hisp	36	24	14	3	3	18
Attend weekly	60	15	8	3	1	13
Attend less	19	30	18	4	5	22
Unaffiliated	8	28	19	9	4	31

Figures read across. Q126. Results based on those who gave an answer to whether abortion should be legal or illegal.

Women are more apt than men to say that their religious beliefs have the most influence on their views about abortion (36% vs. 28%), and Americans 65 and older are much more likely than young adults to say this (44% among those 65 and older vs. 25% among those under age 30).

Among political groups, 53% of conservative Republicans say their attitudes are based primarily on their religious beliefs, compared with just 22% of moderate or liberal Republicans. More than a third of conservative or moderate Democrats (36%) and 17% of liberal Democrats single out the influence of their religious beliefs.

A majority of white evangelical Protestants (58%) say their religious beliefs drive their views on abortion. This figure approaches seven-in-ten (68%) among white evangelicals who attend services at least weekly. Mainline Protestants are much less likely to cite their religious beliefs (22%), but there is still a strong divide between white mainline Protestants who attend church at least weekly (41%) and those who attend less often (14%). White, non-Hispanic Catholics are similarly divided on the issue, with 60% of those who attend weekly services saying their religious beliefs are the main influence on their abortion views, compared with just 19% of those who attend less regularly. More than one-quarter of religiously unaffiliated Americans (28%) rely most on their education in formulating their opinion on abortion.

Half Say Abortion is Morally Wrong

A slight majority of Americans (52%) say having an abortion is morally wrong. One quarter says it is not a moral issue, and just 10% say it is morally acceptable. (The remaining 12% say that the morality of abortion depends on the situation or refuse to express an opinion.)

Is Having an Abortion Morally Acceptable?

	Morally wrong	Morally acceptable	Not a moral issue
	%	%	%
Aug 2009	52	10	25
Feb 2006	*52*	*12*	*23*
Abortion should be ...			
Legal	28	18	42
Illegal	80	4	10
Conserv Rep	75	8	10
Mod/Lib Rep	51	12	25
Independent	48	10	29
Cons/Mod Dem	55	11	23
Liberal Dem	31	13	40
Protestant	59	10	19
White evangelical	74	7	11
White mainline	40	13	29
Black Protestant	58	15	17
Catholic	58	9	22
White non-Hisp	52	8	25
Unaffiliated	30	14	43
Attend services ...			
Weekly or more	67	7	16
Monthly/yearly	50	11	27
Seldom/never	35	15	35

Figures read across. Q180a.

There is a strong connection between views on whether abortion should be legal and views on the morality of having an abortion. Most opponents of legal abortion (80%) say having an abortion is morally wrong. Most supporters of legal abortion, on the other hand, say abortion is morally acceptable (18%) or that it is not a moral issue (42%). But more than a quarter of those who say abortion should be legal (28%) say it is morally wrong to have an abortion.

Consistent with this, the most pro-life groups more often say that abortion is morally wrong. Three-quarters of conservative Republicans say this, as do slight majorities of moderate or liberal Republicans (51%) and conservative or moderate Democrats (55%). Nearly a third of liberal Democrats (31%) say abortion is morally wrong, with 40% saying it is not a moral issue.

White evangelical Protestants are very likely to say abortion is morally wrong (74%). Majorities of black Protestants (58%) and Catholics (58%) also say this. Fewer than half of white mainline Protestants (40%) say that abortion is morally wrong. Among the unaffiliated,

30% say having an abortion is morally wrong, but 43% say it is not a moral issue. Attendance at worship services also plays a role, with those who attend most frequently being twice as likely as those who attend least often to say abortion is morally wrong (67% vs. 35%).

Influence of Religious and Moral Beliefs

Religious beliefs, when cited as the main source of thinking on abortion, are much more likely to influence adherents in a pro-life direction than in a pro-choice direction. Among those who say their religious beliefs have the most influence on their thinking about abortion, an overwhelming majority (82%) say abortion should be illegal. Less than one-in-five (18%) say it should be legal.

Religious and Moral Beliefs Linked with Abortion Views

		--Abortion influence--			--Abortion wrong?--	
	Total public	Rel. beliefs	Educ.	Personal exp.	Yes, morally wrong	No, not wrong
Abortion should be...	%	%	%	%	%	%
Legal in all/most cases	47	18	72	70	24	76
Illegal in all/most cases	45	82	28	30	69	17
Don't know	8	n/a*	n/a*	n/a*	7	7
	100	100	100	100	100	100
On abortion...						
Find middle ground	60	44	64	66	51	70
No room for compromise	29	49	27	26	39	20
Don't know	11	7	9	8	9	10
	100	100	100	100	100	100

*Only those expressing an opinion about the legality of abortion were asked about the main influence on their abortion views.

The opposite is true, however, among those who cite education or personal experience as their main influence. Strong majorities of these groups identify with a pro-choice viewpoint (72% among those saying education, 70% among those saying personal experience).

A similar though less-pronounced pattern is seen on the question of whether the country should find a middle ground on abortion. Those who cite religious beliefs as the primary influence on their abortion views and those who say abortion is morally wrong are considerably more likely than others to say that there is no room for compromise on the issue of abortion.

ABOUT THE SURVEY

Results for this survey are based on telephone interviews conducted under the direction of Princeton Survey Research Associates International among a nationwide sample of 4,013 adults, 18 years of age or older. Interviews were conducted in two waves, the first from August 11-17, 2009 (Survey A) and the second from August 20-27, 2009 (Survey B). In total, 3,012 respondents were interviewed on a landline telephone, and 1,001 were interviewed on a cell phone, including 347 who had no landline telephone. Interviews were conducted in English and Spanish. Both the landline and cell phone samples were provided by Survey Sampling International. For detailed information about our survey methodology, see http://people-press.org/methodology/.

The combined landline and cell phone sample is weighted using an iterative technique that matches gender, age, education, race/ethnicity, region, and population density to parameters from the March 2008 Census Bureau's Current Population Survey. The sample is also weighted to match current patterns of telephone status and relative usage of landline and cell phones (for those with both), based on extrapolations from the 2008 National Health Interview Survey. The weighting procedure also accounts for the fact that respondents with both landline and cell phones have a greater probability of being included in the sample.

The following table shows the error attributable to sampling that would be expected at the 95% level of confidence for different groups in the survey. The topline survey results included at the end of this report clearly indicate whether each question in the survey was asked of the full sample, Survey A only or Survey B only.

Group	Sample Size	Plus or minus...
Total sample	4,013	2.0 percentage points
Survey A	2,010	2.5 percentage points
Form 1	1,011	3.5 percentage points
Form 2	999	3.5 percentage points
Survey B	2,003	2.5 percentage points
Form 1	1,034	3.5 percentage points
Form 2	969	3.5 percentage points

In addition to sampling error, one should bear in mind that question wording and practical difficulties in conducting surveys can introduce error or bias into the findings of opinion polls.

ABOUT THE PROJECTS

This survey is a joint effort of the Pew Research Center for the People & the Press and the Pew Forum on Religion & Public Life. Both organizations are sponsored by the Pew Charitable Trusts and are projects of the Pew Research Center, a nonpartisan "fact tank" that provides information on the issues, attitudes and trends shaping America and the world.

The Pew Research Center for the People & the Press is an independent opinion research group that studies attitudes toward the press, politics and public policy issues. The Center's purpose is to serve as a forum for ideas on the media and public policy through public opinion research. In this role it serves as an important information resource for political leaders, journalists, scholars, and public interest organizations. All of the Center's current survey results are made available free of charge.

The Pew Forum on Religion & Public Life seeks to promote a deeper understanding of issues at the intersection of religion and public affairs. It studies public opinion, demographics and other important aspects of religion and public life in the U.S. and around the world. It also provides a neutral venue for discussions of timely issues through roundtables and briefings.

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PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS
AND PEW FORUM ON RELIGION & PUBLIC LIFE
2009 RELIGION & PUBLIC LIFE SURVEY
FINAL TOPLINE
Survey A: August 11-17, 2009, N=2,010
Survey B: August 20-27, 2009, N=2,003
Combined N=4,013

NOTE: QUESTION NUMBERING IS NOT CONTINUOUS BECAUSE SOME ITEMS HAVE BEEN PREVIOUSLY RELEASED OR HELD FOR FUTURE RELEASE

ASK ALL:
On another subject…
Q.240 Do you think abortion should be **[READ]**
(PLEASE READ CATEGOR IES IN REVERSE ORDER FOR HALF THE SAMPLE)
NOTE: THIS ITEM WAS ASKED AS Q.240 IN SURVEY B AND AS Q.125 IN SURVEY A. THE TWO ITEMS ARE PRESENTED TOGETHER HERE.[1]

	Legal in all cases	Legal in most cases	Illegal in most cases	Illegal in all cases	**[VOL. DO NOT READ]** DK/Ref	NET *Legal in all/most*	NET *Illegal in all/most*
August 11-27, 2009	16	31	27	17	8	*47*	*45*
April, 2009	18	28	28	16	10	*46*	*44*
Late October, 2008	18	35	24	16	7	*53*	*40*
Mid-October, 2008	19	38	22	14	7	*57*	*36*
August, 2008	17	37	26	15	5	*54*	*41*
June, 2008	19	38	24	13	6	*57*	*37*
November, 2007	18	33	29	15	5	*51*	*44*
October, 2007	21	32	24	15	8	*53*	*39*
August, 2007	17	35	26	17	5	*52*	*43*
February, 2006 *AP/Ipsos-Poll*	19	32	27	16	6	*51*	*43*
December 2005 *ABC/Wash Post*	17	40	27	13	3	*57*	*40*
April 2005 *ABC/Wash Post*	20	36	27	14	3	*56*	*41*
December 2004 *ABC/Wash Post*	21	34	25	17	3	*55*	*42*
May 2004 *ABC/Wash Post*	23	31	23	20	2	*54*	*43*
January 2003 *ABC/Wash Post*	23	34	25	17	2	*57*	*42*
August 2001 *ABC/Wash Post*	22	27	28	20	3	*49*	*48*
June 2001 *ABC/BeliefNet*	22	31	23	20	4	*53*	*43*
January 2001 *ABC/Wash Post*	21	38	25	14	1	*59*	*39*
September 2000 *(RVs) ABC/Wash Post*	20	35	25	16	3	*55*	*41*
July 2000 *ABC/Wash Post*	20	33	26	17	4	*53*	*43*
September 1999 *ABC/Wash Post*	20	37	26	15	2	*57*	*41*
March 1999 *ABC/Wash Post*	21	34	27	15	3	*55*	*42*
July 1998 *ABC/Wash Post*	19	35	29	13	4	*54*	*42*
August 1996 *ABC/Wash Post*	22	34	27	14	3	*56*	*41*
June 1996 *ABC/Wash Post*	24	34	25	14	2	*58*	*39*
October 1995 *ABC/Wash Post*	26	35	25	12	3	*61*	*37*
September 1995 *ABC/Wash Post*	24	36	25	11	4	*60*	*36*
July 1995 *ABC/Wash Post*	27	32	26	14	1	*59*	*40*

[1] The introduction to Q.125 Survey A read, "Now thinking about the abortion issue…"

ASK SURVEY A IF Q.125<9:

Q.126 Which one of the following has had the biggest influence on your thinking on the issue of abortion... **[READ AND RANDOMIZE RESPONSE OPTIONS WITH OPTION 6 ALWAYS LAST]**

		---Views on Abortion---	
	Based on Total	Illegal in most/all cases	Legal in most/all cases
Your religious beliefs	29	53	11
Your education	19	12	30
A personal experience	13	9	20
The views of your friends and family	6	5	7
What you have seen or read in the media	4	4	6
OR Something else	18	16	25
Don't know/Refused **[VOL. DO NOT READ]**	1	1	1
No opinion on abortion	*(10)*		
		[N=890]	**[N=926]**

ASK ALL SURVEY A:

Q.127 Over the past year or so, have your views on abortion changed, or have they pretty much stayed the same?

ASK IF VIEWS HAVE CHANGED (Q.127=1)

Q.128 And have you become **[READ AND RANDOMIZE OPTIONS 1 AND 2]**

BASED ON TOTAL

5	Changed
1	More supportive of restricting access to abortion
3	More supportive of a woman's right to choose an abortion
*	Other **[VOL. DO NOT READ]**
*	Don't know/refused **[VOL. DO NOT READ]**
93	Stayed the same
2	Don't know/refused **(VOL.)**

ASK IF Q.128=1,2 [N=77]:

Q.129 And just in your own words, what is the main reason that you have become **[IF Q.128=1, INSERT:** more supportive of restricting access to abortion?; **IF Q.128=2, INSERT:** more supportive of a woman's right to choose an abortion?**]** **[OPEN END. RECORD ONE MENTION]**?

Q.129 RESULTS NOT SHOWN; USED FOR QUALITATIVE PURPOSES ONLY.

ASK ALL SURVEY A:

Q.130 Which comes closer to your view about the abortion issue **[READ AND RANDOMIZE]**

		July 2006
60	The country needs to find a middle ground on abortion laws, **[OR]**	66
29	There's no room for compromise when it comes to abortion laws	29
11	Don't know/refused **(VOL.)**	5

ASK ALL SURVEY A:

Q.135 As far as you know, what is Barack Obama's position on abortion? Is he PRO-CHOICE, that is, supports a woman's right to choose an abortion, or is he PRO-LIFE, that is, supports restricting access to abortion in most cases?

		Trend for comparison (RVs)[2] June 2008
58	Pro choice / supports a woman's right to choose	52
14	Pro life / supports restricting access in most cases	10
28	Don't know/Refused **(VOL.)**	38

ASK SURVEY A IF SAYS OBAMA IS PRO-CHOICE (Q.135=1):

Q.136 Do you [worry that Obama will go too far in supporting abortion rights], [worry that Obama won't go far ENOUGH in supporting abortion rights], OR think that Obama will handle the issue of abortion about right? **[RANDOMIZE OPTIONS IN BRACKETS]**

BASED ON TOTAL SURVEY A

19	Worry that Obama will go too far in supporting abortion rights
4	Worry that Obama won't go far ENOUGH in supporting abortion rights,
29	Think he will handle the issue about right
6	Don't know/refused **(VOL.)**
(42)	*Pro-life/DK/Ref in Q.135*

ASK ALL SURVEY B:

Q.241 Do you ever wonder whether your own position on abortion is the right one or not?

		July 2006	*Gallup* Dec 1988
26	Yes	30	33
66	No	66	60
8	Don't know/Refused **(VOL.)**	4	7

[2] In June 2008, this question was asked about John McCain and Barack Obama among registered voters and those who plan to register.

ASK ALL SURVEY B:

Q.242 Do you think the issue of abortion is a critical issue facing the country, one among many important issues, or not that important compared to other issues?

		March 2006
15	A critical issue facing the country	28
33	One among many important issues	38
48	Not that important compared to other issues	32
3	Don't know/Refused (**VOL.**)	2

ASK SURVEY B IF ABORTION SHOULD BE LEGAL (Q.240=1,2) [N=973]:

Q.243 And do you think the view that abortion should be against the law is a respectable opinion for someone to hold, or not?

50	Yes
42	No
8	Don't know/Refused (**VOL**)

ASK SURVEY B IF ABORTION SHOULD BE ILLEGAL (Q.240=3,4) [N=882]:

Q.244 And do you think the view that abortion should be legal is a respectable opinion for someone to hold, or not?

44	Yes
47	No
9	Don't know/Refused (**VOL**)

Now, on some issues…

RANDOMIZE Q.145 a-c AS A BLOCK WITH Q.146a-b AND 147 AS A SEPARATE BLOCK

Q.145 Do you strongly favor, favor, oppose, or strongly oppose **[READ AND RANDOMIZE WITH ITEM a. ALWAYS FIRST]**? And how about **[INSERT NEXT ITEM]**?

	-----FAVOR-----			-----OPPOSE-----			
		Strongly			*Strongly*		**(VOL.)**
	Total	*Favor*	*Favor*	Total	*Oppose*	*Oppose*	DK/Ref
ASK ALL SURVEY A:							
b. Making it more difficult for a woman to get an abortion							
August 11-17, 2009	41	*19*	*22*	50	*23*	*27*	9
January, 2007	35	*17*	*18*	56	*27*	*29*	9
March, 2006	37	*15*	*22*	56	*24*	*32*	7
December, 2004	36	*19*	*17*	55	*29*	*26*	9
Early February, 2004	36	*17*	*19*	58	*30*	*28*	6
November, 2003	35	*19*	*16*	57	*29*	*28*	8
August, 2003[3]	36	*17*	*19*	57	*30*	*27*	7
May, 1993	32	*15*	*17*	60	*35*	*25*	8
May, 1992	30	--	--	62	--	--	8
May, 1990	38	*21*	*17*	55	*29*	*26*	7
May, 1987	41	*18*	*23*	51	*33*	*18*	8
May, 1985	47	--	--	49	--	--	4
ASK ALL SURVEY A:							
c. Requiring that women under the age of 18 get the consent of at least one parent before they are allowed to have an abortion							
August 11-17, 2009	76	*45*	*31*	19	*8*	*11*	5
July, 2005	73	--	--	22	--	--	5
Sept, 1999	69	--	--	28	--	--	3
May, 1992	73	--	--	23	--	--	4

3 In August 2003 and earlier the question was worded: "Changing the laws to make it more difficult for a woman to get an abortion."

ASK ALL SURVEY A:
Thinking again about abortion…
ASK SURVEY A FORM 1 [N=1011]:
Q.151 Regardless of whether or not you think abortion should be legal, do you think it would be a good thing to reduce the number of abortions performed in the United States, or don't you feel this way?

		July 2005
65	Good thing to reduce the number of abortions	59
26	Don't feel this way	33
10	Don't know/Refused **(VOL.)**	8

ASK SURVEY A FORM 1 [N=1011]:
Q.152 And from what you know, does Barack Obama think it would be a good thing to reduce the number of abortions performed in the United States, or doesn't he feel this way?

38	Obama thinks it would be good thing to reduce the number of abortions
19	Obama doesn't feel this way
44	Don't know/Refused **(VOL.)**

ASK SURVEY A FORM 2 [N=999]:
Q.153 As you may know, Barack Obama has said that he favors reducing the number of abortions. What about you? Regardless of whether or not you think abortion should be legal, do you think it would be a good thing to reduce the number of abortions performed in the United States, or don't you feel this way?

69	Good thing to reduce the number of abortions
20	Don't feel this way
11	Don't know/Refused **(VOL.)**

ASK ALL SURVEY A:
On another subject…
Q.180 Do you personally believe that **[INSERT ITEM AND RANDOMIZE]** is morally acceptable, morally wrong, or is it not a moral issue. **[IF NECESSARY]** And is **[INSERT ITEM]** morally acceptable, morally wrong, or is it not a moral issue?

		Morally Acceptable	Morally Wrong	Not a Moral Issue	**(VOL.)** Depends on the Situation	**(VOL.)** Don't know/ Refused
a.	Having an abortion					
	August 11-17, 2009	10	52	25	8	4
	February, 2006	12	52	23	11	2

ASK ALL:

RELIG What is your present religion, if any? Are you Protestant, Roman Catholic, Mormon, Orthodox such as Greek or Russian Orthodox, Jewish, Muslim, Buddhist, Hindu, atheist, agnostic, something else, or nothing in particular?

[INTERVIEWER: IF R VOLUNTEERS "nothing in particular, none, no religion, etc." **BEFORE REACHING END OF LIST, PROMPT WITH:** And would you say that's atheist, agnostic, or just nothing in particular?]

IF SOMETHING ELSE, NOTHING IN PARTICULAR OR DK/REF (RELIG=11, 12, 99) ASK:

CHR Do you think of yourself as a Christian or not?

40	Protestant (Baptist, Methodist, Non-denominational, Lutheran, Presbyterian, Pentecostal, Episcopalian, Reformed, Church of Christ, Jehovah's Witness, etc.)
23	Roman Catholic (Catholic)
2	Mormon (Church of Jesus Christ of Latter-day Saints/LDS)
*	Orthodox (Greek, Russian, or some other orthodox church)
2	Jewish (Judaism)
*	Muslim (Islam)
1	Buddhist
*	Hindu
2	Atheist (do not believe in God)
3	Agnostic (not sure if there is a God)
2	Something else **(SPECIFY)**
12	Nothing in particular
11	Christian **(VOL.)**
*	Unitarian (Universalist) **(VOL.)**
2	Don't Know/Refused **(VOL.)**

IF CHRISTIAN (RELIG=1-4, 13 OR ((RELIG=11 OR RELIG=99) AND CHR=1)):

BORN Would you describe yourself as a "born again" or evangelical Christian, or not?

BASED ON TOTAL

34	Yes, would
40	No, would not
4	Don't know/Refused **(VOL.)**
78%	Christian

ASK ALL:

ATTEND Aside from weddings and funerals, how often do you attend religious services... more than once a week, once a week, once or twice a month, a few times a year, seldom, or never?

	More than once a week	Once a week	Once or twice a month	A few times a year	Seldom	Never	(VOL.) DK/Ref
August 11-27, 2009	14	23	16	18	16	11	1
August, 2008	13	26	16	19	15	10	1
Aug, 2007	14	26	16	18	16	9	1
July, 2006	15	25	15	18	14	12	1
July, 2005	14	27	14	19	14	11	1
Aug, 2004	13	25	15	20	15	11	1
July, 2003	16	27	15	18	14	10	*

ATTEND CONTINUED...

	More than once a week	Once a week	Once or twice a month	A few times a year	Seldom	Never	(VOL.) DK/Ref
March, 2003	15	24	15	21	15	9	1
March, 2002	15	25	17	18	15	9	1
Mid-Nov, 2001	16	26	14	17	16	10	1
March, 2001	17	26	17	17	15	7	1
Sept, 2000 *(RVs)*	17	28	16	17	13	8	1
June, 1997	12	26	17	20	15	10	*
June, 1996	14	25	17	21	13	9	1

ASK ALL:

Q.280 How important is religion in your life – very important, somewhat important, not too important, or not at all important?

NOTE: THIS ITEM WAS ASKED AS Q.280 IN SURVEY B AND AS Q.185 IN SURVEY A. BOTH ITEMS ARE PRESENTED HERE.

		August 2008	August 2007
57	Very important	58	61
25	Somewhat important	27	24
8	Not too important	7	8
8	Not at all important	7	6
1	Don't know/Refused **(VOL.)**	1	1

ASK ALL:
PARTY In politics TODAY, do you consider yourself a Republican, Democrat, or Independent?
IF ANSWERED 3, 4, 5 OR 9 IN PARTY, ASK:
PARTYLN As of today do you lean more to the Republican Party or more to the Democratic Party?

	Republican	Democrat	Independent	(VOL.) No preference	(VOL.) Other party	(VOL.) DK/ Ref	*Lean Rep*	*Lean Dem*
August 20-27, 2009	26	32	36	3	*	3	*14*	*16*
August 11-17, 2009	23	33	38	3	*	3	*16*	*15*
July, 2009	22	34	37	5	*	2	15	14
June, 2009	25	34	34	3	*	3	11	16
May, 2009	23	39	29	4	*	4	9	14
April, 2009	22	33	39	3	*	3	13	18
March, 2009	24	34	35	5	*	2	12	17
February, 2009	24	36	34	3	1	2	13	17
January, 2009	25	37	33	3	*	2	11	16
December, 2008	26	39	30	2	*	3	8	15
Late October, 2008	24	39	32	2	*	3	11	15
Mid-October, 2008	27	35	31	4	*	3	9	16
Early October, 2008	26	36	31	4	*	3	11	15
Late September, 2008	25	35	34	3	1	2	13	15
Mid-September, 2008	28	35	32	3	*	2	12	14
August, 2008	26	34	34	4	*	2	12	17
July, 2008	24	36	34	3	*	3	12	15
June, 2008	26	37	32	3	*	2	11	16
Late May, 2008	25	35	35	2	*	3	13	15
April, 2008	24	37	31	5	1	2	11	15
March, 2008	24	38	29	5	*	4	9	14
Late February, 2008	24	38	32	3	*	3	10	17
Early February, 2008	26	35	31	5	*	3	11	14
January, 2008	24	33	37	4	*	2	12	18
Yearly Totals								
2008	25.3	35.8	31.7	3.8	.3	3.1	10.5	15.4
2007	25.4	32.9	33.7	4.6	.4	3.1	10.7	16.7
2006	27.6	32.8	30.3	5.0	.4	3.9	10.2	14.5
2005	29.2	32.8	30.3	4.5	.3	2.8	10.2	14.9
2004	29.7	33.4	29.8	3.9	.4	2.9	11.7	13.4
2003	29.8	31.4	31.2	4.7	.5	2.5	12.1	13.0
2002	30.3	31.2	30.1	5.1	.7	2.7	12.6	11.6
2001	29.2	33.6	28.9	5.1	.5	2.7	11.7	11.4
2001 Post-Sept 11	*30.9*	*31.8*	*27.9*	*5.2*	*.6*	*3.6*	*11.7*	*9.4*
2001 Pre-Sept 11	*28.2*	*34.6*	*29.5*	*5.0*	*.5*	*2.1*	*11.7*	*12.5*
2000	27.5	32.5	29.5	5.9	.5	4.0	11.6	11.6
1999	26.6	33.5	33.7	3.9	.5	1.9	13.0	14.5
1998	27.5	33.2	31.9	4.6	.4	2.4	11.8	13.5
1997	28.2	33.3	31.9	4.0	.4	2.3	12.3	13.8
1996	29.2	32.7	33.0	5.2	--	--	12.7	15.6
1995	31.4	29.7	33.4	5.4	--	--	14.4	12.9
1994	29.8	31.8	33.8	4.6	--	--	14.3	12.6
1993	27.4	33.8	34.0	4.8	--	--	11.8	14.7
1992	27.7	32.7	35.7	3.9	--	--	13.8	15.8

PARTY/PARTYLN CONTINUED...

	Republican	Democrat	Independent	(VOL.) No preference	(VOL.) Other party	(VOL.) DK/ Ref	*Lean Rep*	*Lean Dem*
1991	30.9	31.4	33.2	4.5	--	--	14.6	10.8
1990	31.0	33.1	29.1	6.8	--	--	12.4	11.3
1989	33	33	34	--	--	--	--	--
1987	26	35	39	--	--	--	--	--

FILED

IN THE EIGHTEENTH JUDICIAL DISTRICT DIV DOCKET NO. MB
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

2015 DEC 23 P 2:45

CLERK OF THE DISTRICT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KANSAS
MB

THE STATE OF KANSAS, Plaintiff	)	
vs.	)	CASE#09CR1462
SCOTT P. ROEDER, Defendant	)	

MOTION RENEWING THE ORIGINAL
MOTION FOR NEW TRIAL OR JUDGMENT OF ACQUITTAL

Now comes the Defendant, SCOTT P. ROEDER, by defendant's attorneys, Mark T. Rudy, Chief Public Defender, Taryn Locke, Assistant Public Defender, and Jason Smartt, Assistant Public Defender, and moves this Court for an order granting him a new trial, pursuant to K.S.A. 22-3501, or an order setting aside the jury verdict in the above case, and entering a judgment of acquittal pursuant to K.S.A. 22-3419.

In support of this motion, defendant states as follows:

FACTUAL ASSERTIONS

1. It is alleged that the defendant, Scott P. Roeder, put an end to the abortion practice of Dr. George R. Tiller, by killing him May 31, 2009.

2. It is alleged that in the course of committing the alleged murder, the defendant also committed aggravated assault against both Gary Hoepner and Keith Martin.

PROCEDURAL HISTORY

3. Defendant was arrested May 31, 2009 and taken into custody

4. A first appearance occurred June 2, 2009.

5. The defendant was accused of murder in the first degree [K.S.A. 21-3401(a); OGPF], and two counts of aggravated assault [K.S.A. 21-3410(a); SL7PF].

6. An order for a DNA sample of the defendant was granted July 2, 2009.

7. A preliminary hearing occurred on July 28, 2009; whereupon the defendant was arraigned and the case was set for jury trial.

8. Numerous pretrial and trial motion were filed, argued, and heard.

9. The case proceeded to jury trial.

10. The defendant was convicted on January 29, 2010 of murder in the first degree [K.S.A. 21-3401(a); OGPF], and two counts of aggravated assault [K.S.A. 21-3410(a); SL7PF].

11. On March 11, 2010, the prosecution filed notice of its intent to seek a fifty year term of imprisonment, pursuant to K.S.A. 21-4635 et seq. The basis was due to two aggravating factors:

a) "Pursuant to K.S.A. 21-4636(b), the defendant knowingly or purposely created a great risk of death to more than one person."

b) "Pursuant to K.S.A. 21-4636(f), the defendant committed the crime in an especially heinous, atrocious or cruel manner."

12. Defendant was sentenced April 1, 2010. The sentence was a bench sentencing—and not determined in the presence or with the involvement of the jury. Judge Wilbert imposed a sentence for murder in the 1st degree (Count 1) of life / Hard 50. The aggravated assault convictions (Counts 2 and 3) were sentenced as 12 months each, with all counts consecutive. The Judge made findings pursuant to K.S.A. 21-4636 – K.S.A. 21-4638 and incorporated those in the Court's Written Findings of Aggravating Circumstances as Required by K.S.A. 21-4635(d).

SENTENCING PHASE JURY TRIAL

13. The defense previously filed a **Motion to Challenge the Sentencing Statute as Violative of Right to a Jury Trial** (filed March 25, 2010).

14. In Kansas v. Scott Roeder, 336 P.3d 831, 300 Kan. 901 (Kan., 2014), the Court considered the proceedings at the District Court:

> "Premeditated first-degree murder carries a life sentence with a mandatory *858 minimum of 25 years before the defendant becomes parole eligible unless the State establishes that the defendant qualifies for an enhanced minimum sentence,

here 50 years. State v. Nelson, 291 Kan. 475, 486, 243 P.3d 343 (2010) (citing K.S.A. 21–4635; K.S.A. 22–3717[b][1]). At the time Roeder was sentenced, the district court had to find by a preponderance of the evidence that one or more of the aggravated circumstances enumerated in K.S.A. 21–4636 existed and that they were not outweighed by any mitigating factors in order to enhance the minimum sentence. K.S.A. 21–4635(d); Nelson, 291 Kan. at 486–88, 243 P.3d 343."

15. Based on the opinion of the Kansas Supreme Court in Kansas v. Scott Roeder, 336 P.3d 831, 300 Kan. 901 (Kan., 2014), the conviction has been affirmed—but a new sentencing has been granted.

FOR RECONSIDERATION

16. The Court may have erred in the pre-trial rulings.

a) Motion to Reconsider Bond (6/10/2009)

b) Binding Mr. Roeder over for trial upon the findings of the preliminary hearing (7/28/09)

c) Motion to Quash Subpoena—Barry Disney (1/27/10)

d) Motion to Quash Subpoena

17. The Court may have erred in failing to grant the pre-trial motion(s) of the defense.

a) Motion for Order Prohibiting Jury Selection in Violation of Batson v Kentucky (12/22/09)

b) Motion for Discovery

c) Motion for Change of Venue (12/23/09)

d) Motion to Reconsider (1/8/2010)

e) Motion to Not Prohibit Simultaneous Deliberations of Lesser Included Offense (1/29/10)

18. The Court may have erred in granting the pre-trial motion(s) of the prosecution.

a) Motion in Limine Necessity Defense—Use of Force in Defense of Another (1/12/10)

b) Motion in Opposition to Voluntary Manslaughter or Imperfect Self-Defense Jury Instruction

19. The Court may have erred in conducting voir dire.

a) Motion for Cautionary Instruction Prior to [During] Jury Selection (1/21/10)

20. The Court may have erred in denying the defense's trial motion(s).

a) Motion to take Judicial Notice and Instruct Jury (1/29/10)

21. The Court may have erred in granting the prosecution's trial motion(s).

22. The Court may have erred in sustaining various objections by the prosecution during trial.

a) Objections by the prosecution during the direct examination by the defense of Mr. Roeder

23. The Court may have erred in failing to sustain various objections by the defense during jury instructions conference.

24. The Court may have erred in failure to adopt certain jury instructions.

a) Motion to Instruct Regarding Voluntary Manslaughter Imperfect Self Defense or Defense of Others

b) Voluntary Manslaughter

c) Necessity Defense

d) Second Degree Murder

25. The evidence may have been insufficient to prove the defendant guilty beyond a reasonable doubt on all elements of the offenses charged. This was the subject of a Motion for Judgment of Acquittal at the conclusion of the prosecution's case and renewed at the conclusion of defense's case. The Court may have erred in failing to grant the Defendant's Motion for Judgment of Acquittal at the close of the prosecution's case, and renewed at the close of the defenses's case.

WHEREFORE, the defendant respectfully requests the Court to enter an order granting the defendant a new trial, or on the alternative, for a judgment of acquittal, for the above and foregoing reasons.

#19510
Jason Smartt for :

Mark T. Rudy #23090
Chief Public Defender
Office of the Public Defender
604 North Main, Suite D
Wichita, Kansas 67203
(316) 264-8700 ext 208

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion was delivered inter-office to the Sedgwick County District Attorney's office this filing date.

Jason Smartt
Asst. Public Defender

NOTICE OF HEARING

Please take notice and be advised that the foregoing Motion will be heard at 9 on the 3/23/16, before Judge Wilbert.

FILED

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

APP DOCKET NO. MB

2015 DEC 23 P 2:41

CLERK OF THE DISTRICT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KANSAS
MB

THE STATE OF KANSAS,
Plaintiff

vs.

CASE#09CR1462

SCOTT P. ROEDER,
Defendant

DC 18

MOTION FOR DISCOVERY CONFERENCE

Now comes the Defendant, SCOTT P. ROEDER, by defendant's attorneys, Mark T. Rudy, Chief Public Defender, Taryn Locke, Assistant Public Defender, and Jason Smartt, Assistant Public Defender, and moves this Court to set a date and convene a discovery conference.

In support of this motion, defendant states as follows:

FACTUAL ASSERTIONS

1. It is alleged that the defendant, Scott P. Roeder, put an end to the abortion practice of Dr. George R. Tiller, by killing him May 31, 2009.

2. It is alleged that in the course of committing the alleged murder, the defendant also committed aggravated assault against both Gary Hoepner and Keith Martin.

PROCEDURAL HISTORY

3. Defendant was arrested May 31, 2009 and taken into custody

4. A first appearance occurred June 2, 2009.

5. The defendant was accused of murder in the first degree [K.S.A. 21-3401(a); OGPF], and two counts of aggravated assault [K.S.A. 21-3410(a); SL7PF].

6. An order for a DNA sample of the defendant was granted July 2, 2009.

7. A preliminary hearing occurred on July 28, 2009; whereupon the defendant was arraigned and the case was set for jury trial.

8. Numerous pretrial and trial motion were filed, argued, and heard.

9. The case proceeded to jury trial.

10. The defendant was convicted on January 29, 2010 of murder in the first degree [K.S.A. 21-3401(a); OGPF], and two counts of aggravated assault [K.S.A. 21-3410(a); SL7PF].

11. On March 11, 2010, the prosecution filed notice of its intent to seek a fifty year term of imprisonment, pursuant to K.S.A. 21-4635 et seq. The basis was due to two aggravating factors:

a) "Pursuant to K.S.A. 21-4636(b), the defendant knowingly or purposely created a great risk of death to more than one person."

b) "Pursuant to K.S.A. 21-4636(f), the defendant committed the crime in an especially heinous, atrocious or cruel manner."

12. Defendant was sentenced April 1, 2010. The sentence was a bench sentencing—and not determined in the presence or with the involvement of the jury. Judge Wilbert imposed a sentence for murder in the 1st degree (Count 1) of life / Hard 50. The aggravated assault convictions (Counts 2 and 3) were sentenced as 12 months each, with all counts consecutive. The Judge made findings pursuant to K.S.A. 21-4636 – K.S.A. 21-4638 and incorporated those in the Court's Written Findings of Aggravating Circumstances as Required by K.S.A. 21-4635(d).

SENTENCING PHASE JURY TRIAL

13. The defense previously filed a **Motion to Challenge the Sentencing Statute as Violative of Right to a Jury Trial** (filed March 25, 2010).

14. In Kansas v. Scott Roeder, 336 P.3d 831, 300 Kan. 901 (Kan., 2014), the Court considered the proceedings at the District Court:

> "Premeditated first-degree murder carries a life sentence with a mandatory *858 minimum of 25 years before the defendant becomes parole eligible unless the State establishes that the defendant qualifies for an enhanced minimum sentence, here 50 years. State v. Nelson, 291 Kan. 475, 486, 243 P.3d 343 (2010) (citing K.S.A. 21–4635; K.S.A. 22–3717[b][1]). At the time Roeder was sentenced, the

district court had to find by a preponderance of the evidence that one or more of the aggravated circumstances enumerated in K.S.A. 21–4636 existed and that they were not outweighed by any mitigating factors in order to enhance the minimum sentence. K.S.A. 21–4635(d); Nelson, 291 Kan. at 486–88, 243 P.3d 343."

15. Based on the opinion of the Kansas Supreme Court in Kansas v. Scott Roeder, 336 P.3d 831, 300 Kan. 901 (Kan., 2014), the conviction has been affirmed—but a new sentencing has been granted.

LEGAL AUTHORITY

16. K.S.A. 21-6620(e)(3) provides:

"(3) 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. 21-6624, and amendments thereto, or for crimes committed prior to July 1, 2011, K.S.A. 21-4636, prior to its repeal, 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 prosecuting attorney 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. Only such evidence of mitigating circumstances subject to discovery pursuant to K.S.A. 22-3212, and amendments thereto, that the defendant has made known to the prosecuting attorney prior to the sentencing proceeding shall be admissible. No testimony by the defendant at the time of sentencing shall be admissible against the defendant at any subsequent criminal proceeding. At the conclusion of the evidentiary presentation, the court shall allow the parties a reasonable period of time in which to present oral argument."

WHEREFORE, the defendant requests this Court to set a date and convene a discovery conference.

JASON SMART #19510 for:

Mark T. Rudy #23090
Chief Public Defender
Office of the Public Defender
604 North Main, Suite D
Wichita, Kansas 67203
(316) 264-8700 ext 208

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion was delivered inter-office to the Sedgwick County District Attorney's office this filing date.

JASON SMART
Asst. Public Defender

NOTICE OF HEARING

Please take notice and be advised that the foregoing Motion will be heard at 9 on the 3/23/16, before Judge WILBERT.

FILED

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

APP DOCKET NO. MB

2015 DEC 23 P 2:40

CLERK OF THE DISTRICT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KANSAS
MB

THE STATE OF KANSAS,

Plaintiff

vs.

CASE#09CR1462

SCOTT P. ROEDER,

Defendant

DC 18

MOTION FOR ORDER PROHIBITING JURY SELECTION IN VIOLATION OF BATSON V. KENTUCKY, 476 U.S. 79 (1986)

Now comes the Defendant, SCOTT P. ROEDER, by defendant's attorneys, Mark T. Rudy, Chief Public Defender, Taryn Locke, Assistant Public Defender, and Jason Smartt, Assistant Public Defender, and moves this Court to hear evidence and argument in the above captioned case on the issue of Batson v. Kentucky, and certain members of the jury selection panel.

In support of this motion, defendant states as follows:

FACTUAL ASSERTIONS

1. It is alleged that the defendant, Scott P. Roeder, put an end to the abortion practice of Dr. George R. Tiller, by killing him May 31, 2009.

2. It is alleged that in the course of committing the alleged murder, the defendant also committed aggravated assault against both Gary Hoepner and Keith Martin.

PROCEDURAL HISTORY

3. Defendant was arrested May 31, 2009 and taken into custody

4. A first appearance occurred June 2, 2009.

5. The defendant was accused of murder in the first degree [K.S.A. 21-3401(a); OGPF], and two counts of aggravated assault [K.S.A. 21-3410(a); SL7PF].

6. An order for a DNA sample of the defendant was granted July 2, 2009.

7. A preliminary hearing occurred on July 28, 2009; whereupon the defendant was arraigned and the case was set for jury trial.

8. Numerous pretrial and trial motion were filed, argued, and heard.

9. The case proceeded to jury trial.

10. The defendant was convicted on January 29, 2010 of murder in the first degree [K.S.A. 21-3401(a); OGPF], and two counts of aggravated assault [K.S.A. 21-3410(a); SL7PF].

11. On March 11, 2010, the prosecution filed notice of its intent to seek a fifty year term of imprisonment, pursuant to K.S.A. 21-4635 et seq. The basis was due to two aggravating factors:

a) "Pursuant to K.S.A. 21-4636(b), the defendant knowingly or purposely created a great risk of death to more than one person."

b) "Pursuant to K.S.A. 21-4636(f), the defendant committed the crime in an especially heinous, atrocious or cruel manner."

12. Defendant was sentenced April 1, 2010. The sentence was a bench sentencing—and not determined in the presence or with the involvement of the jury. Judge Wilbert imposed a sentence for murder in the 1st degree (Count 1) of life / Hard 50. The aggravated assault convictions (Counts 2 and 3) were sentenced as 12 months each, with all counts consecutive. The Judge made findings pursuant to K.S.A. 21-4636 – K.S.A. 21-4638 and incorporated those in the Court's Written Findings of Aggravating Circumstances as Required by K.S.A. 21-4635(d).

SENTENCING PHASE JURY TRIAL

13. The defense previously filed a **Motion to Challenge the Sentencing Statute as Violative of Right to a Jury Trial** (filed March 25, 2010).

14. In Kansas v. Scott Roeder, 336 P.3d 831, 300 Kan. 901 (Kan., 2014), the Court considered the proceedings at the District Court:

> "Premeditated first-degree murder carries a life sentence with a mandatory *858 minimum of 25 years before the defendant becomes parole eligible unless the State establishes that the defendant qualifies for an enhanced minimum sentence, here 50 years. State v. Nelson, 291 Kan. 475, 486, 243 P.3d 343 (2010) (citing K.S.A. 21–4635; K.S.A. 22–3717[b][1]). At the time Roeder was sentenced, the district court had to find by a preponderance of the evidence that one or more of the aggravated circumstances enumerated in K.S.A. 21–4636 existed and that they were not outweighed by any mitigating factors in order to enhance the minimum sentence. K.S.A. 21–4635(d); Nelson, 291 Kan. at 486–88, 243 P.3d 343."

15. Based on the opinion of the Kansas Supreme Court in Kansas v. Scott Roeder, 336 P.3d 831, 300 Kan. 901 (Kan., 2014), the conviction has been affirmed—but a new sentencing has been granted.

ANTICIPATED CONDITIONS OF JURY SELECTION FOR SENTENCING

16. Potential jurors will be questioned in a jury selection questionnaire.

17. Potential jurors will be questioned during in person jury selection.

18. Questioning of potential jurors will allow identification in terms of (among other information) race, gender, religious beliefs and practice, and pro-life / pro-abortion beliefs and practice.

19. One or more peremptory challenges may be exercised by opposing counsel based on race, gender, religion, or pro-life belief / action.

20. The defense will make objection to such peremptory strikes of the prosecution. The objection will be made before the jury is sworn.

21. The prosecution will be unable to articulate a comprehensible race or gender neutral explanation for the strike(s) in question.

22. The prosecution will be unable to articulate a comprehensible religion neutral explanation for the strike(s) in question.

23. The prosecution will be unable to articulate a comprehensible neutral explanation for the strike(s) in question—unrelated to the stricken panelist's position regarding the pro-life issue.

24. The trial court will exercise the obligation of determining whether the objecting party has carried the burden of proving purposeful discrimination, i.e., determining whether the objecting party has proven discrimination based motivation for the peremptory, including consideration of whether the neutral explanation of the party exercising the peremptory challenge negates purposeful (and prohibited) discrimination.

ARGUMENT I

25. Racial discrimination and gender discrimination are prohibited in jury selection based on the established precedents of Batson v. Kentucky and J.E.B. v. Alabama.

26. Members of the pro-life community are also a cognizable group. See Murchu. The defense here is using the racially cognizable group standard for the analysis of the pro-life community.

27. The group is definable and limited by some clearly identifiable factor. Their belief is identifiable. Their advocacy is identifiable. Their religious views make them identifiable.

28. Members of the pro-life interest group share a common thread of attitudes, ideas or experiences. They believe that life is sacred. They believe that unborn children are alive. They view abortion as killing. They view abortion as wrong. They engage in advocacy and protest activities to stop abortion. They express their points of view. Some hold their points of view to themselves and act in other ways in support of their views.

29. A community of interests exists among the group's members (set out above), such that the group's interest cannot be adequately represented if the group is excluded from the jury selection process. Exclusion of members of the pro-life community from jury service would leave a vacant view point in the deliberation room. It would be difficult, if not impossible, to understand the facts of the case, from all relevant view points, without some member of the pro-life community. Guaranteeing the exclusion of that community would assure that their viewpoints could not be represented.

30. The group members experience unequal, i.e. discriminatory, treatment, and need protection from community prejudices. Active members of the community who protest and engage in confrontational advocacy may be subject to arrest and restraint of their liberties under state and federal law.

31. By treating members of the pro-life community differently, they are placed in a distinct group.

32. Members of the pro-life community merit equal protection analysis when subjected to peremptory jury strikes. They merit Batson analysis independent of pre-text considerations.

ARGUMENT II

33. Should a member of the pro-life community be stricken from the jury selection panel, it may be merely a pretext for racial or gender discrimination.

34. Love v. Yates prohibits jury selection actions that constitute pretexts for purposeful racial discrimination. This should extend as a precedent to actions that constitute pretexts for purposeful gender discrimination.

35. The Pew Research Center study, attached as an exhibit, makes clear that there is support for the pro-life issue, among both members of racial and ethnic minority groups, and also among women.

36. Striking members of the jury selection panel, for their pro-life views, or religious views related to the pro-life issue, may be merely a pre-text that accomplishes the purpose of eliminating racial and ethnic minorities, and women from the jury panel.

37. This would be a violation of Batson.

ARGUMENT III

38. Should a member of the pro-life community by stricken from the jury selection panel, it may be merely a pretext for religious discrimination.

39. The defense argues that the Love v. Yates pretext analysis could be extended to religious discrimination.

40. Batson protections should be extended further to include religious discrimination.

41. The Pew Research Center study, attached as an exhibit, makes clear that there is support for the pro-life issue, among religious groups.

42. Striking members of the jury selection panel, for their pro-life views, or religious views related to the pro-life issue, may be merely a pre-text that accomplishes the purpose of eliminating religious people (of a certain point of view) from the jury panel.

43. This should be considered a violation of Batson.

44. It could also involve violations on a First Amendment basis—in terms of prohibited discrimination based upon religious point of view and government endorsement of, or against, certain viewpoints.

45. A Baylor Law Review article by Elaine Carlson assists in the analysis of extending Batson. Batson, J.E.B., and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process. 46 Baylor L. Rev. 947 (fall 1994), 967-978.

46. The argument that Batson protections are extended to religion, after the decision in J.E.B. is a position the defense believes to have merit in this case.

ARGUMENT IV

47. Barring the Court's finding that excluding pro-life jurors would be a violation of equal protection, consistent with an analysis similar to that in McKinney v. Walker, then the Court should re-consider such strikes as prohibited on the grounds of depriving due process and impeding the selection of an impartial jury.

48. On the point of deliberation, exclusion of pro-life jury panelists will be an issue of not providing a representative jury. The abortion issue is so contentious, that by eliminating pro-life jury panelists impartiality is compromised. It is the contemplation of a heated deliberation, by jurors of all views, including those who are pro-life, that will insure impartial jurors. A juror who is partial from the commencement of the trial (such as one who is biased in favor of abortion),

who also knows they are in an environment absent those holding views they oppose (because jury selection was allowed to eliminate pro-life panelists), would be ripe for partiality.

ARGUMENT V

49. The remedy for a Batson violation is either to seat the juror who was improperly challenged by opposing counsel, or to select a new panel.

50. The defense intends to inquire as to the religious views and practices of jury panelists, as well as their views and practices regarding the pro-life issue.

51. Upon objection to any strikes by the prosecution of pro-life, religious, racial / ethnic minority, or female juror panelists, the Court should conduct a comparative juror analysis to evaluate the prosecution's asserted neutral basis.

52. If the prosecution strikes pro-life, religious, racial / ethnic minority, or female members of the jury selection panel, and objection is made, without some neutral reason that can be elaborated, a remedy should be granted by the Court.

53. The defense has submitted three versions of a Court Order, and each should be signed by the Court prior to commencing jury selection.

WHEREFORE, defendant requests the Court to hear evidence and argument in the above captioned case on the issue of Batson v. Kentucky, and certain members of the jury selection panel.

Respectfully submitted,

Jason Smartt #19510 for:

Mark T. Rudy #23090
Chief Public Defender
Office of the Public Defender
604 North Main, Suite D
Wichita, Kansas 67203
(316) 264-8700 ext 208

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion was delivered in person to the office of the Sedgwick County District Attorney this filing dat.

JASON SMART
Assistant Public Defender

NOTICE OF HEARING

Please take notice and be advised that the foregoing Motion will be heard before District Court Judge WILBERT, at 9 on the 3/23/16.

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS,)
)
Plaintiff)
)
)
vs.) CASE#09CR1462
)
)
SCOTT P. ROEDER,)
)
Defendant)
)

DRAFT

ORDER PROHIBITING JURY SELECTION IN VIOLATION OF BATSON V. KENTUCKY, 476 U.S. 79 (1986): PRO-LIFE

NOW on this, _____, it is hereby the Order of this Court that the jury selection process, in violation of Batson v. Kentucky, 476 U.S. 79 (1986) and J.E.B. v. Alabama, 511 U.S. 127 (1994) extends to prohibit jury selection and peremptory strikes on the basis of a potential juror's beliefs and actions in favor of the pro-life issue.

IT IS SO ORDERED.

_____

District Court Judge

SUBMITTED BY:

_____

Mark T. Rudy #23090
Chief Public Defender
Office of the Public Defender
604 North Main, Suite D
Wichita, Kansas 67203
(316) 264-8700 ext 208

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS,)
)
Plaintiff)
)
)
vs.) CASE#09CR1462
)
)
SCOTT P. ROEDER,)
)
Defendant)
)

DRAFT

ORDER PROHIBITING JURY SELECTION IN VIOLATION OF BATSON V. KENTUCKY, 476 U.S. 79 (1986): RELIGION

NOW on this, _____, it is hereby the Order of this Court that the jury selection process, in violation of Batson v. Kentucky, 476 U.S. 79 (1986) and J.E.B. v. Alabama, 511 U.S. 127 (1994) extends to prohibit jury selection and peremptory strikes on the basis of a potential juror's religious beliefs and religious actions in favor of the pro-life issue.

IT IS SO ORDERED.

_____

District Court Judge

SUBMITTED BY:

_____

Mark T. Rudy #23090
Chief Public Defender
Office of the Public Defender
604 North Main, Suite D
Wichita, Kansas 67203
(316) 264-8700 ext 208

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS,)
)
Plaintiff)
)
)
vs.) CASE#09CR1462
)
)
SCOTT P. ROEDER,)
)
Defendant)
)

DRAFT

ORDER PROHIBITING JURY SELECTION IN VIOLATION OF BATSON V. KENTUCKY, 476 U.S. 79 (1986): PRETEXTUAL RACE / ETHNIC OR GENDER DISCRIMINATION

NOW on this, _____, it is hereby the Order of this Court that the jury selection process, in violation of Batson v. Kentucky, 476 U.S. 79 (1986) and J.E.B. v. Alabama, 511 U.S. 127 (1994) extends to prohibit jury selection and peremptory strikes on the basis of a potential juror's beliefs and actions in favor of the pro-life issue OR potential juror's religious beliefs and religious actions in favor of the pro-life issue IN RELATION TO a potential panelist's racial / ethnic minority status, or status as a woman.

IT IS SO ORDERED.

_____

District Court Judge

SUBMITTED BY:

_____

Mark T. Rudy #23090
Chief Public Defender
Office of the Public Defender
604 North Main, Suite D
Wichita, Kansas 67203
(316) 264-8700 ext 208

FILED

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

APP DOCKET NO. MB

2015 DEC 23 P 2:42

CLERK OF THE DISTRICT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KANSAS
BY MB

THE STATE OF KANSAS,

Plaintiff

vs.

CASE#09CR1462

SCOTT P. ROEDER,

Defendant

DC18

MOTION RENEWING OPPOSITION TO A HARD 50 SENTENCE AND OPPOSING THE STATE'S ANTICIPATED / ALLEGED AGGRAVATING FACTORS

Now comes the Defendant, SCOTT P. ROEDER, by defendant's attorneys, Mark T. Rudy, Chief Public Defender, Taryn Locke, Assistant Public Defender, and Jason Smartt, Assistant Public Defender, and moves this Court to conduct a hearing and precluded the State's use of the anticipated / alleged aggravating factors elaborated upon herein.

In support of this motion, defendant states as follows:

FACTUAL ASSERTIONS

1. It is alleged that the defendant, Scott P. Roeder, put an end to the abortion practice of Dr. George R. Tiller, by killing him May 31, 2009.

2. It is alleged that in the course of committing the alleged murder, the defendant also committed aggravated assault against both Gary Hoepner and Keith Martin.

PROCEDURAL HISTORY

3. Defendant was arrested May 31, 2009 and taken into custody

4. A first appearance occurred June 2, 2009.

5. The defendant was accused of murder in the first degree [K.S.A. 21-3401(a); OGPF], and two counts of aggravated assault [K.S.A. 21-3410(a); SL7PF].

6. An order for a DNA sample of the defendant was granted July 2, 2009.

7. A preliminary hearing occurred on July 28, 2009; whereupon the defendant was arraigned and the case was set for jury trial.

8. Numerous pretrial and trial motion were filed, argued, and heard.

9. The case proceeded to jury trial.

10. The defendant was convicted on January 29, 2010 of murder in the first degree [K.S.A. 21-3401(a); OGPF], and two counts of aggravated assault [K.S.A. 21-3410(a); SL7PF].

11. On March 11, 2010, the prosecution filed notice of its intent to seek a fifty year term of imprisonment, pursuant to K.S.A. 21-. The basis was due to two aggravating factors:

a) "Pursuant to K.S.A. 21-4636(b), the defendant knowingly or purposely created a great risk of death to more than one person."

b) "Pursuant to K.S.A. 21-4636(f), the defendant committed the crime in an especially heinous, atrocious or cruel manner."

12. Defendant was sentenced April 1, 2010. The sentence was a bench sentencing—and not determined in the presence or with the involvement of the jury. Judge Wilbert imposed a sentence for murder in the 1st degree (Count 1) of life / Hard 50. The aggravated assault convictions (Counts 2 and 3) were sentenced as 12 months each, with all counts consecutive. The Judge made findings pursuant to K.S.A. 21-4636 – K.S.A. 21-4638 and incorporated those in the Court's Written Findings of Aggravating Circumstances as Required by K.S.A. 21-4635(d).

SENTENCING PHASE JURY TRIAL

13. The defense previously filed a **Motion to Challenge the Sentencing Statute as Violative of Right to a Jury Trial** (filed March 25, 2010).

14. In Kansas v. Scott Roeder, 336 P.3d 831, 300 Kan. 901 (Kan., 2014), the Court considered the proceedings at the District Court:

> "Premeditated first-degree murder carries a life sentence with a mandatory *858 minimum of 25 years before the defendant becomes parole eligible unless the State establishes that the defendant qualifies for an enhanced minimum sentence, here 50 years. State v. Nelson, 291 Kan. 475, 486, 243 P.3d 343 (2010) (citing K.S.A. 21–4635; K.S.A. 22–3717[b][1]). At the time Roeder was sentenced, the

district court had to find by a preponderance of the evidence that one or more of the aggravated circumstances enumerated in K.S.A. 21–4636 existed and that they were not outweighed by any mitigating factors in order to enhance the minimum sentence. K.S.A. 21–4635(d); Nelson, 291 Kan. at 486–88, 243 P.3d 343."

15. Based on the opinion of the Kansas Supreme Court in Kansas v. Scott Roeder, 336 P.3d 831, 300 Kan. 901 (Kan., 2014), the conviction has been affirmed—but a new sentencing has been granted.

DEFENSE OPPOSITION TO A HARD 50 SENTENCE—RENEWED FROM PRIOR TRIAL

16. The defense previously filed a **Defense's Response to State's Request That Sentencing Be Under K.S.A. 21-4635 / Hard 50** (filed March 25, 2010). The defense renews that motion.

17. Based on the opinion of the Kansas Supreme Court resentencing has been granted.

18. The defense previously filed a **Motion to Challenge the Sentencing Statute as Violative of Due Process** (filed March 25, 2010). The defense renews that motion.

19. The defense opposes the aggravating factors advocated by the prosecution.

ADDITIONAL DEFENSE OPPOSITION TO A HARD 50 SENTENCE

20. K.S.A. 21-4639 directs what is to happen where a determination of unconstitutionality is made, as has been made in this case:

"In the event the mandatory term of imprisonment or any provision of this act authorizing such mandatory term is held to be unconstitutional by the supreme court of Kansas or the United States supreme court, the court having jurisdiction over a person previously sentenced shall cause such person to be brought before the court and shall modify the sentence to require no mandatory term of imprisonment and shall sentence the defendant as otherwise provided by law."

21. In addition to the defense's legal arguments opposed to a Hard 50 sentence, the defense also lodges case specific challenges to a Hard 50 sentencing, and opposing specific aggravating factors.

ARGUMENT—REGARDING AGGRAVATING FACTOR: KNOWINGLY OR PURPOSELY CREATED A GREAT RISK OF DEATH TO MORE THAN ONE PERSON

22. Despite the prosecution's arguments to the contrary [see prosecution's Memorandum in Support of State's Request for a Hard 50 Sentence, filed March 11, 2010], the defendant in this case did not knowingly or purposely create a great risk of death to more than one person.

23. The defense renews trial level advocacy opposing the aggravating factors advocated by the prosecution.

24. As the prosecution pointed out, this case is an act of political assassination. The target of that assassination was the abortion provider George Tiller. If the politics is considered to be the exercise of power—then the political action of George Tiller was the power of ending the lives of innocent unborn children. Scott Roeder terminated that brutal exercise power by killing George Tiller.

25. There was no other intended target.

26. The angle of the discharged firearm, and targeting of the shooting to George Tiller's head, minimized the risk of any other person being shot.

27. The firearm used was not a fully automatic firearm. The ammunition used was single projectile ammunition.

28. The assassination took place in an area removed from the greater congregation.

29. After the completion of the assassination, the defendant immediately retreated from the area, and from the scene.

ARGUMENT—REGARDING AGGRAVATING FACTOR: COMMITTED THE CRIME IN AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MANNER

30. Despite the prosecution's arguments to the contrary [see prosecution's Memorandum in Support of State's Request for a Hard 50 Sentence, filed March 11, 2010], the defendant in this case did not commit the crime in an especially heinous, atrocious or cruel manner.

31. The defense renews trial level advocacy opposing the aggravating factors advocated by the prosecution.

32. This is the case of a shooting to the head of George Tiller.

33. The shooting resulted in instant death to George Tiller.

34. The shooting was not designed to maim or inflict pain.

35. The shooting did not occur in a way that would provide a prolonged opportunity for the imminence of death.

36. There is nothing to distinguish this shooting as any more heinous, atrocious or cruel—than any other shooting. It was not especially so in any way.

37. The presence of witnesses, and the location of the witnesses at a religious building—does not make this shooting especially heinous, atrocious or cruel.

38. The prosecution's attempts to define heinous, atrocious or cruel—in reference to evil—sets up a completely subjective standard that is meaningless in application to this case, and contrary to the method of objective standards intended for the criminal justice system.

39. It has not been adequately proven that defendant prepared or planned to kill George Tiller in an especially heinous, atrocious or cruel manner. As a factor that the killing was done in an especially heinous, atrocious or cruel manner—creates a flawed circular logic that leads back to itself as a predicate rather than as a conclusion.

40. The prosecution's advocacy (Memorandum) is replete with supposition, and speculation about the motives of the defendant—as especially heinous, atrocious or cruel. Such emotionally laden guess work cannot be the basis for using this factor in aggravation.

41. The aggravated assaults against both Gary Hoepner and Keith Martin, are the basis of their own convictions. Using them again as aggravation provides an inadequate aggravating factor. Further, the aggravated assaults—while they were person felonies—were committed as acts instrumental to the defendant's escape and leaving from the scene. It should be noted, that escape occurred without any person being physically injured—because that was the defendant's

intent. The method of committing the two aggravated assaults are contrary to them being considered part of a killing that was especially heinous, atrocious or cruel.

ARGUMENT—REGARDING AGGRAVATING FACTOR: STALKING

42. Despite the prosecution's arguments to the contrary [see prosecution's Memorandum in Support of State's Request for a Hard 50 Sentence, filed March 11, 2010], the defendant has not in this, nor in any other case, been convicted of stalking George Tiller.

43. The defense renews trial level advocacy opposing the aggravating factors advocated by the prosecution.

44. It has not been adequately proven that defendant stalked George Tiller. And even if it were proven, it would not be sufficient as a factor that the killing was done in an especially heinous, atrocious or cruel manner.

WHEREFORE, the defendant requests this Court to conduct a hearing and precluded the State's use of the anticipated / alleged aggravating factors elaborated upon herein.

Jason Smyth #19510 for:

Mark T. Rudy #23090
Chief Public Defender
Office of the Public Defender
604 North Main, Suite D
Wichita, Kansas 67203
(316) 264-8700 ext 208

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion was delivered inter-office to the Sedgwick County District Attorney's office this filing date.

Jason Swartz
Asst. Public Defender

NOTICE OF HEARING

Please take notice and be advised that the foregoing Motion will be heard at 9 on the 3/23/16, before Judge WILBERT.

FILED

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

APP DOCKET NO. MB

2015 DEC 23 P 2:42

CLERK OF THE DISTRICT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KANSAS
MB

THE STATE OF KANSAS,
Plaintiff

vs.

SCOTT P. ROEDER,
Defendant

CASE#09CR1462

SENTENCING PHASE JURY TRIAL—OBJECTION TO HEARSAY; OBJECTION TO JUDICIAL NOTICE; OBJECTION TO EVIDENCE BY TRANSCRIPT OR OTHER RECORDING; AND OBJECTION TO LACK OF CONSTITUTIONAL CONFRONTATION

Now comes the Defendant, SCOTT P. ROEDER, by defendant's attorneys, Mark T. Rudy, Chief Public Defender, Taryn Locke, Assistant Public Defender, and Jason Smartt, Assistant Public Defender, and moves this Court to preclude evidence absent confrontation, absent cross examination, and in violation against rules prohibiting hearsay.

In support of this motion, defendant states as follows:

FACTUAL ASSERTIONS

1. It is alleged that the defendant, Scott P. Roeder, put an end to the abortion practice of Dr. George R. Tiller, by killing him May 31, 2009.

2. It is alleged that in the course of committing the alleged murder, the defendant also committed aggravated assault against both Gary Hoepner and Keith Martin.

PROCEDURAL HISTORY

3. Defendant was arrested May 31, 2009 and taken into custody

4. A first appearance occurred June 2, 2009.

5. The defendant was accused of murder in the first degree [K.S.A. 21-3401(a); OGPF], and two counts of aggravated assault [K.S.A. 21-3410(a); SL7PF].

6. An order for a DNA sample of the defendant was granted July 2, 2009.

7. A preliminary hearing occurred on July 28, 2009; whereupon the defendant was arraigned and the case was set for jury trial.

8. Numerous pretrial and trial motion were filed, argued, and heard.

9. The case proceeded to jury trial.

10. The defendant was convicted on January 29, 2010 of murder in the first degree [K.S.A. 21-3401(a); OGPF], and two counts of aggravated assault [K.S.A. 21-3410(a); SL7PF].

11. On March 11, 2010, the prosecution filed notice of its intent to seek a fifty year term of imprisonment, pursuant to K.S.A. 21-4635 et seq. The basis was due to two aggravating factors:

a) "Pursuant to K.S.A. 21-4636(b), the defendant knowingly or purposely created a great risk of death to more than one person."

b) "Pursuant to K.S.A. 21-4636(f), the defendant committed the crime in an especially heinous, atrocious or cruel manner."

12. Defendant was sentenced April 1, 2010. The sentence was a bench sentencing—and not determined in the presence or with the involvement of the jury. Judge Wilbert imposed a sentence for murder in the 1st degree (Count 1) of life / Hard 50. The aggravated assault convictions (Counts 2 and 3) were sentenced as 12 months each, with all counts consecutive. The Judge made findings pursuant to K.S.A. 21-4636 – K.S.A. 21-4638 and incorporated those in the Court's Written Findings of Aggravating Circumstances as Required by K.S.A. 21-4635(d).

SENTENCING PHASE JURY TRIAL

13. The defense previously filed a **Motion to Challenge the Sentencing Statute as Violative of Right to a Jury Trial** (filed March 25, 2010).

14. In Kansas v. Scott Roeder, 336 P.3d 831, 300 Kan. 901 (Kan., 2014), the Court considered the proceedings at the District Court:

> "Premeditated first-degree murder carries a life sentence with a mandatory *858 minimum of 25 years before the defendant becomes parole eligible unless the State establishes that the defendant qualifies for an enhanced minimum sentence,

here 50 years. State v. Nelson, 291 Kan. 475, 486, 243 P.3d 343 (2010) (citing K.S.A. 21–4635; K.S.A. 22–3717[b][1]). At the time Roeder was sentenced, the district court had to find by a preponderance of the evidence that one or more of the aggravated circumstances enumerated in K.S.A. 21–4636 existed and that they were not outweighed by any mitigating factors in order to enhance the minimum sentence. K.S.A. 21–4635(d); Nelson, 291 Kan. at 486–88, 243 P.3d 343."

15. Based on the opinion of the Kansas Supreme Court in Kansas v. Scott Roeder, 336 P.3d 831, 300 Kan. 901 (Kan., 2014), the conviction has been affirmed—but a new sentencing has been granted.

SENTENCING PHASE JURY TRIAL—OBJECTION TO HEARSAY; OBJECTION TO JUDICIAL NOTICE; OBJECTION TO EVIDENCE BY TRANSCRIPT OR OTHER RECORDING; AND OBJECTION TO LACK OF CONSTITUTIONAL CONFRONTATION

16. The Defense objects to the admission of any information for consideration by the jury, in any proceeding under K.S.A. 21-6620, that would constitute hearsay, or information pursuant to judicial notice, or information by way of transcript or other recording, or information in the absence of State or Federal Constitutional confrontation and cross examination.

WHEREFORE, the defendant requests this Court to preclude evidence absent confrontation, absent cross examination, and in violation against rules prohibiting hearsay.

#19519
Jason Swartz for:

Mark T. Rudy #23090
Chief Public Defender
Office of the Public Defender
604 North Main, Suite D
Wichita, Kansas 67203
(316) 264-8700 ext 208

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion was delivered inter-office to the Sedgwick County District Attorney's office this filing date.

JASON SMART
Asst. Public Defender

NOTICE OF HEARING

Please take notice and be advised that the foregoing Motion will be heard at 9 on the 3/23/16, before Judge WILBERT.

FILED

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

PP DOCKET NO.

2016 JAN -8 P 3:24

CLERK OF THE DISTRICT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KANSAS

BY

THE STATE OF KANSAS,

Plaintiff

vs.

CASE#09CR1462

SCOTT P. ROEDER,

Defendant

No hearing date listed

MOTION TO CIRCULATE A WRITTEN QUESTIONAIRRE TO THE PANEL OF JURY CANDIDATES

Now comes the Defendant, SCOTT P. ROEDER, by defendant's attorneys, Mark T. Rudy, Chief Public Defender, Taryn Locke, Assistant Public Defender, and Jason Smartt, Assistant Public Defender, and moves this Court for authorization of use of a written jury questionnaire during jury selection.

In support of this motion, defendant states as follows:

FACTUAL ASSERTIONS

1. It is alleged that the defendant, Scott P. Roeder, put an end to the abortion practice of Dr. George R. Tiller, by killing him May 31, 2009.

2. It is alleged that in the course of committing the alleged murder, the defendant also committed aggravated assault against both Gary Hoepner and Keith Martin.

PROCEDURAL HISTORY

3. Defendant was arrested May 31, 2009 and taken into custody

4. A first appearance occurred June 2, 2009.

5. The defendant was accused of murder in the first degree [K.S.A. 21-3401(a); OGPF], and two counts of aggravated assault [K.S.A. 21-3410(a); SL7PF].

6. An order for a DNA sample of the defendant was granted July 2, 2009.

DC18

7. A preliminary hearing occurred on July 28, 2009; whereupon the defendant was arraigned and the case was set for jury trial.

8. Numerous pretrial and trial motion were filed, argued, and heard.

9. The case proceeded to jury trial.

10. The defendant was convicted on January 29, 2010 of murder in the first degree [K.S.A. 21-3401(a); OGPF], and two counts of aggravated assault [K.S.A. 21-3410(a); SL7PF].

11. On March 11, 2010, the prosecution filed notice of its intent to seek a fifty year term of imprisonment, pursuant to K.S.A. 21-4635 et seq. The basis was due to two aggravating factors:

a) "Pursuant to K.S.A. 21-4636(b), the defendant knowingly or purposely created a great risk of death to more than one person."

b) "Pursuant to K.S.A. 21-4636(f), the defendant committed the crime in an especially heinous, atrocious or cruel manner."

12. Defendant was sentenced April 1, 2010. The sentence was a bench sentencing—and not determined in the presence or with the involvement of the jury. Judge Wilbert imposed a sentence for murder in the 1st degree (Count 1) of life / Hard 50. The aggravated assault convictions (Counts 2 and 3) were sentenced as 12 months each, with all counts consecutive. The Judge made findings pursuant to K.S.A. 21-4636 – K.S.A. 21-4638 and incorporated those in the Court's Written Findings of Aggravating Circumstances as Required by K.S.A. 21-4635(d).

SENTENCING PHASE JURY TRIAL

13. The defense previously filed a **Motion to Challenge the Sentencing Statute as Violative of Right to a Jury Trial** (filed March 25, 2010).

14. In Kansas v. Scott Roeder, 336 P.3d 831, 300 Kan. 901 (Kan., 2014), the Court considered the proceedings at the District Court:

> "Premeditated first-degree murder carries a life sentence with a mandatory *858 minimum of 25 years before the defendant becomes parole eligible unless the State establishes that the defendant qualifies for an enhanced minimum sentence, here 50 years. State v. Nelson, 291 Kan. 475, 486, 243 P.3d 343 (2010) (citing K.S.A. 21–4635; K.S.A. 22–3717[b][1]). At the time Roeder was sentenced, the district court had to find by a preponderance of the evidence that one or more of the aggravated circumstances enumerated in K.S.A. 21–4636 existed and that they were not outweighed by any mitigating factors in order to enhance the minimum sentence. K.S.A. 21–4635(d); Nelson, 291 Kan. at 486–88, 243 P.3d 343."

15. Based on the opinion of the Kansas Supreme Court in Kansas v. Scott Roeder, 336 P.3d 831, 300 Kan. 901 (Kan., 2014), the conviction has been affirmed—but a new sentencing has been granted.

ARGUMENT

16. Due to the nature of the allegations, and the potential during jury selection, for certain responses to influence the fairness of the entire panel, the defense requests use of a limited jury questionnaire.

17. The questionnaire could be distributed by mail several weeks prior to jury selection and completed prior to commencing selection, and then returned by mail to the jury clerk.

18. Alternatively, the questionnaire could be distributed the morning of jury selection and completed prior to commencing selection.

19. The questionnaire could allow for individual voir dire interviews of jurors who's personal history and experiences could adversely influence the entire jury panel.

20. The defense has drafted a suggested questionnaire—but is receptive to the input of the prosecution on a final product.

WHEREFORE, defendant requests authorization of use of a written jury questionnaire during jury selection.

Mark T. Rudy #23090
Chief Public Defender
Office of the Public Defender
604 North Main, Suite D
Wichita, Kansas 67203
(316) 264-8700 ext 208

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion was hand delivered to the Sedgwick County District Attorney's office this filing date.

Assistant Public Defender

NOTICE OF HEARING

Please take notice and be advised that the foregoing Motion will be heard at _____ on the Court's discretion, before Judge WILBERT.

Draft Questionnaire attached

JUROR QUESTIONNAIRE

Juror #:

1. Full Name: _____ Age: _____

2. Your address in Sedgwick County? _____

3. Please list the gender, age and occupation for each of your children and step-children:
   _____
   _____

4. Please check (☒) any of the following in which you have received training or education:
   ☐ Child development ☐ Criminal justice ☐ Counseling ☐ Criminology .
   ☐ Human sexuality ☐ Law enforcement ☐ Psychology ☐ Law
   ☐ Medicine ☐ Sociology ☐ Interviewing ☐ Forensic Science

5. Where do you work and what is your job (if unemployed/retired, what and where was your last job)? _____

6. How long have (did) you worked there? _____

7. What is your current marital status? _____

8. If you are married or living with someone, for how many years? _____

9. Where does your spouse or partner work and what is this person's job (if unemployed / retired, what and where was this person's last job)? _____

10. Have you, any family members or friends ever applied for work with or worked for any law enforcement agency(ies) [i.e., police, sheriff, prison, jails, etc.]? ☐ YES / NO ☐ If YES, who and for which agency(ies)? _____
    _____

11. Have you or anyone you know ever worked for, or volunteered time or money to, any organization helping crime victims [i.e. YMCA, crisis center, social agency, etc.]? ☐ YES / NO ☐
    If YES, who, what organization(s), and what was the association with that organization(s)?
    _____
    _____

12. Have you or anyone you know ever volunteered time or held a job that involved contact with crime victims (i.e. teacher, social services agency staff, medical, etc.)? ☐ YES / NO ☐
    If YES, who and what type of work did this person do? _____
    _____

13. Have you ever worked, or volunteered at a law enforcement agency?
    ☐ YES / NO ☐ If YES, please tell us why you decided to work or volunteer and when and where you did this: _____
    _____

14. How many times have you served on a:
    ☐ Criminal Jury _____time(s) ☐ Civil Jury _____ time(s) ☐ Never served

    a. What types of criminal case(s)? _____
    b. Was there a verdict(s)? _____
    c. Were you ever the foreperson? ☐ YES / NO ☐

JUROR QUESTIONNAIRE

Juror #:

15. Have you or any family members ever been a victim of a crime? ☐ YES / NO ☐ If YES:

    a. What happened? _____
    b. Who was the victim? _____
    c. Was anyone arrested? ☐ YES / NO ☐
    d. What was the outcome? _____
    e. How did you feel about the outcome? _____
    _____

16. WITHOUT MENTIONING ANY NAMES, have you or anyone you know ever experienced any unwanted physical or violent contact? ☐ YES / NO ☐ If YES, please explain:
    _____
    _____

17. There have been a number of cases in the media lately in which people were killed or killed other people. Have you heard, read or seen any stories particular to this case? _____
    _____
    _____

SUMMARY STATEMENT ABOUT THE DEFENDANT, VICTIM, AND CASE INCIDENT.

18. What was your reaction to what you heard, read, or saw about this particular case? _____
    _____
    _____

19. In general, do you have any feelings or opinions about this particular case [in which the allegation is homicide]? _____
    _____
    _____

20. In a case in which a person is charged with murder or manslaughter, whom would you start out favoring, even if slightly: ☐ the Prosecution ☐ the Police ☐ the Accused ☐ None
    WHY? _____
    _____

21. Please check (☒) the box below that best describes how comfortable you feel talking about a criminal allegation of violence:

    ☐ Very uncomfortable ☐ Uncomfortable ☐ Comfortable ☐ Very comfortable

22. Is there anything else you feel is important for you to tell the Judge and the attorneys? _____
    _____
    _____
    _____
    _____

Deputy District Attorney Ann Swegle
Supreme Court #10920
Office of the District Attorney
535 North Main
2nd Floor
Wichita, Kansas 67203
(316) 660-3600

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS, Plaintiff, vs. SCOTT P. ROEDER, Defendant	Case No. 09 CR 1462

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR ORDER PROHIBITING JURY SELECTION IN VIOLATION OF BATSON V. KENTUCKY, 476 U.S. 79 (1986)

Comes now the State of Kansas, by and through its attorney, Ann Swegle, Deputy District Attorney, and responds to the defendant's motion for an order prohibiting jury selection in violation of *Batson v. Kentucky*, 4476 U.S. 79 (1986). The State respectfully requests that the Court deny the motion.

PERTINENT FACTUAL AND PROCEDURAL BACKGROUND

On January 29, 2010, the defendant was convicted by a jury of one count of Murder in the First Degree (Premeditated) and two counts of Aggravated Assault. On April 1, 2010, he was sentenced by the Court to a term of Life in prison, with parole eligibility after 50 years (Hard 50), for the murder and twelve months in prison for each count of Aggravated Assault. All sentences were to run consecutively.

The defendant appealed his convictions and sentence imposed for the murder conviction. His convictions were upheld by the Kansas Supreme Court in an opinion issued on October 24, 2014. However, his Hard 50 sentence was vacated based on that Court's previous decision in State v. Soto, 299

Kan, 102, 322 P.3d 334 (2014). The Kansas Supreme Court remanded the case for resentencing on the first-degree murder count only. Roeder, 300 Kan. at 943.

Prior to trial in this matter, the Defendant filed virtually the same motion, with the exception of statements regarding procedural history, and virtually the same brief in support of the motion. On December 22, 2009, the Court denied the motion, writing the motion was "Premature until jury selection is undertaken. Peremptory challenges will be ruled upon when exercised @trial." No new authority, legal or otherwise, has been submitted to the Court in regard to this motion.

LEGAL ARGUMENTS AND AUTHORITIES

As the state of the controlling law relevant to the motion has not materially changed over the life of this case, the State continues to rely on its response previously filed in this matter on November 20, 2009. The major points made in that response are as follows:

I. **The issue of a *Batson* violation cannot be addressed until a peremptory strike is exercised and a challenge made by the opposing party. Therefore, these issues are not ripe for review.**

II. **The defendant's motion, in addition to being premature and improperly assuming the State will not follow the law, is fatally deficient in that it makes factual assertions with no evidentiary basis to support them that offers no controlling, on point legal authority for the logical extension of Batson that it requests.**

A chamber copy of the earlier response will be provided to the court with this response.

Wherefore, for the reasons listed therein, the State respectfully requests that the court deny the motion.

Respectfully submitted,

Ann Swegle
Deputy District Attorney

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was delivered to the Public Defender's Office by interoffice mail on the 23rd day of February, 2016 to the following:

Mr. Mark Rudy
Mr. Jason Smartt
Ms. Taryn Locke

And a copy hand-delivered to the chambers of the Honorable Warren Wilbert on the same date.

Ann Swegle
Deputy District Attorney

Deputy District Attorney Ann Swegle
Supreme Court #10920
Office of the District Attorney
535 North Main
2nd Floor
Wichita, Kansas 67203
(316) 660-3600

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS, Plaintiff, vs. SCOTT P. ROEDER, Defendant	Case No. 09 CR 1462

STATE'S RESPONSE TO DEFENDANT'S MOTION RENEWING THE ORIGINAL MOTION FOR NEW TRIAL OR JUDGMENT OF ACQUITTAL

Comes now the State of Kansas, by and through its attorney, Ann Swegle, Deputy District Attorney, and responds to the defendant's motion for an order granting him a new trial or a judgment of acquittal. The State respectfully requests that the Court deny the motion for lack of jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

On January 29, 2010, the defendant was convicted by a jury of one count of Murder in the First Degree (Premeditated) and two counts of Aggravated Assault. On April 1, 2010, he was sentenced by the Court to a term of Life in prison, with parole eligibility after 50 years (Hard 50), for the murder and twelve months in prison for each count of Aggravated Assault. All sentences were to run consecutively.

The defendant appealed his convictions and sentence imposed for the murder conviction. His convictions were upheld by the Kansas Supreme Court in an opinion issued on October 24, 2014. However, his Hard 50 sentence was vacated based on that Court's previous decision in *State v. Soto*, 299 Kan, 102, 322 P.3d 334 (2014), which flowed from the United States Supreme Court ruling in *Alleyne v.*

United States, 570 U.S.____, 133 S.Ct. 2151, 186 L.Ed 2d 314 (2013). *State v. Roeder*, 300 Kan. 901 (2014). In *Soto*, the Court found that the Hard 50 statutory scheme that applied in that case (and in the defendant's case) violated the Sixth Amendment of the United States Constitution "because it permits a judge to find by a preponderance of the evidence the existence of one or more aggravating factors necessary to impose an increased mandatory minimum sentence, rather than requiring a jury to find the existence of the aggravating factors beyond a reasonable doubt." 299 Kan. at 102, Syl. ¶ 9, 322 P.3d 334.

The Kansas Supreme Court remanded the case for resentencing on the first-degree murder count only. *Roeder*, 300 Kan. at 943.

Since remand, this Court has ruled on the substance of the instant motion when, on October 23, 2014, it denied Defendant's motion for a new reasonable doubt jury trial.

LEGAL ARGUMENTS AND AUTHORITIES

It is well-established that a district court's power on remand from an appellate court is generally limited by the terms of the mandate and opinion rendered and directions given by the appellate court. The "mandate rule" was discussed in *State v. Davis*, Nos. 109,032 and 109,033, 2015 WL 3632024 (Kan. App. 2015) (unpublished opinion):

> The longstanding mandate rule codified in K.S.A. 60–2106(c) states that the Supreme Court's mandate and opinion "shall be controlling in the conduct of any further proceedings necessary." See *State v. Collier*, 263 Kan. 629, Syl. ¶ 4, 952 P.2d 1326 (1998); *State v. DuMars*, 37 Kan.App.2d 600, 603, 154 P.3d 1120 ("[A] district court is obliged to effectuate the mandate and may consider only those matters essential to the implementation of the ruling of the appellate court."), rev. denied 284 Kan. 948 (2007); *State v. Downey*, 29 Kan.App.2d 467, 470–71, 27 P.3d 939, rev. denied 272 Kan. 1421 (2001).

Here, the Kansas Supreme Court remanded the case for resentencing on the first-degree murder conviction. Therefore, this Court only has jurisdiction to perform acts related to providing a resentencing. Those acts do not include granting a new trial or a judgment of acquittal.

Additionally, the granting of a new trial is controlled by K.S.A. 2014 Supp. 22-3501. That statute provides as follows:

> (1) The court on motion of a defendant may grant a new trial to the defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 14 days after the verdict or finding of guilty or within such further time as the court may fix during the 14-day period.
> (2) A motion for a new trial shall be heard and determined by the court within 45 days from the date it is made.

The Kansas Supreme Court has held that the 14-day time restriction in K.S.A. 22-3501 is mandatory, not discretionary. *State v. Holt*, 298 Kan. 469, 469, 313 P.3d 826, 829 (2013).

This statute contains the same provisions that were in effect at the time of the defendant's conviction with one exception. The time period for requesting a new trial on grounds other than newly discovered evidence was 10 days after verdict prior to July 1, 2010. Laws 2010, Ch. 135, §25. Defendant timely filed a motion for a new trial that was heard and denied on April 1, 2010. There is no statutory provision for a second motion for a new trial absent a claim of newly discovered evidence.

Further, as to Defendant's alternate request for a judgment of acquittal, the Court's ability to grant such a motion is controlled by the provisions of K.S.A. 22-3419. That statute strictly limits the court's ability to enter such a judgment to responding to a

motion made at the close of the prosecution's case, at the close of all the evidence, during the seven days following a guilty verdict or discharge of the jury, or at such later time as the court sets during that seven-day period. Defendant's motion is also barred by the terms of the statute.

Wherefore, for the reasons stated above, the State respectfully requests that the Court deny the Defendant's motion for lack of jurisdiction.

Respectfully submitted,

Ann Swegle
Deputy District Attorney

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was delivered to the Public Defender's Office by interoffice mail on the 23rd day of February, 2016 to the following:

Mr. Mark Rudy
Mr. Jason Smartt
Ms. Taryn Locke

And a copy hand-delivered to the chambers of the Honorable Warren Wilbert on the same date.

Ann Swegle
Deputy District Attorney

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS,
Plaintiff,

vs.

SCOTT P. ROEDER,
Defendant.

Case No. 09CR1462

STATE'S PROPOSED JURY QUESTIONNAIRE

INTRODUCTORY COMMENTS

Thank you for meeting your responsibilities of citizenship by being here today.

The purpose of taking your time today is to look at your qualifications to be a juror in your court system. There will be no right or wrong answers to the questionnaire. The only right answers are complete and honest responses to all questions. The purpose of using this questionnaire is three-fold. The first is to gain full and honest responses from you without revealing that information to the entire panel of jurors in open court. This will protect the confidentially of your responses. Second, the questionnaire will spare you the long wait that usually occurs when the attorneys must repetitiously ask all of you the same questions. Finally, the use of this questionnaire provides each side the opportunity to select a fair and impartial jury. Therefore, you full cooperation is of the greatest significance to the administration of justice in the case.

The answers you give to the questions here are under a penalty of perjury. Each answer must be true and correct to the best of your knowledge, information and belief. Complete answers will save the Court and all parties involved a great deal of time.

You must not discuss the questions or your answers with anyone before, during or after the completion of the questionnaire. This includes all family and friends. Do not assume that answers given will qualify or disqualify you from jury service. Please print or write legibly. Answer honestly.

If a question goes to something that is not applicable to you, write N/A in the space provided for an answer. If you do not know the answer, write DO NOT KNOW. If you need more space to write your answer, please do so on the extra sheets attached to the questionnaire. Be sure to write the number of the question that you are answering on the blank sheet. If you do not understand the

question, just write DO NOT UNDERSTAND.

The completed questionnaire will become part of the court's records. The judge, the lawyers and the parties all examine the records. The attorneys are under orders to maintain the confidentiality of any information they learn in the course of reviewing these questionnaires.

One's past experience viewed in light of the facts of the case is the best measure of one's qualifications to serve as a juror in a particular case. By this questionnaire, we shall look into your personal experiences, your "court" type experiences, any "law enforcement" type experiences that you may have had and any experience that you have had similar to the case to be tried.

QUALIFICATIONS

To be selected to serve on a jury one must meet the following qualifications:
(Please answer yes or no)

1. Are you at least 18 years of age? _____
2. Are you a resident of Sedgwick County? _____
3. Are you a resident of the State of Kansas? _____
4. Are you a citizen of the United States of America? _____
5. Are you able to read, write and understand the English language? _____
6. Have you been adjudged guilty, pleaded guilty or no contest to a felony crime within the last ten (10) years? _____
7. Have you been found incompetent by a judge? _____
8. Have you served as a juror in the county within one year? _____

GENERAL BACKGROUND

9. Name/Maiden Name _____
10. Age____ Street Address_____

11. How long have you lived in Sedgwick County, Kansas? _____

12.. What is the highest level of education completed?

Less than High School _____

High School Graduate _____

Vocational/Technical _____

Business school _____

Secretarial /Paralegal _____

Community College: 1 year ____ 2 years ____ 3 years ____

Four year college_____

Post-graduate_____

EMPLOYMENT

13. Do you work outside the home? Yes_____ No_____

If yes, where: _____

Please list specific duties: _____

_____

How long have you been with your present employer? _____

14. Have you had any previous occupations? Yes _____ No _____

If yes, please list all employers, dates of employment, titles and responsibilities:

_____

_____

_____

MARITAL STATUS

15. Please check the following that apply:

Single_____ Married_____ Separated _____

Widowed_____ Divorced_____ Living with non-marital mate _____

16. If your spouse or mate is employed, please describe what type of work they do, including name and location of employer, and length of time at the position: _____

_____

_____

_____

_____

17. If your spouse or mate is retired, presently unemployed or disabled, please answer the question above for the last job he/she held.

_____

_____

CHILDREN

18. If applicable, please list the names and ages of your children.

Name	Age	Male/Female

19. If applicable, please list the highest educational level and occupation of your children.

_____

_____

MILITARY SERVICE

20. Have you ever served in the military? Yes ____ No ____

If yes, when: _____

Where: _____

Branch: _____

Highest Rank: _____

Your duties: _____

Type of discharge and when: _____

Were you ever engaged in combat? Yes ____ No ____

Were your ever involved in a military court martial? Yes ____ No ____

If yes, explain: _____

_____

HEALTH

21. Do you have any specific health problem of a serious nature that might make it difficult or uncomfortable for you to sit as a juror in this case? Yes ____ No ____

If yes, please explain: _____

22. Are you taking medication regularly that might make it difficult for you to pay attention or concentrate for long periods of time? Yes ____ No _____

If yes, please explain: _____

WITNESS EXPERIENCE

23. Have you ever testified as a witness in a criminal or civil case? Yes ____ No ____

If yes, please explain: _____

COURT EXPERIENCE

24.. Have you, a friend, a relative, or anyone you know ever been arrested for or convicted of a felony? Yes ____ No _____

If yes, please explain: _____

_____

_____

_____

25. Have you ever been a party to a lawsuit or filed a claim against a governmental agency?

Yes ____ No _____

If yes, please explain: _____

_____

VICTIM EXPERIENCE

26. Have you, or any member of your family, or a close friend ever been a victim of a crime?

Yes _____ No _____

If yes, please explain: _____

_____

_____

27. Have you, a friend, a relative, or anyone you know been seriously injured or killed as a result

of criminal conduct? Yes ____ No ____

If yes, please explain: _____

_____

If yes, please explain how that experience has affected your feelings about the criminal justice system. _____

_____

ADMINISTRATION OF JUSTICE

28. Have you, any member of your family, or a close friend ever taken a course in administration

Of justice, or studied law? Yes ____ No ____

If yes, please explain: _____

_____

_____

_____

29. Have you, any member of your family or a close friend ever been affiliated with any of the following?

Law Enforcement (police officer, Sheriff, F.B.I., etc) _____

Corrections (Prison Guard, Jailer, Warden, etc) _____

Security Employment _____

Mental Institution _____

Juvenile Facilities _____

Probation or Parole _____

District Attorney or United States Attorney _____

Public Defender or Private Defense Counsel _____

Law School _____

Investigative work _____

Immigration Services _____

Drug Enforcement Administration _____

Please explain the ones you've checked. _____

_____

30. Looking at all the experience that you have had with law enforcement, is there anything about your experience that has created in you a bias for or against law enforcement that might affect your ability to fairly evaluate the evidence that comes into the case through a law enforcement officer, should you be chosen to serve in the case? Yes _____ No _____

If yes, please explain _____

_____

31. Is there a crime prevention group in your neighborhood? Yes ____ No ____

If so, do you participate in the group? _____

32. Do you perceive there to be any problems in the current operation of the Criminal justice system? Yes _____ No _____

If yes, please elaborate on your answer: _____

_____

_____

33. Do you know of any reason that would prevent you from following the law that the judge says

applies to this case? Yes _____ No _____

If yes, what is the reason? _____

_____

_____

SPECIAL STUDIES

34. Do you have experience in the gathering, maintaining, preserving, preparation or analysis of specimens for forensic purpose? This would be tool marks, fingerprints, hair, blood, saliva, bullets, shell casings, firearms, drugs etc. Yes _____ No _____

If you have such experience, please tell us the details. _____

_____

35. Do you have specialized knowledge of DNA science? Yes _____ No _____

If you do, tell us the source of this specialized knowledge._____

_____

36. Do you have experience in the study of or the application of law? Yes _____ No _____

If you do, tell us about that experience? _____

_____

37. Have you had training, education or experience in psychiatry or psychology?

Yes _____ No _____

If yes, please tell us of your training, education or experience. _____

_____

_____

PRIOR JURY SERVICE

38. Have you ever been called for jury duty prior to this action? Yes _____ No _____

If yes, please explain when, where, and what type of case you heard. _____

_____

Were you able to reach a verdict? Yes ____ No ____

Were you the jury foreperson? Yes ____ No ____

Do you view the prior service in a positive or negative manner? Yes _____ No _____

Please explain. _____

Did you talk to the Judge, or the attorneys after the case was over, and learn of additional information that was not presented at trial? Yes _____ No _____

If so, please explain. _____

_____

CASE AT HAND

39. Were you personally acquainted with George Tiller or a family member of George Tiller? Yes _____ No _____

If yes, please print the name here and tell us about your relationship with the person.

_____

_____

40. Are you now or were you personally acquainted with Gary L. Hoepner or a family member of Gary L. Hoepner? Yes _____ No _____

If yes, please print the name here and tell us about your relationship with the person.

_____

_____

41. Are you now or were you personally acquainted with Keith E. Martin or a family member of Keith E. Martin? Yes _____ No _____

If yes, please print the name here and tell us about your relationship with the person.

_____

_____

42. Are you personally acquainted with defendant, Scott P. Roeder, or any family member or friend of his? Yes _____ No _____

If you are, please print the name of such person here and tell us about your relationship with the person. _____

_____

43. A list is attached containing the names of people who may be called as witnesses in this case. Please review the list. Circle the name of any witness you know or think you might know. Then write the name here and tell us about your relationship with the person.

MEDIA

44. Prior to the date of Dr. George Tiller's death (May 31, 2009), had you ever heard of Dr. Tiller, either through the media, political publications, word of mouth, or otherwise?

Yes ____ No ____

If yes, please explain: _____

_____

45. After the death of Dr. George Tiller, to what degree did you follow the events of his demise and the subsequent arrest of the defendant?

Not at all, do not know anything about the case _____

Causally, not sure of any facts or surrounding circumstances _____

Mildly interested, read the "headlines," have knowledge of the facts _____

Closely, I read the stories and/or watched the news, know the facts pretty well _____

Intensely, I followed the case as closely as I could _____

None of the above _____

Please explain further: _____

46. What, if any, information have you learned through the media or other sources regarding the defendant in this case, Scott Roeder? Please be a specific as possible. _____

_____

_____

47. Do you have any knowledge, other than from the print or electronic media, about the facts and circumstances surrounding this case? Yes ____ No _____

If yes, please explain in detail: _____

_____

_____

_____

_____

48. Since the death of Dr. George Tiller have you had any conversations with anyone regarding the facts and circumstances surrounding this case? Yes ____ No _____

If yes, please explain: _____

_____

_____

49.. Have you seen, read or heard news reports of the trial and sentencing of Scott Roeder in 2010? Yes _____ No _____

Have you heard, seen or read about this case being used in a political advertisement, commentary or editorial?

Yes _____ No _____

AFIRMATION:

I declare under the pains and penalties of perjury that the answers and information given by me on this questionnaire are true to the best of my information, knowledge and belief.

Date: _____ Signature: _____

_____

Print Name

Respectfully Submitted,

Kim T Parker #11203
Chief Deputy District Attorney
18th Judicial District of Kansas
535 N. Main Wichita Ks 67203
316-660-3600

Certificate of Service

This is to certify that a true and correct copy of the foregoing was hand-delivered to the Office of the Public Defender Sedgwick County 604 North Main, Suite D Wichita, Kansas 67203 on February 24th 2014

Kim T Parker #11203

Kim T. Parker

Deputy District Attorney Ann Swegle
Supreme Court #10920
Office of the District Attorney
535 North Main
2nd Floor
Wichita, Kansas 67203
(316) 660-3600

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS, Plaintiff, vs. SCOTT P. ROEDER, Defendant	Case No. 09 CR 1462

STATE'S RESPONSE TO DEFENDANT'S MOTION RENEWING OPPOSITION TO A HARD 50 SENTENCE AND OPPOSING THE STATE'S ANTICIATED/ALLEGED AGGRAVATING FACTORS

Comes now the State of Kansas, by and through its attorney, Ann Swegle, Deputy District Attorney, and responds to the defendant's motion opposing a Hard 50 sentence and the State's proposed aggravating factors.

PERTINENT FACTUAL AND PROCEDURAL BACKGROUND

On January 29, 2010, the defendant was convicted by a jury of one count of Murder in the First Degree (Premeditated) and two counts of Aggravated Assault. On April 1, 2010, he was sentenced by the Court to a term of life in prison, with parole eligibility after 50 years (Hard 50), for the murder and twelve months in prison for each count of Aggravated Assault. All sentences were to run consecutively.

The defendant appealed his convictions and sentence imposed for the murder conviction. His convictions were upheld by the Kansas Supreme Court in an opinion issued on October 24, 2014. However, his Hard 50 sentence was vacated based on that Court's previous decision in *State v. Soto*, 299 Kan, 102, 322 P.3d 334 (2014). The Kansas Supreme Court remanded the case for resentencing on the first-degree murder count only. *State v.Roeder,* 300 Kan. 901, 943, 336 P.3d 831 (2014).

The resentencing will occur pursuant to the terms of K.S.A. 2014 Supp. 21-6620. This Court has already found that this statute does not violate the Ex Post Facto Clause of the United States Constitution and its counterpart in the Kansas Constitution and can be applied retroactively. Therefore, the State will not address any argument made by the defendant that relates to older, inapplicable sentencing statutes.

LEGAL ARGUMENTS AND AUTHORITIES

K.S.A. 2014 Supp. 21 – 6620 (e) (3) requires the State to provide notice to the defendant of the statutory aggravating circumstances it intends to rely on in seeking a Hard 50 sentence. However, it does not provide the defendant standing to challenge the circumstances chosen by the State.

In order to secure a Hard 50 sentence, the State is required to produce evidence sufficient for a jury to find the existence beyond a reasonable doubt of at least one aggravating circumstance the State has alleged which outweighs any mitigating circumstances found to exist. See K.S.A. 2014 Supp.21- 6620(e)(5). At this point, it would be premature for the court to make any findings as to the adequacy of the evidence the State has presented, as none has been produced. Defendant's speculation as to what

evidence may be shown during the sentencing proceeding cannot serve as a valid basis for a ruling on the sufficiency of the evidence. This issue is simply not ripe for review.

Respectfully submitted,

Ann Swegle #10920
Deputy District Attorney

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was delivered to the Public Defender's Office by interoffice mail on the 23rd day of February, 2016 to the following:

Mr. Mark Rudy
Mr. Jason Smartt
Ms. Taryn Locke

And a copy hand-delivered to the chambers of the Honorable Warren Wilbert on the same date.

Ann Swegle
Deputy District Attorney

Deputy District Attorney Ann Swegle
Supreme Court #10920
Office of the District Attorney
535 North Main
2nd Floor
Wichita, Kansas 67203
(316) 660-3600

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS, Plaintiff, vs. SCOTT P. ROEDER, Defendant	Case No. 09 CR 1462

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR A DETERMINATION THE HARD 50 SENTENCING SCHEME IS UNCONSTITUTIONALAS CRUEL AND UNUSAL PUNISHMENT

Comes now the State of Kansas, by and through its attorney, Ann Swegle, Deputy District Attorney, and responds to the defendant's motion for a determination that mandatory minimum sentences in the Hard 50 sentencing scheme are disproportionate and violate the 8th and 14th amendments to the United States Constitution and § 9 of the Kansas Constitution Bill of Rights.

PERTINENT FACTUAL AND PROCEDURAL BACKGROUND

On January 29, 2010, the defendant was convicted by a jury of one count of Murder in the First Degree (Premeditated) and two counts of Aggravated Assault based on events occurring at Reformation Lutheran Church on Sunday, May 31, 2009 while services were being held. On April 1, 2010, he was sentenced by the Court to a term of life in prison, with parole eligibility

after 50 years (Hard 50), for the murder and twelve months in prison for each count of Aggravated Assault. All sentences were to run consecutively.

The murder victim, George Tiller, was a physician who performed lawful abortions. During the course of the trial and pre-trial proceedings, a variety of chilling facts were established. It was established that the defendant had determined in the early 1990s that killing an abortion provider was a justifiable act. He believed that abortions, even those legally performed, were murders. He believed he had the right to put his own moral beliefs above the law of the land and he believed he had the right to take another's life simply because of his own beliefs. The defendant testified that he resolved that George Tiller must be killed since 1999 and that for 10 years he mulled over various ways to personally kill him. He testified that he determined that the victim's church was the most convenient location for him to kill Dr. Tiller because he could obtain access to him, circumventing precautions Dr. Tiller took to protect himself from anti-abortion activists like the defendant, who may seek to harm or kill him.

The defendant appealed his convictions and sentence imposed for the murder conviction. His convictions were upheld by the Kansas Supreme Court in an opinion issued on October 24, 2014. However, his Hard 50 sentence was vacated based on that Court's previous decision in *State v. Soto*, 299 Kan, 102, 322 P.3d 334 (2014). The Kansas Supreme Court remanded the case for resentencing on the first-degree murder count only. *Roeder,* 300 Kan. at 943.

The resentencing will occur pursuant to the terms of K.S.A. 2014 Supp. 21-6620. This Court has already found that this statute does not violate the Ex Post Facto Clause of the United States Constitution and its counterpart in the Kansas Constitution and can be applied retroactively.

LEGAL ARGUMENTS AND AUTHORITIES

The imposition of a Hard 50 sentence in this case would not be constitutionally disproportionate in violation of the prohibitions against cruel and unusual punishment in the United States and Kansas constitutions.

Defendant asserts that the imposition of a Hard 50 sentence in this case would be a violation of the 8th amendment to the United States Constitution and § 9 of the Kansas Constitution Bill of Rights because it would inflict a punishment that is disproportionate to the crime. Historically, Kansas courts have viewed the 8th amendment and § 9 as nearly identical and they have been construed together. See, *State v. Scott*, 286 Kan. 54, 183 P.3d 801 (2008)

Defendant cites *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011 (2010) in support of his 8th amendment claim. He describes how this case sets out 2 different paths for analysis of a claim of a violation of the 8th amendment: (1) a term-of-years sentence under a categorical analysis; and (2) term-of-years sentences given all the circumstances in a particular case. *Graham* held that the 8th amendment was violated by imprisonment without the possibility of parole in a juvenile nonhomicide case. Or, as stated by Justice Thomas in his dissent, " the Court holds today that it is 'grossly disproportionate' and hence unconstitutional for any judge or jury to impose a sentence of life without parole on an offender less than 18 years old, unless he has committed a homicide." *Graham* at 97, *as modified* July 6, 2010. Or, looked at in a slightly different perspective, the court had no quarrel with life sentences without the possibility parole for juvenile and adult homicide cases.

Defendant cites *State v. Freeman,* 223 Kan. 362, 574 P.2d 950 (1978) as the primary basis for his § 9 claim that a Hard 50 sentence would be disproportionate given all the relevant circumstances of this case. Defendant makes no claim that a Hard 50 sentence would constitute

cruel and unusual punishment as an inhumane, barbarous, inherently cruel, or shocking penalty. See, *State v. Scott*, 265 Kan. 1, 961 P.2d 667 (1998).

Both *Graham* and *Freeman* were discussed in a recent Kansas Supreme Court case, *State v. Mossman*, 294 Kan. 901, 281P.3d 153 (2012). The case involved 8th amendment and § 9 challenges to a sentence that included lifetime post-release supervision for an individual convicted of aggravated indecent liberties with a child. The court stated the *Graham* holding made it clear that the "term of years sentence given all the circumstances in a particular case" challenge classification was available in any case. However, the *Graham* court did not clarify was whether the second challenge classification, the categorical challenge, is available in other than death penalty cases or cases where a juvenile was sentenced to life in prison in a nonhomicide case. *Mossman,* 294 Kan. at 921. Given the split of authority on whether a categorical challenge should be applied in any case, the *Mossman* court elected to undertake the analysis.

Prior to doing so, the court recognized the rarity of cases - specifically recognized in *Graham* - where it has been held that the 8th amendment's threshold comparison of the gravity of the offense and the severity of the punishment has led to an inference of gross disproportionality, and stated:

> This point is illustrated by a series of cases in which the Court held a life sentence for a nonviolent theft or drug crime was not cruel and unusual punishment. *E.g., Lockyer v. Andrade,* 538 U.S. 63, 70, 77, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (sentence of two consecutive prison terms of 25 years-to-life for third-strike conviction for stealing approximately $150 in videotapes); *Ewing,* 538 U.S. at 28–31, 123 S.Ct. 1179 (25 years-to-life sentence under three-strike provision for stealing approximately $1,200 of merchandise); *Harmelin,* 501 U.S. at 961, 996, 111 S.Ct. 2680 (life sentence without possibility of parole for first felony offense, which was possession of more than 650 grams of cocaine); *Rummel v. Estelle,* 445 U.S. 263, 266, 285, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) (life sentence with possibility of parole, imposed under a Texas recidivist statute, for a defendant convicted of obtaining $120.75 by false pretenses [his third felony

> conviction], an offense normally punishable by imprisonment for 2 to 10 years); but see *Solem,* 463 U.S. at 296–97, 303, 103 S.Ct. 3001 (life sentence without possibility of parole imposed on adult offender was "significantly disproportionate" to the defendant's crime, which was predicated on a current offense of "uttering a 'no account' check" for $100 and the defendant's lengthy criminal history that included seven nonviolent felonies).
>
> These cases indicate the Supreme Court allows considerable latitude to a legislature's policy decision regarding the severity of a sentence. A statement made by Justice Kennedy in his concurring opinion in *Harmelin* provides insight into the Court's view of the policy judgment inherent in a proportionality decision. He noted: "[A] rational basis exists for Michigan to conclude the petitioner's crime [of possessing a large quantity of cocaine] is as serious and violent as the crime of felony murder without specific intent to kill, a crime for which 'no sentence of imprisonment would be disproportionate.' [Citation omitted.]" *Harmelin,* 501 U.S. at 1004, 111 S.Ct. 2680 (Kennedy, J., concurring).
>
> *Mossman,* 294 Kan. at 923-24.

The *Mossman* court found that the defendant's sentence was not grossly disproportionate under the 8th amendment case-specific analysis and therefore it did not reach the secondary inquiry of comparing his sentence to other Kansas sentences or sentences from other states for similar crimes. It noted that in that way an 8th amendment analysis differs from the *Freeman* analysis for § 9 challenges, which require consideration of all factors. *Mossman,* 294 Kan. at 924 – 25.

The *Mossman* court reaffirmed that *Freeman* provides the analytical framework for viewing challenges under § 9 of the Kansas Constitution Bill of Rights:

> In *Freeman,* this court recognized: "Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." *Freeman,* 223 Kan. at 367, 574 P.2d 950. This court set out a three-part test to aid in administering this principle, stating:
>
> "(1) The nature of the offense and the character of the offender should be examined with particular regard to the degree of danger present to society; relevant to this inquiry are the facts of the crime, the violent or nonviolent nature

of the offense, the extent of culpability for the injury resulting, and the penological purposes of the prescribed punishment;

"(2) a comparison of the punishment with punishments imposed in this jurisdiction for more serious offenses, and if among them are found more serious crimes punished less severely than the offense in question the challenged penalty is to that extent suspect; and

"(3) A comparison of the penalty with punishments in other jurisdictions for the same offense." *Freeman,* 223 Kan. at 367, 574 P.2d 950.

Accord *State v. Levy,* 292 Kan. 379, 384–85, 253 P.3d 341 (2011); *State v. Reyna,* 290 Kan. 666, 689, 234 P.3d 761, *cert. denied* —— U.S. ——, 131 S.Ct. 532, 178 L.Ed.2d 391 (2010); *State v. Mondragon,* 289 Kan. 1158, 1162–63, 220 P.3d 369 (2009).

No one factor controls. "Ultimately, one consideration may weigh so heavily that it directs the final conclusion," but "consideration should be given to each prong of the test." [*State v.*]*Ortega–Cadelan,* 287 Kan. [157,161], 194 P.3d 1195 [2008].

Mossman, 294 Kan. at 908-09.

Analysis of *Freeman* factors

For the purposes of analysis and discussion, each *Freeman* factor will be set out along with the defendant's assertions regarding that factor as set out in numbered paragraphs in his motion and the State's response to those assertions.

1. **The nature of the offense and the character of the offender should be examined with particular regard to the degree of danger present to society; relevant to this inquiry are the facts of the crime, the violent or nonviolent nature of the offense, the extent of culpability for the injury resulting, and the penological purposes of the prescribed punishment.**

Defendant's assertions:

36. The offenses in this case are motivated by Scott Roeder's desire to save lives of innocent unborn children.

State's response: The evidence at trial established that the defendant committed a well-planned out, cowardly, political assassination of a defenseless man in a house of God. This violent crime is of the most severe nature. As the Kansas Supreme Court noted in its opinion in defendant's direct appeal, "arguably, only capital murder would be a greater legal harm." *Roeder*, 300 Kan. at 917. His acts demonstrated an animus towards our laws and legal system and a total disregard for the rights and welfare of others who did not share his extremist views.

37. Scott Roeder caused the absolute minimum of harm necessary to accomplish his goal of stopping abortions by George Tiller.

State's response: The defendant's desire to end abortions did not entitle him to take the life of another human being. His "minimum harm" assertion was rejected by the Kansas Supreme Court, which held:

> But the final requirement for necessity – that the defendant had no legal alternatives to violating the law – is belied by Roeder's own testimony. He boasted of being successful in getting potential patients to change their minds about having an abortion. Moreover, *Holick* referred to additional legal means of educating women on abortion, including door-to-door discussions, distributing literature on abortion, or continuing lawful protest (citations omitted). Even for Roeder's professed purpose of stopping all abortions, not just illegal abortions, the Draconian measure of murder was not the only alternative.
>
> *Roeder*, 300 Kan at 919.

38. Scott Roeder has been making productive use of his time in prison.

State's response: Please review the following information regarding the defendant's behavior obtained from the Kansas Department of Corrections

website, https://kdocrepository.doc.ks.gov/kasper/search/results, accessed February 21, 2016.

KDOC Disciplinary Report(s) since January 1996

Date	Class	Location	Type of report
Dec 14, 2015	2	Ellsworth Correctional Facility	Misconduct in Dining Room
Dec 10, 2015	2	Ellsworth Correctional Facility	Insub/Disrespect Officer/Other
Dec 07, 2015	3	Ellsworth Correctional Facility	Violation of Published Orders
Dec 04, 2015	3	Ellsworth Correctional Facility	Violation of Published Orders
Dec 03, 2015	3	Ellsworth Correctional Facility	Answering Calls or Passes
Jul 02, 2015	2	Ellsworth Correctional Facility	Restr Area/Unauth Presence
Apr 18, 2015	3	Ellsworth Correctional Facility	Violation of Published Orders
Apr 06, 2015	2	Ellsworth Correctional Facility	Insub/Disrespect Officer/Other
Apr 06, 2015	2	Ellsworth Correctional Facility	Insub/Disrespect Officer/Other
Mar 22, 2015	3	Ellsworth Correctional Facility	Improper Use of Food
Mar 16, 2015	3	Ellsworth Correctional Facility	Violation of Published Orders
Mar 16, 2015	1	Ellsworth Correctional Facility	Undue Familiarity
Feb 27, 2015	1	Ellsworth Correctional Facility	Disobeying Orders
Oct 26, 2014	1	Ellsworth Correctional Facility	Misusing Meds
Oct 26, 2014	2	Ellsworth Correctional Facility	Taking W/O Permission
Jun 20, 2013	1	Lansing Correctional Facility - Central	Misusing Meds
Apr 01, 2013	1	Lansing Correctional Facility - Central	Threaten or Intim Any Person
Sep 12, 2011	1	Lansing Correctional Facility - Central	Disobeying Orders
Sep 12, 2011	2	Lansing Correctional Facility - Central	Unauthorized Dealing or Trade
Jun 15, 2011	1	Lansing Correctional Facility - Central	Dangerous Contraband
May 29, 2011	1	Lansing Correctional Facility - Central	Bodily Waste

Date	Class	Location	Type of report
May 04, 2011	2	Lansing Correctional Facility - Central	Lying

The disciplinary report of April 1, 2013 for threatening an or intimidating any person was based on a threat to the new operator of the facility that used to house Dr. Tiller's clinic in which abortion services were provided. The threat was communicated via a YouTube video posted by anti-abortion activist Dave Leach, who interviewed Roeder via telephone. As described in *Roeder v. Kansas Department of Corrections*, No. 113, 239, 2016 WL 556281(unpublished disposition) (February 12, 2016), when discussing the reopening of the clinic Roeder stated:

> But is a little bit death defying, you know, for someone to walk back in there. I think that's woman name is [name of former clinic spokesperson]...and to walk in there and reopen the clinic, a murder mill, where a man was stopped, it's almost like unit target on your back, saying "well let's see if you can shoot me." But I have to go back to what Pastor Mike Bray said, "if 100 abortionists were shot, they would probably go out of business." I think 8 have been shot, so we got 92 to go. Maybe she'll be number 9. I don't know but she's kind of painting a target on her[self].
>
> *Roeder*, 2016 WL 556281. A copy of this opinion is attached as Appendix A.

39. There is no penological purpose that can be discerned, or additional penological value, which distinguishes a 25-year prison sentence from a 50-year prison sentence.

State's response: The penological goals of incapacitation, general deterrence, specific deterrence, and retribution support a Hard 50 sentence.

40. The defense hopes the court will pay careful attention to the character of the defendant – as indicated by facts of good behavior of the defendant at trial and anticipated at sentencing, as well as the mitigation presented at sentencing and to be presented at resentencing.

State's response: The evidence at trial established that character of the defendant is that of a cowardly, cold-blooded assassin who killed a defenseless man in a church, and who values no laws other than the ones he deems appropriate.

2. A comparison of the punishment with punishments imposed in this jurisdiction for more serious offenses, and if among them are found more serious crimes punished less severely than the offense in question the challenged penalty is to that extent suspect.

Defendant's assertions:

43. Punishing the defendant's conduct more severely than certain other homicide offenses is arguably an indicator of disproportionality.

State's response: This assertion does not address the second *Freeman* factor. It is merely a conclusory statement. The second *Freeman* factor requires a review of a more serious crime than that committed by the defendant. The only arguably more serious crime than first-degree murder is capital murder. That crime carries a punishment more severe, not less severe, than that allowed for first-degree murder. Capital murder can be punished by death or at minimum by life imprisonment without the possibility of parole. K.S.A. 2014 Supp. 21-6620(a)(1).

3. A comparison of the penalty with punishments in other jurisdictions for the same offense.

Defendant's assertions:

45. In some states, first-degree murder may merit a range of punishments, including a life without parole.

State's response: In some states, first-degree murder can be punished by the death penalty or by life imprisonment without the possibility of parole, e.g. Colorado, Delaware, Florida, Louisiana, and North Carolina. The same is true under federal law for civilians and under the Uniform Code of Military Justice for members of the military.

46. In some states, the sentence for first-degree murder may range down to a life sentence with parole eligibility within as little as 15, 20, or 35 years.

State's response: The fact that a few states have an option for parole eligibility on a life sentence in less than 50 years does not mean that parole eligibility at 50 years on a life sentence is grossly disproportionate so as to violate federal and state prohibitions against cruel and unusual punishment. This is particularly true in light of the fact that many states allow the death penalty for first-degree murder, and when considering many of the United States Supreme Court cases cited earlier herein finding no 8th amendment violation for sentences in nonhomicide cases that resulted in life imprisonment without the possibility of parole.

Analyzing the *Freeman* factors in light of the facts and circumstances of this case, it is clear that there would be no federal or state constitutional violation of the prohibitions against cruel and unusual punishment should a Hard 50 sentence be given again in this case.

Wherefore, for the foregoing reasons, the State respectfully requests the Court deny the motion.

Respectfully submitted,

Ann Swegle, #10920
Deputy District Attorney

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was delivered to the Public Defender's Office by interoffice mail on the 23rd day of February, 2016 to the following:

Mr. Mark Rudy
Mr. Jason Smartt
Ms. Taryn Locke

And a copy hand-delivered to the chambers of the Honorable Warren Wilbert on the same date.

Ann Swegle
Deputy District Attorney

APPENDIX A

NOT DESIGNATED FOR PUBLICATION

No. 113,239

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

SCOTT ROEDER,
Appellant,

v.

KANSAS DEPARTMENT OF CORRECTIONS,
Appellee.

MEMORANDUM OPINION

Appeal from Leavenworth District Court; DAN K. WILEY, judge. Opinion filed February 12, 2016. Affirmed.

William K. Rork and *Joseph T. Laski*, of Rork Law Office, of Topeka, for appellant.

Sherri Price, legal counsel/special assistant attorney general, of Lansing Correctional Facility, for appellee.

Before BRUNS, P.J., MCANANY, J., and JOHNSON, S.J.

Per Curiam: Scott Roeder was convicted of murdering Dr. George Tiller of Wichita. Dr. Tiller had been the medical director of Women's Health Care Services which provided abortion services in Wichita. After Roeder's conviction, the former spokesperson for Women's Health Care Services began the process of reopening the clinic. At that point, Roeder was serving his sentence at the Lansing Correctional Facility,

Roeder then filed a petition for a writ of habeas corpus. See K.S.A. 2015 Supp. 60-1501. In his petition, Roeder argued that the sanctions imposed by the prison violated his due process rights and amounted to an unconstitutional restraint of his right to free speech under the First Amendment to the United States Constitution. Roeder also claimed that his statement did not constitute a violation of K.A.R. 44-12-306.

The district court issued a writ to the Kansas Department of Corrections, and the case proceeded to an evidentiary hearing. At the hearing Roeder argued K.A.R. 44-12-306 was invalid both as applied and on its face because it was unconstitutionally vague and overbroad and infringed on his First Amendment right to free speech.

Lucht and Roeder testified at the hearing. Roeder testified that Leach had been his friend for over 20 years. "I guess you would say since he was affiliated with the Pro-Life movement I knew him from the Pro-Life movement." Roeder was aware that Leach had published a lot about his case in his *Prayer and Action News* and he had "no problem" with Leach publishing the interview. In fact, Roeder observed that when it came to Leach publishing the interview, "I think anyone in their right mind could have figured that one out."

The district court denied relief on Roeder's K.S.A. 60-1501 petition, ruling that enforcing K.A.R. 44-12-306 against Roeder did not infringe upon his First Amendment rights. The district court characterized Roeder's statement as indirect intimidation of the new clinic operator. The court reasoned:

> "Roeder could have easily chosen alternative language that would not have violated the regulation. For example, he could have stated an opinion regarding the reopening of the abortion clinic without mentioning [the new clinic operator] whatsoever. He could have refrained from stating that [the new clinic operator] was 'painting a target' on herself, or

Roeder claims that as applied K.A.R. 44-12-306 is an impermissible viewpoint-discriminatory restriction on his right to free speech. The State contends that K.A.R. 44-12-306 as applied is a valid restriction on Roeder's right to free speech because it is reasonably related to legitimate penological interests.

K.A.R. 44-12-306(a) provides that "[a]n inmate shall not threaten or intimidate, either directly or indirectly, any person or organization." K.A.R. 44-12-306(c) states that "[t]he subjective impression of the target of the alleged threat or intimidation shall not be a factor in proving a violation of subsection (a)."

Discrimination against speech based on its message is presumptively unconstitutional. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995). The burden rests on the government to justify restrictions placed on private speech. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000). But the constitutional rights of prisoners are more limited in scope than the constitutional rights of individuals in society at large. A prison inmate has only those First Amendment rights that are consistent with the inmate's status as a prisoner and consistent with the legitimate penological objectives of the penal institution. *Shaw v. Murphy*, 532 U.S. 223, 229, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001); *Pell v. Procunier*, 417 U.S. 817, 822, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974); see *Washington v. Werholtz*, 40 Kan. App. 2d 860, 197 P.3d 843 (2008), *rev. denied* 289 Kan. 1286 (2009). Prison officials are the primary arbiters of the problems that arise in prison management. *Shaw*, 532 U.S. at 230. Because the problems faced by prison officials "'are complex and intractable'" and courts are particularly "'ill equipped'" to deal with these problems, reviewing courts provide a level of deference to the judgments of prison officials in upholding the regulations against constitutional challenges. 532 U.S. at 229.

We take from Roeder's argument that he makes no serious claim that the First Amendment protects as free speech threats and intimidation or the encouragement of others to commit murder. But he does claim that he did not encourage anyone to engage in unlawful or violent acts and that punishing him under K.A.R. 44-12-306 for expressing his personal opinions lacks any rational connection to the regulation's purpose of deterring criminal activity.

In considering this contention we cannot ignore the context of Roeder's remarks. Roeder and Leach had been friends for over 20 years based on their involvement in the pro-life movement and their roles as pro-life activists. Leach visited Roeder on a regular basis after Roeder was incarcerated and routinely reported on Roeder's case and published their conversations in his newsletter. Consistent with past conversations Roeder had with Leach, Roeder understood that the conversation was being recorded. He could reasonably anticipate that his remarks would be circulated among like-minded persons. A violation of K.A.R. 44-12-306 does not require a showing of the speaker's ability to carry out the threat. Here, Roeder knew he was speaking through Leach to persons who shared his penchant for ending abortions through criminal acts against abortion providers.

Roeder's murder of Dr. Tiller was only one of many violent acts against persons and facilities providing abortion services throughout this country. From 1977 to 2014 there were almost 7,000 attacks on abortion providers, including 8 murders, 17 attempted murders, 42 bombings, and 182 acts of arson (Kathy Pollitt—NY Times). Roeder was involved with a group of people associated with the pro-life movement that advocated violence as a method for closing clinics that provided abortions. His statement that 8 doctors had been killed and "we got 92 to go" encouraged the continued murdering of

2d 356 (1985). In doing so, we do not reweigh the evidence or assess the credibility of the witnesses. Our role is merely to examine the record to determine if the evidence that supports the hearing officer's conclusion met this minimal evidentiary standard. *Anderson v. McKune*, 23 Kan. App. 2d 803, 807-08, 937 P.2d 16, *rev. denied* 262 Kan. 959, *cert. denied* 522 U.S. 958 (1997). Roeder bears the burden of proving that prison officials failed to satisfy this minimal evidentiary requirement. See *Sammons v. Simmons*, 267 Kan. 155, 159, 976 P.2d 505 (1999).

K.A.R. 44-12-306 does not include a definition of intimidating. It does provide for an objective rather than subjective determination of whether a statement is intimidating. It specifically provides that "[t]he subjective impression of the target of the alleged threat or intimidation shall not be a factor in proving a violation of [this regulation]." K.A.R. 44-12-306(c). A panel of this court has determined that under K.A.R. 44-12-306 an inmate's actions are objectively threatening or intimidating if "a reasonable person of ordinary sensibilities would find them so." *Grossman v. Kansas Department of Corrections*, No. 106,916, 2012 WL 3171990, at *5 (Kan. App. 2012) (unpublished opinion); see *State v. Phelps*, 266 Kan. 185, 196, 967 P.2d 304 (1998).

Roeder relies on *Phelps* which involved a criminal charge of aggravated intimidation of a witness against Fred Phelps who displayed a sign in the presence of the intended victim accusing him of being a "'Fat, Ugly, Sodomite'" and stating, "'Gays are Worthy of Death.'" 266 Kan. at 186. At trial the victim acknowledged that Phelps did not say anything to him that was intimidating. On appeal, our Supreme Court concluded that these facts were insufficient to establish aggravated intimidation of a witness. 266 Kan. at 196-97.

> "The context in this case includes Wichita's past history of violence against abortion providers, the culmination of this violence in Dr. Tiller's murder less than two years before Defendant mailed her letter, Defendant's publicized friendship with Dr. Tiller's killer, and her reported admiration of his convictions. When viewed in this context, the letter's reference to someone placing an explosive under Dr. Means' car may reasonably be taken as a serious and likely threat of injury." 795 F. 3d at 1201.

Dillard was a civil case which required a preponderance of evidence to support the government's position. In our present case, the evidence needed to support Roeder's disciplinary conviction was only some evidence. In *Dillard*, whether the defendant's statements violated the federal statute was to be decided by the jury. In our present case, the facts were decided by the prison hearing officer. The hearing officer found that Roeder's statements violated the prison regulation. Viewed in context, there clearly was some evidence to support the hearing officer's finding that Roeder's statements were threatening and intimidating in violation of K.A.R. 44-12-306(a).

Finally, Roeder claims that K.A.R. 44-12-306 is unconstitutionally vague and overbroad. In our unlimited review of this issue we conclude that this regulation is neither.

When, as here, a regulation is claimed to be unconstitutionally vague, we must determine (1) whether the regulation conveys a sufficiently definite warning and fair notice of the proscribed conduct in light of common understanding and practice and (2) whether the regulation adequately guards against arbitrary and discriminatory enforcement. See *Steffes v. City of Lawrence*, 284 Kan. 380, 389, 160 P.3d 843 (2007).

When, as here, a regulation is claimed to be unconstitutionally overbroad, we must determine (1) whether the protected activity is a significant part of the law's target and (2)

Affirmed.

Deputy District Attorney Ann Swegle
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IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS, Plaintiff, vs. SCOTT P. ROEDER, Defendant	Case No. 09 CR 1462

MOTION IN LIMINE

Comes now the State of Kansas, by and through its attorney, Ann Swegle, Deputy District Attorney, and moves the Court for an order in limine, prohibiting the introduction of certain evidence during the course of the resentencing proceeding in this case. Specifically, the State seeks an order prohibiting any evidence on behalf of the defendant that (1) would constitute or bolster a claim that the defendant was legally justified in murdering Dr. Tiller, or that at most, the murder was only manslaughter, (2) would purport to describe in any manner the operation of abortions performed by Dr. Tiller, (3) would constitute repetitive evidence of any purported fact, and (4) would be irrelevant to matters appropriate for the jury's consideration or would otherwise be immaterial, inflammatory, disruptive, without probative value, or unduly prejudicial.

PERTINENT FACTUAL AND PROCEDURAL BACKGROUND

On January 29, 2010, the defendant was convicted by a jury of one count of Murder in the First Degree (Premeditated) and two counts of Aggravated Assault based on events occurring at Reformation Lutheran Church on Sunday, May 31, 2009 while services were being held. On April 1, 2010, he was sentenced by the Court to a term of life in prison, with parole eligibility after 50 years (Hard 50), for the murder and twelve months in prison for each count of Aggravated Assault. All sentences were to run consecutively.

The defendant appealed his convictions and sentence imposed for the murder conviction. His convictions were upheld by the Kansas Supreme Court in an opinion issued on October 24, 2014. *State v. Roeder*, 300 Kan. 901 (2014), 336 P.3d 831, *cert. denied*, 135 S.Ct. 2316, 191 L.Ed.2d 984 (2015), *reh'g denied* 136 S.Ct 10 (2015). However, his Hard 50 sentence was vacated based on that Court's previous decision in *State v. Soto*, 299 Kan, 102, 322 P.3d 334 (2014). The Kansas Supreme Court remanded the case for resentencing on the first-degree murder count only. *Roeder,* 300 Kan. at 943.

The murder victim, George Tiller, was a physician who performed lawful abortions. During the course of the trial and pre-trial proceedings, a variety of chilling facts were established. It was established that the defendant had determined in the early 1990s that killing an abortion provider was a justifiable act. He believed that abortions, even those legally performed, were murders. He believed he had the right to put his own moral beliefs above the law of the land and he believed he had the right to take another's life simply because of his own beliefs. At trial, based on those beliefs, Defendant attempted to assert a "necessity defense" to claim he was legally justified in murdering Dr. Tiller. Given the law and the facts of the case, this Court correctly ruled that such a defense was not justified and the jury was not instructed on

the "necessity defense." The Court's ruling was upheld by the Kansas Supreme Court. *Roeder,* 300 Kan. at 918.

The Defendant also tried to assert an imperfect defense-of-others to attempt to limit his legal liability for Dr. Tiller's murder to the offense of voluntary manslaughter. This Court refused to give such as instruction given the facts of the case and the statutory requirements for voluntary manslaughter under that theory. Again, the Kansas Supreme Court agreed with this ruling. *Roeder,* 300 Kan. at 926.

LEGAL ARGUMENTS AND AUTHORITIES

The defendant may attempt to re-litigate his legal culpability for the murder through the resentencing procedure. This would be inappropriate as his legal culpability has been established and is not subject to change through the resentencing. The sentencing jury's obligation is to determine whether any aggravating circumstances exist, and if so, whether such circumstances are outweighed by any mitigating circumstances found to exist. Pursuant to K.S.A. 21-6620 *et seq.*, the defendant is entitled to present evidence in mitigation of his crime, but he is not entitled to deny the legality of his just conviction. Therefore, the Court should preclude any evidence designed to suggest to the jury that he is not justly convicted of murder.

The defendant also attempted to introduce evidence regarding abortions performed at the clinic Dr. Tiller operated, the purported illegality of some of those abortions, and the criminal prosecutions against Dr. Tiller through witnesses other than himself. The Court did not allow that - but did allow the defendant to testify as to certain facts about the criminal trial the defendant attended and the other prosecution. The Court's decisions limiting the evidence in this regard was also upheld by the Kansas Supreme Court. That Court commented:

> Roeder next argues that the district court erred in denying his motion to take judicial notice of the two criminal cases filed against Dr. Tiller. Instead of taking judicial notice, the district court allowed Roeder to testify to the facts surrounding Dr. Tiller's prior trials and "how those facts affected his thinking process and ultimately his decision to act the way he did." We discern that the district court permitted more evidence to be introduced on the imperfect defense-of-others issue than was warranted by the concept of relevancy. The court did not err in refusing the requested judicial notice.
>
> *Limiting Roeder's Testimony During Direct Examination*
>
> Roeder points to several instances during his direct examination where the district court limited his discussion of Dr. Tiller's abortion practices. Roeder argues that the district court should have followed its earlier ruling that Roeder could testify regarding "his personally-held beliefs just in general about abortion, whether it is harmful, whether it terminates a viable baby."
>
> A review of Roeder's testimony shows that the district court allowed Roeder to testify on each of the issues identified in the district court's earlier ruling and only limited Roeder's testimony when Roeder attempted to discuss matters we have deemed irrelevant and completely off-base. The trial court's patience is applauded, and we find no error in the court controlling the trial by limiting testimony, where necessary.
>
> *Roeder*, 300 Kan. at 931-32.

The Kansas Supreme Court's comments regarding "irrelevant and completely off-base" matters refer to its prior holding that Barry Disney's and Phil Kline's testimony was not relevant. It is clear from the Court's opinion, that it viewed this Court's restrictions on the evidence as either appropriate or overly generous. At the resentencing, the court should exercise the same discretion, as allowed by K.S.A. 60-445, prohibiting or limiting evidence as appropriate to the contours of the case.

Wherefore, for the reasons stated above, the State respectfully requests the Court issue an order in limine as described herein.

Respectfully submitted,

Ann Swegle #10920
Deputy District Attorney

NOTICE OF HEARING

Please be advised that the above motion will be heard at 9:00 a.m. on April 4, 2016 before the Honorable Warren Wilbert.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was delivered to the Public Defender's Office by interoffice mail on the 23rd day of February, 2016 to the following:

Mr. Mark Rudy
Mr. Jason Smartt
Ms. Taryn Locke

And a copy hand-delivered to the chambers of the Honorable Warren Wilbert on the same date.

Ann Swegle
Deputy District Attorney

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IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS, Plaintiff, vs. SCOTT P. ROEDER, Defendant	Case No. 09 CR 1462

STATE'S RESPONSE TO DEFENDANT'S MOTION CHALLENGING THE HARD 50 PROVISION OF K.S.A. 21-6620 AS A VIOLATION OF CONSTITUTIONAL NORMS AND PUBLIC POLICY

Comes now the State of Kansas, by and through its attorney, Ann Swegle, Deputy District Attorney, and responds to the Defendant's motion for a determination that a Hard 50 sentence should not be imposed as it would violate constitutional norms and public policy.

PERTINENT FACTUAL AND PROCEDURAL BACKGROUND

On January 29, 2010, the defendant was convicted by a jury of one count of Murder in the First Degree (Premeditated) and two counts of Aggravated Assault based on events occurring at Reformation Lutheran Church on Sunday, May 31, 2009 while services were being held. On April 1, 2010, he was sentenced by the Court to a term of Life in prison, with parole eligibility after 50 years (Hard 50), for the murder and twelve months in prison for each count of Aggravated Assault. All sentences were to run consecutively.

The murder victim, George Tiller, was a physician who performed lawful abortions. During the course of the trial and pre-trial proceedings, a variety of chilling facts were established. It was established that the defendant had determined in the early 1990s that killing an abortion provider was a justifiable act. He believed that abortions, even those legally performed, were murders. He believed he had the right to put his own moral beliefs above the law of the land and he believed he had the right to take another's life simply because of his own beliefs. The defendant testified that he resolved that George Tiller must be killed since 1999 and that for 10 years he mulled over various ways to personally kill him. He testified that he determined that the victim's church was the most convenient location for him to kill Dr. Tiller because he could obtain access to him, circumventing precautions Dr. Tiller took to protect himself from anti-abortion activists like the defendant, who may seek to harm or kill him.

The defendant appealed his convictions and sentence imposed for the murder conviction. His convictions were upheld by the Kansas Supreme Court in an opinion issued on October 24, 2014. *State v. Roeder,* 300 Kan. 901 (2014). However, his Hard 50 sentence was vacated based on that Court's previous decision in *State v. Soto*, 299 Kan, 102, 322 P.3d 334 (2014). The Kansas Supreme Court remanded the case for resentencing on the first-degree murder count only. *Roeder*, 300 Kan. at 943.

The resentencing will occur pursuant to the terms of K.S.A. 2014 Supp. 21-6620. This Court has already found that this statute does not violate the Ex Post Facto Clause of the United States Constitution and its counterpart in the Kansas Constitution and can be applied retroactively.

LEGAL ARGUMENTS AND AUTHORITIES

Defendant cites K.S.A 21-4601 (now codified as K.S.A. 21- 6601) and K.S.A. 21-4606 (now codified as K.S.A. 21-6705) as statutes providing important public policy considerations that should be utilized by a sentencing court in imposing sentence. He urges the court to factor in those considerations as well as the aggravating and mitigating factors provided in K. S. A. 2014 Supp.21-6624 and K.S.A. 2104 Supp. 21-6625, respectively. While acknowledging that K.S.A. 21-4606 is not binding on crimes committed on or after July 1, 1993, Defendant fails to point out that by its own terms, it has no applicability whatsoever to crimes committed on or after July 1, 1993. K.S.A. 2014 Supp. 21-6705(c), and its earlier version, state, "[t]he provisions of this section shall not apply to crimes committed on or after July 1, 1993."

As to the policy considerations contained in K.SA. 21-6601, these must be reviewed in light of the Kansas Sentencing Guideline Act came into effect for crimes committed on or after July 1, 1993. This act established the sentencing policy for Kansas that was in existence at the time of the instant crime. It made clear that there were two primary concerns for most crimes in Kansas: the severity level of the crime, and the defendant's criminal history. See K.S.A. 21-4702 *et seq.* (the sentencing guidelines act in effect at the time of the crimes here). Exceptions to that were found in non-grid crimes and off-grid crimes. Off-grid crimes are the most serious crimes in Kansas. First-degree murder is an off-grid crime. And, as noted in the Kansas Supreme Court's opinion in this case, "[a]rguably, only capital murder would be a greater legal harm." *Roeder,* 300 Kan. at 917. The sentence that has been established by a law for first-degree murder is life imprisonment without exception. The issue at hand here is not sentence. The issue is minimum parole eligibility, though a sentence of life imprisonment without the possibility of

parole for 50 years is commonly referred to as a Hard 50 sentence. That is an issue to be decided by a sentencing jury, with the sentence to be ultimately imposed by the court.

The public policy of this state is seen through the enactments of its legislature. See *Bolz v. State Farm Mutual Auto. Ins. Co.,* 274 Kan. 420, 52 P.3d 898 (2002). And, "[t]he legislature of is the branch of government entrusted with the power to set the punishment for a crime." *State v. Riley,* 26 Kan.App.2d. 533,536, 989 P.2d 792 (1999). The Kansas Legislature has provided guidelines for the jury to use in exercising its discretion as to whether to impose a Hard 50 sentence in K.S.A. 2014 Supp. 21-6620 and the statutes cited therein, particularly those dealing with aggravating and mitigating circumstances that the jury is to consider.

In August, 2013, the Kansas Legislature decreed that on and after September 12, 2013 the new default parole eligibility for those convicted of premeditated first-degree murder is 50 years. It also established a procedure by which a defendant could attempt to win a parole eligibility of 25 years by proving certain mitigating circumstances. In essence, the Legislature flipped the parole eligibility determination procedure on its head. The new norm is 50 years. That is the current public policy of our state.

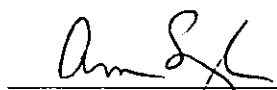
Defendant cites no case law in support of his claim that our Hard 50 sentencing scheme violates constitutional due process principles and constitutes cruel and unusual punishment. Nor could he as the law, in its various forms as a Hard 40 or Hard 50 has withstood such challenges with the exception of the constitutional challenge that brings this case back before the court for resentencing. See e.g. *State v. Spain*, 269 Kan. 54, 4 P.3d 621 (2000) (imposition of a Hard 40 sentence where the aggravating factors were found to not be outweighed by mitigating factors does not constitute cruel and unusual punishment as prohibited by the Kansas and United States constitutions.) Defendant does not specify how a hard 50 sentence would be violative of his due

process rights or constitute cruel and unusual punishment other than a vague, conclusory assertion that it would be contrary to public policy and that defendant should be sentenced in a manner that considers "all relevant factors, and proper basis of public policy in sentencing." The legislature set out the appropriate and relevant factors in the hard 50 sentencing scheme. They are designed to serve the legitimate penological goals of the state. See, *State v. Mossman*, 294 Kan. 901, 281 P.3d 153 (2012) (acknowledging retribution, deterrence, incapacitation, and rehabilitation as legitimate penological goals.) The Legislature crafted a constitutional fix for the *Alleyne* issue, and the Defendant should be resentenced according to its provisions.

Additionally, "[t]he constitutionality of a statute is presumed. All doubts must be resolved in favor of its validity, and before the act may be stricken down it must clearly appear that the statute violates the constitution. In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it. If there is any reasonable way to construe the statute as constitutionally valid, that should be done. A statute should not be stricken down unless the infringement of the superior law is clear beyond substantial doubt." *State v. Myers,* 260 Kan. 669, Syl. ¶ 4, 923 P.2d 1024 (1996).

Wherefore, the State respectfully requests the court deny the defendant's motion.

Respectfully submitted,



Ann Swegle, #10920
Deputy District Attorney

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was delivered to the Public Defender's Office by interoffice mail on the 23rd day of February, 2016 to the following:

Mr. Mark Rudy
Mr. Jason Smartt
Ms. Taryn Locke

And a copy hand-delivered to the chambers of the Honorable Warren Wilbert on the same date.

Ann Swegle
Deputy District Attorney

Deputy District Attorney Ann Swegle
Supreme Court #10920
Office of the District Attorney
535 North Main
2nd Floor
Wichita, Kansas 67203
(316) 660-3600

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS, Plaintiff, vs. SCOTT P. ROEDER, Defendant	Case No. 09 CR 1462

STATE'S RESPONSE TO DEFENDANT'S OBJECTIONS RELATED TO SENTENCING PHASE JURY TRIAL

Comes now the State of Kansas, by and through its attorney, Ann Swegle, Deputy District Attorney, and responds to the Defendant's objections related to the sentencing phase jury trial. The Defendant asks the Court to "preclude evidence absent confrontation, absent cross-examination, and in violation against rules prohibiting hearsay."

PERTINENT FACTUAL AND PROCEDURAL BACKGROUND

On January 29, 2010, the defendant was convicted by a jury of one count of Murder in the First Degree (Premeditated) and two counts of Aggravated Assault. On April 1, 2010, he was sentenced by the Court to a term of Life in prison, with parole eligibility after 50 years (Hard 50), for the murder and twelve months in prison for each count of Aggravated Assault. All sentences were to run consecutively.

The defendant appealed his convictions and sentence imposed for the murder conviction. His convictions were upheld by the Kansas Supreme Court in an opinion issued on October 24, 2014. However, his Hard 50 sentence was vacated based on that Court's previous decision in State v. Soto, 299 Kan, 102, 322 P.3d 334 (2014). The Kansas Supreme Court remanded the case for resentencing on the first-degree murder count only. *Roeder,* 300 Kan. at 943. The resentencing will occur pursuant to the terms of K.S.A. 2014 Supp. 21-6620.

Defendant has filed a pleading in which he objects to the new sentencing jury being allowed to consider information that is allowed by law. No legal authority is provided to support the objections.

LEGAL ARGUMENTS AND AUTHORITIES

K.S.A. 2014 Supp. 21-6620(e)(3), applicable here, provides:

> 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. 21-6624, and amendments thereto, or for crimes committed prior to July 1, 2011, K.S.A. 21-4636, prior to its repeal, 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 prosecuting attorney 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. Only such evidence of mitigating circumstances subject to discovery pursuant to K.S.A. 22-3212, and amendments thereto, that the defendant has made known to the prosecuting attorney prior to the sentencing proceeding shall be admissible. No testimony by the defendant at the time of sentencing shall be admissible against the defendant at any subsequent criminal proceeding. At the conclusion of the evidentiary presentation, the court shall allow the parties a reasonable period of time in which to present oral argument. (Emphasis added.)

Thus, this statutory provision specifically provides for the admission of hearsay statements so long as the court deems them to have probative value. This provision has been part of Kansas law since it was first enacted in 1994 (L.1994, Ch. 341, §6). Those provisions are lawful and should be followed. The Defendant has not provided any legal basis for the court to do otherwise.

In *State v. Richardson*, 526 Kan. 69, 883 P.2d 1107 (1994), the court discussed certain provisions of in K.S.A. 21 – 4635, the predecessor to K.S.A. 21 – 6620. The court dealt with statutory provisions that allow for evidence that may not be admissible under the rules of evidence and that allow for evidence other than that related to aggravating or mitigating factors. In that case a jury had recommended a Hard 40 sentence be imposed and the trial court agreed, imposing that sentence. As part of the sentencing proceeding, the State had put on information regarding prior criminal activity of the defendant. The defendant claimed this was an error. The court found no error, stating:

> Richardson's contention that evidence of her prior criminal activity is not relevant to any of the aggravating circumstances appears in part to be accurate. However, the legislature authorized the introduction of a broad spectrum of evidence which 'shall include matters relating to any of the aggravating circumstances' but expressly is not limited to matters relating to those circumstances. K.S.A.1993 Supp. 21–4624(3). In fact, the legislature authorized the introduction of evidence 'concerning any matter that the court deems relevant to the question of sentence.' K.S.A.1993 Supp. 21–4624(3). The trial court deemed the evidence of prior criminal activity relevant and properly so as to 21–4625(3).

256 Kan. at 79, 883 P.2d 1107.

While K.S.A. 2014 Supp.21-6620 is a statute applied only in certain murder cases, sentencing proceedings in Kansas historically have had relaxed standards of admissibility of evidence. K.S.A. 2014 Supp. 22-3424(e) provides that:

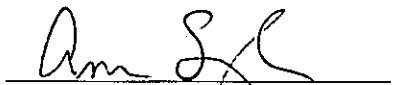
> Before imposing sentence the court shall: (1) Allow the prosecuting attorney to address the court, if the prosecuting attorney so requests; (2) afford counsel an

opportunity to speak on behalf of the defendant; (3) allow the victim or such members of the victim's family as the court deems appropriate to address the court, if the victim or the victim's family so requests; and (4) address the defendant personally and ask the defendant if the defendant wishes to make a statement on the defendant's own behalf and to present any evidence in mitigation of punishment.

The Kansas Constitution also provides victims a qualified right to be heard at sentencing. Article 15,§15 states that victims have the right "to be heard at sentencing or at any other time deemed appropriate by the court, to the extent that these rights do not interfere with the constitutional or statutory rights of the accused."

For cases such as the instant one, the legislature has made specific provision for a judge to allow for hearsay evidence provided that it is relevant, and provided that the Defendant be afforded an opportunity to rebut it. This statutory procedure allows pertinent information to be considered by a jury in an efficient and expeditious manner. The provision allowing the defendant to rebut any hearsay rule provides sufficient protection for the Defendant's interests.

Respectfully submitted,



Ann Swegle, #10920
Deputy District Attorney

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Ann Swegle
Deputy District Attorney