No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Scott P. Roeder, Petitioner

vs.

State of Kansas, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

THE KANSAS SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Scott P. Roeder #65192

Ellsworth Correctional Facility

PO Box 107

Ellsworth KS 67439

Questions Presented for Review:

1. Has the fact that all unborn babies are humans/persons been sufficiently established by juries, expert witnesses, state legislatures, and Congress to invoke Roe's ruling that state legislatures and courts should now protect their 14th Amendment rights?

2. Is the 6th Amendment right to trial by jury satisfied when the only contested issue of the trial is kept secret from the jury and decided by the judge alone?

3. Can any interpretation of any element of any defense, which leaves no way to lawfully save thousands of lives using the least necessary force, stand, once fact finders are allowed to remove all reasonable doubt that the many lives saved were of humans, a.k.a. persons?

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

Other

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Supreme Court of Kansas appears at Appendix A to the petition and is reported at State of Kansas v. Scott P. Roeder, #104520. The date the highest state court decided my case was October 24, 2014. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a). The trial court entry of judgment is in Appendix B.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

My arguments are based on and involve the Preamble to the U.S. Constitution, 14th Amendment "equal protection", 5th Amendment "Due Process", Model Penal Code § 3.02, 18 U.S.C. § 1841(d), K.S.A. 21-3403(b), (Voluntary manslaughter) K.S.A. 21-3211 (Defense of others). K.S.A. 21-5402 (First Degree Murder.) The text of these is in Appendix C.

STATEMENT OF THE CASE

I ended the life of late term abortionist George Tiller[1] in the only way, time, and place possible.[2] I stipulated unilaterally to the facts alleged in my charges before my trial began[3] because the prosecutor, after scheduling 182 witnesses to prove facts I did not contest, had moved to forbid my jury from hearing the *only contested fact* of the case:[4]

1 The date was May 31, 2009, Pentecost Sunday. The place: Reformation Lutheran Church, Wichita, KS.

2 This was established in trial transcript 012810, Vol 12, pages 66:6-68:9, 108:6-25, 109:10-111:6, 131:8-135:7, 142:24-143:9, 182:16-184:11. See Appendix D. And yet without identifying any alternative, the Kansas Supreme Court said "Even for Roeder's professed purpose of stopping *all* aborticides, not just illegal aborticides, the Draconian measure of murder was not the only alternative." (Page 23.) I am now trying another alternative: presenting irrefutable arguments in court and praying some judge will acknowledge their existence. But before I saved lives, I had no "standing" to intercede for the unborn.

3 My stipulation, and my reasons for it, are found on pages 26-29 of my pro se pretrial brief was docketed January 8, 2010. (The brief begins with an explanation of what compelled me to file a pro se brief even though I had two state-appointed public defenders.)

4 I don't mean there was only one question for my jury. It should have been for my jury to make the

which was not *what I did*, but *who I saved*.[5] I hoped to clear the smoke obscuring the defense I *did* raise. To tell what I did, but not why, left my sanity in doubt.

The prosecutor still called 24 witnesses to prove the facts to which I had stipulated, giving the illusion of a trial *by jury* of the contested fact which was kept secret from the jury. Trial Judge Wilbur frequently vowed "this trial is NOT going to be about abortion"[6] as he censored the "third persons" element of my statutory lesser included defenses. How can a trial be "about" anything other than the *pivotal contested issue* before it?

No serious question was raised that I saved unborn babies. Tiller's website had boasted 60,000[7] victims, while his marketing pointed to thousands more in his career path.[8] Nor was it ever denied that unborn babies of human mothers are humans, but

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judgment whether my belief in each of the facts was "reasonable" or at least "honest". Perhaps these are technically "fact questions", but I think of them as matters of judgment where the nature of reality is not seriously questioned. For example, there was much debate about "imminence", but it was not about how much later than my action the evil I prevented was scheduled; it was about the legal definition of the word "imminence". There was debate about whether Tiller's abortions were "unlawful", but it was not about the evidence available or its limitations; it was about whether the limited evidence could support a "reasonable" or even "honest" belief. In the case of the existence of "third persons", however, it was the nature of reality itself which had not been "established".

5 My defense was framed by the Negating Defense in Kansas, Defense of Others, K.S.A. 21-3211, and by the common law affirmative Necessity Defense, whose elements are virtually identical, as I will explain later. The existence of "third persons" was an element common to all the negating defenses that were discussed. I argued that the existence of "third persons", whose lives I saved, was proved by 18 U.S.C. § 1841(d). I introduced this argument on pages 9-25 of my pretrial pro se brief; I developed them further in my Pro Se Supplemental Brief filed Jan 6, 2012, pages 42-50, and in my Pro Se Supplemental Brief received Aug 3, 2012 and docketed Jan 14, 2013, pages 10-11. I incorporate these by reference.

6 See Appendix D for quotes from the transcript of Judge Wilbur saying this.

7 In my sentencing statement, page 155, Volume 1 of the 040110 transcript, I said "Judge Wilbert, [sic] over 50 million innocent children have perished over the past 37 years through the procedures 1 just described, and George Tiller admits to killing 60,000 of them. I did not stop George Tiller to avenge their deaths. I stopped him so he could not kill again. I stopped him so he could not dismember another helpless, innocent baby. It was the most agonizing and stressful decision I have ever had to make, and it took years to come to this conclusion, especially with the knowledge I may never see my son, my daughter or my family again." At 60,000 slain over about a 40 year career, Tiller would have slain another 6,000, had nothing else stopped him, just in the next 4 years during which Wichita had no abortionist. More calculations are on p. 95 of my 1/28/10 pro se pretrial brief. Of course, had I saved only the one child I was later privileged to see, my defense would still stand.

8 To prove that I had a reasonable expectation that my action would save lives, my court appointed attorney subpoenaed Tiller's schedule for the following Monday to prove that there were actual lives that were spared because of my Sunday action. But the subpoena was quashed. Nevertheless the fact is proved by common knowledge, and as if that were not adequate, by this principle: "The suppressing of evidence ought always to be taken for the strongest evidence." *The Trial of John Peter Zenger,* 1735.

neither was it ever acknowledged. That was the "element in the room".

Neither Judge Wilbur nor the Opinion Below ruled on whether 18 U.S.C. § 1841(d) legally establishes my view – that unborn babies of humans are humans/persons – as correct and controlling. Or on Congress's authority to determine this fact. Or on my reliance on the statute. The record outside my own pro se briefs omits 18 U.S.C. § 1841(d).

The unlawfulness of a substantial number of Tiller's abortions, under Kansas law, was relevant to the "unlawful harm" element. Judge Wilbur minimized the 109 criminal charges including 23 felonies brought against Tiller by Attorney General Phill Kline, saying they were all dismissed. Wilbur ignored the fact that every judge who reviewed the merits of Kline's charges agreed the charges were sound,[9] and the circumstances of their dismissal were of such questionable legality that they became public scandals.[10]

Judge Wilbur's second reason for minimizing the usefulness of the charges against Tiller to my lesser included was that Tiller was later acquitted of 19 other, lesser charges. That established Tiller's innocence. Wilbur had confused standards of evidence.

> In prosecuting Tiller, the State had to prove that he was guilty beyond a reasonable doubt....In prosecuting me, the State must in effect prove that Tiller was *innocent* beyond a reasonable doubt....A factfinder who agreed that the probability that Tiller had unlawfully killed viable infants was 50-50 would acquit Tiller but acquit me too. *See my pro se supplemental brief, Jan 2013, pp. 13-14 for development of this point.*

Wilbur quashed my only two witnesses, whom I had called to establish the

9 Judge Paul Clark dismissed Kline's charges on the spurious ground that an Attorney General has no jurisdiction to file charges without a county prosecutor's permission. Another version was that Foulston, DA, accused Kline of not informing her before filing charges as Kansas law requires, although Kline testified that he had and that Foulston had expressed no objection. Kline's testimony is reviewed in my Jan 6, 2012 Pro Se Supplemental Brief, Pages 10-12. Kline appealed, and his successor in office dismissed Kline's charges again. He sort of attacked the merits, but his statement indicated he did not understand them. See my pro se pretrial brief, Jan 8, 2010, p. 98.

10 Had evidence of Tiller's crimes not been cut so short even in Kline's proffer, we could have shown that as measured by widely reported scandals regarding campaign contributions to people who destroyed evidence, much of Wichita "reasonably believed" Tiller's abortions were substantially unlawful. My knowledge of these events at the time was not limited to newspapers. A friend fed me stacks of legal documents, besides prolife publications and my friendship with eyewitnesses.

"reasonableness" or at least "honesty" of my belief that Tiller's abortions were substantially criminal by Kansas law. (None of "the state's" 24 witnesses were quashed despite their irrelevance to any remaining contested issue.) He sent one home without even proffering, and limited the second to a proffer, on the extralegal grounds that he was "too credible",[11] that his impressive credentials would be too likely to make the jury think that my beliefs were "reasonable",[12] and that his testimony was "cumulative" since I could testify, myself, to what I wanted him to document![13]

Wilbur let me testify relevant to Voluntary Manslaughter (not Defense of Others or Necessity). But by jury instruction decision time, VM's subjective standard had magically turned into "objective requirements" for two of the elements[14] for which there was a lack of the evidence I had expected my witnesses to provide.

The result, for my jury, was unsupported testimony about my personal beliefs, without any subsequent jury instruction that might have saved it from irrelevancy.

Nor did the Kansas Supreme Court ever acknowledge my key defense, its fact issue,

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11 An expert witness disqualified for being "too credible"? But that's what my ears heard at trial, and the transcript documents it. See my analysis of it in my January 6, 2012 Pro Se Supplemental Brief, pages 1-2, which includes relevant quotes from the transcript.

12 Steadier minds than mine may be required to follow this train of thought. But perhaps the explanation is that by this time Judge Wilbur had decided there was no evidence to support Kansas' Defense of Others, K.S.A. 21-3211, which requires a finding that my beliefs were "reasonable". But he was still letting me pursue "Voluntary Manslaughter", K.S.A. 21-3403(b) , which required that my beliefs be merely "honest". So therefore, perhaps, in his mind, evidence that my beliefs were "reasonable" was irrelevant to Voluntary Manslaughter – the only relevance of the evidence was to a Lesser Included for which, he had already ruled, there was no evidence. Never mind that the evidence should have prompted him to reconsider his ruling that it didn't exist. Never mind that I was facing a high enough hurdle just trying to show the jury my belief was "honest", which would have been lowered by evidence that it was "reasonable". See Appendix my analysis of it in my January 6, 2012 Pro Se Supplemental Brief, pages 5-15, which includes relevant quotes from the transcript.

13 Even after one of my witnesses was quashed, the second one was quashed partly because his testimony would be "cumulative"! See my January 6, 2012 Pro Se Supplemental Brief, pages 2-5, which includes relevant quotes from the transcript.

14 (Volume 12, page 221 of the 012810 transcript) The impact on my case of Wilbur's waffling, to the extent of denying that yesterday's order was not technically a "ruling", is explained in my 1/6/2012 Pro Se Supplemental brief, pp. 2-5, Issue 2.

or its reliance upon federal law. Instead they substituted a straw man.

> ...a good deal of the evidence at trial dealt with Roeder's religious beliefs and their manifestation into his perceived need to kill Dr. Tiller.[15]

I did not cite the Bible or "religious belief" to back any element of my defense.

Kansas said my belief about the unborn was a result of my 1992 conversion, but my testimony was that it came long before.[16] My conversion was not when I first *believed* abortion is murder; it is when I felt *responsibility* to save as many lives as I could.[17]

One doesn't have to be religious to realize that the babies of humans are humans. We are in a land where every legal authority which has taken a position on the subject has unanimously agreed they are. The only reason my testimony touched on my personal beliefs at all was because of Judge Wilbur's rulings that that is all I could testify about, which he had promised was relevant to the subjective elements of Voluntary Manslaughter, before he decided its elements were objective after all and my beliefs were so obviously unreasonable that no jury should have to hear them.[18]

Wilbur's denial that my trial was "about abortion" was such an affront to reality that even the calendar protested, starting the trial[19] on Jan 22, 2010, the 37th Anniversary of Roe v. Wade. The clock concurred: next week's headlines announced that the jury deliberated only 37 minutes. The sentencing hearing was scheduled on April 1, the 6th

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15 Kansas' opinion below, page 6.

16 Transcript 012810 Volume 12, page 74)

17 Transcript 012810 Volume 12, Pages 75 to 76

18 My first pro se supplemental brief, filed January, 2012, pages 1-18, lists five errors of Judge Wilbur as he wavered on whether some of the "unreasonable but honest" elements of Voluntary Manslaughter ought to be interpreted as a "reasonable" standard, including quashing my only two witnesses because they were "cumulative" and "too credible" and might actually influence my jury to think my beliefs were beyond "honest", all the way to "reasonable", which would be bad because that would support my claim to Defense of Others, which he had already ruled out.

19 Scheduling of the first day of trial was beyond Judge Wilbur's control. He had begun jury selection the previous Monday, and had barred media, which prompted a Supreme Court appeal by media. Considering the turbulence of the week, few thought the actual voir dires would proceed so quickly and allow trial to begin on Friday.

Anniversary of the federal law that defines all unborn babies from conception as humans/persons, the issue which Wilbur had vowed must not be acknowledged.

By avoiding any mention of my defense, the Kansas Supreme Court indicated its concurrence with Judge Wilbur's sentiment that "this trial is NOT going to be about abortion!" Our affronted calendar[20] took offense again, arranging for the Court to publish its opinion October 24, leaving my deadline for filing my SCOTUS application for Writ of Certiorari to fall on the 42nd Anniversary of Roe v. Wade.

REASONS TO GRANT THE WRIT

The Opinion Below documents how universally courts in abortion prevention cases[21] wrongly think Roe says abortion's "constitutional protection" makes irrelevant any facts established by court-recognized fact finders about who abortion harms.

> "The rationale utilized by '[t]he majority of courts. . . [was] that because abortion is a lawful, constitutionally protected act, it is not a legally recognized harm which can justify illegal conduct.'" (p. 19 of Opinion Below, quoting *City of Wichita v. Tilson,* 855 P.2d 911 (Kan. 1993)

This rationale has made it illegal to save the lives of a discrete class of persons. It is treated by courts as some sort of "Immovable Object". My case brings against it an "Irresistable Force": the fundamental right to present a complete defense to the jury, of which this rationale has deprived me and an entire class of thousands of defendants in abortion prevention cases, even though case law is full of promises that a defendant must be allowed to present a "complete defense".[22] In fact, I was not allowed *any defense at all.*

20 I don't actually believe clocks and calendars orchestrate such "coincidences" by their own volition. I can't help but take encouragement from God's remarkable timing that perhaps He can use my case to save more lives. I thank Yahweh for the opportunity He has already given me to save many lives.

21 By this term I mean the whole range of actions to prevent or reduce abortions, ie. trespass, arson, "mob action," refusal to obey an officer, "threats," "intimidation".

22 "We...require that criminal defendants be afforded a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. 479, 485 (1984). See Crane, 476 U.S. at 690; *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973); *Washington,* 388 U.S. at 23; and *Oliver,* 333 U.S. at 273. Justice White said "[A]n accused with the right to be tried by a jury of his peers [which gives] him an inestimable

According to courts below, this rationale must not budge for any law, evidence, logic, or constitutional right. Thousands of times, it would not let juries weigh the affirmative defense usually called Necessity or Duress, even though the only seriously contested issue in all those trials was the factual nature of the unborn, which was a leg of the "comparison of harms". In my case, it would not even budge for my two Negating Defenses, Kansas' "lesser includeds" to the charge of First Degree Murder.[23] Whether the lives I saved are "third persons" is an element of my negating defenses, but Judge Wilbur saw no reason to even "debate" it: killing them is "legal".

> We can debate whether [abortion is] deadly or not, whether or not it's a viable fetus and whether or not life is being terminated, but it is lawful in the State of Kansas. (Volume 12, 012810, page 219; see also page 221)

Didn't Casey[24] abandon "constitutional protection" for abortion in 1992?[25]

Didn't Roe say in so many words "we can't even *speculate* whether these babies we let mothers kill are humans/persons – of course if that is ever *established*, then we will stop it"?[26] By saying doctors and preachers know more about it than SCOTUS, didn't Roe defer to fact finders,[27] treating personhood as a fact question?

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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 a single judge, he was to have it." *Duncan v. Louisiana,* 391 U.S. 145, 156 (1968).

23 K.S.A. 21-3403(b), (Voluntary manslaughter) K.S.A. 21-3211 (Defense of others). I will explain a little later why the latter should be recognized as a negating defense instead of as an affirmative defense as Judge Wilbur and my court appointed attorney asserted.

24 Planned Parenthood v. Casey, 505 U.S. 833, 945, 954 (1992)

25 Justice Scalia's dissent in *Lawrence v. Texas* 539 U.S. 558, 595, 123 S. Ct. 2472, 2493 (U.S., 2003), explaining how the Supreme Court, in 1992, abandoned Roe's position that the right of a woman to choose to hire someone to kill her unborn child was a "fundamental right": "We have since rejected Roe' s holding that regulations of abortion must be narrowly tailored to serve a compelling state interest, see *Planned Parenthood v. Casey,* 505 U.S., at 876,....-and thus, by logical implication, Roe' s holding that the right to abort an unborn child is a 'fundamental right.'

26 "If this suggestion of personhood [of unborn babies] is established, the...case [for legalizing aborticide], of course, collapses, for the fetus' right to life is then guaranteed specifically by the [14th] Amendment." Roe v. Wade, 410 US 113, 156

27 "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at

Certainly by the principle "actions speak louder than words" it is reasonable for courts below, and Americans in general, to infer that SCOTUS has ruled that unborn babies are in fact *not* human beings and have no value other than for their "potential" to *become* human beings. Or that their personhood is irrelevant. But aren't SCOTUS's *words* also important? Haven't these courts "decided an important federal question in a way that conflicts with relevant decisions of this Court"?[28]

16 years after Roe, Webster said "we still don't need to decide."[29] I don't know of any other case that has made any attempt to decide unborn personhood, or to consider what triers of facts say about it, or even treat it as a a topic of interest. Even Justices Scalia and Thomas, noting the life-and-death importance of the question in their dissents, avoid affirming their own certainty that the unborn are humans/persons, or even that the question can be objectively resolved. Nor do they acknowledge the growing evidence that unborn babies of human mothers are humans. Taking no position as SCOTUS justices is consistent with their theory that the right to kill babies is a "value judgment"[30] for states.

Meanwhile the consensus of fact finders, that the unborn babies of human mothers are humans after all, matured. As I will show later, triers of facts who were allowed to weigh the issue agreed. A few district judges in bench trials also agreed.[31] The proffers of

this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Roe v. Wade* 410 US 113, 159

28 Supreme Court rule 10c.

29 *Webster v. Reproductive Health Services,* 492 US 490 (1989) said the impact of a state's "personhood" law on Roe's "collapse" clause was not properly before the Court. The issue was not ripe. "...until...courts have applied the preamble to restrict appellees' [abortionists] activities in some concrete way, it is inappropriate for federal courts to address its meaning." Sandra Day O'Conner concurred: "This Court refrains from deciding constitutional questions where there is no need to do so....When the constitutional invalidity of a State's abortion statute actually turns upon the constitutional validity of Roe, there will be time enough to reexamine Roe, and to do so carefully." (Quoting from the syllabus.)

30 *Planned Parenthood v. Casey*, 505 U.S. 833, 982 (1992) (Concurrence/dissent of Scalia, White, Thomas)

31 A dissent by Mahoney in *Detwiler v. Akron,* C.A. No. 14385 at 22 (9th App. Dist. 1990) said "Until the Court decides when a fetus is a person, I see no reason to deny the defense of necessity to those who believe that the fetus is viable and is a person...At least it would get the issue squarely before the U.S. Supreme Court...."

tens of thousands of expert witnesses, in abortion prevention trials, were uncontested. States affirmed the fact, either in stand-alone personhood laws or as part of Unborn Victims of Violence laws; the number of states has reached 38, which is a Constitutional Majority.[32] Finally, Congress, the fourth and final category of court-recognized fact finders, made it unanimous.[33] 2004 was a banner year for personhood because not only did Congress make the consensus of court-recognized finders of fact unanimous, but Congress' authority to find facts is well regarded by SCOTUS.[34]

No court-recognized fact finder has ever said the unborn are *not* humans or persons.

Is this enough to make unborn babies "recognizably human"? (Roe equated "recognizably human" with "persons".[35]) That would make abortion recognizable as murder, which would annul thousands of precedents which have denied the right of Trial by Jury to people charged with saving lives. It would not foment anarchy, or leave me reason to shoot again, because it would simultaneously require states to criminalize abortion, as Roe's "collapse" clause explains.[36] It would resolve the "third persons" element of my negating defense. It would end the legal anarchy of basing who lives and who dies on alleged ignorance of who is human.

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32 Am I making up a term? Anyway, 38 is the 3/4 of the states needed to ratify a Constitutional Amendment.

33 18 USC §1841(d)

34 ...the existence of facts supporting the legislative judgment is to be presumed...not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators....the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist. ...But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. *U.S. v. Carolene Products,* 304 U.S. 144, 152 (1938)

35 These disciplines variously approached the question [of when life begins] in terms of the point at which the embryo or fetus became "formed" or *recognizably human, or in terms of when a 'person' came into being,* that is, infused with a 'soul'... Roe v. Wade 410 U.S. 113, 133 (1973)

36 "If this suggestion of personhood [of unborn babies] is established, the...case [for legalizing aborticide], of course, collapses, for the fetus' right to life is then guaranteed specifically by the [14th] Amendment." Roe v. Wade, 410 US 113, 156

If the unanimous, uncontested consensus of all court-recognized fact-finders is not enough to "establish" the existence of unborn humans to SCOTUS' satisfaction, how much more "establishment" of this fact is necessary? Is there a more "important question of federal law that has not been, but should be, settled by this Court"?[37]

Within these questions are more life-and-death questions: Did Roe v. Wade treat "when [the right to] life begins" as a fact question for fact finders, or as a question of law in which the factual nature of the unborn is entirely irrelevant?

Much of the rationale for Roe was that "the unborn have never been recognized in the law as persons in the whole sense." 410 U.S. at 162. But Roe's legislative history has been seriously criticized by scholars. For as long as this history is made the basis for deciding who gets to live, shouldn't SCOTUS revisit this history, address criticisms, and make any warranted corrections?

Some of the rationale for Roe's alleged ignorance of "when life begins" was that "those trained in...theology are unable to arrive at any consensus...." *Roe v. Wade* 410 US 113, 159. Yet not one single Bible verse was analyzed in reaching this conclusion. How is it possible to assess the position of any religion, while treating its Scriptures as irrelevant? Roe's characterization of the position of Protestantism and Judiasm on when babies become humans/persons was not decided by anything resembling a thoughtful study, yet it was made part of Roe's basis for deciding when it is legal to kill them. This makes the relevant Scriptures an "important question of federal law", a situation in which I would think courts would not want to remain.

Not only does the survival of abortion's legality require denial of the 6th Amendment

37 Supreme Court rule 10c.

right to Trial by Jury in thousands of cases, but in cases like mine it requires denial of my right to dispute my alleged mens rea. The legitimacy of this charade is an "important question of federal law" which SCOTUS should decide, and the reason for this charade is that appellate courts have "decided an important federal question in a way that conflicts with relevant decisions of this Court."

ARGUMENT IN SUPPORT OF THESE REASONS

I was convicted of first degree murder under K.S.A. 21-5402[38] after I was not allowed to disprove the mens rea portion of the charge, based on inferences from Roe v. Wade which exceed, and pervert, SCOTUS' stated concerns.

The KS Supreme Court admits an obligation to allow a Lesser Included defense when there is "*some* evidence" supporting it "in the light most favorable to the defendant".[39] Judge Wilbur admitted he should instruct the jury to consider a "lesser included" offense even if my own "unsupported testimony" merely "tends" to support it.[40] In other words, if I merely allege facts which, if true, support my defense, the jury should hear my evidence and be instructed to weigh my defense. It didn't happen.

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38 K.S.A. 21-5402.

39 Kansas v. Rodriguez, No. 103, 467 (2012) " '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). In other words, lesser included offense instructions must be given when there is some evidence, emanating from whatever source and proffered by whichever party, that would reasonably justify a conviction of some lesser included crime." See also p. 24, the Opinion Below.

40 "The Court does recognize my duty to instruct the jury on all lesser included offenses that's established by substantial evidence. And that's found in State versus Deavers, 252 Kansas 149. The first syllabus cited by the Supreme Court states, as follows: The defendant in a criminal prosecution has a right to have the Court instruct the jury on all lesser included offenses established by substantial evidence, *however weak, unsatisfactory, or inconclusive the evidence may appear to the Court.* To refuse to so instruct the jury invades the jury's province in the trial of a case. The question is not whether, in the mind of the Court, the evidence as a whole excludes the idea that the defendant is guilty of a lesser degree of the offense charged, but whether there is any substantial evidence tending to prove a lesser degree of the offense. If there is, then the question of such degree should be submitted to the jury. The *unsupported testimony of the defendant alone, if tending* to establish such lesser degree, is sufficient to require the Court to so instruct." Transcript 01-08-10 p. 11:13-12:8.

If the judges in my case had credible legal reasons for defining the elements of my lesser included defenses in a way that made it impossible for me to save lives, or if my issues involve only intricacies of Kansas law which do not affect the nation, then I have no case before SCOTUS. But I will try to demonstrate that no credible logic or law justified not letting my jury review the contested fact issues, and that the resolution of my case affects the nation in this way: judges don't normally get basic due process as wrong as they did in my case, and in thousands of similar cases. The errors all begin with "The Element in the Room": those unwelcome "third persons".

Kansas First Degree Murder's mens rea is "intentionally, and with premeditation". A lesser included offense is Voluntary Manslaughter, K.S.A. 21-3403(b), in which I must have an "honest" belief that third persons were in imminent danger from unlawful harm whom I had no alternative way to save. If my beliefs are found "reasonable", I qualify for Defense of Others, K.S.A. 21-3211, an acquittal.

Although Defense of Others was called an "affirmative defense" by the trial judge and my attorney,[41] and that is how it should be classified for minor offenses with no mens rea requirement, it is a negating defense with regard to murder because both first degree murder and voluntary manslaughter have express mens rea and fact elements defining lack of justification, or excuse. The existence of the lesser includeds shows that their elements are subsumed under the mens rea requirement of first degree murder.

Juries must be given the question if there is any evidence at all supporting elements of a lesser included, including, in this case, Defense of Others which is not an offense. No

41 The judge: "...the defendant is seeking an instruction on the lesser included offense of voluntary manslaughter rather than asserting the affirmative defense of defense of others..." My attorney: "Judge, we agree with you that's it's improper for you to rule on a possible defense of others because it's an affirmative defense." 01-08-10 pretrial hearing, transcript p. 15:19-22 and 24:25-25:2.

fact, no matter how obvious, can be decided by a judge. A judge has no authority to preclude evidence "tending" to support a negating defense. If it is remotely relevant, he can't rule it inadmissible, or not worthy of a jury instruction, because it does not persuade him or he thinks it can't persuade a jury.

Yet Wilbur preceded the trial with his ruling that evidence of the "third persons" element – the elephant in the room – would not be admitted; for no legal reason that he gave.[42] This was weeks before[43] he claimed he didn't need to address the "third persons" element because my lesser included defense failed on another element – mostly, imminence. Nor would the Opinion Below address the element.

Imminence. Wilbur ruled out a jury instruction for Voluntary Manslaughter via his minute limit on "imminence" – contrary to law, precedent, or authorities – according to which it is impossible to legally save lives of a discrete class of persons.

> And shooting and killing his brother-in-law two hours before the event, the Supreme Court said was not imminent. That two-hour window still provided opportunities to call the police, to seek some other intervention short of deadly force. (012810 p. 218:9-13. See pp. 218:4 to 221:11 for full discussion.)

Judge Wilbur acknowledged the connection between the two-hour window, and its opportunity for a less forceful intervention, but he failed to note the inapplicability of a two-hour standard to my case in which two *years* wouldn't have been enough time for me to involve police in saving lives. That connection wasn't in the case he cited. He probably got it from my January 8 pretrial brief (which I now incorporate by reference) which he said he read. Part of its "imminence" section, pages 83-95, was a quote from LaFave &

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42 "...this will not become a trial of the abortion issues. And there are not going to be witnesses who will testify to graphic descriptions of abortion procedures and revisit and argue all of the legally insufficient discussions and debates over the harm caused": (P. 23:16-21, 010810 transcript)

43 He ruled evidence of the harm of abortion inadmissible in a January 8, 2010 pretrial hearing. The trial began January 22, the 37th Anniversary of Roe v. Wade. He ruled out my lesser included January 28.

Scott, quoting Robinson to explain why a strict time limit such as Wilbur's makes no sense.

> "Suppose A kidnaps and confines D with the announced intention of killing him one week later. D has an opportunity to kill A and escape each morning as A brings him his daily ration. Taken literally, the *imminent* requirement would prevent D from using deadly force in self-defense until A is standing over him with a knife, but that outcome seems inappropriate. *** The proper inquiry is not the immediacy of the threat but the immediacy of the response necessary in defense. If the threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self-defense must permit him to act earlier - as early as is required to defend himself effectively." LaFave & Scott, §5.7(d), 656, *citing* 2 P. Robinson, Criminal Law Defenses § 131(c)(1) (1984):

"The immediacy of the response necessary in defense" was expressed in my pretrial pro se brief as "it is the closing of the window of opportunity to prevent serious harm that must be near in time." p. 84. The closing of the window in my case could not have been more imminent. A second later – certainly a minute later – it would have slammed shut.

My imminence arguments on appeal, which I incorporate by reference,[44] explain that neither ordinary language, nor Kansas law, nor Kansas case law, nor U.S. law, limit "imminence" to less than a day; and in no precedent was force declared unjustified because it was too distant in time from the threat to life, if it was plausibly *necessary* to save lives. No judge in my case addressed these points.

The Opinion Below dismisses my defense, and "persons", with a non sequitur:

> That timeline belies the notion that Roeder sincerely believed that the harm to be prevented was imminent; one does not wait over a decade to prevent an imminent harm. (p. 22) ....Even ignoring the question of whether a fetus is a third person, the defense could not stand. (p. 31) We need not recount the other reasons that the requested defense-of-others instruction was not legally appropriate....Stepping out of the delusional world in which Roeder apparently resides, no rational person would reasonably believe that deadly force was needed against an imminent use of unlawful force in this case. (p. 46)

My decade of patience is irrelevant to the elements of my defenses, which do not

44 p. 18-40, Pro Se Supplemental Brief, January 6, 2012. Also pp. 7-9, second PSS brief, January 2013.

require me to save lives for ten years before it is legal to save any. The lives I saved *were* in imminent danger, as precedents and authorities define "imminence". They would have been killed had I not acted. This non sequitur quibbling is a poor substitute for addressing my charge that the 14th Amendment requires courts, and not just me by myself, to protect the unborn. "Delusional" is a strong accusation for a court which itself shuts 18 USC §1841(d) outside its world to the extent of "ignoring" precedents and authorities as needed to censor an element of a negating defense.

Here is a summary of LaFave and Scott, with concurring authorities:

> ... a requirement that the threatened harm must have been imminent is identical to a requirement that the defendant must have had no alternative, legal means to avoid the threatened harm. In most cases, until the threatened harm is imminent, there are legal options for avoiding it. (Footnote 52: W. LAFAVE & A. Scott, supra note 6, § 50, at 388. See also Holmes, 26 F. Gas. at 366 ("The peril must be instant, overwhelming, leaving no alternative.") (emphasis added).
>
> Some courts and commentators also use an "imminence" requirement as a surrogate for the requirement that a harm giving rise to a necessity defense must be clear and certain. Levitin, Putting the Government on Trial. The Necessity Defense and Social Change, 33 WAYNE L. REv. 1221, 1225 (1987) [hereinafter Levitin]. See also Mitchell v. Harmony, 54 U.S. (13 How.) 115, 133 (1851) ("the danger must be immediate and impelling, and not remote or contingent").
>
> In addition, the MPC formulation does not require the defendant to have acted to avoid an "imminent" harm. The Code drafters believed that an imminence requirement would be unnecessarily restrictive.7 2 p. 687
>
> MODEL PENAL CODE § 3.02 comment 2, at 17. The drafters noted, however, that in most valid necessity cases, the threatened harm will have been imminent because "genuine necessity rests on the unavailability of alternatives that would avoid both evils, and ... typically when the evil is not imminent some such alternative will be available." Id.
>
> *Journal of Criminal Law and Criminology, Volume 81, Issue 3 Fall Article 7, Fall 1990, The Use of the Necessity Defense by Abortion Clinic Protesters, by Arlene D. Boxerman*

Unlawful harm. Judge Wilbur founded his rejection of my lesser included almost as much on their "unlawful harm" element.

I can't imagine how any reasonable person, following the widely reported scandals

about destruction of evidence of Tiller's crimes conducted by recipients of Tiller's campaign contributions, could escape at least a little reasonable doubt about Tiller's innocence by Kansas law.[45]

Another reason I easily meet the "unlawful harm" element is that "lawful" is quite a different word than "legal". This is from my Jan 8 2010 pro se pretrial brief, pp. 56-57:

> Black's, 4th Ed, under "Legal": "The principal distinction between the terms 'lawful' and 'legal' is that the former contemplates the substance of law, the latter the form of law....Further, the word 'lawful' more clearly implies an ethical content than does 'legal.' The latter goes no further than to denote compliance, with positive, technical, or formal rules; while the former usually imports a moral substance or ethical permissibility...." Thus defendant may, and does, argue that he "reasonably believes that such force is necessary to defend such person or a third person against such other's imminent use of unlawful [ethically impermissible] force.

Contributing to Judge Wilbur's denial of my Voluntary Manslaughter instruction was his confusion of VM's *"honest* belief" requirement with *"reasonable* belief":

> And while Mr. Roeder's honestly held and maybe unreasonable beliefs that Dr. Tiller was performing an illegal abortion, there is no basis in the evidence, there is *no proof of that,* and in fact the only time that it was ever prosecuted, it's in the record now, the jury has heard that Dr. Tiller was found not guilty and acquitted. So Scott Roeder had *no reasonable basis, no objective reasonable standard* that Dr. Tiller was performing illegal abortions. ... So it would fail on that second prong, that there is even the unlawful use of force. (Transcript 012810 Vol. 12 pp. 218:22-219:11)

Wilbur's five reversible errors are that (1) he ruled against a Voluntary Manslaughter instruction because the "unlawful harm" element didn't meet the "reasonable belief" standard when the correct standard was "honest belief"; (2) he should have allowed the jury to hear it anyway because even if the evidence should seem slight,

45 See my 2nd Pro Se Supplemental appeal brief, pp. 13-14. This is part of my argument there: "The State makes another argument against my being allowed to introduce evidence as to the necessity of my killing Dr. Tiller: that he had already been prosecuted on charges of illegal abortion and not been convicted. That argument confuses standards of proof. In prosecuting Tiller, the State had to prove that he was guilty beyond a reasonable doubt and to meet the technical requirements of a criminal prosecution, which it failed to do. In prosecuting me, the State must in effect prove that Tiller was *innocent* beyond a reasonable doubt."

even slight evidence can generate the "reasonable doubt" necessary for acquittal; (3) the evidence would have been less "slight" had Wilbur not disqualified my two expert legal witnesses on the ground that they might persuade the jury that my beliefs about Tiller's substantially criminal abortions are not merely "honest" but "reasonable"; (4) he avoided the extralegal manner in which the felony charges were dismissed, which is strong evidence of Tiller's guilt by the Zenger[46] principle; and (5) he censored my argument that *all* abortions are legally recognizable as murder.

The Opinion Below documents the felonies for which Tiller was charged, (p. 35), but minimizes them as mere "administrative or procedural irregularities" (p. 38):

> Once the choice of evils is clarified to be the premeditated intentional murder of a human being versus the violation of administrative procedures governing an otherwise legal abortion, the answer is crystal clear. By analogy, no one would find it necessary to kill an over-the-road trucker for failing to maintain an up-to-date log book. (Page 22, Opinion below)

But what if the trucker was failing to keep up his log book in order to disguise a series of deliveries of suitcase atomic bombs to a terrorist in New York? And what if a 2004 federal law had established legal recognition of New Yorkers as humans?

But Kansas never accepted the "third persons" element as worth considering. Certainly a jury in doubt whether New Yorkers are human beings would be horrified that shipments of A-bombs were so violently aborted over mere "administrative procedures". All hinges on whether New Yorkers are humans. If they are, "the answer is crystal clear".

"Violation of administrative procedures", when occasional and accidental, certainly does not merit harsh response. But when it is deliberate, determined, ongoing, and consistent, it is evidence of a deliberate cover up of the harm which the regulations were

46 "The suppressing of evidence ought always to be taken for the strongest evidence." *The Trial of John Peter Zenger,* 1735.

designed to prevent. In this case, one charge was that Tiller falsified the ages of babies he killed so he could kill them at a much later age when Kansas law did *not* regard their abortions as "otherwise legal", but as closer to murder.[47]

It is a circular argument to say it is unnecessary to consider the "third persons" element because the "unlawful harms" element destroys the defense anyway, when the reason the "unlawful harms" element destroys the defense is that there are no "third persons" whose safety is unlawfully harmed. Without "third persons", not even armed robbery, kidnapping, or murder will be seen by Kansas as serious enough to justify killing to prevent it, since what is robbed, kidnapped, or murdered might not be a "person".

But were fact finders allowed to remove all reasonable doubt that the many lives saved were of humans, a.k.a. persons, and that killing their murderer was the only way to save them, then legalistic enforcement of any construction of any element whose effect is to punish the saving of those many lives is immediately recognizable as the tyrannical sophistry more to be expected of a caliphate or communist stronghold than of a free nation. Such sophistry must end, here.

Alternatives. The unexplained and inexplicable statement of the KS Supreme Court that I had more peaceful alternatives (footnote #2) to the way I saved thousands of lives must be immediately acknowledged as preposterous on its face.

Summary. There was clearly no ground for denying jury instructions on both lesser included defenses: Defense of Others, and Voluntary Manslaughter. Even my own unsupported testimony, *"tending"* to support the defenses, should have been enough. Yet my oral and pretrial written testimony was not only clearly honest, but probably

47 Another charge was that he failed to report statutory rape when he aborted babies of girls below the age of consent, resulting in those girls remaining in those tyrannical situations.

irrefutable given the irregularity of its suppression and denial of due process.

Persons. That leaves the "element in the room" whose evidence Judge Wilbert vowed would never be allowed in his court room – the sole fact issue of my trial which was kept secret from Triers of Fact – the pivotal legal argument of my defense – the law which sealed that fact: 18 USC §1841(d) – the fact "established" by the uncontested unanimous court-recognized fact-finders of America: *abortion is murder.*

Here is the sum total of what Wilbur said about the "third persons" element:

> We can debate whether it's deadly or not, whether or not it's a viable fetus and whether or not life is being terminated, but it is lawful in the State of Kansas. To allow voluntary manslaughter at this point in time would be nothing more than to reinsert the necessity defense in this case under the guise of voluntary manslaughter. (Transcript 012810 Vol. 12 pp. 219:11-18)

What paranoia can make a judge worry that an affirmative defense requiring "reasonable belief" can disguise itself as a negating defense requiring "honest belief", so to avoid that great likelihood, neither should reach the ears of the jury?

When I say my 18 U.S.C. §1841(d) legal argument is pivotal, I mean that the other issues – imminence, lack of alternatives, the unlawfulness of the "harm" I ended – all hang on my claim that those I saved are humans/persons. If I prevented no "harm", then there was nothing to be found "unlawful", or in danger of "imminent" demise, or to be "saved" by other means. But if I stopped aborticide, saving thousands of lives, then defining "imminence" in a way that makes it impossible to save those lives is recognizable as legalistic quibbling at the most charitable, as LaFave & Scott testify.

If I saved lives, *it doesn't even matter* how many of Tiller's abortions were criminal by Kansas law, because all of them are legally recognizable as murder, which "of course"

forces the "collapse"[48] of abortion's dubious legality, which renders unconstitutional all laws and precedents protecting abortion and punishing its prevention, and which leaves abortion, being murder, *legally recognizable as unlawful under common law even before new statutes can be enacted.*

In fact, if I saved lives, then any requirement that the harm I stopped must be "illegal" in addition to "unlawful" or it was still a crime to save those lives, must be found unconstitutional – being in violation of the 14th Amendment Right to Life of unborn humans/persons, for whose benefit the Constitution was created;[49] and the multiple choice historical elements of the parallel Necessity Defense can't be assembled in a way that makes it illegal to save the lives of a discrete class of persons.[50] They must be resolved in favor of Wharton and of a correct reading of Robinson.

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

Robinson says when "any legally protected interest", such as human life, is threatened, "conduct constituting an offense is justified if" the conduct "furthers a legal interest greater than the harm or evil caused...." such as interfering with the *right to kill human life* whose humanity is "established" by the uncontested consensus of court-recognized fact finders. Which "legal interest" is "greater"? The Constitutionally protected

48 "If this suggestion of personhood [of unborn babies] is established, the...case [for legalizing aborticide], of course, collapses, for the fetus' right to life is then guaranteed specifically by the [14th] Amendment." Roe v. Wade, 410 US 113, 156

49 The Constitution was created "for ourselves and for our posterity" according to its preamble. I incorporate by reference my observations about this in pp. 100-102 of my Jan 8, 2010 pro se pretrial brief.

50 Where constitutional rights directly affecting the implication of guilt are implicated, rules of evidence may not be applied mechanistically to defeat the ends of justice. See *Chambers,* 410 U.S. at 302.

Right to Life, or the "privacy" right to "privately" kill human beings which stopped being "constitutionally protected" in 1992?

> Conduct constituting an offense is justified if.
> (1) any *legally-protected interest* is unjustifiably threatened or an opportunity to further such an interest is presented; and
> (2) the actor engages in conduct, constituting the offense,
> (a) when and to the extent necessary to protect or further the interest,
> (b) that avoids a harm or evil or furthers a *legal interest greater than the harm* or evil caused by actor's conduct. (Italics in original.) 2 Robinson, Criminal Law Defenses § 124(a) pp. 45-46 (1984).[51]

But Robinson was against abortion preventers like me, according to the Kansas precedent invoked against me, which quoted Robinson and several concurring appellate decisions. *City of Wichita v. Tilson* 253 Kan. 285 (1993), 855 P.2d 911 said the "legally protected interest" protect isn't human life, as we say: our *real* purpose is "interfering with the rights of others"[52] which is not a "legally protected interest".

> "at page 295....appellant nevertheless insists that he was justified in violating the law in this case because his actions were motivated by higher principles....we cannot allow each individual to determine based upon his or her personal beliefs whether another person may exercise their Constitutional rights and then allow that individual to assert the defense of justification...." Judge Wilbur quoting Tilson, pp. 219:25-220:13 of the 012810 transcript. [Tilson had just previously said "...the defense of justification by necessity cannot be used when the harm sought to be avoided is a constitutionally protected legal activity and the harm incurred is in violation of the law...We therefore conclude that defendants did not engage in illegal conduct because they were faced with a choice of evils. Rather, they intentionally trespassed on complainant's property in order to interfere with the rights of others...."]

This is a poor attempt to honestly state the actual goals of Elizabeth Tilson or of myself. This is a straw man: our goals were to save life. It is also a red herring: beliefs about *facts, and actions* – not goals – are relevant to our defense.[53]

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51 I incorporate by reference my contrast of Robinson with appellate courts who qhote him, in the section "Grammar so bad it literally kills", pro se pretrial, Jan 8, 2010, pp. 47-55.

52 I quoted and discussed Tilson's straw man rationale in my pro se pretrial brief at page 52. I also incorporate by reference my analysis in my first Pro Se Supplemental brief, Jan 2012, pp. 40-50

53 See pp. 32-40, pretrial pro se brief, Jan 8, 2010, for more authorities explaining why Necessity must be

Robinson's version invites us to compare which "legally protected interest" is greater: *human life*, or the right to *kill* human life. Tilson's version of Robinson is that SCOTUS has made the right to kill so sacred that evidence of the reality of the unborn must not be allowed to interfere. And if that doesn't sell, abortion preventers don't *really* care about life anyway – they just want to mess with women's rights.[54]

Abortion may not be "a legally recognized harm" but the mass murder of millions of human beings certainly is. Even if they are first trimester unborn babies, Roe "legally recognizes" the possibility of harm, and orders its own demise, ending the legality of abortion, once Triers of Fact establish that's what abortion is. *Tilson* tragically, by contrast, orders that evidence that...

> ... the harm we want to prevent *is unthinkably harmful* - even genocide itself – is "irrelevant". If it is "legal", we must step aside and allow it to ravage us and those we love. (Pro se pretrial brief, p. 47)

This expectation of appellate courts is "absurd, slavish, and destructive of the good and happiness of mankind" according to the American spirit that created our Constitution.

> "...the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind." - *The report from the ratifying conventions to the U.S. Constitution of Virginia, Sept 17, 1787; Maryland, April 29, 1788; North Carolina, August 2, 1788; also the Constitutions of New Hampshire, 1784, Tennessee Art. 1 §2; and North Carolina, Nov 21, 1789.*
>
> "The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants." - Thomas Jefferson
>
> "The blood of the martyrs is the seed of the church." - Tertullian

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allowed even when the prevented harm is legal and constitutionally protected.

54 Tilson summarized several other appellate rulings which employed the same Straw Man, such as: "...the 'injury' prevented by the acts of criminal trespass is not a legally recognized injury." *People v. Krizka*, 92 IILApp.3d 288, 48 III.Dec. 141, 416 N.E.2d 36, "... a claim of necessity cannot be used to justify a crime that simply interferes with another person's right to lawful activity." *State v. Sahr,* 470 N.W.2d at 191-192. *Krizka* is correct, if the "injury prevented" is merely abortions of unloved soul-less "blobs of tissue" whose humanity is uncertain. Krizka is cruelly corrupt, if the "injury prevented" is the mass slaughter of human beings who are "persons in the whole sense" as documented by triers of fact! *Sahr* is precise, if the only reason for breaking a law is to "interfere with another person's right to lawful activity". *Sahr* is foolishly sad, if saving human lives was the real reason a relatively minor law was broken, and it was to obscure that real reason that *Sahr* contracted with a Straw man.

> "...all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life.....--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it...." - The Declaration of Independence

Judge Wilbur, quoting Tilson, said there is no place in law for such principles. By following them I should "be prepared to pay the consequences."

> "...some individuals, because of firmly held and honestly believed convictions, will feel compelled to break the law. If they choose to do so, however, they must be prepared to face the consequences." - Trial transcript 012810, pp. 220:6-17

First, no abortion preventer ever asked any court to "determine" anything "based upon his or her personal beliefs". We ask courts to obey due process that requires juries to rule on contested facts. We ask our 6th Amendment "right to a speedy and public trial, by an impartial jury...." Denial of what we ask is *judicial* vigilantism.

Second, SCOTUS' insistence that it need not decide, yet,[55] whether it legalizes murder, meets the definition of "arbitrary power and oppression", as Virginia put it.

Third, the acceptance of risk, by martyrs and patriots, in order to save life and liberty from dangerous predators, must not be confused for a truce with tyranny.

Fourth, the patriotic declarations above are endorsements neither of general violence nor of individual action justified only by subjective relativism. They simply acknowledge that when one opposes evil, one must expect evil to remain evil.

Fifth, a judge's concern should be to be on the right side of Freedom's struggle.

> Matthew 10:15 Verily I say unto you, It shall be more tolerable for the land of Sodom and Gomorrha in the day of judgment, than for that city. 16 Behold, I send you forth as sheep in the midst of wolves: be ye therefore wise as serpents, and harmless as doves. 17 But beware of men: for they will deliver you up to the

55 *Webster v. Reproductive Health Services,* 492 US 490 (1989) "This Court refrains from deciding constitutional questions where there is no need to do so...." (Quoting O'Conner concurrence from the syllabus.)

> councils, and they will scourge you in their synagogues; 18 And ye shall be brought before governors and kings for my sake, for a testimony against them and the Gentiles. 19 But when they deliver you up, take no thought how or what ye shall speak: for it shall be given you in that same hour what ye shall speak. 20 For it is not ye that speak, but the Spirit of your Father which speaketh in you.

My action was surgical, taking only the one life which was murdering thousands. My peaceful action now is to find judges who will acknowledge an irrefutable fact. Every court-recognized legal authority agrees with me about whether babies are humans. No authority disagrees. I am not the vigilante.

Tilson quotes Sahr reaching the opposite view from mine, of Robinson's support for Necessity so long as the interest protected [life] is legal. Sahr achieves this opposite view by quoting Robinson on civil disobedience as if that is relevant to abortion prevention, while I had quoted Robinson's application of Necessity to saving lives.

> "The evil, harm, or injury sought to be avoided, or the interest sought to be promoted, by the commission of a crime must be legally cognizance [sic] to be justified as necessity. '[I]n most cases of civil disobedience a lesser evils defense will be barred. This is because as long as the laws or policies being protested have been lawfully adopted, they are conclusive evidence of *the community's view* on the issue.' 2 P. Robinson, Criminal Law Defenses 124(d)(1), at 52. Abortion in the first trimester of pregnancy is not a legally recognized harm, and, therefore, prevention of abortion is not a legally recognized interest to promote." (*City of Wichita v. Tilson,* 253 Kan. 295)

First, saving lives is not "civil disobedience" or "protesting".

Second, the "community view" about "when [the right to] life begins" is not represented by laws forced upon almost all state legislatures by eight unelected men who themselves declared they were "in no position to speculate" on the question.

Third, to the extent Robinson's "community view" test fits abortion prevention, it provides another reason to review state rulings, now that 28 states[56] join Congress in

56 State v. Courchesne, 296 Conn. 622, 689 n. 46, 998 A.2d 1, 50 n.46 (2010) ("'[As of March 2010], at least [thirty-eight] states have fetal homicide laws.'" (quoting the National Conference of State Legislatures, Fetal Homicide Laws (March 2010) (alterations in Courchesne))

explicit recognition of the humanity of the unborn from conception.

It is something like circular reasoning for courts to force all states to legalize what they had criminalized for a century, forcing communities across America to reverse their definition of abortion as murder, under protest more vigorous than America saw during the Civil Rights Movement, and then say it is only honoring "the community view" to rule that abortion cannot be recognized as murder.

A lesson from Nazi Germany is that some things which are legal are evil. Murder can be made legal, but not harmless. The slaughter of millions whose only offense is their existence has often been encouraged by laws, but never justified.

Another lesson is the power of evil laws to intimidate "the community" into tolerating terrible evils which poison its "community values" into what "the community" itself recognizes as an abomination, both before, after, and even during the reign of those laws. One measure of how far laws depart from historical "community values" is the number of martyrs compelled to act by the departure.

Even apart from the poison of evil laws, the history of the 14th Amendment should remind us that not all "communities" have "values" that always protect the least among us. America is founded on higher law than "community values".

Illogical. The Opinion Below violates basic rules of logic to avoid dealing with "persons".

> ... the necessity defense would never be available to a defendant who commits premeditated first-degree murder of a doctor in order to prevent that doctor from performing an abortion.... (pp. 3-4, Opinion Below)

It begs the question to call my action "murder" as part of its rationale for not letting my jury decide whether *abortion* is murder, in which case it is not "murder" for me to *stop*

murder. And it wasn't just *one* abortion that I prevented! It was thousands!

> Roeder suggests that his actions fit within the parameters of an imperfect defense-of-others voluntary manslaughter because of his honestly held religious belief that an abortion kills a person. In other words, Roeder contends that his subjective belief that he was saving others' lives by killing Dr. Tiller was all that mattered, even if that belief was objectively unreasonable in all respects and even if the belief was contrary to the law. (p. 26)

The court's straw man of my defense in the first sentence above is certainly easier to dismiss than my actual defense, which is that my "belief that [I] was saving others' lives" (2nd sentence) is hardly subjective, but legally demanded by 18 USC §1841(d), which this opinion won't acknowledge. Notice no cite to the record tells where to find this straw man.

Wait a minute. Does the second sentence actually address the "third persons" element, ruling that the belief that babies of human mothers are humans not only counters what Roe is accused of implying but is "unreasonable in all respects"? This is so indirect – attacking my rationality as an alternative to articulating a clear position; so presumptuous – classifying the consensus of America's court-recognized finders of facts as "unreasonable in all respects"; and so dismissive of Due Process - ruling on a fact issue in a trial whose central appealable issue was keeping that fact issue secret from the jury and ruling any evidence of that fact "inadmissible", that I am not sure.

Here is a red herring:

> Perhaps more importantly, the Court of Appeals found that Holick's principal purpose in trespassing was to prevent *all* abortions, not just illegal abortions. 2007 WL 518988, at *5. (p. 20)

It is irrelevant to the elements of Necessity what the Court thought Holick's "principal purpose", or mine, was. The issue is the nature of the facts, which should have been established by triers of facts. Necessity considers only whether serious injury was reasonably believed to be prevented. It is disturbing that the Court considers this red

herring “more important” than relevant considerations.

Human motives are always multi-dimensional. My motives might alternatively be described as wanting to follow the Golden Rule, which by itself does not satisfy any element of my defense. Can citation of that motive make irrelevant my motive of saving lives? But even my motive of saving lives is irrelevant to my legal defense, which is whether I reasonably believed I saved lives, which is persuasively proved by evidence that I did, in fact, save thousands of lives. Now another red herring:

> In a pro se supplemental brief, Roeder makes the argument that Kline's testimony would have been relevant to show the reasonableness of Roeder's beliefs for the perfect defense-of-others under K.S.A. 21-3211. But Roeder fails to connect the dots between Kline's failed pursuit of technical abortion statute violations against Dr. Tiller and whether a rational, objective person would commit premeditated murder of a person with whom that person had theological disagreements. In other words, the proffered testimony had no relevance on any issue before the jury in this prosecution. p. 36

Theological disagreements! I shot George Tiller because he believes the wrong doctrines! Such nonsense is found nowhere in the record! And I did not “murder” anyone. I had no mens rea of murder. Since 2004 life saving of the unborn from abortion has been legally recognizable as the *prevention* of murder. My argument does not rest on theology! It rests on Roe v. Wade! (These weren’t the only missteps of logic.[57])

Negating & Affirmative Defenses. Even though Defense of Others and Necessity have identical elements[58] as Kansas formulates them,[59] I claim Defense of Others because its denial faces a higher bar, and Necessity because its elements according to authorities

57 Kansas, p. 35, thinks Kline’s opinion that my *actions* were reasonable is somehow relevant to the element that inquires if my *beliefs* about certain facts were honest. For analysis see my Pro Se Supplemental brief, Jan 2012, pp. 5-15.

58 *City of Wichita v. Tilson,* 855 P.2d 911 (Kan. 1993) describes the two defenses as if they are identical, without identifying any difference between them.

59 This fact makes it fascinating that the Opinion Below (p. 19) casts doubt on whether Necessity is legally recognized in Kansas, while not doubting that Defense of Others is.

above, as opposed to Kansas' view,[60] protects lawful harms.[61] The higher bar is explained in my pretrial pro se brief:

> "Most defenses, such as self-defense, insanity, and entrapment, require factual determinations that the jury should make, rendering pretrial disposition inappropriate." *U.S. v. Smith* 866 F.2d 1092, *1096 (C.A.9 (Alaska),1989)
>
> This is because a defense that tends to *negate* a mens rea element of the offense, unlike a duress or necessity defense, which tends to *excuse* the *conceded* and otherwise-criminal mens rea, can only be a question for the jury. A trial court may determine, in response to a motion in limine, whether a duress or necessity defense lies at law or not, if all facts proffered by the defendant are believed. But it invades the province of the jury for a trial court to rule on a similar motion when the defense asserted, if the proffered facts be true, *necessarily* lies at law. The negation of an essential element of the offense (by the defendant's successful defense that the element does not exist in his case) necessarily lies at law, because it does not hold a person *excused for* criminal conduct, but rather *innocent of* criminal conduct....
>
> It is axiomatic that defense of another, by it very nature, constitutes the paradigm of a "justification or excuse", the *absence* of which is an element of murder. Therefore, "a determination of the defense of justifiable homicide- self-defense- is *exclusively* a jury question" *U. S. ex rel. Crosby v. Brierley* 404 F.2d 790, *801 (C.A.Pa. 1968)(emphasis added)
>
> The Supreme Court has long ago stated that, because self defense (and therefore defense of others) "repels the proof of malice", thereby negating an element of murder, "it is for the jury to say whether, on all the evidence before them, the malice....is proved or not." *Davis v. U.S.* 160 U.S. 469, *490-491, 16 S.Ct. 353,**359 "(B)ecause a defendant must possess a certain state of mind in order to be convicted of that crime, any evidence showing the absence of that state of mind is relevant and thus admissible to negate that element." *People v. Jung* 2001 WL 755380, *8 (Guam Terr.,2001) *My pretrial pro se brief, January 8, 2010, p. 31-33.*

The citing of authorities before trial preserves the error of violating them.

I acknowledge in footnote 41 that my own court-appointed attorney agreed with Judge Wilbur that Kansas' "Defense of Others" is an affirmative, not a negating defense. I want to explain why that was a mistake – I have just explained why it matters.

The mens rae of Kansas' First Degree Murder was that my killing was "deliberate

60 Opinion below, p. 1: "...Regardless of whether Kansas courts can recognize a necessity defense...."

61 The latitude accorded to Necessity when prevented harms are legal, by several authorities, is documented in Wharton and Robinson, page 21, and pp. 32-40, pretrial pro se brief, Jan 8, 2010.

and premeditated". Kansas' Voluntary Manslaughter is a "lesser included" and thus a negating defense to First Degree Murder. The logical implication is that proving the elements of Voluntary Manslaughter disproves/negates the mens rea of First Degree Murder. Defense of Others has identical elements to Voluntary Manslaughter, the only difference being that with Defense of Others the belief that its elements are present must be "reasonable", while for Voluntary Manslaughter the belief need only be "honest".

So if Voluntary Manslaughter attacks the mens rea of First Degree Murder, how does Defense of Others' stronger evidence of the same elements not negate the mens rae even more? How is it not a lesser included/negating defense also?

And if my mere allegation that my beliefs about these elements was *reasonable* requires a jury instruction, by what conceivable stretch of logic could Judge Wilbur deny a jury instruction, or disallow my only two witnesses, upon my claim that my beliefs were at the very least *honest?*

Wilbur quashed more than two of my witnesses. The two were what I was reduced to by his pretrial ruling (Appendix D) that no evidence of the factual nature of abortion would be permitted. There were researchers and doctors who could have testified that Tiller's "work" did end the "lives" of real human persons without due process as individuals. A theologian had flown in to the trial, ready to testify about the Bible's position on abortion.

Something very wrong happened in my case. Something not accounted for by Wilbur's reasoning in the record, or by the Straw Men of the Kansas Supreme Court. The explanation not being available from the reasoning of the judges, it is fair to look elsewhere in the record. And we do not have to search long, before we are distracted by the elephant in the room.

Roe's "Collapse".

> "If this suggestion of personhood [of unborn babies] is established, the...case [for legalizing aborticide], of course, collapses, for the fetus' right to life is then guaranteed specifically by the [14th] Amendment." Roe v. Wade, 410 US 113, 156

This short "collapse" clause tells us five things:

(1) "establishment" of the unborn as humans/persons, to an extent that SCOTUS will legally recognize it, is *possible*, and will transfer "constitutional protection" from baby killers to babies;

(2) the unspecified authority/agency of this "establishment" is not SCOTUS;

(3) what must be "established" is a fact question about which the Roe court is in doubt – not a question of American law, upon which SCOTUS is the world's expert;[62]

(4) fact finders (ie. juries, legislatures, or expert witnesses) are invited to "establish" this fact if they can – *SCOTUS' alleged ignorance cannot rationally or legally be made an obstacle to letting fact finders "establish" this fact* - although we are not told which of them, or how many of them, must agree before SCOTUS will consider the fact established "enough"; and

(5) abortion's legality and aura of "constitutional protection" can continue only in the absence of this "establishment" - *this alleged uncertainty whether the unborn babies of human mothers are humans.*

Federal law "establishes" legal recognition of the unborn as humans/persons:

> 18 USC §1841(d) ...the term "unborn child" means a child in utero, and the term "child in utero" or "child, who is in utero" means a member of the species homo sapiens, at any stage of development, who is carried in the womb.

62 Also: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Roe v. Wade* 410 US 113, 159 Roe would not defer to doctors and preachers as their superiors on a question of law!

Roe equates "recognizably human" with 14th Amendment "persons", disposing of any legalistic claim that federal law doesn't meet Roe's requirement because it uses a different word:

> These disciplines variously approached the question [of when life begins] in terms of the point at which the embryo or fetus became "formed" or recognizably human, or in terms of when a 'person' came into being, that is, infused with a 'soul'... Roe v. Wade 410 U.S. 113, 133 (1973)

It is just as obvious today as when Roe's "collapse" clause began with "of course", that SCOTUS can't decide who lives and dies as a question so exclusively of law as to render irrelevant the unanimously acclaimed fact that abortion is murder.

The 14th Amendment "equal protection of the laws" is for all who are *in fact* humans/persons. Had it been only for those who are *legally recognized* as human, we could still have slavery. All that pro-slavery judges would need to do would be to rule that blacks are only 3/5 human by law. Or that immigrants are "illegals".

Congress was not the *only*, but only the *final* court-recognized fact finder to "establish" this pivotal fact after juries, expert witnesses, and state legislatures had voted unanimously. Is that enough to "establish" this fact?

Juries. How about when the reason judges stopped informing juries that abortion prevention defendants had a defense was not any insufficiency of evidence that abortion is a terrible "harm", but the opposite: such unanimous acquittals that abortionists dismissed as soon as Necessity was allowed, afraid of precedents favoring the unborn. Is the consensus of Triers of Fact enough to "establish" the fact?

> After the court ruled that it would allow the [Necessity] Defense to go to the jury, the Women for Women Clinic dropped the prosecution. If the defense is permitted, evidence is introduced that life begins at conception. This evidence is rarely contradicted by the prosecution, which is merely proving the elements of criminal trespass. Rather than risk such

> a precedent, many clinics prefer to dismiss. In fact, defense counsel have admitted that their intent is to bring the abortion issue back before the United States Supreme Court to consider the very question of when life begins, an issue on which the Court refused to rule in Roe... *("Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic",* 48 U.Cin.L.Rev. 501 (1979), in a footnote on page 502. The *Cincinnati Law Review* footnote analyzes the case *of Ohio v. Rinear,* No. 78999CRB-3706 (Mun. Ct. Hamilton County, Ohio, dismissed May 2, 1978)

By calling the goal of triggering Roe's "collapse" clause through jury verdicts and appeals an "admission", this law review author treats the resort to our court system as some sort of nefarious scheme which the clever author has finally exposed. The readiness of juries to acknowledge harm to occupants of wombs is described here as a threat grave enough to justify keeping juries from involvement in jury trials.

I cite this article to document the readiness of juries, informed of their right to do so, to "establish" the fact that unborn babies are humans/persons – a pattern otherwise difficult to survey because juries seldom explain their verdicts,[63] and because few juries were ever informed of the contested issue.

This is like the John Peter Zenger trial of 1735,[64] in which Zenger wasn't allowed to submit evidence that his "zingers" aimed at the royal New York governor were the truth. "Truth is not a defense against libel", the judge told him. In fact, proving those zingers were true would only make them sting worse, the judge explained.

Zenger told the jury there ought to be no law against telling the truth. (Had the judge censored the legal argument too, we might not have Freedom of the Press today.) But how could Zenger persuade the jury that his zingers were the truth, with his evidence ruled irrelevant? "The suppressing of evidence ought always to be taken for the strongest

63 A handful of district judges in bench trials have similarly acquitted abortion preventers via the Necessity Defense, including Wichita District Judge Paul Clark, who was reversed by the same ruling cited to deprive me of my defense by the Kansas trial and appellate courts: *City of Wichita v. Tilson,* 855 P.2d 911 (Kan. 1993). Clark was the same judge who later dismissed Kline's charges against Tiller on Sedgwick County Prosecutor Nola Foulston's motion.

64 Apparently the only record of the trial was the one published by Zenger himself.

evidence", he told them. They acquitted, giving us Freedom of the Press.

Today we may similarly reasonably infer, from the routine judicial suppression of fact questions from Triers of Facts and its explanation in the Cincinnati article, and from its justification on a distortion of Roe and on missteps of logic, that the fear of losing, when juries are informed, colors if not explains the decision to keep them ignorant of the trial issue. This inferred expectation, we may take for evidence in addition to the jury acquittals we know about,[65] that to the extent Triers of Facts are allowed to weigh the Comparison of Harms/Choice of Evils, they almost unanimously find much greater value in the residents of wombs than in the alleged "constitutional right" to kill them.

Expert witnesses. A third category of court-recognized fact finders is expert witnesses. As the preceding Cincinnati Law Review article reported, it was typical of abortion prevention trials to bring in a doctor to testify how profoundly fully distinct human life begins from conception. No one ever disputed it. The fact was even introduced in *my* trial – *by the prosecution's witness, questioned by the prosecution!*

> (Volume 11, 52:2 of the transcript)
> Ms. PARKER: Please explain for us what DNA is and how it is used?
> STEADMAN: DNA stands for deoxyribonucleic acid. It's often referred to as the building block of life because it's a chemical molecular structure that encodes for the individuals that we are.
> The DNA that we type in the Sedgwick County laboratory is found within the central compartment of the cell, called the nucleus. And I often preface my explanation about DNA typing with a straightforward example of a mother, a father and a child. And if you think about the father and the mother and one cell in the father's body, that cell would contain 46 packages of DNA, or 46 chromosomes, and you could think of it as two sets of 23, because 23 plus 23 is 46.
> Likewise, in a single cell of the mother's body, there are the same number of chromosomes. *When a sperm cell unites with an egg cell,* ***this gives rise to the child****,* and that set of DNA from that original cell, cell division occurs and the DNA that was inherited from the father and the mother is copied into the other cells of the offspring. (Shelley Steadman is "the forensic biology and DNA laboratory manager at

65 I personally know people who have been found innocent by such juries.

the Regional Forensic Science Center here in Sedgwick County", (Vol 11, p. 49)

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

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

Of tens of thousands of abortion prevention trials, thousands featured expert witnesses documenting the reality that unborn babies of humans are humans. Is their unanimous, undisputed testimony enough? Lives depend on SCOTUS' answer.

State legislatures. "At least 38 states have enacted fetal-homicide statutes, and 28 of those statutes protect life from conception."[66] *Hamilton v. Scott*, 97 So. 3d 728 (Ala. 2012) This includes my state, Kansas, which so found in 2007.

> "'Unborn child' means a living individual organism of the species homo sapiens, in utero, at any stage of gestation from fertilization to birth." K.S.A. 21-3452

Most of them have had their constitutionality challenged: all survived.

Congress.

> 18 USC §1841(d) ...the term "unborn child" means a child in utero, and the term "child in utero" or "child, who is in utero" means a member of the species homo sapiens, at any stage of development, who is carried in the womb.

It has been objected that although §1841(d) defines all unborn babies as humans/persons, §1841(c) exempts abortion from the penalties of §1841(a). But law contains many disparate penalties for disparate situations, for many reasons, without any

66 Hamilton v. Scott's basis: "See State v. Courchesne, 296 Conn. 622, 689 n. 46, 998 A.2d 1, 50 n.46 (2010) ("'[As of March 2010], at least [thirty-eight] states have fetal homicide laws.'" (quoting the National Conference of State Legislatures, Fetal Homicide Laws (March 2010) (alterations in Courchesne))

implication that people in less protected situations have less value. §1841(d) is categorical. It establishes a fact. Laws do not change facts.[67]

All the votes are in. They are unanimous and undisputed. It is not possible for any fact to be any more overwhelmingly legally recognized in America. If *any* "establishment" of this life-and-death fact can satisfy SCOTUS, *this* must, because no greater legal "establishment" of a fact is possible than the unanimous, undisputed concurrence of all court-recognized fact finders.

Not even one single court-recognized fact finder positively asserts that unborn babies are *not* humans/persons. I can't imagine any such legal authority with the *courage* to assert such a thing. It is astonishing enough that some hold their head high as they publicly insist they cannot tell. Most aborticidists manage the problem by saying Roe said it doesn't matter. Or that since SCOTUS said it, it must be true even if SCOTUS didn't actually say it, which excuses them from thinking.

Roe's erroneous legislative history. To the consensus of all court-recognized fact finders *since* Roe, that the babies of humans are humans/persons from conception, must be added the evidence, and near-consensus of scholars, that court-recognized fact finders *before* Roe concurred with those after, and that Roe's history of them to the contrary, which was Roe's justification for doubting unborn personhood, was erroneous.

The existence of this scholarly discussion is so well known that I will include just a sample of it in Appendix E from a 2012 Alabama case. This criticism vindicates Rehnquist's dissent in Roe that "the right to an abortion is not so universally accepted as the appellant would have us believe." Roe v. Wade: 410 U.S. 113, 174

67 For full treatment of this objection see my pretrial pro se brief, Jan 8 2010, pp. 18-23.

Here is where Roe says its legislative history was much of the basis for its alleged doubt about "when [the right to] life begins":

> "...the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn ...[exceptions] would appear to be [designed] to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. ...In short, the unborn have never been recognized in the law as persons in the whole sense. Roe v. Wade: 410 U.S. 113, 161.

Any history relied on to decide life and death is "an important question of federal law that has not been, but should be, settled by this Court".[68] The criticism of legal scholars merits a response. The blood of millions cries out for a serious answer.

Roe's erroneous review of religions' positions. Roe's alleged ignorance was also somewhat based on a brief survey of the treatment of the unborn by religions.

Roe has made the position of Christianity and Judiasm about "when life begins" relevant to its definition of which human beings are allowed to live. Roe has thus made the true position of the Bible relevant to "an important federal question which has not been decided but which should be decided." Yet Roe did this without quoting a single Bible verse, producing an inescapably egregious distortion. SCOTUS must either carefully analyze the relevant Scriptures that are its basis for legalizing baby killing, or abandon Roe's characterization and concede that the position of Protestantism and Judiasm concerning the unborn does not interest SCOTUS as SCOTUS decides who lives and who dies. SCOTUS should at least analyze the passages, and their implications, which I have placed in Appendix F.

Rhode Island. Just weeks after Roe alleged uncertainty about the unborn because

68 Supreme Court rule 10c.

"the unborn have never been recognized in the law as persons in the whole sense",[69] Rhode Island so recognized the unborn in its laws.

> The Rhode Island legislature apparently read the opinion of the Supreme Court in Roe v. Wade to leave open the question of when life begins and the constitutional consequences [**12] thereof. *Doe v. Israel,* 358 F. Supp. 1193, 1199 (1973)

Rhode Island made official what AG Wade had only argued, but Judge Pettine went far beyond SCOTUS, saying all the evidence in the world was irrelevant.

> I neither summarize nor make any findings of fact as to their testimony [about whether unborn babies of human mothers are humans/persons]. To me the United States Supreme Court made it unmistakably clear that the question of when life begins needed no resolution by the judiciary as it was not a question of fact. As will be discussed infra, I find it all irrelevant to the issues presented for adjudication. *Doe v. Israel,* 358 F. Supp. 1193, 1197

SCOTUS never said that, so it was reasonable for Rhode Island to essentially ask SCOTUS, "is *this* enough more establishment?" SCOTUS' reply: *Doe v. Israel,* 1 Cir., 1973, 482 F.2d 156, *cert. denied,* 416 U.S. 993.

So far, Rhode Island has been the only state which has placed that question squarely before the courts. Missouri almost did, 15 years later, but they added an abortion exception to their otherwise strong personhood law, which let SCOTUS respond "we don't need to decide yet." (See footnote #27.) Webster left the impression that when SCOTUS decides, it could go either way. Now 38 states concur with Missouri.

Was Roe's "collapse" clause nullified when Roe was gutted by Casey? What if Roe v. Wade is no longer what sustains abortion's legality? Did SCOTUS, in Casey,[70] say it no longer matters whether the unborn are humans/persons because the rationale that "we

69 Roe v. Wade: 410 U.S. 113, 161
70 Planned Parenthood v. CASEY, 505 U.S. 833

cannot tell"[71] has been replaced with "women are so used to killing them now"?

Fortunately not. Neither the opinion nor the dissent addressed the "we cannot tell" rationale. No evidence of human life was presented, discussed, or rejected. However, an unidentified "outer shell of Roe" was discussed.[72] I submit "we cannot tell" is that "shell", upon which legal abortion continues to "hang", and without which any new rationale must "collapse". To say a thing "hangs" on another thing is to suggest that without the other thing, the thing would "collapse". So what today sustains abortion's legality must still be defined by Roe's "collapse" clause.

The later dissent in Casey reminds us of "the whole [ignored] argument":

> The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child is a human life. Thus, whatever answer Roe came up with after conducting its "balancing" [between women's "privacy" and "potential life"] is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. *Planned Parenthood v. Casey*, 505 U.S. 833, 982 (1992) (Concurrence/dissent of Scalia, White, Thomas)

But this dissent overlooks the possibility of establishing unborn personhood as fact; it says it can't be determined as law, but it is a personal "value judgment" - a subjective judgment made without particular restraint of law or fact.

> There is, of course, no way to determine [whether the unborn are human] as a legal matter; it is, in fact, a value judgment. Some societies have considered newborn children not yet human, or the incompetent elderly no longer so. (Ibid, following paragraph)

Whether I am a human being is a "value judgment"? Not a question for fact finders? Is our Right to Life any safer at the mercy of whether we are "wanted" by decision makers than if our humanity is "legally recognized"? We already have "death panels" running

71 See footnote 27.

72 "The joint opinion, following its newly minted variation on stare decisis, retains the outer shell of Roe v. Wade, 410 U.S. 113 (1973), but beats a wholesale retreat from the substance of that case.... Roe continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality." Planned Parenthood v. Casey, 505 U.S. 833, 945, 954 (1992) (Concurrence/dissent of Rehnquist, White, Scalia, Thomas)

health care. We already pull plugs on semi-conscious patients like Nancy Cruzan and Christine Busalacchi. As a prisoner scheduled to reach advanced age behind bars, I am personally concerned.

Well, another way fact finders are described is that they establish "community values".[73] So whether we call them "court-recognized fact finders" or "court-recognized value finders" we can breach the impasse with the same jury.

Only one thing holds up Roe, Casey, and all in between: alleged uncertainty whether unborn babies of human mothers are humans. Smash that "shell" with legally recognized certainty that the unborn are human, and let's see how long that "reliance interests" sophistry can stand, all alone! Once abortion is "established" as genocide, "women's schedules" are exposed as a barbarically trivial excuse for it.

As late as *Stenberg v. Carhart* 530 U.S. 914, 920-921 (2000) SCOTUS still had no position on whether the unborn are humans/persons. It dismisses the belief of many "that life begins at conception and consequently that an abortion [causes] the death of an innocent child" as a "point of view" which is "irreconcilable" with, and apparently canceled by, the "view" that murder is OK. As for Roe's "speculation" whether abortion is murder, or Casey's claim that women are used to killing, "We shall not visit these legal principles."

Even Stenberg's dissents avoid a position. Whether the unborn are "human life or [merely] potential human life" is "depending on one's view".[74] It "dehumanizes the fetus and trivializes human life", not because it wantonly *takes* human life, but because it *"approaches* infanticide".[75] Whether to save lives "is a value judgment, dependent upon how

73 "...participation in jury trials provides citizens an opportunity to incorporate community values into dispute resolution...." *Court looks to educate public about value of jury service,* July 13, 2011, http://www.legalnews.com/macomb/1006090/

74 *Stenberg v. Carhart,* 530 U.S. 914, 980 Dissent by Thomas, Rehnquist, Scalia.

75 *Stenberg v. Carhart,* 530 U.S. 914, 1006 Dissent by Thomas.

much one respects (or believes society ought to respect)...life...."[76]

Abortion on trial. My defense, along with the defense of tens of thousands of abortion preventers before me, is our murder charge against abortion. It is not possible to acquit any of us without convicting abortion. The defense for abortion must prove that we did *not* save human lives. To say only "we cannot tell" if abortion is murder, is a pretty pathetic defense of abortion. My jury won't convict me "beyond a reasonable doubt" if I can say I saved 6,000 human beings from being tortured to death and the prosecution concedes "well maybe you're right. We cannot tell."

Abortion, and its sustaining rationale that we can't tell if babies of humans are humans, threatens more than unborn babies. By successfully dehumanizing millions of persons over a term like "fetus", Roe demonstrates the device of denying defensible rights to any group the state considers "unwanted" (ie. PVS, seniors, mentally ill, or prisoners) by simply alleging inability to define certain elements of humanity or personhood.

I did not "murder" anyone. I had no murder mens rea. Since 2004 life saving of the unborn from abortion has been legally recognizable as the *prevention* of murder.

CONCLUSION. I saved thousands of human lives May 31, 2009. I ask this Court to save all still in danger, by granting my petition for a writ of certiorari to affirm that the babies I saved were humans and persons, abortion's legality has "collapsed", and defense elements cannot be so mechanistically interpreted as to make saving life impossible.

Respectfully submitted,

_____ Scott P. Roeder

January ____, 2015

76 *Stenberg v. Carhart,* 530 U.S. 914, 954 Dissent by Scalia

IN THE SUPREME COURT OF THE STATE OF KANSAS

Appendix A

No. 104,520

STATE OF KANSAS,
Appellee,
v.
SCOTT P. ROEDER,
Appellant.

SYLLABUS BY THE COURT

A defendant requesting a change of venue based upon pretrial publicity must satisfy the district court that there exists in the county where the prosecution is pending so great a prejudice against the defendant that he or she cannot obtain a fair and impartial trial in that county. The defendant bears the burden to show prejudice exists in the community as a matter of demonstrable reality and to show that the level of prejudice makes it reasonably certain that the defendant cannot obtain a fair trial.

2.

Both our federal and state constitutions entitle a criminal defendant to present evidence in support of his or her theory of defense, but a trial court does not err by excluding evidence that is not relevant to a legally sufficient theory of defense.

3.

Regardless of whether Kansas courts can recognize a necessity defense as a matter of common law and regardless of the formulation of the defense that might be adopted, the necessity defense would never be available to a defendant who commits premeditated first-degree murder of a doctor in order to prevent that doctor from performing an

abortion sometime in the future, even if the defendant is convinced that the doctor will fail to comply with all the administrative rules and regulations applicable to abortion providers.

4.

The crime of imperfect defense-of-others voluntary manslaughter is defined as the intentional killing of a human being committed upon an unreasonable but honest belief that circumstances existed that justified deadly force under K.S.A. 21-3211. Under K.S.A. 21-3211, a person is justified in the use of deadly force against another's use of unlawful force when the person reasonably believes deadly force is necessary to prevent the imminent death or great bodily harm to a third person.

5.

An unreasonable but honest belief that circumstances existed that justified deadly force will not support a claim of imperfect defense-of-others unless the circumstances, if reasonably believed, would have supported a claim of perfect defense-of-others under K.S.A. 21-3211.

6.

If, as a matter of law, the circumstances that the defendant honestly believed existed would not have supported a claim of imperfect defense-of-others, the trial court does not err in refusing to admit the defendant's proffered evidence to corroborate the honesty of the defendant's belief.

7.

A prosecutor's improper comment or argument during closing argument can be prejudicial, even if the misconduct was extemporaneous and made under the stress of

rebutting defense counsel's arguments. The extemporaneous, rebuttal nature of a prosecutor's comment or argument is merely a factor that may be considered on appeal.

8.

Where there is no reasonable possibility that a prosecutor's improper comment or argument during closing argument contributed to the jury's verdict, the error will not result in a reversal of the defendant's conviction.

9.

Where the defendant testified that he intentionally killed a specific person after having premeditated the murder for approximately 16 years, any error by the district court in refusing to give a lesser included offense instruction on second-degree murder based upon the killing being an instantaneous act was harmless beyond a reasonable doubt.

10.

A perfect defense-of-others claim is not objectively reasonable where the perceived harm to be prevented will not occur until sometime in the future, *i.e.*, where the other's unlawful use of force against a third person is not imminent.

11.

The test for cumulative error is whether the trial errors, which were not singularly reversible, nevertheless combined in such a way as to deny the defendant his or her right to a fair trial.

12.

Kansas' statutory procedure for imposing a hard 50 sentence as provided in K.S.A. 21-4635 violates the Sixth Amendment to the United States Constitution as interpreted in

Alleyne v. United States, 570 U.S. ___, 133 S. Ct. 2151, 2155, 2160-63, 186 L. Ed. 2d 314 (2013), because it permits a judge to find by a preponderance of the evidence the existence of one or more aggravating factors necessary to impose an increased mandatory minimum sentence, rather than requiring a jury to find the existence of the aggravating factors beyond a reasonable doubt.

13.

The propriety of retroactively applying the hard 50 sentencing scheme set forth in K.S.A. 2013 Supp. 21-6620 after an appellate court vacates a hard 50 sentence imposed pursuant to K.S.A. 21-4635 will not be ripe for appellate review until a prosecutor chooses to pursue such a sentence upon remand for resentencing.

Appeal from Sedgwick District Court; WARREN M. WILBERT, judge. Opinion filed October 24, 2014. Convictions affirmed, hard 50 sentence vacated, and case remanded with directions.

Rachel L. Pickering, of Kansas Appellate Defender Office, argued the cause, and *Michelle A. Davis*, of the same office, was with her on the briefs for appellant, and *Scott P. Roeder*, appellant pro se, was on the supplemental briefs.

Boyd K. Isherwood, chief appellate attorney, argued the cause, and *Nola Tedesco Foulston*, district attorney, and *Derek Schmidt*, attorney general, were with him on the brief for appellee.

Stephen Douglas Bonney, of ACLU of Kansas & Western Missouri, of Kansas City, Missouri, and *Alexa Kolbi-Molinas* and *Talcott Camp*, of counsel, ACLU Foundation, of New York, New York, were on the brief for amici curiae National Abortion Federation, American Civil Liberties Union, and ACLU of Kansas & Western Missouri.

The opinion of the court was delivered by

JOHNSON, J.: On May 31, 2009, Scott Roeder executed his years-old plan to kill Dr. George Tiller to prevent the Wichita, Kansas, doctor from performing any further abortions. After fatally shooting the doctor from point blank range during church services while the doctor served as an usher, Roeder hastily fled the premises. During his getaway, Roeder threatened to shoot two other ushers who had pursued him outside the church. Roeder did not deny committing the physical acts underlying a premeditated first-degree murder charge and two counts of aggravated assault, and the jury convicted him of those offenses.

On appeal, Roeder challenges both his convictions and his hard 50 life sentence. With respect to his convictions, Roeder raised numerous issues, some of which overlap, to-wit: (1) The district court erroneously denied his requested instruction on voluntary manslaughter based upon an imperfect defense-of-others; (2) the district court violated his due process right to present a defense of voluntary manslaughter based upon an imperfect defense of another; (3) the district court erroneously denied the defense motion for a change of venue; (4) the prosecutor committed reversible misconduct during closing argument; (5) the district court violated his due process right by excluding evidence to support a necessity defense and by failing to instruct on the necessity defense; (6) the district court erroneously denied his requested second-degree murder instruction; (7) the district court erroneously denied his requested defense-of-others instruction; and (8) the cumulative effect of trial errors denied him a fair trial. Finding that Roeder was not denied a fair trial, we affirm his convictions.

With respect to Roeder's sentence, our determination that the sentencing scheme in K.S.A. 21-4635 violates the Sixth Amendment to the United States Constitution requires

that we vacate Roeder's hard 50 sentence and remand for resentencing. Therefore, we will not address Roeder's other sentencing issues.

FACTUAL AND PROCEDURAL BACKGROUND

Because Roeder did not deny that he intentionally shot Dr. Tiller in the head with the premeditated intent to kill him or that he intentionally threatened to shoot the two ushers to prevent their pursuit as he ran away from the church, a good deal of the evidence at trial dealt with Roeder's religious beliefs and their manifestation into his perceived need to kill Dr. Tiller.

Roeder testified about his 1992 conversion to Christianity, which ultimately led to a strong opposition to abortion. He testified that he believed that "[f]rom conception forward, [abortion] is murder" because "[i]t is not man's job to take life." As his feelings against abortion intensified, Roeder became actively involved in the anti-abortion movement, often demonstrating at abortion clinics, including Dr. Tiller's, in an attempt to convince patients not to have abortions. Roeder focused on Dr. Tiller because the doctor "was one of the three late-term abortionists in the country," and Roeder believed late- term abortions "are definitely wrong." Roeder encouraged women arriving at Dr. Tiller's clinic to instead seek counseling next door at the Crisis Pregnancy Center. Roeder related that some of the women with whom he spoke outside Dr. Tiller's clinic ultimately decided not to have abortions, and he therefore deemed his interventions to be successes in his fight against abortion.

Roeder was also allowed to testify about the criminal charges that had been brought against Dr. Tiller and Roeder's frustration with the results of those cases. He related that in 2006, the Attorney General at that time filed felony charges in Sedgwick County alleging that Dr. Tiller had unlawfully performed late-term abortions but that

those charges were dismissed the next day at the insistence of the Sedgwick County District Attorney. In 2009, an assistant attorney general prosecuted Dr. Tiller on 19 misdemeanor counts of failing to follow the correct procedure in performing late-term abortions, but a jury acquitted Dr. Tiller on all 19 counts. Roeder testified that the acquittal caused him to believe that

> "[t]here was nothing being done and the legal process had been exhausted and these babies were dying every day, and I felt that if someone did not do something, he was going to continue aborting children, and so I felt that I needed to act and quickly for those children."

Roeder was further permitted to discuss previous attempts to "stop" Dr. Tiller by other anti-abortion criminals. For instance, Dr. Tiller's clinic was bombed in 1986, but the clinic was functioning again a few days later. In 1993, a woman shot Dr. Tiller once in each arm, but he was back at work the next day. Accordingly, in 1993, Roeder began exploring the possibility of personally using physical force against abortion providers in general and Dr. Tiller in particular. Roeder even admitted that he initially thought about cutting Dr. Tiller's hands off with a sword but ultimately decided that he needed to kill Dr. Tiller.

Roeder explained that he abandoned his initial plans to commit the murder at Dr. Tiller's home or clinic because of the security measures the doctor had put in place. That circumstance led Roeder to the realization that the only place he could get close enough to Dr. Tiller was in the doctor's church. From the record, one cannot discern whether Roeder grasped the irony of his testimony, *i.e.*, the only way that Roeder could kill the doctor in the name of his own God was to commit the murder in the house of Dr. Tiller's God. Roeder took affirmative steps toward accomplishing the goal of his new plan as

early as 2002 when he made his first visit to the doctor's church and gathered information about the premises.

Some years later, in 2008, Roeder again attended the services at Dr. Tiller's church, this time armed with a 9mm weapon with which to shoot the doctor. That attempt was thwarted by the doctor's absence from that particular service.

On May 18, 2009, Roeder bought a Taurus PT .22 caliber semi-automatic handgun from a pawn shop in Lawrence, Kansas. Roeder's federal background check was held up, delaying delivery of the weapon to Roeder until May 23, 2009. The next day, Roeder took that weapon to Dr. Tiller's church, but again, the doctor was not attending the service. Six days later, Roeder returned to the pawn shop to buy two boxes of ammunition, which he took to his brother's home in a rural area near Topeka, Kansas, to test fire his gun. After experiencing problems with the weapon, Roeder and his brother went to a gun shop in Topeka and purchased a different type of ammunition before Roeder headed to Wichita to "deal with Dr. Tiller." During his drive to Wichita, Roeder pulled over in rural areas and test-fired the weapon with the new ammunition.

After arriving in Wichita, Roeder attended the Saturday evening service, but again, the doctor was not in attendance. After staying the night in a Wichita hotel, Roeder returned to Dr. Tiller's church. He backed his car into a stall as close as possible to the church doors to facilitate a hasty exit. Roeder entered the church and took a seat in the sanctuary until he spotted Dr. Tiller in the church foyer. Then, he approached the doctor and, without warning, placed the gun to Dr. Tiller's forehead and pulled the trigger. Roeder immediately fled the scene of the crime, running from the church foyer to his parking spot and then driving away in his vehicle.

Two men who were serving as ushers with Dr. Tiller that Sunday, Gary Hoepner and Keith Martin, separately chased after Roeder. At different points along his escape route, Roeder separately pointed his weapon at Hoepner and Martin, threatening to shoot each of them. Hoepner was able to report the shooting to a 911 operator, and another church member relayed Roeder's vehicle license plate number.

After leaving the church parking lot, Roeder drove towards his Kansas City home. Along the way, he disposed of his weapon in Burlington, Kansas. A deputy spotted Roeder's vehicle on I-35 and pulled him over near Gardner, Kansas, at approximately 1:25 p.m. Roeder made no attempt to resist arrest.

Roeder testified that he killed Dr. Tiller because if someone did not stop Dr. Tiller, "he was going to continue [performing abortions] as he had done for 36 years." More specifically, Roeder believed that if he did not kill Dr. Tiller, unborn children were going to die 22 hours later because Dr. Tiller had abortions scheduled at his clinic the next day.

The jury convicted Roeder of premeditated first-degree murder and two counts of aggravated assault. The district court found aggravating circumstances to impose a hard 50 life sentence on Roeder's first-degree murder conviction, as will be discussed below, and further imposed 12 months' imprisonment on each of the aggravated assault convictions; all sentences were imposed consecutively.

Roeder timely appeals his convictions and hard 50 sentence. We take the liberty of addressing Roeder's issues in a different order than he presented them, beginning with his change of venue request, the disposition of which could render the remaining issues on appeal moot.

CHANGE OF VENUE

Prior to trial, Roeder's counsel filed a motion for change of venue based on the long history of public conflict and controversy surrounding the abortion portion of Dr. Tiller's medical practice and, more particularly, based on the publicity surrounding this homicide case. At the motion hearing, defense counsel proffered into evidence 32 exhibits which detailed the reporting of the case by The Wichita Eagle, the community's major daily newspaper. Defense counsel "stipulate[d] that part of the pretrial publicity [was Roeder's] own doing" but argued that fact did not change the district court's inquiry into whether pretrial publicity had tainted the jury pool. The defense asked the judge to either rule that the pretrial publicity, standing alone, mandated moving the trial to a new venue or to keep an open mind throughout jury selection because defense counsel, if necessary, planned to make a renewed motion after attempting to impanel a jury.

The district court initially held that it would be premature to rule on a change of venue until the court had attempted to impanel a jury. Jury selection began with 140 venire persons, who had all completed a questionnaire prepared by the district court to be utilized during jury selection. The court split the potential jurors into three panels, and the parties conducted an individual voir dire of the first panel of 61 persons. Jury selection proceeded smoothly, and the district court was able to impanel a jury that it declared to be fair and impartial without going beyond the first panel of potential jurors. The district court then denied Roeder's renewed motion for a change of venue. On appeal, Roeder contends that the district court abused its discretion in refusing to change venue because the prior history of turmoil surrounding the abortion clinic in Wichita, coupled with the pretrial publicity in this case, resulted in the Wichita community being prejudiced against Roeder. We disagree.

Standard of Review

Roeder's appellate counsel acknowledges that, pursuant to *State v. Higgenbotham*, 271 Kan. 582, 591, 23 P.3d 874 (2001), this issue would be reviewed for an abuse of discretion and that the defendant would carry the burden to show prejudice. Recently, in *State v. Carr*, 300 Kan. ___, 331 P.3d 544, 596 (2014), we clarified that a change of venue challenge under the Sixth Amendment to the United States Constitution based on pretrial publicity is viewed through two different lenses:

> "'The first context occurs where the pretrial publicity is so pervasive and prejudicial that we cannot expect to find an unbiased jury pool in the community. We "presume prejudice" before trial in those cases, and a venue change is necessary.' [*Goss v. Nelson*,] 439 F.3d [621,] 628 [10th Cir. 2006]. 'In such cases, a trial court is permitted to transfer venue without conducting voir dire of prospective jurors.' *House v. Hatch*, 527 F.3d 1010, 1023-24 (10th Cir. 2008).
>
> "The second context, 'actual prejudice,' occurs 'where the effect of pretrial publicity manifested at jury selection is so substantial as to taint the entire jury pool.' *Goss*, 439 F.3d at 628; see *Gardner v. Galetka*, 568 F.3d 862, 888 (10th Cir. 2009). 'In cases of actual prejudice, "the voir dire testimony and the record of publicity [must]
> reveal the kind of wave of public passion that would have made a fair trial unlikely by the jury that was impaneled as a whole." [Citation omitted.]' *Hatch*, 527 F.3d at 1024."

A presumed prejudice challenge is subject to a mixed standard of review. The court first looks for substantial competent evidence in the record to support the factors that must be considered to determine presumed prejudice. See *Carr*, 300 Kan. at ___, 331 P.3d at 599-603 (discussing *Skilling v. United States*, 561 U.S. 358, 130 S. Ct. 2896, 177 L. Ed. 2d 619 [2010] factors). But the overall weighing of the *Skilling* factors results in a conclusion of law that is subject to a de novo standard. *Carr*, 300 Kan. at ___, 331 P.3d at 599. On the other hand, the actual prejudice analysis is reviewed for an abuse of discretion. 300 Kan. at ___, 331 P.3d at 605.

Analysis

The Kansas statute governing a change of venue calls for the defendant to establish a high level of prejudice, to-wit:

"In any prosecution, the court upon motion of the defendant shall order that the case be transferred as to him [or her] 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 [or she] cannot obtain a fair and impartial trial in that county." K.S.A. 22-2616(1).

Our caselaw confirms that a defendant seeking reversal of a denied motion to change venue is facing a steeply uphill battle. "The determination of whether to change venue is entrusted to the sound discretion of the trial court, and its decision will not be disturbed on appeal absent a showing of prejudice to the substantial rights of the defendant. *State v. Cravatt*, 267 Kan. 314, 336, 979 P.2d 679 (1999)." *Higgenbotham*, 271 Kan. at 591. The defendant bears the burden "to show prejudice exists in the community, not as a matter of speculation but as a demonstrable reality. The defendant must show that such prejudice exists in the community that it was reasonably certain he or she could not have obtained a fair trial. 267 Kan. at 336." 271 Kan. at 591-92.

Roeder does not make a constitutional presumed prejudice challenge. His brief quotes *Higgenbotham* for the factors to consider when determining whether the statutory grounds for a change of venue exist:

> "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 the 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." 271 Kan. at 592.

Roeder does not segregate the factors for individual consideration, rather he focuses on the general facts that Dr. Tiller was at the center of a decades-long conflict with anti-abortionists and that there was "'massive pretrial publicity'" about Dr. Tiller's death. Certainly, there is plenty of evidence in the record from which one could find that the particular degree to which the publicity circulated throughout the Wichita community was much greater than for most other homicides. For instance, the day after Dr. Tiller's death, June 1, 2009, The Wichita Eagle printed seven articles—three on the paper's front page—which contained multiple statements from anti-abortion and abortion rights groups, together with an opinion piece and letters to the editor relating to Dr. Tiller and the homicide investigation. Several articles identified Roeder as the suspect in Dr. Tiller's murder, including a front page article headlined: "Suspect is linked to anti-government group," which included Roeder's photograph and information on his past anti-abortion activities. The Wichita Eagle continued to carry articles related to Dr. Tiller and/or the homicide investigation each day through June 10, 2009, and, thereafter, the paper ran relevant articles on the following dates in 2009: June 13, 14, 17, 19, 20, 21; July 26, 29; August 10, 30, 31; October 23, 25, 30; November 10, 11, 13, 14, and 24. Letters to the editor and opinions regarding Dr. Tiller's death were also prevalent. Several of the articles contained information the media received from Roeder and his counsel. For example, one article discussed Roeder's interview with The Kansas City Star where Roeder admitted killing Dr. Tiller and discussed his trial strategy.

But Roeder has not met his burden by simply establishing the existence of a large amount of pretrial publicity. This court has opined that "media publicity alone *never* establishes prejudice." (Emphasis added.) *State v. Verge*, 272 Kan. 501, 508, 34 P.3d 449 (2001); see also *Higgenbotham*, 271 Kan. at 593 (quoting *State v. Ruebke*, 240 Kan. 493, 500, 731 P.2d 842, *cert. denied* 483 U.S. 1024 [1987]; "'[m]edia publicity alone has never established prejudice per se'"). Moreover, although we are not aware of any precedent that would preclude a defendant from intentionally creating the publicity upon which the defendant later relies to establish the requisite prejudice to support a change of venue, such a ploy should be unavailing.

Notwithstanding the notion of gamesmanship, one can imagine that there is a sound basis for refraining from exclusive reliance on the degree to which publicity circulated throughout the community when considering whether to change the venue of a trial. For one thing, there must be some place to which the trial could be moved that would not be subject to the same degree of prejudice as the original community. Thus, the second factor addresses the degree to which the publicity or that of a like nature has circulated to those other areas to which venue could be changed.

Roeder did not present evidence on this factor, in stark contrast to the defendant in *Higgenbotham*, who presented a survey conducted by a litigation consulting firm. The *Higgenbotham* survey revealed that a high percentage of the people residing in Harvey County, the trial community, believed that the defendant was guilty. In comparison, the survey revealed that the residents of Ellis County, with a similar makeup as Harvey County, did not suffer "the same problems with regard to publicity and knowledge of the case." *Higgenbotham*, 271 Kan. at 593. In contrast to that comparative information, Roeder's own pretrial motion alleged that Dr. Tiller was known on a national scale and that the national media "including network television, national daily publications, and major internet news sources ran stories detailing the events of the killing with utmost

priority." That argument actually counseled against changing venue because a move to another Kansas judicial district would still leave the trial susceptible to the prejudice created by such pervasive national publicity.

The factor addressing the amount of time that elapsed between the most intense publicity and the date of trial does not appear to be particularly compelling for either side. The majority of the coverage about which Roeder complains, especially the coverage not spurred by Roeder himself, occurred months before the trial. Some prospective jurors noted during individual voir dire that they had heard about the case when it first happened but that they had thereafter not followed or heard much about the case. Others mentioned that a lot of time had passed between the crime and the voir dire.

With respect to the next *Higgenbotham* factor, the record reveals that the district court exercised a great deal of care in selecting the jury. On January 6, 2010, approximately 140 jurors were summoned to court to complete the questionnaire. On January 11, 2010, at the request of the State and defense, the district court issued an order closing jury voir dire "to insure the defendant a fair and impartial jury to decide this trial." Further, based on the answers given by the potential jurors in the questionnaires, the court granted the State and defense's request for "individual voir dire of each juror to explore any challenges for cause, outside of the presence of [the] entire venire, so that any individual answers [would not] taint the entire panel." As previously noted, the court impaneled a jury from the first group of 61 persons.

Not surprisingly, given the amount of initial publicity, all of the selected jurors had experienced some degree of media exposure about the case prior to trial. But as Roeder acknowledges, all of the selected jurors indicated that they could be fair and impartial and base their decision on the evidence presented in court, rather than what they had previously heard or read. Moreover, the history of abortion as a hot button issue in

Wichita, together with the pretrial publicity, cut both ways. A number of potential jurors participating in the individual voir dire had negative things to say about Dr. Tiller, suggesting that in some instances the publicity was detrimental to the State, rather than the defense.

The juror challenges exercised by the defense, both peremptory and for cause, do not suggest that the defense was saddled with an unduly prejudiced venire. The defense challenged nine jurors for cause, and the trial court only overruled three of those challenges, none of whom sat on the jury. The defense had a total of 14 peremptory challenges to exercise. Five of the prospective jurors passed for cause did not need to be considered to obtain the 14 persons needed, with two alternates.

Roeder does argue that the next factor—the connection of government officials with the release of publicity—cut in his favor because the district attorney was "widely quoted" in the media as claiming that Dr. Tiller's death was "'an American act of terrorism.'" But that quote was not given directly to the media by the district attorney. Rather, the comment was made in a telephone conversation with the district court concerning Roeder's bond which was released to the media. Further, the quote only appeared in the newspaper one time. Moreover, the label of "terrorism" has commonly been attached to facts which replicate those that Roeder proudly admitted, *i.e.*, the cold- blooded murder of an unarmed and defenseless person in a place of worship for the sole reason that the victim refused to abandon his or her own beliefs in favor of those of the killer and to thereby send a message to all who might similarly sin in the future.

The factor of the severity of the charged offense—premeditated first-degree murder—favors Roeder, albeit he was not charged with capital murder. Countering that factor is the size of the area from which the venire is drawn. Sedgwick County is a large metropolitan area, which would diffuse the effects of the publicity.

Reviewing all of the factors articulated in *Higgenbotham*, taken together, we cannot discern that the district court abused its discretion in denying Roeder's motion for a change of venue. Perhaps most importantly, here, like in *Higgenbotham*, "there was no undue difficult[y] in [i]mpaneling a jury," 271 Kan. at 594, and, therefore, Roeder's substantial rights were not prejudiced.

DEFENSE

Next, we consider Roeder's challenge to the district court's ruling that he could not present a necessity defense and, correspondingly, that he could not have the jury instructed on that defense. Prior to voir dire and apparently in response to Roeder's lengthy pro se brief in support of a necessity defense, the State sought a ruling that Kansas does not acknowledge the necessity defense. Relying on *City of Wichita v. Tilson*, 253 Kan. 285, 855 P.2d 911 (1993), and a Florida case, the State argued that "abortion is not a harm that can be used to invoke the necessity defense." The district court ruled in favor of the State. Roeder contends on appeal that the disallowance of his necessity defense violated his due process right to present evidence in support of his theory of defense.

Standard of Review

The issues of whether the necessity defense is recognized by Kansas law and whether the defense was applicable to Roeder's criminal acts are questions of law subject to unlimited appellate review. See 253 Kan. at 288.

Analysis

Roeder points out that this court has recognized that both our state and federal constitutions entitle a criminal defendant to present the theory of his or her defense. See *State v. Evans*, 275 Kan. 95, 102, 62 P.3d 220 (2003). But it is not error for the trial court to exclude evidence that is not relevant to a legally sufficient theory of defense. *Cf. State v. Pennington*, 281 Kan. 426, Syl. ¶ 2, 132 P.3d 902 (2006) (no error to exclude psychologist's expert testimony proffered in furtherance of theory of defense when evidence irrelevant to *mens rea* defense). For instance, a defendant is not constitutionally entitled to present evidence that he or she did not know that his or her actions were unlawful because ignorance of the law is not a legally sufficient theory of defense. See *State v. Young*, 228 Kan. 355, 360, 614 P.2d 441 (1980) (all persons presumed to know general public laws of state where they reside, as well as legal effects of their actions). Accordingly, Roeder's constitutional challenge hinges upon whether necessity can be a legally recognized theory of defense under the facts of his case.

Roeder acknowledges this court's rejection of the necessity defense in *Tilson*. There, the district court had acquitted Tilson despite her admission that she violated the City of Wichita's criminal trespass law by blocking the entrance to an abortion clinic. The lower court ruled that the necessity defense absolved Tilson of criminal responsibility because the expressed purpose of her actions was to prevent the evils she perceived to be associated with an abortion. Initially discussing the background of the necessity defense, *Tilson* explained:

> "Necessity is a common-law defense recognized in some jurisdictions, while in others it has been adopted by statute. Several states which have no statute on the defense have not determined whether the common-law defense will be recognized. It has been referred to by various terms, including 'justification,' 'choice of evils,' or 'competing harms.'

> Depending upon the jurisdiction, various elements must be proven in order for a defendant to establish the defense." 253 Kan. at 288.

The *Tilson* court then opined that "[r]egardless of what name is attached to the defense . . . one thing is clear: The harm or evil which a defendant, who asserts the necessity defense, seeks to prevent must be a legal harm or evil as opposed to a moral or ethical belief of the individual defendant." 253 Kan. at 289-90. In that vein, the court noted that "[e]very appellate court to date which has considered the issue has held that abortion clinic protesters, or 'rescuers' as they prefer to be called, are precluded, as a matter of law, from raising a necessity defense when charged with trespass. [Citations omitted.]" 253 Kan. at 292. The rationale utilized by "[t]he majority of courts. . . [was] that because abortion is a lawful, constitutionally protected act, it is not a legally recognized harm which can justify illegal conduct." 253 Kan. at 293; see also *Hill v. State*, 688 So. 2d 901, 906 (Fla. 1996) (rejecting the necessity defense to charges of first- degree murder for killing an abortion clinic physician and a volunteer and stating that harm component of its inquiry cannot be met by legal abortions as a matter of law), *cert. denied* 522 U.S. 907 (1997). Moreover, the *Tilson* court concurred with cases cited from other states that held:

> "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.

But *Tilson* was careful to note that "the necessity defense, except as codified in statutes such as those relating to self-defense and compulsion, has not been adopted or recognized in Kansas." 253 Kan. at 291. *Tilson* did not resolve that question of whether the necessity defense could ever be used in another circumstance. Instead, the court simply chose to hold that, even if necessity can be a legally sufficient theory of defense in

this state under some scenarios, it would not apply to trespass prosecutions involving abortion clinics. 253 Kan. at 296; see also *State v. Hunt*, No. 106,296, 2012 WL 3966535, at *3 (Kan. App. 2012) (unpublished opinion), *rev. denied* 297 Kan. 1251 (2013) (refusing to find that common-law defense of necessity was abolished by statute, but finding necessity defense not applicable to facts of that case).

More recently, our Court of Appeals had occasion to consider whether the necessity defense could be utilized to defend against a trespass charge when the defendant claimed that *illegal* abortions were being performed on the premises. *City of Wichita v. Holick*, No. 95,340, 2007 WL 518988 (Kan. App. 2007) (unpublished opinion). In that case, the defendant was convicted of trespass in violation of the Wichita City Code for protesting at Dr. Tiller's clinic despite the defendant's assertion of the necessity defense based upon his allegations that the clinic was performing illegal abortions "on minors, coerced women, and women with viable late-term pregnancies." 2007 WL 518988, at *3.

The *Holick* panel held that, to invoke the necessity defense, Holick had to show an imminent harm or evil which he sought to prevent by his actions and that "'under Kansas law the harm must be something more than the performance of an abortion.'" 2007 WL 518988, at *3. The panel was unconvinced by Holick's allegations that the "something more" was present in his case because *unlawful* abortions were occurring at the clinic. First, the panel found that Holick had failed to establish that partial birth abortions were scheduled on the day of the protest, "let alone that such procedures were planned without compliance with the requirements of K.S.A. 65-6721(a)(1) and (a)(2)." 2007 WL 518988, at *4. Perhaps more importantly, the Court of Appeals found that Holick's principal purpose in trespassing was to prevent *all* abortions, not just illegal abortions. 2007 WL 518988, at *5.

En route to its decision, the *Holick* panel noted that the district court had utilized the Tenth Circuit Court of Appeals' formulation of the necessity defense, which requires a defendant to show "(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." *Holick*, 2007 WL 518988, at *3 (citing *United States v. Turner*, 44 F.3d 900, 902 [10th Cir. 1995]). Roeder used that formulation in his requested jury instruction on the necessity defense, the refusal of which he now appeals. Even under Roeder's own proffered elements of necessity, the defense was simply not applicable to the facts of this case.

Before considering whether Roeder chose the lesser of two evils, we must clarify the evils subject to comparison. On one side of the ledger, Roeder's admitted evil act was the premeditated intentional murder of a human being who was legally recognized as a person in all respects. Arguably, only capital murder would be a greater legal harm.

On Roeder's side of the ledger, the evil he sought to prevent was Dr. Tiller's failure to comply with all of the rules and regulations applicable to abortion providers, *i.e.*, administrative or procedural irregularities. Roeder wants to argue that the doctor was murdering babies, but that is his religious and moral view, rather than the legal view in this state. As noted above, *Tilson* declared that "[t]he harm or evil which a defendant, who asserts the necessity defense, seeks to prevent must be a legal harm or evil as opposed to a moral or ethical belief of the individual defendant." 253 Kan. at 289-90. Indeed, one need look no further than Dr. Tiller's criminal trial upon which Roeder relies to establish his belief that illegal abortions were occurring at the clinic. The doctor was not charged with murder, but rather that trial was about misdemeanor violations for failing to follow the proper procedure.

Once the choice of evils is clarified to be the premeditated intentional murder of a human being versus the violation of administrative procedures governing an otherwise legal abortion, the answer is crystal clear. By analogy, no one would find it necessary to kill an over-the-road trucker for failing to maintain an up-to-date log book. Roeder cannot clear the first hurdle of the necessity defense because he did not choose the lesser evil when he killed Dr. Tiller in cold blood.

Likewise, Roeder fails the second test, *i.e.*, that he acted to prevent *imminent* harm. Roeder acknowledges that Dr. Tiller was not going to cause the harm of which he complains until the next day. Obviously, there were not going to be any abortions performed at the church while the doctor was ushering for a Sunday morning service. Roeder argues that the potential that the doctor would perform an abortion some 22 hours after the shooting qualified as imminent harm. We disagree. The shooting occurred at the church because it made the assassination easier to accomplish, not because the perceived harm was imminent. Moreover, Roeder testified that he first determined that it would be necessary to kill Dr. Tiller in about 1993, that he formulated the plan to kill the doctor at his church in 2002, and that he attended the doctor's church in 2008 with the intent to kill the doctor before he actually effected his plan in May 2009. That timeline belies the notion that Roeder sincerely believed that the harm to be prevented was imminent; one does not wait over a decade to prevent an imminent harm.

The causal relationship requirement was arguably met because Roeder's killing of the doctor would avert the perceived harm that the doctor would fail to follow proper administrative protocol in performing abortions. But the final requirement for necessity— that the defendant had no legal alternatives to violating the law—is belied by Roeder's own testimony. He boasted of being successful in getting potential patients to change their minds about having an abortion. Moreover, *Holick* referred to additional legal means of educating women on abortion, including door-to-door discussions, distributing

literature on abortion, or continuing lawful protests. 2007 WL 518988, at *7 (quoting *Turner*, 44 F.3d at 902). Even for Roeder's professed purpose of stopping *all* abortions, not just illegal abortions, the Draconian measure of murder was not the only alternative.

As in *Tilson*, we decline to definitively state whether the necessity defense has any life in this state under other circumstances. We do hold, however, that the facts of this case unequivocally preclude the application of the necessity defense, and the district court did not err in refusing to allow Roeder to rely on that defense or to instruct the jury on the necessity defense.

VOLUNTARY MANSLAUGHTER—IMPERFECT DEFENSE-OF-OTHERS

Next, we consider Roeder's argument that the district court erred in denying his requested lesser included offense instruction on voluntary manslaughter based upon imperfect defense-of-others. See *State v. Harris*, 293 Kan. 798, 803, 269 P.3d 820 (2012) ("Imperfect [defense-of-others] may trigger a lesser degree of homicide, but it is not a defense to criminal liability."). The instruction that Roeder proffered was based on PIK Crim. 3d 56.05 and provided:

> "If you do not agree that the defendant is guilty of First Degree Murder, you should then consider the lesser included offense of Voluntary Manslaughter[.]
>
> "To establish this charge, each of the following claims must be proved:
>
> 2. That the defendant intentionally killed George Tiller;
>
> 3. That it was done upon an unreasonable but honest belief that circumstances existed that justified deadly force in defense of a person[;]
>
> That this act occurred on or about the 31st day of March, 2009, in Sedgwick County, Kansas."

Defense counsel argued that Roeder's testimony established that he honestly believed that he had to kill Dr. Tiller when he did it to protect the unborn children that were in danger of imminent harm because of the abortions scheduled for the following day. The district court denied the instruction because the doctor was not engaging in any unlawful conduct at his abortion clinic and because "there [was] no imminence of danger on a Sunday morning in the back of a church." Moreover, the district court found that the subjective part of the analysis related to the "unreasonable but honest belief" language of K.S.A. 21-3403 but that "[w]hen we return to the statutory elements under K.S.A. 21- 3211, those become objective." We agree.

Standard of Review

We recently clarified our standard of review for jury instruction issues:

> "(1) First, the appellate court should consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; (2) next, the court should use an unlimited review to determine whether the instruction was legally appropriate; (3) then, the court should determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and (4) finally, if the district court erred, the appellate court must determine whether the error was harmless, utilizing the test and degree of certainty set forth in *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012)." *State v. Plummer*, 295 Kan. 156, Syl. ¶ 1, 283 P.3d 202 (2012).

Analysis

Roeder properly preserved this issue for appellate review by requesting a voluntary manslaughter instruction and distinctly stating the grounds for its inclusion. See K.S.A. 22-3414(3) (establishing preservation rule for lesser included crime instructions).

Furthermore, Roeder's requested instruction was legally appropriate, as our caselaw "has long held that voluntary manslaughter is a lesser included offense of first-degree premeditated murder under K.S.A. 21-3107(2)(a)." *State v. Qualls*, 297 Kan. 61, 69, 298 P.3d 311 (2013).

The controlling question here is whether the instruction, viewed in the light most favorable to Roeder, was factually appropriate. *Qualls*, 297 Kan. at 69. "District courts have a duty to issue instructions on any lesser included offense established by the evidence . . . ." *State v. Nelson*, 291 Kan. 475, 480, 243 P.3d 343 (2010) (citing K.S.A. 22-3414[3], which requires an instruction "'where there is some evidence which would reasonably justify a conviction of some lesser included crime'").

The statutory definition of the requested version of voluntary manslaughter is found in K.S.A. 21-3403(b), which requires an "intentional killing of a human being committed . . . (b) upon an unreasonable but honest belief that circumstances existed that justified deadly force under K.S.A. 21-3211, 21-3212 or 21-3213 and amendments thereto." Two of the referenced statutes, K.S.A. 21-3212 and K.S.A. 21-3213, deal with the use of force in defense of property, and, consequently, they have no bearing on our inquiry in this case. The self-defense statute referenced in the definition of voluntary manslaughter that is applicable here is K.S.A. 21-3211, the relevant portions of which state:

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

Roeder suggests that his actions fit within the parameters of an imperfect defense- of-others voluntary manslaughter because of his honestly held religious belief that an abortion kills a person. In other words, Roeder contends that his subjective belief that he was saving others' lives by killing Dr. Tiller was all that mattered, even if that belief was objectively unreasonable in all respects and even if the belief was contrary to the law. Roeder reads the definition of imperfect defense-of-others voluntary manslaughter too broadly.

Granted, Roeder can point to expansive language in *State v. Ordway*, 261 Kan. 776, 934 P.2d 94 (1997), to support the notion that the only consideration under K.S.A. 21-3403(b) is whether the defendant honestly believed his action was necessary to defend others, regardless of the circumstances. Ordway killed his parents because voices in his head told him he needed to do so to save his sons from being killed by the parents. The *Ordway* court declared that "[b]oth elements in the offense of voluntary manslaughter as defined in [K.S.A.] 21-3403(b) are subjective" and that "the 'objective elements' of [K.S.A.] 21-3211 [(Ensley)]—an aggressor, imminence, and unlawful force—would not come in for consideration." 261 Kan. at 787.

Black's Law Dictionary currently defines "subjective" as: "1. Based on an individual's perceptions, feelings, or intentions, as opposed to externally verifiable phenomena . . . . 2. Personal; individual . . . ." Black's Law Dictionary 1652 (10th ed. 2014). In that vein, *Ordway*'s stated interpretation of K.S.A. 21-3403(b) would mean that a defendant's personal and individual perception or feeling that deadly force was necessary to defend others, standing alone, would meet the definition of imperfect defense-of-others voluntary manslaughter without regard to the externally verifiable phenomena surrounding the crime. That interpretation would negate the fundamental notion that everyone is presumed to know the law and one cannot use as a defense his or

her subjective belief that the law is or should be something different. See *State ex rel. Murray v. Palmgren*, 231 Kan. 524, 536, 646 P.2d 1091 (1982) (stating the "ancient maxim, 'Ignorance of the law is no excuse'"). Carried to the extreme, one could argue that, based purely on subjective belief, the Islamic terrorists who killed Americans on September 11, 2001, would fit within the definition of those entitled to claim imperfect defense-of-others, as would a death penalty opponent who might kill the warden at the Huntsville Prison in Texas to prevent further prisoner executions.

Yet, even *Ordway* does not appear to have applied that sweeping principle of pure subjectivity when reaching its ultimate holding; *Ordway* affirmed the district court's refusal to give a lesser included offense instruction on voluntary manslaughter. In reaching that decision, the *Ordway* court did not focus on what the defendant personally and individually perceived or felt, but rather it fashioned a rule based upon the underlying *reason* that the defendant subjectively believed deadly force was necessary. Specifically, *Ordway*'s penultimate ruling was that "the 'unreasonable but honest belief' necessary to support the 'imperfect right to self-defense manslaughter' cannot be based upon a psychotic delusion." 261 Kan. at 790. The opinion did not explain why excluding those whose subjective belief derived from a psychotic delusion is not, in essence, the application of an objective criterion to narrow the class of persons entitled to the voluntary manslaughter instruction. Moreover, we can only speculate whether *Ordway* intended for the constraint on subjectivity to apply to others whose belief may have been the product of aberrant mental processes, *e.g.*, brainwashed cult members or religiously indoctrinated terrorists.

More importantly, the purely subjective interpretation does not comport with the statutory language of K.S.A. 21-3403(b). If the legislature had intended to allow a defendant to make up his or her own version of the law based upon the defendant's declaration of an honest belief, the statute could have simply defined the crime as an

intentional killing of a human being committed upon an unreasonable but honest belief that circumstances existed that justified deadly force. But the statute adds something; it requires that the honest belief has to be "that circumstances existed that justified deadly force *under K.S.A. 21-3211, 21-3212 or 21-3213 and amendments thereto.*" (Emphasis added.) K.S.A. 21-3403(b).

The statutory reference to the perfect defense statutes has to mean something because we do not interpret statutes in such a manner as to render portions superfluous or meaningless. See *State v. Van Hoet*, 277 Kan. 815, 826-27, 89 P.3d 606 (2004) ("The court should avoid interpreting a statute in such a way that part of it becomes surplusage."). The logical interpretation is that the circumstances which the defendant honestly believed to exist must have been such as would have supported a claim of perfect self-defense or defense-of-others, if true. Accord *People v. Enraca*, 53 Cal. 4th 735, 761, 137 Cal. Rptr. 3d 117, 269 P.3d 543 ("'To make the observation in *In re Christian S.*[, 7 Cal. 4th 768, 773 n.1, 30 Cal. Rptr. 2d 33, 872 P.2d 574 (1994),] more general, not every unreasonable belief will support a claim of imperfect self-defense but only one that, if reasonable, would support a claim of perfect self-defense.'"), *cert. denied* 133 S. Ct. 225 (2012).

Subsequently, in *State v. White*, 284 Kan. 333, 161 P.3d 208 (2007), this court did not follow *Ordway*'s suggestion to completely disregard the objective element of imminence when considering imperfect defense-of-others voluntary manslaughter. There, White believed that his son-in-law was sexually abusing White's grandson, so he shot and killed the son-in-law in the Wal-Mart while the son-in-law was working. White asserted imperfect defense-of-others, and the State countered that White presented no evidence that the grandson was in imminent danger from the son-in-law at the time of the shooting. This court agreed with the State, reasoning:

"[T]he evidence relied upon by White explains why he might have believed that B.A.W. had previously been abused or would be abused in the future. But White did not provide *any* evidence that he believed B.A.W. was in imminent danger at the time of the shooting. At that time, Aaron, the purported abuser, was not in the presence of B.A.W., the purported victim. Indeed, because White went to Aaron's Wal-Mart work-place, it would be quite difficult for him to present evidence that he honestly believed his 5-year- old grandson was there and that abuse was imminent." 284 Kan. at 353.

White looked to California caselaw for guidance on imperfect defense-of-self-or- others. Specifically, we referred to *In re Christian S.*, where the California Supreme Court "held that '[f]ear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice.' 7 Cal. 4th at 783. It concluded that 'the trier of fact must find an *actual* fear of an *imminent* harm. . . .' 7 Cal. 4th at 783." 284 Kan. at 352. As noted above, the *Enraca* court extrapolated from *Christian S.* the general rule that an imperfect self-defense claim is only available where the unreasonable beliefs would have supported a perfect self-defense claim if they had been reasonable beliefs. 53 Cal. 4th at 761.

White also discussed *Menendez v. Terhune*, 422 F.3d 1012 (9th Cir. 2005), where the Menendez brothers, Erik and Lyle, were convicted in California state court of two counts each of first-degree murder for shooting their defenseless parents with numerous shotgun blasts. The brothers' petitions for writs of habeas corpus to the Ninth Circuit Court of Appeals alleged, *inter alia*, that the decision not to instruct the jury on imperfect self-defense violated the brothers' rights to due process. The state trial and appellate courts found that an imperfect self-defense instruction was not warranted because the brothers were unable to show a belief that danger was imminent. 422 F.3d at 1028-29.

In denying relief, the Ninth Circuit discussed the brothers' evidence establishing that they were repeatedly abused by their father and that their mother had acquiesced in

the abuse. But the court found that this focus on past abuse was unpersuasive because it fell short of establishing that "at the moment [Erik] shotgunned his parents to death, he feared he was in imminent peril." 422 F.3d at 1030. The court found that even Erik's belief that "his parents would kill him when they exited the room [was] insufficient to support the instruction" because, assuming this testimony was true, the killings were preemptive strikes. 422 F.3d at 1030.

Recently, we reached a different result in *Qualls*, where we found that the district court's failure to give an imperfect self-defense instruction created reversible error. Qualls admitted shooting the victim in a bar fight but argued for a voluntary manslaughter instruction based on his honest but unreasonable belief that lethal force was justified. Specifically, Qualls testified that he saw the victim reach for his waist; that he saw something that he believed was a gun; and that he responded by shooting the victim in self-defense. *Qualls* held that the district court should not have applied an objective standard to determine that the victim's hand at his waist did not warrant an imperfect self- defense instruction, but rather the question was "whether there was evidence of Qualls' subjective belief that unlawful force was imminent when that evidence is viewed in the light most favorable to Qualls." 297 Kan. at 70. In that case, pursuant to the rationale in the *Enraca* case described above, the voluntary manslaughter instruction was factually appropriate because the defendant's honest belief that the victim was drawing a gun from his waistband would have fit the statutory requirements for a perfect self-defense set forth in K.S.A. 21-3211 if the belief had been reasonable, *i.e.*, if the circumstances believed to exist were true.

In contrast to *Qualls*, here, even if the circumstances that Roeder believed existed had been true—that Dr. Tiller would be performing abortions the following day—those circumstances would not have supported a claim of perfect defense-of-others. For that defense to apply under K.S.A. 21-3211(a), Roeder had to be defending against Dr.

Tiller's "imminent use of unlawful force" against a third person. Even ignoring the question of

whether a fetus is a third person, the defense could not stand.

As the trial court aptly noted, no use of force was imminent in the church foyer that Sunday morning. Moreover, the facts belie the notion that Roeder committed the crime when and where he did because of an honest belief in the imminence of harm. To the contrary, he coldly calculated the time and place that gave him the best odds of successfully completing his planned murder. Additionally, given that abortions are lawful, Roeder could not have been defending against *unlawful force*, as required for perfect defense-of-others. Even if the doctor had failed to comply with all of the rules and regulations governing abortions, the use of the force required to accomplish the abortion would not have been unlawful.

Finally, we would note that Roeder's argument that he honestly believed that Dr. Tiller was performing unlawful abortions based upon the attorney general investigations and allegations that the doctor was violating administrative protocol is simply disingenuous. Roeder testified that he formed the belief that he needed to kill Dr. Tiller over a decade prior to any attorney general investigation. Further, he clearly testified that he sought to stop *all* abortions, including those that were legal under the law.

Consequently, we affirm the district court's denial of Roeder's request for an imperfect defense-of-others voluntary manslaughter instruction.

RIGHT TO PRESENT A DEFENSE

Closely related to his argument that the district court erred in denying his requested lesser included offense instruction on voluntary manslaughter—imperfect

defense-of-others, Roeder argues that the district court violated his due process right to present this defense.

Standard of Review

"When a criminal defendant claims that a district judge has interfered with his or her constitutional right to present a defense, we review the issue de novo." *State v. Carter*, 284 Kan. 312, 318-19, 160 P.3d 457 (2007) (citing *State v. Kleypas*, 272 Kan. 894, 921-22, 40 P.3d 139 [2001], *cert. denied* 537 U.S. 834 [2002]).

Analysis

A defendant has a right to present his or her theory of defense, but that right is subject to some constraints, to-wit:

> "Under our state and federal constitutions, a defendant is entitled to present the theory of his or her defense. *State v. Evans*, 275 Kan. 95, 102, 62 P.3d 220 (2003). The defendant's fundamental right to a fair trial is violated if relevant, admissible, and noncumulative evidence which is an integral part of the theory of the defense is excluded. See *State v. Mays*, 254 Kan. 479, 487, 866 P.2d 1037 (1994).
>
> "However, the right to present a defense is subject to statutory rules and case law interpretation of the rules of evidence and procedure. *State v. Thomas*, 252 Kan. 564, 573, 847 P.2d 1219 (1993). An appellate court's first consideration when examining a challenge to a district court's admission of evidence is relevance. Once relevance is established, evidentiary rules governing admission and exclusion may be applied either as a matter of law or in the exercise of the district judge's discretion, depending on the contours of the rule in question. *State v. Carter*, 278 Kan. 74, Syl. ¶ 1, 91 P.3d 1162 (2004)." *State v. Patton*, 280 Kan. 146, 156, 120 P.3d 760 (2005), *disapproved on other grounds by State v. Gunby*, 282 Kan. 39, 55-56, 144 P.3d 647 (2006).

Roeder argues that the district court interfered with his right to present a voluntary manslaughter defense when the court: (1) quashed Barry Disney's subpoena; (2) excluded Disney and Phill Kline from testifying in Roeder's defense; (3) ordered the defense to proffer Roeder's and Kline's testimony; (4) denied Roeder's motion to take judicial notice and instruct the jury of the two criminal cases against Dr. Tiller; and (5) limited Roeder's testimony during direct examination.

Quashing Disney's Subpoena

After the district court granted the motion to quash the subpoena issued to Deputy Attorney General Barry Disney, Roeder's counsel made the following proffer:

> "As to Barry Disney, we believe Mr. Disney, if he had been allowed to testify, would have indicated he is a licensed attorney. He is employed by the Attorney General's office, working out of Topeka, Kansas. He became the lead prosecutor in the case *State v. Tiller*, captioned 07 CR 2112. He prosecuted in front of a jury a 19-count Complaint alleging—the gist of the allegations were all the same, that he failed to, at least on 19 occasions, obtain an independent second opinion relative to the patient on whom he had performed an abortion. Furthermore, we anticipate that he would have testified that Dr. Tiller was acquitted on all 19 charges."

Roeder argues that the district court erroneously applied K.S.A. 60-245(c)(3)(A), which provides:

> "(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:
>
> (2) Fails to allow reasonable time for compliance;
>
> (3) requires a resident of this state who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person or requires a nonresident who is not a

party or an officer of a party to travel to a place more than 100 miles from the place where the nonresident was served with the subpoena, is employed or regularly transacts business, except that, subject to the provisions of subsection (c)(3)(B)(iii), such a nonparty may in order to attend trial be commanded to travel to the place of trial;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden."

Roeder argues that the facts of this case did not meet any of the four provisions in K.S.A. 60-245(c)(3)(A). But we have also recognized the "well-established principle that district courts have the authority, independent of a statutory privilege, to prevent or limit the power of compulsory process when necessary to prevent abuse, harassment, undue burden or expense, to manage litigation, to prevent violation of constitutionally protected interests, and to protect confidential matters." *State v. Gonzalez*, 290 Kan. 747, 767, 234 P.3d 1 (2010). Pertinent here, our caselaw provides that "[s]ubpoenas in aid of civil or criminal litigation are subject to stringent relevancy requirements." 290 Kan. at 767 (citing *State ex rel. Stephan v. Clark*, 243 Kan. 561, 568, 759 P.2d 119 [1988]); see also 98 C.J.S., Witnesses § 25 ("In a proper case, the prosecution may seek to quash a defendant's subpoena where the testimony that is sought is neither relevant nor material to the issues involved.").

Roeder contends that Disney's testimony was relevant to show the jury that Roeder had a basis in fact to believe that Dr. Tiller was not complying with the law when performing abortions. The district court ruled that establishing Disney's good faith in prosecuting Dr. Tiller was "unnecessary" and that any questioning in that regard would invade Disney's mental impressions. The district court also noted that it would be redundant for Disney to testify that he had a good faith basis to prosecute Dr. Tiller, given that the law and a prosecutor's professional ethics require that good faith. The court further reasoned that "Roeder is not going to be able to corroborate or validate his beliefs

by bringing in collateral sources, be it Mr. Disney, Mr. Phill Kline, or anybody else's opinion on the legality or illegality of what Dr. Tiller was doing."

Given that we have held in the foregoing issue that Dr. Tiller's failure to comply with some administrative or procedural requirement would not transform the actual abortion into an unlawful use of force within the meaning of the defense-of-others statute, Disney's testimony was no more relevant to these proceedings than the price of wheat in Kansas. Accordingly, the district court made the correct decision. See *State v. Bryant*, 272 Kan. 1204, 1210, 38 P.3d 661 (2002) (district court's correct decision may be upheld even where rationale not articulated).

Excluding Disney and Kline from Testifying in Roeder's Defense

Roeder also argues that the district court erred by excluding Disney's and Kline's testimony. In addition to quashing Disney's subpoena, the district court, over Roeder's objection, required Roeder to proffer Kline's testimony. Kline's proffered testimony discussed his investigation into Dr. Tiller's abortion practice while Kline served as the Kansas Attorney General. Kline testified that the investigation involved potential criminal late-term abortions and failure to report sexual abuse of children. He also testified that he came to a good faith conclusion that Dr. Tiller was performing unlawful abortions and discussed the criminal charges he filed against Dr. Tiller on December 21, 2006. But Kline clarified that he thought Roeder was not justified in killing Dr. Tiller and that Roeder's actions were unreasonable.

The district court ruled that Kline could not testify. The court first noted that portions of Kline's testimony were irrelevant and immaterial because the testimony discussed private inquisitions and records. The court then found that Kline's testimony regarding the charges made public involved Kline's legal theories, which were not

matters for jurors as factfinders to consider. The district court ruled that Roeder could testify regarding how the dismissal and acquittal impacted him. But the district court found that Disney and Kline had no insight into how their legal maneuvers impacted Roeder.

Roeder argues that the district court erred in excluding Disney and Kline from testifying in his defense because the evidence was relevant to Roeder's subjective beliefs. Again, we disagree and find Roeder's citation to the Maryland decision in *Simmons v. State*, 313 Md. 33, 542 A.2d 1258 (1988), to be inapposite here. *Simmons* involved the exclusion of the expert testimony of a psychiatrist on the issue of Simmons' asserted subjective belief. Yet, Roeder does not even attempt to argue that either Disney or Kline would have had the expertise to discuss Roeder's psychological profile.

In a pro se supplemental brief, Roeder makes the argument that Kline's testimony would have been relevant to show the reasonableness of Roeder's beliefs for the perfect defense-of-others under K.S.A. 21-3211. But Roeder fails to connect the dots between Kline's failed pursuit of technical abortion statute violations against Dr. Tiller and whether a rational, objective person would commit premeditated murder of a person with whom that person had theological disagreements. In other words, the proffered testimony had no relevance on any issue before the jury in this prosecution.

Ordering Defense to Proffer Kline's and Roeder's Testimony

Roeder also argues that the district court infringed on his constitutional rights and failed to ensure his right to a fair trial by ordering defense counsel to proffer his testimony before the State had rested its case. The district court explained:

> "If he chooses to testify, there is going to be a proffer made by counsel, because he is not going to get up there and get to just blurt out whatever he wants to say. I agree. It has to be relevant and material. But until I hear the proffer, I can't even judge if it's irrelevant or immaterial, nor can I do that on Phill Kline."

Roeder argues that the proffer under these circumstances was improper and any objections to his testimony should have been done during direct examination. Roeder argues that the State gained an advantage because the State was able to "'preview'" Roeder's direct examination, allowing the State to make numerous timely objections to his testimony.

Roeder's argument that he should not have been required to proffer a summary of his or his witness' testimony before the State had rested its case-in-chief has merit. "The purpose of a proffer is to make an adequate record of the evidence to be introduced" in order to preserve the issue for appeal. *State v. Evans*, 275 Kan. 95, 99, 62 P.3d 220 (2003). Here, the district court erred in requiring Roeder to proffer his testimony before the testimony was presented.

Nevertheless, given that the testimony of both Kline and Roeder on this issue was irrelevant on the imperfect defense-of-others defense, the error was harmless. There was no reasonable possibility that the error contributed to the verdict. See *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012).

Denying Roeder's Motion to Take Judicial Notice and Instruct the Jury on the Two Criminal Cases Against Dr. Tiller

Roeder next argues that the district court erred in denying his motion to take judicial notice of the two criminal cases filed against Dr. Tiller. Instead of taking judicial notice, the district court allowed Roeder to testify to the facts surrounding Dr. Tiller's

prior trials and "how those facts affected his thinking process and ultimately his decision to act the way he did." We discern that the district court permitted more evidence to be introduced on the imperfect defense-of-others issue than was warranted by the concept of relevancy. The court did not err in refusing the requested judicial notice.

Limiting Roeder's Testimony During Direct Examination

Roeder points to several instances during his direct examination where the district court limited his discussion of Dr. Tiller's abortion practices. Roeder argues that the district court should have followed its earlier ruling that Roeder could testify regarding "his personally-held beliefs just in general about abortion, whether it is harmful, whether it terminates a viable baby."

A review of Roeder's testimony shows that the district court allowed Roeder to testify on each of the issues identified in the district court's earlier ruling and only limited Roeder's testimony when Roeder attempted to discuss matters we have deemed irrelevant and completely off-base. The trial court's patience is applauded, and we find no error in the court controlling the trial by limiting testimony, where necessary.

PROSECUTORIAL MISCONDUCT

Roeder claims that the prosecutor committed misconduct during the rebuttal portion of closing argument by (1) appealing to the passion and prejudice of the jury, and (2) encouraging the jury to consider factors outside of the evidence. We find that the majority of the prosecutor's comments were not outside the wide latitude a prosecutor is allowed and, therefore, did not constitute misconduct. To the extent the prosecutor's comments exceeded this wide latitude, the comments were unequivocally harmless.

Standard of Review/Applicable Tests

A claim of prosecutorial misconduct based on comments made during closing argument will be reviewed on appeal, even where, as in this case, there was no contemporaneous objection. See *State v. King*, 288 Kan. 333, 349, 204 P.3d 585 (2009). Such review involves a two-step process. First, we decide whether the comments were outside the wide latitude that a prosecutor is allowed in discussing the evidence. *State v. Marshall*, 294 Kan. 850, 856, 281 P.3d 1112 (2012). If the comments were improper and constituted misconduct, we then determine whether the comments prejudiced the jury against the defendant and denied the defendant a fair trial. 294 Kan. at 856. Under this second step, we consider three factors. First, was the misconduct gross and flagrant? Second, was the misconduct motivated by ill will? Third, was the evidence of such a direct and overwhelming nature that the misconduct would have had little weight in the mind of a juror? *State v. Bridges*, 297 Kan. 989, Syl. ¶ 15, 306 P.3d 244 (2013). None of the three factors is individually controlling. *State v. Adams*, 292 Kan. 60, 66, 253 P.3d 5 (2011).

Finally, in considering the third factor, this court requires that the prosecutorial misconduct error meets the "dual standard" of both constitutional and statutory harmlessness in order to uphold a conviction. *State v. Tosh*, 278 Kan. 83, 97, 91 P.3d 1204 (2004). The State bears the burden of demonstrating harmlessness under both standards. However, if the State meets the higher constitutional harmless error standard, the State necessarily meets the lower statutory standard under K.S.A. 2013 Supp. 60-261. See *Bridges*, 297 Kan. at 1012-13, 1015. The constitutional, or *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, *reh. denied* 386 U.S. 987 (1967), harmless error standard provides that

> "error may be declared harmless where the party benefitting from the error proves beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict." *Ward*, 292 Kan. 541, Syl. ¶ 6 (citing *Chapman*, 386 U.S. 18).

Analysis

Roeder challenges the rebuttal portion of the State's closing argument. The State argues that the comments Roeder now challenges were made in response to defense counsel's closing argument; therefore, to the extent that any portion of the prosecutor's rebuttal was suspect, the prosecutor was attempting to redirect the jury back to its duties and counter the defendant's plea to the jury to base its decision on passion. To support this argument, the State cites to *State v. Murray*, 285 Kan. 503, 517, 174 P.3d 407 (2008), where we stated: "[N]o prejudicial error occurs—including prosecutorial misconduct— where the questionable statements are provoked and made in response to prior arguments or statements by defense counsel."

Shortly after the State filed its brief, we noted two disparate lines of reasoning regarding the "open-the-door" rule in prosecutorial misconduct cases and reaffirmed that "[t]he open-the-door rule does not insulate a prosecutor from a finding of misconduct." *Marshall*, 294 Kan. at 860. Therefore, "a prosecutor's improper comment or argument can be prejudicial, even if the misconduct was extemporaneous and made under the stress of rebutting arguments made by defense counsel. The extemporaneous, rebuttal nature of a prosecutor's argument is merely a factor to be considered by an appellate court." 294 Kan. at 861; see also *State v. Stimec*, 297 Kan. 126, 130, 298 P.3d 354 (2013) ("In short, defendants do not open the door to prosecutorial misconduct.").

Although not determinative of this issue, the rebuttal nature of the prosecutor's argument is still a factor we consider. In Roeder's closing argument, defense counsel argued that after the trial, the abortion debate "will rage on." He discussed some of history's tragedies including the inhumane treatment of Native Americans, Stalin's "purges in Mother Russia," and Hitler's "incomprehensible slaughter of 6 million Jews." He noted that we "remember and we celebrate individuals who stood up and made the world a better place" such as Dr. Martin Luther King, Jr. Defense counsel concluded his argument by stating:

> "Wichita changed on May 31st, 2009. I think that can't be disputed. We are going to ask you to all collectively fulfill your duties, and in your verdict represent our little part of the nation well. The State as well as Scott Roeder provided to you that he killed Dr. George Tiller, but only you collectively can determine if he murdered George Tiller. No defendant should ever be convicted based upon his convictions. We ask you not to convict the defendant. We are going to ask you to acquit Scott Roeder of first degree murder."

Roeder challenges the italicized portion of the State's rebuttal argument:

> "*On May 31st, that quiet Sunday, Wichita did change. It changed from a quiet community celebrating their Sabbath to a community terrorized.* We are a society of laws. We each rely on it every day. We rely on judges, we rely on legislators, and we rely on jurors taking an oath to follow the law, as each of you have done.
>
> "But *on 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. . . .*
>
> . . . .
>
> "*And while Gary Hoepner lives, as you saw even today, with the guilt of failing to stop the man, the killer, the defendant feels relieved at his success. And while in this courtroom the defendant*[] *pick*[*s*] *through the State's case at the various witnesses and act*[*s*] *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." (Emphasis added.)

Roeder argues that the prosecutor's argument, "while Gary Hoepner lives, as you saw even today, with the guilt of failing to stop the man, the killer, the defendant feels relieved at his success," was not commentary on the evidence but was a judgment designed to arouse jurors' anger. We disagree and find these comments were based upon evidence presented at trial. During Hoepner's examination, the prosecutor read a portion of Hoepner's interview with investigators where Hoepner said, "'I wanted to apprehend the guy myself. I really felt bad that I couldn't have.'" During Roeder's testimony, Roeder admitted that he felt "[a] sense of relief" that Dr. Tiller's clinic was shut down. Roeder also testified that he did not regret what he did. Therefore, we find this challenged portion of the prosecutor's closing argument was within the wide latitude a prosecutor is allowed to discuss the evidence presented at trial.

Roeder also takes issue with the prosecutor's statement, "[W]hile in this courtroom the defendant[] pick[s] through the State's case at the various witnesses and act[s] incredulous after answers, the defendant is preparing his testimony, where he can proudly in a public forum take credit for his murder." We find this portion of the State's closing argument is comparable to *State v. Finley*, 273 Kan. 237, 244, 42 P.3d 723 (2002), where Finley argued that the prosecutor improperly appealed to community interests by arguing, "'He's not accepting responsibility for what he did. And his behaviors are exactly why we have this felony murder rule. He cannot expect to get away with this killing.'" As we found in *Finley*, the prosecutor's comments were "based on a fair inference drawn from the evidence." 273 Kan. at 244.

Two of the prosecutor's comments arguably appealed to the jurors' passion and prejudice and encouraged the jury to consider factors outside of the evidence. The

prosecutor argued that Wichita was "terrorized" by Roeder's actions. The prosecutor also argued that Roeder's conduct "sends chills down the backs of conscientious people." Roeder argues that these statements distracted the jury from its role as factfinder and were designed to elicit anger and resentment in the jury. We have "repeatedly emphasized that it is improper for a prosecutor to comment on facts not in evidence, to divert the jury's attention from its role as factfinder, or to make comments that serve no purpose other than to inflame the passions and prejudices of the jury." *Stimec*, 297 Kan. at 128-29.

In *Stimec*, we found that a prosecutor's comments during the rebuttal portion of closing argument were improper for a number of reasons, including that they appealed to the passions of the jury and diverted the jury's attention from the case. There, the State presented evidence that Stimec's 6-year-old son, J.S., spent every other weekend with Stimec. One weekend, when J.S. returned to his mother's house, J.S. told her that he and Stimec put lotion on each other, including each other's private parts. In his defense, Stimec asserted that he put lotion on his son but never in inappropriate places and argued consistent with this assertion during his closing argument. In rebuttal, the State argued:

> "'It is not illegal to put lotion on a child's back. It is not illegal to put it on their ankles, knees, shoulders, head, anywhere else. None of that is a crime, absolutely, but it is a crime to stroke your son's penis with lotion. I mean, let's just call it what it is, okay, that's a crime. You know what, feel free to take a poll in the jury room when you go to deliberate, take a poll. If there is one member of this panel who has stroked their son's penis with lotion, then by all means, find that way. I suspect that won't be the case.'" 297 Kan. at 128.

This court found that the prosecutor's suggestion to the jury to take a poll in the jury room was inappropriate and in error. 297 Kan. at 129.

Obviously, the prosecutor's statements in *Stimec* were exponentially more egregious than the prosecutor's statements in this case. Nevertheless, in the abstract, one could question the prosecutor's reference to a "community terrorized" or to the characterization of Roeder's cavalier attitude as "[sending] chills down the backs of conscientious people." But, cutting to the bottom line, there is no possibility whatsoever that the relatively innocuous comments by the prosecutor in an emotionally charged trial had any effect on the trial's outcome given that the defendant not only admitted killing Dr. Tiller, but also essentially bragged about committing the crime.

SECOND-DEGREE MURDER LESSER INCLUDED OFFENSE INSTRUCTION

Roeder argues that the district court erred in failing to give his requested second- degree murder lesser included offense instruction. Because Roeder requested the instruction, this issue is preserved for review. Furthermore, second-degree intentional murder is a lesser included offense of premeditated first-degree murder; therefore, the instruction would have been legally appropriate. See *State v. Haberlein*, 296 Kan. 195, 204, 290 P.3d 640 (2012), *cert. denied* 134 S. Ct. 148 (2013). The State questions whether the second-degree murder instruction was factually appropriate. See *State v. Plummer*, 295 Kan. 156, Syl. ¶ 1, 283 P.3d 202 (2012).

Although Roeder makes the unintelligible argument that the right to a jury trial in serious criminal cases is part of the State's obligation under due process of the law, we fail to discern how the instructional challenge rises to the level of a constitutional error. But we need not get bogged down debating the propriety of giving a second-degree murder lesser included offense instruction in this case. If the district court erred in failing to give the requested second-degree murder instruction, it was harmless beyond all possible doubt.

Roeder testified that he had planned on killing Dr. Tiller since 1993. A defendant's own testimony that he or she contemplated and planned to kill a specific person for approximately 16 years is irrefutable evidence that the defendant thought the matter over beforehand, *i.e.*, that the defendant committed premeditated murder, rather than instantaneous murder. Roeder's defense was that he was justified in committing the murder. A jury either had to convict of premeditated murder or acquit based upon jury nullification. No reversal here. See *Ward*, 292 Kan. 541, Syl. ¶ 6.

DEFENSE-OF-OTHERS INSTRUCTION

Roeder also argues that the district court erred in failing to give his requested perfect defense-of-others instruction. Roeder's requested instruction was based on PIK Crim. 3d 54.17 and stated:

> "Scott Roeder claims his 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 use of force is permitted [in] defense of someone else, there is no requirement to retreat."

Because Roeder requested the instruction, this issue is preserved for review. We next turn to whether the instruction was legally appropriate. *Plummer*, 295 Kan. 156, Syl. ¶ 1. We conclude that it was not. As previously stated, K.S.A. 21-3211 sets out a two-part test:

"'The first is *subjective* and requires a showing that [Roeder] sincerely and honestly believed it was necessary to kill to defend [himself] or others. The second prong is an *objective* standard and requires a showing that a reasonable person in [Roeder's] circumstances would have perceived the use of deadly force in self-defense as necessary. [Citation omitted.]' (Emphasis added.)" *State v. Friday*, 297 Kan. 1023, 1037, 306 P.3d 265 (2013) (quoting *State v. McCullough*, 293 Kan. 970, 975, 270 P.3d 1142 [2012]).

Roeder recognizes that the defense-of-others requires both a subjective and a reasonable belief that the use of force is necessary; however, he argues that viewing the evidence in a light most favorable to him, a rational factfinder could find that he reasonably (objectively) believed that his use of force was necessary. Stepping out of the delusional world in which Roeder apparently resides, no rational person would reasonably believe that deadly force was needed against an imminent use of unlawful force in this case.

In *State v. Hernandez*, 253 Kan. 705, 713, 861 P.2d 814 (1993), we found that a defense-of-others instruction was not warranted when Hernandez asserted he shot a man to protect his sister from the victim. Hernandez established a history of domestic violence between his sister and the victim. We rejected a finding of imminence even though Hernandez presented evidence that the victim had threatened to kill his sister at 11 a.m. on the day Hernandez shot the victim and that his sister was working in the adjoining factory when the shooting took place.

Here, even viewing the evidence in a light most favorable to Roeder, the harm he sought to prevent was 22 hours away. This danger was remote when compared to the *Hernandez* circumstances, which we found were not sufficient to establish imminence. We need not recount the other reasons that the requested defense-of-others instruction was not legally appropriate. This was not a close call.

CUMULATIVE ERROR

Alternatively, Roeder claims that even if none of the singular errors addressed above warrant reversal, their cumulative effect requires reversal. The State counters that Roeder failed to establish any trial error and that the evidence overwhelmingly established his guilt. Our findings that the prosecutor committed misconduct during the rebuttal portion of her closing argument and that the district court might have erred in failing to instruct the jury on second-degree murder refute the State's claim of no trial error. Nevertheless, we find that the cumulative effect of those errors did not prejudice Roeder to the point of denying him a fair trial and decline to reverse on that basis.

Standard of Review

We utilize a de novo standard when determining whether the totality of circumstances substantially prejudiced a defendant and denied the defendant a fair trial based on cumulative error. *State v. Cruz*, 297 Kan. 1048, 1073-74, 307 P.3d 199 (2013). We recognize the cumulative error analysis is somewhat subjective. 297 Kan. at 1074. Our task is to determine whether the cumulative effect of both of the errors is such that collectively they cannot be determined to be harmless. "In other words, was the defendant's right to a fair trial violated because the combined errors affected the outcome of the trial?" *State v. Tully*, 293 Kan. 176, 205, 262 P.3d 314 (2011).

Analysis

As discussed above, the prosecutor's statements, although arguably misconduct, were very mild and were made in response to defense counsel's argument. Further, the abundant evidence of premeditation made any error in failing to provide a second-degree murder instruction harmless beyond a reasonable doubt. Consequently, especially in light

of the overwhelming evidence, we conclude that cumulative error did not affect the trial's outcome and did not deny Roeder a fair trial.

HARD 50 SENTENCE

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

Since Roeder's sentencing, we have held that a hard 50 sentence based upon a judge's own preponderance-of-the-evidence determination that an aggravating factor existed is unconstitutional and must be vacated. Specifically, in *State v. Soto*, 299 Kan. 102, Syl. ¶ 9, 322 P.3d 334 (2014), we held:

> "Kansas' statutory procedure for imposing a hard 50 sentence as provided in K.S.A. 21-4635 violates the Sixth Amendment to the United States Constitution as interpreted in *Alleyne v. United States*, 570 U.S. ___, 133 S. Ct. 2151, 2155, 2160-63, 186 L. Ed. 2d 314 (2013), because it permits a judge to find by a preponderance of the evidence the existence of one or more aggravating factors necessary to impose an increased mandatory minimum sentence, rather than requiring a jury to find the existence of the aggravating factors beyond a reasonable doubt."

> In accord with *Soto*, Roeder's hard 50 sentence was unconstitutionally imposed by the district court in violation of Roeder's Sixth Amendment right to a jury trial. *Soto* considered, but did not definitively resolve, "whether a modified harmless error standard can apply to a hard 50 [Sixth Amendment] error." 299 Kan. at 128. *Soto* opined that "because Kansas' hard 50 scheme requires the sentencing court to not only find aggravating and mitigating circumstances, but to weigh any mitigating circumstances against aggravating circumstances, only in a rare instance could a hard 50/*Alleyne* error be harmless." 299 Kan. at 127. Like *Soto*, this case is not one of those rare cases where we can declare that the district court's utilization of an unconstitutional sentencing scheme was harmless as a matter of law. Accordingly, we must vacate Roeder's hard 50 sentence and remand for resentencing.

In *Soto*, we acknowledged that in response to *Alleyne*, at a September 2013 special session, the Kansas Legislature amended the hard 50 sentencing scheme to assign the applicable fact-finding to a jury utilizing the beyond a reasonable doubt burden of proof. 299 Kan. at 128; see L. 2013, ch. 1, sec. 1 (Special Session). That special legislation contained a retroactivity provision, to-wit:

> "'[F]or all cases on appeal on or after the effective date of this act, if a sentence imposed under . . . K.S.A. 21-4635, prior to its repeal, is vacated for any reason other than sufficiency of the evidence as to all aggravating circumstances, resentencing shall be required under this section, as amended by this act, unless the prosecuting attorney chooses not to pursue such a sentence.'" 299 Kan. at 128.

The *Soto* parties presented arguments on whether retroactive application of the special session hard 50 sentencing scheme would violate the Ex Post Facto Clause of the United States Constitution, albeit both parties conceded that the question would not be ripe until the State sought to apply the new scheme to *Soto*. The prosecutor could decide

not to pursue a hard 50 sentence on remand. Accordingly, *Soto* refrained from issuing an advisory opinion on the unripe ex post facto issue. 299 Kan. at 128-29.

> Nevertheless, *Soto* chose to address the question of whether sufficient evidence supported the aggravating factor in that case, even though utilizing the new statute on remand would require evidence of the aggravating factor to be presented anew to a jury, *i.e.*, the evidence on resentencing could be different than in the current appeal. The reason given for that advisory opinion was that "[sub]section (e) of K.S.A. 2013 Supp. 21-6620 suggests the State would be precluded from pursuing a hard 50 sentence if this court had vacated Soto's sentence for lack of sufficient evidence to support the aggravating circumstance." 299 Kan. at 129. Later, the opinion intimated that resentencing under the new statute cannot occur if even one of the reasons for vacating a K.S.A. 21-4635 hard 50 sentence is the insufficiency of the evidence of the aggravating factor. See 299 Kan. at 130 ("Consequently, the sole reason we are vacating Soto's sentence is because it was imposed in violation of his Sixth Amendment right to a jury trial, as interpreted in *Alleyne*.").

Arguably, *Soto* went farther than was necessary in the appeal before it. Once the court determined that Soto's sentence had to be vacated because of the unconstitutional sentencing scheme, the question of whether sufficient evidence existed to meet the requirements of the unconstitutional statute was rendered moot. The sufficiency of the evidence of any aggravating factor described in the new statute, K.S.A. 2013 Supp. 21- 6620, will only be germane when, or if, the prosecutor elects to seek resentencing under the new statute's retroactive provision in subsection (e).

Moreover, the retroactive provision speaks to applying the new statute where a sentence under the old statute has been "vacated for *any* reason *other than* sufficiency of the evidence as to all aggravating circumstances." (Emphasis added.) K.S.A. 2013 Supp.

21-6620(e). The Sixth Amendment violation that requires us to vacate Roeder's hard 50 sentence would fit within the category of "any reason other than sufficiency of the evidence." In other words, the plain language of the provision purports to apply the new sentencing scheme to this case because the old sentence is being vacated for a reason other than the insufficiency of the aggravating circumstances evidence. Whether the sentence might also have been subject to being vacated based upon an insufficiency of the evidence if the sentencing scheme had not been found unconstitutional is an academic question we need not answer.

In making this determination, we are not unmindful of *Soto*'s progeny, in which we opined on the sufficiency of the evidence to support the aggravating factors used to impose hard 50 sentences, even though we had vacated those sentences for the same Sixth Amendment violation. See *State v. Hayes*, 299 Kan. ___, 327 P.3d 414, 420 (2014); *State v. Lloyd*, 299 Kan. 620, 644-45, 325 P.3d 1122 (2014); *State v. DeAnda*, 299 Kan. 594, 603-05, 324 P.3d 1115 (2014); *State v. Astorga*, 299 Kan. 395, 402-04, 324 P.3d 1046 (2014); *State v. Hilt*, 299 Kan. 176, 204-05, 322 P.3d 367 (2014). Nevertheless, here, we simply vacate the hard 50 sentence under K.S.A. 21-4635 and remand for resentencing without further directions.

Roeder's convictions are affirmed, the hard 50 sentence for the first-degree premeditated murder conviction is vacated, and the matter is remanded for resentencing.

MORITZ, J., not participating.

Appendix B Trial court entry of judgment

NF/KP/AS/acf

ORIGINAL FILE
RETURN TO CLERK'S OFFICE

FILED

IN THE EIGHTEENTH JUDICIAL DISTRICT COURT
SEDGWICK COUNTY, KANSAS

APP DOCKET NO.

JOURNAL ENTRY OF JUDGMENT

2010 APR -2 A 11:01

COPY

CLERK OF DIST COURT
18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KS
BY

SECTION I. CASE IDENTIFYING INFORMATION

Tra[illegible]on Number:

STATE v. SCOTT P. ROEDER SSN: XXX-XX-6395 ADDRESS: 4316 Mercier 1S Kansas City, Missouri 64111	☒ Male	Court O.R.I. Number KS087025G	K.B.I. Number 303301

County	Court Case Number	Sentencing Judge	Sentencing Date
SEDGWICK	09CR1462	WARREN M. WILBERT	04/01/10

KSC

Defense Counsel: ☒ Appointed — Counsel Name: Charles S. Osburn and Mark T. Rudy

Type of Proceeding: ☒ Jury Trial

FILED
JUN 07 2010
CAROL E. GREEN
CLERK OF APPELLATE COURTS

Date of Conviction: 01/29/10

Pre-Trial Status of Offender: ☒ In Custody

SECTION II. CRIMINAL HISTORY CLASSIFICATION

Offender's Overall Criminal History Classification as Found by the Court: ☒ I

Objections to Criminal History? ☒ No

SECTION III. CURRENT CONVICTION INFORMATION

Name of MOST SERIOUS Offense of Conviction:
MURDER IN THE FIRST DEGREE

Count No.: 1 Date Of Offense: 05/31/09

K.S.A. Title, Section, Subsection(s): 21-3401(a)

Grade of Offense: ☒ Felony ☒ Person

Offense Category: ☒ Off-grid

SPECIAL RULE APPLICABLE:
☒ 1. Person Felony Committed With a Firearm

10-104520-S

☒ Offender committed the current crime with a deadly weapon
OFFENDER REGISTRATION SUPPLEMENT INFORMATION:

Section A: Registration Requirement: K.S.A. 2006 Supp. 22-4902
(a)(7) Offender required to register due to conviction of person felony with court finding on the record that such felony was committed with a deadly weapon (on or after 7/1/06).

Section B: Registration Terms: K.S.A. 2006 Supp. 22-4906
☒ First conviction: Offender confined = 10 years from date of parole, discharge or release, whichever is most recent.

SENTENCE IMPOSED:

Guideline Range Imposed: ☒ *Not applicable*

Prison Term: KDOC
☒ Prison sentence imposed.
☒ Off-grid Crime ☒ Life – Hard 50

Postrelease Supervision Term: ☒ Life Parole

Name of PRIMARY Offense of Conviction:

AGGRAVATED ASSAULT

Count No.: 2 Date Of Offense: 05/31/09

Sentences Concurrent or Consecutive: ☒ Consecutive to Count(s): 1

K.S.A. Title, Section, Subsection(s): 21-3410(a)

Grade of Offense: ☒ Felony, Severity Level 7 ☒ Person

Offense Category: ☒ Nondrug

Presumptive Sentencing Range:
Mid 12 High 13 Low 11
☒ Presumptive Prison
☒ Special Rule Applies

SPECIAL RULE APPLICABLE:

☒ 1. Person Felony Committed With a Firearm

☒ Offender committed the current crime with a deadly weapon
OFFENDER REGISTRATION SUPPLEMENT INFORMATION:

Section A: Registration Requirement: K.S.A. 2006 Supp. 22-4902
(a)(7) Offender required to register due to conviction of person felony with court finding on the record that such felony was committed with a deadly weapon (on or after 7/1/06).

Section B: Registration Terms: K.S.A. 2006 Supp. 22-4906
☒ Second or subsequent conviction: Lifetime Registration

SENTENCE IMPOSED:

Guideline Range Imposed: ☒ Mid

Prison Term: KDOC 12 months ☒ Prison sentence imposed.

Postrelease Supervision Term: ☒ 12 months

Name of ADDITIONAL Offense of Conviction:
AGGRAVATED ASSAULT;
Count No.: 3 Date Of Offense: 05/31/09

Sentences Concurrent or Consecutive: ☒ Consecutive to Count(s): 1 & 2

K.S.A. Title, Section, Subsection(s): 21-3410(a)

Grade of Offense: ☒ Felony, Severity Level 7 ☒ Person

Offense Category: ☒ Nondrug

Presumptive Sentencing Range: (Use Criminal History Classification "I" for non-primary convictions.)
Mid 12 High 13 Low 11 ☒ Presumptive Prison ☒ Special Rule Applies

SPECIAL RULE APPLICABLE:

☒ 1. Person Felony Committed With a Firearm

☒ Offender committed the current crime with a deadly weapon

OFFENDER REGISTRATION SUPPLEMENT INFORMATION:

Section A: Registration Requirement: K.S.A. 2006 Supp. 22-4902
(a)(7) Offender required to register due to conviction of person felony with court finding on the record that such felony was committed with a deadly weapon (on or after 7/1/06).

Section B: Registration Terms: K.S.A. 2006 Supp. 22-4906
☒ Second or subsequent conviction: Lifetime Registration

SENTENCE IMPOSED:

Guideline Range Imposed: ☒ Mid

Prison Term: KDOC 12 months ☒ Prison sentence imposed.

Postrelease Supervision Term: ☒ 12 months

SECTION V. OTHER CONDITIONS

Costs Ordered:

Total Court Costs	$	194.50
Booking/Fingerprint Fee	$	33.00
BIDS Attorney Fees	$	
BIDS Administrative Fee	$	100.00
Witness Fees	$	756.40
Mileage Fees	$	1,248.00

SECTION VI. RECAP OF SENTENCE

Sentence Imposed:

Total Prison Term: Life (Hard 50) + 24 months *(sentenced pursuant to K.S.A. 21-4638)*

Good Time Credit:

☒ For each count, the Court pronounced the complete sentence, including the maximum potential good time percentage. (K.S.A. 21-4704(e)(2) and 21-4705(c)(2). ☒ 20% (Counts 2 & 3 only)

Postrelease Supervision Term: ☒ Life Parole

Jail Credit:

Location		Dates in Custody	Number of Days	Awarded/Not Awarded
J	Sedgwick County Jail	05/31/09 to 04/01/10	306	☒ A

Sentencing Date: 04/01/10 - Total Number of Days of Jail Credit Actually Awarded 306 = Sentence Begins Date: 05/31/09

Miscellaneous Provisions:

☒ Defendant informed of right to appeal within 10 days of this date. K.S.A. 22-3608.

☒ Defendant informed of potential rights of expungement under K.S.A. 2006 Supp. 21-4619.

☒ Defendant informed of the prohibition against carrying a firearm pursuant to K.S.A. 21-4204 and amendments thereto.

☒ Defendant informed of duty to register as an offender pursuant to the Kansas Offender Registration Act, K.S.A. 22-4901 et seq.

OFFENDER REGISTRATION SUPPLEMENT INFORMATION:

Section A: Registration Requirement: K.S.A. 2006 Supp. 22-4902

(a)(2) Offender required to register due to violent offender status indicated by conviction of the following crime:

☒ Murder in the First Degree – K.S.A. 21-3401

Section B: Registration Terms: K.S.A. 2006 Supp. 22-4906

VIOLENT OFFENDER:

☒ First conviction: Offender confined = 10 years from date of parole, discharge or release, whichever is most recent.

☒ Defendant has been processed, fingerprinted and palmprinted.

☒ Court remands defendant to custody of Sheriff to await transportation to the custody of the Secretary of Corrections.

☒ Hard 50 finding: The Court finds that the murder in Count 1 was committed in an especially heinous, atrocious or cruel manner and that the existence of this aggravating factor is not outweighed by any mitigating circumstance which may exist.

Motion for New Trial: ☒ Denied	Motion for Judgment of Acquittal: ☒ Denied

SECTION VII. SIGNATURES

for WARREN M. WILBERT
JUDGE OF THE DISTRICT COURT

DATE: Apr 2, 2010

NOLA FOULSTON, #09175
District Attorney

KIM T. PARKER, #11203
Chief Deputy District Attorney

ANN SWEGLE, #10920
Deputy District Attorney

Address: Sedgwick County Courthouse
535 North Main
Wichita, Kansas 67203

Phone No.: (316) 660-3600

CHARLES S. OSBURN, #14982
Attorney for Defendant

MARK T. RUDY, #23090
Attorney for Defendant

Address: Sedgwick County Public Defender's Office
604 N. Main, Suite D
Wichita, Kansas 67203-3695

Phone No.: (316) 264-8700

Certificate of Clerk of the District Court. The above is a true and correct copy of the original instrument filed on the 2nd day of April 2010 and recorded in this Court of the Eighteenth Judicial District, Sedgwick County, Kansas.
Dated this 2nd day of April 2010
Clerk of the District Court
By

DISTRICT COURT SEAL SEDGWICK COUNTY, KANSAS

Appendix C Constitutional and Statutory Provisions: text

Preamble to the U.S. Constitution: *We the People* of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves **and our Posterity,** do ordain and establish this Constitution for the United States of America.

14th Amendment, § 1, sentence 2: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction **the equal protection of the laws.**

Model Penal Code § 3.02. Justification Generally:

Choice of Evils. (1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and (c)a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

18 U.S.C. § 1841(d) As used in this section, the term "unborn child" means a child in utero, and the term "child in utero" or "child, who is in utero" means a member of the species homo sapiens, at any stage of development, who is carried in the womb.

K.S.A. 21-3403(b), (Voluntary manslaughter)

Voluntary manslaughter is the intentional killing of a human being committed:

(a) Upon a sudden quarrel or in the heat of passion; or

(b) upon an unreasonable but honest belief that circumstances existed that justified deadly force under K.S.A. 21-3211, 21-3212 or 21-3213 and amendments thereto.

Voluntary manslaughter is a severity level 3, person felony.

K.S.A. 21-3211 (Defense of others).

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

K.S.A. 21-5402 (First Degree Murder.) K.S.A. 21-5402.

Murder in the first degree. (a) Murder in the first degree is the killing of a human being committed: (1) Intentionally, and with premeditation; or....(b) Murder in the first degree is an off-grid person felony. ...(d) Murder in the first degree as defined in subsection (a)(2) is an alternative method of proving murder in the first degree and is not a separate crime from murder in the first degree as defined in subsection (a)(1). The provisions of K.S.A. 2013 Supp. 21-5109, and amendments thereto, are not applicable to murder in the first degree as defined in subsection (a)(2). Murder in the first degree as defined in subsection (a)(2) is not a lesser included offense of murder in the first degree as defined in subsection (a)(1), and is not a lesser included offense of capital murder as defined in K.S.A. 2013 Supp. 21-5401, and amendments thereto. As set forth in subsection (b) of K.S.A. 2013 Supp. 21-5109, and amendments thereto, there are no lesser included offenses of murder in the first degree under subsection (a)(2).

Appendix D:

Wilbur: “This trial is NOT going to be about abortion!”

p. 23:16-24, 010810 transcript
16 But this will not become a trial of the
17 abortion issues. And there are not going to be
18 witnesses who will testify to graphic descriptions of
19 abortion procedures and revisit and argue all of the
20 legallyinsufficient discussions and debates over the
21 harm caused. It's not a legal argument. It may make
22 for good political or philosophical discussion outside
23 the courtroom but that's not a legal principle we can
24 try this case on.

p. 25:23-26:5, Jan 8, 2010 transcript
I'm
23 just saying that this will not become a trial on the
24 bigger issue of abortion. It will on Mr. Roeder's
25 beliefs. And it will be limited to his beliefs or how
SANDRA J. BERGER, CSR
OFFICIAL COURT REPORTER
STATE vs. SCOTT P. ROEDER, 09 CR 1462 - 01-08-10
1 he came to form those beliefs to support an
2 instruction,which is not an instruction to acquit
3 him, but it's what's been referred to in the law as an
4 imperfect defense for a lesser included, homicide,5 involuntary manslaughter.

104520s 012210 trial vol 8 - Vol. 1 (12/27/2010), (Page 103:2 to 103:9)
MS. PARKER: Your Honor, we have spent six days
3 picking a jury, telling them one by one that abortion is not
4 the issue, nor the occupation of Dr. George Tiller. This is
5 exactly what our original motion in limine was made for the
6 Court to consider, to ensure the jury's attention is not going
7 to that controversial nature of his occupation. The
8 evidence --
9 THE COURT: Okay.

104520s 012210 trial vol 8 - Vol. 1 (12/27/2010), (Page 104:6 to 104:8)
6 If the State thinks the word "abortion" or the
7 occupation of the victim is never going to come into this
8 trial, that's silly.

104520s 012210 trial vol 8 - Vol. 1 (12/27/2010), (Page 104:21 to 104:23)
21 we have struggled with and appeal to this
22 Court to understand our belief, you have ruled consistently
23 abortion will not enter into this.

104520s 012210 trial vol 8 - Vol. 1 (12/27/2010), (Page 105:6 to 105:23)
6 THE COURT: It's going to be unavoidable that at
7 times during this trial Dr. Tiller's occupation, and certainly
8 from the defendant's viewpoint, if we get to that point in the
9 trial, that becomes relevant, whether it's his unreasonable
10 belief or not, and what he thinks of Dr. Tiller and the
11 subject matter of abortion.
12 When I said abortion is going to be kept out of this
13 case, I'm not going to allow one side or the other to line up
14 20, 30, 50 witnesses to debate the harm of abortion, whether
15 it should be legal or illegal, and things of that nature.
16 It's well known that Dr. Tiller was an abortion provider. And
17 I agree Mr. Rudy was pushing the envelope when he said are you
18 aware of the controversy. He could have stopped, did you know
19 Dr. Tiller, did you treat him any differently. When he said
20 are you aware of the controversy surrounding Dr. Tiller, he
21 didn't follow up with that he was an abortion provider, or
22 that -- he didn't use the word "abortion." And it was to
23 elicit whether or not he treated him any differently.

104520s 012710 roeder trial vol 11 - Vol. 1 (12/27/2010), (Page 115:16 to 115:21)
16 THE COURT: I want to reemphasize, we are not going
17 to make this a referendum on abortion. Scott Roeder can
18 testify to his personal beliefs, and the Court is prepared to
19 give him some pretty wide latitude, and I'm sure that it's not
20 going to be -- he is not going to paint Dr. Tiller in a very
21 complimentary fashion.

104520s 012710 roeder trial vol 11 - Vol. 1 (12/27/2010), (Pages 116:17 to 117:1)
17 THE COURT: And that is my point. We are not going
18 to bring in multiple collateral sources to somehow bolster his
19 subjective belief. The distinction and the example that, if I
20 didn't make myself clear, he is in a men's Bible study group,
21 months before May 31. He expresses his views about Tiller,
22 abortion, how harmful, that the system and its peaceful
23 demonstrations, whatever, through trials of Dr. Tiller,
24 through attempts to prosecute Dr. Tiller, that none of these
25 things are successful. That proves his state of mind, his
1 reasoning, and how he formed that belief prior to May 31st.

104520s 012710 roeder trial vol 11 - Vol. 1 (12/27/2010), (Page 118:4 to 118:14)

But he is not going to testify, this person is not going to testify to their own belief on abortion. They are going to reiterate what Scott Roeder expressed on a prior occasion. And that forms the basis of his belief. But what Barry Disney thought in his good faith prosecution of Dr. Tiller has, I mean --

MR. RUDY: I'm not asking to bring in Barry Disney for what he thought. Barry Disney could stand on -- the fact that he prosecuted that man stands on its own, and that is exactly one of the things that Scott Roeder believed and used to form his honest belief.

104520s 012710 roeder trial vol 11 - Vol. 1 (12/27/2010), (Page 133:2 to 133:15)

But his personally-held beliefs just in general about abortion, whether it's harmful, whether it terminates a viable baby, he is going to get to testify to that, because all these arguments and the rules we usually play with are the reasonable man standards, and it's very easy to try and calculate what is relevant and material on a reasonable man standard, the objective, reasonable -- and that is when we do get into the imminence of danger and the unlawful conduct. That is a reasonable standard.

But his honestly-held beliefs is a subjective unreasonable standard, and that opens the door pretty wide, for that part of voluntary manslaughter. It doesn't mean that he gets an instruction on voluntary manslaughter, because there are other elements of that statute that have to be met.

104520s 012810 roeder trial vol 12 - Vol. 1 (12/27/2010), (Page 27:1 to 27:7)

I have sat here, and because this is a proffer outside the presence of the jury, and you said because it's a proffer you allowed him to work upon a narrative statement, which is typically not allowed under the rules of evidence, but it is becoming increasingly clear to this Court that this is nothing more than a political debate and his opinion on abortion.

104520s 012810 roeder trial vol 12 - Vol. 1 (12/27/2010), (Page 45:2 to 45:9)

THE COURT: Well, as I sat here and listened to Phill Kline testify, up to the point of the bench conference, it's exactly what this Court seeks to avoid, which I said I would not allow, and that I would not allow this courtroom to turn into a forum or referendum or a debate on abortion. Mr. Kline talked about everything from his legislative

history, the drafting of legislation, its intent, its spirit, and then the interpretation of that by the Attorney General.

104520s 012810 roeder trial vol 12 - Vol. 1 (12/27/2010), (Pages 47:25 to 48:8)

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

104520s 012810 roeder trial vol 12 - Vol. 1 (12/27/2010), (Pages 100:15 to 101:5)

And again, I have steadfastly maintained throughout the course of this trial that due process and the right to a jury trial and the right for Mr. Roeder to present evidence, that it's incumbent that he be allowed to talk about how he formed his beliefs. But we are not going to discuss specific medical procedures, we are not going to discuss about pain that babies may or may not have experienced during an abortion procedure, we are not going to talk about specific abortion procedures. That, as the Court said, this is not going to become a trial on abortion.

Now, what you sought to learn, how you come to form your beliefs, and why you felt it necessary to take the action that you took on May 31st is relevant and material to a part of a statute that deals with honest but unreasonably held beliefs. And that is the only reason I'm allowing you to testify about how you have formed your beliefs on abortion.

104520s 012810 roeder trial vol 12 - Vol. 1 (12/27/2010), (Page 103:6 to 103:14)

THE COURT: Again, I have tried to set some parameters on what is relevant and material under a specific portion of a statute that makes that testimony relevant and material on honestly held, albeit unreasonable beliefs. I have also indicated in some broad parameters that we are not going to discuss or testify about specific medical procedures, specific types of abortions. And it's difficult, because unfortunately the unreasonable belief may not have any real basis in fact, but it's the unreasonable subjective belief.

You see, the judge never allowed discussion, testimony, or witnesses on whether my belief might have been actually reasonable! Nor did he once address the federal law I relied on.

Appendix E: Roe's legislative history scrutinized by Alabama

Hamilton v. Scott, 97 So. 3d 728 (Ala. 2012)

A. Roe misstated the protection of the unborn child under the common law.

Roe 's viability rule was based, in significant part, on an incorrect statement of legal history. The Supreme Court in Roe erroneously concluded that "the unborn have never been recognized in the law as persons in the whole sense." 410 U.S. at 162. Roe also referred to "the lenity of the common law." 410 U.S. at 165. However, scholars have repeatedly pointed to inaccuracies in Roe 's historical account since Roe was decided in 1973.[77] "[T]he history embraced in Roe would not withstand careful examination even when Roe was written." Joseph Dellapenna, Dispelling the Myths of Abortion History 126 (Carolina Academic Press 2006).

Sir William Blackstone, for example, recognized that unborn children were persons. Although the Court cited Blackstone in Roe, it failed to note that Blackstone addressed the legal protection of the unborn child within a section entitled "The Law of Persons." It also ignored the opening line of his paragraph describing the law's treatment of the unborn child: "Life is an immediate gift of God, a right inherent by nature in every individual." 1

77 See generally Joseph Dellapenna, Dispelling the Myths of Abortion History (Carolina Academic Press 2006); John Keown, Abortion, Doctors and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982 (Cambridge University Press 1988). See also Paul Benjamin Linton, Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court, 13 St. Louis U. Pub.L.Rev. 15 (1993); Dennis J. Horan, Clarke D. Forsythe & Edward R. Grant, Two Ships Passing in the Night: An Interpretavist Review of the White–Stevens Colloguy on Roe v. Wade, 6 St. Louis U. Pub.L.Rev. 229, 230 n. 8, 241 n. 90 (1987); James S. Witherspoon, Reexamining Roe: Nineteenth Century Abortion Statutes and the Fourteenth Amendment, 17 St. Mary's L.J. 29, 70 (1985) ("In short, the Supreme Court's analysis in Roe v. Wade of the development, purposes, and the understandings underlying the nineteenth-century antiabortion statutes, was fundamentally erroneous."); and Robert Byrn, An American Tragedy: The Supreme Court on Abortion, 41 Fordham L.Rev. 807 (1973).

William Blackstone, Commentaries on the Laws of England *129.[78] As Professor David Kadar noted in 1980, “Rights and protections legally afforded the unborn child are of ancient vintage. In equity, property, crime, and tort, the unborn has received and continues to receive a legal personality.” David Kadar, The Law of Tortious Prenatal Death Since Roe v. Wade, 45 Mo. L.Rev. 639, 639 (1980) (footnotes omitted).

B. Roe misstated the protection of the unborn child under tort law and criminal law.

Professor Kadar and others have pointed out “the mistaken discussion within Roe on the legal status of the unborn in tort law.” Kadar, 45 Mo. L.Rev. at 652. The Court's discussion in Roe of prenatal-death recovery “was perfunctory, and unfortunately largely inaccurate, and should not be relied upon as the correct view of the law at the time of Roe v. Wade.” 45 Mo. L.Rev. at 652–53. See also William R. Hopkin, Jr., Roe v. Wade and the Traditional Legal Standards Concerning Pregnancy, 47 Temp. L.Q. 715, 723 (1974) (“[I]t must respectfully be pointed out that Justice Blackmun has understated the extent to which the law protects the unborn child.”).

Roe 's adoption of the viability standard in 1973 did not reflect American law. Viability played no role in the common law of property, homicide, or abortion. Clarke D. Forsythe, Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms, 21 Val. U.L.Rev. 563, 569 n. 33 (1987). And there was no viability standard in wrongful-death law because the common law did not recognize a cause of action for the wrongful death of any person. Farley v. Sartin, 195 W.Va. at 674, 466 S.E.2d at 525 (“At

78 See Dellapenna, at 200:“[M]odern research has established that by the close of the seventeenth century, the criminality of abortion under the common law was well established. Courts had rendered clear holdings that abortion was a crime, no decision indicated that any form of abortion was lawful, and secondary authorities similarly uniformly supported the criminality of abortion. The only difference among these authorities had been the severity of the crime (misdemeanor or felony), an uncertainty that, under Coke's influence, began to settle into the pattern of holding abortion to be a misdemeanor unless the child was born alive and then died from the injuries or potions that led to its premature birth.”

common law, there was no cause of action for the wrongful death of a person."); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 127, at 945 (5th ed. 1984) ("The common law not only denied a tort recovery for injury once the tort victim had died, it also refused to recognize any new and independent cause of action in the victim's dependants or heirs for their own loss at his death.").

The viability standard was introduced into American law by Bonbrest v. Katz, 65 F.Supp. 138 (D.D.C.1946), the first case to recognize a cause of action for prenatal injuries. Bonbrest implied that such a cause of action would be recognized only if the unborn child had reached viability. 65 F.Supp. at 140.

Viability was initially adopted by courts in prenatal-injury law, but its influence was waning by 1961. See Daley v. Meier, 33 Ill.App.2d 218, 178 N.E.2d 691 (1961) (holding that an infant born alive could recover damages for injuries suffered before viability); see also Note, Torts—Extension of Prenatal Injury Doctrine to Nonviable Infants, 11 DePaul L.Rev. 361 (1961–62). One thorough legal survey of prenatal-injury law a decade before Roe was decided concluded that "[t]he viability limitation in prenatal injury cases is headed for oblivion. Courts are coming to realize that it is illogical and unjust to the children affected and not readily amenable to scientific proof." Charles A. Lintgen, The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries, 110 U. Pa. L.Rev. 554, 600 (1962).

....Since Roe was decided in 1973, advances in medical and scientific technology have greatly expanded our knowledge of prenatal life. The development of ultrasound technology has enhanced medical and public understanding, allowing us to watch the growth and development of the unborn child in a way previous generations could never

have imagined. Similarly, advances in genetics and related fields make clear that a new and unique human being is formed at the moment of conception, when two cells, incapable of independent life, merge to form a single, individual human entity.[79] Of course, that new life is not yet mature—growth and development are necessary before that life can survive independently—but it is nonetheless human life. And there has been a broad legal consensus in America, even before Roe, that the life of a human being begins at conception.[80] An unborn child is a unique and individual human being from conception, and, therefore, he or she is entitled to the full protection of law at every stage of development.

79 See, e.g., Bruce M. Carlson, Human Embryology and Developmental Biology 3 (1994) ("Human pregnancy begins with the fusion of an egg and a sperm ."); Ronan O'Rahilly & Fabiola Muller, Human Embryology and Teratology 8 (2d ed. 1996) ("Although life is a continuous process, fertilization is a critical landmark because, under ordinary circumstances, a new, genetically distinct human organism is thereby formed. This remains true even though the embryonic genome is not actually activated until 4–8 cells are present, at about 2–3 days."); Keith Moore, The Developing Human: Clinically Oriented Embryology 2 (8th ed. 2008) (The zygote "results from the union of an oocyte and a sperm during fertilization. A zygote or embryo is the beginning of a new human being."); Ernest Blechschmidt, The Beginning of Human Life 16–17 (1977) ("A human ovum possesses human characteristics as genetic carriers, not chicken or fish. This is now manifest; the evidence no longer allows a discussion as to if and when and in what month of ontogenesis a human being is formed. To be a human being is decided for an organism at the moment of fertilization of the ovum."); C.E. Corliss, Patten's Human Embryology: Elements of Clinical Development 30 (1976) ("It is the penetration of the ovum by a sperm and the resultant mingling of the nuclear material each brings to the union that constitutes the culmination of the process of fertilization and marks the initiation of the life of a new individual."); and Clinical Obstetrics 11 (Carl J. Pauerstein ed. 1987) ("Each member of a species begins with fertilization—the successful merging of two different pools of genetic information to form a new individual.").

80 See Paul Benjamin Linton, Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court, 13 St. Louis U. Pub.L.Rev. 15, 120–137 (1993) ("Appendix C: The Legal Consensus on the Beginning of Life," citing caselaw and statutes from 38 states and the District of Columbia stating that the life of a human being should be protected beginning with conception).

Appendix F: Scriptures SCOTUS must address before saying Christianity supports abortion.

Introduction: Roe accepted validation of its alleged ignorance of whether unborn babies of human mothers are humans from the fact that many savage religions of ancient times had no problem murdering unborn babies. Which seems an undesirable precedent for a free people, since those religions had no problem with murdering adults, either, or savagely "sacrificing" them. But Roe thought its ignorance vindicated by elements within Christianity and Judiasm too.

> When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer....There has always been strong support for the view that life does not begin until live birth....It appears to be the predominant, though not the unanimous, attitude of the Jewish faith.[81] It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family.[82] The Aristotelian theory of "mediate animation," that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from the moment of conception. Roe v. Wade, 410 U.S. 113, 159-161

Roe's treatment of Christianity and Judiasm notes how men choose to respond to the Truth, and ignores what the Bible says is true.

Neither Judaism nor Christianity are understood by taking a poll of how well Christians and Jews *live up to* their standards. They are understood by reading the

81 Lader 97-99; D. Feldman, Birth Control in Jewish Law 251-294 (1968). For a stricter view, see I. Jakobovits, Jewish Views on Abortion, in Abortion and the Law 124 (D. Smith ed.1967).

82 Amicus Brief for the American Ethical Union et al. For the position of the National Council of Churches and of other denominations, see Lader 99-101.

Scriptures they claim *are* their standards. (I hope the views of "secular Jews" who reject Jewish Scriptures is not part of Roe's evidence of Jewish positions!)

Limiting understanding of any religion to human opinion is like a judge not looking up a law or a case for himself but taking lawyers' word for what it says. It is like hearsay, compared with cross examining an eyewitness. Citing a book about The Book, as Roe did, is a poor substitute for reading The Book.

You will find varying opinions in various churches about how Christians ought to respond to abortion. But you will not find, even where those statements conflict, *significant* disagreement about what various verses say about the unborn. Those who base their positions on a careful reading of Scripture pretty much agree. Those who don't, are no guide to understanding Christianity. SCOTUS can't rule analysis of the Bible irrelevant, and expect to understand the religions who revere it.

I will be totally surprised if SCOTUS conducts an appropriate analysis of Scripture in order to correct Roe's vague reliance on religion for its alleged uncertainty whether the babies of human mothers are humans/persons. But this analysis must be done or SCOTUS must retract any implication that its legalization of abortion finds any support in any religion.

Psalm 139 says David's human life began before his tiny body had arms and legs. *Before* conception.[83] He was God-recognized before he was legally recognized.

> Psalm 139:13-16 You created every part of me; you put me together in my mother's womb. I praise you because you are to be feared; all you do is strange and wonderful. I know it with all my heart. When my bones were being formed, carefully put together in my mother's womb, when I was growing there in secret, you knew that I was there---you saw me before I was born. and in thy book all *my*

83 Jeremiah 1:5 likewise affirms that our souls begin *before* conception: "Before I formed thee in the belly I knew thee; and before thou camest forth out of the womb I sanctified thee, *and* I ordained thee a prophet unto the nations."

members were written, *which* in continuance were fashioned, when *as yet there was* none of them. GNB/KJV

Luke 2 says that in the womb, a baby (1) can hear voices; (2) can sense the difference between a voice sweet with blessing and a voice coarse with cursing; and (3) can choose which kind of voice to get excited about. In other words, (4) an unborn baby can choose between good and evil.

> Luke 1:39 And Mary arose in those days, and went into the hill country with haste, into a city of Juda; 40 And entered into the house of Zacharias, and saluted Elisabeth. 41 And it came to pass, that, when Elisabeth heard the salutation of Mary, the babe [John the Baptist] leaped in her womb; and Elisabeth was filled with the Holy Ghost: 42 And she spake out with a loud voice, and said, Blessed *art* thou among women, and blessed *is* the fruit of thy womb. 43 And whence *is* this to me, that the mother of my Lord should come to me? 44 For, lo, as soon as the voice of thy salutation sounded in mine ears, the babe leaped in my womb for joy. KJV

A few verses before that tell us that even from the womb, a baby has a soul for the Holy Spirit to fill:[84]

> Luke 1:15 For he shall be great in the sight of the Lord, and shall drink neither wine nor strong drink; and he shall be filled with the Holy Ghost, even from his mother's womb.

Saline abortions, which burn babies alive with acid that blackens over half their skin while eating out their lungs, are our cultural equivalent of the pagan god Molech, into whose red hot brass arms worshipers threw their children, whose screams were covered by the priests' drums. Today we similarly have what was given as the name of the first video of an ultrasound of an abortion: "The Silent Scream." God said this is so barbaric that He never even imagined such a thing. This is a remarkable idea for those who believe God foresees every detail of what evils men will do, but all translations and commentators seem to agree that's what the verse means. Of no other evil in the entire Bible does God say this was so evil that He did not foresee it.

84 This, along with Jeremiah 1:5, supports the capacity of an unborn baby to choose good or evil.

> Jeremiah 32:35 And they built the high places of Baal, which *are* in the valley of the son of Hinnom, to cause their sons and their daughters to pass through *the fire* unto Molech; which I commanded them not, neither came it into my mind, that they should do this abomination, to cause Judah to sin.

God also has something to say about *how we should respond* to abortion. This verse was in Operation Rescue's masthead, until 1993 when the first abortionist was shot. The scenario is where murderers have so much power over their victims that they can "lead them away" to kill them where they choose, and by a schedule known to others. That pretty much limits the scenario to government-protected murders.

> Proverbs 24:10 If you faint in the day of adversity, your strength is small. 11 Rescue those who are being taken away to death; hold back those who are stumbling to the slaughter. 12 If you say, "Behold, we did not know this," does not he who weighs the heart perceive it? Does not he who keeps watch over your soul know it, and will he not repay man according to his work? ESV

The only citation of any Bible verse in Roe is to Exodus 21:22, in footnote 22. Roe says the verse *"may* have" influenced Augustine! What was the point of adding such a speculation if it can't even be documented that Augustine *thought* about it? Was it an attempt to stick a verse into the record that some have thought minimizes the value of the unborn, even though most do not? Cults use obscure, ambiguous verses as a wedge to get Doubt's foot in the door. Here is the verse:

> Exodus 21:22 And when men fight, and they strike a pregnant woman, and her child goes forth, [literally "so her children come out" according to an NLT note] and there is no injury, being fined he shall be fined. *As much as* the husband of the woman shall put on him, even he shall give through the judges. [That is, he can sue in a court of equity and a jury will decide any award.] (Literal Translation of the Holy Bible)

The uncertainty is whether "there is no injury" means "no injury to either the mother or the child", or only "no injury to the mother – who cares about the child?" Commentator John Gill (1690-1771) notes places in the talmud that say the verses are concerned only for women, but he says the verse itself applies also to babies:

> **and yet no mischief follow**: to her, as the Targum of Jonathan, and so Jarchi and

> Aben Ezra restrain it to the woman; and which mischief they interpret of death, as does also the Targum of Onkelos; but it may refer both to the woman and her offspring, and not only to the death of them, but to any hurt or damage to either.... *John Gill's Exposition of the Entire Bible*

Adam Clark (1715-1832) understands it to protect mother and child alike:

> But if mischief followed, that is, if the child had been fully formed, and was killed by this means, or the woman lost her life in consequence, then the punishment was as in other cases of murder - the person was put to death.... *Adam Clark's Commentary on the Bible*

The Bible Knowledge Commentary is emphatic that the child's life is revered as much as the mother's. Commentaries since 1973 take a position on abortion.

> 21:22–25. **If … a pregnant woman** delivered her child prematurely as a result of a blow, but both were otherwise uninjured, the guilty party was to pay compensation determined by **the woman's husband** and **the court**. However, **if there** was **injury** to the expectant mother or her child, then the assailant was to be penalized in proportion to the nature of severity of the injury. While unintentional life-taking was usually not a capital offense (cf. vv. 12–13), here it clearly was. Also the unborn fetus is viewed in this passage as just as much a human being as its mother; the abortion of a fetus was considered murder.[85]

Wiersby sees no uncertainty that the unborn are as revered as the born:

> Verses 22–23 are basic to the pro-life position on abortion, for they indicate that the aborting of a fetus was equivalent to the murdering of the child. The guilty party was punished as a murderer ("life for life") if the mother or the unborn child, or both, died. See also Ps. 139:13–16.[86]

Tyndale's commentary sermonizes about it:

> In the case of mothers and children, special laws were given to protect the helpless and innocent (21:22–25). If a man caused a woman to give birth prematurely but the infant was not harmed, then a simple fine was to be levied. If the child or mother was harmed, then the law of retaliation was applied. Punishment was restricted to that which was commensurate with the injury. In these verses God shows clear concern for protecting unborn children, a concern that people today would do well to heed. Surely the abortion of millions of unborn babies will fall under God's condemnation.[87]

But the *Faithful Life Bible* seems to be pro-abortion:

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85 Hannah, J. D. (1985). Exodus. In J. F. Walvoord & R. B. Zuck (Eds.), *The Bible Knowledge Commentary: An Exposition of the Scriptures* (Vol. 1, p. 141). Wheaton, IL: Victor Books.
86 Wiersbe, W. W. (1993). *Wiersbe's Expository Outlines on the Old Testament* (Ex 21:12–36). Wheaton, IL: Victor Books.
87 Hughes, R. B., & Laney, J. C. (2001). *Tyndale concise Bible commentary* (p. 39). Wheaton, IL: Tyndale House Publishers.

> **21:22 as the judges determine** Describes a situation where the woman who is injured survives the attack but her child does not. The penalty in such a case is a fine. However, v. 23 says that if the woman is killed, the death penalty is prescribed. Consequently, the life of the adult woman was deemed of greater value than the contents of her womb. This passage is frequently used to justify abortion: the woman was viewed as a person; the child was not.[88] [Wow!]

The Hebrew text simply doesn't specify whether "if there is no injury" applies to both child and mother, or to only one of them. Nor does the Hebrew say whether "the baby comes out" means healthy or dead. The disagreement of translators and commentators is possible because of this textual ambiguity. Commentaries since 1973 face societal pressure to stay out of Roe's way. Ancient Talmud entries likewise faced the social pressure of the ever present Molech worship surrounding Israel, and too frequently invading Israel. Jesus' metaphor for Hell was the "valley of Tophet" just outside Jerusalem where children were once burnt alive to Molech.

I would submit that while the *text* may be unclear, the *context* is certainly clear. From "be fruitful and multiply", Genesis 1:28, to "As arrows in the hand of a mighty man, so *are* the sons of the young. Blessed *is* the man who has filled his quiver with them....", Psalm 127:4-5, and all the laws in between about the importance of descendants, it is inconceivable that any jury in Moses' time could be apathetic about an unnatural miscarriage! The translations that leave this idea implied but not specified are MKJV, RV, YLT, GW, ISV, JPS, KJV, ABP, ASV, ESV, NLT, NIV84, NASB95, HCSB, NCV, TNIV, CPB, NirV. However, these translations limit concern to the mother: BBE, "causing the loss of the child, but no other evil comes to her"; CEV, if she "suffers a miscarriage" but "isn't badly hurt"; DRB "and she miscarry indeed, but live herself"; ERV "If the woman was not hurt badly"; and Message "so that she miscarries but is not otherwise hurt". As

88 Barry, J. D., Heiser, M. S., Custis, M., Mangum, D., & Whitehead, M. M. (2012). *Faithlife Study Bible* (Ex 21:22). Bellingham, WA: Logos Bible Software.

noted before, “miscarriage” is a poor translation since the Hebrew word as easily means a healthy birth.

The Brenton translation expresses concern *only for the baby:* “And if two men strive and smite a woman with child, and her child be born imperfectly formed, he shall be forced to pay a penalty....”

Theologians are less likely than lawyers to consider in this verse the difficulty of assessing criminal intent in this situation. Two men are fighting, and a woman gets hit. What is she doing there? What responsibility did she have for getting out of the way? When the man hit her, was he actually aiming at her or was he just struggling against the other man? If he deliberately hit her, was he just defending himself against her attack, or was he deliberately aiming at the womb? These are questions for a jury. They are factors that could make a penalty greater for harm to the mother than for the child, *or vice versa,* depending not on their relative human worth but on where any culpability was focused.