No. 03-90198-S

IN THE
SUPREME COURT OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

JONATHAN D. CARR
Defendant-Appellant

SUPPLEMENTAL BRIEF OF APPELLANT

Appeal from the District Court of Sedgwick County, Kansas
Honorable Paul Clark, Judge
District Court Case No. 00 CR 2979

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Oral Argument: 30 minutes

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Nature of the Case

Jonathan Carr has been convicted of capital murder, and the State seeks to execute him. This brief supplements his prior briefs with an issue newly arisen from this Court's decision in *Hodes & Nauser, MDs, P.A. v. Schmidt*, __ Kan. __, 440 P.3d 461 (2019).

Statement of Issue

The death penalty is unconstitutional under §1 of the Kansas Constitution Bill of Rights.

Statement of Facts

No additional facts are necessary beyond those stated in Mr. Carr's prior briefs.

Arguments and Authorities

The death penalty is unconstitutional under §1 of the Kansas Constitution Bill of Rights.

Summary of the Issue

"All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Kan. Const. Bill of Rts. §1.

With this, our founders enshrined a fundamental right to life for all Kansans. While it was aspirational in 1859, it was enforced quickly. Capital punishment in Kansas was ended in practice by 1872 and in law in 1907. Before the capital building was finished, Kansans had enforced the pledge of the right to life by ending the death penalty.

But subsequent generations have reneged on that promise. In 1935 and 1994, the Kansas legislature reinstated the death penalty. The 1935 resurrection led to few executions and was ended in practice well before *Furman v. Georgia* in 1972. Supporters of the 1994 effort were under the false impression that the death penalty could provide

retribution and deterrence through swift executions and truncated appeals. Others thought it would "deter" crime by preventing those executed from getting out of prison and committing new crime. In the 25 years since, however, the Kansas death penalty has failed to serve those hoped-for goals.

Any deterrent or retributive effect the Kansas death penalty could theoretically have is nullified by the reality of death penalty proceedings. A "death sentence" is effectively life without parole. And because true "life without parole" now exists, the State cannot show that it is not just as effective in meeting the goal of protecting life.

Any deterrent or retributive effect the Kansas death penalty could theoretically have is also nullified by the fact that we do not sentence the worst to death. Instead, the State seeks to execute people who live in certain counties, kill white victims, and are mentally ill.

As this Court recently held, "[S]ection 1 . . . acknowledges rights that are distinct from and broader than the [U.S.] Constitution and . . . our framers intended these rights to be judicially protected against governmental action that does not meet constitutional standards." *Hodes*, 440 P.3d at 471.

The right to life set out in §1 is fundamental, and the State seeks to infringe upon it by executing Mr. Carr. This infringement cannot meet the strict scrutiny test this Court set out in *Hodes*, or even a rational basis test. As such, Mr. Carr asks that this Court judicially uphold the guarantee that our Kansas founders made by finding that the Kansas death penalty is unconstitutional under §1 of the Kansas Bill of Rights.

Standard of Review

An appellate court reviews issues requiring the interpretation of constitutional provisions de novo. *Hodes*, 440 P.3d at 471.

Objection Below

Mr. Carr did not make this argument below because *Hodes* was decided after his 2002 trial. But Mr. Carr's case is pending on direct appeal, so *Hodes* applies. See *State v. Spencer Gifts,* 304 Kan. 755, 768, 374 P.3d 680 (2016) (new decisions apply to pending cases). This Court must also consider this issue as assigned error under K.S.A. 21-6619(b), and because consideration serves the ends of justice and will prevent the denial of Mr. Carr's fundamental rights. See *State v. Cheever*, 295 Kan. 229, 240-42, 284 P.3d 1007 (2012), *rev'd on other grounds*, 571 U.S. 87 (2013); *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015).

Argument

I: The Kansas death penalty cannot survive strict scrutiny.

When it infringes on a citizen's fundamental rights under the Kansas Constitution, the State must satisfy strict scrutiny. *Hodes*, 440 P.3d at 493. That is, once there has been an infringement of a fundamental right, regardless of degree, the government's action is presumed unconstitutional. The burden is then on the State to show the law in question is narrowly tailored to further a compelling state interest. *Hodes*, 440 P.3d at 496-97, 502.

The first two parts of this inquiry are questions of law, which this Court should decide now. First, this Court must determine whether the right alleged is one that is protected by the Kansas Bill of Rights. Second, this Court must determine whether the

right is infringed by the government action at issue. The third step—whether the government can justify infringement by satisfying its burden under strict scrutiny—is also ultimately a question of law, although Mr. Carr acknowledges that the State may wish to request a remand to attempt to meet its burden to make underlying factual showings. To satisfy strict scrutiny, one way or another, the State must prove that the law in question 1) serves a *compelling state interest*; 2) actually *furthers* that state interest; and 3) is *narrowly tailored* to further that interest.

I.A: All Kansans, including Mr. Carr, have a natural, inalienable, and fundamental right to life protected by §1 of the Kansas Bill of Rights.

The first question before this Court is whether §1 protects the natural, inalienable, and fundamental right to life. Because that right is explicit in the plain language of §1, this Court's inquiry can begin and end at that point. However, even if this Court finds that the words themselves are somehow unclear, as will be discussed, the historical record also shows that our Kansas founders intended to create a broad right to life. Lastly, even if the right to life had not been made explicit, substantive due process still supports its recognition.

I.A.1: The plain language of §1 supports a fundamental right to life.

The long-established standard for interpreting the Kansas Constitution is that the plain language controls. See *Wright v. Noell*, 16 Kan. 601, 607 (1876). Thus, our fundamental right to life is best established by looking to the plain language of §1 which expressly provides: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Kan. Const. Bill of Rts. §1. While

§1 recognizes the existence of other, unenumerated, fundamental rights, three rights are explicit: life, liberty, and the pursuit of happiness. Likewise, while there may be ambiguity in the scope of the rights to liberty and the pursuit of happiness, there is none in the right to life. It means—as it has from the days of Thomas Jefferson—the right to be alive. Likewise, the right to life is listed as the primary of the three rights, in recognition that life is necessary to exercise all other rights. The plain language of §1 is unambiguous and controlling—Kansans have a natural, inalienable, and fundamental right to life.

I.A.2: Kansas constitutional history supports a fundamental right to life.

While the plain language makes our founders' intent clear, in the event this Court finds ambiguity, it must look to the historical record to discern our founders' intent. "When the words [of the Kansas Constitution] themselves do not make the drafters' intent clear, courts look to the historical record, remembering the polestar is the *intention* of the *makers* and *adopters*." *Hodes*, 440 P.3d at 471. A look at the historical record shows the intent of the makers and adopters was to create a broad, enforceable right to life. This is established by the proceedings at the Wyandotte Convention, the speedy end of the death penalty by the legislatures and governors in Kansas' foundational years, and the treatment of capital cases by the Kansas Supreme Court during that same period.

I.A.2.a: The delegates of the Wyandotte Convention enshrined a broad, fundamental right to life.

In 1859, Kansas' newly formed Republican Party went to the Wyandotte Constitutional Convention to write a constitution that provided a broad, all-embracing protection of human rights, similar to the rights enshrined in the Declaration of

Independence by Thomas Jefferson. Those rights, as the Republican abolitionists understood, existed even if their enforcement could only come as fast as circumstances would permit. The framers of the Kansas Constitution intended the right to life to be one of those rights.

In *Hodes*, this Court studied the Wyandotte Convention, and unanimously agreed that §1 provides "judicially enforceable protections against unwarranted government intrusion." *Hodes*, 440 P.3d at 504 (Biles, J. concurring). Review of those proceedings, and the public discussion at the time, reveals that when the framers wrote that all men had a right to life, they did so intending to create a broad, all-embracing provision protecting human rights that would be enforceable as soon as circumstances permitted.

Before turning to the proceedings themselves, it is helpful to discuss the constitutional theories that guided the Kansas' abolitionist Republicans going into the Wyandotte Convention. A prevailing notion at the time was that the federal constitution sanctioned the existence of slavery—one of the greatest crimes humanity ever committed—and was a "covenant with death, [and] an agreement with Hell[.]" William Lloyd Garrison and the Fight Against Slavery: Selections from the Liberator 36 (William E. Cain ed., 1995). Yet, abolitionists argued the sanctioned practice of slavery did not extend to the territories as there was "a higher law than the Constitution[.]" Senator William H. Seward, On the admission of California: delivered in the Senate of the United States (March 11, 1850). For abolitionists in Kansas, it was the Declaration of Independence that encapsulated that "higher law" principle—and disallowed slavery—by affirming that it was "self-evident, that all men are created equal, that they are endowed

by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." See *No Right to Do Wrong*, The Lawrence Republican (Archived as the Western Home Journal) (Nov. 11, 1858) at 2[1]; See also Lysander Spooner, The Unconstitutionality of Slavery, Chapter V (1845) (Arguing the self-evident truths of the Declaration abolished slavery at the founding of the country). As Abraham Lincoln put it, the Declaration meant what it said, even if the rights it set out were *initially* aspirational:

> "This they said, and this they meant. They did not mean to assert the obvious untruth that all were then actually enjoying that equality, nor yet that they were about to confer it immediately upon them. In fact, they had no power to confer such a boon. **They meant simply to declare the right, so that enforcement of it might follow as fast as circumstances should permit.**" Speech in Springfield, Illinois, (June 26, 1857) *in* Abraham Lincoln; Complete Works, Comprising His Speeches, State Papers, and Miscellaneous Writings (1920) at 232. (Emphasis added.)

When the Republican Party first organized, in May 1859 at the convention in Osawatomie, their platform made this fealty to the Declaration clear stating:

> "*Resolved*, That we affirm that the only true basis of Free Governments, and of popular rights, for all countries and times, is to be found in the great self-evident truths enunciated by Thomas Jefferson and the Fathers of the Republic, in the Declaration of Independence." Daniel Wilder, The Annals of Kansas 202 (1875).

As the Wyandotte Convention began, The Lawrence Republican newspaper, co-edited by Wyandotte Convention delegate Solon Thacher[2], declared that the first duty of the Convention would be to enshrine the self-evident rights that Jefferson had declared:

> "Chief among all others will be the full, broad and all-embracing provision asserting that Human Rights and their maintenance, in importance 'rise above and are superior to all legislative enactments.' It will be a provision which, in

[1] All historical newspaper articles were accessed through the newspaper.com archives accessible to all Kansas residents via https://www.kshs.org/p/kansas-digital-newspaper-program/16126.

[2] *Droppings from the Eaves of the Constitutional Convention*, The Elwood Free Press (July 30, 1859) at 2.

> contradistinction to that creed of despotism which maintains 'property' to be superior and primary to all law, declares the 'inalienable rights' of humanity to be the chiefest care of government. Upon this question we apprehend the Convention will find little or no difficulty. The experience of the Democracy with the despot's faith as incorporated in their Lecompton Constitution, has too clearly demonstrated the position of the people of Kansas on this great question, and has sufficiently warned that party that liberty and free institutions are much dearer to the men of Kansas than the dogmas of the slave driver and his plantation. It is only upon collateral questions to this that the Democracy will raise any dispute. We expect to see the party of despotism, the aristocratic party, the oligarchy, move heaven and earth to worm into the Constitution of Kansas some clause, some expression, repugnant, distasteful and insulting to liberty, and in accordance with the heathenism and oppression of the past. We devoutly pray high Heaven to thwart their plans. We hope to see that Constitution radiant in every line and syllable with the glow of freedom. We trust no shade of darkness may settle upon a single word in all that instrument. Let its keynote be, *We hold these truths to be self-evident*. We believe such it will be." *The Constitutional Convention. – Its Duties*, The Lawrence Republican (July 7, 1859) at 2.

It was in that context that, on July 18, 1859, the Wyandotte Constitutional Convention began their debate on what would become §1.

> The initial proposal did not use Jefferson's words at all. It stated,
>
> "All men are by nature equally free and independent, and have certain inalienable rights, among which are those of enjoying and defending their lives and liberties, acquiring, possessing, and protecting property, and of seeking and obtaining happiness and safety, and the right of all men to the control of their persons, exists prior to law and is inalienable." Proceedings and Debates of the Kansas Constitutional Convention (Drapier ed., 1859), reprinted in Kansas Constitutional Convention 271 (1920) ("*Convention*").

Over the course of the debates, the delegates proposed nearly a dozen variations to the text, ranging from an amendment that would exclude non-whites (meant as a mockery of earlier proposals by the pro-slavery faction) to the words of Jefferson that were eventually adopted. *Convention* at 271-285. Immediate concerns were raised about whether the §1 language would make all criminal law unenforceable, invalidate the

fugitive slave law, or enunciate a "higher law" principle. *Convention* at 271-285.

These debates were not unfounded. The U.S. Supreme Court had just overturned a Wisconsin Supreme Court decision that had invalidated convictions under the Fugitive Slave Act as violating a state citizen's right to "liberty." *Ableman v. Booth*, 62 U.S. 506 (1858); *In re Booth*, 3 Wis. 1 (1854); See Calabresi & Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299, 1353-57 (2015) (summarizing the litigation) ("*Lockean Natural Rights*"). One delegate expressly praised the actions of Wisconsin's Supreme Court in invalidating the fugitive slave law, hoping for the same in Kansas. *Convention* at 279. Still others attempted to limit those concerns by proposing that the rights could apply except for those "lawfully imprisoned", "except for the commission of crime," or "[e]xcept in cases where the party is charged with crime, or has been convicted thereof." *Convention* at 273, 275-76, 282. Upon hearing one of the proposals containing such express limitations, Samuel Kingman suggested what would eventually become §1:

> "Mr. President, I do not propose to argue this question. I would be willing to vote for the section as it stands, but I prefer the language of the substitute just offered. But I hold in my hand a section which I prefer to both of them. I do not propose at this time to offer it. But I hold that this use of the word 'inalienable,' is misunderstood and misinterpreted in this House. A man's right to his life is inalienable in law under all circumstances. He has no right to sell or give it away—no right to dispose of it at all. But the word 'inalienable' has a fixed meaning in law. And when in the common use of the word we say, that a man cannot alienate his property, none would suppose we mean to say, he cannot forfeit his property. We propose, at the proper time, to propose in this Constitution, that there shall be a homestead set apart to each settler in the State, which shall be inalienable, but we do not propose to ordain that it shall not be forfeited for debts due to the State, and so on. I do not like to see this doctrine impinged. I do not like to depart from old, established usage. Therefore I hope the section which I hold in my hand will be adopted. By the leave of the Convention I will read it:

> "'All men are possessed of equal and inalienable natural rights, among which are those of life, liberty and the pursuit of happiness.'
>
> "These terms, Mr. President, are fixed in the minds of the American people—they have become traditional. And I offer to strike out and insert this, that the American feeling might appear in this section. We all cling to old truths, and I love the very forms of expression in which old truths have been presented. I dislike to change any old truth from the forms of language to which I have been accustomed. I dislike to see them taken from the habiliments in which I have so often seen them clothed and put into new and doubtful phraseology; and our national Declaration of Independence is of this class of truth. That Declaration of Rights forms a part of our political creed, from which no man can extricate himself; and I do not wish to change the clothing of these ideas. It is this feeling that makes a man who has long read one book—as the Bible or Blackstone—value it a hundred fold above its intrinsic value. This makes a man like to read the sentiments he cherishes in their original style of expression—makes him like to dwell on the very words that cover the principles he holds closest to his heart. And we should express these sentiments in few words—sufficient to cover their views and carry their original force, and whatever goes beyond that is injurious to the sense. I say again, sir, I love these old forms. They are, it seems to me, as the political Bible of every citizen of the United States. If you change their language, you mar their beauties—carry the mind away from the sense, and send it off into reflections on the phraseology and meaning of these new terms. I think the amendment I have read, in these old terms, is broad enough. It will show no man's prejudices, and it is broad enough for all to stand upon." *Convention* at 282-283.

While he broached it as if it were a compromise, Kingman's proposal was to adopt the words of the Declaration—the core of the Republican platform—and the statement of all-embracing, self-evident human rights the Republicans had gone into the Convention seeking. Where many declarations of natural rights employed phrases like "enjoying and defending life and liberty" or set out an inalienable right to property, Kingman's proposal broadly protected "life, liberty and the pursuit of happiness", a trait shared by the Wisconsin Constitution. *Lockean Natural Rights*, 93 Tex. L. Rev. at 1444-1452, Appendix B. One delegate objected to Kingman's proposal, noting that the words of the

Declaration had taken on different meanings with the changes of time. *Convention* at 284-285. However, Kingman's proposal—which, without any exceptions, provided for an inalienable natural right to life—passed 42 to 6. *Convention* at 285.

Exceptions to the §1 rights, when desired, were made explicit in drafting the rest of the Kansas Constitution. For example, §6 of the Kansas Bill of Rights—likely the clearest exception to the liberty rights—provided: "There shall be no slavery in this State, and no involuntary servitude, unless for the punishment of crime, whereof the parties shall have been duly convicted." Kan. Const. Bill of Rts. §6. Thus, while the rights to "life, liberty, and the pursuit of happiness" had no express limitations upon conviction of a crime, §1 and §6, read together, still allowed penal labor as punishment for a crime.

Likewise, Kingman's homestead provision articulated the exceptions intended to exist to that right, and courts have found that those exceptions do not let the homestead right be forfeited as punishment for a crime. See Wyandotte Constitution, Article XV, §9; *Convention* at 308-324; *State ex rel. Apt v. Mitchell*, 194 Kan. 463, 466 (1965).

Finally, while the framers intended to and did set out a broad declaration of human rights, they also included one reference to a capital offense. Section 9 of the Kansas Bill of Rights provides a right to bail "except for capital offenses, where proof is evident or the presumption great." Kan. Const. Bill of Rts. §9. But that reference must be read in context with something the Kansas Constitution does not say.

As this Court noted in *Hodes*, §1 provides substantive rights, not procedural rights such as those set out in the Fourteenth Amendment—*i.e.*, the Kansas Constitution has no clause that allows taking life even with "due process of law". *Hodes*, 440 P.3d at 473. See

also *State v. Peeler*, 321 Conn. 375, 411, 140 A.3d 811 (2016) (Palmer, J. concurring) (Noting an express reference to capital punishment in a state constitution "implies at most that the death penalty is not unconstitutional per se, at all times and under all circumstances.") Read in conjunction with §6—which allows penal labor as punishment for a crime but not the taking of life—this is a telling omission. Essentially, while Kansas does have a provision referencing capital punishment, it has no provisions enabling it.

Additionally, as mentioned above, the Republican founders of Kansas understood that the words of the Declaration, as they enshrined them in the Kansas Constitution, provided rights so that enforcement could follow as soon as circumstances permitted. To that point, the Kansas Constitution further provided that a penitentiary be built in the state. Wyandotte Constitution, Article VII, §2. As is discussed in the next section, it was with the construction of the state penitentiary, a location for the long-term incapacitation of people convicted of crimes, that the right to life was fully enforced.

The authors of §1 went to the Wyandotte Constitutional Convention to write a constitution that provided a broad, all-embracing protection of human rights as enshrined in the Declaration of Independence. They accomplished that goal, protecting the natural, inalienable, and fundamental right to life, and provided no exceptions.

I.A.2.b: Kansas legislatures and governors quickly realized and fully enforced the right to life.

While the right to life was not fully realized at statehood, it was quickly enforced within Kansas' foundational era. Capital punishment was ended for the first time in 1872, and it would be gone for the remainder of the founding generation. That quick realization

of the right to life, as soon as was functionally possible, reinforces that the right included the right to be free from the State's executioners.

Undeniably, Kansas briefly allowed capital punishment shortly after entering statehood in 1861. However, as this Court noted in *Hodes*, the history of the transfer of the laws from the bogus legislature to territorial law, and then the hasty adoption of the initial criminal code, means little weight can be given to that early criminal code. *Hodes*, 440 P.3d at 489-490. Like the historical abortion laws discussed in *Hodes*, the use of capital punishment for first-degree murder began with the "bogus laws" of the pro-slavery legislature, and briefly remained in place when Kansas entered statehood. Barry, *Legal Hangings in Kansas*, Kansas Historical Quarterly, 279 (Aug. 1950) ("*Hangings*"); See G.L. 1862, Ch. XXXIII, Section 1, Section 3. Likewise, shortly after statehood, Kansas made treason punishable by death, though that law was considered symbolic and no one was ever executed for treason. Hougen, *The De Facto Abolition of Capital Punishment in Kansas, 1872*, Law in the West 73, 73 n.2 (1985) ("*Abolition*"); See G.L. 1862, Ch. XXXIV, Section 1. And even in those early days, there were protests against the death penalty. See *From The State Capital*, The Leavenworth Times (May 18, 1861) at 2.

In all, nine men—Carl Horne, William Griffith, John Hendley, Ernest Wa-tee-cha, Ben Lewis, Martin Bates, Scott Holderman, Melvin Baughn, and William Dickson—were executed under Kansas' first-degree murder law between 1863 and 1870. *Hangings* at 282. The law provided that all executions were to be carried out in a private enclosure, a rejection of earlier public hangings. *Abolition* at 73. Even so, several of Kansas'

executions were botched and illegal. See *e.g.*, *Execution of Carl Horne*, The Leavenworth Times (Feb 14, 1863) at 3 (noting Horne strangled to death for 9 to 15 minutes); *Abolition* at 73-74 (noting Griffith was executed in front of hundreds of spectators).

But two things would prompt the end of Kansas' early death penalty in 1872.

First, the Kansas State Penitentiary opened between 1867 and 1868, providing a place for long-term incarceration in Kansas. Gable, *The Kansas Penitentiary,* Collections of the Kansas State Historical Society 1915-1918 pp. 386-389. With a functioning penitentiary came the circumstances allowing the end of the death penalty and full realization of the right to life. For example, during debates in 1868, Senator James Rogers noted that, with the completion of the state's prison, it was now possible to secure criminals and the need for capital punishment was over. *Kansas Legislature*, The Daily Kansas Tribune (Lawrence) (Feb 15, 1868) at 2. He believed Kansas should join Michigan, Vermont, and Wisconsin in ending the death penalty. *Id.* Others noted that only through imprisonment could a person make reparation to society for his wrongs. *Id.*

By 1869, others were arguing capital punishment was a relic of barbarism. *Debate in Committee of the Whole on the Bill to Abolish Capital Punishment*, The Kansas State Record (Topeka) (Jan 31, 1869) at 1. Justice Lawrence Bailey was a Kansas Supreme Court Justice from the State's founding until January 1869, when he immediately joined Kansas' House of Representatives. "In Memoriam" 47 Kan. xii-xiii; *Unititled*, Topeka Weekly Leader (Jan. 14, 1869) at 3. He explained that the death penalty causes a "reckless disregard of the sacredness of human life which would sap the very foundations of society." *Judge Bailey's Remarks,* The Kansas State Record (Topeka) (Jan 31, 1869) at

1. Justice Bailey believed "that human life is something too sacred to be tampered with, being the direct gift of God." *Id.* To him, the state penitentiary provided safety to society "without resorting to death." *Id.* Moreover, while there were many practical reasons to abolish the death penalty, Justice Bailey believed "there were higher grounds. The sacredness of human life was the foundation, the safeguard of society, and capital punishment struck at this while striving to protect it." *Id.* For Justice Bailey, it was time to realize the right to life, the right protected by higher law.

The second event that spelled the end of the early Kansas death penalty was the illegal execution of William Dickson in 1870. *Abolition* at 74. While Kansas law required private executions, Dickson's execution made a mockery of that premise. The scaffolds were arranged so that entire public could see the execution from their rooftops and windows. *Hangings* at 294. It was reported that thousands of people watched, half of whom were children. *Abolition* at 76. On top of that, the executioners botched the hanging, failing to break Dickson's neck. He strangled to death over the course of 14 minutes in front of the crowd. *Abolition* at 76; *The Gallows*, The Leavenworth Times (Aug 10, 1870) at 4. Reforms quickly followed.

Thomas Fenlon, who was the prosecutor in Horne's case and part of the defense team in Dickson's, led the movement to end the death penalty. *Abolition* at 75, 76-77. Fenlon viewed "the law which forfeits the life of man as a disgrace to our civilization—a relic of barbarism[.]" *From the Capital*, The Leavenworth Times (Feb 22, 1872) at 2. While debates on the means to end the death penalty were underway, Governor Harvey, in 1871, commuted the next two death sentences to life imprisonment, leading some to

say he had already ended the death penalty. *Hangings* at 295-96; *The Abolition of Capital Punishment*, The Daily Commonwealth (Topeka) (Aug 17, 1871) at 2.

In 1872, the legislature, convening in the newly-constructed first wing of the statehouse, passed what was called the "Maine Law". *Abolition* at 75, 77; Adams, *The Capital of Kansas*, Transactions of the Kansas State Historical Society, 1903-1904 p. 348. Previously, those sentenced to death were executed in the local jail, one month after sentencing. Under the "Maine Law," all those sentenced to death would be transferred to the state penitentiary. *Abolition* at 77. Execution would only occur upon a governor-issued warrant, but nothing required any governor to actually issue a warrant. *Abolition* at 77. When the law passed, it was understood that it had abolished the death penalty in Maine, and would do the same in Kansas. *Abolition* at 77; *About Capital Punishment*, Kansas Tribune (Lawrence) (Mar 7, 1872) at 2. It did. No governor ever issued a warrant for execution. *Abolition* at 77. The death penalty was over in Kansas after 11 years of statehood, only 7 of which had actually seen executions. The death penalty would remain abandoned for the rest of Kansas' foundational period, being fully taken off the books in 1907. *Abolition* at 77. It would be over 70 years before Kansas had another execution, in 1944, following the restoration of capital punishment in 1935. *Abolition* at 77. Even then, the rate of executions was anemic. From 1954 to 1960, there was a moratorium, and the last execution took place in 1965, well before *Furman v. Georgia*, 408 U.S. 238 (1972). Truman Capote, In Cold Blood, 308-311, 336 (Vintage International 2012) (1965).

While the right to life was not fully realized at statehood, it was quickly realized and enforced within Kansas' foundational era. The use of capital punishment in Kansas

ended for the first time in 1872, and was not revived during the founding generation. That quick realization of the right to life, as soon as was functionally possible, reinforces that the right included the right to be free from the State's executioners.

I.A.2.c: Kansas Supreme Court opinions never addressed the constitutionality of the early death penalty prior to its end, though early opinions reflect extreme limitations on its application.

Finally, this Court's treatment of capital cases between 1863 and 1870, while not addressing §1, reflects a strict review of capital punishment and the primacy of the right to life. As this Court's summary of §1 cases in *Hodes* makes clear, the relevant caselaw did not develop until *after* Kansas had functionally abolished the death penalty in 1872. *Hodes*, 440 P.3d at 476-78. We know Justice Bailey thought capital punishment violated the sacred right to life, but other justices had limited opportunities to state their views. *Judge Bailey's Remarks,* The Kansas State Record (Topeka) (Jan 31, 1869) at 1.

Of note, this Court only heard the appeals of two of the nine men who were subsequently executed, those of Carl Horne and William Dickson. Horne's appeal was the first criminal case this Court heard, and this Court reversed his conviction for first-degree murder and remanded the case for new trial. *Horne v. State*, 1 Kan. 42, 74, (1862). He was convicted again after being retried before Judge Samuel Lecompte and executed just over a month later, without an appeal. *Abolition* at 75.

Dickson's appeal was thus the first and only case of this Court affirming a conviction that would result in execution during the 1800s. But no constitutional challenges were raised as to his sentence. *State v. Dickson*, 6 Kan. 209, 219 (1870). Thus, capital punishment came and went in Kansas without this Court having to weigh in with

analysis of the Kansas Constitution. The right to life was realized so quickly, that it was never an issue that needed to be put before this Court.

That is not to say that Kansas had no cases addressing first degree-murder, but, in every case of conviction between Horne and Dickson, this Court reversed. See *Smith v. State*, 1 Kan. 365 (1863); *Campbell v. State*, 3 Kan. 488 (1866); *Craft v. State*, 3 Kan. 450 (1866). This Court also reversed every first-degree murder conviction after Dickson until the end of capital punishment in 1872, as well. *State v. Reddick*, 7 Kan. 143 (1871); *State v. Huber*, 8 Kan. 447 (1871); *State v. Medlicott*, 9 Kan. 257 (1872). The limited application of capital punishment in Kansas arose from those cases. See, *e.g.*, *Craft*, 3 Kan. at 481-488 (narrowly defining circumstances amounting to first-degree murder).

Thus, while this Court had little caselaw in the foundational era regarding capital punishment, what exists shows it was limited, rigorously scrutinized, and gave primacy to the right to life. This is consistent with other parts of the aforementioned historical record in Kansas. Taken all together—from the Wyandotte Convention, to the legislatures, governors, and courts—the historical record shows the intention of the makers and adopters of the Kansas Constitution was to create a broad, enforceable right to life.

I.A.3: Even if the right to life had not been enumerated, substantive due process supports a fundamental right to life.

Finally, were the plain language of §1 and the historical record insufficient, substantive due process further supports the right to life being fundamental. Though infrequently analyzed, the fundamental right to life has been repeatedly referenced as existing as a matter of substantive due process. See, *e.g.*, *Ford v. Wainwright*, 477 U.S.

399, 408–09 (1986) (referring to fundamental right to life); *People v. Smith*, 63 N.Y.2d 41, 71-79 (1984) (striking down death penalty statute while "mindful of the singular gravity of the death penalty" and the "fundamental respect for humanity"); *In re Anderson*, 69 Cal. 2d 613, 655, 447 P.2d 117 (1968), *overruled by constitutional amendment Ghent v. Superior Court*, 90 Cal. App. 3d 944, 952 n.9 (1979). (Upon execution, man "suffers a deprivation of *all* 'the basic civil rights of man,' even life itself."). Much like the plain language discussion above, this is an obvious conclusion. All other fundamental rights stem from the fundamental right to be alive.

As it relates to the death penalty, this was most clearly spelled out by the Massachusetts Supreme Court in the two opinions in *Com. v. O'Neal*, 367 Mass. 440, 327 N.E.2d 662 (1975) (*O'Neal I*), and 369 Mass. 242, 339 N.E.2d 676 (1975) (*O'Neal II*). The *O'Neal I* court, in addressing the state constitutionality of their law imposing mandatory death for rape-murder, said, "[T]he right to life is fundamental and, further . . . this proposition is not open to serious debate." 367 Mass. at 449. Beyond its placement in the due process clause, the right to life was the basis of all other rights, a natural right of everyone. *O'Neal I*, 367 Mass. at 449. As such, the court held that "life is a constitutionally protected fundamental right, the infringement upon which triggers strict scrutiny under the compelling State interest and least restrictive means test." *O'Neal I*, 367 Mass. at 449–50. The parties were told to brief that test. *O'Neal I*, 367 Mass. at 450.

In *O'Neal II*, following the supplemental briefing, the court found their death penalty law unconstitutional in violation of the Massachusetts Declaration of Rights, though the individual justices did so on various grounds. 369 Mass. at 243. Chief Justice

Tauro analyzed the issue as a matter of substantive due process under the Massachusetts Declaration of Rights, interlocking with state's the prohibition on cruel or unusual punishment. *O'Neal II*, 369 Mass. at 244–45 (Tauro, C.J. concurring)[3]. Tauro had little doubt that the fundamental right to life was explicitly and implicitly guaranteed by the constitution. *O'Neal II*, 369 Mass. at 245–46. He explained that life is a natural right, encompassing even the right to have rights, and capital punishment extinguished that right. *O'Neal II*, 369 Mass. at 245–46. Thus, strict scrutiny review was required, a burden the state ultimately could not carry. *O'Neal II*, 369 Mass. at 245–46, 263.[4]

As it is, the majority opinions in *O'Neal I* and Chief Justice Tauro's opinion in *O'Neal II* support the understanding that the right to life is fundamental as a matter of substantive due process. However, reaching the question as a matter of "judicially favored rights" through substantive due process reasoning is unnecessary for this Court because of the plain language of §1. See *Hodes*, 440 P.3d at 524 (Stegall, J. dissenting).

The right to life is expressly protected by §1 of the Kansas Bill of Rights. Even if the plain words were not enough, Kansas' historical record shows that the framers of the Kansas Constitution meant to create a broad declaration of human rights, including the right to life, when they wrote §1. The legislature and governor quickly moved to protect that right to life by ending capital punishment by 1872, and this Court's opinions from that era show capital cases were treated with rigorous scrutiny. The right to life is firmly established as a fundamental right protected by the Kansas Constitution.

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[3] Unless otherwise noted all citations of *O'Neal II* are to Chief Justice Tauro's concurring opinion.
[4] Tauro would have also required strict scrutiny analysis under the state's prohibition of cruel or unusual punishments. *O'Neal II*, 369 Mass. at 251.

I.B: The right to life is infringed upon when the government deliberately, premeditatedly kills a person who is being held in captivity.

Sometimes it is obvious that governmental action impairs a right. "Imprisonment, for example, obviously impairs the right to liberty." *Hodes*, 440 P.3d at 498. In the narrow circumstance presented by this case—where the State seeks to deliberately, premeditatedly kill a person who is already being held in captivity—the State necessarily infringes on Mr. Carr's right to life. See *Tennessee v. Garner*, 471 U.S. 1, 9 (1985) ("The suspect's fundamental interest in his own life need not be elaborated upon.")

I.C: The State cannot meet its burden to show that Kansas's death penalty is narrowly tailored to further a compelling state interest.

Having shown the right to life is fundamental and execution infringes on that right, this brief could end here. The burden of proof is shifted to the State, and the ordinary presumption of validity of a statute is reversed because "government infringement of a fundamental right is inherently suspect." *Hodes*, 440 P.3d at 499. Based on the posture of this case, Mr. Carr acknowledges that the State may wish to request a remand to attempt to meet its burden. But one way or another, the State must show: 1) there is a *compelling state interest* supporting the death penalty; 2) the death penalty actually *furthers* that interest; and 2) the death penalty is *narrowly tailored* to further that interest. See *Hodes*, 440 P.3d at 496-97, 502. The State will be unable to do so.

I.C.1: There are only two permissible *compelling interests* that can be furthered by the death penalty—retribution and deterrence. But retribution is not a stand-alone compelling state interest.

While this claim is raised under the Kansas constitution, the federal constitution

still limits what the State can argue is a compelling interest. See *State v. Carr*, 300 Kan. 1, 57–58, 331 P.3d 544 (2014), *rev'd on other grounds*, 136 S. Ct. 633 (2016) (State provisions must yield to the federal constitution). Further our §9 prohibition on "cruel or unusual punishment" redoubles the Eighth Amendment limitations. See *State v. Kleypas II*, 305 Kan. 224, 339, 382 P.3d 373 (2016); Kan. Const. Bill of Rts. § 9.[5]

Under the Eighth Amendment, there are only two permissible interests for the death penalty—retribution and deterrence. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). "Unless the imposition of the death penalty . . . 'measurably contributes to one or both of these goals, it "is nothing more than the purposeless . . . imposition of pain and suffering" and hence an unconstitutional punishment.'" *Atkins v. Virginia*, 536 U.S. 304, 319 (2002), citing *Enmund v. Florida*, 458 U.S. 782, 789 (1982).

But while the Eighth Amendment is the constitutional floor, the strict scrutiny this Court has required for §1 claims is more protective than the test that has been used to evaluate Eighth Amendment challenges in modern-era death penalty cases.

To be sure, *Furman* said they were the same test:

> "The concepts of cruel and unusual punishment and substantive due process become so close as to merge when the substantive due process argument is stated in the following manner: because capital punishment deprives an individual of a fundamental right (i.e., the right to life) . . . the State needs a compelling interest to justify it. . . .Thus stated the substantive due process argument reiterates what is essentially the primary purpose of the Cruel and Unusual Punishments Clause of the Eighth Amendment-i.e., punishment may not be more severe than is necessary to serve the legitimate interests of the State." (Internal citations omitted.) 408 U.S. at 359 n.141 (Marshall, J. concurring).

[5] For brevity, this brief refers to the Eighth Amendment only, but, in doing so, counsel intends to invoke the identical protections of both the Eighth Amendment *and* §9 of the Kansas Bill of Rights.

But notably, using *that* understanding of the Eighth Amendment—one that was really strict scrutiny—the U.S. Supreme Court found the death penalty was unconstitutional, as did the Massachusetts Supreme Court when considering the same idea under its state constitution. See *Furman*, 408 U.S. at 239-40 (the death penalty is cruel and unusual under the Eighth and Fourteenth Amendments); *O'Neal II*, 369 Mass. at 244–45.

In *Gregg*, though—also under a purported Eighth Amendment analysis—the U.S. Supreme Court changed tack, beginning by presuming that the death penalty was constitutional, and making the defendant prove otherwise:

> "[I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people." 428 U.S. at 175.

In *Gregg*, of course, the death penalty was found constitutional. 428 U.S. at 169.[6]

In addition to shifting the burden of proof, the Eighth Amendment makes an allowance for popular will. See *Graham v. Florida*, 560 U.S. 48, 58, (2010) (considering evolving standards of decency). As discussed above, however, by making the right to life "inalienable", the framers of the Kansas Constitution intended it to be above the whims of public opinion. As such, more strict review applies to §1 claims.

In short, while the Eighth Amendment sets a floor for §1, what constitutes a

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[6] Pre-*Hodes*, only two death-sentenced defendants have challenged the death penalty outright under the Kansas constitution. In both cases, the courts began by presuming the statute was constitutional; neither used any test approaching strict scrutiny. See *State v. Scott*, 286 Kan. 54, 87-94, 183 P.3d 801 (2008), overruled on other grounds by *State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016); *State v. Kleypas I*, 272 Kan. 894, 1045-52, 40 P.3d 139 (2001).

"compelling interest" under §1 is an independent issue. It must be considered afresh under strict scrutiny—*i.e.*, with the burden on the State to prove constitutionality. And retribution—while it might be acceptable under the Eighth Amendment—does not meet this Court's definition of a compelling state interest under §1.

A compelling interest is one that "is 'not only extremely weighty, possibly urgent, but also rare—much rarer than merely legitimate interests and rarer too than important interests.' [Citation omitted.]" *Hodes*, 440 P.3d at 493. To that end, courts have recognized that "as society has evolved and matured, the erstwhile importance of retribution as a goal of and justification for criminal sanctions has waned." *State v. Santiago*, 318 Conn. 1, 97, 122 A.3d 1 (2015), citing *Baze v. Rees*, 553 U.S. 35, 80 (2008) (Stevens, J. concurring) ("[O]ur society has moved away from public and painful retribution toward ever more humane forms of punishment.")

And retribution has never been a stand-alone compelling state interest. "While retribution may be a permissible aspect of punishment, it 'is no longer the dominant objective of the criminal law,' *Williams v. New York*, 337 U.S. 241, 248 . . . (1949), and it cannot act as the sole justification for a particular penalty. [Citation omitted.]" *O'Neal II*, 369 Mass. at 262. "[I]t is incompatible with the dignity of an enlightened society to . . . justify the taking of life for purposes of vengeance." *Anderson*, 6 Cal. 3d at 651.

Retribution is, likewise, incompatible with the fundamental right to life set out in §1. In *Hodes*, this Court recognized the importance the framers put on the right to life, listing it first in the natural rights protected. 440 P.3d at 492. To that end, deterrence is, at least, a valid compelling state interest with the goal of saving lives. But the same cannot

be said of retribution. Retribution does not bring back the victim of the murder committed. It does not prevent future murders. When a state executes one of its citizens, it only adds to the loss of life. As such, while it may be a byproduct of the death penalty, retribution cannot act as a stand-alone compelling state goal.[7]

I.C.2: The State cannot prove that the death penalty *furthers* deterrence or retribution in any way.

If the State is to meet its burden, it must show, not only a compelling interest, but that the death penalty actually furthers that interest. *Hodes*, 440 P.3d at 502.

I.C.2.a: The State cannot meet its burden to prove that the death penalty furthers deterrence of murders in any way.

At the time of *Gregg*, the U.S. Supreme Court could not say whether the death penalty had a deterrent impact. 428 U.S. at 184-85 (statistical attempts to evaluate the worth of the death penalty are inconclusive). More recently, in a concurring opinion, Justice Stevens noted that "[d]espite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders." *Baze*, 553 U.S. at 79. In his dissent in *Glossip v. Gross*, 135 S.Ct. 2726, 2768 (2015), Justice Breyer cites to a study by the National Research Council of the National Academy of Sciences ("NRC"), which found "that research . . . on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of

[7] For the sake of argument, this brief addresses both deterrence and retribution, but maintains that retribution is not a compelling state interest, and the State must show that the death penalty deters murder to prevail.

the death penalty on homicide." NRC, *Deterrence and the Death Penalty*, The National Academies Press (2012), at 2. After over 40 years of the modern death penalty then, the *best* case for the State is that we don't know if the death penalty works to deter murder.

But there is evidence that it does not. Even if one disregards the NRC warning that murder rates are not a valid yardstick for the efficacy of capital punishment, U.S. Census Bureau and FBI statistics show that non-death penalty states actually have lower murder rates than death penalty states. See Death Penalty Information Center ("DPIC"), *Murder Rate of Death Penalty States Compared to Non-Death Penalty States*, https://deathpenaltyinfo.org/facts-and-research/murder-rates/murder-rate-of-death-penalty-states-compared-to-non-death-penalty-states (last visited August 14, 2019) (showing murder rates averaging 4 to 44% higher in death-penalty states).

In fact, a nationwide study comparing state murder rates from 1973 to 1984 concluded that states with the death penalty have higher homicide rates than those without. Peterson & Bailey, *Murder and Capital Punishment in the Evolving Context of the Post-Furman Era,* 66 Soc. Forces 774, 784 (1988). And some studies have documented an increase in homicide rates coinciding with reinstatement of the death penalty. Thomson, *Effects of an Execution on Homicides in California,* 3 Homicide Studies 129 (1999) (increase in homicides in L.A. after California reinstated in 1992); Bailey, *Deterrence, Brutalization and the Death Penalty: Another Examination of Oklahoma's return to Capital Punishment,* 36 Criminology 711 (1998) (significant increase in stranger killings after Oklahoma reinstated in 1989).

In 2004, the Death Penalty Advisory Committee of the Kansas Judicial Council

("2004 Judicial Council Committee") studied "[w]hether there are any recent studies indicating the deterrent effect of the death penalty; what does the social science literature indicate with respect to deterrence[.]" Report of the Kansas Judicial Council Death Penalty Advisory Committee on Certain Issues Related to the Death Penalty (November 12, 2004) ("*2004 Report*"), at 2.[8] The committee found that "[d]espite the existence of studies that show a deterrent effect to the death penalty, the overwhelming mass of research on the subject concludes [there is] no deterrent effect." *2004 Report* at 21. "Crime statistics generally support . . . that the death penalty is not a deterrent. A 2000 New York Times article highlighted that in the last 20 years, homicide rates in death penalty states have been 48% to 101% higher than in non-death penalty states." *2004 Report* at 22. "The social science community generally agrees that the death penalty does not have a general deterrent effect on would-be murders." *2004 Report* at 4.

Of course, the presence of a death penalty is just one factor that goes into a state's murder rate, but, if the State's rationale for having a death penalty is to deter murder, the State must, at the least, show some positive correlation. None exists.

And, as will be discussed further below, the real question for deterrence is not whether the death penalty deters in the abstract, but whether it deters more than life without parole. See *Furman*, 408 U.S. at 303 (Brennan, J. concurring). Given that it does not, and incorporating the other arguments as to narrow tailoring below, the State cannot meet its burden to show the Kansas death penalty furthers the state interest of deterrence.

[8] This report can be found on the Kansas Judicial Council website in the "Studies and Reports" section, under the year 2004, designated November 2004.

I.C.2.b: The State cannot meet its burden to prove that the death penalty furthers the state interest of retribution.

I.C.2.b.i: Retribution is not measurable.

While Kansas's formulation of strict scrutiny requires a statute to "further" a compelling state interest, the Eighth Amendment (a floor here, also) requires that a death penalty statute "measurably contribute" to a state's retributive goals. Compare *Hodes*, 440 P.3d at 502 with *Atkins*, 536 U.S. at 319. Regardless of the formulation, it is difficult to see how the State can prove that a law either "furthers" or "measurably contributes" to a compelling interest if progress towards that interest cannot be objectively evaluated.

To that point, the question of whether the death penalty furthers retribution suffers from the conceptual problem that retribution is not measurable, *i.e.*, "no assessment of the degree of punishment necessary to effect retribution is possible." *O'Neal II*, 369 Mass. at 244–45. "Unlike with deterrence, the retributive value of an execution defies easy definition and quantification, shrouded as retribution is in metaphysical notions of moral restoration and just deserts." *Santiago,* 318 Conn. at 102.

In addition to *what* is being measured, the State must also answer *who* we are looking to in determining if retribution is being furthered. "[T]he most tangible retributive fruit of capital punishment [is] providing victims and their families with a sense of respite, empowerment, and closure . . . ." *Santiago*, 318 Conn. at 102. But not all victims' families find closure when death is sought. See, *e.g.*, Armour & Umbreit, *Ultimate Penal Sanction and Closure for Survivors of Homicide Victims*, 91 Marq. L.

Rev. 381, 424 (2007) (discussing the complicated nature of "closure"); see also *Hearing on HB 2282 Before the House Comm. On Corrections and Juvenile Justice*, February 19, 2019, Attachments #3, #26 (opposition to the death penalty by family members of murder victims). Further, "the capital punishment process often creates a second victimization of survivors. They must contend with repeated reminders about the murder during the protracted proceedings in which the death penalty's implementation is—usually unsuccessfully—sought." *Santiago*, 318 Conn. at 102, citing Tabak & Lane, *The Execution of Injustice: A Cost and Lack–of–Benefit Analysis of the Death Penalty*, 23 Loy. L. Rev. 59, 129 (1989). "Psychologically, the capital punishment system . . . may impede the healing process. [Citation omitted.]" *Santiago*, 318 Conn. at 102.

In order for the State to even begin to meet its burden to prove that retribution is furthered by the death penalty, it must come up with an answer to these very basic problems of measurability. Until it does, there is no way for the State to objectively show that the death penalty furthers the state interest of retribution.

I.C.2.b.ii: Retribution will always be tied to whatever the "worst" punishment is, so the death penalty is not necessary to prevent vigilantism.

Even assuming retribution could be measured, it will always be subject to scale based on what the worst lawful punishment is. The State will likely argue the death penalty is necessary because we must punish the worst crimes with the worst punishments to avoid vigilante justice. See *e.g. State v. Moeller*, 1996 S.D. 60, ¶ 106, 548 N.W.2d 465 (1996), citing *Gregg*, 428 U.S. at 183-84 (death penalty is "essential in [a] . . . society that asks . . . citizens to rely on legal processes rather than self-help to vindicate .

. . wrongs.") But we already *don't* punish the worst crimes with the "worst" punishments.

In colonial America, capital punishment was carried out by methods such as "flogging to death" and "breaking on the wheel". *Santiago*, 318 Conn. at 32. Historical cases relate prisoners being "dragged to the place of execution . . . embowelled alive, beheaded, and quartered . . . . Mention is also made of public dissection . . . and burning alive . . . ." *Wilkerson v. State of Utah*, 99 U.S. 130, 135 (1878).

If retribution required that the worst punishments really be used for the worst crimes, those punishments would still be permissible today. That they are not shows that these "worst" punishments are not necessary to further any interest the State might have in retribution. "'[G]rading punishments according to the severity of the crime does not require that the upper limit of severity be the death penalty.' [Citation omitted.]" *O'Neal II*, 369 Mass. at 261. "[L]ife imprisonment without . . . parole is itself a severe sanction . . . ." *Roper v. Simmons*, 543 U.S. 551, 572 (2005).

Further, in the 21 states with no death penalty and the 4 states with governor imposed moratoriums, the governments manage to maintain order and justice without a death penalty, just as Kansas did from 1872 to 1935 and from 1972 to 1994. See ABA'S Criminal Justice Section, The State of Criminal Justice 2019 at 232, 240 ("*Justice 2019*"). In the 6 additional states that have not carried out an execution in the past 10 years, the governments—Kansas among them—manage to maintain order and justice without an active death penalty. DPIC, *States With No Recent Executions*, https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions (last visited July 17, 2019). And, as cited above, not only do the non-death

penalty states manage to maintain law and order, they do so with lower murder rates than states that have a death penalty. Any claim that we need a death penalty to further lawful retribution and prevent vigilantism is without merit.

I.C.2.b.iii: Retribution is not adequately tied to culpability in our current Kansas death penalty system and is not meted out quickly enough to further the State's purported goal.

Lastly, to further retribution, "'. . . a criminal sentence must be directly related to the personal culpability of the criminal offender.' [Citation omitted.]" *Graham*, 560 U.S. at 71; See also *Roper*, 543 U.S. at 568 ("Capital punishment must be limited to those offenders . . . whose extreme culpability makes them 'the most deserving of execution.'") For reasons that will be further discussed below in regards to narrow tailoring, retribution is not furthered because we don't punish the most culpable people and we don't punish them swiftly. Incorporating the arguments below, the State cannot meet its burden to prove the death penalty furthers retribution.

I.C.3: Because life without possibility of parole would serve the State's goals just as well, and because it is arbitrary and discriminatory, the State cannot prove that the Kansas death penalty is *narrowly tailored* to further deterrence and retribution.

To pass strict scrutiny review, our death penalty statute must also be narrowly tailored to further a compelling state interest. *Hodes*, 440 P.3d at 493. Whether the Kansas death penalty is narrowly tailored to further deterrence and retribution depends on whether there are less intrusive means to serve those goals. If the State "can achieve the same ends through constitutional means," the statute is not narrowly tailored. *State v. Ryce*, 303 Kan. 899, 963, 368 P.3d 342 (2016). See also *Eisenstadt v. Baird*, 405 U.S. 438, 447 n. 7 (1972) (if a statute impinges upon fundamental freedoms the statutory

classification must be "*necessary* to the achievement of a compelling state interest") (emphasis added); *O'Neal II*, 369 Mass. at 245 ("if there is an alternative means by which the State can fulfil its purpose, having less adverse effects on fundamental constitutional rights, the State is required to use the less restrictive, more precisely adapted means.").

Also relevant to the inquiry is whether the enactment actually works to serve the interest. "A regulation must further the identified state interest that motivated the regulation not merely in theory, but in fact." *Hodes*, 440 P.3d at 511 (Biles, J. concurring, quoting *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 239-240 [Iowa 2018]); *Ernest v. Faler*, 237 Kan. 125, 138, 697 P.2d 870 (1985) (statute found unconstitutional because "the legislative means selected does not have a real or substantial relation to the objective sought."); *Furman*, 408 U.S. at 242 (1972) (Douglas, J. concurring) ("The generality of a law inflicting capital punishment is one thing. What may be said of the validity of a law on the books and what may be done with the law in its application do, or may, lead to quite different conclusions.")

I.C.3.a: Kansas' death penalty is not narrowly tailored because the death penalty is no more effective than life without parole to further the State's interests.

In *Furman*, the U.S. Supreme Court found the death penalty, as administered at that time, unconstitutional under the Eighth Amendment. 408 U.S. at 238. Although the specific issue before that court concerned cruel and unusual punishment, the court employed an analytical framework similar to the strict scrutiny used in *Ryce:* "If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted . . . the punishment inflicted is unnecessary and therefore

excessive." *Furman*, 408 U.S. at 279 (Brennan, J. concurring). "[T]he question to be considered is not simply whether capital punishment is a deterrent, but whether it is a better deterrent than life imprisonment." 408 U.S. at 346–47 (Marshall, J. concurring).

I.C.3.a.i: The State cannot prove that the death penalty is a better deterrent to murder than life without parole.

"Despite many studies conducted over the past fifty years, no evidence has been found to support the hypothesis that the death penalty deters the commission of crimes more effectively than life imprisonment." Bentele, *Does the Death Penalty, by Risking Execution of the Innocent, Violate Substantive Due Process?* 40 Houston L. Rev. 1359, 1381 (Spring 2004). See, Radelet & Lacock, *Do Executions Lower Homicide Rates: The Views of Leading Criminologists,* 99 J. Crim. L. & Criminology 489, 489-490 (2008-2009) ("The findings demonstrate an overwhelming consensus . . . that the death penalty does not add deterrent effects to those already achieved by long imprisonment.").

In *Furman*, Justice Brennan proposed reasons for the lack of deterrent effect:

> "Proponents of [the death penalty] necessarily admit that its validity depends upon the existence of a system in which . . . death is invariably and swiftly imposed. Our system, of course, satisfies neither condition. A rational person contemplating a murder or rape is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future. The risk of death is remote and improbable; in contrast, the risk of long-term imprisonment is near and great. In short, whatever the speculative validity of the assumption that the threat of death is a superior deterrent, there is no reason to believe that as currently administered the punishment of death is necessary to deter the commission of capital crimes." *Furman*, 408 U.S. at 302 (Brennan, J. concurring).

The conditions that led Justice Brennan to find that the death penalty was not a superior deterrent to imprisonment—infrequent use and lengthy delays before execution—continue to exist today. Both executions and new death sentences remain

near historic lows in the United States, with sentences and executions concentrated heavily in a few southern states. *Justice 2019* at 231-33, 235-36.

Kansas reflects the nationwide trend of declining execution rates. It is one of 31 states that have either abolished the death penalty completely, or have not carried out an execution in at least 10 years. DPIC, *States With No Recent Executions*, https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions (last visited July 16, 2019). In fact, Kansas has had no executions since reinstatement in 1994, and no new death sentences imposed since May 18, 2016. See Kansas Department of Corrections ("KDOC"), *Capital Punishment Information*, https://www.doc.ks.gov/newsroom/capital (last visited July, 26, 2019).

"Death row prisoners in the U.S. typically spend more than a decade awaiting execution. Some prisoners have been on death row for well over 20 years." DPIC, *Time on Death Row*, https://deathpenaltyinfo.org/death-row/conditions-on-death-row/time-on-death-row (last visited July 16, 2019). Statistics from the U.S. Department of Justice Bureau of Justice Statistics show that the average time between sentencing and execution increased from 74 months in 1984 to 186 months—or 15.5 years—in 2013. Bureau of Justice Statistics, *Capital Punishment, 2013-Statistical Tables*, Table 10, p. 14.[9]

Kansas follows this trend. Gary Kleypas was imprisoned under a sentence of death on March 11, 1998, more than 20 years ago. Reginald and Jonathan Carr were imprisoned on November 15, 2002, almost 17 years ago. John Robinson on January 21,

[9] All cited Bureau of Justice statistics can be found on the Bureau of Justice website in the corrections section, under capital punishment.

2003, 16 years ago. Sidney Gleason on August 28, 2006, 13 years ago. See Kansas Legislator Briefing Book, 2019, sec. G-4. Because Kansas has yet to execute anyone under the current statute, "the average time between sentencing and execution in this State is currently incalculable. Despite this court's recent efforts . . . nothing suggests that Kansas will beat the national average . . . in the foreseeable future." *State v. Robinson*, 303 Kan. 11, 354, 363 P.3d 875 (2015) (Johnson, J. dissenting).

In short, in the United States, and Kansas as well, "[a] rational person contemplating a murder or rape is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future. The risk of death is remote and improbable; . . . the risk of long-term imprisonment is near and great." *Furman*, 408 U.S. 302 (Brennan J. concurring). As a result, for the rare capital murderer who contemplates the possible penalties if they are caught, if the risk of life without parole is no deterrent, it is unrealistic to believe the risk of execution is either.

The State cannot prove that the death penalty is a superior deterrent to life without parole. As such, our laws imposing the death penalty for capital murder are not narrowly tailored to serve deterrence and cannot pass the strict scrutiny review required for a law infringing the fundamental constitutional right to life.

I.C.3.a.ii: The State cannot prove that the death penalty serves the goal of retribution better than a sentence of life without parole.

Assuming retribution is a compelling state interest, the 21 states with no death penalty have found that retribution can be adequately served by life imprisonment. Likewise, for a majority of its own history, Kansas has found that retribution is

adequately served without executions. And, even within Kansas today, prosecutors do not seek the death penalty in every capital case. As noted in 2004, in the 10 years prior:

> "Of the 54 defendants charged with capital murder only **14** defendants or **25%** actually went to trial on those charges. The remaining **40** defendants or **74%** negotiated with prosecutors for sentences less than death, were tried on non-capital charges, or have cases pending." *2004 Report* at 14.

If prosecutors believe that justice can be served in 74% of capital murder cases by imprisonment, such that they are willing to negotiate pleas in those cases, it would seem to reflect their judgment that retribution can be adequately served without an execution. And, in fact, prosecutors have said that even more explicitly.

In 2017, the Kansas County and District Attorneys Association incorporated 2014 testimony by Johnson County District Attorney Steve Howe into their own legislative testimony. After touting the usefulness of the death penalty as leverage to obtain guilty pleas in return for life without parole, Mr. Howe stated, "In addition to avoiding the costs of four trials and the appeals process, [the plea bargains for life without parole have] provided relief and finality to the victim's families." *See Hearing on HB 2167 Before the House Comm. On Corrections and Juvenile Justice*, February 13, 2017, Attachment #32.

> "When the overwhelming number of criminals who commit capital crimes go to prison, it cannot be concluded that death serves . . . retribution more effectively than imprisonment. The asserted public belief that murderers and rapists deserve to die is flatly inconsistent with the execution of a random few. As the history . . . shows, our society wishes to prevent crime; we have no desire to kill criminals simply to get even with them." *Furman*, 408 U.S. at 304–05 (Brennan J. concurring).

And "[i]f capital crimes require the punishment of death in order to provide moral reinforcement for the basic values of the community, those values can only be undermined when death is so rarely inflicted . . . ." *Furman*, 408 U.S. at 303 (Brennan J.

concurring). Just as the long delay between sentencing and execution renders the death penalty ineffective as a deterrent, it renders it ineffective as a method of retribution.

Connecticut's Supreme Court has agreed that delays eliminate any retributive effect. In a description of Connecticut's death row that sounds remarkably similar to that of Kansas, the Connecticut court said,

> "The second reason the death penalty has lost its retributive mooring in Connecticut is that the lengthy . . . delays . . . do not just undermine the death penalty's deterrent effect; they also spoil its capacity for satisfying retribution. . . . Of the eleven individuals awaiting execution in Connecticut, four have been there for more than twenty years, and several others for well over one decade. Nor is there any reasonable probability that anyone will be executed in this state for many years to come, given the availability of various appellate and postconviction remedies…" *Santiago*, 318 Conn. at 99–100. (Internal quotation marks and citations omitted.)

The court also observed that "[a]fter such lengthy delays, scholars have questioned whether there can be any true retribution when the middle aged inmate who goes to the gallows bears little resemblance to the individual who offended years before." 318 Conn. at 101. See also *Valle v. Florida,* 564 U.S. 1067 (2011) (Breyer, J. dissenting from the denial of stay of execution) ("I would ask how often [the] community's sense of retribution would forcefully insist [on] a death that comes only several decades after the crime was committed"); *Coleman v. Balkcom,* 451 U.S. 949, 960 (1981) (Rehnquist, J. dissenting from the denial of certiorari) ("[t]here can be little doubt that delay in the enforcement of capital punishment frustrates the purpose of retribution").

The death penalty can serve no retributive interest until it is carried out, and among the few who receive sentences of death in the United States, most are not executed. In 2016, ninety inmates were "removed from under sentence of death" in the

United States. Fifty-one of those inmates were "removed" as the result of courts overturning their convictions, sentences, or the capital punishment statute in their jurisdiction. Twenty of those inmates were "removed" by execution and almost as many–nineteen–were "removed" by death from natural causes. Bureau of Justice Statistics, *Statistical Brief, Capital Punishment, 2016,* Table 3, p. 5. So, in the case of the inmates whose convictions and death sentences had not been vacated due to judicial review, half those sentences were, in effect, commuted to life sentences without parole.

Here in Kansas, Douglas Belt was sentenced to death for capital murder on November 17, 2004, and died in prison on April 13, 2016. Frazier Cross, sentenced on November 10, 2015, is 78 years old. John Robinson, sentenced on January 21, 2003, is 75 years old. Gary Kleypas, sentenced on March 11, is 64 years old. James Kahler, sentenced on October 11, 2011, is 56 years old. See KDOC, *Capital Punishment Information*, https://www.doc.ks.gov/newsroom/capital (last visited July, 26, 2019). None of these men have exhausted their judicial remedies and, "nothing suggests that Kansas will beat the national average on death penalty delays in the foreseeable future." *Robinson*, 303 Kan. at 354 (Johnson, J. dissenting). It is unlikely that Belt will remain the only Kansas inmate "removed from under sentence of death" by natural causes.

In summary, most capital cases in Kansas are resolved by pleas to life imprisonment. Among the few that go to trial and result in death sentences, if Kansas follows national trends, this Court can anticipate that more than half will be "removed" through judicial decisions, and—among those remaining on death row—there will be as many natural deaths as deaths by execution. Those who reach the execution chamber will

likely be decades older than they were when they committed their crimes. The event of execution is so attenuated from the offense as to render it meaningless as retribution.

Under these conditions, the State cannot demonstrate that the death penalty is superior to life without parole as a means of retribution. Our death penalty statute is therefore not narrowly tailored to serve retribution and cannot pass the strict scrutiny review required for a law infringing the fundamental constitutional right to life.

I.C.3.b: Kansas' death penalty is not narrowly tailored because it is imposed in an arbitrary and discriminatory manner.

I.C.3.b.i: An arbitrary death penalty is not narrowly tailored to serve either deterrence or retribution. Where similar crimes are treated differently and the county a person lives in determines who will be sentenced to death, the death penalty is arbitrary.

In *Furman*, all five concurring justices agreed that the arbitrary imposition of the death penalty rendered it unconstitutional. Joining Justices Brennan and White who found the threat of the death penalty too "remote and improbable" and "attenuated", respectively, to further either deterrence or retribution, Justice Douglas cited the "uncontrolled discretion of judges or juries," in finding death penalty statutes "…unconstitutional in their operation." 408 U.S. at 253, 256, 302, 313. He added, "They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." 408 U.S. at 256–57 (Douglas J. concurring). Justice Marshall shared the concern about the discriminatory use of the death penalty:

> "[I]t has been said that '(i)t is usually the poor, the illiterate, the underprivileged, the member of the minority group-the man who, because he is without means, and is defended by a court-appointed attorney-who becomes society's sacrificial lamb[]'

> Indeed, a look at the bare statistics regarding executions is enough to betray much of the discrimination. A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape. It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population." 408 U.S. at 364.

And finally, Justice Stewart famously declared:

> "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race… I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." 408 U.S. at 309–10 (Stewart, J. concurring). See also, *State v. Gregory*, 192 Wash. 2d 1, 5, 427 P.3d 621 (2018) (arbitrary death penalty failed to serve legitimate penological goals).

Even Kansas' modest experience with the death penalty demonstrates the arbitrariness of its lightning strikes.

Scott Cheever was sentenced to die for killing a law enforcement officer who was trying to arrest him on outstanding warrants. Cheever was hiding in an attic and shot as the officer mounted the steps. *Cheever*, 295 Kan. at 233-234. Jeffery Hebert was sentenced to life imprisonment for killing a law enforcement officer who was trying to arrest him after he escaped from county jail. Hebert was hiding in an attic and shot as the officer mounted the steps. *State v. Hebert*, 277 Kan. 61, 63–64, 82 P.3d 470 (2004).

Sidney Gleason was sentenced to death for killing two people during the course of one evening. *State v. Gleason*, 299 Kan. 1127, 1133, 134, 329 P.3d 1102 (2014), *rev'd*

sub nom. Kansas v. Carr, 136 S. Ct. 633 (2016). Darrell Stallings was sentenced to life imprisonment for killing five people—one of them 8 months pregnant—in the course of one evening. *State v. Stallings*, 284 Kan. 741, 741–42, 163 P.3d 1232 (2007); *State v. Harris*, 284 Kan. 560, 562–64, 162 P.3d 28 (2007) (recounting the facts).

Justin Thurber was sentenced to death for the kidnapping and murder (with an associated sexual offense) of a 19-year-old victim. *State v. Thurber*, 308 Kan. 140, 143, 420 P.3d 389 (2018). Elgin Ray Robinson, Jr. was sentenced to life imprisonment for the kidnaping, rape, and murder of a 14-year-old victim, who was 9 months pregnant at the time of her death. *State v. Robinson*, 293 Kan. 1002, 1006, 270 P.3d 1183 (2012). See also *State v. Davis*, 306 Kan. 400, 403, 408, 394 P.3d 817 (2017) (death not imposed for rape, kidnapping, and murder of an 8-year-old victim).

Justice White noted that "the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Furman*, 408 U.S. at 313 (White, J. concurring). This remains the case in Kansas, as it is impossible to distinguish why, for example, Cheever was deemed more deserving of death than Hebert for the same offense committed under almost identical circumstances, or why a jury extended mercy to Stallings, with 5 victims, and not to Gleason, with 2 victims.

Cheever and Hebert were tried in different counties, as were Stallings and Gleason. While the location of a murder has no bearing on the culpability of the offender, it has a great effect on the likelihood of a death sentence. As Justice Breyer, joined by Justice Ginsburg, said in dissent in *Glossip v. Gross*, 135 S. Ct. 2726, 2761–62 (2015):

> "Geography also plays an important role in determining who is sentenced to death. . . . And that is not simply because some States permit the death penalty while others do not. Rather *within* a death penalty State, the imposition of the death penalty heavily depends on the county in which a defendant is tried. Between 2004 and 2009, for example, just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide. And in 2012, just 59 counties (fewer than 2% of counties in the country) accounted for *all* death sentences imposed nationwide.
>
> "What accounts for this county-by-county disparity? Some studies indicate that the disparity reflects the decision making authority, the legal discretion, and ultimately the power of the local prosecutor.
>
> "Others suggest that the availability of resources for defense counsel (or the lack thereof) helps explain geographical differences.
>
> "Still others indicate that the racial composition of and distribution within a county plays an important role.
>
> "Finally, some studies suggest that political pressures, including pressures on judges who must stand for election, can make a difference." (Internal citations omitted.)

Once again, the Kansas experience mirrors the national experience.

> "In potential capital cases, capital charges are brought relatively uniformly throughout the state. But there is a geographic disparity in whether these capital charges are brought to trial. Based on the two counties with the most potential capital cases, Wyandotte and Sedgwick, it is obvious that a capital defendant in Sedgwick County is much more likely to proceed to trial than one in Wyandotte County. **Thus, a capital defendant in Sedgwick County is also much more likely to receive a death sentence than a capital defendant in Wyandotte County.**" *2004 Report* at 4. (Emphasis added.)

The 2004 Judicial Council Committee reviewed statistics from Wyandotte and Sedgwick County because those two counties "historically have the most potential for charged capital crimes and they are indicative of the inconsistency in the way capital crimes are handled throughout the state." *2004 Report* at 4. The report stated:

> "According to BIDS . . . Sedgwick County has had 17 potential capital crimes

since 1994. Wyandotte has had 25 potential capital crimes in the same time period. Of those crimes, Sedgwick has charged 8 of the 17 defendants with a capital crime, while Wyandotte has charged 15 of the 25 defendants with a capital crime. These numbers are roughly consistent with the overall state trend of approximately 64 percent of the potential capital crimes being charged as capital crimes (54/84).

"The inconsistency, however, lies in the bringing of the defendant to trial and the resulting death sentence itself. In Sedgwick County, all of the capitally charged defendants were brought to trial (8/8), while Wyandotte County brought less than one-fifth of the same defendants to trial (2/15). A capital defendant in Sedgwick County is much more likely to go to trial than a capital defendant in Wyandotte County. Similarly, **in Sedgwick County, 71 percent (5/7) of the capital trials ended in a death sentence. None of the cases in Wyandotte County ended in a death sentence. Thus, of the potential capital crimes in each county, 29 percent of the Sedgwick defendants were sentenced to death (5/17), while not one of the Wyandotte defendants was sentenced to death (0/25).**" *2004 Report* at 9-10. (Emphasis added.)

"It is generally agreed 'that punishment should be directly related to the personal culpability of the criminal defendant.'" *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988) quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J. concurring). However, it is clear that in Kansas, as well as nationwide, the imposition of the death penalty is more a function of the prosecuting jurisdiction than the personal culpability of the defendant. A death sentence that is not directly related to the personal culpability of the defendant serves neither the goal of deterrence nor the goal of retribution. *Enmund*, 458 U.S. at 798–801. The arbitrary imposition of the death penalty in Kansas renders it ineffective as a means of deterrence or retribution and thus the State cannot prove that the death penalty statute is narrowly tailored to serve those interests.

I.C.3.b.ii: A discriminatory death penalty is not narrowly tailored to serve either deterrence or retribution. Where the death penalty is disproportionately reserved for those who kill white victims, the death penalty is discriminatory.

As noted above, the racially discriminatory imposition of the death penalty was of

great concern to two of the concurring *Furman* justices. And that racial discrimination is still present today, as noted by many experts on the subject:

> "**Examinations of the relationship between race and the death penalty . . . have now been conducted in every major death penalty state. In 96% of these reviews, there was a pattern of either race-of-victim or race-of-defendant discrimination, or both.** The gravity of the close connection between race and the death penalty is shown when compared to studies in other fields. **Race is more likely to affect death sentencing than smoking affects the likelihood of dying from heart disease.**" DPIC, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/the-death-penalty-in-black-and-white-who-lives-who-dies-who-decides (last visited July 15, 2019). (Emphasis added.)
>
> "A meta-analysis of studies published prior to 1990 conducted by the United States Government Accountability Office . . . found 'a pattern of evidence indicating racial disparities in the charging, sentencing and imposition of the death penalty after the *Furman* decision.' **Studies published during this period consistently reported that defendants convicted of killing Whites were more likely to be sentenced to death** than other defendants, over and above any differences in case characteristics. . . .
> "More recent studies report similar findings. . . . Specifically, **most studies find that defendants convicted of killing Whites are significantly more likely to receive a death sentence than others, even after controlling for a wide range of legal and extra-legal factors that may also influence outcomes in capital cases**." Beckett & Evans, *Race, Death, and Justice: Capital Sentencing in Washington State, 1981-2014*, 6 Columbia Journal of Race and Law 77, 84-85 (2016). (Emphasis added.) See also Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 Houston Law Rev. 807, 814 (2008) ("**[A]lmost all studies suggest that death is more apt to be imposed on behalf of white victims**.")

Kansas is in line with these national studies that have concluded that the race of the victim has a "robust" influence on who receives the death penalty. "Between 1994 and 2004, 120 individuals were victims of the 84 potential capital murder cases. . . . Of the 120 victims, 77 were white, 34 were black and 10 were Hispanic. . . . Of the eight defendants who received death sentences all of their victims were White." *2004 Report* at 13. As was the case in 2004, counsel is unable to identify any non-white victims of the

ten men currently under death sentence in Kansas.

"The fact that a white prosecutor or a white juror may be more troubled by the death of a white victim than of a black or Hispanic victim may be psychologically explicable, but it is not morally defensible. It should not be the basis on which we decide who lives and who dies." *Santiago*, 318 Conn. at 165; See also *Gregory*, 192 Wash. 2d at 5 (state's death penalty invalid because it was imposed in a racially biased manner). "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 481 U.S. 137, 149 (1987). For the death penalty to serve any deterrent or retributive purpose it cannot be reserved for those who kill only white victims, as it currently is in Kansas.

I.C.3.b.iii: The death penalty is also discriminatory when it is disproportionately imposed upon people who are severely mentally ill. The execution of severely mentally ill people fails to serve either deterrence or retribution.

"Mental Health America estimates that at least 20% of people on death row have a severe mental illness. However . . . precise statistics are not available, so it remains difficult to determine exactly how many capital defendants live with a severe mental illness." ABA Death Penalty Due Process Review Project White Paper, *Severe Mental Illness and the Death Penalty*, 16, (2016) ("*ABA Severe Mental Illness*").[10] A study of the social histories of one hundred offenders executed in the United States prior to the conclusion of the study found: "Over half (fifty-four) of the . . . offenders had been diagnosed with or displayed symptoms of a severe mental illness. Six defendants were

[10] This white paper may be found on the ABA Death Penalty Due Process Review website in the "Severe Mental Illness" section.

diagnosed with schizophrenia, three with bipolar disorder, and nine with post-traumatic stress disorder. Six defendants attempted suicide during their lifetimes. These mental illnesses impair the ability to think clearly, manage emotions, make decisions, relate to others, and cause unpredictable and disorganized behavior." Smith, Cull, & Robinson, *The Failure of Mitigation?* 65 Hastings L.J. 1221, 1224, 1244 (2014).

Our Kansas experience is similar. Of the ten men currently under sentences of death, at least four have been diagnosed with severe mental illness and one showed signs of such illness during his trial. Gary Kleypas has "a history of chronic mental illness" including dissociation, psychosis, and schizophrenia. *Kleypas II*, 305 Kan. at, 236–37. James Kahler "was suffering from severe major depression at the time of the crime." *State v. Kahler*, 307 Kan. 374, 381, 410 P.3d 105 (2018), *cert. granted,* 139 S. Ct. 1318 (2019). Justin Thurber was diagnosed with bi-polar disorder, has experienced hallucinations and delusional thinking, and was "grossly delusional" when interviewed by a psychologist. Amended Appellant's Brief at 17-18, *State v. Thurber,* No. 09-102605-S, filed December 7, 2015. And Kyle Flack has been diagnosed with major depressive disorder, bipolar affective disorder, and schizoaffective disorder, manifesting in visual and auditory hallucinations, paranoia, mood swings, suicidal thoughts, and suicide attempts. Appellant's Brief at 15-17, *State v. Flack,* No. 16-115964-S, filed June 25, 2018.

Frazier Cross represented himself at trial—and, as such, was not screened for mental illness—but his behavior before the district court suggests he is also severely mentally ill. He claimed his actions were patriotic and justified because George

Washington had also killed innocent people. He testified that Jewish people were creating a humanity of ignorant "slave-drugged robots, wallowing gleefully inside the global plane plantation." Appellant's Brief at 4, 7-8, 10-11, 16, *State v. Cross*, No. 15-114919-S, filed June 27, 2017. These, and other statements as fully set out in his brief, are not the declarations of a mentally healthy person.

While the mentally ill make up a large portion of those sentenced to death, "[o]verall, people with severe mental illness contribute very little to the rate of violence, and they are much more likely to be victims of violence than perpetrators. Less than 3 to 5% of crimes involve people with mental illness as defendants . . . ." *ABA Severe Mental Illness* at 17-18. "Executing people whose disorders or disabilities significantly impair their ability to appreciate the nature of their conduct, exercise rational judgment, or conform their behavior to the requirements of the law is fundamentally inconsistent with the retributive and deterrent goals of the death penalty." *ABA Severe Mental Illness* at 6.

To serve the purpose of deterrence, the death penalty must be reserved for those who can deliberate and consider the consequences of their actions before committing murder. To serve the purpose of retribution, it must be reserved for those whose actions are not influenced by compulsions or delusions. But the Kansas experience runs counter to these principles—persons diagnosed with, or showing signs of, severe mental illness constitute at least half of Kansas' death row. The disproportionate imposition of the death penalty on people with severe mental illnesses renders the death penalty ineffective as a deterrent and inappropriate as a means of retribution.

II: The Kansas death penalty cannot survive rational basis review.

Even if this Court finds that life is somehow not fundamental under §1, all seven justices of this Court agreed with the *Hodes* dissent that, at minimum, "the people have given the State the power to act only when it does so reasonably and for the common welfare." *Hodes*, 440 P.3d at 479. This was described as "rational basis with bite,"

> "In order to be constitutional exercise of power, *every* act of our Legislature must be rationally related to the furtherance or protection of the commonwealth. . . . The people have not authorized the State to act in arbitrary, irrational, or discriminatory ways. Applying the necessary deference, a court must examine the *actual* legislative record to determine the *real* purpose behind any law in question before it can conclude the law is within the limited constitutional grant of power possessed by the State." *Hodes*, 440 P.3d at 551 (Stegall, J. dissenting).

As to the "real purpose" behind our current statute, the 1994 effort to revive the death penalty was largely driven by murder victims' families, who misguidedly believed that truncated appeals and swift executions were possible. With those, they felt the death penalty would lead to effective retribution and deterrence. For example, one person said that any death penalty discussion must include "reform to reduce the number of post-conviction appeals and the length of time they require to resolve . . . . Until speedier punishment is restored, any arguments about capital punishment as a deterrent is [*sic*] speculative at best and perhaps irrelevant." *Hearing on HB 2578 Before the House Comm. On Fed. & State Affairs*, January 25, 1994, Attachment #6.[11] Another said deterrence would happen if we executed people quickly. *Id.* at Attachment #10. And a third said 18 months was a reasonable time limit for appeals. *Id.* at Attachment #11.

[11] See also, generally, both cited hearings, which contain the bulk of the proponent testimony.

Many were also concerned that "life" sentences would not keep people in prison for life, so the death penalty was needed to deter through incapacitation. The committees heard many variations on the idea that execution would "keep *that* person from killing again". See *e.g.*, *id.* at Attachment #2, #4, #7; *Hearing on SB 473 Before the Senate Comm. On Judiciary*, February 17, 1994, Attachment #4.

Given those stated purposes for the legislation, the Kansas death penalty is too arbitrary, irrational, and discriminatory to withstand even rational basis review.

The 1994 statute was built on the idea that quick appeals were possible, and, with those, the death penalty would provide deterrence and retribution. But, as time has shown, the appeal process cannot be both fast and constitutional. With that base premise crumbled, the State's action becomes irrational. Further, in 1994, Kansas did not have life without parole. Now that we do, any deterrence rationale falls apart. See K.S.A. 21-6620 (requiring life without parole for capital murder). And, as stated above, as it is applied in Kansas, the death penalty is arbitrary and discriminatory—and cannot serve deterrence or retribution—where it is meted out based on geography, race, and mental illness.

While *Hodes* did not address who has the burden of proof for this enhanced rational basis review, typically the party challenging the statute has the burden. See *e.g.*, *Miller v. Johnson*, 295 Kan. 636, 668, 289 P.3d 1098 (2012), abrogated on other grounds by *Hilburn v. Enerpipe Ltd.*, __ Kan.__, 442 P.3d 509 (2019). Mr. Carr believes that, looking at the entirety of the arguments in this brief through the lens of the stated purposes of the 1994 statute, he has shown that the Kansas death penalty is arbitrary, irrational, and discriminatory. In the event this Court finds that Mr. Carr has not met his

burden under this Court's formulation of rational basis review, Mr. Carr respectfully requests a remand hearing so that he can make a full evidentiary showing. Even under a "rational basis with bite" test, the Kansas death penalty is unconstitutional under §1.

Conclusion

Our Kansas founders enshrined a fundamental right to life in §1 of the Kansas Bill of Rights. While it was not immediately enforceable then, the time has come for this Court to follow through with our founders' intent and its own judicial duty to uphold the Kansas Constitution. If the State is permitted to execute Mr. Carr, it will be infringing on his fundamental right to life. The State cannot justify its right to do so.

The Kansas death penalty is not narrowly tailored to further a compelling state interest. It does not deter murder. And, even assuming retribution is proper, it does not provide that either. These realities were recognized even in 1872. It is not more effective than life without parole, and it is imposed in an arbitrary and discriminatory way against people who live in certain counties, kill white victims, and are mentally ill. The idea that the death penalty could possibly further any permissible state interests was unrealistic when our current statute was enacted and has only proven more so since.

For the reasons stated above, in the alternative to the relief already requested in his prior briefs, Mr. Carr respectfully requests that this Court find the death penalty unconstitutional under §1 of the Kansas Constitution Bill of Rights, and resentence him to life without possibility of parole pursuant to K.S.A. 21-6628.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that this brief was e-mailed to Boyd Isherwood, Sedgwick County District Attorney's Office, appeals@sedgwick.gov ; and Derek Schmidt, Attorney General, ksagappealsoffice@ag.ks.gov on the 16th day of August, 2019.

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