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No. 10-104520-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

v.

SCOTT P. ROEDER
Defendant-Appellant

**BRIEF OF AMICI CURIAE
NATIONAL ABORTION FEDERATION,
AMERICAN CIVIL LIBERTIES UNION, &
ACLU OF KANSAS & WESTERN MISSOURI**

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

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Table of Contents

INTERESTS OF AMICI 1

INTRODUCTION 2

ARGUMENT 3

THE DISTRICT COURT PROPERLY REFUSED TO ALLOW DEFENDANT TO PRESENT A NECESSITY OR VOLUNTARY MANSLAUGHTER DEFENSE3

I. THIS COURT'S DECISIONS AND THE U.S. CONSTITUTION PRECLUDE A NECESSITY OR VOLUNTARY MANSLAUGHTER DEFENSE TO USE OF LETHAL VIOLENCE TO OBSTRUCT THE EXERCISE OF A CONSTITUTIONAL RIGHT 3

City of Wichita v. Tilson, 253 Kan. 285 (1993)4, 5, 6, 7

Kan. Stat. Ann. § 21-32114

Kan. Stat. Ann. § 21-3403 4

Hill v. State of Florida, 688 So.2d 901 (Fla. 1996) 4, 5

McMillan v. City of Jackson, 701 So.2d 1105 (Miss. 1997) 4

Bennett v. Texas, 1994 WL 594007 (Tex. App.-Dallas 1994) 4

People v. Belsan, 625 N.E.2d 913 (Ill. App. 2d Dist. 1993) 4

State v. Shannon, 258 Kan. 425 (1995) 4, 6

Griswold v. Connecticut, 381 U.S. 479 (1965)6

Lawrence v. Texas, 539 U.S. 558 (2003) 6

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) . 6

Alpha Med. Clinic v. Anderson, 280 Kan. 903 (2006) 6

Com. v. Wall, 372 P.A. Super. 534 (1988) 7

II. THE VOLUNTARY MANSLAUGHTER STATUTE WAS NEVER INTENDED TO, AND CANNOT, MITIGATE CULPABILITY BASED ON POLITICAL BELIEFS7

Kan. Stat. Ann. § 21-3403 8

| | |
|---|------------------|
| Kan. Stat. Ann. § 21-3211 | 8Statutes |
| Kan. Stat. Ann. § 21-3211 | 4, 8, 12 |
| Kan. Stat. Ann. § 21-3403 (2010) | 4, 8 |
| Kan. Stat. Ann. § 21-3452 | 8 |
| <i>State v. Carter</i> , 284 Kan. 312 (2007) | 8 |
| <i>State v. Jones</i> , 27 Kan. App. 2d 910 (Kan. Ct. App. 2000) | 8 |
| III. DEFENDANT'S PURPORTED BELIEF THAT DR. TILLER PERFORMED UNLAWFUL ABORTIONS IS IRRELEVANT | 10 |
| <i>City of Wichita v. Holick</i> , 151 P.3d 864, 2007 WL 518988 (Kan. App. 2007)... | 11, 13 |
| <i>City of Wichita v. Tilson</i> , 253 Kan. 285 (1993) | 11, 12 |
| <i>State v. Shannon</i> , 258 Kan. 425 (1995) | 11, 13 |
| <i>State v. Thayer</i> , 14 A.3d 231 (Vt. 2010) | 11 |
| <i>Bennett v. Texas</i> , 1994 WL 594007 (Tex. App.-Dallas 1994) | 11 |
| Kan. Stat. Ann. § 21-3211 | 12 |
| Kan. Stat. Ann. § 21-5419(b)(2) | 12 |
| Kan. Stat. Ann. § 65-6712 | 12 |
| Kan. Stat. Ann. § 65-6713 | 12 |
| Kan.Stat. Ann. § 65-67a09 | 12 |
| Kan. Stat. Ann. § 65-6703(g) | 12 |
| Kan. Stat. Ann. § 65-6705(k) | 12 |
| <i>State v. White</i> , 284 Kan. 333 (2007) | 13 |
| <i>Hill v. State of Florida</i> , 688 So.2d 901 (Fla. 1996) | 13 |
| CONCLUSION..... | 13 |
| CERTIFICATE OF SERVICE..... | 14 |

INTERESTS OF AMICI

The National Abortion Federation ("NAF"), a non-profit organization founded in 1977, is the professional association of abortion providers in the United States and Canada. Its members include 400 nonprofit and private clinics, women's health centers, hospitals, and private physicians' offices. NAF's members care for over half the women who choose abortion each year in the United States. NAF works closely with law enforcement to ensure the safety of its members.

The American Civil Liberties Union ("ACLU") is a nationwide nonpartisan organization of nearly 600,000 members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the United States Constitution. The ACLU of Kansas and Western Missouri is a local affiliate of the ACLU. The ACLU and its affiliates have long been active in protecting, generally, the rights of privacy and equality guaranteed by the Constitution and, specifically, the right of a woman to decide whether to continue or end a pregnancy. Constitutional protection for that right precludes those who murder abortion providers from seeking acquittal or diminished culpability and punishment, on the basis of their sincere belief that, contrary to almost forty years of U.S. Supreme Court precedent, abortion should be illegal.

The Center for Reproductive Rights is a legal advocacy organization dedicated to the advancement of reproductive rights under the U.S. Constitution and as fundamental human rights. The Center represents abortion providers across the United States in challenges to restrictions that impede access to abortion and other reproductive health care. The Center advocates for the recognition and protection of abortion providers as

human rights defenders – those whose work allows others to exercise their human rights.

INTRODUCTION

If a man, with premeditation, tracks down the person he wishes to kill, follows that person into his church, and shoots that person dead, the man has committed first degree murder – whether he acted for pecuniary gain, revenge, political belief, or any other motivation. Under the laws and constitution of this State and of the United States, the Defendant here cannot be acquitted of the murder of Dr. Tiller or convicted of a lesser included offense simply because he acted out of genuine opposition to legal abortion. Allowing Defendant to assert that his beliefs should diminish his culpability – either entirely through a necessity defense or significantly through a voluntary manslaughter defense – would violate longstanding state and federal precedents and undermine basic constitutional principles. *Amici* appreciate that a defendant's ability to defend against criminal prosecution should be limited only in the narrowest circumstances. Nonetheless, it is the uncontroverted law of this State that a defendant's sincerely held political beliefs cannot absolve him of liability or garner him more lenient treatment for the commission of a criminal act – here, murder – that is explicitly designed to obstruct other individuals' exercise of their constitutional rights. Accordingly, *Amici* submit this brief to urge this Court to preclude Defendant from arguing his anti-abortion beliefs in support of a necessity defense or a lesser included charge of voluntary manslaughter.

ARGUMENT

THE DISTRICT COURT PROPERLY REFUSED TO ALLOW DEFENDANT TO PRESENT A NECESSITY OR VOLUNTARY MANSLAUGHTER DEFENSE.

Defendant appeals, *inter alia*, the district court's decision to prevent Defendant from presenting and not instructing the jury on a necessity defense or the lesser included offense of voluntary manslaughter in his trial for the premeditated, politically-motivated murder of Dr. Tiller.¹ Defendant has readily conceded from the outset of this case that he committed the cold, calculated and premeditated murder of Dr. Tiller for no other reason than that Dr. Tiller was a physician who provided abortions and Defendant is opposed to abortion. The sincerity of Defendant's anti-abortion beliefs is not in question. Indeed, there is no one who believes he stalked Dr. Tiller to his Church and gunned him down in front of his friends, family, and community for any other reason. But, *as a matter of law*, those beliefs do not in any way justify or excuse the use of lethal force against those who disagree with him—nor could they without rending the constitutional right to abortion, or any other constitutional right, utterly meaningless. Thus, for the reasons set forth below, Defendant's appeal on these grounds is entirely without merit.

I. THIS COURT'S DECISIONS AND THE U.S. CONSTITUTION PRECLUDE A NECESSITY OR VOLUNTARY MANSLAUGHTER DEFENSE TO USE OF LETHAL VIOLENCE TO OBSTRUCT THE EXERCISE OF A CONSTITUTIONAL RIGHT.

The district court correctly precluded Defendant from asserting either the necessity or voluntary manslaughter defense ("imperfect defense of another") in this case. The contours of the necessity defense are well-settled: Although defendant has

¹ *Amici* take no position on the other grounds on which Defendant bases his appeal.

unquestionably and intentionally committed a crime, he did so to prevent commission of a greater evil and therefore must be exculpated. *See City of Wichita v. Tilson*, 253 Kan. 285, 288-90 (1993) (per curiam).² By contrast, the voluntary manslaughter defense mitigates the defendant's culpability for the "intentional killing of .a human being committed... upon an unreasonable but honest belief that circumstances existed that justified deadly force," Kan. Stat. Ann. § 21-3403 (2010), to defend a "third person against such other's imminent use of unlawful force," *id.* § 21-3211. This Court has recognized on more than one occasion that a defendant's sincere opposition to abortion does not provide a justification, even an imperfect one, for homicide; nor does it entitle him to use violence to nullify the constitutionally protected rights of those with whom he disagrees. *See State v. Shannon*, 258 Kan. 425, 429-30 (1995) (no voluntary manslaughter defense for politically-motivated attempted murder of abortion provider); *Tilson*, 253 Kan. 285 (no necessity defense for politically-motivated trespass at abortion clinic); *see also Hill v. State of Florida*, 688 So.2d 901 (Fla. 1996) (no necessity defense for politically-motivated murder of abortion provider) (citing *Tilson*).³

² This Court has never formally adopted the necessity defense, though it is has considered, and rejected, its applicability to the use of violence or unlawful activity to obstruct constitutionally protected activity, including abortion. *See id.* 290-91. *Amici* take no position on whether this Court should officially recognize the defense in all cases, but argue that as this Court has previously held even were the Court to adopt the defense, it would be unavailable in this case.

³ Virtually every other court to address the question has similarly held that sincere anti-abortion beliefs do not justify criminal activity. *See, e.g., Tilson*, 253 Kan. at 292 ("Every appellate court to date which has considered the issue has held that abortion clinic protesters . . . are precluded, as a matter of law, from raising a necessity defense when charged with trespass") (citing cases); *see also McMillan v. City of Jackson*, 701 So.2d 1105 (Miss. 1997) (no necessity defense for trespass at abortion clinic); *Bennett v. Texas*, 1994 WL 594007 (Tex. App.-Dallas 1994) (same) (unpublished decision); *People v. Belsan*, 625 N.E.2d 913 (Ill. App. 2d Dist. 1993) (same).

In *Tilson*, the defendant was arrested for criminal trespass after blocking the entrance to a clinic. 253 Kan. at 286. At trial, the defendant admitted blocking the entrance, but asserted that her actions were justified by necessity, arguing that "abortion takes the life of an unborn baby, and I wanted to prevent that." *Id.* at 287. The district court judge accepted the defense and held that the defendant was absolved of any criminal liability for her actions on the basis of her opposition to abortion and her belief that her actions were necessary to save human lives. *Id.* at 287-88.

This Court reversed, holding that to assert the necessity defense, "[t]he harm or evil which a defendant . . . seeks to prevent must be a legal harm or evil as opposed to a moral or ethical belief of the individual defendant." *Id.* at 289-90. Recognizing that "[e]very appellate court to date which has considered the issue has held that abortion clinic protesters . . . are precluded, as a matter of law, from raising a necessity defense," *id.* at 292-96 (citing cases), the Court affirmed that "[w]hen the objective sought is to prevent by criminal activity a lawful, constitutional right, the defense of necessity is inapplicable," *id.* at 296 (emphasis added). The Court's holding was unambiguous:

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.

Id. at 296. *See also Hill*, 688 S0.2d at 905-07 (defendant who murdered abortion provider precluded from asserting necessity defense because "permitting a defendant to vindicate his or her criminal activity in such a manner would be an invitation for lawlessness").

The same logic applies to the voluntary manslaughter defense. *Shannon*, 258 Kan. at 429-30. Disagreement with the constitutional right to abortion does not mitigate criminal acts of violence directed at those who provide that constitutionally protected service—nor could it without undermining the very constitutional right at issue. Thus, for the same reason Defendant cannot assert the necessity defense, this Court's decisions preclude the voluntary manslaughter defense as Defendant formulates it: that killing an abortion provider is a less serious offense than first degree murder if the killer was motivated by opposition to abortion. *See id.*

It "is established, beyond any argument, that since 1973," the U.S. Supreme Court has recognized the constitutional principles that protect a woman's right to end a pregnancy. *Tilson*, 253 Kan. at 291. In an unbroken line of cases – reaching from *Griswold v. Connecticut*, 381 U.S. 479 (1965), in 1965, to *Lawrence v. Texas*, 539 U.S. 558 (2003), in 2003 – the U.S. Supreme Court has repeatedly affirmed these principles: that the right to decide whether and when to have a child is within the constitutionally protected zone of privacy; that it is essential to dignity, self-determination, and women's equality; and that the Due Process Clause of the U.S. Constitution therefore protects a woman's right to choose abortion. Today, no less than sixteen years ago, when this Court first addressed the issue in *Tilson*, decisions surrounding abortion involve "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy," and "central to the liberty protected by the Fourteenth Amendment." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992); *see also Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 920 (2006)

(affirming "fundamental right of a pregnant woman to obtain a lawful abortion without government imposition of an undue burden on that right").

Moreover, as this Court has recognized, if Defendant were allowed to assert either a necessity defense or voluntary manslaughter defense here, the implications would reach well beyond a woman's constitutional right to end a pregnancy. "If every person were to act upon his or her personal beliefs in this manner, and [the Court] were to sanction the act, the result would be utter chaos." *Tilson*, 253 Kan. at 296. A ruling that sincere, even if unreasonable, opposition to *any* lawful or constitutionally protected activity justifies or excuses murder would be an open invitation to vigilantes everywhere. It would be comparable to a declaration that Klu Klux Klan were justified in, or at the very least should be held less culpable for, lynchings and bombings aimed at preventing Blacks from exercising the right to vote. *See id* This is obviously wrong. "In a society of laws and not of individuals, we cannot allow each individual to determine, based upon his or her personal beliefs, whether another person may exercise her constitutional rights." *Tilson*, 253 Kan. at 296 (quoting *Corn. v. Wall*, 372 P.A. Super. 534, 543-44 (1988)). Hence, as a matter of law, the district court properly prohibited Defendant from asserting the necessity or voluntary manslaughter defense.

II. THE VOLUNTARY MANSLAUGHTER STATUTE WAS NEVER INTENDED TO, AND CANNOT, MITIGATE CULPABILITY BASED ON POLITICAL BELIEFS.

It is not only constitutionally impermissible for Defendant to assert the voluntary manslaughter defense in this case, but the statute, as written and conceived by the Kansas Legislature, is entirely inapplicable in these circumstances. Accordingly, the district court properly precluded Defendant from asserting the defense.

As described above, the voluntary manslaughter defense mitigates the culpability of a defendant for the "intentional killing of a human being committed . . . upon an unreasonable but honest belief that circumstances existed that justified deadly force," Kan. Stat. Ann. § 21-3403, to defend a "third person against such other's imminent use of unlawful force," *id.* § 21-3211. By definition, the murder of Dr. Tiller in order to prevent him from performing abortions does not meet these basic statutory requirements. First, contrary to Defendant's assertion, *see* Appellant Br. at 17, under Kansas law, a fetus is not a person for purposes of abortion. Kan. Stat. Ann. § 21-3452.

Second, Defendant incorrectly relies on the phrase "unreasonable but honest belief," *id.* § 21-3403, to suggest that it is precisely because his anti-abortion beliefs are so extreme—extreme enough to lead to premeditated murder—that he is entitled to assert the defense. *See, e.g.*, Appellant Br. at 21-23 (quoting Defendant, "I did what I thought was needed to be done to protect the children. I shot him."); *see also id.* at 16-17. But the term "unreasonable belief," as used in the voluntary manslaughter statute, does not refer to the defendant's dogma or world view. As used in the statute, the term "unreasonable belief" refers to an honest, even if unreasonable, misunderstanding of the circumstances that led to the use of deadly force. *See, e.g., State v. Carter*, 284 Kan. 312 (2007) (defendant argued he was entitled to voluntary manslaughter defense for intentional killing because he mistakenly believed he was about to be robbed); *State v. Jones*, 27 Kan. App. 2d 910 (Kan. Ct. App. 2000) (defendant entitled to voluntary manslaughter instruction where he intentionally shot and killed individual who was part of a mob descending on his family, and he mistakenly believed that individual had a gun). The defense was never intended to be a vehicle through which Defendant can

mitigate his culpability for intentional homicide based on political or moral beliefs, such as Defendant's belief that abortion is murder, even though he knows it is a constitutionally protected medical procedure. In other words, the imperfect self defense charge is available only when the defendant mistakenly believes the circumstances are such that the use of deadly force is justified; it is not available where, as here, Defendant is perfectly cognizant of the circumstances and that they do not justify deadly force under existing law, but he simply disagrees with that law, and thinks it should ban abortion.

Indeed, there is no reasonable argument that the cold, calculated and premeditated murder of Dr. Tiller was based on an honest misunderstanding. Defendant was not mistaken in his belief that Dr. Tiller was an abortion provider. Likewise, Defendant was not mistaken in his belief that abortion causes the death of an embryo or fetus. That he knew these facts to be true, which they are, was his sole motivation for the killing:

Mr. Roeder: The lives of those children were in imminent danger. If someone did not stop George Tiller, he was going to continue as he had done for 36 years prior to that time. If someone did not stop him, they were going to continue to die. The babies were going to continue to die. My honest belief was that if he did not stop that, at the time when I had the window of opportunity, they would have continue (*sic*) to die 22 hours later.

Appellant Br. at 17; *see also id.* at 17-18. The voluntary manslaughter defense was never meant to provide leniency for a homicide motivated by such a deliberate and knowing disregard for the law.

Moreover, as above, the implications of the statutory interpretation Defendant urges on this Court are tremendous. Does an honest belief that the death penalty is

morally wrong, despite numerous state and federal court decisions upholding its constitutionality, diminish the culpability of an anti-death penalty activist who stalks a prison guard to his church and shoots him dead because that guard is scheduled to carry out an execution the next day? Of course not. Yet this is the very principle Defendant would have this Court adopt: categorical leniency for politically-motivated murder. Defendant's reading of the voluntary manslaughter statute is thus entirely unprecedented and unsupported. This Court should reject this interpretation, along with any other attempt by Defendant to argue that his anti-abortion beliefs justify the "imperfect self-defense" in this case.

HI. DEFENDANT'S PURPORTED BELIEF THAT DR TILLER PERFORMED UNLAWFUL ABORTIONS IS IRRELEVANT.

On appeal, Defendant attempts to distinguish this settled precedent by arguing that he murdered Dr. Tiller because he purportedly believed Dr. Tiller performed *unlawful* abortions. *See* Appellant Br. at 21-22, 24-48, and 61-66. He claims to have held this belief because, on two prior occasions, Dr. Tiller was charged with various misdemeanor violations of Kansas' abortion law, *id.*, to wit, failing to "obtain an independent second opinion relative to the patient on whom he performed an abortion," Appellant Br. at 26. This argument fails.

First, Defendant admitted – indeed, asserted – that he was well aware that each of those charges either were dismissed for lack of jurisdiction or resulted in acquittal after a jury trial. *Id.* at 25-26, 30-31. It was his very frustration with the fact that the law did *not* close Tiller's practice and that a jury acquitted him of any wrongdoing that led, Defendant to plan the murder. *See, e.g., id.* at 35 ("[T]hose failures of the State to successfully prosecute Dr. Tiller, being dismissed and being acquitted, that goes to the

mindset of Scott Roeder. That is what let (*sic*) to the frustration and honest belief). Thus, Defendant misconstrues the defenses as being available to a killer who disagrees with the law – which Defendant clearly did – rather than to someone who misunderstood the facts – which Defendant admitted he did not. If disagreeing with the law excused killing to prevent conduct that the law does not ban, each killer would be a law unto himself

Second, Defendant's argument that he gunned down Dr. Tiller because he believed Dr. Tiller had, for example, failed to obtain a second opinion for some of his patients is non-credible. "[A] fair reading of the record reveals that [Defendant's] primary purpose . . . was to prevent all abortions, including those women have a right to obtain under [the] United States Constitution and Kansas Law." *City of Wichita v. Holick*, 151 P.3d 864, 2007 WL 518988 (Kan. App. 2007) (holding necessity defense unavailable when defendant sought to prevent both lawful abortions and allegedly unlawful post-viability abortions) (unpublished decision); *see, e.g.*, App. Br. at 22 (arguing Defendant believed use of force justified because "Mr. Roeder had a lengthy and varied involvement in the pro-life movement").⁴

⁴ Defendant's stubborn refusal to accept the jury's acquittal no more justifies premeditated murder (or creates an honest, but mistaken, belief that the circumstances warranted the use of lethal force) than does his stubborn refusal to accept that abortion is constitutionally protected. *See, e.g., Tilson*, 235 Kan. 285; *Shannon*, 258 Kan. at 429-30 (no voluntary manslaughter defense for attempted murder of abortion provider where defendant testified "our government refuses to do its job and protect the lives of the babies, so somebody has to"); *State v. Thayer*, 14 A.3d 231, 235 (Vt. 2010) (no basis in law for necessity defense where defendant charged with unlawfully cultivating marijuana was "dismayed" by medical marijuana provisions "that seemed to her grossly inadequate and seemingly arbitrary"); *cf. Bennett*, 1994 WL 594007 at *4 (no basis in law for necessity defense where defendants testified "that abortion clinics are not closely regulated in Texas and that, because of lax reporting procedures, it was entirely *possible* that unlawful abortions were being conducted") (emphasis in original).

Third, lethal force could never be justified even in response to a realistic threat of unlawful abortion. As this Court has noted, the crux of the necessity defense is that the crime defendant commits (here, premeditated homicide) is a lesser evil than the purported crime defendant sought to prevent (here, unlawful abortion). *See, e.g., Tilson*, 253 Kan. at 289. Likewise, voluntary manslaughter is available only to a defendant who unreasonably but honestly believes it "necessary to prevent imminent death or great bodily harm to such person or a third person." Kan. Stat. Ann. § 21-3211. Thus, to assert the necessity defense, a defendant must be able to demonstrate that, on balance, the crime he prevented outweighs the crime he committed and that he had no choice but to commit the crime; to assert the voluntary manslaughter defense a defendant must be able to prove that had the circumstances been as he believed, the same would have been true. A realistic threat (or an honest, but mistaken, belief that there is a realistic threat) that a doctor may perform an abortion that does not comply with state or federal law can never justify or excuse the premeditated murder of that doctor.

Fourth, necessity and voluntary manslaughter both require a showing of imminence,⁵ which makes them unavailable even if Defendant had honestly believed that Dr. Tiller was breaking the law. And the reason for that is simple: if a person seeking to stop a crime has any recourse whatsoever other than using lethal force, he must take that recourse. Hence, where a person seeks to prevent allegedly illegal conduct that is not imminent, he must call the police or the prosecutor, rather than take it upon himself to

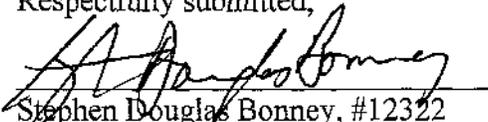
⁵ *State v. White*, 284 Kan. 333, 352 (2007) (voluntary manslaughter unavailable absent unless evidence of "actual fear of an imminent harm") (internal citations omitted); *see also Shannon*, 258 Kan. at 429-30; *Holick*, 2007 WL 518988, at *3-5; *Hill*, 688 So.2d at 905-06.

kill. It was the futility of calling the police – the fact that doing so would stop no abortions – that led Defendant to shoot a man dead on in church a Sunday morning, when no medical procedures were imminent. Under these circumstances, neither necessity nor involuntary manslaughter is available.⁶

CONCLUSION

For the reasons set forth above, *Amici* urge this Court to uphold the district court's decision to preclude Defendant from presenting a necessity or voluntary manslaughter defense.

Respectfully submitted,


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MISSOURI*

⁶ However, for the reasons stated herein, it is the position of *Amici* that even if the crime had been committed in the operating room at Dr. Tiller's clinic Defendant could not here assert either defense.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this February 28 2012, two copies of the foregoing Brief were served by first class mail, postage prepaid, upon:

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A handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to read 'A. Douglas'.