No. 03-90198-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee,

vs.

JONATHAN D. CARR
Defendant-Appellant.

BRIEF FOR AMICI CURIAE MIDWEST INNOCENCE PROJECT, JOINED BY WITNESS TO INNOCENCE AND FLOYD BLEDSOE IN SUPPORT OF DEFENDANT-APPELLANT

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

/s/ Alice Craig
Alice Craig
Kansas Bar # 17332
1535 W. 15th Street, Rm 409
Lawrence, KS 66045
(785) 864-5571
alice.craig@ku.edu
Attorney for MIP

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STATEMENT OF INTEREST OF AMICI CURIAE

The mission of the Midwest Innocence Project (MIP) is to educate about, advocate for, and obtain and support the exoneration and release of wrongfully convicted people in a five-state area, including Kansas. In the past four years, MIP, with its partners, has represented four now-exonerated individuals in Kansas in the cases leading to their exoneration. Drawing on lessons from these and other innocence cases, MIP advocates for reforms to enhance the criminal legal system's truth-seeking functions to prevent wrongful convictions and ensure that the wrongfully convicted live to see injustices corrected.

Amicus MIP is joined in this brief by Witness to Innocence and Floyd Bledsoe.

Witness to Innocence (WTI) is a non-profit organization of exonerated death row survivors and their loved ones. Through public speaking, testifying in state legislatures, and media work, its members educate the public about wrongful convictions. WTI also provides an essential network of peer support for the exonerated, most of whom received no post-release compensation or access to reentry services. WTI offers a unique perspective on the death penalty in Kansas and America, particularly the phenomenon of sentencing innocent people to death, because its members have been personally impacted by the failures of the criminal legal system.

Floyd Bledsoe was wrongfully convicted of first-degree murder in Jefferson County, Kansas for a crime he did not commit. He was exonerated on October 20, 2015. Mr. Bledsoe has first-hand experience with the flaws in the criminal legal system in Kansas and has an interest in preventing the wrongful deaths of innocent Kansans.

ARGUMENT AND AUTHORITY

"I kept on telling them I didn't do anything." Nearly 30 years later, this is how Kansas exoneree Eddie Lowery still speaks about his wrongful conviction—a conviction that took over twenty years to correct. Hurst Laviana, *Settlement reached in wrongful conviction*, THE WICHITA EAGLE, Aug. 08, 2014. In 1982, Lowery was convicted of rape after detectives coerced him into making a false confession. National Registry of Exonerations, *Eddie Lowery*, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3394. Lowery served 10 years in prison before being paroled in 1991. Twelve years later, Lowery and his counsel secured DNA testing which excluded Lowery as the perpetrator, and his conviction was vacated. *Id.*

Lowery lost 10 years of his life in prison and ten more suffering the consequences of being on the sex offender registry for a crime he did not commit. Nothing within the criminal legal system that wrongfully convicted him can restore those years. But Lowery had the opportunity, even after completing his sentence, to seek exoneration. A death-sentenced defendant who "completes" his or her sentence—by being executed—has no such opportunity. If the right to life under Section 1 of the Kansas Constitution is to be meaningful, it must include the right to live so that we may correct wrongful convictions.

I. Death Row Exonerations Reveal An Intolerable Risk of Wrongful Execution.

The threat of executing an innocent person is not just philosophical. As of February 2021, 185 death-sentenced individuals have been exonerated, amounting to one exoneration for every nine executions. Death Penalty Information Center (DPIC), *DPIC Special Report: The Innocence Epidemic* (Feb. 18, 2021), https://deathpenaltyinfo.org/facts-and-research

/dpic-reports/dpic-special-report-the-innocence-epidemic (hereinafter DPIC Special Report). A 2013 review of those known exonerations approximated a 4.1% false conviction rate among people sentenced to death in the United States, meaning that one of every 25 people currently on death row are sentenced to death for crimes they did not commit. Samuel R. Gross, et al., "*Rate of False Conviction of Criminal Defendants Who Are Sentenced To Death*," 111 PNAS 7230, 7230 (May 20, 2014), *available at* https://doi.org/10.1073/pnas.1306417111. Another study looking at capital rape-murders in the 1980s corroborates this estimate, finding an error rate between 3.3% and 5%. D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. Crim. L. & Criminology 761, 762 (Spring 2007).

These statistics and what they portend about the execution of the innocent have not gone unnoticed by courts and commentators. The United States Supreme Court itself has recognized that a "disturbing number of inmates on death row have been exonerated." *Atkins v. Virginia*, 536 U.S. 304, 320 n.25 (2002). In a 2006 dissent joined by Justices Stevens, Ginsburg, and Breyer, Justice Souter acknowledged that wrongful convictions are both "remarkable in number" and "probably disproportionately high in capital cases." *Kansas v. Marsh*, 548 U.S. 163, 210 (2006) (Souter, J., dissenting) (noting that "these false verdicts defy correction").

Justice Stevens, too, has written extensively about the dangers the death penalty poses for innocent people, noting in a 2008 concurrence that "the irrevocable nature of the consequences is of decisive importance….The risk of executing innocent defendants can be entirely eliminated by treating any penalty more severe than [life without parole] as

constitutionally excessive." *Baze v. Rees*, 553 U.S. 35, 85–86 (2008) (Stevens, J., concurring) (internal citations omitted). More recently, in 2018, Justice Breyer noted that accumulated evidence suggests "the death penalty as it is applied today lacks requisite reliability," citing examples. *Jordan v. Mississippi,* 138 S.Ct. 2567, 2571 (2018) (Breyer, J., dissenting from the denial of certiorari).

There is no question that innocent people have been sentenced to death, and "[w]ith an error rate at trial over 4%, it is all but certain that several of the 1,320 defendants executed since 1977 were innocent." Gross et al., *False Conviction*, *supra* at 7235. Because "no process of removing potentially innocent defendants from the execution queue can be foolproof[,]" *id.*, there is only one way to ensure that innocents are not put to death in Kansas: to uphold Kansans' right to life and strike down the death penalty.

While no one can know how many executed individuals were innocent, the rate of death row exonerations coupled with the high number of executions make the execution of an innocent person very likely. Austin Sarat et al., *Innocence is Not Enough: The Public Life of Death Row Exonerations*, 9 Brit. J. Am. Legal Stud. 209, 214 (Fall 2020); *see also Furman v. Georgia*, 408 U.S. 238, 366–68 (1972) (Marshall, J., concurring) ("We have no way of judging how many innocent persons have been executed but we can be certain that there were some."). Historic examples where known innocents were executed prove the risk is not speculative. DPIC, *Posthumous Pardons*, https://deathpenaltyinfo.org/policy-issues/innocence/posthumous-pardons. In 1987, Nebraska pardoned William Jackson; Jackson had been hanged in 1887 for the murder of man who was later found alive.[1] *Id.* In

[1] Notably, when found, the victim was alive and living in Kansas. *Id.*

2009, South Carolina pardoned Thomas and Meeks Griffin; the Griffins were electrocuted in 1915 based on perjured testimony. *Id.* And in 2011, Colorado pardoned Joe Arridy, executed in 1939 by lethal gas; an "overwhelming body of evidence" supported Arridy's innocence, "including false and coerced confessions, the likelihood that Arridy was not in [town] at the time of the killing, and an admission of guilt by someone else." *Gov. Ritter Grants Posthumous Pardon in Case Dating Back to 1930s*, Office of Gov. Bill Ritter, Jr. (Jan. 7, 2011), https://files.deathpenaltyinfo.org/legacy/documents/ArridyPardon.pdf.

States have been more willing to admit to executing an innocent when the execution took place many decades ago, but a shocking number of recent executions also feature the hallmarks of wrongful convictions. ACLU, *Case Against the Death Penalty* (2012), https://www.aclu.org/other/case-against-death-penalty. The Death Penalty Information Center has identified nine persons executed **since 2015** who were likely innocent, including two who were executed only last year.[2] DPIC, *Executed but Possibly Innocent* (2020), https://deathpenaltyinfo.org/policy-issues/innocence/executed-but-possibly-innocent.

Indeed, the unavoidable risk of executing an innocent led Illinois to abolish the death penalty in 2011. While Illinois had reinstated the death penalty after the Supreme Court's decision in *Gregg v. Georgia*, by 2000, the state had exonerated more inmates than it had executed. DPIC, *Illinois* (2021), https://deathpenaltyinfo.org/state-and-federal-info/state-by-

[2] Consider just one egregious example: In 2018, Georgia executed Cartlon Michael Gary despite substantial physical evidence of innocence. DNA testing excluded Gary as the origin of semen on the clothing of a victim who identified him at trial, and a suppressed police report revealed that the victim had initially said her room was dark and she could not describe her attacker. Prosecutors consulted with an expert regarding a bite mark on a victim, but they did not call the expert after he concluded Gary could not have made the markings. Finally, size 10 shoeprints from a crime scene were suppressed because they could not have belonged to Gary, who wore size 13½ shoes. *Id.*

state/illinois. Alarmed, Illinois imposed a moratorium on executions, during which it exonerated seven additional persons on death row, for a total of twenty. *Id.* As a result, on March 9, 2011, Governor Pat Quinn signed legislation abolishing the death penalty, citing "the numerous flaws that can lead to wrongful convictions." John Schwartz and Emma G. Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, New York Times, Mar. 9, 2011, *available at* https://www.nytimes.com/2011/03/10/us/10illinois.html.

These "numerous flaws" in the criminal justice system are still present, in Kansas and elsewhere. Past examples and statistical data about the prevalence of wrongful convictions demonstrate that states have mistakenly executed innocent persons in the past, and likely continue to do so. Kansas is not immune to this risk. When the sentence is death, mistakes are irreversible. And mistakes are too frequent in the American legal system, even on death row.

II. The Risk Of Executing An Innocent Person Is Present In Kansas.

While there has yet to be an exoneration of an individual sentenced to death in Kansas, that does not mean there is not a wrongfully convicted person on death row within this state's boundaries or that this will never happen in the future. The same issues that led to the incarceration and execution of innocent individuals in other states also exist in Kansas. In fact, of the four Kansans recently exonerated with assistance from the Midwest Innocence Project and its partners, three were convicted of crimes qualifying for capital murder: Floyd Bledsoe, Lamonte McIntyre, and Olin "Pete" Coones, Jr. And all three of those convictions were obtained through state misconduct. Floyd, Lamonte, and Pete were at risk of being murdered at the hands of the very state whose misconduct led to their wrongful convictions.

A. Floyd Bledsoe

Floyd Bledsoe served over sixteen years for a crime the State knew from the beginning he had not committed. In 2000, Floyd was convicted of first-degree murder, aggravated kidnapping, and aggravated indecent liberties with a child in the shooting death of his 14-year old sister-in-law. Had the State chosen to, it could have pursued the death penalty, as the aggravated indecent liberties with a child charge made the crime eligible for a capital murder charge under K.S.A. 21-3439(7)(b).

In November 1999, just north of Oskaloosa, Kansas, the body of Floyd's sister-in-law was found under a pile of trash with two gunshot wounds. Floyd's brother, Tom, initially confessed to the brutal rape and murder, but once in jail, recanted and blamed Floyd. All of the evidence pointed to Tom: he was unaccounted for during the time the victim disappeared, the murder weapon was a gun from Tom's truck, Tom led police to the body, and he confessed not only to police, but also to his minister and his parents. Floyd had an alibi, and no physical evidence connected him to the crime. Yet the State ignored all of this, instead choosing to support Tom's jail-cell recantation and pursue charges against Floyd. At trial, the prosecution's entire case hinged on the testimony of Tom, including false testimony that Floyd had confessed to him. The jury ultimately convicted Floyd, and he was sentenced to life in prison.

After his conviction, Floyd repeatedly and consistently continued to assert his innocence in appeal after appeal. In 2004, after the Kansas Supreme Court upheld Floyd's convictions on direct appeal, a hearing was held on a K.S.A. 60-1507 motion for new trial alleging that Floyd's trial counsel provided him with a constitutionally inadequate defense

for failing to present the evidence implicating Tom. Although the motion was denied, the Kansas Supreme Court found that the prosecution had nonetheless improperly discussed facts not in evidence and misstated facts and that Floyd's defense attorney made numerous mistakes. Yet, while the court determined that Floyd's counsel's performance fell below "the constitutional threshold of objective reasonableness," it ruled that the errors were not sufficiently prejudicial.

In 2008, Floyd received temporary relief; a United States District Court judge granted Floyd's federal habeas petition on the grounds of ineffective assistance of counsel and he was released on bond while the state appealed the decision. *Bledsoe v. Bruce*, No. 07-3070-RDR, 2008 WL 2549029 (D. Kan. June 23, 2008). Tragically, a year later, the 10th Circuit Court of Appeals reversed the decision, and reinstated Floyd's conviction and sentence. *Bledsoe v. Bruce*, 569 F.3d 1223 (10th Cir. 2009). As a result, Floyd—who had already served 9 years for a crime he did not commit—returned to prison, his hope for the future unclear.

At that moment, in 2009, Floyd had exhausted all appellate avenues—direct appeal, post-conviction, and federal habeas. And had he been sentenced to death, he would have been eligible for the State to set an execution date. Had that occurred, he would not have been alive to pursue the DNA testing that ultimately proved his innocence six years later.

In 2015, Floyd was exonerated after the results of DNA testing of semen taken from the victim's vaginal swab exclude Floyd and implicated Tom. After the results of the test were known, Tom, knowing he would soon be investigated for the murder, committed suicide. In his suicide note, Tom confessed to raping and killing the victim and claimed that

the County Attorney urged him to pin the crime on Floyd. The County Attorney had "told [Tom] to keep [his] mouth shut." Tom's letter included a diagram he drew of the murder scene and details that led detectives to an empty shell casing left at the scene that had never been uncovered during the initial investigation. Tom wrote, "Floyd is innocent… tell [him] I am sorry."

At the time of Floyd's conviction in 1999, DNA testing had not advanced enough to exonerate Floyd. Methods for reliably testing "touch" DNA and small amounts of DNA evidence would not emerge until many years later. Had Floyd received the death penalty, science may have been too late to save him.

B. Lamonte McIntyre

Lamonte McIntyre similarly was convicted of a crime he did not commit because of law enforcement and prosecutor misconduct. On April 15, 1994, victims Donald Ewing and Doniel Quinn were shot and killed as they sat in a car in Wyandotte County, Kansas. *State v. McIntyre*, 259 Kan. 488, 489 (1996). No physical evidence or motive connected Lamonte to the crimes. Yet, the investigation conducted by Detective Roger Golubski was closed just six hours later with Lamonte's arrest; witness interviews lasted just 19.5 minutes.

Lamonte's conviction was the direct result of misconduct that would take another 23 years to come to light. It is now clear that for decades, Golubski terrorized poor Black women, making them submit to sexual acts through force or with threats of arrest or harm to them or their loved ones, and coercing them to fabricate evidence to close his cases. Complaint at 2, *McIntyre v. United Government of Wyandotte County*, 2020 WL 1028303 (D. Kan. Mar. 3, 2020) (2:18-cv-02545-KHV-KGG).

Lamonte's was one of those cases. *Id.* Several years before the 1994 double homicide, Golubski sexually assaulted Lamonte's mother by threatening to arrest her and her then-boyfriend. Out of fear, she moved and changed her number to get away. Later, when Golubski needed to close the double murder of Ewing and Quinn, Golubski, with the help of prosecutor Terra Morehead, framed her son, Lamonte. *Id.*

Lamonte was ultimately convicted based upon the testimony of two eyewitnesses who testified that Lamonte was the shooter. Golubksi used coercion or improper suggestion to force both of them to falsely identify Lamonte. One of those witnesses, Niko Quinn, immediately recanted, and went to Morehead to tell her that Lamonte looked nothing like the perpetrator. Morehead also threatened Niko, who ultimately succumbed and testified to support the State's false narrative. A third witness, Stacey Quinn, recognized the shooter as someone other than Lamonte, and told police and Morehead, but there is no record of any interview of Stacey; the prosecutor sent her away without ever disclosing her existence to the defense. The false and fabricated testimony of two coerced witnesses and years of misconduct from Golubski and other government officials ended in Lamonte behind bars for a crime he did not commit.

Twenty-three years later, during a 2017 post-conviction evidentiary hearing, "in the face of a cascade of evidence of police and prosecutorial misconduct, Wyandotte County District Attorney Mark Dupree abruptly rose and announced that the prosecution agreed that [Lamonte's] conviction should be vacated."[3] National Registry of Exonerations, *Lamonte*

[3] Dupree also announced, in light of Lamonte's case, he would be establishing a conviction integrity unit within his office. Roxana Hegeman, *Prosecutor Wants Probe Of KCK Detective In Wrongful Conviction*, NPR KCUR, Nov. 10, 2017, https://www.kcur.org/community/2017-11-10/prosecutor-wants-probe-of-kck-detective-in-wrongful-conviction.

McIntyre (Feb. 24, 2020), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5216.

While Lamonte is now free, the end of this case could have been very different. Had the crime occurred just a few months later, Lamonte would have been18 years old and Kansas would have reinstated the death penalty. Because this was a double murder, it would have been eligible to be charged as a capital crime under K.S.A. 21-3439(6). Given the corruption and fabrication of evidence, there is no reason to believe the prosecutor would not have sought death in this case. Like many death row exonerations, Lamonte's wrongful conviction took decades to correct, which could be far too late for the State to correct a manifest injustice.

C. Olin "Pete" Coones, Jr.

Exoneree Olin "Pete" Coones, Jr., was also a victim of official misconduct in Wyandotte County, Kansas who could have been charged with capital murder under K.S.A. 21-3439(6) and sentenced to death. National Registry of Exonerations, *Olin Coones* (updated Feb. 22, 2021), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5866. In January 2009, Coones was convicted and sentenced to 50 years to life in prison. In a bizarre plot, Kathleen Schroll killed her husband and herself, but staged their deaths to frame Coones.

Prosecutor Edmond Brancart concealed evidence of Schroll's lack of credibility and motive to lie in order to convict Coones. Schroll was in serious debt, facing imminent arrest for embezzlement, and under investigation for elder abuse against Coones' grandfather. Police had obtained 120 checks written on Coones' grandfather's account, and a handwriting

analyst testified there was "strong evidence" 115 of them were forged by Schroll; Schroll had also embezzled more than $11,000 from the credit union where she worked and the discovery of that embezzlement was imminent.

The prosecution also knowingly presented false testimony from a jailhouse informant, Robert Rupert. Rupert claimed that Coones confessed to him while they were briefly in the same jail pod. Many of the details of the "confession" did not match the evidence, and the Butler County District Attorney's Office told Brancart that Rupert was unreliable and mentally unstable. Nonetheless, Brancart threatened to jail Rupert if he didn't cooperate against Coones, and he put Rupert's false tale in front of the jury.

Following Coones' post-conviction evidentiary hearing in 2020, Wyandotte County District Judge Bill Klapper found "rife" prosecutorial misconduct: Brancart failed to disclose threats and promises he made to Rupert and Rupert's full criminal history, and he suborned perjury related to whether he'd previously interviewed Rupert.

Coones' case follows the pattern of others exonerated after a sentence of death. The testimony of jailhouse informants like Rupert are a leading cause of wrongful capital convictions. Center on Wrongful Convictions, *The Snitch System* (Winter 2004-2005), www.innocenceproject.org/wp-content/uploads/2016/02/SnitchSystemBooklet.pdf. As is the case with the State's allowance of Rupert's testimony against Coones and their suppression of exculpatory evidence, more than half of all death row exonerations involved both official misconduct *and* perjury or false accusation. DPIC Special Report, *supra*.

In November of 2020, after a re-investigation by Wyandotte County District Attorney Mark Dupree's Conviction Integrity Unity, and with the assistance of MIP and private

attorneys, Coones was exonerated after serving more than 10 years in prison. He passed away just five days ago, only 108 days after his release. Had Coones been sentenced to death, he may never have experienced freedom at all.

D. Misconduct and the Death Penalty

The death penalty is intrinsically linked to official misconduct. Of the 185 death row exonerations that have occurred since 1973, 69.2 percent (128) involved misconduct by police, prosecutors, or other government officials. DPIC Special Report, *supra*. Official misconduct was even more likely in cases involving defendants of color and cases in which exonerations took a decade or more, suggesting both a high degree of racial bias and a low degree of remorse among those responsible. *Id.* And in counties with multiple wrongful convictions, either official misconduct or perjury was present in 90.3 percent of all death row exonerations. *Id.*

Research also suggests the relationship between the death penalty and misconduct also flows the other way—simply having the death penalty as an option facilitates official behavior that increases the risk of wrongful convictions, even if the prosecutor chooses not to pursue capital charges. False confessions occur at a higher rate when the accused is threatened with death, and prosecutors frequently leverage the threat of death to secure guilty pleas. Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1062–65, 1097 (Apr. 2010); Lauren Morehouse, *Confess or Die: Why Threatening a Suspect With the Death Penalty Should Render Confessions Involuntary*, 56 Am. Crim. L. Rev. 531, 533–34 (Spring 2019). It is incredibly difficult to maintain one's innocence when, for example, officials display photos of death row, point to the location on the arm where the needle is

inserted during a lethal injection, then promise life in exchange for a confession. Morehouse, *supra*, at 538.

Johnson County District Attorney Steve Howe provided firsthand insight into the cold calculations that lead to such behavior during testimony before the Kansas legislature in 2017. After touting the usefulness of the death penalty as leverage to obtain guilty pleas in return for life without parole, Howe stated that such plea bargains helped his office "*avoid[] the costs* of four trials and the appeals process." *Hearing on HB 2167 Before the House Comm. On Corrections and Juvenile Justice*, Feb. 13, 2017, petitioner's attachment # 32 (emphasis added). This logic prioritizes efficiency over accuracy; when combined with the effectiveness of the threat of death in procuring confessions and guilty pleas, it ensures that as long as the death penalty remains a tool in the prosecutor's belt, there will be a greater risk of wrongful convictions, regardless of whether capital charges are ever filed.

Finally, because wrongful death sentences are strongly correlated with official misconduct, locations with higher rates of misconduct run a higher risk of executing an innocent.[4] In Kansas, Wyandotte County is an area of particular concern due to the pattern of misconduct revealed in Lamonte's case. Wyandotte and Sedgwick are the two counties with the most capital cases. Kansas Judicial Council, *Report of the Kansas Judicial Council Death Penalty Advisory Committee on Certain Issues Related to the Death Penalty* (Nov. 12, 2004), pgs. 9–11; Kansas Judicial Council, *Report of the Judicial Council Death Penalty Advisory*

[4] Location matters in the context of the death penalty generally, with most death sentences concentrated in only a handful of counties due to factors like the authority and discretion of the local prosecutor and political pressures on local officials. *Glossip v. Gross*, 576 U.S. 863, 918–21 (2015) (Breyer, J., dissenting). These same factors naturally have a similar influence on rates of official misconduct.

Committee (Feb. 13, 2014). And Wyandotte and Sedgwick together make up four of the thirteen exonerations in Kansas so far. National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/about.aspx. The dramatic and persistent misconduct revealed in Lamonte's case suggests the worrying probability that other, undiscovered wrongful convictions have occurred in Wyandotte County. Unless something changes, it is only a matter of time until an innocent is found on Kansas's death row. Removing the death penalty as an option is the only guaranteed way to prevent the execution of an innocent.

CONCLUSION

The stories of Floyd, Lamonte, Pete, and other survivors of wrongful convictions show—correcting a wrongful conviction requires the courage to speak truth to power, decades of effort, and perseverance in the face of endless obstacles and official misconduct. It also requires life. When an innocent is executed, there can be no remedy; the injustice is written in stone, a monument to the failures of the justice system. This cannot be allowed to happen in Kansas. The right to life under Section 1 of the Kansas Constitution must include the right to live so that the wrongfully convicted—now and in the future—can continue to seek justice and challenge the system that failed them.

Dated: March 1, 2021

Respectfully submitted,

/s/ Alice Craig
Alice Craig
Kansas Bar # 17332
1535 W. 15th Street, Rm 409
Lawrence, KS 66045
(785) 864-5571
alice.craig@ku.edu
Attorney for MIP

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing will be served on counsel for each party through the Court's electronic filing system, which will send a "Notice of Electronic Filing" to each party's registered attorney.

Kristafer Ailslieger

Sedgwick County District Attorney

Kansas Attorney General

Merl B Carver-Allmond

Capital Appellate Defender

/s/ Alice Craig
Alice Craig