No. 10-104520-S

IN THE
SUPREME COURT OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

SCOTT P. ROEDER
Defendant-Appellant

PRO SE SUPPLEMENTAL BRIEF OF APPELLANT

Appeal from the District Court of Sedgwick County, Kansas
Honorable Warren Wilbert, Judge
District Court Case No. 09 CR 1462

Scott P. Roeder, Appellant
KDOC#0065192
Lansing Correctional Facility
P.O. Box 2
Lansing, Kansas 66043-0002

QUESTIONS PRESENTED:

Group I: Exclusion of a witness; elements of Voluntary Manslaughter

1. Can a witness be "too credible" to be allowed to testify, because of the danger that he might "prejudice" the jury to believe the defendant's beliefs, if not actions, were "reasonable"?

2. Is "unreasonable belief" an element of "voluntary manslaughter" that must be positively proved, or does it merely articulate the concession that it doesn't even have to be "reasonable", so long as it is at least "honest"?

3. Does the "voluntary manslaughter" defense require that the defendant's *actions* be "honest", or that defendant's *beliefs* about his *victim's* actions be "honest"?

4. Is it error to disqualify the only witness for the defense on the ground that the defense already has other evidence it is allowed to present?

5. Is it error to prohibit evidence of an element of the defense allowed, on the ground that it requires addressing a controversial subject?

Group II: The meaning of "imminence"

6. Does "imminence" mean, as a matter of statutory or case law, "considerably less than 24 hours away"? Did the District Court err in holding that, in K.S.A. x21-3211, "imminent use of unlawful force" can never describe a threat the next day?

7. If the law contains no such time limit on "imminence" regardless of context, can a jury decide as a matter of fact whether a danger is imminent?

8. Must the "imminence" element of "voluntary manslaughter" be established by proving that the danger averted was objectively, factually "imminent", or only that "the actor" honestly but subjectively *believed* the danger was imminent?

9. In the defense of others, was it an "imminent" danger if the threat was certain to occur had the defendant not acted, even though 24 hours would pass between the unlawful force and the opportunity to stop it?

Group III: The Necessity and Defense of Others defenses

10. Considering that Tilson cast no doubt about the availability of Defense of Others, which it said came under the "umbrella" of the Necessity Defense, yet Tilson expressed uncertainty about the Necessity Defense, is the Necessity Defense available to Kansas defendants?

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***Defendant's Motion to Reconsider* (Actions 88, 89, 92), filed and heard January 8, 2010, is referred to throughout this brief as "my 2010 pro se brief"**

ARGUMENT

A. Mr. Kline and Disney should have been allowed to testify regarding the "use of unlawful force" element of Voluntary Manslaughter

Issue 1: **An expert witness can't be disqualified as being excessively credible.**

The Court erroneously claimed that my expert witness (who was my only remaining witness after the court had disqualified my first witness – also an expert witness – for being "cumulative") was *too* credible to be allowed to testify. The Court said that allowing a witness to testify who is not only a lawyer but an eminent legal expert would "prejudice" the jury to believe the facts testified to!

> (Trial Volume 12, Page 39, Judge Wilbert speaking:) And for Mr. Kline, having the status of being the former Attorney General, the chief law enforcement officer for the State of Kansas, and the official charged with interpreting and enforcing the laws, would give way too much weight and credit and influence on the jury (as to whether my belief was reasonable relating to the "use of unlawful force" element of Voluntary Manslaughter)....

The credibility of a witness makes a witness valuable. It does not disqualify a witness. Dramatic *lack* of credibility would keep any but the most desperate attorney from calling him, but even then it would not normally be the judge who disqualifies the witness.

Normally the word "credible", modifying "witness", denotes the legal system's acceptance of, if not respect for that witness. When a witness appears trustworthy, intelligent, and otherwise persuasive, and otherwise likely to be believed by a jury, the witness is called "credible". The concept of "too much credibility" "prejudicing" the jury is not found in Kansas law.

Mr. Kline testified in his proffer to the fact of the reasonableness of the beliefs he shares with me about the lawfulness of some of Dr. Tiller's abortions. He was not being asked to state the law – that is the function of the court – but rather, he simply testified

that he had "probable cause" for filing charges – and that the charges were later dismissed for reasons unrelated to their merits. Surely it is not "unfairly prejudicial" to introduce evidence that a former attorney general believes that a certain belief about another's unlawful use of force is at least within the realm of reason. It is persuasive to do so, of course, and that is why I wished to have Mr. Kline testify.

In effect, the trial judge was saying that the more legal credentials a witness has, the less right as a matter of law the jury has to hear him! This might disqualify any policeman from taking the stand, would probably disqualify any lawyer, and would certainly disqualify any judge! Is that now the law of Kansas? Will this become a precedent for future cases?

Technically, yes, Kline's testimony would have been "prejudicial". "Virtually all evidence is prejudicial or it isn't material. The prejudice must be 'unfair.'" Dollar v. Long Mfg., N.C. Inc., 561 F.2d 613, 618 (5th Cir. 1977) How would it have been "unfair"?

My *beliefs* were encouraged by Kline's prosecution attempts, which proved that my beliefs were shared by the Attorney General of the State of Kansas, in a *prosecution which no one has ever challenged on the merits,* which should make it hard for a jury to regard them as terribly unreasonable.

Issue 2: **My only witness can't be barred because his testimony is "cumulative"**

The trial court said on Wednesday that allowing either of my only two witnesses couldn't be allowed because "Roeder can testify all he wants" so allowing me a witness would be "redundant"! But as a substitute for a witness, the Court offered to "take judicial notice" of the facts to be proved by testimony:

> (Vol 11, p. 120) THE COURT: But again, Phill Kline's prosecution or attempts to prosecute Dr. Tiller, Barry Disney's actual prosecution of Dr. Tiller are facts

that are well known. You could bring up the court file in 07 CR 2112 to establish that. You can ask the Court to take judicial notice of its own court file. And then Scott Roeder can testify all he wants about his attendance of that trial. But for Barry Disney to get up here and say I prosecuted Dr. Tiller and I had a good faith basis to prosecute him is almost redundant.

The Court made formal the next day its ruling against both witnesses because their testimony would be "collateral" and would give my "beliefs...credence":

> "to bring in Barry Disney or Phill Kline to somehow collaterally bolster up [defendant's] beliefs or to give it more credence or more validity is inappropriate." (Vol 12, p. 48)

After my witness was sent home, the Court qualified his offer of judicial notice.

> RUDY: ...if we aren't allowed to have Mr. Disney testify, then I guess we will ask for the Court to take judicial notice...
> COURT: ...that is...what I just said you are not going to do.
> RUDY: You just indicated that we could ask the Court to take judicial notice.
> COURT: Of the court file....I can take judicial notice that [list of docketing facts] and that in and of itself would demonstrate that Mr. Disney proceeded on a good faith basis. (Vol 11, p. 121) ...And that is as far as I would propose to go. (Vol 11, p. 124)

The next day, after my public defender had spent extra time preparing the motion which the Court suggested, the Court completely withdrew his offer:

> (Vol. 12, p. 44) RUDY: ...we have prepared a motion for judicial notice. The Court talked about it yesterday, indicated what they would do. ..."
> (Vol 12, p. 51) RUDY: Yesterday the Court, in sort of announcing its decision as to Mr. Disney, [to disallow Disney as a witness], indicated the Court would be willing to take judicial notice of files...and would at least entertain instructing the jury as to the evidence that we would seek to introduce through Mr. Kline and Mr. Disney's testimony.... We believe that that is evidence that is fairly admitted, and we discussed this yesterday. ….
> THE COURT: Well, I guess I would take some exception to your characterization of my ruling yesterday. Number one, *it wasn't a ruling.* And I have found out from time to time that *my thinking out loud and sharing some of my thoughts with the attorneys, to offer some assistance* or guidance in the conduct of the trial, may have better been saved and not said. Sometimes it's misinterpreted and -- but when you were arguing the basis to call Barry Disney for a good faith belief, and *I just opined that the Court could take judicial notice* that charges were filed and they sustained certain scrutiny and defense challenges and ultimately went to a jury with a judgment of acquittal was just that, *I was kind of thinking out loud to digest in my own mind* the need to -- or that *there wasn't a need to call Barry Disney to testify.* Your motion as framed

> asked me to take judicial notice of the Court files, and then further to instruct the jury somehow the impact of those filings. And I just think that is inappropriate. ...for me to instruct the jury would give way too much weight and credit to that evidence. It goes beyond uncontroverted facts. It gets into legal conclusions that are inappropriate for the Court to instruct the jury on. The jury is a finder of fact.
>
> (Vol 12, p. 54) COURT: I'm not sure that the Court even needs to take judicial notice if Scott Roeder testifies to those facts. And unless they are challenged on cross-examination to prove that they are false, his testimony will be uncontroverted. To that extent you can argue it in closing arguments and the jury can consider it and give it whatever weight and credit it deems appropriate. I think it's unnecessary for the Court to take judicial notice. And *would I rethink what I said yesterday? Probably. Again, that was a pretty heated exchange yesterday afternoon, I will be very candid about it. And everybody's minds were racing and I just offered an example of how we could avoid Barry Disney's need to testify.* But *having thought about it even further, Scott Roeder can testify to those factual events* if they were made known to him, and he can testify about how he learned about it and how those facts affected his thinking process and ultimately his decision to act the way he did. And at the end of the trial, then I have to weigh all that evidence to determine what if any instructions I will give to the jury. So at this time, *your motion to take judicial notice and to instruct the jury is denied*.

In other words, the Court on Wednesday said "You don't need witnesses. You can testify yourself. If you like I will take Judicial Notice of the facts you want established." The Court on Thursday, after my two witnesses had been sent home, said "I changed my mind about judicial notice. I only offered it because you got me upset. You can testify yourself, and maybe your evidence will be uncontroverted. (Of course even if it is, the jury will think you are crazy.)"

I understand that had I, for example, called 182 witnesses, the number the prosecution initially indicated they would call, some of them could lawfully be excluded as "cumulative" because they would consume excessive court time. But can one witness be lawfully excluded as "cumulative"? Would one witness to a heavily disputed element, added to my own testimony, have been "cumulative", but the state's several witnesses to facts which I tried in my 2010 pro se brief to stipulate, were not?

My public defender articulated the violation of Due Process (14th Amendment) in

disqualifying my only two witnesses on the ground that there was no need for corroboration of my own testimony:

> (Vol 11, p. 119) MR. RUDY: Judge, this is a building block. If the State is prosecuting a murder case, there may be five eyewitnesses. You wouldn't say well, you already called one so the other four are irrelevant, or I'm not going to admit them. We are allowed to build our case. We are allowed to build -- in this case we're obligated to build Scott's beliefs to show you why he came to this honest belief that he needed to act the way he did. ... These are the things that led Scott to these beliefs. ...I think we are being handcuffed if we are not allowed to demonstrate that.
>
> (Vol 12, p. 112) RUDY: So we have the obligation and certainly the right to present and build a case that would demonstrate to the trier of fact that he did in fact have this honest belief. (page 113) ...And just having [Roeder] talk about the trial does not have the same effect or result that we are attempting to do, we are obligated to do, in proving beyond a reasonable doubt that he had an honest belief.

Issue 3: **Reasonableness of defendant *action:* irrelevant to Voluntary Manslaughter**

The *honesty* of my belief is an element of Voluntary Manslaughter (K.S.A. 21-3403(b). The *reasonableness* of my belief is an element of Defense of Others (K.S.A. 21-3211). Both the trial judge, and my public defender, got side tracked on an issue which is not an element of either defense: the reasonableness of my *actions*.

> THE COURT: For [former Attorney General Phill Kline] to sit there and opine whether or not the defendant's *actions* were reasonable or unreasonable is an invasion of the province of the jury and their ultimate fact finding. And *that is one of the ultimate questions of fact to be determined* if the Court instructs on voluntary manslaughter. (Vol 12, p. 40)

My *actions* were *not* reasonable according to Phill Kline in his proffer (the jury was never allowed to hear him), in response to Public Defender Mark Rudy's question.

> RUDY: As Attorney General, you came to the conclusion, the good faith conclusion that Dr. Tiller was performing unlawful abortions; is that correct?
> KLINE: That's correct.
> Q. Do you think that the *behavior* of Scott Roeder, if the allegations prove to be true, were justified in killing Dr. Tiller?
> A. No.
> Q. Do you think they were in fact unreasonable?
> A. Yes. (Vol 12, p 36, Mark Rudy questioning Kline)

The *legitimate* purpose of Kline's testimony was to corroborate the reasonableness of the *belief* upon which I acted, which Kline was notorious for sharing, that at least some of Dr. Tiller's abortions were unlawful. That is an element of the Defense of Others, which at that point in the trial had not been completely foreclosed. Had the jury heard Kline and still doubted our belief was reasonable, I hoped he would at least move the jury to accept my beliefs as "honest", the element of Voluntary Manslaughter.

The trial court disallowed my only remaining witness, whom I called to establish a real element of K.S.A. 21-3403(b) (whether my *beliefs* about the lawfulness of some of Tiller's abortions was "honest") on the ground that my witness would incline the jury towards accepting an element of the Voluntary Manslaughter defense which is *not* a real element. (Whether my *actions* were reasonable.) If "whether my *actions* were reasonable" were a real element, disallowing the witness would be an even greater error.

The entire discussion of whether my *actions* were reasonable was a red herring, a distraction from the true concern of the elements of Voluntary Manslaughter: not my *actions* towards George Tiller, but my *beliefs,* about the legality of *George Tiller's* actions.

It is the defendant's *beliefs* about his *victim's* actions that must be "honest".

K.S.A. 21-3403(b), Voluntary manslaughter, requires an "honest belief that circumstances existed that justified deadly force under K.S.A. 21-3211...."

What "circumstances", according to K.S.A. 21-3211, Defense of Others, justify deadly force?

Only three elements are found in 21-3211 below: (a) "unlawful force"; (b) "imminence" of such force (addressed in a later section); and (c) a "third person" against

whom such force would have been directed had I not prevented it. (K.S.A. 21-3403(b) is identical in content except for substituting "honestly" instead of "reasonably".)

> **K.S.A. 21-3211**(a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such force is necessary to defend such person or a third person against such other's imminent use of *unlawful* force.

Kline's testimony would have not just influenced the jury's view of my actions, as the trial court and Rudy argued. It would have influenced the jury to think it was "reasonable" for me to believe "unlawful force" was imminent. Indirectly, it would have also impressed the jury that I might even have been reasonable to believe the object of the "unlawful force" was "third persons". Kline didn't testify directly about that, but if unborn babies of humans are neither humans nor persons, prosecuting someone for killing them makes no sense. Kline's dogged efforts to prosecute Tiller can only be explained by presuming that Kline believes as I do.

Kline's implied opinion that those I saved were "third persons" was more than reinforced by explicit testimony *by a state's witness, under examination by the prosecutor.* Shelley Steadman, "the forensic biology and DNA laboratory manager at the Regional Forensic Science Center here in Sedgwick County", (Vol 11, p. 49), said "when a sperm cell unites with an egg cell, this gives rise to the child."

> (Volume 11, 52:2) BY MS. PARKER:
> Ms. PARKER: Please explain for us what DNA is and how it is used?
> STEADMAN: DNA stands for deoxyribonucleic acid. It's often referred to as the building block of life because it's a chemical molecular structure that encodes for the individuals that we are.
> The DNA that we type in the Sedgwick County laboratory is found within the central compartment of the cell, called the nucleus. And I often preface my explanation about DNA typing with a straightforward example of a mother, a father and a child. And if you think about the father and the mother and one cell in the father's body, that cell would contain 46 packages of DNA, or 46 chromosomes, and you could think of it as two sets of 23, because 23 plus 23 is 46.
> Likewise, in a single cell of the mother's body, there are the same number

> of chromosomes. *When a sperm cell unites with an egg cell, this gives rise to the child*, and that set of DNA from that original cell, cell division occurs and the DNA that was inherited from the father and the mother is copied into the other cells of the offspring.

Even this controversial, absolutist prolife position is documented as reasonable and factual by the state's witness. How much more reasonable should the Court consider the far less controversial belief that an 8-month baby killed in an illegal late term abortion is a "third person"?

When the defense alleges those I saved were "third persons" and the prosecution assists by presenting evidence of the same by an expert witness, we are very close to a stipulation. All that is missing are official signatures.

Once my jury had reached the conclusion that I saved "third persons" from unlawful destruction, then jury instructions properly applying Kansas law would have directed the jury to find me innocent under the Defense of Others, not to mention whatever lesser relief I should have had under Voluntary Manslaughter. Even if the jury could not have accepted Defense of Others relief, it would have given them much greater sympathy for the honesty of my belief relating to Voluntary Manslaughter.

My two beliefs, that those I saved were "third persons" and that many of the abortions that threatened them were illegal, was shared by Former Attorney General Phill Kline, who is such an eminent legal authority that he is disqualified from being my witness because he might prejudice the jury to believe me. Yet Kline still thinks it is "unreasonable" to take precisely those actions that I took which are justified by Kansas Law, as if he personally believes it is the Defense of Others itself which is "unreasonable".

But in the eyes of Kansas law, it is irrelevant whether Kline thought my *actions* were "unreasonable", or if the trial court, attorneys, news reporters, and jurors thought so.

The only relevant fact was whether my *belief* was "reasonable" that *Tiller's* actions were unlawful and imminent, and that the intended beneficiaries of those actions were "third persons".

We have the trial court's testimony on the record that Kline's testimony would have "prejudiced" the jury to think so, in which case the trial court should have let the jury hear Kline's testimony, and then should have reversed its premature censorship of argument or evidence supporting the Defense of Others.

Here is the trial court's reasoning, with more context than the selection above:

> (Volume 12, p. 38) MR. RUDY: But I believe the gist of [Kline's] testimony, again that he was the Attorney General, took up an investigation, brought these charges, probable cause was found by a judge regarding these cases, and then that ultimately it was dismissed, is relevant and should be admissible. He also testified obviously as to the unreasonableness of the defendant's *action*.
>
> We have already had some testimony as in fact that was unreasonable. But certainly, Judge, *that is an element* of our proposed...request for an instruction on voluntary manslaughter....
>
> THE COURT: Let me address just one portion of his testimony, then I will hear from the State. For him to sit there and opine whether or not the defendant's *actions* were reasonable or unreasonable is an invasion of the province of the jury and their ultimate fact finding. And *that is one of the ultimate questions of fact to be determined* if the Court instructs on voluntary manslaughter. (Page 40)
>
> And for Mr. Kline, having the status of being the former Attorney General, the chief law enforcement officer for the State of Kansas, and the official charged with interpreting and enforcing the laws, would give way too much weight and credit and influence on the jury, to have a former Attorney General opine whether Mr. Roeder's *actions* were reasonable or unreasonable on May 31, 2009. That is one of the ultimate questions, fact questions, and the jury is given that for their deliberations. And we all know that more times than not, and there is limited exceptions for any witness to testify on the ultimate question of fact, that for Mr. Kline to opine whether Roeder's *actions* were reasonable or unreasonable is, one, prejudicial, and is not supported by the rules of evidence.

The Court would have been right to say "for him to sit there and opine whether or not the defendant's actions were reasonable or unreasonable" would be irrelevant. But the Court called it "one of the ultimate questions, fact questions, and the jury is given that".

Notice that the trial court did not just keep Kline from testifying to the jury that my actions were *un*reasonable. He said Kline wasn't allowed to suggest they were *reasonable*, either.

But the trial court's real concern surely was not with the ridiculously easy task of proving my *actions* were *un*reasonable to the satisfaction of average jurors! So what concern was left? The trial court had to have been concerned that Kline's testimony would prove my *beliefs* about Tiller's actions were "*reasonable*!" Not merely honest, but reasonable – which would not only have given the jury a lot more sympathy for the Voluntary Manslaughter defense, but which would have raised the question whether the trial court should have reconsidered his suppression of the Defense of Others defense.

Had my jury been lawfully instructed that the honesty/reasonableness of *my* actions was not the issue of Voluntary Manslaughter, but the issue was the honesty/reasonableness of my beliefs about *George Tiller's* actions (whether they constituted "unlawful force"), and had they been allowed to hear the testimony of former Attorney General Phill Kline in the proffer, I might well have been acquitted. As it was, they were no doubt puzzled as to why I was pleading Not Guilty when I admitted killing George Tiller. They would have learned that even though Kline's charges against Tiller were dismissed, as the trial court repeatedly reminded me, (Vol 11, p. 108, 111, 114, 124, 129, 132, 134) *no one ever challenged their validity on the merits.*

The jury would have learned that Judge Yost, who approved the charges against Tiller, did so after being persuaded there was reasonable cause, and the judge who dismissed the charges the following day did so because Nola Foulston, who was also the lead prosecutor in my trial, asserted a line item veto over the Kansas Attorney General's jurisdiction to operate in "her" county, which she was allowed to exercise after the

Attorney General had invested years of work in a criminal investigation.

(Vol 12, p. 31)

KLINE: These appear to be a file stamped copy of the charges filed on December 21, 2006, State of Kansas versus Dr. Tiller, the charges which I just referenced.

RUDY: Can you indicate for purposes of the record what the case number is on that?

A. The case number is 06 CR 2961.

... I met with the District Attorney and informed her of the filing of the charges as my assistant Attorney General and chief of staff met with a criminal judge here, because Kansas law requires a judge to review and find probable cause to believe that the (Page 32) crimes alleged were committed and the person to whom it's charged committed the crimes. That review was taking place. I concluded my meeting with the District Attorney, met with my staff, and these charges were filed after the judge's approval.

(Vol 12, p. 33)

Q. Do you know the history of that Complaint? After you filed it on the 21st, what happened to it?

A. Well, I was back in Topeka and I received an e-mail from the District Attorney indicating that she had taken -- as I best recall, it was "I have taken this action in this case." And there was attached to the e-mail an order dismissing the case. I'm sorry, I do not recall the judge, but it was not... Judge Yost, who had reviewed the evidence. And the claim was that I as Attorney General did not have jurisdiction to file that case, so that case was dismissed. We filed a motion, emergency motion for reconsideration.

...Q. The testimony would be Judge Yost was the judge who found probable cause --

A. Correct.

Q. -- on these allegations?

A. Yes.

Q. And you believe that a different judge the next day dismissed it based upon the actions, behaviors of the Sedgwick County District Attorney's Office?

A. Right.

Q. And their claim was you did not have jurisdiction in order to come into Sedgwick County and prosecute this case?

A. Correct.

Q. All right.

A. Or file it.

Q. Or file it.

A. Right.

Q. Are you aware of whether or not the Sedgwick County District Attorney's Office then picked up the case based on the findings and your investigation and prosecuted George Tiller?

A. My knowledge is that this case never moved forward.

The jury would have learned that the Kansas Attorney General thought Tiller's

abortions included significant "unlawful force", a judge agreed, *and no one said they disagreed: not the judge who dismissed the charges on a technicality, not Nola Foulston, and certainly not a jury which had been allowed to review the evidence.*

The evidence which the Court disallowed – corroborating my beliefs about Tiller's unlawful actions – was unchallenged. The Court itself had articulated the considerable value of "testimony [which] will be uncontroverted" (Vol 12, p. 54) The evidence could have persuaded the jury that our shared belief about Tiller's "use of unlawful force" was within range of "reasonable".

Had the element of Voluntary Manslaughter been whether my *actions* were reasonable, then a case might have been made that a reasonable citizen would have waited until a jury could have heard the case against Tiller on the merits, even if that meant waiting until Foulston lost an election and a Kline clone won a future election. A "reasonable person", it may be argued, would have waited while thousands more "third persons" were cruelly, unlawfully killed. It is not popularly considered "reasonable" to take great personal risk to help those whom society is currently determined to dehumanize, even though society honors as "heroes" those who sacrifice themselves to help those whom *other* societies are, or were in the past, determined to dehumanize. (Please review my analysis at pp. 25, 46 of my 2010 Pro Se brief.)

But the reasonableness of my *actions* is not an element of either defense. Indeed, it should not be: these defenses, stated just as they are, besides offering the benefit of defense against common criminals, are especially important in situations where for reasons of political popularity or corruption the government is lax in preventing one private citizen from violating the rights of another.

And if the defenses were amended to prohibit anyone from saving lives until a

jury had found the perpetrator of "unlawful force" guilty, they would for any practical purpose be amended out of existence.

If it still remains unclear that K.S.A. 21-3403(b) contains no element about the "unreasonableness" of my *actions,* here is one final proof: 21-3403(b) says nothing about "unreasonableness" anyway, right? The word isn't there. Instead the word is "honestly". "Honest belief" is something a jury can weigh. But "honest actions"?

Issue 4: **Defendant need not prove his unreasonableness, in K.S.A. 21-3403**(b)

> (Volume 12, p. 38) MR. RUDY: But I believe the gist of [Kline's] testimony,... He also testified obviously as to the unreasonableness of the defendant's *action*. We have already had some testimony as in fact that was unreasonable. But certainly, Judge, *that is an element* of our proposed...request for an instruction on voluntary manslaughter....
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> THE COURT: For him to sit there and opine whether or not the defendant's *actions* were reasonable or unreasonable is an invasion of the province of the jury and their ultimate fact finding. And *that is one of the ultimate questions of fact to be determined* if the Court instructs on voluntary manslaughter. (Page 40)

My only two witnesses were disqualified because it was not relevant for them to testify about the reasonableness of my actions – which is true because my actions are not an element of K.S.A. 21-3403(b). But the Court said the reasonableness of my actions *was* not only an element of the defense but "one of the ultimate questions of fact to be determined".

My argument in this section is that there is no legal purpose for me to "prove" my alleged "unreasonableness", period, either of my beliefs or, as I argued in the previous section, my actions.

The confusion I addressed in the last section, over whether the elements of Kansas law concerned my "unreasonable actions" or "honest beliefs", was compounded by thinking that my "unreasonableness", whether of beliefs or actions, was an element

requiring positive proof. The discussion of whether my witnesses were necessary to prove that – the Court decided they weren't – seemed to distract the Court from weighing whether my witnesses were needed to corroborate the real element of law – my belief about Tiller's "unlawful use of force".

Does the law really require the defendant to prove that his actions were unreasonable before the defense of Voluntary Manslaughter is allowed? On the contrary, the law's obvious intent is as a concession, viz: "you don't even have to prove it was reasonable, so long as you can at least prove it was honest". (I address this on p. 7 of my 2010 pro se brief.)

This concession is the practical effect of the "unreasonable but honest" element. Failure to prove my beliefs were "*un*reasonable" would simply have left my jury believing they were *reasonable*, qualifying me for the "Defense of Others" defense.

This appears to be what the Court was trying to say on January 8, notwithstanding the Court's contrary assertion on January 28:

> ...if the reasonable belief that force was necessary, which is the substance of 21-3211, is substituted for the defense of others -- of self or others as designated in 21-3403(b), ... the 21-3211 reasonableness of the belief that deadly force was justified is irrelevant because 21-3403(b) belief is unreasonable. Jan 8, p. 14-15

Rudy, likewise, at another time correctly stated that it was my "honest belief" that was the element, although perhaps he still thought the "unreasonableness" of my actions was yet another element, as he said in the earlier quote.

> (Vol 11, Page 119:) MR. RUDY: ...we're obligated to build Scott's beliefs to show you why he came to this honest belief that he needed to act the way he did. ….it's what these gentlemen did and the positions they did them is what caused Scott to form his beliefs.

But the trial court decided my "beliefs" (that some of Tiller's abortions were conducted unlawfully) couldn't even be discussed during the trial!

> (Vol 12, p 48, Judge Wilbert speaking:) But to bring in Barry Disney or Phill Kline to somehow collaterally bolster up his beliefs or to give it more credence or more validity is inappropriate. I said I'm not going to allow either side of this issue to line up five, 10, 15, 20 witnesses and debate the issue of abortion. And that is all that this is when you call Barry Disney and Phill Kline, is to debate one side that possibly Dr. Tiller was conducting illegal abortions in Sedgwick County, Kansas.

The clause "Tiller was conducting illegal abortions" suggests the Court was focused on my desire to prove the "unlawful use of force" element. But if that is what the Court was thinking about, how did the specter of 20 witnesses come to his mind? Especially since he knew from the court paperwork that we called only two.

I could easily call 20 witnesses to prove abortion kills "third persons", but where would I find more than two to testify about their "probable cause" that Tiller was guilty of unlawful abortions?

That question, plus the fact that the Court said "I am not going to allow either side of this issue to...debate the issue of abortion", suggests the Court's focus was bouncing between my belief that some of Tiller's abortions were "use of unlawful force", and my belief that all of Tiller's abortions were the most unspeakable, (the rest of the world agrees they are unshowable), stomach-turning barbaric subhuman cruelty, and that it was the latter belief I sought witnesses to corroborate.

Whether or not this explains the mixed messages in the Court's statement, it resulted in disallowing my only two witnesses whose purpose was to establish the "unlawful force" element of K.S.A. 21-3403(b) (Voluntary Manslaughter).

5. Court can't bar evidence of an element of a legal defense

The Court told the world repeatedly (Vol 11, p. 115) "...we are not going to make this a referendum on abortion." He began saying this before it became clear that I would

raise the defenses of Voluntary Manslaughter and Defense of Others (which I raised in my 2010 pro se brief; my attorneys argued only the first defense.) He continued saying this even after he knew this would be my defense.

The problem is that an element of both Voluntary Manslaughter and the Defense of Others is the existence of a "third person" endangered by "unlawful force".

At this point I will challenge the usual interpretation of existing law.

There can't be a greater "referendum on abortion" than for a jury to weigh whether this element of the defenses exists, since establishing this fact would precisely meet the condition given in Roe v. Wade for Roe's own "collapse", and with it, the legality of all abortions:

> *The appellee and certain amici argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment.* In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for *the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument.* On the other hand, the appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment. *Roe v. Wade* 410 U.S. 113.

Roe said doctors and preachers have more expertise on that issue than the Supreme Court, proving that the Court didn't regard this an issue of law, regarding which the Supreme Court justices are the world's experts, but as an issue for fact finders.

> Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer. Roe v. Wade: 410 U.S. 113.

In American law, there is a legal authority with even more cognizable expertise over facts than doctors and preachers: the jury.

Courts have preserved the legality of abortion only by deflecting every attempt for decades to place the issue of the humanity of the unborn before juries. This goes back at least until 1978, when the Cincinnati Law Review explained that abortionists drop charges rather than risk allowing a jury to learn about the Necessity Defense's comparison of the harm of killing a large number of alleged "persons" with the harm of preventative action. Abortionists understood the defendant would be allowed to prove unborn babies are "human beings" and "persons", making abortion the greatest of harms: murder. Who can deny that fact? Roe itself said the justices lack the expertise to deny it, and no other legal authority has ever positively denied it – who can, if SCOTUS can't?

The article goes on to explain, partly between the lines, that a precedent could allow prolife doorblockers to block abortion doors as long as they liked, without fear of arrest. Once that happened, abortion centers would be shut down all over America.

> "After the court ruled that it would allow the [Necessity] Defense to go to the jury, the Women for Women Clinic dropped the prosecution. If the defense is permitted, evidence is introduced that life begins at conception. This evidence is rarely contradicted by the prosecution, which is merely proving the elements of criminal trespass. Rather than risk such a precedent, many clinics prefer to dismiss. In fact, defense counsel have admitted that their intent is to bring the abortion issue back before the United States Supreme Court to consider the very question of when life begins, an issue on which the Court refused to rule in Roe..." *Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic,* 48 U.Cin.L.Rev. 501, 502 footnote (1979) The footnote analyzes the case of Ohio v. Rinear, No. 78999CRB-3706 (Mun. Ct. Hamilton County, Ohio, dismissed May 2, 1978)

The trial court never cited any authority beyond his determination not to discuss abortion for not allowing me to prove the "third persons" element of my defense. No law. No case law. No legal theory. Just, "this case is not going to be about abortion."

In the following example from the transcript, the trial court disallows evidence not only about abortion per se, but also about "illegal abortions". The trial court prohibited me from proving not just one element of my defense, but two: not just the

"third persons" element, but also the "unlawful force" element.

> (Vol 12, p. 48), Wilbert speaking:) But to bring in Barry Disney or Phill Kline to somehow collaterally bolster up his beliefs or to give it more credence or more validity is inappropriate. I said I'm not going to allow either side of this issue to line up five, 10, 15, 20 witnesses and *debate the issue of abortion*. And that is all that this is when you call Barry Disney and Phill Kline, is to debate one side that possibly Dr. Tiller was conducting *illegal abortions in* Sedgwick County, Kansas.

The trial court said "abortions are legal in the state of Kansas" (Volume 11, 134:25). That is not true of all abortions. Late-term abortions performed in the absence of codified circumstances such as severe danger to the mother are indisputably illegal in Kansas. The witnesses on either side of this inquiry, had it been allowed, would not have been debating law or policy; they would have been debating the fact of whether it was reasonable to believe that abortions illegal under Kansas law were being performed by Dr. Tiller.

But Voluntary Manslaughter is also a legal defense in the state of Kansas, and one of its elements in the state of Kansas is the existence of "third persons".

If a defense is allowed, the proof of its elements must also be allowed.

B: "Imminent" should not have been ruled "less than 24 hours away"

Issue 6, **B1: "Imminent" means "ready to take place"**

The Court acknowledged that "imminent" does not mean "immediate", but could not imagine how any jury could think my action, "22 hours away" from the tragedy I prevented, could ever be called "imminent":

> And imminent, while not being immediate, has to be close at hand. And again, the facts aren't that Dr. Tiller was killed while entering the parking lot of his health care facility. He was killed in the back of a church on a Sunday morning

while he was far removed from his office. (p. 10, January 8 pretrial transcript)

I raised the defense-of-others and voluntary manslaughter defenses pro se, [2010 pro se brief] and my public defender raised the voluntary manslaughter defense. [Vol 12, p. 39] The trial judge rejected both, on the ground that even if Roeder's action was necessary to defend a third person against Tiller's use of unlawful deadly force, that unlawful deadly force was not imminent, because Tiller was killed on Sunday morning and Roeder admitted that the unlawful deadly force would not occur until Monday morning.

> Mr. Roeder by his own admission says the next event that he had to intervene on would have been 22 hours later. So under the circumstances of this case, I think the imminence requirement cannot be met, and no reasonable factfinder could find that. That is not even addressing the issue of unlawful force, which is the imminent danger of that use. (Vol 12, p. 218)

I argue in this section that it is lawful to save a person's life by shooting someone who has already planned his death but will only act on the plan in 24 hours, not immediately— and when shooting the murderer is a last resort, after it is clear that appeals to the police go unheard because of the murderer's political influence. Does the word "imminence" in Kansas law require punishment of a good Samaritan whose actions would be fully lawful if the danger were immediate?

Consider the scenario posited by LaFave & Scott, x5.7(d), 656, citing 2 P. Robinson, Criminal Law Defenses x131(c)(1)(1984):

> "Suppose A kidnaps and confines D with the announced intention of killing him one week later. D has an opportunity to kill A and escape each morning as A brings him his daily ration. Taken literally, the imminent requirement would prevent D from using deadly force in self-defense until A is standing over him with a knife, but that outcome seems inappropriate. *** The proper inquiry is not the immediacy of the threat but the immediacy of the response necessary in defense. If the threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self-defense must permit him to act earlier - as early as is required to defend himself effectively."

I have said before that I acted as the closing of the window of opportunity to save lives became near in time. Robinson says the same thing with different words: "The proper inquiry is not the immediacy of the threat but the immediacy of the response necessary in defense. If the threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self-defense must permit him to act earlier - as early as is required to defend himself effectively."

K.S.A. x21-3403 defines the defense of voluntary manslaughter as killing with "an unreasonable but honest belief that circumstances existed that justified deadly force under K.S.A. x21-3211".

The Kansas defense-of-others statute, K.S.A. x21-3211 says:

> (a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such force is necessary to defend such person or a third person against such other's imminent use of unlawful force.
> (b) A person is justified in the use of deadly force under circumstances described in subsection (a) if such person reasonably believes deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person.

The trial judge's ruling was wrong, because "imminent" does not mean "happening at this very minute", but "impending". What is crucial is that the threatened harm be not merely possible, or even merely likely, but that it be highly probable— that without preventive action we may reasonably say it will occur.

In other words, to the extent "immediacy" plays any role in weighing "imminency", "imminent" means "too near in time for any less violent alternative to the defendant's action". [2010 pro se brief, p. 84. Please see pp. 83-95 for further cases and argument.]

The purpose of the statute is clear: it is to provide safety from prosecution for private citizens who fill the place of the police when the police are not available to

prevent someone from breaking the law. The statute does not allow citizens to use more force than necessary, nor to use force to act somene from acting lawfully, nor to use force to punish someone for crimes they already committed. Thus, it does not legalize what most people think of as vigilanteism, which is private punishment of criminals after the crime has already occurred. What the statute does is to structure a criminal justice system that makes efficient use of both public and private agents of the state. The state defines crime, and delegates power to prevent crime to people whom it pays to prevent it— the police— and to others who serve without pay— private citizens. A policeman is punished by his supervisors if he fails to act, but a private citizen is usually free to allow crime to occur (not always—reporting some crimes, for example, is mandatory). The use of force by police and private citizen is equally legal and legitimate within the different bounds the law provides for each.

That the police are assigned more scope for force than private citizens is not a matter of principle, but prudence. In the 1970's there was an academic debate on this between two sets of celebrated scholars. Nobel laureates Becker and Stigler argued that justice would work more efficiently if privatized, with the courts providing bounties to whoever properly caught criminals. Law professors Landes and Posner (now a judge) argued that it would be efficient to use government police because private citizens would expend too much time pursuing the bounties.

It might appear that every American state agrees with Landes and Posner and uses government police rather than privatizing. It is often said that the government has a monopoly on violence. But that is not true. Every U.S. state uses a compromise system, allowing some violence by private citizens and some by the police to enforce the law. Bail bondsmen and private jails are one example. The state entrusts prisoners to private

parties and allows them to use force to make prisoners obey the law and return to court, because private enterprise can do some things at less cost than government agencies.

Self-defense is another example. If the government really retained a monopoly on violence, it would prosecute anyone acting in self-defense, requiring them to suffer battery or murder passively.

Most people would prefer to have the police stop the attack rather than do it themselves, but that would require assigning everyone a permanent bodyguard, which is too costly. Instead, the states in effect deputize every citizen to defend himself.

And so it is with defense of others.

The most common reason why a citizen needs to use force himself rather than calling on the police is that time is too short to call the police. The key to self defense, however, is that the citizen's own force is necessary, not that the police are far away. This applies equally if the police are present, but unwilling to act.

This unwillingness could be because the police do not believe a crime is going to occur, or because the police do not object to the crime. Consider the citizen who is unlawfully assaulted by a policeman. Can he defend himself? He cannot argue that it is too difficult to call the police, since the policeman is right there, beating him up. His self-defense is lawful, however, because the policeman has chosen in a particularly vivid way not to enforce the law. The same would be true if the assailant were a friend of the policeman, and the policeman stood by as a spectator.

A jury would decide whether self defense was "necessary" in such cases.

This category of crimes that the police could prevent but are unwilling to prevent is crucial to civil liberties. Kansas law, I argue, does not require citizens to stand by idly when the law is broken simply because the elected officials and their employees tolerate

crime. If the sheriff's nephew tries to beat me up, and I fight him off, the sheriff might well arrest me and the county prosecutor might well choose to prosecute me, not the nephew. It is important that the law allows me to argue self-defense. Thus, the law should not exclude evidence relating to my motivation for breaking the sheriff's nose.

If the county judge is another friend of the sheriff, or if I am a member of an unpopular minority that always loses elections for all these county offices, it is important that I be able to make my case before a jury of randomly chosen citizen. And it is important that if I lose at the local level, I can appeal to a higher court and that court is not required by law to exclude evidence relating to self-defense.

The statute provides efficient incentives for private citizens to enforce the law. They may use violence, but only at their own peril, because they must prove to the satisfaction of a jury that the violence was to prevent definite, unlawful, and highly likely harm, that it was necessary if the probability of the harm was to be brought to zero. If the case is one of self-defense, the citizen's reward for helping enforce the law is his own preservation. If it is defense of others, his reward is a feeling of duty well done. His penalty if he makes a mistake in enforcing the law is to go to prison.

Balancing satisfied feelings against time in Lansing Correctional Facility, the citizen is unlikely to err on the side of too much defense of others.

Adding the element of time before the unlawful harm is to occur introduces nothing new to the reasoning that sometimes private action is necessary when official action fails. The Kansas statute requires the citizen's force to be "necessary" and the danger to be "imminent". Does this mean the harm must be "immediate"?

Suppose Hometown County has been taken over by the mob, as Cicero, Illinois was in the 1920's. The mob leader amuses himself by each Monday by announcing that

he will shoot a random woman the following Friday, and each Friday for six weeks he carries out his threat. Citizens ask the county prosecutor to prosecute, but he answers nervously that he doesn't think the evidence is sufficient to obtain a conviction. On the seventh Wednesday, John Doe shoots the mobster from a nearby building. Surrounded by national reporters, Doe surrenders himself to the police, and nobody dares murder him. The prosecutor does, however, press murder charges against Doe, and moves to exclude any evidence relating to the mobster's past and future murder threats, on the grounds that the threatened Friday killing, at least 24 hours away, was not "imminent death or great bodily harm to such person or a third person". The county judge agrees, and Doe is convicted by a puzzled jury which were instructed to decide only whether Doe killed the mobster with premeditation and wonders why, after confessing to the killing on the witness stand, Doe is still pleading innocent.

The case goes to an appellate court uninfluenced by the mob. Should it agree with the trial judge?

Surely the real question that should matter in a case like this is whether it was necessary and appropriate for Doe to kill to prevent the unlawful use of force, not whether the unlawful use was going to happen immediately. If we take "imminent" to mean "immediate" or "within a very short space of time", then the word "imminent" only serves to defeat the purpose of the statute. If, on the other hand, we take "imminent" in its everyday and usual statutory meaning of "ready to take place" or "hanging over one's head", the timing is flexible but the the term "imminent" does impose a requirement that the harm be definite and impending rather than merely possible, and near enough in time to rule out less violent alternatives.

Nearness in time to the harm prevented, per se, is not an useful criteria of

imminence, to anyone who cares about saving lives. As I point out in my pro se brief [p. 86-95], federal cases justified defendants in situations where the danger might not have occurred for months, but which could have struck at any time.

But there are two sensible tests implied by the element of "imminence": (1) the inevitability of harm if no preventive action is taken – the ruling out of less violent alternatives because of the nearness of time, and (2) the timing of the closing of the window of opportunity to prevent the harm. [p. 84, 87, 2010 pro se brief]

The rest of the brief will support the claim that "imminent" means "ready to take place", which will not necessarily take place within 22 hours, depending on the situation.

B2: **Ordinary language doesn't limit "imminent" to "less than a day"**

In interpreting statutes, the general meaning of a word is relevant, if not conclusive. "Imminent" derives from the Latin "imminens" meaning "projecting" or "threatening", and ultimately from "mons", meaning mountain. The Merriam Webster Dictionary [http://search.eb.com/dictionary?va=imminent&x=0&y=0] defines "imminence" as:

> ready to take place; especially : hanging threateningly over one's head <was in imminent danger of being run over>

The Oxford English Dictionary defines "imminence" as

> 1. Of an event, etc. (almost always of evil or danger): Impending threateningly, hanging over one's head; ready to befall or overtake one; close at hand in its incidence; coming on shortly. 1528 GARDINER in Pocock Rec. Ref. I. l. 115 Fear..being so imminent and lately felt.1555 EDEN Decades 103 Preseruation from so many imminent perels. 1593 SHAKES.
> 2 Hen. VI, V. iii. 19 You haue defended me from imminent death. 1604 emem Oth. I. iii. 136 Haire-breadth scapes i' th' imminent deadly breach. a1661 FULLER Worthies (1840) III. 3 Presaging their intended and imminent destruction. 1769 ROBERTSON Chas. V (1813) III. VII. 26 To oppose, first of all, the nearest and most imminent danger. 1875 STUBBS Const. Hist. III. xviii. 27 Invasion was imminent. 1883 C. J. WILLS Mod. Persia 330 In an

> Austrian lottery..a drawing was imminent. y2. Remaining fixed or intent (upon something). Obs. [L. imminemacre in sense to be intent upon.] 1641 MILTON Reform. II. 65 Their eyes ever imminent upon worldly matters.
>
> 3. In literal sense: Projecting or leaning forward; overhanging. 1727 W. MATHER Yng. Man's Comp. 27 Eminent, famous. Iminent, over head.1858 HAWTHORNE Fr. & It. Jrnls. (1872) I. 38 Heights began to rise imminent above our way. (http://dictionary.oed.com/cgi/entry/50112509?single=1&query type=word&queryword=imminent&first=1&max to show=10 OED Online SECOND EDITION 1989)

Notice in example two that an "invasion" may be said to be "imminent". A military invasion of a nation is a prime example of the absurdity of defining "imminent" apart from context, and as never meaning an event as far into the future as 2 hours because that was too far into the future to be counted as "imminent" in the situation of State v. Hernandez, 253 Kan. 705 (1993).

A Google News search for "imminent" on April 23, 2010, the only day I could arrange to have checked, turns up the following headlines on the first page:

> "Seattle Seahawks' Pete Carroll: Walter Jones retirement imminent"
> "ARM denies imminent Apple takeover"
> "UN Official: No Imminent War On Lebanon"
> "Earth Day: 40 years of imminent catastrophe"
> "Buzz Update: Tiger Woods Divorce Imminent, Lindsay Lohan's Dad ..."
> "Dodd Says New Reform Language Imminent"
> "Facebook Credits are imminent, says Zuckerberg"
> "An Imminent Government Crackdown on Salt?"
> "Dutchess Rail Trail construction imminent"

In none of these headlines is "imminent" limited to "less than 24 hours."

In some of them the timing is at some uncertain time, perhaps immediate, and in some it is not immediately, but in a few days, weeks, or months. The last article, for example, says "The Dutchess Rail Trail's third stage of construction may begin as early as next week". In all of them, the meaning is "ready to take place". Evidence that in common usage "imminent" means "ready to take place" or "impending", and not "within a day" could easily be multiplied.

B3. Kansas law doesn't limit "imminent" to "less than a day"

In general, Kansas law uses "imminent" in its everyday meaning. For example, the Kansas Corporation Commission said in one case,

> A five-day response time is not unreasonable, especially in light of the imminent filing deadlines and discovery delays. (In the Matter of the Application of Sunflower Electric Power, Kansas Corporation Commission, 1999 Kan. PUC LEXIS 135, February 17, 1999)

In another case, on February 16, the Commission staff asked that a comment period be shortened to end on February 24 because of a corporate agreement that would expire March 1.

> Due to the imminent expiration period, the Commission finds that the response time allowed parties under K.A.R. 82-1-218 shall be shortened until noon on February, 24, 1999. (In the Matter of the Investigation of Actions of Western Resources, Kansas Corporation Commission, 2002 Kan. PUC LEXIS 520, May 6, 2002)

The Kansas Attorney-General has used "imminent" as if it means possibly far enough in the future for bureaucrats to investigate workplace hazards, order remedies, and for the remedies to be carried out – as if the word could not possibly mean "within 24 hours":

> If the secretary of human resources determines that conditions or products in any place of employment are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately, or before such danger can be eliminated through the enforcement provisions otherwise provided by law, the secretary may order the immediate taking of any steps necessary to avoid, correct or remove such imminent danger and prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists, except individuals whose presence is necessary to avoid, correct or remove such imminent danger or to prevent any avoidable loss of production facilities or product. (K.S.A. 1978 Supp. 44-636(d) 2)

We could no doubt find other examples in Kansas law of "imminent" meaning "impending" rather than "immediate". That would be helpful, since the examples above are not from court decisions.

B4. Kansas case law doesn't limit "imminent" to "less than a day", and in no case was force plausibly necessary to forestall danger but declared unjustified because the danger was too distant in time.

Is "imminent" a term of art in Kansas criminal law, having a meaning of proximity in time that is different from its dictionary, everyday, or Kansas civil law meaning?

It is true that in Kansas criminal law, "imminent" has been used to mean "close in time," but not in distinction to "ready to take place". (Even "close in time" or "within 24 hours" would make this a question of fact for the jury.)

In the cases in which imminence has been used to mean "close in time", the facts are such that if the courts had instead said "ready to take place" the decision would have been the same, because the fact patterns are generally that the defendant makes an implausible claim of justification when his violence was to forestall an indefinite danger or an emotion-driven threat whose danger was far enough in the future that less violent alternatives could have been resorted to, so that his use of force lacked necessity. In none of these cases was the danger so imminent that he could not have gone to the police or tried to avert the danger with talk instead of violence. In no case did the Court say that the danger was real and impending, and that defendant's force was necessary to prevent it, but that his defense was barred because the danger was not immediate.

At some point the law shifted from "present danger" or "immediate" to "imminent".

Some trial judges were slow in catching on, and used the word "immediate" in self-defense cases, and the Supreme Court told them to use "imminent" instead. There was a rash of battered wives cases then, too. I will discuss these in the following

paragraphs.

> " . . .when there shall be reasonable cause to apprehend a design to commit a felony or to do some great personal injury, and there shall be immediate danger of such design being accomplished. . . ." (See Note, Charles Kline, 1 Washburn L.J. 149 1960-1962, which discusses State v. Jones, 1985 Kan. 235 (1959). 7G.S. Kan. 1949, 21-404 allowed self-defense)

In State v. Hundley, a battered wife shot her husband when he threatened her and reached for a beer bottle. She pled self-defense. The trial court instructed that self-defense was justified only if a defendant reasonably believed his conduct was necessary to defend himself against an aggressor's "immediate" use of force. The Supreme Court said that was reversible error: the word "imminent" should have been used. The Court said:

> "Immediate" is defined in Webster's Third New International Dictionary (1961): "Occurring, acting or accomplished without loss of time." p. 1129 "Imminent" is defined as: "Ready to take place . . . impending." p. 1130. Therefore, the time limitations in the use of the word "immediate" are much stricter than those with the use of the word "imminent." State v. Hundley, 236 Kan. 461, 466 (1985).

State v. Osbey similarly reversed a trial court that used "immediate" instead of "imminent" in a jury instruction regarding self-defense by a wife, judging the difference large enough to justify reversal:

> While only one word was involved, this word was critical to Osbey's perception of the need to defend herself. That one word was sufficient to establish reversible error. State v. Osbey, 238 Kan. 280, 283 (1985).

In State v. Hodges, yet another trial court was reversed for using "immediate" instead of "imminent" in a jury instruction regarding self-defense by a wife:

> The word "immediate" does not conform to the statutory word "imminent," as the State contends. The use of the word "imminent" does not place undue emphasis on the nature and effect of the history of violence. Rather, it allows the jury to determine, based upon all the evidence before it, including the history of violence and the events just prior to the shooting, whether defendant's [*75] claim of self-defense was reasonable in light of all the circumstances. [italics in original] State v. Hodges, 239 Kan. 63, 74 (1986) .

State v. Stewart might seem to say the reverse, but that is illusory. Peggy Stewart

had run away from her husband to Oklahoma, feeling suicidal. She returned voluntarily, and on the day she returned, her husband threatened to kill her if she ever left again. That evening, as her husband was asleep, she shot him, though she had access to the car keys and could easily have left. The court ruled that the danger was not imminent.

> In order to instruct a jury on self-defense, there must be some showing of an imminent threat . . . whether circumstances surrounding the killing were sufficient to create a reasonable belief in the defendant that the use of deadly force was necessary. . . . Under such circumstances, a battered woman cannot reasonably fear imminent life-threatening danger from her sleeping spouse. (State v. Stewart 243 Kan. 639, 646, 1988).

What is crucial is not that Peggy Stewart was safe until her husband awoke, but that she had returned to live with them, that she could easily have left before he awoke, and that his threat of death was conditional upon her leaving again, which she did not do. The danger was not "imminent", but for a more important reason than that it was not "immediate" or "within 24 hours": because the danger was unclear and she could in any case avert it in other ways than by killing him.

A careless glance at other states' precedents might suggest "imminent" has indeed been used to mean "immediate" there. For example, a California court said in In re Christian S., 7 Cal. 4th 768 :

> "[f]ear of future harm-no matter how great the fear and no matter how great the likelihood of the harm-will not suffice." 7 Cal. 4th at 783. It concluded that "the trier of fact must find an actual fear of an imminent harm. Without this finding, imperfect self-defense is no defense." 7 Cal. 4th at 783.

This harmonizes with my understanding of "imminence". I agree that greatness of fear is not a factor at all. I agree the certainty of harm, alone, is not enough to justify violent action. There must also be no less violent alternative. Or, if there is a less violent alternative, there must be too little time to avail oneself of it. Or the window of opportunity for such an alternative must be closing. Although "nearness in time" without

context is a standard with sometimes absurd results, I agree danger must be "near enough in time" to foreclose peaceful alternatives, and in particular the closing of the window of opportunity to prevent an absolutely certain harm must be very near in time.

Perhaps the best evidence that "imminent" is not a legal term of art connoting "immediate" comes from Kansas jury instructions, as routinely accepted by the Kansas Supreme Court. Kansas self-defense jury instructions use the word "imminent" without further explanation, which presumably means the jury are to use the normal, dictionary meaning of the word, not some special legal meaning.

Two cases, State v. Hernandez, 253 Kan. 705 (1993) and State v. White, 284 Kan. 333, might seem to go the other way and imply that imminent has a purely temporal meaning. But even the trial court, discussing White, acknowledged the issue was not a matter of shortness of time but "there was no present danger, no danger readily at hand because the grandson wasn't at the Walmart store" (Vol 12, p. 217) and the reason 2 hours away was not "imminent" in Hernandez was because "That two-hour window still provided opportunities to call the police, to seek some other intervention short of deadly force." (Vol 12, p. 218)

Nevertheless the trial court overlooked the difference that for me, there was no less violent alternative I could have pursued during the 22 hours between my action and the killings I prevented:

> Mr. Roeder by his own admission says the next event that he had to intervene on would have been 22 hours later. So under the circumstances of this case, I think the imminence requirement cannot be met, and no reasonable factfinder could find that. Volume 12, p. 218

In State v. White, 284 Kan. 333, defendant grandfather White thought his daughter's boyfriend was molesting his grandson, so he shot the boyfriend at work, some hours before the boyfriend was going to see the grandson again.

> But White did not provide any evidence that he believed B.A.W. was in imminent danger at the time of the shooting. At that time, Aaron, the purported abuser, was not in the presence of B.A.W., the purported victim. Indeed, because White went to Aaron's Wal-Mart workplace, it would be quite difficult for him to present evidence that he honestly believed his 5-year-old grandson was there and that abuse was imminent.

In State v. Hernandez, 253 Kan. 705 (1993), a husband threatened his wife, so defendant Hernandez, the wife's brother, shot the husband at work, some hours before he was going to meet the wife again. The supposed threat was that the husband might harm the wife, who was about to divorce him, because in arguments he had threatened to shoot her.. As the White court said (at 708-9):

> The day of the victim's death, he told his wife at work that she had until 11 a.m. that morning to make up her mind and that he "hope[d] like hell" she would make the right decision. 253 Kan. at 707. Her brother, who worked at the same factory, was informed [***34] of these episodes. He then retrieved a gun from his car and invited the victim outside to talk. When they walked outside, the brother [*351] asked the victim what was going on. When the victim replied that what he did to the sister was none of the brother's business and started forward, the brother shot him three times. He testified that several shots were to stop the victim from going after his sister, e.g.: "[T]he whole time my mind was on my sister. . . . I thought maybe he was gonna take me down and then go in [the adjoining factory] after my sister." . . .Hernandez believed that Randy would kill his sister at 11:00 a.m. She was not present when Hernandez killed Randy. The history of violence could not turn the killing into a situation of imminent danger. The trial court correctly determined that .K.S.A. 21-3211 [***35] requires at least an imminently dangerous situation at the time of the killing before a defense-of-another instruction should be given. Although the term imminent describes a broader time [**221] frame than immediate, the term imminent is not without limit. The danger must be near at hand.

Neither White nor Hernandez tried to contact the police, verify that the threat existed, or remove the threatened person from the danger by simply moving them to a different place. Thus, the Court clearly was correct in deciding that even under the alleged facts the defendant was not justified in using force. The language the court used to rule out defense-of-others was "imminence", saying that the time gap of several hours meant that the danger was too remote.

Neither case turned on "imminent" meaning "immediate", however. Rather, in both it was clearly not "necessary" for the killers to kill the victims to avert the threat, because the killers had plenty of time and opportunity to take less extreme measures. In both, the word "imminent" was used as if it meant that the danger had to be so likely that unless the defendant acted immediately, the threatened event would happen. In neither case, however, was it mere lapse of time that mattered. Instead, it was that during the period of time before the impending harm the defendant could have averted the event by less drastic means than killing.

State v. Hunt 270 Kan. 203 (2000) might be raised, but it is irrelevant. Hunt thought he was in danger from the drug dealer who supplied him. He arranged to visit the police, but first he shot the victim and a woman who was nearby.

> Hunt also seeks to expand this "defense" to take into account more than just the immediate circumstances of his killing Williams. He has argued that stories that had been related to him about the ruthlessness of the drug suppliers [***13] he was dealing with had made him generally fearful for his own and his family's safety. The supposedly frightening context in which he acted, however, lends no credence to his defense. With the help of Charlie Walker, Hunt had an appointment to talk with the sheriff and drug enforcement agents. In the meantime, at Walker's suggestion, Hunt had removed himself, his girlfriend, and his daughter from harm's way. But Hunt chose not to stay out of harm's way. On his own volition, Hunt armed himself, left the motel room in Minneapolis, drove to Salina, and went to Williams' house in the middle of the night. [*210] Thus, the defendant's own actions in the "bigger picture" as well as in the immediate circumstances of Williams' death run counter to the defense he asserts.

Thus, the Court did admit the possibility of the bigger picture would be relevant. But it wasn't, in Hunt.

The unpublished State v. Vann, 212 P.3d 263 might also be brought up (Kan. App. unpublisbed, 2009). Vann attacked the victim at the victim's store after escalating run-ins throughout the day, and the Kansas Court of Appeals said:

> Vann's testimony did not show that he was in imminent danger of great bodily

> harm when he initiated the final shooting incident at Donnell's mini-mart. Fear of some future harm is not adequate to show a person is in imminent danger, nor will a history of violence suffice to show imminent danger; the danger must be imminent at the time of the shooting.

"Imminent" is not being used here to mean "immediate", or to refer to time at all. Rather, it is being used to mean "impendng": Vann had argued with his victim, but his facts could not support a finding that unless he shot the victim he would be shot himself. Most arguments, even with violent people, do not end up with violence. Threats of violence are routine, but for that very reason they are not credible. Indeed, a threat delivered with unemotional matter-of-factness is more credible than the threats to kill that we commonly encounter.

Actions speak louder than words. That is why courts more often say that a threat is imminent when it is evidenced by actions which the defendant observes than by words that he (or she) hears. An example is State v. Bench, 188 P.3d 42 (Kan. App. 2008). Best told Bench to get out of his truck and when she objected, reached for what she thought (on the pleadings) was a gun. She then stabbed him to death.

> With regard to the lesser included voluntary manslaughter instruction, the district court allowed the jury to consider whether [*11] Bench's conduct was an "intentional killing upon an unreasonable but honest belief that circumstances existed that justified deadly force" in defense of a person. See K.S.A. 21-3403; PIK Crim. 3d 56.05B. This imperfect self defense basis for voluntary manslaughter was appropriate given Best's defense.

Another case that might be mentioned is State v. Rose, 30 Kan. 501, 1 P. 817 (Kan. 1883). The defendant fought his victim to prevent his victim's violence in "future time" (a phrase used before "imminent" came into use). The holding in that case is that "future time" does not mean every time except the very second of the start of a fight. Indeed, "present time" could be a century long:

> "Present time" usually means a period of time of some appreciable duration, and generally of some considerable duration. It may mean a day, a year, or a

> century. We often speak of the present century and of future centuries. "Present time" usually means some period of time within which certain transactions are to take place; and "future time" usually means a period of time to come after such present time, and after the period of time when such transactions have actually taken [**821] place. The time that the court had in contemplation as present time when it gave this instruction was evidently the time during which the defendant and Ware were engaged in their final conflict which resulted in the death of Ware; and the time which the court had in contemplation as "future time" was evidently some period of time which would necessarily and in the natural order of things take place subsequently and at some indefinite period of time after that conflict had finally [***10] ended.

Thus, Kansas cases have allowed force to forestall unlawful violence when the threat of unlawful violence was impending, but not otherwise. The crucial fact to establish for the jury or judge is that the defendant had to use force to prevent unlawful force, which would be false if enough time remained that the defendant could have averted the harm by other means. Imminence was not mere proximity in time, but the likelihood that the threatened harm would occur if action were not taken.

B5. U.S. law doesn't limit "imminent" to "less than a day"

As well as Kansas law and everyday language, federal law uses "imminent" to mean "ready to take place" in contradistinction to "immediate". This is relevant not because US law is binding on Kansas courts, but to help illuminate the meaning of "imminent" generally and in legal usage.

Article I, x10, cl. 3, of the Constitution of the United States says

> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay .

"Imminent" surely does not mean "within 24 hours" here. In this context, danger distant enough in time to build ships was called "imminent" by America's Founders! Rather, the question is whether otherwise unlawful action may be taken because delay

would be too harmful. The same is true of federal statutes. Section 13(a) of the OSHA Act (http://www.osha.gov/as/opa/worker/danger.html) defines imminent danger as

> .....any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.

In this context, danger distant enough in time to be prevented by the slowly turning wheels of bureaucratic enforcement machinery is still considered "imminent".

The U.S. Supreme Court said in Meghrig v. KFC Western, Inc. 516 U.S. 479, *485-486, (U.S. 1996):

> The meaning of this [imminence] timing restriction is plain: An endangerment can only be "imminent" if it "threaten[s] to occur immediately,"....(T)his language implies that there must be a threat which is present now, although the impact of the threat may not be felt until later."

"There must be a threat which is present now" may include a threat whose impact can strike even before preventative measures can be taken, but it is specifically the lingering threat distant enough in time to exist after preventative action can be taken, that is justified by preventative action, and is called "imminent". Otherwise states could not defend themselves from invasion, and OSHA could not eliminate workplace dangers.

In Meghrig, the Supreme Court cited approvingly Price v. U.S. Navy 39 F.3d 1011, *1019 (C.A.9 (Cal.),1994) :

> A finding of imminency does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present: An imminent hazard may be declared at any point in a chain of events which may ultimately result in harm . . . citing, Environmental Defense Fund, Inc. v. Environmental Protection Agency, 465 F.2d 528, 535 (D.C.Cir.1972)(internal quotes omitted)

The Supreme Court has specifically found that "on the eve of" an event is "imminent" to it, the time frame in the Roeder case. Speaking of a lawyer making prejudicial public statements "imminently" before trial, it said:

> A statement which reaches the attention of the venire on the eve of voir dire might require a continuance or cause difficulties in securing an impartial jury, and at the very least could complicate the jury selection process. Gentile v. State Bar of Nevada 501 U.S. 1030, *1044, 111 S.Ct. 2720, **2729 (U.S. (Nev.),1991)

We may add federal lower court decisions, too. In U.S. v. Stevens, 985 F. 2d 1175, the defendant claimed he had been coerced into selling drugs. The underlying conspiracy lasted at least 10 months. Notwithstanding this fact, the trial court permitted the defendant to present all his duress evidence to the jury, and in fact instructed the jury on the duress defense. While the jury did not find it credible, the duress defense was available as a matter of law to a defendant who claimed, at most, a generalized fear which lasted ten solid months, during which time he was not said to have been living under the physical control of the man he accused of coercion. It was properly left to the jury to assess the credibility of his claim that he was under duress. In that jurisdiction, a claimed "imminence" spanning 10 months is adequate to allow a duress defense to go before a jury, and indeed to generate jury instructions.

Please consider my observations about U.S. v. Gomez 92 F.3d 770 (C.A.9 (Cal.),1996) at pp. 87-90 in my Jan 8, 2010 pro se brief, where "a history of futile attempts revealed the illusionary benefits of the alternatives." p. 778.

In United States v. Contento-Pachon, 723 F.2d 691 (9th Cir.1984), the court reversed a conviction because the trial court had abused its discretion in granting a government motion in limine like the one in Kansas v. Roeder. The defendant smuggled drugs under duress, he said, because he had been threatened three weeks prior by someone who "...had gone to the trouble to discover that Contento-Pachon was married, that he had a child, the names of his wife and child, and the location of his residence..." Id at 694. The district court ruled that the threats were not immediate enough because

"they were conditioned on defendants failure to cooperate in the future and did not place defendant and his family in immediate danger", Id at 694. Although the defendant had offered nothing to substantiate his claim that he was under surveillance for at least part of that time, the appellate court ruled "(t)hese were not "vague threats of possible future harm", and the threatened harm was immediate enough to ground a prima facie claim of duress." Id at 694. "Imminent", in this context, was judged to stretch at least three weeks.

In U.S. v. Haney 287 F.3d 1266, *1273 (C.A.10 (Colo.), 2002), a prison inmate was allowed to present a third-party duress defense to a jury although the threat had occurred two weeks prior to his conduct. The imminence of the threat was left to the jury.

Please consider my observations about U.S. v. Kpomassie 323 F.Supp.2d 894, (W.D.Tenn.,2004) on p. 91 of my pro se brief, where "immediate" was a question for the jury even though the action was at the beginning of a flight to Africa with stops in Atlanta and Paris.

The question of imminence has come up in the "battered woman" cases of various states, but in a way unhelpful to the present question. In the typical "battered woman" murder case, a woman abused by her husband has killed him and raises the defense that the husband would have used lethal force against her in the future, even though he was not at the time of the killing (when, for example, he might be asleep).

Courts rule against self-defense in those cases, but lack of imminence is not the only problem. Rather, in the typical case (a) the woman could have retreated, leaving the husband and moving to live somewhere else, (b) the woman could have appealed to the law, and (c) the danger of lethal harm from the husband was unlikely, since he had abused and threatened the wife illegally but not lethally. These cases do not present credible evidence that killing the husband was necessary to prevent lethal danger. It is not just a

matter of timing.

The relevant self-defense precedent would be a case in which evidence shows that the person killed would certainly have murdered the murder defendant in the future, even if the defendant had fled and sought police protection, had the defendant not pre-emptively attacked. We know of no such cases.

B6. The self-defense statute does not make sense if force must be "necessary and immediate but not ready to take place", while it does make sense if force must be "necessary and ready to take place, but not immediate."

As my heading says, the self-defense statute does not make sense if force must be "necessary and immediate but not ready to take place", while it does make sense if force must be "necessary and ready to take place, but not immediate." The essence is the necessity of immediate action, not the immediacy of the harm.

The Model Penal Code omits the word "imminent". This prevents confusion over whether the timing of force matters.

> x3.05. Use of Force for the Protection of Other Persons.
> (1) Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable to protect a third person when:
> (a) the actor would be justified under Section 3.04 in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect; and
> (b) under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and
> (c) the actor believes that his intervention is necessary for the protection of such other person.

Kansas law should make it clear that "imminent" refers to "ready to take place unless stopped now". In most cases, this coincides with "immediate", but not in all.

C. *City of Wichita v. Tilson*, 855 P.2d 911 (Kan. 1993)

Issue 7: Necessity, justifying repulse of a legal harm, is available in Kansas

The Court misread *Tilson* in its reason for ruling against the Necessity Defense:

> "Whether the necessity defense should be adopted or recognized in Kansas may best be left for another day." *Tilson*
>
> "I'm reaffirming my previous denial of the necessity defense. It's not recognized in Kansas....Necessity always has to be less than the harm it perceives to stop. Taking the life of Dr. Tiller is no less than taking the life, again for argument sake, of an unborn baby. So Necessity fails by its very definition...." (January 8 pretrial hearing, p. 17, 8-9)

Or, Tiller had killed only one baby, and there is no difference between the right to life of one who kills and one who is killed. By that reasoning, self defense is against the law because the victim has no more right to life than his killer.

The Court noted my confusion over *Tilson's* line between the Necessity Defense and the Defense of Others.

> Mr. Roeder asked for an explanation on the necessity defense. And he wasn't quite sure whether there was a partial necessity defense left when we talk about the use of force in defense of others. (P. 6, Jan 8, 2010 pretrial transcript)

The Court was referring to point #2 of my "Motion to Reconsider" filed that day, which asked what evidence I was allowed to submit in support of the Defense of Others, a defense not yet ruled unavailable, after Necessity had been ruled unavailable, since (1) *City of Wichita v. Tilson*, 855 P.2d 911 (Kan. 1993) didn't doubt the availability of Defense of Others, (2) but doubted the availability of the Necessity Defense, (3) even though it said the former came under the "umbrella" of the latter, and (4) it didn't explain any difference between the two.

The purpose of this section is to explore what difference there may be between the two, and whether, with that difference clarified, it ought to be recognized in Kansas. But

before that will appear relevant, it is necessary to address how *Tilson* reached its conclusion that neither defense is available for preventing abortion.

Elizabeth Tilson blocked an abortionist's door to prevent human mothers from walking through them to murder their human babies – a characterization of the facts with which the district court substantially agreed. Her express motive was to save human lives. She even brought expert witnesses into the trial to prove that the lives she saved were human beings. The prosecution didn't dispute this evidence, but called it "irrelevant".

> At trial, over the objections of the City, the defendant was allowed to introduce expert testimony on the question of when life begins. The City did not attempt to controvert such evidence but instead took the position that the evidence was inadmissible because it was irrelevant. *(Tilson)*

Even a jury's concurrence that those abortions I stopped which were "legal" were the most cruel, barbaric, stomach-turning genocide, would be "irrelevant", according to "The City". But the Court said saving human beings wasn't Tilson's motive, but rather "preventing a law-abiding citizen from exercising her legal and constitutional rights".

> To allow the personal, ethical, moral, or religious beliefs of a person, no matter how sincere or well-intended, as a justification for criminal activity aimed at *preventing a law-abiding citizen from exercising her legal and constitutional rights* would not only lead to chaos but would be tantamount to sanctioning anarchy.
>
> Defendant argues that as she had expert medical testimony that life begins at conception, the necessity defense must be allowed. We do not agree. When the objective sought is to *prevent by criminal activity a lawful, constitutional right,* the defense of necessity is inapplicable, and evidence of when life begins is irrelevant and should not have been admitted. *Tilson.*

Do these two paragraphs indeed say that *Tilson* substituted the defendant's formal defense with an easily ridiculed defense before ruling against her? If so, this leaves the case silent on whether a defendant whose actual motive was saving lives would find relief through the Necessity Defense. Not to mention raising the question whether such a substitution violates Due Process.

Or do these two paragraphs accept that the defendant may indeed have saved innocent human beings, but that is not allowed to interfere with another woman's constitutional right to murder those same innocent human beings?

Tilson can't mean that. Courts can't say that. That is where the proverbial frog jumps out of the boiling water. When a law or precedent deliberately, openly, publicly protects unnecessary destruction of innocent human life, it defies the very purpose of law, undermines the Rule of Law, and leads to judicial anarchy.

> "The care of human life and happiness, and not their destruction, is the first and only legitimate object of good government." --Thomas Jefferson, letter to The Republican Citizens of Washington County, Maryland, 1809

In the following selection, *Tilson* says "violating the law...motivated by [alleged] higher principles" invites "utter chaos". Of course it does, if you mean all a defendant has to do to be acquitted of violating a law is to "insist that he was justified".

But *Tilson* glossed over the fact that the law we are talking about legalizes killing human beings whom numerous legal authorities have recognized as "persons", (2010 pro se brief, p. 57-61, besides the post-*Tilson* legal recognition of that fact in 18 U.S.C. § 1841(d) - 2010 pro se brief, p. 12-20), and which no legal authority has declared are not! How much greater "utter chaos" can a society suffer than laws subverting the very purpose of laws by protecting killers of innocent human beings? Here's *Tilson:*

> "...appellant ... insists that he was justified in violating the law in this case because his actions were motivated by higher principles. To accept appellant's argument would be tantamount to judicially sanctioning vigilantism. If every person were to act upon his or her personal beliefs in this manner, and we were to sanction the act, the result would be utter chaos. In a society of laws and not of individuals, we cannot allow each individual to determine, based upon his or her personal beliefs. whether another person may exercise her constitutional rights and then allow that individual to assert the defense of justification to escape criminal liability." 372 Pa. Super. at 543-44. *Com. v. Wall*, 372 Pa. Super. 534, quoted with approval by *Tilson.*

Tilson had to misstate routine legal procedure to reach its conclusion. No prolife

defendant has asked any court to let "every person...act upon his or her personal beliefs... [and expect courts] to sanction the act"! Our petitions to courts have been to allow juries to weigh the only contested fact issue in most of our trials, (see "Right to trial by jury", section 2 of my 2010 pro se brief, Pages 25-30) which has been whether those we save are, in fact, "third persons". We don't ask that juries empower our "personal beliefs" to dictate "whether another person may exercise her constitutional rights"! We ask juries to compare millions of innocent human beings slain with the "harm" of preventing people from committing legal murder – the very inquiry which *Roe* invites, and indeed demands.

> If this suggestion of personhood is [ever] established [by Triers of Fact, since the Supreme Court is "not in a position to speculate" about "when life begins"], the appellant's case [for legalizing abortion], of course, collapses, for *the fetus' right to life would then be guaranteed specifically by the [14th] Amendment.* Roe v. Wade: 410 U.S. 113.

How is it "anarchy" for a court to allow evidence to resolve the fact question which *Roe* placed so much importance on resolving? How is it *not* judicial anarchy for a court to censor from the knowledge of Triers of Fact the single unresolved fact question upon which the decision hangs which has overturned the laws of most of the states and plunged America into its bitterest division for the past 39 years?

Tilson leaves *Roe's* "collapse" clause twisting in the wind by opining that no amount of actual harm can be justified – not the most cruel, barbaric, unthinkable, stomach-turning genocide – if the Constitution *might* protect it. (*Roe* didn't say abortion is unequivocally constitutionally protected. It said it looks like it is, assuming unborn babies aren't human beings or "persons", a fact question about which the *Roe* justices declared they were "not in a position to speculate". They said, in effect, "abortion *might* be constitutionally protected. We cannot tell.") *Tilson* quoted these cases with favor:

> ...the defense of necessity asserted here cannot be utilized when the harm sought to be avoided (abortion) remains a constitutionally protected activity and the harm incurred (trespass) is in violation of the law." 784 S.W.2d at 192. In State v. O'Brien, 784 S.W.2d 187 (Mo. App. 1989),
>
> By denying abortion classification as a harm the law has determined that the greater harm per se is in the criminal conduct. The defense of necessity which has been created by the law may not, therefore, be employed to justify or excuse it." Kettering v. Berry, 57 Ohio App.3d at 68-69.
>
> We find that a legally sanctioned activity cannot be termed a public disaster." Com. v. Markum, 373 Pa. Super at 349.

There are four legal problems with this reasoning.

1. Laws don't change facts. The Necessity Defense deals with actual harm. The legal status of a harm is irrelevant according to Robinson and Wharton. (Analysis follows. See also my 2010 pro se brief, page 49.)

2. *Roe's* "constitutional protection" was conditioned on uncertainty whether the unborn are "third persons". Therefore tentative "constitutional protection" cannot become evidence that the unborn are in fact *not* "third persons", or precedent against the admission of evidence that the unborn are in fact "third persons".

3. This reasoning would outlaw Necessity in all situations where the prevented harm is legal. It would reduce the Rule of Law to mindless legalism. (2010 pro se brief, Part 3, pp. 33-56)

It would become battery to knock down another to keep him from running into the path of an oncoming car; criminal destruction of property, to steer your car into someone's garage to avoid hitting a child; kidnapping, to keep a friend from leaving your home to go cook mushrooms you know are poisonous but he insists are not; robbery, to take away his mushrooms by force; driving without a license, for a 12-year-old to take the steering wheel and coast to a stop when the driver has a heart attack.

Normally the rightness of these actions is so obvious that prosecutors don't prosecute them, and if they do, governors pardon. But not always, so we can't rely solely

on executive discretion to save us from mindless legalism. We need sensible laws too.

4. *Tilson* scorned *Roe's* "collapse" clause by not allowing "triers of fact" to weigh the fact question of whether the unborn I saved are "third persons". (Since 2004 that has already been decided, by federal law. See my 2010 pro se brief, p. 9-25.)

Roe v. Wade treats the issue of the humanity/personhood of the unborn as so relevant, that once it is established by triers of fact, abortion can no longer be legal.

> If this suggestion of personhood is [ever] established [by Triers of Fact, since the Supreme Court is "not in a position to speculate" about "when life begins"], the appellant's case [for legalizing abortion], of course, collapses, for *the fetus' right to life would then be guaranteed specifically by the [14th] Amendment.* Roe v. Wade: 410 U.S. 113.

The statement to the contrary that "abortion is not a legally recognized interest to promote" (*Tilson*, quoting *State v. Sahr,* 470 N.W.2d 185 (N.D. 1991) replaces *Roe's* subjection to a yet-to-be-resolved fact with protection of abortion so decided that it is irreversible and immune to any conceivable onslaught of evidence. To cling to the statement now, even after 18 U.S.C. § 1841 has positively and absolutely established the "legally recognized interest" of the innocent human beings attacked by abortion, is to subvert *Roe,* the 14th Amendment "equal protection of the laws", the Rule of Law, and the purpose of law. (See more argument at p. 23, 2010 pro se brief.)

Admittedly there is no legal protection of unborn babies as *Roe* may be said to characterize them: *first trimester unborn babies whose humanity is in doubt, whose mothers want them dead.*

However, *Roe* legally protects, indeed *constitutionally* protects, *human life*, even of first trimester babies. Even *Roe* "legally recognizes" killing unborn human beings as a harm – serious enough to "collapse" *Roe* rather than knowingly allow such harm. *Roe* even invites evidence from fact finders to establish "when life begins" for the express

purpose of "collapsing" *Roe* should life turn out to begin at conception, before a single unborn human being can knowingly be slain by unthinkably cruel abortion. "Of course" abortion should then be outlawed, *Roe* says.

Roe, taken at its word, respects human life and would never knowingly endanger it. *Roe* allowed abortion only after failing to find any legislative history, case, or statute with the express purpose of protecting unborn life:

> Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life. Pointing to the absence of *legislative history* to support the contention, they claim that most state laws were designed solely to protect the woman....*no case could be cited* that holds that a fetus is a person within the meaning of the Fourteenth Amendment. …. we there would not have indulged in *statutory interpretation* favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection. *Roe v. Wade,* 410 U.S. 113.

The two preceding *Roe* excerpts indicate that a statutory definition of the personhood of the unborn should entirely defeat any right to abortion. Reinforcing 18 U.S.C. § 1841(d), KS 21-3452 affirms the full humanity of the unborn from fertilization.

> An "unborn child" is "a living individual organism of the species homo sapiens, in utero, at any stage of gestation from fertilization to birth" 21-3452(b)(2)

KS 21-3452(d) classifies slaying an unborn child as murder. Its penalties exempt abortions, but its *definition* of "unborn child" has no exemptions. See p. 20-22 of my 2010 Pro Se brief regarding the disparate treatment of "wanted" and "unwanted" babies.

Tilson's phobia about conflicting opinions is its explanation why courts should not allow juries to learn about Necessity's "Comparison of Harms", and why it is a life saver, not a court, who foments anarchy and tries to "circumvent the effect of Roe":

> *(Tilson, Page* 917:) Under Roe, an abortion during the first trimester of pregnancy is not a legally recognizable injury, and therefore, defendants' trespass was not justified by reason of necessity.
>
> "Defendants attempt to *circumvent the effect of Roe* and to bolster their

> defense of necessity by arguing that they reasonably believed that they acted to prevent the destruction of human life. They point to language in Roe in which the court declined to speculate on when human life begins. [Citation omitted.] Defendants argue that life begins at the time of conception, and that they were denied due process of law because the trial court refused to admit evidence which was proffered to support this contention.
>
> "True, in Roe, the court acknowledged the existence of competing views regarding the point at which life begins. However, the Court declined to adopt the position that life begins at conception, giving recognition instead to the right of a woman to make her own abortion decision during the first trimester. [Citation omitted.] *We do not believe that the Court in Roe intended courts to make a case-by-case judicial determination of when life begins.* We therefore reject defendants' argument." *People v. Krizka* 92 III.App.8d at 290-91, 48 Ill.Dec. 141, 416 N.E.2d 36 (quoted in *Tilson*)

The Court's bottom line was not any response to the evidence that abortion is, in fact, barbaric genocide, but the Court's "belief", not citing any authority for such a "belief" in Roe, law, or case law, that "we do not believe that the Court in Roe intended courts to make a case-by-case judicial determination of when life begins."

It is unlikely that the *Roe* justices, who treated "when life begins" as a fact issue which the justices had less capacity to resolve than doctors and preachers...

> When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus (on "when life begins"), the judiciary...is not in a position to speculate as to the answer. Roe v. Wade: 410 U.S. 113.

...and who invited triers of fact to resolve it even if that meant *Roe's* "collapse", could not have anticipated the possibility of resolution through future cases. And surely the *Roe* justices understood that case law is not established by a single case that then automatically prevails across the nation for all time, but by a series of cases with somewhat competing arguments and rulings. "Precedent" is sort of an average of them. Juries likewise establish facts, and the acceptability of various arguments, only as prosecutors and defense teams study thousands of varying verdicts to estimate what strategies seem to work, and what claims of facts juries will accept.

Tilson's fear of case-by-case anarchy from answering *Roe's* invitation to establish the factual nature of abortion is fear of the *everyday operation of American law.* The opposite of *Tilson's* claim is true. *Roe does* invite Triers of Fact – juries – to establish the Facts of "when life begins" in the only way possible: case by case.

WHAT "NECESSITY" COVERS, THAT "DEFENSE OF OTHERS" DOESN'T

Wharton articulates what Necessity justifies, that Defense of Others does not: prevention of harms that are *lawful.*

> "The distinction between necessity and self-defense consists principally in the fact that while self-defense excuses the repulse of a wrong, *necessity justifies the invasion of a right.* It is therefore essential to self-defense that it should be a defense against a present unlawful attack, while *necessity may be maintained through destroying conditions that are lawful.*" (Wharton, *Criminal Law*, Section 126, 128.)

The Necessity Defense, as understood generally across America, recognizes that innocent human life is threatened by many things – some of them legal, some of them even "constitutionally protected" – and human decency requires the right to defend it from any and all threats, regardless of the threats' legal status.

"Professor Robinson", quoted in *Tilson,* likewise does not limit Necessity to preventing only unlawful force:

> Conduct constituting an offense is justified if.
> (1) any *legally-protected interest* is unjustifiably threatened or an opportunity to further such an interest is presented; and
> (2) the actor engages in conduct, constituting the offense,
> (a) when and to the extent necessary to protect or further the interest,
> (b) that avoids a harm or evil or furthers a *legal interest greater than the harm* or evil caused by actor's conduct. (Italics in original.) 2 Robinson, Criminal Law Defenses § 124(a) pp. 45-46 (1984).

Tilson agrees, right after quoting Robinson: "*The harm* or evil which a defendant, who asserts the necessity defense, seeks to prevent *must be a legal harm....*" However, *Tilson's* opening summary says the opposite: "...necessity can*not* be used when the harm

sought to be avoided is a constitutionally protected *legal* activity....” (See my 2010 pro se brief, p. 50-51.) If the latter statement is *Tilson's* meaning, *Tilson* appears to contradict Wharton and Robinson. But if Wharton and Robinson are correct, then Necessity justifies stopping a legal harm, unlike the Defense of Others which only justifies stopping “unlawful force”. That is a significant enough difference to account for the unnamed distinction between the two defenses made by *Tilson*, that leaves the latter available but the former in doubt. Point #3, on p. 44 of this brief, gives examples of absurdities that would result from ruling Necessity unavailable in Kansas. Those, plus Wharton, Robinson, and half of Tilson, are my argument for recognizing Necessity in Kansas.

Robinson's “legally protected interest”, according to Elizabeth Tilson, was innocent human life. Robinson's version of the Necessity Defense would argue *“innocent human life* is a legally protected interest; therefore protecting it from any threat is justified: the legal status of the *threat* [abortion] is irrelevant.” *Tilson* appears to reason “*obedience to the letter of the law* is a legally protected interest; therefore protecting it from any threat is justified; the humanity of the law's *victims* is irrelevant.”

Or, “If killing babies is constitutionally protected, how can it be legal to save them from being killed? But since it is legal to save human beings, babies must not be legally recognizable as human beings. Letting juries decide would be anarchy. Therefore a law allowing me to kill you places your humanity in doubt, since of course it can't be the law which is in doubt.” Similar reasoning justified slavery.

> (Applied to the classic Necessity example, whether it is legal to break down your neighbor's door to save him from a fire:) Tilson would say it may be relevant, after all, whether your neighbor is a human being. What must first be established is whether the fire was legal. [ie. was it caused by wiring which had recently passed inspection?] If the fire is illegal, you are fine. You may save your neighbor because he is a human being. But if the fire was perfectly legal, then you cannot say your “interest” is saving life; nay, your purpose must be put down as “preventing a legal fire”, which is plainly illegal. Evidence that

> your neighbor is a human being is "irrelevant". Evidence that the fire is killing a human being in the most cruel manner is "not legally cognizable". (Pro se brief, Jan 8, 2011, page 52; for more analysis of *Tilson's* treatment of *Robinson* please see pages 47-52.)

Tilson tragically orders that whether or not a harm we want to prevent *is unthinkably harmful – even genocide itself* – is "irrelevant", so long as it is "legal". If it is "legal", we must stand aside and allow it to ravage us and those we love. Yea, not only "we", but every judge and jury in America!

Everything depends on whether an unborn baby is an innocent human being or a "blob of tissue". We can put off change as long as we can define "abortion" as "the destruction of flesh of whose humanity we cannot tell". We can ignore *Roe's* call to resolve that uncertainty as soon as we can. But 18 USC §1841 removes the alleged uncertainty. It fills in the brackets, and the results aren't pretty.

> ...the defense of justification by necessity cannot be used when the harm sought to be avoided *[abortion of innocent human beings whose souls cry out to God as their precious perfect bodies are being dismembered, or as their brains are being sucked out while they are being born]* is a constitutionally protected legal activity and the harm incurred is in violation of the law...

Were this the clear position of either *Tilson* or *Roe*, the proverbial frog would jump out of the boiling water! Too much tyranny, too fast! Abortion's survival rests upon keeping the humanity of the unborn "unknown", and where proved, "irrelevant".

Conclusion

For the foregoing reasons, this Court should order a new trial with instructions that the Court's errors not be repeated.

Respectfully submitted,

(Signed)_____
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Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was made by delivering one copy each, to:

David Lowden, Chief Attorney, Appeals Div., 1900 East Morris, Wichita, KS 67211;

Derek Schmidt, Attorney General, Kansas Judicial Center, Topeka, KS 66612;

Rachel Pickering, #21747, Kansas Appellate Defender Office Jayhawk Tower, 700 Jackson, Suite 900 Topeka, Kansas 66603;

and 16 copies to the

Kansas Supreme Court, 301 SW 10th St, Kansas Judicial Center, Topeka KS 66612.

The date of my signing this Certificate of Service and the signature page of the brief is the ___ day of January, 2012. However, the date of mailing is later because I am not allowed to receive more than an ounce of mail at a time by the Lansing mail room. This means I am not allowed to receive a complete bound typewritten copy of my brief, prepared with outside help, which I can then send to you from here; so I must sign the signature pages and mail them to my outside help, to be copied and assembled with the rest of the briefs, for mailing from there. Since I have no control over how promptly my jailers will mail the signature pages, or how long the post office will take to get them to my outside help, the date of mailing of these briefs can't be filled out by me but is entered by my outside help. The date of actual mailing is the _____ day of January, 2012.

Signed _____

Scott P. Roeder