375 U.S. 85, 86-87, 11 L. Ed. 2d 171, 84 S. Ct. 229 [1963]).

One reason why the district court denied Mr. Roeder's instruction request was because the court ruled that abortion, in general, was legal. (R. XXI, 220-21.) The district court failed to consider the defense's argument that Mr. Roeder believed that Dr. Tiller was performing illegal abortions. In accordance with *Shannon,* the evidence supported that Mr. Roeder "honestly believed the aggressor was performing an unlawful act." *Shannon,* 425 Kan. 425, Syl. 4.

As noted by defense counsel at the motion to quash subpoena hearing, to present the theory of voluntary manslaughter, defense was "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." (R. XX, 112, 119.) The court's ruling prevented Mr. Roeder from building his case; the rulings prevented the defense from establishing the necessary building blocks to support the theory of defense. (R. XX, 119.) The court excluded material evidence which went to Mr. Roeder's honest but unreasonable belief about the unlawful nature of Dr. Tiller's abortion practice and the urgency to act after Dr. Tiller's acquittal.

The court interfered with Mr. Roeder's constitutional right to present a defense by excluding evidence that was an integral part of his theory of defense. This Court must reverse and remand for a new trial.

Issue 3: The district court erred in denying the motion for a change of venue because the history of conflict and the surrounding publicity in the Wichita community was a demonstrable reality that was reasonably certain to prejudice Mr. Roeder's right to a fair trial.

Introduction

Although jurors expressed an understanding of the need to be "fair and impartial," the decades-long conflict in Wichita arising from Dr. Tiller's abortion practice and the

media coverage generated in the past and around this case warranted that the district court grant Mr. Roeder's motion for a change of venue.

This Court has applied an abuse of discretion standard to this issue and has required "a showing of prejudice to the substantial rights of the defendant." *State v. Higgenbotham*, 271 Kan. 582, 591, 23 P.3d 874 (2001).

Argument

The right to a jury trial guarantees to the accused a fair trial "by a panel of impartial, indifferent jurors." *State v. Cady*, 248 Kan. 743, 754, 811 P.2d 1130 (1991). K.S.A. 22-2616(1) provides that:

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

The defendant has the burden to show prejudice exists in the community, not as a matter of speculation but as a demonstrable reality, and that the prejudice was such that it was reasonably certain he or she could not have obtained a fair trial. *Higgenbotham*, 271 Kan. at 591-2; *State v. Krider*, 41 Kan. App. 2d 368, 202 P.3d 722 (2009). This Court has held that "media publicity alone" does not establish "prejudice per se." *Higgenbotham*, 271 Kan. at 593 (quoting *State v. Ruebke*, 240 Kan. 493, 500, 731 P.2d 842 [1987]).

In *Higgenbotham*, the Court noted that in determining whether the atmosphere is such that a defendant's right to a fair trial would be jeopardized, courts have looked at such factors as:

> [T]he particular degree to which the publicity circulated throughout the community; the degree to which the publicity or that of a like nature

> circulated to other areas to which venue could be changed; the length of time which elapsed from the dissemination of the publicity to the date of trial; the care exercised and the ease encountered in the selection of the jury; the familiarity with the publicity complained of and its resultant effects, if any, upon the prospective jurors or the trial jurors; the challenges exercised by the defendant in the selection of the jury, both peremptory and for cause; the connection of government officials with the release of the publicity; the severity of the offense charged; and the particular size of the area from which the venire is drawn.

Higgenbotham, 271 Kan. at 592 (citing *State v. Jackson,* 262 Kan. 119, 129 [1997]).

District court proceedings

The defense moved for a change of venue and a transfer of the trial from Sedgwick County. (R. II, 1-4.) The supporting brief stated that:

> [T]he defendant is accused of shooting and killing an infamous late term abortionist, Dr. George Tiller. Dr. Tiller was one of only a handful of licensed medical professionals in the entire country who was willing to perform 2nd and 3rd Trimester abortions. The victim was outspoken regarding his professional actions, and was aggressive in the defense of his livelihood. As a result, a large and strong contingent of anti-abortion opponents remained vigilant in a likewise aggressive manner, and the victim's abortion clinic, located in Wichita, Kansas served as the epicenter of the abortion protest/debate for decades.
>
> The death of George Tiller represented the confluence of controversial issues deeply ingrained into the mindset of multiple generations of Wichita residents.

(R. II, 2.)

The motion for a change of venue noted the extensive coverage by the Wichita media in the form of television stations, radio stations, internet sites, and a major daily newspaper. "[T]he Wichita Eagle ran stories relating to the death of Dr. Tiller, and information regarding the defendant daily until June 11, 2009, some eleven days after the event .... the Sedgwick County District Attorney was widely quoted in the media claiming that the shooting of Dr. Tiller was 'an American act of terrorism.' " (R. II, 3.)

(Emphasis in original.)

In the defense motion, counsel stated that, "There is no precedent for the massive pretrial publicity garnered by the death of Dr. Tiller, and as such, a change of venue should be granted." (R. II, 3.) At the hearing on the motion, defense counsel argued that:

> When the entire pool of potential jurors has been continuously exposed to intense adverse pretrial publicity, the law will not trust the preservation of impartiality to answers given in voir dire. An assumption of a trial judge that a juror could disregard pretrial publicity because he is so instructed is a triumph of faith over experience. After potential jurors have been subject to such vast pretrial publicity, it becomes a a legal fiction to assume that jurors will preserve the presumption that a defendant is innocent.

(R. II, 4.) (Emphasis added.)

At a pretrial hearing, defense counsel argued that the pretrial publicity and the ongoing publicity justified a change of venue. (R. XIV, 4, 9.) The case had received "an unprecedented level of coverage," and the "level of exposure" would "ramp-up" as the trial approached. (R. XIV, 4, 9.) Counsel presented newspaper exhibits for the district court to review, numerous articles from the Wichita Eagle from June 1, 2009, through November 24, 2009. (R. XIV, 4, 7; XXX, Def. Exh. A-Z, Al-A6.)

Defense counsel noted that Dr. Tiller had been "well-known" in Wichita "for years and years and years." This case was "set against the background of the practice of abortion, which has been a hot button here in Wichita for years and years and years." (R. XIV, 5.) Counsel argued that with the "inordinate amount of negative publicity associated with Mr. Roeder, associated with the cause in which he believes, mainstream media, as well as perhaps Internet sources," that Mr. Roeder would not "get a fair and impartial trial" with a jury drawn from the Wichita area. (R. XIV, 15.)

Defense counsel argued that the legislature, through its statutory enactment, had contemplated a change of venue in this type of situation, and if a change of venue wasn't

warranted in this case, then "what kind of case would it happen in?" (R. XIV, 6-7.) "This case is ripe to be moved to an area where the jurors have not been so inundated, barraged, if you will, with information regarding this case and all the facts and the circumstances." (R. XIV, 7.)

The district court, noting that the court clerk has sent out three hundred summonses, ruled that it would be premature to rule on the motion until the court attempted to seat a jury that could be fair and impartial. (R. IV, 17-9; XVII, 8.)

The prospective jurors completed a jury questionnaire and the district court conducted individual voir dire sessions. The fourteen jurors selected to serve (jurors number 1, 9, 17, 18, 20, 21, 24, 26, 27, 29, 30, 33, 38, 39) stated that they were aware of the case or had followed the coverage through various media, such as the internet, newspaper, and television, and through conversations with other people. (R. XXIV, Vol. 1, p. 7, 21-22; Vol. 2, p. 86-7; Vol. 3, p. 76-8, 84-5, 116-17, 130-31, 185-6; Vol. 4, p. 21, 24, 34-7, 90-1, 106-9, 173, 188-9; Vol. 5, p. 66, 74-6.)

Juror One "looked at it in the newspaper and followed it early on." (R. XXIV, Vol. 1, p. 21-2.) Juror Nine said "that it was almost unavoidable to hear some media accounts of what happened." (R. XXIV, Vol. 2, p. 82.) Juror Nine said that since he had lived in Wichita all of his life, he couldn't help but know about Dr. Tiller: he was an abortion provider and there were protests at his clinic. (R. XXIV, Vol. 2, p. 87.) Juror Twenty-Six said that he knew of Dr. Tiller "from the protests along Kellogg, where his business was, and of course the media has been full of it." (R. XXIV, Vol. 4, p. 24.)

Juror Twenty-Seven said that from pretrial publicity, he had learned that Mr. Roeder had "admitted to the crime," and that the judge had disallowed a "necessity" defense and a change of venue. (R. XXIV, Vol. 4, ps. 35-8.) Juror Thirty said that the

last thing he heard (on local radio) when he was driving was "they were speculating about whether or not the former Attorney General (Kline) would be a witness." (R. XXIV, Vol. 4, p. 109-11.) Juror Thirty-Three said that Dr. Tiller "had been in and out of the media for years," and an attorney "was on TV a year or so ago trying to say that he did illegal abortions in some way." (R. XXIV, Vol. 4, p. 188.)

Juror Seventeen commented, "[T]here was a murder from everything I have heard." (R. XXIV, Vol. 3, p. 79, 82.) In response to the prosecutor's statements, including, "We are looking for jurors that can be open minded and not consider media accounts," Juror Seventeen said, "I think I pride myself on being fair and impartial." (R. XXIV, Vol. 3, p. 81-2.) Juror Eighteen had heard and knew, "just the basics, not like most people in the community, I'm sure in Wichita." (R. XXIV, Vol. 3, p. 85-6.)

When the attorneys inquired as to whether these prospective jurors could decide the case based on the evidence presented in court, or could be fair and impartial, the jurors acknowledged that they understood the concept or that they could follow it. (R. XXIV, Vol. 1, page 7, 22; Vol. 2, 84-5; Vol. 3, p. 81-2, 85, 122, 130-1, 187, 194; Vol. 4, 22, 39-40, 43, 96, 109, 191, 199; Vol. 5, p. 67, 69, 77-82.)

Prior to the court's swearing-in of the jury, Mr. Roeder's counsel renewed the motion for change of venue. (R. XVII, 9.) Counsel stated, "... I think every single juror indicated they were aware of the case, they were aware of Dr. Tiller, they were aware of Dr. Tiller's profession, they were aware of the general motivation for the alleged crime. We believe just on pretrial publicity alone, the motion should be granted." (R. XVII, 9.)

The district court noted that each juror had been examined as to whether he or she could base a verdict on the evidence presented, and not upon any pretrial or ongoing publicity. (R. XVII, 9.) The court denied the motion on the basis that it had been able to

impanel a jury (that said it could be) fair and impartial: "[T]here isn't such adverse pretrial publicity that we couldn't find a sufficient number of fair and impartial people to try the case." (R. XVII, 9-10.)

The prejudice in the Wichita community was too great.

As defense counsel noted, the killing of Dr. Tiller was not an isolated event. It followed "decades" wherein "the victim's abortion clinic, located in Wichita, Kansas served as the epicenter of the abortion protest/debate." (R. II, 2.) Dr. Tiller was an "infamous late term abortionist," one of only a few doctors in the United States "who was willing to perform 2nd and 3rd Trimester abortions," and Dr. Tiller was "outspoken" and "aggressive in the defense of his livelihood." In response, "a large and strong contingent of anti-abortion opponents remained vigilant in [an] aggressive manner." (R. II, 2.)

In the middle of this decades-long milieu were the residents of Wichita. Juror Twenty-Six noted "the protests along Kellogg [Street], where his [Dr. Tiller's] business was." (R. XXIV, Vol. 4, p. 24.) This entrenched conflict in the community had to affect the attitudes and perceptions of residents, even at a subconscious level. And, if a Wichita resident did not experience the conflict directly while that resident was driving along Kellogg, then the extensive media coverage disbursed the conflict into the community. The events of this case connected Wichita residents to all of the past disturbances and conflict in their community around the abortion issue. And, the extensive media coverage noted by defense counsel ensured that the community was saturated.

All of the history and interconnection of past and present events in Wichita warranted a change of venue. The court and the prosecutor, in their statements, reflected this interconnection between the community and the events. In denying Mr. Roeder's request for an instruction on second degree intentional murder, the district court stated

that the evidence supported that Mr. Roeder planned to kill Dr. Tiller "to eliminate the practice of abortion in this town, at his clinic." (R. XXI, 213.) (Emphasis added.) The State, in its closing argument, played into this theme of a community caught in the conflict, caught in the crossfire:

> On May 31st, that quiet Sunday, Wichita did change ... from a quiet community celebrating their Sabbath to a community terrorized.
>
> [O]n that day and the days before, when Scott Roeder contemplated taking the law into his own hands, he took it from the rest of us.

(R. XXII, 28.) (Emphasis added.)

As defense counsel noted, "the entire pool" of potential jurors had been exposed to intense adverse pretrial publicity. (R. II, 4.) Based upon the circumstances of this case, the district court could not rely on a juror's acknowledgment of the duty to disregard everything that juror had learned and only rely upon the evidence presented. Because of the prior history of conflict and the resulting prejudice in the Wichita community, the district court erred in denying the defense motion for a change of venue. In order to guarantee Mr. Roeder a fair trial, the district court was obligated to change venue.

Issue 4: The prosecutor's improper commentary in closing argument prejudiced Mr. Roeder's right to a fair trial and is reversible error.

Introduction

The prosecutor's closing argument to the jury was not fair commentary on the evidence because it only served to, (1) encourage the jury to consider factors outside of the evidence, and (2) appeal to the passions and prejudices of jurors.

This Court must remand for a new trial because the prosecutor's conduct was outside the latitude allowed and it violated Mr. Roeder's right to a fair trial. See *State v. Tosh,* 278 Kan. 83, 85, 91 P.3d 1204 (2004) (misconduct that violates the right to a fair trial is reversible error).

"When specific guarantees of the Bill of Rights are involved, courts must take special care to insure that prosecutorial misconduct in no way impermissibly infringes upon those guarantees." *State v. Cady*, 248 Kan. 743, Syl. 3, 811 P.2d 1130 (1991). "Denial of a fair trial violates the due process rights of the guilty defendant just as surely as those of the innocent one." *Tosh*, 278 Kan. at 97.

A contemporaneous objection is not required to preserve questions of prosecutorial misconduct for comments made during closing argument. This Court conducts a two-step analysis: (1) whether the conduct was outside the wide latitude allowed prosecutors when arguing cases; and (2) if so, whether that conduct deprived the defendant of a fair trial. *State v. King*, 288 Kan. 333, 334, 204 P.3d 585 (2009).

The prosecutorial misconduct

The prosecutor, in the second part of the State's closing argument, stated that:

> On May 31st, that quiet Sunday, Wichita did change ... from a quiet community celebrating their Sabbath to a community terrorized.
>
> [O]n that day and the days before, when Scott Roeder contemplated taking the law into his own hands, he took it from the rest of us.

(R. XXII, 28.)

> And while Gary Hoepner lives, as you saw even today, with the guilt of failing to stop this man, the killer, the defendant feels relieved at his success. And while in this courtroom the defendants pick through the State's case at the various witnesses and act incredulous after answers, the defendant is preparing his testimony, where he can proudly in a public forum take credit for his murder. And while he does so, it sends chills down the backs of conscientious people.

(R. XXII, 30.)

Appeal to passion and prejudice

Actions by a prosecutor that might invoke the jury's prejudice against the defendant are flagrant conduct. See ABA Standards for Criminal Justice 3-5.8(c) (3d. ed.

1993). (The prosecutor "should not make arguments calculated to appeal to the prejudices of the jury.")

The prosecutor's comments were an appeal to the jurors as part of a community that had been wronged. First, the prosecutor argued that the "community" had been victimized: "Wichita did change ... from a quiet community celebrating their Sabbath to a community terrorized." (R. XXII, 28.) (Emphasis added.) Then, the prosecutor made it personal to each juror: "[W]hen Scott Roeder contemplated taking the law into his own hands, he took it from the rest of us." (R. XXII, 28.)

These type of comments were designed to elicit anger and resentment in jurors, to appeal to raw negative emotions. The prosecutor argued that, "while Gary Hoepner lives, as you saw even today, with the guilt of failing to stop this man, the killer, the defendant feels relieved at his success." (R. XXII, 30.) This is not commentary on the evidence; it is a judgment designed to arouse jurors' anger.

The prosecutor stated that, "while in this courtroom the defendants pick through the State's case at the various witnesses and act incredulous after answers, the defendant is preparing his testimony, where he can proudly in a public forum take credit for his murder." (R. XXII, 30.) (Emphasis added.) Again, this is a character attack upon the defendant and his counsel, designed to elicit prejudice and anger. The prosecutor concludes, "[a]nd while he [Mr. Roeder] does so, it sends chills down the backs of conscientious people." (R. XXII, 30.) This comment is another call to judgment, to righteous indignation.

Through these comments, the prosecutor improperly distracted the jury from its role as fact-finder. See *State v. Lockhart,* 24 Kan. App. 2d 488, 492, 947 P.2d 461 (1997)

("Juries must be given an opportunity to exercise reason and sound judgment in deciding the facts of a case, free from passion and prejudice.") A prosecutor should not make statements intended to inflame the passions or prejudices of the jury or to divert the jury from its duty to decide the case based on the evidence and the controlling law. *Tosh*, 278 Kan. at 90.

Consider factors outside of the evidence

The prosecutor's commentary implied that the jury had a responsibility to convict, not based upon the evidence, but based upon some larger obligation. These comments were improper because the "prosecutor must guard against anything that could prejudice the minds of the jurors and hinder them from considering only the evidence adduced." *State v. Ruff*, 252 Kan. 625, 636, 847 P.2d 1258 (1993).

In *Ruff*, the "prosecutor's last statement to the jurors prior to their determination as to Ruffs guilt was that the jury had a duty to send a message to the community that certain conduct will not be tolerated." *Ruff* 252 Kan. at 636. In reversing the convictions, the Court held that, "The prosecutor's statement was improper and transcends the limits of fair discussion of the evidence." 252 Kan. at 636.

In *State v. Martinez*, 290 Kan. 992, 1015, 236 P.3d 481 (2010), the Court noted that:

> The State's comment urging the jury to tell A.G. "she did the right thing" by reporting the incident crosses this line because it appealed to the jurors' parental instincts and diverted their attention from the evidence and the law.

Martinez, 290 Kan. at 1015.

The prosecutor's argument in this case went beyond fair discussion of the evidence because the prosecutor told the jury to determine guilt based upon factors

outside of the evidence presented at trial. The jury's responsibility was to view the evidence, apply the law, and reach a verdict. The jury's duty did not reach any further than that. The jury did not have a responsibility to avenge a perceived wrong done to the community at large.

Conclusion

The first step of the prosecutorial misconduct analysis has been met because the prosecutor made improper comments that vouched for the State's evidence, encouraged the jury to consider factors outside of the evidence, and appealed to the passions and prejudices of jurors.

The misconduct warrants reversal

The second step requires the examination of three factors: (1) whether the misconduct was so gross and flagrant that it denied the accused a fair trial; (2) whether the remarks showed ill will by the prosecutor; and (3) whether the evidence against the defendant was of such a direct and overwhelming nature that the prosecutor's statements would not have much weight in the jurors' minds. None of these factors is controlling. The third factor can never override the first two factors until the harmlessness tests of both K.S.A. 2010 Supp. 60-261 (no reasonable probability that the error will or did affect the outcome of the trial) and *Chapman v. California,* 386 U.S. 18, 22, 87 S. Ct. 824 (1967) (no reasonable possibility that the error contributed to the verdict) have been met. *State v. Ward,* Kan. , P.3d , Op. No. 99,549, pg. 18 (July 29, 2011); *State v. Simmons,* Kan. , 254 P.3d 97, 99-100 (July 8, 2011).

The prosecutor's conduct described above was, by definition, gross and flagrant. The prosecutor's remarks were intentional, and from this intention, can be presumed. See, *State v. Tosh,* 278 Kan. 83, 91 P.3d 1204 (2004) ("[T]he cross-

examination and comments by the prosecutor were intentional and not done in good faith. They demonstrated the prosecutor's ill will.")

The prosecutor's improper commentary violated Mr. Roeder's right to fair jury deliberations by diverting the jury from its mandated task of reaching a verdict based solely upon the evidence and the law. The standard of K.S.A. 60-261 is satisfied because the error or defect in the prosecutor's closing argument prejudiced Mr. Roeder's substantial right to a fair trial.

Based upon the prosecutorial misconduct, this Court must reverse the convictions and remand for a new trial.

Issue 5: The district court violated Mr. Roeder's due process right by excluding a necessity defense and by failing to instruct on the necessity defense.

Background

Whether Mr. Roeder's constitutional right to a fair trial and to present a defense was violated is a question of law. *State v. White,* 279 Kan. 326, 332, 109 P.3d 1199 (2005).

Prior to voir dire, the State moved the district court to rule that Mr. Roeder could not present a necessity defense. (R. II, 14; XIV, 33.) Mr. Roeder had filed a lengthy pro se brief in support of a necessity defense. (R. II, 51, 55-100; III, 1-58.)

The State argued against allowing any defense arising out of necessity, stating that the necessity defense was not an acknowledged defense in Kansas. (R. XIV, 33-34.) In support, the State cited to *City of Wichita v. Tilson,* 253 Kan. 285, 855 P.2d 911 (1993), and a Florida case, which indicated that "abortion is not a harm that can be used to invoke the necessity defense." (R. XIV, 34.)

Defense counsel argued that the State's motion in limine was premature. (R. XIV, 43.) The defense explained that "all evidence overlaps itself, [and] can be used for many different reasons." (R. XIV, 45.) "[E]very question, every piece of evidence that we may seek to introduce goes to further our case and hold [the State] to their burden of proof" (R. XIV, 45.) The court reviewed *City of Wichita v. Tilson* and ruled that Mr. Roeder could not present the defense of necessity. (R. II, 41; XIV, 49-64.)

Argument

This Court has recognized that under the state and federal constitutions, a defendant is entitled to present the theory of his defense. *State v. Evans,* 275 Kan. 95, 102, 62 P.3d 220 (2003).

"Necessity is a common-law defense recognized in some jurisdi while in others it has been adopted by statute....It has been referred to by various terms ¸ including `justification,' `choice of evils,' or 'competing harms.'" *Tilson,* 253 Kan. at 288.

Mr. Roeder should have been able to present the alternative defense of necessity to the jury because the shooting was done in order to thwart Dr. Tiller's scheduled late-term abortions.

In *Tilson,* the defendant, an abortion protester, was charged with trespassing on the property of an abortion clinic. In defense, the defendant argued "that her actions were excused by the necessity defense." *Tilson,* 253 Kan. at 296. The trial court dismissed the conviction, the city appealed and this Court sustained the appeal.

In reaching that decision, the *Tilson* Court reviewed several other cases that held the necessity defense did not apply in abortion-trespass criminal prosecutions. This Court stated that the harm sought to be avoided was a constitutionally protected legal activity and the harm incurred was in violation of the law. *Tilson,* 253 Kan. at 285, Syl.

¶5. Under those circumstances, the defendant had "failed to demonstrate that the necessity defense would apply to this case even if the defense was recognized." *Tilson,* 253 Kan. at 296. The *Tilson* Court specifically stated that it would not rule either way as to whether the court recognized a necessity defense. *Tilson,* 253 Kan. at 296.

In contrast, in this case, the district court ruled that Kansas did not recognize a necessity defense. At the hearing, the district court quoted the *Tilson* opinion regarding this Court's decision not to decide whether the necessity defense was recognized in Kansas. (R. XIV, 58.) Despite this, the district court ruled, "The Kansas Supreme Court in the *Tilson* case *did not recognize the necessity defense,* although it did undertake the analysis of the defense to determine if it as even viable[.]" (R. XIV, 52-53.) (Emphasis added.) The court later ruled, "I think it's clear and *City of Wichita v. Tilson* requires this Court to rule as a matter of law that the necessity defense is not viable in the State of Kansas, it's not viable under the facts of this case, and cannot be presented to the jury at the time of trial." (R. XIV, 64.)

The district court's ruling is contrary to this Court's holding in *Tilson.* This Court has not yet ruled on whether it recognizes the necessity defense. See *Tilson,* 253 Kan. at 296; see also *City of Wichita v. Holick,* 151 P.3d 864, 2007 WL 518988 at *8, No . 95,340 (Feb. 16, 2007) (attached). Instead of ruling that the necessity defense is not viable in the State of Kansas, the district court should have allowed Mr. Roeder to at least present evidence as to how the late-term abortions being performed were not a constitutionally protected legal activity and that the harm incurred was not in violation of the law.

The exclusion of the necessity defense also affected Mr. Roeder's sentence. In its post-trial motion regarding the court's consideration of the State's trial evidence at sentencing, the defense noted that Mr. Roeder was unable to present evidence of the evils of abortion: "By precluding the defense from presenting evidence regarding the necessity

(or lesser-of-evils) defense at trial, the defense has been precluded from having such evidence available for sentencing." (R. VI, 39.)

The State's case against Mr. Roeder at sentencing included character accusations that he was "as assassin" and that this "act was an act of a terrorist Who was on his way to commit an act that would, he believed, make him a hero, bring him glory." (R. XIV, 36.) If Mr. Roeder had been able to present this defense, he would have showed that he was not a glory-seeking terrorist. Rather, he felt a moral need to stop one lesser evil over another. In his pro se motion on the necessity defense, Mr. Roeder stated his actions were done to stop the "unlawful harm" of abortion. (R. II, 77-79.)

Not only was the inability to present this defense violative of Mr. Roeder's constitutional right to present a defense, but it also harmed him when the court weighed the mitigating and aggravating factors at sentencing. Evidence that Mr. Roeder felt that shooting Dr. Tiller was the lesser-of-evils would have greatly assisted in proving the mitigating circumstance that Mr. Roeder's capacity to appreciate his conduct's criminality or to conform his conduct to the requirements of law was substantially impaired.

Ironically, while Mr. Roeder was prevented from presenting a defense based in part on moral and religious grounds, the district court used moral and religious grounds as one of the aggravating circumstances in imposing a hard 50 sentence. For the third aggravating circumstance, the court found the location chosen by Mr. Roeder to gain access Dr. Tiller was in "total disregard for the reverence that should be shown in a house of worship[.]" and thus the shooting was heinous, atrocious and cruel. (R. VI, 109.)

The court's pretrial ruling infringed on Mr. Roeder's right to present his theory of

defense and given the aggravating circumstances considered at sentencing, Mr. Roeder was prejudiced at sentencing by the ruling.

The district court erred in not providing a necessity instruction.

The court also erred in not instructing the ' y on the defense of necessity. Mr. Roeder requested the instruction. (R. IV, 80.) T e instruction read:

Necessity to defend others is an Affirmative Defense to the charge of First Degree Murder if you find that:

1. Mr. Roeder was faced with a choice of evils and chose the lesser evil;
2. That he acted to prevent imminent harm;
3. That he reasonably anticipated a casual relationship between his conduct and the harm to be avoided;
4. And that there were no other legal alternatives to violating the law.

(R. IV, 80.) See *United States v. Turner,* 44 F.3d 900, 901 (10th Cir. 1995) (setting out the four elements of the necessity defense).

Without the ability to raise a necessity defense, Mr. Roeder was unable to present relevant evidence in support of a necessity instruction. As a consequence, he was unable to present his defense to the jury. For example, in support of the element that Mr. Roeder was choosing the lesser of two evils, Mr. Roeder's motion in support of the necessity defense explained how abortion was an evil that "cannot be transformed into good by protecting it with law." (R. II, 77-79.) He argued that `Laci and Connor's Law," 18 U.S.C. 1841, had established "the humanity of the unborn," and thus, abortion was no longer "constitutionally protected." (R. II, 55.)

The district court's denial of presenting evidence under this theory of defense was premature. The district court should have allowed Mr. Roeder to present evidence

supporting the defense of necessity and then determine if there was sufficient evidence to instruct on the necessity defense.

This Court should reverse and remand for a new trial.

Issue 6: The district court erred in failing to give a requested instruction on the lesser included offense of intentional second degree murder.

Introduction

In reviewing this issue, this Court views that evidence in the light most favorable to the defendant. *Drennan,* 278 Kan. at 712-13. Generally, this Court does not weigh evidence or determine the credibility of witnesses. *Hodges v. Johnson,* 288 Kan. 56, 65, 199 P.3d 1251 (2009).

Mr. Roeder's counsel requested that the district court instruct the jury on the lesser included offense of second degree murder. (R. IV, 75; XXI, 207-08.) Counsel argued that the element of premeditation was "a question for the jury to decide," noting that the district court would be instructing the jury on the definition of premeditation. (R. XXI, 208.)

The district court has an affirmative duty to instruct the jury on all lesser included offenses when there is some evidence that would reasonably justify a conviction of that offense. *State v. Drennan,* 278 Kan. 704, 712-13, 101 P.3d 1218 (2004); *State v. Cordray,* 277 Kan. 43, 54-5, 82 P.3d 503 (2004). The instruction must be given even if the evidence is weak, inconclusive, and consists solely of the defendant's testimony. *State v. Kirkpatrick,* 286 Kan. 329, 334, 184 P.3d 247 (2008). However, an "instruction need not be given if the evidence would not have permitted a rational factfinder to find the defendant guilty" of the lesser offense. *State v. Young,* 277 Kan. 588, 599-600, 87 P.3d 308 (2004).

Argument

The district court denied counsel's request for an instruction on the lesser of second degree, stating that, "it would be hard for a reasonable fact finder to find anything other than the defendant formulating his belief," and planning his intention of killing Dr. Tiller in order to eliminate the practice of abortion at his clinic. (R. XXI, 213.)

The district court erred in refusing the requested instruction on the lesser offense of second degree murder because there was some evidence that would reasonably justify a conviction of that offense. Murder in the second degree is the killing of a human being committed intentionally. K.S.A. 21-3402. The offenses of first and second degree murder both require a specific intent to kill. See *State v. Hayes,* 270 Kan. 535, 543, 17 P.3d 317 (2001); *State v. Hill,* 242 Kan. 68, 81-3, 744 P.2d 1228 (1987).

While the evidence may reasonably justify a conviction of first degree murder, the evidence may also reasonably justify a conviction of second degree murder, because both crimes have the same element of an intentional killing. Mr. Roeder testified that when he saw Dr. Tiller, he "got up at that moment and followed him out, and in the foyer area and I did what I thought was needed to be done to protect the children. I shot him." (R. XX, 115.) That evidence supports a jury finding of an intentional killing.

K.S.A. 22-3414 provides that:

> In cases where there is some evidence which would reasonably justify a conviction of some lesser included crime as provided in subsection (2) of K.S.A. 21-3107 and amendments thereto, the judge shall instruct the jury as to the crime charged and any such lesser included crime.

K.S.A. 22-3414(3).

The statute does not say that the judge shall only instruct the jury as to the crimes that are best supported by the evidence. The statute requires an instruction on any lesser

offense for which there is some evidence that would reasonably justify a conviction. The evidence in this case supported a conviction of intentional second degree murder. It was then the role of the jury to determine whether to convict of the charged crime or whether to convict of a lesser offense supported by the evidence.

By refusing to instruct the jury on a lesser offense for which there was support in the evidence, the district court prevented the jury from performing its function, a role that is the cornerstone of our system of justice. In *Duncan v. Louisiana*, 391 U.S. 145, 155-156, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968), the Court ruled that the right to a jury determination was so significant that the States were required to afford a jury trial in serious criminal cases as part of their obligation to extend due process of law:

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and • justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government .... The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it .... Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Duncan, 391 U.S. at 155-6 (citing *Singer v. United States*, 380 U.S. 24, 31, 13 L. Ed. 2d 630, 83 S. Ct. 783 [1965]).

The district court had an obligation to instruct the jury as to the crime charged and any lesser included crime for which there was some evidence that would reasonably justify a conviction. See K.S.A. 22-3414(3). It was the role of the jury to choose between those crimes, the charged greater offense or the lesser included offense.

The evidence supported a conviction of intentional second degree murder. See *Young*, 277 Kan. at 599-600 (instruction on lesser offense warranted if the evidence would have permitted a guilty verdict). The district court erred in failing to so instruct, mandating reversal of the conviction.

Issue 7: **The district court erred in denying Mr. Roeder's requested instruction on the "defense of others."**

Background

This Court views the evidence in the light most favorable to the defendant. *State v. Drennan*, 278 Kan. 704, 712-13, 101 P.3d 1218 (2004).

In the set of proposed instructions prepared for the court, the defense requested the following defense of others instruction:

> Scott Roeder claims is use of force was permitted as the defense of another person(s).
>
> Scott Roeder is permitted to use force against another person when and to the extent that is appears to him and he reasonably believes such force is necessary to defend someone else against the other person's imminent use of unlawful force. Reasonable belief requires both a belief by defendant and the existence of facts that would persuade a reasonable person to that belief.
>
> When the use of force is permitted defense of someone else, there is no requirement to retreat.

(R. IV, 79.)

This instruction was based on PIK Crim. 3d 54.17. (R. IV, 79.) The district court did not include the instruction in its instructions to the jury. (R. VI, 76-87.)

Argument

A court is required to instruct the jury on the 'law applicable to defendant's *theories* for which there is supporting evidence.' " *State v. White,* 284 Kan. 333, 349, 161 P.3d 208 (2007) (citing *State v. Gonzalez*, 282 Kan. 73, 106, 145 P.3d 18 [2006]).

In *State v. White,* this Court explained, "The incompatibility of theories does not necessarily prevent instruction on both: "When a party requests instruction on alternative theories, the district judge must consider the instructions separately and determine if the evidence could support a verdict on either ground." (Emphasis added.) *White,* 284 Kan. at 349 (citing *United States v. Heredia,* 483 F.3d 913, 922 (9th Cir. 2007) (citing *Griffin v. United States,* 502 U.S. 46, 59, 116 L. Ed. 2d 371, 112 S. Ct. 466 [1991]); see also *State v. Scobee,* 242 Kan. 421, 426, 748 P.2d 862 (1988) ("It is not inconceivable that a defendant might assert ... alternative theories ... and that the evidence could support either theory depending upon the jury's belief of the evidence.").

To qualify for an instruction on defense of others, there must be some evidence presented at trial that the defendant reasonably believed force was necessary to defend others. See *State v. Sims,* 265 Kan. 166, 169, 960 P.2d 1271 (1998).

K.S.A. 21-3211 provides that 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 use of force is necessary to defend such person or third person against such other's imminent use of unlawful force."

The defense of others requires both a subjective and a reasonable belief that use of force was necessary. *State v. Wiggins,* 248 Kan. 526, Syl. ¶ 1, 808 P.2d 1383 (1991); see also PIK Crim. 3d 2008 Supp. 54.17, Comment. "A reasonable belief is one which arises from the existence of facts which would persuade a reasonable person to that belief." *Wiggins,* 248 Kan. 526, Syl. Par. 1.

In this case, Mr. Roeder did claim that his use of force was permitted as the defense of another persons(s). In the light most favorable to Mr. Roeder, he had presented testimonial evidence of his subjective belief that use of force was necessary. He testified that he was justified in using deadly force. (R. XXI, 115.) He explained that

the use of force was necessary to defend the "children" that Dr. Tiller would abort.

The defense of others also requires a reasonable belief that use of force was necessary, that is, whether the facts existed that would persuade a reasonable person to that belief. Viewing the evidence in the light most favorable to Mr. Roeder, a rational factfinder could find that Mr. Roeder had acted in defense of another, because Dr. Tiller had previously performed abortions and the following day, he would perform additional abortions. Due to the dismissed criminal charges filed against Dr. Tiller, Mr. Roeder presented evidence that Dr. Tiller's abortions could be judged unlawful. (R. XXI, 95-96.) Mr. Roeder testified that this was the only opportunity to stop Dr. Tiller.

The jury, not the court, should have been able to apply the objective standards to determine whether Mr. Roeder was justified in his use of force. Whether Mr. Roeder committed the offense in defense of others was a question for the jury. The court was required to instruct on use of force in defense of others based on Mr. Roeder's testimony of his subjective belief and evidence that the use of force was necessary.

The district court erred in not instructing on the requested use of force in defense of a person. Because this was a requested instruction, the question turns to whether the court's failure to instruct on the use of force was harmless error. There was overwhelming evidence of Mr. Roeder's subjective belief, and viewing the evidence in the light most favorable to Mr. Roeder, there was some evidence to form a reasonable belief that use of force was necessary, thus the error was not harmless. This Court must reverse and remand for a new trial.

Issue 8: Cumulative trial error substantially prejudiced Mr. Roeder and denied him a fair trial.

Cumulative trial errors may require reversal of a defendant's conviction "if the totality of circumstances substantially prejudiced the defendant and denied him a fair

trial." *State v. Lumbrera,* 252 Kan. 54, 57, 845 P.2d 609 (1992) (reversal for cumulative trial errors).

The Fifth, Sixth, and Fourteen Amendments to the United States Constitution guarantee the accused a fair trial before an impartial jury.

Even if the above errors are deemed harmless when viewed individually, the cumulative effect of these errors substantially prejudiced Mr. Roeder and "when viewed cumulatively in the totality of the circumstances herein," it is evident that Mr. Roeder did not receive a fair trial as guaranteed by the Fourteenth Amendment to the United States Constitution or Section Ten of the Kansas Bill of Rights. *State v. Lumbrera,* 252 Kan. at 57 (reversal for cumulative trial errors); see also *United States v. Wood,* 207 F.3d 1222 (10th Cir. 2000) (reversing involuntary manslaughter conviction even though evidence was sufficient to sustain conviction and nonconstitutional trial errors "might be harmless when viewed individually"; defendant's "right to a fair trial was substantially impaired" by cumulative effect of errors).

The cumulative effect of the errors challenged in Issues 1 through 7 substantially prejudiced Mr. Roeder and denied him the right to a fair trial. His convictions must be reversed and the case remanded for a new trial.

Sentencing Issues

Issue 1: The district court erred in finding three aggravating circumstances, which justified the imposition of a hard 50 sentence.

Introduction

"When a defendant challenges the sufficiency of evidence for establishing the existence of an aggravating circumstance in a hard 50 sentencing proceeding, the standard of review is whether, after a review of all the evidence, viewed in the light most favorable to the prosecution, a rational factfinder could have found the existence of the

aggravating circumstance by a preponderance of the evidence." *State v. Washington,* 280 Kan. 565, 568, 123 P.3d 1265 (2005).

The shooting death of Dr. Tiller, which resulted in his instant death, was not a murder that rose to the level of especially heinous, atrocious or cruel. The district court erred in finding aggravated circumstances. Mr. Roeder's actions did not meet the statutory definition of stalking because his actions did not cause Dr. Tiller to be "actually placed in fear" of Mr. Roeder. The court also failed to find that any alleged plans or preparation of the shooting indicated an intention that the shooting was meant to be especially heinous, atrocious or cruel. And the district court's reliance upon the location of the shooting, a church, as an aggravating circumstance was not "conduct" that was especially heinous, atrocious or cruel.

Legal standard

For a premeditated first degree murder conviction, the sentencing court shall determine whether to require imprisonment for 50 years without eligibility for parole. "If the aggravating circumstances outweigh the mitigating circumstances, the court must sentence the defendant to serve a minimum of 50 years before being eligible for parole." *State v. Baker,* 281 Kan. 997, 1018-19, 135 P.3d 1098 (2006); K.S.A. 21- 4635(d).

The legislature mandated that the aggravating circumstances *"shall be limited"* to the following:

> (f) The defendant committed the crime in an especially heinous, atrocious or cruel manner. A finding that the victim was aware of such victim's fate or had conscious pain and suffering as a result of the physical trauma that resulted in the victim's death is not necessary to find that the manner in which the defendant killed the victim was especially heinous, atrocious or cruel. In making a determination that the crime was committed in an especially heinous, atrocious or cruel manner, any of the following conduct by the defendant may be considered sufficient:

(1) Prior stalking of or criminal threats to the victim;
(2) preparation or planning, indicating an intention that the killing was meant to be especially heinous, atrocious or cruel;
(3) infliction of mental anguish or physical abuse before the victim's death;
(4) torture of the victim;
(5) continuous acts of violence begun before or continuing after the killing;
(6) desecration of the victim's body in a manner indicating a particular depravity of mind, either during or following the killing; or
(7) any other conduct in the opinion of the court that is especially heinous, atrocious or cruel.

K.S.A. 21-4636(f)(1)-(7)(Emphasis added.)

"All murders are heinous, atrocious, and cruel; however, exceptional circumstances must exist before a murder can be classified as such under K.S.A. 21-4643(f)." *State v. Holmes,* 278 Kan. 603, Syl. ¶ 21, 102 P.3d 406 (2004) (holding that evidence was insufficient to support aggravating circumstances and vacating hard 40 sentence). In *Holmes,* this Court explained that the hard 50 (previously a hard 40) sentence should be reserved for special cases. *Holmes,* 278 Kan. at 606. Otherwise, the *Holmes* Court explained, the legislature would have mandated the hard 50 sentence in *all* first degree murder cases. *Holmes,* 278 Kan. at 606.

Background

At the sentencing hearing, the State argued that Mr. Roeder committed the shooting in an especially heinous, atrocious, or cruel manner as defined under K.S.A. 21-4636(0. Specifically, the State argued that (1) Mr. Roeder's actions fell under K.S.A. 21-4636(f)(1), "prior stalking of or criminal threats to the victim" because Mr. Roeder stalked Dr. Tiller; (2) the court should find the aggravating circumstance of "preparation or planning, indicating an intention that the killing was meant to be especially heinous, atrocious or cruel" because of Mr. Roeder's preparation and plans to kill Dr. Tiller, and (3) the court should find that the shooting in a church was especially heinous, atrocious or

cruel. (R. XXIII, 32-44.) The State also argued that Mr. Roeder "knowing or purposely created a great risk of death to more than one person[.]" (R. VI, 2; XXIII, 28.)

The court rejected the State's argument that Mr. Roeder created a great risk of death to others. The court, however, found the following statutory aggravating circumstances: (1) prior stalking of or criminal threats to the victim; (2) preparation or planning, indicating an intention that the killing was meant to be especially heinous, atrocious or cruel; and 3) the shooting at the church was especially heinous, atrocious or cruel. (R. VI, 107-110; XXIII, 63-70.)

Regarding the aggravated circumstances of "prior stalking of or criminal threats to the victim," the State argued that Mr. Roeder had stalked Dr. Tiller by appearing at Dr. Tiller's church, clinic, and gated community, and thus, the shooting was committed in an especially heinous, atrocious, or cruel manner. (R. XXIII, 31-33.) While the stalking statute provides that the victim has to be fearful for his own safety, the State argued that Mr. Roeder's actions fell under the "common meaning" of stalking. (R. XXIII, 32.) "So under the rules of statutory construction we look to the plain meaning and to what exactly the common meaning would be of these issues regarding stalking and for criminal threats to the victim." (R. XXIII, 32.) The State argued, "Stalking is to pursue or approach your prey stealthily, to walk in quiet strides or to proceed in a steadily deliberate or sinister manner. They use it a lot as a verb, as in 'pursuing,' or 'prey,' for example, hunting game." (R. XXIII, 32.)

At the hearing, the defense explained that the State had provided no authority in support of its argument that the court should adopt the common meaning of stalking and find that aggravating circumstance. (R. XXIII, 51.) The defense argued that Mr

Roeder's actions did not fall under the statute of stalking because Dr. Tiller was never actually placed in fear for his safety. (R. XXIII, 51.) The defense noted that the State had stipulated that it did not know if Dr. Tiller believed he was being stalked by the defendant. (R. XXIII, 52.) The district court ruled that Mr. Roeder's actions did fall under stalking due to his appearances at Dr. Tiller's work and church. (R. XXIII, 65.)

In arguing against the second aggravating circumstance, "preparation or planning, indicating an intention that the killing was meant to be especially heinous, atrocious or cruel," the defense explained that the State had failed to present evidence "that he intended this to be especially heinous, atrocious or cruel, and there was no evidence that was his intention at all." (R. XXIII, 52.) Nevertheless, the district court found that Mr. Roeder's planning of the killing of Dr. Tiller was an aggravating circumstance. (R. VI, 108; XXIII, 67.)

The court began its ruling by outlining the different means that Mr. Roeder had contemplated to stop Dr. Tiller, including killing him. (R. XXIII, 67-68.) Although the court noted Mr. Roeder abandoned those thoughts and "ultimately decided that the church was the only accessible place for him to carry out his plan to kill Dr. Tiller." (R. VI, 108; XXIII, 69-70.) The district court did not state that Mr. Roeder's preparation or planning showed his intent to have Dr. Tiller's killing be especially heinous, atrocious, or cruel. (R. XXIII, 69.) After listing its reasons for finding this aggravating circumstance, the court stated, "So, again, the Court thinks there is a preponderance of the evidence to demonstrate preparation or planning as aggravating factors." (R. XXIII, 69.)

The court also found that the location where Dr. Tiller was fatally shot, namely a church, was an aggravating circumstance. At the hearing, the court stated:

> And it is, in this Court's opinion, an aggravating factor that Mr. Roeder chose a church, a house of God and place of worship, where one would expect to be safe and let their guard down. A church is suppose to be a place of peace and tranquility. If any place should provide a sanctuary or asylum from the violence in our society, a church should be one of the most obvious places.
>
> Mr. Roeder chose that because it was easy access. It provided him with the only real opportunity to accomplish his intended result, and he intentionally killed Dr. Tiller in the very place that abhors the use of violence, a church.

(R. VI, 109; XXIII, 69.) The court also found,

> Mr. Roeder shot and killed Dr. Tiller at point blank range, leaving him bleeding on the floor of the narthex, where everyone exiting from the sanctuary would see the horrific scene, including women, Dr. Tiller's family, as well as the other church members. The location chosen by the defendant to meet his need for access, and in total disregard for the reverence that should be shown in a house of worship, is in this court's opinion by itself, heinous, atrocious and cruel.

(R. VI, 109; XXIII, 69.)

As defined in K S.A. 21-46360(4 Mr. Roeder 's actions do not meet the statutory aggravating circumstance of "prior stalking of or criminal threats to the victim."

The legislature did not provide a definition of stalking in K.S.A. 21-4636(f). The State, however, argued that Mr. Roeder's actions met the "common term" of stalking. (R XXIII, 32.) This Court should reject the State's argument.

As a general rule, criminal statutes must be construed in favor of the accused. *State v. Jenkins*, 272 Kan. 1366, 1381, 39 P.3d 47 (2002). This Court should look to the stalking statute, K.S.A. 21-3438(a)(1), for guidance. Under K.S.A. 21-3438(a)(1), stalking is committed by:

> Intentionally or recklessly engaging in a course of conduct targeted at a specific person which would cause a reasonable person in the circumstances of the targeted person to fear for such person's safety, or the safety of a member of such person's immediate family *and the targeted person is actually placed in such fear.*

The State never presented evidence, nor argued that Dr. Tiller was aware of Mr. Roeder's

actions. (R. XXIII, 32-33.) One example that the court gave in support of stalking was that Mr. Roeder had gone to Dr. Tiller's church on numerous occasions. (R. XXIII, 66.) As a result, in this case, an essential element of stalking, that the targeted person, Dr. Tiller, was actually placed in such fear, was absent. Even viewing the evidence in a light most favorable to the State, no rational factfinder could find that Dr. Tiller was actually placed in fear by Mr. Roeder's actions. Mr. Roeder's conduct thus did not meet the statutory definition of stalking.

A similar argument was raised in *State v. Johnson,* 284 Kan. 18, 159 P.3d 161 (2007), wherein the defendant challenged the district court's findings of two aggravated circumstances under K.S.A. 21-4636, including the defendant's prior stalking. He also argued that his conduct did not meet the statutory definition of stalking under K.S.A. 21-3438. *Johnson,* 284 Kan. at 25. He specifically argued that his two confrontations with his live-in girlfriend, Griffin, "shortly before the murder are insufficient to establish the repetitive conduct which is the gravamen of stalking." *Johnson,* 284 Kan. at 25.

The *Johnson* Court did not reject the defendant's argument that his conduct had not met the statutory definition of stalking. *Johnson,* 284 Kan. at 25. This Court could have held that the defendant's actions did not have to meet all the elements under K.S.A. 21-3438 in order for the district court to consider it an aggravating circumstance under K.S.A. 21-4636(f)(1) . Instead, the *Johnson* Court affirmed the sentence under K.S.A. 21-4636(f)(7), "any other conduct in the opinion of the court that is especially heinous, atrocious or cruel."

The *Johnson* Court explained that the district court was permitted under K.S.A. 21-4636(f)(7), to consider the defendant's conduct "during the weeks prior to the murder

can be considered by the court, *regardless of the label assigned to that conduct." Johnson,* 284 Kan. at 25. (Emphasis added.)

The *Johnson* Court looked to *State v. Kleypas,* 282 Kan. 560, 566-68, 147 P.3d 1058 (2006), a capital murder case. The statute governing aggravating circumstances in capital murder cases did not include stalking of a victim to establish a capital murder was committed in an especially heinous, atrocious, or cruel manner. The *Kleypas* Court "noted that 'mental anguish before death' can be the basis for finding a murder to be especially heinous, atrocious, or cruel and that ' [m]ental anguish includes a victim's uncertainty *as* to his or her ultimate fate.'" *Johnson,* 284 Kan. at 26 (quoting *Kleypas,* 282 Kan. at 569). In reaching that conclusion, the *Kleypas* Court considered other jurisdictions that found stalking was relevant in determining whether a murder was committed in an especially heinous, atrocious or cruel manner, but the victims were aware, apprehensive, or afraid of the defendant due to the defendant's stalking. *Kleypas,* 282 Kan. at 588 (citing *Harvard v. State,* 414 So. 2d 1032, 1036 [Fla. 1982]; *Reiber v. State,* 663 So. 2d 985, 992-93 [Ala. Crim. App. 1994]; *State v. Cooper,* 718 S.W. 2d 256, 257-60 [Tenn. 1986]).

In light of *Kleypas,* the *Johnson* Court reviewed the defendant's actions towards the victim, Griffin. The first incident was a domestic dispute. But in the second incident, Johnson terrorized Griffin: he confronted her, jumped on her car's hood, which prevented her from leaving, and refused to leave when a security guard tried to intervene. *Johnson,* 284 Kan. at 26. The *Johnson* Court found that "[u]nder such circumstances, one can reasonably infer that Griffin 'was aware of the possibility of the violence which awaited ...her,' regardless of whether we label the conduct as stalking, a criminal threat, or other

conduct manifesting an especially heinous, atrocious, or cruel behavior." *Johnson,* 284 Kan. at 26 (quoting district court's findings of a crime committed in a heinous, atrocious or cruel manner).

Even if this Court should follow *Johnson's* example and consider "any other conduct in the opinion of the court that is especially heinous, atrocious or cruel," the facts in this case are distinguishable from *Johnson.* Because Dr. Tiller was never aware of Mr. Roeder's actions, Dr. Tiller was not aware of the possibility of violence from Mr. Roeder. Mr. Roeder's actions are also distinguishable from the cases cited in *Kleypas. Kleypas,* 282 Kan. at 568. In those cases, the victims were aware and fearful of the defendant due to the stalking. See *Kleypas,* 282 Kan. at 588 (citing *Harvard v. State,* 414 So. 2d 1032, 1036 [Fla. 1982]; *Reiber v. State,* 663 So. 2d 985, 992-93 [Ala. Crim. App. 1994]; *State v. Cooper,* 718 S.W. 2d 256, 257-60 [Tenn. 1986]).

Under the statute, Mr. Roeder's actions did not constitute "prior stalking of or criminal threat to the victim" as mandated by the statute. As a result, Mr. Roeder's prior actions did not support the trial court's finding that the crime was committed in "an especially heinous, atrocious or cruel manner." The district court erred in imposing the hard 50 sentence based on this aggravating circumstance.

Under K.S.A. 21-46360(2), Mr. Roeder 's preparations did not meet the statutory aggravating circumstance of "preparation or planning, indicating an intention that the killing was meant to be especially heinous, atrocious or cruel."

In determining if the crime was committed in an especially heinous, atrocious or cruel manner, the statute limits the defendant's conduct to "preparation or planning, indicating an intention that the killing was meant to be especially heinous, atrocious or cruel." K.S.A. 21-4636(0(2).

Yet nowhere in the court's written findings or at the hearing, did the court state what the statute requires: Mr. Roeder's preparation or planning indicated "an intention that the killing was meant to be especially heinous, atrocious or cruel." (R. VI, 108-09; XXIII, 68-69.) The court simply stated how Mr. Roeder thought of different means of killing Dr. Tiller. (R. VI, 108-09; XXIII, 68-69.) In fact, the court noted how Mr. Roeder "abandoned" all previous plans and carried out his plan to shoot Dr. Tiller in the church. (R. VI, 108.)

Not surprisingly, in the court's written filing of the aggravated circumstances, the court only titled this finding as "K.S.A. 21-4635(f)(2): Preparation or Planning". (R. VI, 108.) The court did not include the essential remaining statutory language, "indicating an intention that the killing was meant to be especially heinous, atrocious or cruel." (R. VI, 108-09.) The plain language of statute requires the court to find more than just preparation or planning of the crime.

In *State v. Papen,* 249 Kan. 149, 163, 50 P.3d 37 (2002), the district court made the finding that the evidence did "show that there was preparation and planning involved in this murder." The evidence, however, "does not show that planning and preparation indicated an intention that the killing was meant to be especially heinous, atrocious or cruel." *Papen,* 249 Kan. at 163. For different reasons, the district court found the aggravating circumstances outweighed the mitigating circumstances and the district court affirmed the court's sentence. *Papen,* 249 Kan. at 163.

As in *Papen,* in this case, there was no evidence showing that any alleged planning or preparation indicated an intention that the killing was meant to be especially heinous, atrocious or cruel. At trial, Mr. Roeder testified how he decided to quickly

shoot Dr. Tiller and not to cause any additional harm to others. (R. XXI, 115.)

The jury had already found that Mr. Roeder had premeditated the shooting. (R. XXII, 33.) To use the same circumstances again in support of an aggravating circumstance would mandate the hard 50 sentence in all first degree premeditated murders. See *State v. Holmes,* 278 Kan. 603, Syl. ¶ 21 (A hard 40 sentence should be reserved for special cases "otherwise, the legislature would have mandated the hard 40 sentence in all first degree murder cases.") The district court failed to follow what the statute mandates: the defendant's preparation or planning must indicate an intention that the killing was meant to be especially heinous, atrocious or cruel.

Under the plain language of K.S.A. 21-4636(f)(7), the court's finding that the location of the crime, a church, is especially heinous, atrocious or cruel was not conduct, and thus, does not fall under "any other conduct in the opinion of the court that is especially heinous, atrocious or cruel."

Under K.S.A. 21-4636(0(7), "the district court is permitted to consider 'any other conduct in the opinion of the court that is especially heinous, atrocious or cruel.'" *State v. Johnson,* 284 Kan. at 25. This aggravating circumstance is not without limits. The plain language of the statute restricts the district court's consideration to a defendant's conduct. Conduct is defined as "an act or a series of acts, and the accompanying mental state." K.S.A. 21-3110(3).

K.S.A. 21-4636(0(7) specifically states that the aggravating circumstances must be based on the defendant's conduct. The statute lists the defendant's conduct twice:

> The defendant committed the crime in an especially heinous, atrocious or cruel manner. A finding that the victim was aware of such victim's fate or had conscious pain and suffering as a result of the physical trauma that resulted in the victim's death is not necessary to find the manner in which the defendant killed the victim was especially heinous, atrocious or cruel. In making a determination that the crime was committed in an especially heinous, atrocious, or cruel manner, any of the following *conduct by the*

defendant may be considered sufficient:

> (7) any other *conduct* in the opinion of the court that is especially heinous, atrocious or cruel.

K.S.A. 21-4636(f)(7). (Emphasis added.)

The court's ruling was erroneous because the location of the shooting was not "conduct" as required under the statute. The court's failed to find that Mr. Roeder's *conduct* was especially heinous, atrocious or cruel. Rather, the court looked at the location of the shooting, and determined that based on the shooting's location, a church, the shooting resulted in "total disregard for the reverence that should be shown in a house of worship, is in this court's opinion by itself, heinous, atrocious and cruel." (R. VI, 109.)

Because the crime's location is not the statutory equivalent of "any other conduct" in committing the crime, there is no statutory authority for the court's finding. There does not appear to be any Kansas case law in support of the court's findings. To impose a harsher penalty based on a crime's location is highly problematic. Many locations are places where one would expect to be safe and would not take the usual steps of protection. Because one person's "place of peace and tranquility" is another person's bedroom or library, adding the crime's location as an aggravating circumstance would result in arbitrarily harsher penalties.

Additionally, in a shooting crime, there is always the potential that witnesses will view a victim's deceased body. In this case, Mr. Roeder testified, as acknowledged by the district court, that the church location was the only accessible means that he had to stop Dr. Tiller. (R. XXI, 99.) Mr. Roeder did not testify that he intended to shoot Dr. Tiller with the hope that Dr. Tiller would be left "bleeding on the floor of the narthex,

where everyone exiting from the sanctuary would see the horrific scene, including *women,* small children, and members of Dr. Tiller's family," as the court wrote in its order. (R. VI, 109.) It is also unclear how the specific gender of a church member, i.e., female, would make the shooting heinous, atrocious and cruel. There was no evidence presented at trial that *all the church* members had to view Dr. Tiller's body.

A police officer testified that she had the area near Dr. Tiller cleared so the evidence would not be tainted. (R. XI, 14, 15.) The circumstance of viewing the body was not exceptional.

The shooting death was not especially heinous, atrocious or cruel.

This Court has held that "exceptional circumstances must exist" before a murder can be classified as such under K.S.A. 21-4636(f). Only in "a few special cases, [has] this court found shooting deaths to be especially heinous, atrocious or cruel." *State v. Baker,* 281 Kan. 997, 135 P.3d 1098 (2006). "[T]he fact that the cause of death is shooting is not enough to rise to the level of an especially heinous, atrocious, or cruel manner for hard 40 sentencing purposes." *Holmes,* 278 Kan. at 603, Syl. ¶ 21.

In *State v. Flournoy,* 272 Kan. 784, 36 P.3d 273 (2001), the Court reviewed the district court's finding that the defendant's shooting of the victim, his grandmother, was found not to be especially heinous, atrocious or cruel. In considering this issue, the *Flournoy* Court looked at other shooting cases, including *State v. Alford,* 257 Kan. 830, 838, 896 P.2d 1059 (1995), and *State v. Brady,* 261 Kan. 109, 123, 929 P.2d 132 (1996).

In *Alford,* this Court affirmed a hard 40 sentence because defendant chased the victim into the lobby of the restaurant, shot her twice, forced the victim back into the kitchen, shot her again as she attempted to escape, and dragged her around the kitchen while firing additional shots. *Flournoy,* 272 Kan. at 793 (citing *Alford,* 257 Kan. at 838).

In *Brady*, this Court upheld a hard 40 sentence because the "victims in *Brady* were forced to lie face down on the floor for 15 minutes now knowing what would happen, while Brady paced the room holding the gun." *Flournoy*, 272 Kan. at 793 (citing *Brady*, 261 Kan. at 123). After the first victim was shot, the second victim also knew he was going to be shot. *Brady*, 261 Kan. at 123.

Unlike *Alford* and *Brady*, the shooting victim in *Flournoy* "was not chased down, nor forced to lie on the floor awaiting death. The shooting took place within one minute." *Flournoy*, 272 Kan. at 794. The court concluded that "the evidence does not support a finding that the murder was committed in an especially heinous, atrocious or cruel manner." *Flournoy*, 272 Kan. at 794. See also *State v. Cook*, 259 Kan. 370, 401-03, 913 P.2d 97 (1996) (reversing hard 40 sentence because the defendant's act of shooting the victim twice was not especially heinous, atrocious or cruel).

In *Flournoy*, the defendant shot five shots. *Flournoy*, 272 Kan. at 794. Mr. Roeder fired a single shot into Dr. Tiller's forehead. (R. XVII, 64; XVIII, 4, 12, 18; *XX*, 88.) Dr. Tiller immediately fell to the floor and showed no signs of life. (R. XI, 49-51; XX, 88.) This shooting death did not rise to the level of especially heinous, atrocious, or cruel, as contemplated by the plain language of K.S.A. 21-4636(f). See *Baker*, 281 Kan. at 1116 (although court was "struck by the cold and callous nature of this crime," reversing hard 50 sentence because "While we are we cannot focus on Gerard's defenselessness alone and speculate about what occurred or whether Gerard was aware of his imminent death.")

In summary, the statute's stalking provision did not apply because Dr. Tiller was not fearful of Mr. Roeder because he was never aware of Mr. Roeder's actions. Any of the alleged plans and preparation to shot Dr. Tiller did not indicate an intention for the shooting to be heinous, atrocious, or cruel. And the location of the shooting, a church,

was not a statutory aggravating circumstance.

This Court must vacate the district court's hard 50 sentence and remand the matter for resentencing. See *State v. Spain,* 263 Kan. 708, 725, 953 P.2d 1004 (1998) (defendant's hard 40 sentence vacated and remanded for resentencing because district court erred in finding an aggravating circumstance and thus, the only remaining aggravating circumstance needed to be weighed against the one mitigating circumstance.)

Issue 2: The district court erred in imposing a hard 50 sentence.

A. The district court erred in finding no mitigating circumstances.

B. The district court erred in finding the aggravating circumstances outweighed the mitigating circumstances.

Background

After the court found aggravating circumstances and heard the State's arguments that there were no mitigating circumstances, the defense presented evidence of the mitigating circumstances. Mr. Roeder's defense argued that the two mitigating circumstances were: (1) Mr. Roeder's capacity to appreciate the criminality of his conduct or, moreover, to conform his conduct to the requirements of the law, was substantially impaired; and (2) Mr. Roeder's lack of significant criminal history. (R. XXIII, 101-140; 200.)

In support of the first mitigating circumstance, the defense presented Dr. Hough, a clinical psychologist, who had interviewed Mr. Roeder on two different occasions. (R. XXIII, 103.) Dr. Hough explained that Mr. Roeder had a "radical religious conversion" and held extremist, ideological beliefs. (R. XXIII, 107.) As a result, Mr. Roeder moved "increasingly to outer fringes of social thought and affirmation, seeking out various churches that he hoped would be biblically correct[.]" (R. XXIII, 107.)

The psychologist explained how Mr. Roeder was "caught in a spiritual war between forces of light and dark and also on the political plane between the forces of

various sides of the fence because of the abortion issue, but he saw himself more in terms of being a foot soldier in the war, but certainly in the war and much of his discourse was permeated with war imagery. So clearly in his mind he was embattled in a war." (R. XXIII, 109.) Consequently, he saw Dr. Tiller as a threat, "so nothing in his view short of [ ] Dr. Tiller's demise would have sufficed." (R. XXIII, 111.)

Mr. Roeder felt justified in killing Dr. Tiller; and this was something that "he needed to do for a long time. He felt glad for the unborn, who he thought would be born and that his mission had been accomplished, and, again, he denied feelings of guilt." (R. XXIII, 113.) In "Mr. Roeder's moral universe, in his moral compass," the psychologist explained, "he was acting in obedience to God's law." (R. XXIII, 114.) Because this was an act that had be done, "the normal prohibitions and inhibitions against taking such kind of action were overrode (sic) by obedience to the higher law." (R. XXIII, 114.) In Dr. Hough's opinion, Mr. Roeder's ability to "conform his conduct to the requirements of the law was substantially impaired, but not entirely." (R. XXIII, 115.) Although Mr. Roeder knew what he was doing, because of the strength of his belief system, "rationality was eventually squeezed out of the equation[.]" (R. XXIII, 115.)

On cross-examination, the psychologist stated that Mr. Roeder acted in conformance with his belief system. (R. XXIII, 144-45.) He explained that, "Under the magnitude of that belief system, the strength of it and the rigidity and so on becomes the force unto itself." (R. XXIII, 144.) On redirect, Dr. Hough again stated that in his opinion, based on Mr. Roeder's extremist ideological beliefs, his capacity to conform his behavior was substantially compromised. (R. XXIII, 145-46.)

The district court began its analysis by noting that the defense had presented a clinical psychologist and not a forensic psychologist. (R. XXIII, 207.) The district court

then explained that "the statute is designed for the individual who has a true mental illness or some neurological disorder, some impaired brain function, cognitive ability, things of that nature." (R. XXIII, 207-08.) The court also questioned whether the mitigating circumstances had been met and stated how Mr. Roeder's rigid and strong belief system is "not really this mental illness or some neurological or dysfunction in his brain that he can't conform his conduct. It's a belief, admittedly a strongly-held belief, as described by his mental health care professional[.]" (R. XXIII, 208.)

At the end of the sentencing, the district court stated: "At best, and I had some hesitation whether the statute that says to conform to the defendant's conduct to the requirements of the law was substantially impaired, *I don't think that that was the intent of the statute and I don't think that there was a mental health diagnosis that warrants the finding of that mitigating factor[.]"* (R. XXIII, 214.) (Emphasis added.)

In support of Mr. Roeder's lack of significant criminal activity, the defense explained that Mr. Roeder, at the age of 52, had a criminal history score of I. (R. XXIII, 200.) He had no prior felony convictions and only minor misdemeanor convictions.

The State argued that the test was not whether Mr. Roeder had a significant criminal history score, but rather was whether or not he had a significant history of criminal activity. (R. XXIII, 203.) The State argued that Mr. Roeder had a "very significant history of criminal activity because he was ready and willing to kill Dr. Tiller." (R. XXIII, 203.) The State listed the following times Mr. Roeder thought to kill Dr. Tiller:

> [T]he first one occurred in 2002 with a knife, the second one occurring in August of 2008, then another in April of '09, another on May 30th of 2009, May 24th, I believe of 2009, and then of course the murder of May 31 of 2009.

(R. XXIII, 203.) The State claimed that Mr. Roeder's earlier steps to kill Dr. Tiller were "criminal activity." (R. XXIII, 203.)

The district court ruled, "I agree that 'no significant history of prior criminal activity' is not limited to a presentence investigation and convictions disclosed on a presentence investigation. Criminal activity goes far beyond that, and as you articulated, there are numerous events, prior attempts, planning, stalking, that the Court does not find to be a mitigating circumstances. In fact, the Court finds there is significant prior criminal activity by this defendant." (R. XXIII, 214.)

After the district court ruled that "there are no mitigating factors that outweigh the aggravating factors previously found by the Court[,]" the court specifically ruled that it had found no mitigating circumstances. (R. XXIII, 210, 214.)

A. The district court erred in finding there were no mitigating circumstances.

"Where a defendant challenges the trial court's refusal to find a mitigating circumstance under K.S.A. 21-4637, all the evidence is viewed in a light most favorable to the defendant." *State v. Spain,* 263 Kan. 708, 953 P.2d 1004 (1998).

K.S.A. 21-4637 provides that the mitigating circumstances shall include, but are not limited to, the following:

> (a) The defendant has no significant history of prior criminal activity.
>
> (b) The crime was committed while the defendant was under the influence of extreme mental or emotional disturbances.
>
> (c) The victim was a participant in or consented to the defendant's conduct.
>
> (d) The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.
>
> (e) The defendant acted under extreme distress or under the substantial

domination of another person.

(f) The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) At the time of the crime, the defendant was suffering from posttraumatic stress syndrome caused by violence or abuse by the victim.

Mr. Roeder's capacity to appreciate the criminality of his conduct or to conform his conduct was substantially impaired.

K.S.A. 21-4637 provides several mitigating circumstances, including subsection (0 "The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired." The district court interpreted K.S.A. 21-4637 to mean that the defendant had "a true mental illness or some neurological disorder, some impaired brain function, cognitive ability, things of that nature." (R. XXIII, 207-08.) The court later stated, "I had some hesitation whether the statute that says to conform the defendant's conduct to the requirements of the law was substantially impaired, I don't think that there was a mental health diagnosis that warrants the finding of the mitigating factor[.]" (R. XXIII, 214.)

The court's ruling was an incorrect interpretation of the statute because the statute already provided for mental illness. See K.S.A. 21-4637(b) ("The crime was committed while the defendant was under the influence of extreme mental or emotional disturbances.")

This Court must interpret the statute in Mr. Roeder's favor. See *State v. Jenkins*, 272 Kan. 1366, 1381, 39 P.3d 47 (2002) (As a general rule, criminal statutes must be construed in favor the accused.) K.S.A. 21-4637 does not specifically refer to a

defendant's incapacity based on physiological factors such as a neurological disorder or some impaired brain function.

To prove how Mr. Roeder's belief system had became a "force unto itself' and thus, prevented Mr. Roeder from fully appreciating the criminality of the shooting death or conforming his behavior, the defense was correct to have a clinical psychologist testify in support of this mitigating circumstances. The clinical psychologist explained how Mr. Roeder's belief system took over and Mr. Roeder felt that this was something he had to do.

Even if the court's interpretation was correct and Mr. Roeder's mitigating circumstance did not fall under K.S.A. 21-4637(f), mitigating circumstances are not limited to those listed in the statute. See K.S.A. 21-4637 ("the mitigating circumstances shall include, but are not limited to, the following"); see also *State v. Livingston,* 272 Kan. 853, 858, 35 P.3d 918 (2001) (discussing standard of review of court's decision regarding whether a nonstatutory mitigating circumstance exists) (citing *Spain,* 263 Kan. at 270.) Regardless of how this mitigating circumstance was categorized, the fact remains that Mr. Roeder's rigid belief system, which had formed over many years, rendered him unable to appreciate the criminality of his conduct or conform his conduct to the requirements of law. As a consequence, viewing all the evidence in a light most favorable to Mr. Roeder, this was a mitigating circumstance.

Because the district court misinterpreted this statutory circumstance under K.S.A. 21-4637, the district court did not properly consider this mitigating circumstance. This erroneous legal ruling requires this Court to vacate Mr. Roeder's sentence and remand for resentencing.

The defendant has no significant history of prior criminal activity.

The district court erred in finding a significant history of prior criminal activity. The district court ruled that Mr. Roeder's "[c]riminal activity goes far beyond that, and as you articulated, there are numerous events, prior attempts, planning, stalking, that the Court does not find to be a mitigating circumstance. In fact, the Court finds there is significant prior criminal activity by this defendant." (R. XXIII, 214.)

The listed criminal activity all stem from the Mr. Roeder's alleged actions against Dr. Tiller, but those actions were already cited in the district court's finding of two aggravating circumstances: stalking, and steps taken in preparing to kill Dr. Tiller. In fact, in finding aggravating circumstances, the district court stated that Mr. Roeder's actions had overlapped between the two aggravating circumstances of stalking and preparation and planning. (R. XXIII, 67.)

In *State v. Dieterman,* 271 Kan. 975, 993, 29 P.3d 411 (2001), the defendant challenged his hard 40 sentence because the "court did not give appropriate weight to the mitigating factor of his lack of criminal history[.]" The district court had given "little weight to the lack of criminal convictions, expressly noting that the evidence at trial showed that Deiterman was heavily involved in the use and sale of illegal drugs." *Deiterman,* 271 Kan. at 993. Deiterman argued that the "lack of criminal history" referred to only a defendant's criminal convictions. The *Deiterman* Court held that the specific wording of K.S.A. 21-4637(a) allowed a court to consider whether the defendant had "no significant history of prior criminal activity," and thus, the district court properly considered the defendant's criminal activity. *Deiterman,* 271 Kan. at 994.

This case is distinguishable from *Dieterman.* In that case, the defendant committed many crimes before the charged crime. The defendant had been "heavily involved" in the use and sale of drugs. The criminal activity in *Dieterman* was also

unrelated to the capital murder offense. In *Dieterman,* moreover, the State did not present the same evidence of the defendant's use and sale of drugs to prove two aggravating circumstances and to weaken a mitigating circumstance.

In comparison, as noted by the State, Mr. Roeder's actions all relate to stopping Dr. Tiller. (R. XXIII, 34-35.) And his activities were already cited in the district court's finding of two aggravating circumstances. (R. XXIII, 63-68.) Mr. Roeder's "criminal activity" as found by the district court, did not include any completed criminal acts. (R. XXIII, 63-68.) Nor did the State present evidence that Mr. Roeder was leading a life of crime, like the defendant in *Dieterman,* who was actively engaged in drug sales and possession.

The district should have found that Mr. Roeder's lack of criminal activity was a mitigating circumstance. It was error to use his actions in support of aggravating circumstances and to negate a mitigating circumstance.

The district court erred in finding that there were no mitigating circumstances.

B. The district court erred in finding the aggravating circumstances outweighed the mitigating circumstances.

The standard of review "on the trial judge's weighing of aggravating and mitigating circumstances is abuse of discretion. Judicial discretion is abused when no reasonable person would have taken the position by the trial court." *State v. Washington,* 280 Kan. 565, 572, 123 P.3d 1265 (2005).

Once the district court's determination of aggravating and mitigating circumstances has been made, the district court's task is to determine whether the mitigating circumstances outweigh the aggravating circumstances. K.S.A. 21-4635(c); see also *State v. Baker,* 281 Kan. 997, 1018, 135 P.3d 1098 (2006); *State v. Saiz,* 269

Kan. 657, 667-68, 7 P.3d 1214 (2000).

In this case, the district court ruled, "The Court will find that there are no mitigating circumstances that outweigh the aggravating circuinstances." (R. XXIII, 210.) The district court erred in finding that the aggravating circumstances outweighed the mitigating circumstances.

In *State v. Spain,* this Court found that the district court erred in finding one of the two aggravating circumstances. *Spain,* 263 Kan. at 718. In that case, the district court had found that the defendant had "knowingly created a great risk of death to more than one person." *Spain,* 263 Kan. at 718. The *Spain* Court concluded that the district court misapplied a statutory aggravating circumstance under K.S.A. 21-4636(b), which "requires a direct relationship between creating the great risk of death to another and the homicide." *Spain,* 263 Kan. at 718.

The *Spain* Court determined that within the meaning of the statute, the district court had erred in finding this aggravating circumstance. Consequently, there only remained one aggravating circumstance to be weighed against the one mitigating circumstance. *Spain,* 263 Kan. at 725. Because the district court erred in its finding of an aggravating circumstance, this Court vacated the defendant's sentence and remanded for resentencing so that the district court could weigh the remaining aggravating circumstance against the one mitigating circumstance. *Spain,* 263 Kan. at 725..

Likewise in this case, the district court erred in its finding of aggravating circumstances. As in *Spain,* the district court misapplied K.S.A. 21-4636. Under the plain language of K.S.A. 21-4636(f), Mr. Roeder's actions did not fall under any of the three aggravating circumstances found by the court. As a result, there were no aggravating circumstances to outweigh the mitigating circumstances. The district court

also erred in misinterpreting K.S.A. 21-4637 and finding that there were no mitigating circumstances.

As a result, in weighing the aggravating and mitigating circumstances, the district court did not recognize the existence of two mitigating circumstances, nor did the court carefully consider them. Instead, the district court focused entirely on the three aggravating circumstances. (R. XXIII, 210.) The two mitigating circumstances were compelling and the district court should have considered them in determining if the mitigating circumstances outweighed the aggravating circumstances. As in *Spain,* this Court must vacate Mr. Roeder's sentence and remand for resentencing.

Because there were no aggravating circumstances, the viable mitigating circumstances did outweigh the aggravating circumstances. The court abused its discretion by sentencing Mr. Roeder to a hard 50 life sentence. This Court should vacate Mr. Roeder's hard 50 sentence.

Issue 3: The district court erred in restricting and limiting Mr. Roeder's right of allocution at sentencing.

Introduction

Mr. Roeder's counsel lodged objections to the district court's rulings that limited Mr. Roeder in his allocution to the court. (R. XXIII, 182, 196, 198.) The district court's failure to comply with the allocution statutes is error, but is only reversible error if the defendant shows prejudice to his or her substantial rights. *State v. Borders,* 255 Kan. 871, 881, 879 P.2d 620 (1994).

Argument

Allocution affords the accused the opportunity to present any complaint he or she may have against the integrity of the proceedings. *State v. Kennelly,* 207 Kan. 344, 347, 485 P.2d 179 (1971). Historically, the term "allocution" has included the right to speak

at sentencing. *State v. Webb,* 242 Kan. 519, 522, 748 P.2d 875 (1988).

K.S.A. 22-3422 and K.S.A. 22-3424(4) provide the defendant with the right of allocution. *Borders,* 255 Kan. at 876. K.S.A. 22-3422 requires that when the defendant appears for judgment, the court must inform the defendant of the jury's verdict or the court's finding and ask if the defendant "has any legal cause to show why judgment should not be rendered." If none is shown, the court shall pronounce judgment. K.S.A. 22-3424(e)(4) requires that the district court, before imposing sentence, personally address the defendant and ask (1) if defendant wishes to make a statement on his or her own behalf, and (2) if the defendant wishes to present any evidence in mitigation of punishment. *State v. Mebane,* 278 Kan. 131, 134, 91 P.3d 1175 (2004).

The right of allocution is the cornerstone of a fair sentencing process. A criminal defendant may speak with "halting eloquence" that resonates more powerfully than the argument of "[t]he most persuasive counsel." *United States v. Green,* 365 U.S. 301, 304, 5 L. Ed. 2d 670 81 S. Ct. 653 (1961).

At Mr. Roeder's sentencing, the district court ruled on the existence of aggravating circumstances and the defense presented evidence of mitigating circumstances. (R. XXIII, 70, 73.) Prior to counsel's argument on mitigating circumstances, the Court stated that it would consider Mr. Roeder's statement "in support of mitigating circumstances and his overall right of allocution to direct the Court with regards to ultimate punishment." (R. XXIII, 146.)

Mr. Roeder read from a prepared written statement. (R. XXIII, 146, 70.) When Mr. Roeder began speaking about the District Attorney, the Court interrupted and stated that it would not permit Mr. Roeder to engage in "character assassination." (R. XXIII, 178-185.) Counsel made a contemporaneous objection that Mr. Roeder was "not being

allowed his full allocution." (R. XXIII, 182.) Mr. Roeder stated his belief that "if this atrocity (abortion) is ever going to end," then district attorneys have to "uphold their duties under the law." (R. XXIII, 184.)

In response to the Court's finding of an aggravating circumstances that the crime was heinous, atrocious, or cruel because it was done in a church, Mr. Roeder commented on the Reformation Lutheran Church, which Dr. Tiller attended. (R. XXIII, 194-5.) When Mr. Roeder's comments were critical of the leaders and members of the church, the Court again interrupted to limit the "political diatribe" and defense counsel lodged an objection. (R. XXIII, 196.)

When Mr. Roeder wanted to "speak to expectant mothers," the Court interrupted, questioning how that was relevant to Mr. Roeder's belief that his acts were justified or to the circumstances that he could not conform his conduct to the requirements of the law. (R. XXIII, 197.) Defense counsel stated that Mr. Roeder would "move on to the next section," again lodging an objection. (R. XXIII, 198.)

After Mr. Roeder stated that the District Attorney needed to "repent" of her "lawless, lies and deceit," and the Court interrupted, Mr. Roeder stated, "That's all I have to say. That's all I'm allowed to say. But, Judge, 50 years for protecting life, 25 years for protecting life is uncalled for." (R. XXIII, 198-99.)

The district court ruled on the existence of aggravating circumstances and the defense presented evidence of mitigating circumstances. (R. XXIII, 70, 73.) Prior to defense counsel's argument on mitigating circumstances, the Court stated that it would consider Mr. Roeder's statement "in support of mitigating factors and his overall right of allocution to direct the Court with regards to ultimate punishment." (R. XXIII, 146.)

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The district court stated that it would consider Mr. Roeder's statement "in support of mitigating circumstances and his overall right of allocution to direct the Court with regards to ultimate punishment." (R. XXIII, 146.) However, the district court then limited Mr. Roeder in his opportunity to present mitigating evidence, through his own words, before the court imposed sentence. As a result, there was an erroneous exclusion of evidence because the district court limited Mr. Roeder's opportunity to present evidence in mitigation.

The district court was obligated to provide the statutory right of allocution. See *Borders,* 255 Kan. at 881 (citing K.S.A. 22-3424[4]). Mr. Roeder attempted to speak on his own behalf in mitigation. The district court limited that opportunity. Mr. Roeder was prejudiced by the court's rulings because the court ultimately imposed a hard 50 sentence, finding that the mitigating circumstances did not outweigh the aggravating circumstances.

Issue 4: The hard 50 sentencing scheme is unconstitutional because a jury does not determine beyond a reasonable doubt the facts that double the penalty from an ordinary life sentence.

The constitutionality of a statute is a question of law with unlimited review. *State v. Beard,* 274 Kan. 181, Syl. ¶ 1, 49 P.3d 492 (2002).

Premeditated first degree murder is an off-grid person felony with a penalty of life imprisonment and parole eligibility in 25 years. See K.S.A. 22-3717. The sentencing

court may enhance the sentence by expanding the term of parole ineligibility to 50 years by finding by a preponderance of the evidence that the circumstances mitigating the crime do not outweigh the circumstances aggravating the crime. K.S.A. 21-4635; K.S.A. 21-4638. This scheme, instead of merely constraining the judge's discretion to select the appropriate penalty within a statutorily-provided range, permits the imposition of additional punishment. Further, it creates a separate offense, consisting of premeditated first degree murder plus aggravating circumstances, which in turn operate as elements of the greater offense.

In *Ring v. Arizona,* 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002), the United States Supreme Court held that, pursuant to the Sixth Amendment to the United States Constitution, Arizona's statutory aggravating circumstances operate as "the functional equivalent of an element of a greater offense" and must be found by a jury beyond a reasonable doubt. *Ring* 536 U.S. at 605. The *Ring* Court cited to the concurring opinion in *Apprendi v. New Jersey,* 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2349 (2000) in which the Justice Thomas noted, "if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact, the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime." *Ring,* 536 U.S. at 605.

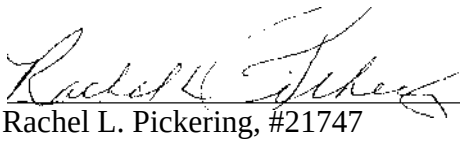
The Kansas hard 50 sentencing scheme is unconstitutional because a jury does not determine the facts that increase the penalty beyond a reasonable doubt. Mr. Roeder recognizes that this Court has held that the hard 50 life sentencing scheme does not expose a defendant to a higher maximum sentence than provided by statute. *State v. Warledo,* 286 Kan. 927, 954-55, 190 P.3d 937 (2008). Mr. Roeder respectfully asserts that *Warledo* is incorrectly decided for the aforementioned reasons and includes this issue

to exhaust his remedies in state court.

Conclusion

For the foregoing reasons, this Court should reverse Mr. Roeder's convictions and remand for a new trial, or in the alternative, this Court should vacate his sentence and remand for a new sentencing hearing.

Respectfully submitted,



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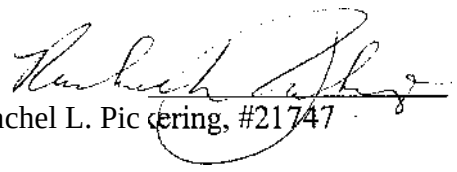
Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was made by mailing two copies, postage prepaid, to David Lowden, Chief Attorney, Appeals Div., 1900 East Morris, Wichita, KS 67211; and by hand delivering one copy to Derek Schmidt, Attorney General, Kansas Judicial Center, Topeka, KS 66612 on the 6 day of August, 2011.



Rachel L. Pickering, #21747

Westlaw

151 P.3d 864, 2007 WL 518988 (Kan.App.)
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 151 P.3d 864, 2007 WL 518988 (Kan.App.))

C

(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)

Court of Appeals of Kansas.
CITY OF WICHITA, Appellee,
v.
Mark HOLICK, Appellant.

No. 95,340.
Feb. 16, 2007.

Background: Defendant was convicted by a jury in the District Court, Sedgwick County, David W. Kennedy and Clark V. Owens, II., B., of trespass in violation of city code. Defendant appealed.

Holdings: The Court of Appeals held that:
(1) defendant was not entitled to present a necessity defense;
(2) trial court's refusal to allow defendant to reopen his defense case to call himself as a witness was not an abuse of discretion; and
(3) trial court had discretion to impose special probation condition that prohibited defendant from being within 100 yards of women's clinic.

Affirmed.

[1] Trespass 386 (key graphic) (Westlaw key graphic) (key) 84

386 Trespass
386111 Criminal Responsibility
386k84 k. Defenses. Most Cited Cases

Defendant was not entitled to present a necessity defense, in prosecution for trespassing; defendant failed to establish illegal abortions were performed at clinic, and thus he could not establish that he trespassed on clinic property to prevent imminent harm, defendant's motivation in trespassing was to prevent all abortions, not, just illegal abortions, there was not a direct causal relationship between defendant's trespass and the harm to be averted, and defendant had other legal alternatives to trespass. K.S.A. 65-6701, 65-6704, 65-6705, 65-6721.

[2] Witnesses 410 €13

410 Witnesses
4101 In General
410k7 Subpoena
410k13 k. Service. Most Cited Cases

Order quashing subpoenas was proper, where the trial court determined that the subpoenas had not been properly served.

[3] Criminal Law 110 (key) 686(2)

110 Criminal Law
110XX Trial
110XX(C) Reception of Evidence
110k685 Reopening Case for Further Evidence
110k686 In General
110k686(2) k. After Party Offering Evidence Has Rested. Most Cited Cases

Witnesses 410 (key) 88

410 Witnesses
41011 Competency
410II(B) Parties and Persons Interested in Event
410k87 Defendants in Criminal Prosecutions
410k88 k. In General. Most Cited Cases

The trial court's refusal to allow defendant to reopen his defense case to call himself as a witness was not an abuse of discretion, in prosecution for trespass; defendant was called as a witness by co-defendant and was afforded his constitutional right to testify.

The trial court's refusal to allow defendant to

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reopen his defense case to call himself as a witness was not an abuse of discretion, in prosecution for trespass; defendant was called as a witness by co-defendant and was afforded his constitutional right to testify.

[4] Trespass 386 (key) 89

386 Trespass
386111 Criminal Responsibility
386k89 k. Trial. Most Cited Cases

Trial court was not required to instruct the jury that when a group of people were trespassing each person had to personally and individually be told to leave in order to convict that person of trespassing, as argued by defendant; city ordinance required personal communication, not individualized communication.

[5] Sentencing and Punishment 350H (key) 1967(2)

350H Sentencing and Punishment
350HIX Probation and Related Dispositions
350HIX(G) Conditions of Probation
350Hk1964 Particular Terms and Conditions
350Hk1967 Geographic or Travel Restrictions
350Hk1967(2) k. Validity. Most Cited Cases

Trial court had discretion to impose special probation condition that prohibited defendant from being within 100 yards of women's clinic; city ordinance, which, listed permissible probation conditions, empowered the trial court to "impose any conditions of probation or suspension of sentence that the court deems proper."

[6] Constitutional Law 92 (key)1417

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1413 Criminal Law
92k1417 k. Probation. Most Cited Cases

Constitutional Law 92 €=>1430

92 Constitutional Law
92X1V Right of Assembly
92k1430 k. In General. Most Cited Cases

Constitutional Law 92 (key) 2104

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(V) Judicial Proceedings
92XVIII(V)2 Criminal Proceedings
92k2104 k. Probation and Parole. Most Cited Cases

Sentencing and Punishment 35011 (key) 1967(2)

350H Sentencing and Punishment
350HIX Probation and Related Dispositions
350HIX(G) Conditions of Probation
350Hk1964 Particular Terms and Conditions
350Hk1967 Geographic or Travel Restrictions
350Hk1967(2) k. Validity. Most Cited Cases

Special probation condition that prohibited defendant from being within 100 yards of women's clinic did not violate defendant's First Amendment rights of freedom of speech, assembly, or religion, in prosecution for trespassing; the condition bore a reasonable relationship to the goal of defendant's probation, as defendant's conviction was his fourth conviction for illegal activities occurring at medical clinics, and the probation condition was limited in scope. U.S.C.A. Const.Amend. 1.

Special probation condition that prohibited defendant from being within 100 yards of women's clinic did not violate defendant's First Amendment rights of freedom of speech, assembly, or religion, in prosecution for trespassing; the condition bore a reasonable relationship to the goal of defendant's probation, as defendant's conviction was his fourth

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conviction for illegal activities occurring at medical clinics, and the probation condition was limited in scope. U.S.C.A. Const.Amend. 1.

Appeal from Sedgwick District Court; David W. Kennedy and Clark V. Owens, II, judges. Opinion filed February 16, 2007. Affirmed.Mark E. Holick, appellant pro se.

Sharon L. Dickgrafe, assistant city attorney, Gary E. Rebenstorf, city attorney, for appellee.

Before MCANANY, P.J., ELLIOTT and BUSER, H.

MEMORANDUM OPINION

PER CURIAM.

*1 Mark Holick appeals his conviction for trespass in violation of the Wichita City Code. We affirm.

Factual and Procedural Background

Holick and several codefendants were convicted of criminal trespass in the Wichita Municipal Court. Holick appealed his conviction to the Sedgwick County District Court.

At the jury trial, Carl Swinney, a security guard at Women's Health Care Services, testified that on June 16, 2004, 12 individuals, including Holick, entered the clinic's parking lot. Access to this parking lot was controlled by an opening in a wooden privacy fence which displayed "No Trespassing" signs. Swinney told the group that they were trespassing and needed to leave. The group refused to leave, and the Wichita Police Department was called for assistance.

Officer David Halverson, testified that when he arrived he spoke with Swinney, who told him that the 12 people were not authorized to be on the property. Halverson observed that the group was peaceful and some individuals were carrying Bibles. In particular, he recalled that Holick was either standing or kneeling while praying in the parking lot.

Halverson told the group on two occasions to leave the property. At the time of these orders, Halverson was about 10 to 12 feet in front of the group. He also advised the group that if any person left the property they would avoid arrest. Halverson testified that it appeared to him that the group members heard his commands. Lieutenant Walker Andrews also ordered the group to leave the property. Andrews testified he was absolutely certain that everyone heard the order. The group members, including Holick, refused to leave and were arrested.

At trial, Holick appeared pro se and presented three witnesses in his defense case. Donna Lippoldt, a self-described pro-life missionary, testified to her observations of what occurred at the facility on the day Holick was arrested. She also testified regarding her years of work as a "sidewalk counselor" offering pregnant women entering the facility alternatives to abortion. Michelle McGinnis, wife of codefendant William McGinnis, laid the evidentiary foundation for admission of a videotape that depicted a crying woman and a man entering the facility on June 16, 2004. Finally, Marilyn Shipman testified briefly that, as a teenage patient of Dr. George Tiller, a physician at the facility, she was very uncomfortable on occasions when she had regular checkups.

Holick rested his defense case without calling himself as a witness. Codefendant William McGinnis, however, called Holick to testify as a defense witness. Holick testified he was a pastor for almost 15 years, frequently counseling women regarding abortion-related issues. Holick referenced Old and New Testament verses which he testified motivated him on the day of his arrest. In particular, Holick testified:

"And then the Scripture that probably most moved me that day was based on the Word of God as found in Proverbs, Chapter 24, in Verse 11, 'Rescue those who are being led away to

> death; hold back those staggering toward slaughter.' If you say, "But we knew nothing about this", does not he who weighs the heart perceive it? Does not he who guards your life know it? Will he not repay each person according to what he has done?" '

*2 Holick testified that his motives for being at the facility that day were peaceful and related to his experiences as a minister.

The jury found Holick and several codefendants guilty of criminal trespass. Holick was sentenced to 180 days' imprisonment and a fine of $100 but was placed on probation for 2 years. His probation included the special condition that he not be within 100 yards of the perimeter of Women's Health Care Services. Holick appeals.

Preclusion of the Necessity Defense

[1] Prior to trial, the City filed a motion in limine seeking to preclude Holick and his codefendants from "presenting testimony, evidence or arguments that their actions were justified to save a human life." This is commonly known as the necessity defense. Additionally, the City sought to preclude the defense "from arguing that the jury may disregard the law and that they are allowed to 'do what they believe is fair.' " In a written response, Holick did not address the necessity defense but did argue in support of jury nullification.

The district court granted the City's motion fmding that although Kansas law had not specifically recognized the necessity defense, it was found to be inapplicable in a similar abortion clinic trespass case, *City of Wichita v. Tilson,* 253 Kan. 285, 855 P.2d 911 (1993). While the district court in the present case disallowed evidence or argument regarding the necessity defense, the court ruled it would allow the defendants to present testimony about their motives for trespassing. At a hearing on the defendants' motion to reconsider this adverse decision, the district court allowed the defendants to present evidence, make proffers, and argue in support of the necessity defense. Upon reconsideration, however, the district court reaffirmed its prior ruling precluding this defense.

The determination of the applicability of the necessity defense in the present case involves "questions of law subject to broad appellate review." 253 Kan. at 288, 855 P.2d 911 (citing *State, ex. rel. v. Doolin & Shaw,* 209 Kan. 244, 261, 497 P.2d 138 [1972]).

We agree with the district court that our Supreme Court's holding in *Tilson* is important to the resolution of this issue. In *Tilson,* the defendant was arrested for trespassing on property owned by the Wichita Family Planning Clinic, Inc., in violation of the Wichita City Code. Following her conviction in the Wichita Municipal Court, Tilson appealed to the district court. During a bench trial (presided over by the same judge who precluded the use of the necessity defense in the present case) the defendant admitted she had blocked the entrance to the clinic but justified her actions because " `abortion takes the life of an unborn baby, and I wanted to prevent that, and I wanted to prevent the detrimental effect that happens to the woman, the father of the baby, the grandparents and brothers and sisters involved.' " 253 Kan. at 287, 855 P.2d 911.

At the conclusion of the trial, the district court acquitted Tilson of trespass based upon the necessity defense. The City reserved the question of whether or not the necessity defense was applicable to Tilson's act of criminal trespass. Our Supreme Court agreed with the City's position and sustained the appeal.

*3 The *Tilson* court explicitly declined to recognize the existence of the necessity defense in Kansas but held that in the context of a trespass upon the property of an abortion clinic the defense was inapplicable. 253 Kan. 285, Syl. ¶ 6, 855 P.2d 911. Our Supreme Court reasoned:

> "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." 253 Kan. at 296, 855 P.2d 911.

Holick attempts to distinguish the present case from *Tilson,* however, by alleging he was trespassing at the clinic to prevent the preforming of *illegal* abortions. In particular, Holick claims these abortions were illegal because they were performed on minors, coerced women, and women with viable late-term pregnancies.

In considering Holick's argument, the district court adopted the Tenth Circuit's formulation of the necessity defense, as set forth in *United States v. Turner,* 44 F.3d 900 (10th Cir.1995). In *Turner,* a "sidewalk counselor" scaled the fence surrounding the same clinic at issue in the present case—Women's Health Care Services—and "entered the clinic in order to pray and place her body in front of a woman who was attempting to enter the clinic." 44 F.3d at 901. Turner was arrested and subsequently convicted of obstructing a federal court order not to trespass. Following a successful appeal, Turner was retried and again convicted.

Turner's primary claim on appeal was that the district court erred in refusing to instruct the jury on the necessity defense. The Tenth Circuit set out the four elements of the defense as follows: (1) that the defendant was faced with a choice of evils and chose the lesser evil, (2) the defendant acted to prevent imminent harm, (3) the defendant reasonably anticipated a direct causal relationship between his conduct and the harm to be averted, and (4) the defendant had no legal alternatives to violating the law. 44 F.3d at 902.

Considering *Turner's* four factors in the present case, the district court first considered whether there was an imminent harm or evil which Holick sought to prevent. The district court noted "[a]s defendants recognize under Kansas law the harm must be something more than the performance of an abortion." We agree.

As our Supreme Court noted in *Tilson, "[a]* woman has an unfettered constitutional right to an abortion during the first trimester of pregnancy and a somewhat more restricted right to abortion thereafter." 253 Kan. 285, Syl. 4, 855 P.2d 911. K.S.A. 65-6701 *et seq* codifies this constitutional right and sets forth a complex array of requirements which must be complied with by physicians, abortion providers, counselors, women (including unemancipated minors) seeking an abortion, the parents or legal guardians of unemancipated minors seeking an abortion, the Department of Health and Environment, and Kansas courts.

*4 Holick alleges there was an imminent harm occurring, however, because illegal abortions were being committed. In particular, Holick advised the district court he intended to call Pastor Daniel Thompson to testify that he had seen underage women entering the clinic. This fact does not prove any illegality, however, because Kansas law permits minors under strictly circumscribed conditions to obtain abortions. See K.S.A. 65-6704 and K.S.A. 65-6705.

In the district court, Holick also proffered evidence that late-term partial birth abortions were being performed at the clinic. Holick argues on appeal, "Kansas law not only criminalizes partial birth abortions, but also prohibits the abortion of viable fetuses."

K.S.A. 65-6721, however, provides an exception that allows a partial birth abortion on a viable fetus when the abortion provider and another physician determines "(1) [t]he abortion is necessary to preserve the life of the pregnant woman; or (2) a continuation of the pregnancy will cause a substantial and irreversible impairment of a major physical or mental function of the pregnant woman." Holick failed to proffer evidence that any partial birth abortions were scheduled at the clinic on June 16,

2004, let alone that such procedures were planned without compliance with the requirements of K.S.A. 65-6721(1) and (2). As a result, Holick failed to establish any imminent harm by an illegal act.

In the district court, Holick also sought to establish imminent harm by playing a videotape of a crying woman and her boyfriend walking into the clinic on June 16, 2004. This tape was not included in the record on appeal for this court to review. On appeal Holick alleges this incident and others show "that women were being coerced into the abortion procedure by 'boyfriends' or other domineering males who insisted that the pregnancies be terminated, probably so that the putative father could avoid the responsibility of child support."

As the district judge concluded, however,

> "[t]he only problem with that proffer of the video tape is that the video tape, first of all, is rather vague as to whether or not she was just having second thoughts or if there's other interpretations of her actions on that occasion. The bottom line is she did not get the abortion as I understand. That, apparently, when it came ... to be given the consent inside the clinic, she chose not to sign it."

K.S.A. 65-6709 mandates that "[n]o abortion shall be performed or induced without the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced." To insure compliance, the statute requires that extensive written information must be provided to the woman prior to an abortion, that the physician who is to perform the abortion have a private meeting with the woman "to ensure that she has an adequate opportunity to ask questions of and obtain information from the physician concerning the abortion," and that the woman must certify in writing the information was provided and that she, in fact, met with the physician. K.S.A. 65-6709(c) and (e).

*5 Holick did not proffer evidence that these statutory requirements to insure a woman's knowing and voluntary decision to have an abortion were not met in the case of the woman depicted on the videotape. The district court properly concluded "[o]utside observers would have to speculate as to the manner in which the informed consent is given. Proof of an imminent harm by an illegal act cannot be shown."

Finally, after a thorough review of Holick's pleadings, proffers, evidence and argument on the motion to reconsider it is apparent that Holick's primary motivation in trespassing upon the clinic's property was to prevent *all* abortions not just illegal ones. In his motion for reconsideration, Holick wrote:

> "The key issue is what is the unborn? If the unborn is not a human being then clearly trespassing on the abortion clinic parking lot is the greater evil. But if the unborn is a human being, then without a doubt, the greater evil in this case is the taking of an innocent life.
>
> "The [defendants] are united in our belief that it is morally wrong to intentionally take the life of an innocent human being and we believe that the *[sic]* this court must by definition hold to this same belief. I will be proving that abortion intentionally takes the life of an innocent human. Leaving us the only conclusion that abortion is wrong and is the greater evil."

Only recently, however, our Supreme Court reiterated that there exists a federal constitutional right "long recognized and protected by the United States Supreme Court" which "is the fundamental right of a pregnant woman to obtain a lawful abortion without government imposition of an undue burden on that right." *Alpha Med. Clinic v. Anderson,* 280 Kan. 903, 920, 128 P.3d 364 (2006).

In assessing the applicability of the necessity defense in the present case, the district court

thoughtfully considered Holick's fervent beliefs that motivated his criminal conduct and those federal and state laws that provide for legalized abortion: "I sympathize with the position of the defendants that feel very morally committed to this position. Nevertheless, it's the Court's obligation to uphold the law. And until that law is changed there isn't any option for the Court but to carry out the mandate of the higher court." In this regard, the district court faithfully adhered to *Tilson's* guiding principle: "When the objective sought is to prevent by criminal activity a lawful, constitutional right, the defense of necessity is inapplicable." 253 Kan. at 296, 855 P.2d 911.

In summary, by failing to proffer evidence of illegal abortions occurring at the facility on the day of his trespass, Holick failed to provide a sufficient factual basis to support the applicability of the first two elements of the necessity defense as formulated in *Turner.* Moreover, while Holick attempts to distinguish the present case from *Tilson* by arguing that his conduct was necessary to prevent the imminent harm of illegal abortions, a fair reading of the record reveals that Holick's primary purpose in trespassing at the clinic was to prevent all abortions, including those women have a right to obtain under our United States Constitution and Kansas law. For all these reasons *Tilson* mandates that the necessity defense is unavailing.

*6 While our finding resolves the necessity defense issue, we also review the other two *Turner* factors because they were addressed by the district court and the parties.

The third element of the *Turner* formulation is whether the defendant reasonably anticipated a direct causal relationship between his conduct and the harm to be averted. 44 F.3d at 902.

In the district court, Holick argued "[w]e contend that [the trespass] did exactly what we had expected and had the police done their job and ascertained our reasons for being there instead of only listening to the security guard, then further action could have been taken to protect the unborn children being killed inside."

In rejecting Holick's argument, the district court observed:

> "[I]t would be reasonable to anticipate that what's going to happen in a trespass scenario is that the defendants are going to be arrested. They are not going to actually be able physically to get into the clinic, get access to the patients, and stop an abortion from taking place. But rather what it amounts to is, basically a token protest."

Holick's claim in the district court, that had the police listened to his arguments they may have been persuaded to allow the defendants to take further action to prevent abortions performed at the clinic, is speculation. Moreover, there was evidence, provided by Holick, that the police would not be amenable to assisting him in his efforts to prevent abortions at the clinic. In his motion for reconsideration Holick indicated: "In the past we have reported illegal activity to the police where they have not responded with an investigation.... Police have disregarded our requests." Holick's own words undermine his argument that there was a direct causal relationship between his trespass and the harm to be averted.

On appeal, Holick modifies his argument:

> "Defendant has personal knowledge from past experience that his actions *do* dissuade women from aborting their children. If permitted Defendant would have testify [sic] that his acts, combined with 'sidewalk counseling' of women entering an abortion clinic, have led to women changing their mind with regard to an abortion. Thus, Defendant was reasonable in believing that his actions would prevent at least one woman from taking her child's life."

Holick's argument on appeal is confusing. He seems to suggest there were other occasions wherein he trespassed at a clinic that performs

abortions which prevented an abortion, yet Holick made no proffer of any prior trespass. Holick also undercuts his argument by suggesting that sidewalk counseling (which does not involve a trespass) is an important adjunct with trespassing in order to convince women not to have an abortion. As a result, Holick's argument only reflects an indirect and tangential relationship between trespassing and the prevention of illegal abortions. In summary, Holick's arguments relating to the third *Turner* element are both speculative and lacking a sufficient factual basis to establish the requisite direct causal relationship between his criminal conduct and the harm to be averted.

*7 We next consider the fourth element of the *Turner* formulation of the necessity defense—whether Holick had any legal alternatives to violating the law. 44 F.3d at 902. In the district court, Holick contended "we have exhausted all available, legal alternatives and those alternatives as a class has *[sic]* been futile over a long period."

In rejecting Holick's argument, the district court found:

"An abortion is a medical procedure that cannot be performed in an instant. The medical staff would have to take some time to prepare and complete the procedure. A person trespassing upon land to save a drowning child would not have the time to call for assistance. To prevent an illegal abortion from occurring, law enforcement could be called in time to stop."

On appeal, Holick expands his argument to include not just illegal abortions, but legal abortions:

"Defendant ... and others have taken every legal step conceivable to put an end to legalized abortion. The evidence will show that Defendant has appealed to legislative bodies and countless politicians, picketed abortion clinics, conducted sidewalk counseling, distributed pro-life information and campaigned for pro-life candidates—but abortion on demand remains legal."

Holick's argument and the testimony he presented at trial refutes his claim that there were no legal alternatives to violating the law. First, as noted earlier, the necessity defense is inapplicable to defend against criminal conduct perpetrated to prevent a constitutional or legal right of another. Second, Holick presented evidence at trial that the legal alternative of counseling could be effective in convincing women to forgo an abortion. In particular, Holick presented testimony from Donna Lippoldt, a "sidewalk counselor" outside the clinic who testified that "[t]housands of people have allowed us to help them over the 14 years or we wouldn't still be there."

In affirming the defendant's conviction in *Turner,* the Tenth Circuit solely based its determination that Turner was not entitled to a necessity defense instruction on this fourth factor—the defendant's failure to show there were no legal alternatives to violating the law. 44 F.3d at 902. The court observed:

"Ms. Turner could go door-to-door conveying her views, distribute literature personally, through the mails or via publication, or simply continue her otherwise lawful protests. Plainly, women can be, and in fact are educated on issues concerning abortion by legal means; violating the laws of the United States and ignoring orders of the federal courts are not the only way of doing so." 44 F.3d at 902.

We agree. Holick failed to prove that no legal alternatives existed to deter illegal abortions.

In *Tilson,* our Supreme Court stated: "Whether the necessity defense should be adopted or recognized in Kansas may best be left for another day." 253 Kan. at 291, 855 P.2d 911. Fourteen years later, that day has not yet dawned. We do, however, reaffirm *Tilson's* holding that: "[i]n a criminal prosecution for trespass upon the property of an abortion clinic, the defense of justification by necessity is inapplicable." 253 Kan. 285, Syl. ¶ 6, 855 P.2d 911. Moreover, assuming arguendo the necessity

defense was applicable given the particular circumstances of the present case, Holick failed to proffer a sufficient factual basis to justify this defense.

*8 We hold the district court did not err in sustaining the City's motion in limine to preclude Holick from presenting testimony, evidence, or argument that his criminal conduct was justified by the defense of necessity.

Quashing of Subpoenas

[2] Three days prior to the original trial date, several defense subpoenas were served on a guard at the security desk of the Women's Health Care Services clinic. Attorneys for the individuals named in the subpoenas promptly filed a motion to quash the subpoenas. After considering memoranda and argument, the district judge ruled:

> "The subpoenas weren't served. They're not valid. There's no valid service on the subpoenas. And there's nothing to enforce.
>
> "But, even if there had been proper service, based on the motion in limine and based on the rulings I made on the motions for discovery ... I would still probably quash all—well, probably all of the testimony that I'm hearing is wanting to be elicited. So. There's nobody to bring to court, and so it's gonna be moot on that—in that respect."

On appeal, Holick claims the quashing of the subpoenas violated his constitutional rights.

Holick did not include copies of the subpoenas in the record on appeal. The burden is on the appellant to furnish a record which affirmatively shows that prejudicial error occurred in the district court. Without such a record, an appellate court presumes the action of the district court was proper. *State v. Holmes,* 278 Kan. 603, 612, 102 P.3d 406 (2004).

On appeal, Holick also fails to address the district court's ruling that the subpoenas were improperly served. By failing to challenge on appeal one of the alternative reasons cited by the district court for its ruling quashing the subpoenas, Holick has conceded the propriety of the district court's decision in that regard. See *Greenwood v. Blackjack Cattle Co.,* 204 Kan. 625, 627, 464 P.2d 281 (1970) (when the district court's decision is based on alternative grounds, appellant's failure to challenge all grounds on appeal "renders unnecessary" a decision on the issue that is raised); see also *Roy v. Young,* 278 Kan. 244, 248, 93 P.3d 712 (2004) (issue not briefed is deemed waived or abandoned). We find no error in the quashing of the subpoenas.

Refusal to Allow Holick to Reopen His Defense Case

[3] Holick called three witnesses during his case in chief. After the third witness testified, the district court asked Holick if there were any other witnesses he would like to call to the stand. Holick said, "No, sir, I have no other witnesses." The district court then proceeded to allow a codefendant to present his defense case. Holick did not contemporaneously advise the district court that he desired to testify on his own behalf or object to this proced- ure.

Later, Holick was called to testify on behalf of codefendant McGinnis. Holick's testimony, however, primarily focused on his own motive for trespassing at the clinic. According to Holick, his motive was to rescue the unborn from the evil of abortion. He testified his motive was based on religious beliefs founded on scripture and his years of experience working as a minister. Holick also noted the peaceful nature of his conduct in remaining upon the clinic property.

*9 During a series of objections interposed by the prosecutor during this testimony, Holick said, "Your Honor, it may be easier if I just call myself as a witness. Can we do that?" The district judge replied, "You've already rested. So you're gonna have to rely on [the codefendant]." Holick did not object or seek to reopen his defense case.

On appeal, Holick claims his constitutional right to testify on his own behalf was violated by the district court's refusal to allow him to testify

after he rested his defense case.

We first note the general rule that an appellant must raise an issue before the district court before it can be raised on appeal. *State v. Rojas,* 280 Kan. 931, Syl. 1, 127 P.3d 247 (2006). Moreover, with certain exceptions, even when constitutional grounds are asserted, issues raised for the first time on appeal are not properly before an appellate court for review. *State v. Williams,* 275 Kan. 284, 288, 64 P.3d 353 (2003). Although it appears Holick's question to the district court was more of an attempt to facilitate his testimony, rather than an invocation of his constitutional right to testify, we will consider the merits.

We begin our analysis by citing well-settled precedent: It is a matter of discretion whether the trial court permits either or both of the parties to reopen a case for introduction of additional evidence after having rested. *McDaniel v. Jones,* 235 Kan. 93, 114, 679 P.2d 682 (1984). An abuse of discretion exists only when no reasonable person would take the view adopted by the trial court. *State v. Moses,* 280 Kan. 939, 945, 127 P.3d 330 (2006).

The issue Holick presents, however, is not a typical situation wherein a defendant seeks to reopen his case. What distinguishes Holick's claim is that he alleges constitutional error because he sought to reopen his defense case in order to testify on his own behalf.

During presentation of his defense case, Holick never intimated any desire to testify. After Holick advised the district court that he had no further witnesses, he did not object when the court proceeded to allow another defendant to present his case. In short, the record does not indicate that Holick desired to testify as part of his defense case. In this regard it must be remembered there is no general rule which mandates that a trial court advise a defendant of his right to testify. See *State v. McKinney,* 221 Kan. 691, 694, 561 P.2d 432 (1977). Moreover, a trial court has no duty to ask a defendant whether the defendant wishes to waive his right to testify. *Taylor v. State,* 252 Kan. 98, 106, 843 P.2d 682 (1992).

For whatever reason, Holick chose to present his testimony and augment the defense case by submitting himself for questioning by McGinnis, rather than by testifying in narrative form in his own case-in-chief. We have reviewed the record of Holick's testimony and are convinced that, under questioning by McGinnis, Holick was afforded his constitutional right to testify, especially regarding his background, the circumstances of the trespass incident, and his motive based upon religious beliefs which caused him to trespass at the clinic. Moreover, the only limitation on Holick's testimony occurred when the questions asked or testimony elicited violated the court's motion in limine.

*10 We find no abuse of discretion in the district court's determination to not allow Holick to reopen his defense case.

Response to Jury's Question

[4] During deliberations, the jury requested that each defendant's testimony be read back wherein they testified about whether they were personally asked to leave the clinic property. Without objection, the district court ordered a read back of this requested testimony. Additionally, the jury sent the district court a note with the following question: "Does the 'law' say you have to be `personally' asked to leave the property or is a blanket statement to leave be *[sic]* considered a 'personal' statement for each one to leave?"

In response to the district court's inquiry of the defendants, Holick requested that the court respond by reading the criminal trespass ordinance to the jury. The district court denied Holick's request and sent the following response to the jury: "A blanket statement which is communicated to someone is legally sufficient if the person heard it." Subsequent to this response and before any read back of the requested testimony, the jury returned its verdicts.

Holick argues "[a]ccording to City Code corn-

munication must be 'personally' communicated. The courts [sic] instructions were incorrect. The jury was instructed by the court that 'a blanket statement is sufficient,' and repeated court statements confirm that blanket statements were given." As a result, Holick claims, "the law has been misapplied." Holick provides no case law precedent in support of his contention.

Where a district court's response to a jury's question during deliberation is at issue, this court's standard of review is abuse of discretion. *State v. Moore,* 274 Kan. 639, 643, 55 P.3d 903 (2002).

Wichita City Ordinance 5.66.050 states, in relevant part:

> "Criminal trespass is entering or remaining upon or in any land ... by a person who knows he/she is not authorized or privileged to do so, and: person enters or remains therein in defiance of an order not to enter or to leave such premises on property personally communicated to such person by the owner thereof or other authorized person."

"The fundamental rule of statutory construction is to ascertain the legislature's intent.... A statute should not be read to add language that is not found in it." *State v. Bryan,* 281 Kan. 157, 159, 130 P.3d 85 (2006). Holick essentially asks this court to add a requirement that, where a group of people are trespassing, each person must be personally and *individually* told to leave. The language of the statute, however, does not support such a construction. The Wichita ordinance requires personal communication, not individualized, one-on-one communication.

In order to convict Holick of violating the ordinance, it was necessary for the jury to find that he was personally advised by an authorized person that he should leave the property. Whether Holick was alone or part of a group at the time that message was personally communicated is irrelevant. The district court's response to the jury's inquiry fairly and accurately reflected the language of the ordinance. We find no abuse of discretion.

Special Probation Condition

***11** *[5]* Finally, Holick protests the district court's special probation condition that he not be within 100 yards of the perimeter of Women's Health Care Services. In particular, Holick argues that this special probation condition is not provided for by the Wichita ordinance and also violates his First Amendment rights.

" 'Probation from serving a sentence is an act of grace by the sentencing judge and is granted as a privilege, not as a matter of right. The judge, when granting probation, has broad powers to impose conditions designed to serve the accused and the community.' " *State v. Spencer,* 31 Kan.App.2d 681, 683, 70 P.3d 1226, *rev. denied* 276 Kan. 973 (2003). Imposition of probation conditions is within the sound discretion of the district court. *State v. Calhoun,* 28 Kan.App.2d 340, 342, 19 P.3d 179, *rev. denied* 269 Kan. 935 (2000).

Wichita City Ordinance 99.02.164(2)(c) provides a list of permissible probation conditions that may be imposed for violation of city ordinances. None of these conditions include the special probation condition at issue. The ordinance, however, also empowers the sentencing court to "impose any conditions of probation or suspension of sentence that the court deems proper." This suggests the sentencing court has discretion to impose nonspecified conditions when appropriate to protect the community and rehabilitate the offender. The district court's order that Holick avoid the vicinity wherein his trespass occurred is just such an order.

[6] Next, Holick asserts this special probation condition violates his First Amendment rights to freedom of speech, assembly, and religion as guaranteed by the United States Constitution.

We have previously held there are limitations on probation conditions that impinge on constitutional rights. *Calhoun,* 28 Kan.App.2d at 342, 19 P.3d 179. This is consistent with the Tenth Circuit's

approach in *Turner:*

> "Incidental restrictions of First Amendment rights to freedom of speech and association are permissible if reasonably necessary to accomplish the essential needs of the state and public order. *Birzon v. King,* 469 F.2d 1241, 1243 (2d Cir.1972). Courts have consistently upheld imposition of conditions of probation that restrict a defendant's freedom of speech and association when those conditions bear a reasonable relationship to the goals of probation. *Cf. Porth v. Templar,* 453 F.2d 330, 334 (10th Cir.1971)." *United States v. Turner,* 44 F.3d 900, 903 (10th Cir.1995).

See *Gibbons v. State,* 775 S.W.2d 790, 791 (1989) (protester convicted of trespass on church property ordered not go onto or within 200 yards of the property); *United States v. Lowe,* 654 F.2d 562, 563 (9th Cir.1981) (protester convicted of trespass on Trident missile base ordered not to come within 250 feet of the base); *United States v. Bird,* 124 F.3d 667, 669 (5th Cir.1997) (defendant convicted of violating the Freedom of Access to Clinic Entrances Act, 18 U.S.C.A. § 248[a][1], ordered to stay at least 1,000 feet from abortion clinics).

*12 *Turner* is especially instructive in this regard. As noted earlier, *Turner* involved an anti-abortion trespasser at the same Wichita clinic where Holick engaged in trespassing. The federal district court in *Turner* imposed a special probation condition that Turner not " 'harass, intimidate or picket in front of any gynecological or abortion family planning services center.' " 44 F.3d at 903. In upholding this special probation condition the Tenth Circuit concluded:

> "There is no question here but that the conditions imposed on Ms. Turner bear a reasonable relationship to the goal of her probation. Given her deeply held convictions regarding abortion, it is not fantastic to speculate that if she were permitted to protest at abortion clinics, she might not be able to restrict her activities within lawful parameters. In order to help insure Ms. Turner does not repeat her criminal conduct, the district court did not abuse its discretion by imposing this condition as a term of her probation." 44 F.3d at 903.

In the present case, the district court's special probation condition restricted Holick from the vicinity of this particular clinic for a 2–year period. This condition facilitated the protection of the clinic and its employees and patients from further trespass by Holick. Moreover, imposition of a 100–yard buffer zone seems particularly appropriate given the State's proffer that the present offense was Holick's fourth conviction for illegal activities occurring at Wichita medical clinics. Given Holick's history, the buffer zone seems reasonable because he had demonstrated an inability to refrain from unlawful conduct when engaged in otherwise lawful protest activities. In short, the special probation condition was reasonably related to the goal of insuring the safety of the public and rehabilitating the offender.

Finally, we view any restrictions on Holick's First Amendment rights with heightened scrutiny. Holick's crime was a violation of property rights. Apart from his trespass, Holick has constitutionally protected rights of free speech and assembly, and religious expression which entitle him to articulate his long-standing and strongly held anti-abortion views. Given the fundamental liberties at issue, we scrutinize whether the special probation condition is reasonably related to the purposes of probation, yet not unduly restrictive upon Holick's constitutional rights. See *Turner,* 44 F.3d at 903 (1995); *State v. Friberg,* 435 N.W.2d 509, 515-17 (Minn.1989).

In the present case, the district court's special probation condition was limited in scope. The buffer zone simply provided that Holick may not revisit the scene of the offense in order for Holick to resist the temptation to engage in further incidents of trespass. The district court did not limit in any way Holick's continued participation in anti-abortion or

religious activities. Under the court's order, Holick is free to express his views, associate with individuals who share his commitment to the anti-abortion movement (or any other religious or political cause), and also protest at other medical clinics or locations Holick chooses in an attempt to persuade individuals to adopt his beliefs.

*13 We hold the special probation condition was permitted under the Wichita ordinance, was reasonably related to the goals of probation, and did not unreasonably limit Holick's First Amendment rights of freedom of speech, assembly, or religion.

Stare Decisis

In his brief, Holick extensively discusses what he believes are the limitations of the doctrine of stare decisis, especially as it relates to the United States Supreme Court decision in *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

At the outset, Holick did not specifically raise this issue before the district court. As a general rule, an appellant must raise an issue in the district court before it may be raised on appeal. *State v. Rojas,* 280 Kan. 931, Syl. 1, 127 P.3d 247 (2006). Moreover, our Supreme Court has consistently upheld *Roe's* holding. *Alpha Med. Clinic v. Anderson,* 280 Kan. 903, 923, 128 P.3d 364 (2006). In this regard, the Court of Appeals is duty bound to follow Kansas Supreme Court precedent, absent some indication the court is departing from its previous position. *State v. Beck,* 32 Kan.App.2d 784, 788, 88 P.3d 1233, *rev. denied* 278 Kan. 847 (2004). We know of no such indication.

Holick's claim is not properly before us and is also without merit.

Affirmed.

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