

1 District Attorney Nola Tedesco Foulston
Supreme Court #09175
2 Chief Deputy District Attorney Kim Parker
Supreme Court #11203
3 Deputy District Attorney Ann Swegle
Supreme Court #10920
4 Office of the District Attorney
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5 Wichita, Kansas 67203
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FILED 

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CLERK OF C
18TH JUDGE

BY 

8 IN THE EIGHTEENTH JUDICIAL DISTRICT
9 DISTRICT COURT, SEDGWICK COUNTY, KANSAS
10 CRIMINAL DEPARTMENT
11

12 STATE OF KANSAS,

13 Plaintiff,

14 vs.

15 SCOTT P. ROEDER,

16 Defendant
17

Case No.: Case No. 09 CR 1462

18 **MOTION IN LIMINE**

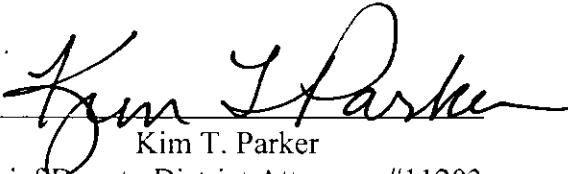
19 **Comes Now** the State of Kansas by and through its attorneys, District Attorney Nola
20 Foulston, Chief Deputy District Attorney Kim T. Parker and Deputy District Attorney Ann
21 Swegle and moves this Court for an Order in Limine prohibiting the presentation of evidence and
22 argument in support of the "necessity defense" by the defendant and prohibiting any evidence or
23 argument to the jury to influence them to disregard the evidence or the law during any stage of
24 the trial, from jury selection to closing argument.
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1 In support of its motion, the State incorporates the attached memorandum.

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3 Respectfully Submitted,

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6 Nola Tedesco Foulston
7 District Attorney, #09175

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10 Kim T. Parker
11 Chief Deputy District Attorney, #11203

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14 Ann Swegle
15 Deputy District Attorney, #10920

16 **CERTIFICATE OF SERVICE**

17 This is to certify that a true and correct copy of the foregoing motion and attached memorandum was hand-delivered on this 12th day of November, 2009 to the following:

18 Mr. Steve Osburn
19 Mr. Mark Rudy
20 Public Defender's Office
21 604 N. Main, Suite D
22 Wichita, KS 67203

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

24 _____
25 Ann Swegle
Deputy District Attorney

NOTICE OF HEARING

Please take notice that the foregoing motion will be heard at 9:30 a.m. on December 22, 2009 before the Honorable Warren Wilbert.

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

11
12 STATE OF KANSAS,
13 Plaintiff,
14 vs.
15 SCOTT P. ROEDER,
16 Defendant

Case No.: Case No. 09 CR 1462

17
18 **MEMORANDUM IN SUPPORT OF STATE'S MOTION IN LIMINE**

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20 **Comes Now** the State of Kansas by and through its attorneys, District Attorney Nola
21 Foulston, Chief Deputy District Attorney Kim T. Parker and Deputy District Attorney Ann
22 Swegle and submits this memorandum in support of its Motion in Limine.
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1 Nature of the Case

2 The defendant is charged in the instant matter with one count of premeditated first-degree
3 murder and two counts of aggravated assault for events occurring at an area church on Sunday,
4 May 31, 2009 while services were being held. The murder victim, George Tiller, was a
5 physician who performed abortions. The defendant, though not his counsel, has made statements
6 that he may seek to rely on the “necessity defense” during the trial of this matter, asserting that
7 the murder of George Tiller was justified to prevent the killing of human fetuses through
8 abortion. The defendant may also seek to influence trial jurors to ignore the Court’s instructions
9 on the law and urge them to rely instead on their own personal moral, philosophical or religious
10 beliefs in arriving at their verdicts.

11
12 Arguments and Authorities

13 **I. The “necessity defense” is not recognized as a lawful defense in Kansas under the factual**
14 **situation present in the instant action, and therefore evidence and argument in support of**
15 **such a defense should not be allowed.**

16 “The justification by necessity defense, except as codified in statutes such as those
17 relating to self-defense and compulsion, has not been adopted in Kansas.” *City of Wichita v.*
18 *Tilson*, 253 Kan. 285, Syl.3, 855 P.2d 911, 911 (1993). The defendant in *Tilson* was charged
19 with criminal trespass at a Wichita health care clinic where abortions were performed. She
20 claimed her trespass was justified by the common-law doctrine of justification by necessity, also
21 known as the necessity defense. The City of Wichita appealed the district court’s holding that
22 the necessity defense was recognized in Kansas and absolving the defendant of any criminal
23 liability for her conduct.

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1 After reviewing ways various jurisdictions describe the element of the common-law
2 doctrine, also referred to as “competing harms” or “lesser evils”, the Kansas Supreme Court
3 stated that “...one thing is clear: The harm or evil which a defendant, who asserts the necessity
4 defense seeks to prevent must be a legal harm or evil as opposed to a moral or ethical belief of
5 the individual defendant.” *Tilson*, 253 Kan. at 289-290. The court ultimately concurred with the
6 reasoning of a number of courts in abortion clinic/trespass cases whose opinions it cited, finding
7 that because abortion is a lawful, constitutionality protected activity, the defendant was
8 precluded as a matter of law from asserting the necessity defense, explaining:

9 To allow the personal, ethical moral, or religious beliefs of a person, no matter how
10 sincere or well-intended, as a justification for criminal activity aimed at preventing a
11 law-abiding citizen from exercising her legal and constitutional rights would not only
lead to chaos but would be tantamount to sanctioning anarchy.

12 *Id.* at 296.

13 In the instant matter, the defense clearly has no applicability, even if the defense were
14 recognized in Kansas. George Tiller was not engaged in illegal conduct at the time of his murder;
15 he was serving his church as an usher. And while the victim’s provision of lawful abortion
16 services to women may be the motive behind the defendant’s attack, those past or potential
17 future services cannot serve as a legal justification for it. *See, Tilson, supra.*

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20 **II. The defendant should not be permitted to seek jury nullification, or to in any way
21 influence or encourage the jury to ignore the evidence or the Court’s instructions on the
law.**

22 K.S.A 22-3403(3) provides that “When the trial is to a jury, questions of law shall be
23 decided by the court and issues of fact shall be determined by the jury.” K.S.A. 60-247(d) states
24 that “jurors shall be sworn to try the case conscientiously and return a verdict according to the
25 law and the evidence.”

1 The statutes cited above clearly indicate that it is the exclusive province of the court to
2 determine the law applicable to a case and the duty of the jury to follow that law in arriving at its
3 verdict. Despite these incontrovertible facts, jurors are sometimes encouraged to disregard the
4 law and the evidence and decide a case based on their own feelings, often leading to a result
5 called jury nullification. Jury nullification has been defined as “A jury’s knowing and deliberate
6 rejection of the evidence or refusal to apply the law either because the jury wants to send a
7 message about some social issue that is larger than the case itself or because the result dictated
8 by law is contrary to the jury’s sense of justice, morality, or fairness.” *Black’s Law Dictionary*
9 875 (8th ed. 2004)

10
11 Kansas law does not permit jurors to disregard the law and substitute their own moral
12 beliefs as a basis for their verdicts. *State v. McClanahan*, 212 Kan. 208, Syl. 3, 510 P.2d 153
13 (Although it must be conceded that the jurors in a criminal case have the raw physical power to
14 disregard both the rules of law and the evidence in order to acquit a defendant, it is the proper
15 function and duty of a jury to accept the rules of law given to it in the instructions by the court,
16 apply those rules of law in determining what facts are proven and render a verdict based
17 thereon.) Because tactics, explicit or implicit, designed to influence or encourage a jury to
18 ignore the law or the evidence may lead to results contrary to the law, they must not be allowed.
19 Such tactics might include the use of language that tends to vilify the victim, or cast the victim in
20 an unfavorable light; the projection of personal opinion characterizing the victim’s activities or
21 personal characteristics without an established basis in evidence; and the use of inflammatory
22 language in describing the victim or his work.

23
24 **Conclusion**
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