No. 03-90198-S

IN THE SUPREME COURT
OF THE STATE OF KANSAS

STATE OF KANSAS,
Plaintiff-Appellee

v.

JONATHAN D. CARR,
Defendant-Appellant

APPELLEE'S SUPPLEMENTAL BRIEF

In Response to Appellant's Supplemental Brief Filed on August 16, 2019

Appeal from the District Court of Sedgwick County, Kansas
Honorable Paul W. Clark, Judge,
District Court Case No. 00CR2979

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Nature of the Case

In 2002, a jury convicted Jonathan Carr of four counts of capital murder and sentenced him to death. Defendant appealed, and the parties were last before this Court for oral arguments on May 4, 2017. In 2019, this Court decided *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 611, 440 P.3d 461 (2019). The State now responds to Defendant's supplemental briefing in light of *Hodes*.

STATEMENT OF THE ISSUE

Does the death penalty violate Section One of the Kansas Constitution Bill of Rights?

I. **Is strict scrutiny appropriate when it is inapplicable to criminal-process challenges and when imposition of the death penalty following a valid capital murder conviction does not infringe upon the fundamental right to life?**

II. **Under a proper rational basis review, is Kansas' death penalty constitutional, given that it is rationally related to the legitimate penological goals of deterrence, retribution, and incapacitation?**

STATEMENT OF FACTS

The State's prior briefing in this matter contains all relevant facts, and there are no additional facts necessary to determine the supplemental legal issue.

ARGUMENTS AND AUTHORITIES

The death penalty does not violate Section One of the Kansas Constitution Bill of Rights.

Standard of Review

Whether the death penalty is constitutional under Section One of the Kansas Constitution is a question of law over which this Court exercises unlimited review. *See State v. Gleason*, 305 Kan. 794, 807, 388 P.3d 101 (2017).

Summary of Argument

Defendant Jonathan Carr seeks relief under the first section of the Kansas Constitution Bill of Rights, which provides, "all men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of

happiness." Kan. Const. § 1. Defendant erroneously argues that in light of *Hodes*, the State must satisfy a strict scrutiny test and show that the death penalty is narrowly tailored to a compelling government interest. *Hodes* is a civil case involving the fundamental right to personal autonomy, and it has no bearing on the constitutionality of the death penalty. Rather, strict scrutiny does not apply to criminal processes, including statutorily proscribed sentences; the appropriate test is rational basis. *See Chapman v. United States*, 500 U.S. 453, 464-65, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991).

Further, strict scrutiny does not apply because imposing the death penalty after a valid capital conviction does not violate a fundamental right. This Court previously determined "that Kansas' death penalty scheme does not violate the spirit or the letter of § 1." *State v. Kleypas*, 272 Kan. 894, 1052, 40 P.3d 139 (2001), *cert. denied* 537 U.S. 834, 123 S. Ct. 144, 154 L. Ed. 2d 53 (2002), *abrogated on other grounds by Kansas v. Marsh,* 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006). To hold that the right to life bars the death penalty would "stretch the meaning of the venerable words in § 1 in the state Bill of Rights far beyond their intended purpose." *Id.*

Finally, suggesting that *Hodes* embraced a "rational basis with bite" test, Defendant argues that the Kansas death penalty cannot survive rational basis review. The State submits that *Hodes* did not utilize a rational basis test, with or without bite, and does not have any effect on this Court's ruling in *Kleypas* regarding the constitutionality of the death penalty. As such, his attempt to engage in rational

basis analysis should be rejected. In the event the Court disagrees with the State's position, Defendant cannot overcome the presumption of constitutionality or prove that the death penalty is not rationally related to the furtherance or protection of the common welfare. Defendant cites various statistics and raises numerous policy arguments, but these debates surrounding the death penalty are properly considered by the legislature. *See Gregg v. Georgia*, 428 U.S. 153, 186, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). Within the confines of Section Nine of the Kansas Bill of Rights and the Eighth Amendment to the United States Constitution, "[i]t is the legislature's prerogative to make policy decisions and specify punishments for a crime." *State v. Scott*, 265 Kan. 1, 961 P.2d 667 (1998). The Kansas death penalty is well within the applicable constitutional bounds. For these reasons, the Court should reaffirm its holding in *Kleypas* and find that the death penalty remains constitutional.

Analysis

I. Strict scrutiny is not appropriate because it is inapplicable to criminal-process challenges and because imposition of the death penalty following a valid capital murder conviction does not infringe upon the fundamental right to life.

Defendant asserts that the right to life is fundamental and that under *Hodes* the State bears the burden of proving that the death penalty is narrowly tailored to a compelling government interest. (Def. Brief at 21.) But the ultimate holding of *Hodes* is irrelevant to this case, as Defendant seeks only to apply the strict scrutiny test the *Hodes* Court used to reach its decision. With one exception, no court has applied strict scrutiny to capital punishment. This Court should follow the Supreme Court's guidance in *Chapman v. United States* and find that strict scrutiny does not

apply. In so holding, the Court should also reaffirm its prior holding in *Kleypas* that the death penalty does not violate the fundamental right to life.

A. Hodes *has no impact on the constitutionality of the death penalty.*

Extrapolating from *Hodes*, Defendant argues that strict scrutiny should apply because capital punishment infringes on a fundamental right. (Def. Brief at 21.) Defendant's interpretation misconstrues the central holding of *Hodes*, which is silent on the death penalty. In no way does *Hodes* require the State to satisfy strict scrutiny before carrying out a constitutional sentence.

In *Hodes*, medical providers challenged the constitutionality of S.B. 95, which prohibited certain abortion procedures. *Hodes*, 440 P.3d at 466-67. The Court recognized that Section One of the Kansas Constitution Bill of Rights provides men and women with natural rights. The Court found a right to personal autonomy "firmly embedded within section 1's natural rights guarantee and its included concepts of liberty and the pursuit of happiness." *Id.* at 483. Finally, the Court concluded these natural rights protect a woman's choice whether to continue a pregnancy. *Id.* at 486.

After defining the fundamental right, the Court employed strict scrutiny analysis. *Id.* at 493 (explaining this Court has recognized and adopted the three scrutiny standards generally applied to claims under the Fourteenth Amendment to the U.S. Constitution). The Court recognized strict scrutiny has been applied in cases where the government has imposed restrictions on abortions. *Id.* (citing *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), and *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973)). Rather than adopt the "undue burden"

standard from *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), which has been criticized as amorphous, the Court chose to apply strict scrutiny. *Hodes*, 440 P.3d at 494-95.

Hodes is devoid of any mention of the death penalty, or criminal processes more generally. *Hodes* does not explain or describe the right to life or its scope. And the State action at issue in *Hodes* was a legislative enactment that could potentially affect all pregnant women, whereas the death penalty is a punishment reserved only for duly convicted capital murderers. Ultimately, the strict scrutiny test employed in *Hodes* does not apply to the death penalty, and consequently, *Hodes* has no impact on Defendant's appeal.

B. Courts do not apply "fundamental rights" analysis to criminal processes.

Defendant argues the State seeks to impinge a fundamental right to life, therefore it must meet strict scrutiny. (Def. Brief at 2.) Similarly, the defendants in *Chapman* argued that the right to liberty is fundamental as a matter of due process. *Chapman*, 500 U.S. at 465. Based upon this premise, they argued their sentence could only be upheld if the government had a compelling interest for the penalty provision in question. *Id.* The Court rejected that argument and refused to apply strict scrutiny, explaining, "[W]e have never subjected the criminal process to this sort of truncated analysis, and we decline to do so now." *Id.* at 465. Instead, the Court upheld the sentencing scheme in question, finding "Congress had a rational basis for its choice of penalties." *Id.* at 465 (suggesting rational basis is the appropriate level of scrutiny).

There is sound reasoning behind this and a firm basis for rejecting Defendant's argument that strict scrutiny should apply to the death penalty. Kansas' death penalty statute does not impose an immediate infringement on the fundamental right to life any more than statutory incarceration penalties impose an immediate infringement on the fundamental right to liberty. In both instances, the statutory punishment is not imposed unless the offender takes some volitional action to violate a criminal statute.

The punishment and the criminal statute defining the prohibited conduct are inextricably intertwined. The sentence is not and cannot be imposed until the criminal statute is violated (and the offender tried and found guilty beyond a reasonable doubt). Thus, the analytical starting point is not the sentence but the criminal statute tied to the sentence. If that criminal statute does not infringe upon a fundamental right, then strict scrutiny does not apply. Here, the criminal statute that leads to the death penalty is the capital murder statute, which prohibits murder. As there is no fundamental right to murder another person, this statute—and the sentence that goes with it—is not subject to strict scrutiny.

This reasoning is consistent with this Court's recognition in *Hodes* that, "as long as an individual remains within her (or his) private domain, she may do as she pleases, provided her 'conduct does not encroach upon the rightful domain of others. As along as [her] actions remain within this rightful domain, other persons—including persons calling themselves government officials—should not interfere without *a compelling justification*.'" 440 P.3d at 492-93 (citation omitted; emphasis in

original). But, as here where an individual has gone beyond his rightful domain and plainly encroached—indeed extinguished—the rights of others, the requirement of the government to show a compelling justification to interfere with his fundamental rights no longer exists. Through his own conduct, Defendant has forfeited that protection. Indeed, as a result of his criminal conduct, Defendant has forfeited his fundamental rights to liberty and life.

This is because natural rights, while fundamental, do not relieve convicted persons of responsibility for their crimes. As the United States Supreme Court explained in *Chapman*, "Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees." 500 U.S. at 465 (citing *Bell v. Wolfish*, 441 U.S. 520, 535-36, n. 16, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)). "But a person who *has* been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual, and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment." *Id.* (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 92, n. 8, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986); *Meachum v. Fano*, 427 U.S. 215, 224, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976)). Rather than apply strict scrutiny, the Supreme Court upheld the sentencing scheme as rational. *Chapman*, 500 U.S. at 465.

Though Defendant's claim arises under the Kansas Constitution rather than federal due process, *Chapman*'s reasoning is on point, and the Court should employ it here. *See Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 920, 128 P.3d 364 (2006) (this Court customarily interprets the Kansas Constitution "to echo federal standards"). Every Kansan has a fundamental right to life, so long as the person does not engage in criminal conduct that is condemned by law and punishable by death. The Kansas legislature reinstated the death penalty in 1994. Since that time, this Court and the United States Supreme Court have upheld the death penalty under Section Nine and the Eighth Amendment. *Kansas v. Marsh*, 548 U.S. at 173 ("the Kansas capital sentencing system is constitutionally permissible"); *State v. Scott*, 286 Kan. 54, 98, 183 P.3d 801 (2008). The Kansas death penalty is not based on an arbitrary distinction that violates due process. *Scott*, 286 Kan. at 88. Thus, persons who have been convicted of capital murder beyond a reasonable doubt may constitutionally be sentenced to death.

Other than Massachusetts, no state has applied the strict scrutiny analysis Defendant pursues. Rather, our sister states and the federal District of Kansas refrain from applying strict scrutiny to criminal processes, including the death penalty. *See, e.g., State v. Alcorn*, 638 N.E.2d 1242 (Ind. 1994) ("[Appellant] argues that since he has a 'fundamental interest in life,' the classification must further a compelling state interest. We do not agree."); *State v. Nelson*, 229 Ariz. 180, 273 P.3d 632 (Ariz. 2012) (applying rational basis review); *Henderson v. State*, 962 S.W.2d 544, 561 (Tex. 1997) ("[L]ife no longer occupies the status of a fundamental right for

persons who have been convicted under the current capital murder scheme. Therefore, consistent with *Chapman*, we will review appellant's claim under the rational basis test."); *State v. Jose DeJesus*, 947 A.2d 873 (R.I. 2003) (applying *Chapman* and rational basis review to murder sentencing scheme); *Commonwealth v. Shawver*, 18 A.3D 1190, 1197 (Pa. 2011) (applying rational basis review to recidivist statutes; citing *Commonwealth v. Bell*, 512 Pa. 334, 346, 516 A.2d 1172 (Pa. 1986): "[D]efendant has no right to avoid punishment and no right to a particular punishment within the pertinent statutory range," thus, strict scrutiny was inappropriate); *United States v. Tisdale*, 2008 WL 5156426 (D. Kan. 2008) (denying fundamental right to life claim and finding "[defendant] cites only civil cases in which strict scrutiny was applicable, and fails to explain the Supreme Court cases which have specifically refused to require strict scrutiny analysis of criminal processes"); *United States v. Keller*, 2014 WL 12695942 (D. Kan. 2014) (applying rational basis review to defendant's claim that her conviction infringed upon her fundamental right to liberty).

Applying Defendant's desired strict scrutiny analysis would subject every criminal sentence and every statutorily prescribed punishment to a Section One "right to life" or "right to liberty" challenge. *See Keller*, at *2 ("Under this theory, however, every statute setting forth a crime punishable by imprisonment would evoke strict scrutiny review. The undersigned finds no authority for such a far-reaching proposal.") Instead, the Court should presume the constitutional validity of legislatively enacted sentencing schemes and uphold the death penalty as rationally

related to legitimate State interests. *Scott*, 286 Kan. at 92, ("The constitutionality of a statute is presumed."); *Chapman*, 500 U.S. at 465 (applying rational basis review); *see also McCleskey v. Kemp*, 481 U.S. 279, 298, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) (explaining "there were legitimate reasons for the Georgia Legislature to adopt and maintain capital punishment").

C. Strict scrutiny does not apply because a lawfully imposed sentence does not violate a fundamental right.

Strict scrutiny only applies when legislation burdens a suspect class or infringes upon a fundamental right. *State v. Limon*, 280 Kan. 275, 283-84, 122 P.3d 22 (2005) (citing *Farley v. Engelken*, 241 Kan. 663, 667, 740 P.2d 1058 (1987)). Defendant contends the death penalty infringes upon his Section One right to life, so the burden is on the State to show the law in question is narrowly tailored to a compelling state interest. (Def. Brief at 3.) Defendant's argument is not novel. This court previously considered such a claim and concluded, "Kansas' death penalty scheme does not violate the spirit or the letter of § 1." *Kleypas*, 272 Kan. at 1052. Because the death penalty does not infringe on the Section One right to life, strict scrutiny does not apply.

1. This Court recognized that the natural right to life is not absolute.

Defendant argues that the plain language of the Constitution, Kansas constitutional history, and substantive due process establish a fundamental right to life. (Def. Brief at 4.) He paints a lengthy historical narrative through which he asserts the founders intended to create a broad, all-encompassing, fundamental right

to life, with no exceptions. (Def. Brief at 12.) He further argues that the 1907 abolition and the lack of early appeals challenging the death penalty demonstrate "that the right included the right to be free from the State's executioners." (Def. Brief at 17-18.)

This Court considered many of the same arguments in *Kleypas*. (*See* Appendix: Excerpt from Kleypas' brief, Vol. III at 555-64.) Kleypas argued that "[t]he death penalty violates the natural right to life enshrined in § 1 of the Kansas Bill of Rights." *Id.* at 561. Making a historical argument incorporating the Wyandotte Constitutional Convention, Kleypas argued that Samuel Kingman's statement, "[a] man's right to life is inalienable in law under all circumstances," meant that "[t]he extinguishment of a person's right to life by the state is not contemplated by the Kansas Constitution." *Id.* at 562. Kleypas further argued that Kansas "has been a role model for its citizens by engendering a culture of respect for human life and dignity." *Id.* at 563-64.

This Court flatly rejected these arguments. Rather than embrace Kleypas' interpretation of constitutional history, the founders' intent, and Section One's scope, this Court clarified that the Constitutional Convention debates were "clearly grounded in the issue of slavery." *Kleypas*, 272 Kan. at 1051. The founders did not intend to create a right to life that would transcend the existing criminal law and render capital punishment unconstitutional. *See id.* In fact, this Court noted that the founders "did not 'propose that the authority of the State shall not hold the persons of men if they have committed crime, but simply that this right exists prior to law, and is inalienable by the person holding it—that is, he cannot sell it or dispossess

himself of it.'" *Id.* at 1052 (quoting Larimer, Wyandotte Constitutional Convention, p. 280 (1920)). Disagreeing with Kleypas' historical construction, the Court found that the founders adopted the words in Section One because of their similarity to those in the Declaration of Independence. *Id.* (citing Larimer, p. 283). Ultimately, this Court held that the Constitution does not confer an absolute right to life, explaining, "Kleypas would have this court stretch the meaning of the venerable words in § 1 of the state Bill of Rights far beyond their intended purpose. This we decline to do." *Kleypas*, 272 Kan. at 1052.

Here, Defendant raises many of the same arguments this Court rejected in *Kleypas*. And while he does so in greater length, nothing about the plain language of the Constitution, the framers' intent, or constitutional history has changed. This Court should follow *Kleypas* and reject Defendant's arguments. The plain language of Section One establishes a right to life, but that right is not absolute. *See Kleypas*, 272 Kan. at 1051. The founders did not intend for the right to be so broad as to invalidate the death penalty, which was established by law and in practice at the time of the Convention.

Defendant further argues that "Kansas legislatures and governors quickly realized and fully enforced the right to life" and that this Court's lack of case law on its constitutionality demonstrates a "broad, enforceable right to life." (Def. Brief at 12, 18.) Defendant's conclusions about the views and motivations of these early Kansans is largely speculative and based on dubious inferences and assumptions. Regardless, while Defendant's beliefs about the views of early legislators and

governors are suspect, they are also irrelevant to the instant claim. It is the role of the legislature to proscribe punishment for crime, *see State v. Schoonover*, 281 Kan. 453, 468, 133 P.3d 48, 62 (2006), and the legislature enacted the current death penalty scheme in 1994. Thus, speculation about the views of early legislators is, for the most part, immaterial. And the absence of case law in the foundational era regarding capital punishment cannot mean that the sentencing scheme enacted in 1994 is categorically unconstitutional. Defendant's historical arguments lack merit.

2. The plain language of the Constitution shows that the founders expressly contemplated capital punishment.

Defendant acknowledges that Section Nine of the Kansas Constitution references capital offenses. (Def. Brief at 11.) However, he argues that since there is no provision *specifically enabling* the death penalty, the death penalty is not an "exception" to the right to life. (Def. Brief at 11-12.) Again, this Court considered a similar argument in *Kleypas*. Kleypas argued that "[t]here is no provision for the permissible deprivation of the right to life under the Kansas Constitution," and "our state constitution simply does not contemplate the taking of a life by the State under any circumstances." (See Appendix: Excerpt from *Kleypas' brief, Vol. III at 562*); *Kleypas*, 272 Kan. at 1051. The Court rejected this argument. *Kleypas*, 272 Kan. at 1051-52.

Section Nine of the Kansas Constitution provides a right to bail "*except for capital offenses*, where proof is evident or the presumption great." Kan. Const. § 9 (emphasis added). Section Nine further provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Id. While the prohibition on cruel and unusual punishment may speak to the manner and means of execution, it does not bar the death penalty. *See State v. Kilpatrick*, 201 Kan. 6, 19, 439 P.2d 99 (1968) ("As a means of enforcement of the death penalty for crime, the only qualification apparently inserted is that the method of execution should not be needlessly cruel.").

By its very text, the Constitution expressly contemplates the death penalty without banning its practice. "When several provisions apply to a topic, they 'must be construed together with a view of reconciling and bringing them into workable harmony if possible.'" *State v. Stallings*, 284 Kan. 741, 743, 163 P.3d 1232 (2007) (quoting *Pieren-Abbott v. Kansas Dept. of Revenue*, 279 Kan. 83, 89, 106 P.3d 492 (2005); *State v. Huff*, 277 Kan. 195, 203, 83 P.3d 206 (2004)). "It is impossible to hold unconstitutional that which the Constitution explicitly contemplates." *Glossip v. Gross*, --- U.S. ---, 135 S. Ct. 2726, 2747, 192 L. Ed. 2d 761 (2015) (Scalia & Thomas, JJ., concurring); *see also Furman v. Georgia*, 408 U.S. 238, 380, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Burger, C.J., dissenting) ("[T]he explicit language of the Constitution affirmatively acknowledges the legal power to impose capital punishment.").

Defendant cannot read Section One in a vacuum and thereby avoid a duly imposed sentence. In order to reconcile Section One with Section Nine to bring them into "workable harmony," the only logical conclusion is that capital punishment does not violate Section One. The Court reached this conclusion in *Kleypas*. There is no valid reason to reach a different conclusion now.

3. Substantive due process does not render the death penalty unconstitutional.

Defendant argues that substantive due process supports a fundamental right to life. (Def. Brief at 18.) Citing Massachusetts Supreme Court cases, he argues the fundamental due process right to life triggers strict scrutiny. (Def. Brief at 19, citing *Com. v. O'Neal*, 367 Mass. 440, 327 N.E.2d 662 (1975), and 369 Mass. 242, 339 N.E.2d 676 (1975).)

No other court has adopted Massachusetts' reasoning from *O'Neal*, and neither should this one. *See, e.g., State v. Ramseur*, 524 A.2d 188, 106 N.J. 123, n.12 (1987) (rejecting *O'Neal* and applying rational basis review: "Our function is not to determine whether, in our opinion, any penological ends served by the death penalty are compelling or legitimate. Nor is it thought to be appropriate for the judiciary to invalidate a particular statutory punishment on the ground that something less might accomplish the same penological goal."). In fact, Kleypas cited *O'Neal* in his briefing. (See Appendix: Excerpt from Kleypas' brief, Vol. III at 563.) Apparently, the Court did not consider *O'Neal* to be persuasive.

In addition to recognizing that the legislature determines the proper punishments for crimes, these courts recognize that the Supreme Court implicitly rejected *O'Neal* in *Gregg v. Georgia*, 428 U.S. 153 (1976). *See, e.g., Johnson v. State*, 731 P.2d 993, 1006 (Okla. Crim. App. 1987) ("The *O'Neal* approach predates the decision of the United States Supreme Court in *Gregg v. Georgia*, and the rationale employed in *O'Neal* was ultimately rejected in *Gregg*."); *see also Smith v. State*, 465

N.E.2d 1105, 1113 (Ind. 1984); *State v. Pierre*, 572 P.2d 1338, 1346 (Utah 1977), *cert. denied*, 439 U.S. 882 (1978) (both concluding the Supreme Court rejected the *O'Neal* when the court presumed the validity of legislative choice to impose the death penalty); *see also State ex. Rel. Serna v. Hodges*, 89 N.M. 351, 552 P.2d 787, 796 (1976) (pre-*Gregg* case rejecting *O'Neal*). Under *Gregg*, the Court presumes valid any punishment selected by a democratically elected legislature, and "a heavy burden rests on those who would attack the judgment of the representatives of the people." *Gregg*, 428 U.S. at 175.

II. Under a proper rational basis review, Kansas' death penalty is constitutional because it is rationally related to the legitimate penological goals of deterrence, retribution, and incapacitation.

As a preliminary matter, the State submits that Defendant's argument on rational basis review exceeds the scope of this Court's mandate. This Court ordered the parties to file supplemental briefing addressing what effect, if any, the *Hodes* decision has on whether the Kansas death penalty is unconstitutional under §1 of the Kansas Constitution Bill of Rights. Contrary to Defendant's unsupported suggestion that *Hodes* created a "rational basis with bite" test, *Hodes* did not create such a test because it did not utilize a rational basis test in making its ruling. The impact of *Hodes* is limited to application of strict scrutiny review. This Court's ruling in *Kleypas* controls the rational basis issue, and Defendant has no legitimate basis to argue otherwise. If this Court disagrees with this position, Defendant's claim still fails because he cannot meet his burden under rational basis review.

The general rule is that a law will be subject to rational basis review unless it targets a suspect class or burdens a fundamental right. *State v. Limon*, 280 Kan. 275, 287, 122 P.3d 22, 30 (2005) (citing *Romer v. Evans*, 517 U.S. 620, 632 (1996)); *State v. Edwards*, 48 Kan. App. 2d 264, 269, 288 P.3d 494 (2012). Because the death penalty does not implicate a fundamental right and criminal processes are not subject to strict scrutiny, rational basis review applies. *See Chapman*, 500 U.S. at 465. "For a statute to pass constitutional muster under the rational basis standard, it therefore must meet a two-part test: (1) It must implicate legitimate goals, and (2) the means chosen by the legislature must bear a rational relationship to those goals." *Limon*, 280 Kan. at 288 (quoting *Mudd v. Neosho Memorial Regional Med. Center*, 275 Kan. 187, 198, 62 P.3d 236 (2003)). The party challenging the statute bears the burden. *Miller v. Johnson*, 295 Kan. 636, 668, 289 P.3d 1098 (2012).

A. Retribution, deterrence, and incapacitation are important and legitimate State interests.

It is a fundamental principle of criminal law that retribution, deterrence, and incapacitation are important and legitimate penological goals. *Gregg*, 428 U.S. at 183. Defendant argues "there are 'only two' government interests to justify the death penalty—retribution and deterrence." (Def. Brief at 22, citing *Gregg*, 428 U.S. at 183.) Defendant agrees that deterrence and retribution are valid penological goals, and that deterrence is even a "compelling state interest with the goal of saving lives." (Def. Brief at 24.) However, Defendant fails to address the third legitimate purpose: "the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future." *Gregg*, 428 U.S. at 183 n.28; *Barefoot*

v. Estelle, 463 U.S. 880, 896 (1983) ("[T]he likelihood of a defendant committing further crimes is a constitutionally acceptable criterion for imposing the death penalty.").

The death penalty clearly furthers the legitimate state interest of incapacitation, because it prevents future crime and thereby protects society. Because Defendant ignores incapacitation altogether, he cannot contest that it is a valid state interest. *See State v. Williams*, 298 Kan. 1075, 1083, 319 P.3d 528 (2014) ("[W]hen appellant fails to adequately brief an issue, that issue is waived or abandoned.") Since Defendant focuses only on retribution and deterrence, the remainder of this brief addresses those legitimate state interests.

B. The death penalty furthers deterrence and retribution.

Though Defendant recognizes deterrence and retribution as legitimate interests, he argues that the death penalty does not actually *further* those interests. (Def. Brief at 25.) This Court has found otherwise. *See State v. Kahler*, 307 Kan. 374, 407, 410 P.3d 105 (2018), *cert. granted* --- U. S. ---, 139 S. Ct. 1318, 203 L. Ed. 2d 563 (2019) (recognizing retribution and deterrence as "'legitimate penological goals' *served by the imposition of the death penalty* on those who commit the worst crimes," quoting *Kleypas*, 305 Kan. at 328-37 (emphasis added)).

With respect to retribution, Defendant argues that retribution is not measureable, not necessary to prevent vigilantism, and not adequately tied to individual culpability. (Def. Brief at 28-31.) Defendant makes policy arguments

common among death penalty abolitionists, but he cannot prove that the death penalty does not further retribution.

The death penalty serves "as an expression of society's moral outrage at particularly offensive conduct." *Gregg*, 428 U.S. at 183. "This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." *Id.* at 183. Retributive punishment seeks justice for the community as a whole, thereby discouraging individuals from resorting to self-help and vigilante justice. As the Supreme Court explained:

> The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch law.

Gregg, 428 U.S. at 183 (quoting *Furman v. Georgia*, 408 U.S. at 308).

With respect to deterrence, Defendant cites concurring and dissenting opinions and a number of statistical studies to call into question the efficacy of capital punishment as a deterrent. (Def. Brief at 25-27.) While statistical attempts to evaluate the worth of the death penalty as a deterrent "have occasioned a great deal of debate . . . [t]he results have simply been inconclusive." *Gregg*, 428 U.S. at 184-85. Whereas Defendant cites some studies questioning deterrence, the State could easily point to statistical studies that have concluded that there is a deterrent effect from the death penalty. *See, e.g.,* Cass R. Sunstein and Adrian Vermeule, *Is Capital*

Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs, 58 STAN. L. REV. 703 (2006) (concluding "capital punishment may well have deterrent effects, there is evidence that few categories of murders are inherently undeterrable."); Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, JOURNAL OF APPLIED ECONOMICS, Vol. III, No. 1, 163, 190 (May 2004) (". . . it is estimated that each state execution deters somewhere between 4 and 25 murders per year (14 being the average)); Hashem Dezhbakhsh, Paul H. Rubin, Joanna M. Shepard, *Does Capital Punishment have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, AMERICAN LAW AND ECONOMIC REVIEW, 344, 373 (Fall, 2003) ("Our results suggest that the legal change allowing executions beginning in 1977 has been associated with significant reductions in homicide . . . . [O]ur most conservative estimate is that the execution of each offender seems to save, on average, the lives of 18 potential victims."); *see also Glossip v. Gross,* 135 S. Ct. at 2748-49 (Scalia & Thomas, JJ., concurring) (disputing speculation that death penalty does not deter and citing same studies).

Regardless, deterrence remains an important and legitimate state interest, and the law assumes that it works:

> We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, were other sanctions may not be adequate.

Gregg, 428 U. S. at 185-86. Thus, while statistics and opinions vary, "[t]he value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures." *Id.*

Defendant further argues that the death penalty does not deter any more than life without parole; therefore, the State cannot meet its burden to show the Kansas death penalty furthers the state interest of deterrence. (Def. Brief at 27.) Because strict scrutiny does not apply, the State has no such burden.

At best, Defendant's arguments regarding deterrence, retribution, and alternatives to the death penalty highlight one side of the topic. These arguments are properly considered by the legislature. *Id.; State v. Scott*, 265 Kan. 1, Syl. ¶ 3, 961 P.2d 667 (1998) ("It is the legislature's prerogative to make policy decisions and specify punishments for a crime."). "[T]he Supreme Court allows considerable latitude to a legislature's policy decision regarding the severity of a sentence." *State v. Mossman*, 294 Kan. 901, 923, 281 P.3d 153 (2012). This legislative power is controlled only by the Constitutions of the United States and the State of Kansas. *State v. Reed*, 248 Kan. 792, 798, 811 P.2d 1163 (1991) (citing *State v. Keeley*, 236 Kan. 555, 560, 694 P.2d 422 (1985)). Since Kansas' death penalty scheme is constitutionally permissible, this Court should defer to the legislature's decisions regarding the most severe punishment for the most heinous crimes.

C. The Kansas death penalty is neither arbitrary nor discriminatory.

Defendant argues the Kansas death penalty "is imposed in an arbitrary and discriminatory manner." (Def. Brief at 39, 49.) Though Defendant folds his "arbitrary

and discriminatory" argument into strict scrutiny analysis, courts typically consider such arguments within the larger context of the Eighth Amendment or the Equal Protection Clause.

Courts faced with "arbitrary and discriminatory" claims apply the following test: "a state capital sentencing system must: 1) rationally narrow the class of death-eligible defendants; and 2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Kansas v. Marsh*, 548 U.S. at 174; *Romano v. Oklahoma*, 512 U.S. 1, 7, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994). In ensuring that the death penalty is not used arbitrarily or capriciously, the Court's principle concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury. *Romano*, 512 U.S. at 8 (citing *California v. Ramos*, 463 U.S. 992, 999, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983)). The Kansas death penalty satisfies this test: "the Kansas capital sentencing system, which directs imposition of the death penalty when a jury finds that aggravating and mitigating circumstances are in equipoise, is constitutional." *Marsh*, 548 U.S. at 181.

1. Defendant fails to show the death penalty is arbitrary and capricious.

Defendant contrasts certain defendants who were sentenced to death with others who were sentenced to life without the possibility of parole, arguing 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." (Def. Brief at 41.) But Defendant's argument

ignores the fact that each case turns on its own specific facts, which make one case more or less egregious than another, as well as the different aggravating and mitigating factors that may be presented, and the constitutional requirement for individualized sentencing. Given the discretion that juries must retain in order to make an individualized sentencing determination, Defendant "cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty." *McCleskey v. Kemp*, 481 U.S. at 307. The imposition of the death penalty in some extreme cases such as this one, while other murderers receive life without parole, cannot logically lead to a conclusion that the death penalty is arbitrary and capricious.

2. Defendant fails to show the death penalty is imposed in a racially discriminatory manner.

Defendant further argues that the Kansas death penalty is imposed in a racially discriminatory manner. (Def. Brief at 43-45.) Specifically, he alleges "the race of the victim has a 'robust' influence," and "[f]or the death penalty to serve any deterrent or retributive purpose, it cannot be reserved for those who kill white victims, as it currently is in Kansas." (Def. Brief at 44, 45.) Defendant challenges the entire Kansas death penalty scheme, rather than raising equal protection allegations particular to his case. *Id.*

The Kansas death penalty scheme is facially neutral. Within that scheme, each jury is tasked with considering aggravating and mitigating circumstances and making an individualized sentencing determination. This individualized sentencing determination necessarily involves a degree of discretion. *See McCleskey v. Kemp*, 481

U.S. at 305-13. And "it is the jury that is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice." *Id.* at 310 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 309, 25 L. Ed. 664 (1880)). "In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants," the statistics Defendant cites do not demonstrate a constitutionally significant risk of racial bias affecting the Kansas capital sentencing process. *See McCleskey*, 481 U.S. at 313.

3. Defendant fails to show the death penalty discriminates against the mentally ill.

Finally, Defendant argues the death penalty is discriminatory because it is "disproportionately imposed on people who are severely mentally ill." (Def. Brief at 45.)

In *State v. Kahler*, this Court held the death penalty is not unconstitutional when imposed on a defendant with mental illness. *State v. Kahler*, 307 Kan. 374, Syl. ¶ 13. The Court recognized there are existing legal protections in place for people with mental illnesses, including those that protect the incompetent from trial and the "insane" from execution. *Id.* at 408 (citing K.S.A. 2015 Supp. 22-3302 (competency) and *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986) (Eighth Amendment prohibits executing those who are "insane" at the time the sentence is carried out)). In addition, a defendant may present a trial defense based on lack of capacity. *Id.* Finally, and most critical here, mental illness can be asserted

as a mitigator, allowing the jury to consider culpability in selecting the appropriate sentence. *Id.*; K.S.A. 22-6617.

Whatever their causes, "[a]pparent disparities in sentencing are inevitable part of our criminal justice system." *McCleskey*, 481 U.S. at 312. Despite these imperfections, constitutional guarantees are met when "the mode for determining guilt or punishment itself has been surrounded with safeguards to make it as fair as possible." *Id.* at 313 (reaffirming post-*Furman* the principle originally stated in *Singer v. United States*, 380 U.S. 24, 35, 85 S. Ct. 783, 13 L. Ed. 2d 630 (1965)). In a criminal justice system where many people experience mental illness, capital cases are not immune. However, Defendant's cited statistics do not arise to a constitutional violation in a system where every capital sentencing determination is based on the unique and individualized characteristics of each defendant.

In sum, the Kansas death penalty guarantees all defendants the right to an individualized sentencing determination, consistent with the state and federal constitutions. Defendant fails to show the Kansas death penalty is imposed in an arbitrary, capricious, or discriminatory manner. Because Kansas' death penalty is rationally related to the legitimate goals of protecting its citizens through deterrence and retribution, the death penalty remains constitutional.

CONCLUSION

For the foregoing reasons, the Court should reject Defendant's claim that imposition of the death penalty following a valid conviction of capital murder violates Section One of the Kansas Constitution.

Respectfully submitted,

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APPENDIX

Excerpt from Kleypas Brief, Vol. III, 555-64

The Death Penalty Violates § 9 of the Kansas Bill of Rights

Analyzed under the disjunctive cruel *or* unusual punishment clause in §9, it is clear that the death penalty constitutes cruel punishment under that provision. This conclusion is compelled, not only by the reasoning set forth in *People v. Anderson*, supra, and *District Attorney...v. Watson*, supra, which applies equally to the analysis under §9, but also by the historical unacceptability of the death penalty in the state of Kansas.

There is no doubt about the split in public opinion among Kansans about the death ***556** penalty. When the Kansas Legislature reenacted the death penalty in 1994, it passed by a margin of 67 to 58. 1994 *Journal of the House* 2364. Nevertheless, public opinion, while relevant, is not conclusive in assessing whether the death penalty is in accord with contemporary standards of decency; if it were, there would be no need for constitutional adjudication. See *District Attorney v. Watson*, 411 N.E.2d at 1282(and citations therein). Moreover, public opinion in favor of the death penalty is not as overwhelming as it would appear. In a survey of Kansas voters conducted by Bill Bowers and Patricia Duggan of Northeastern University in April of 1994, 85% of the respondents expressed their support for capital punishment when presented a simple yes or no question of choice on the death penalty, but when alternative measures were afforded, such as the choice between the death penalty or life with no chance for parole with inmates required to work in prison industries for money that would go to the families of the victims, 66% favored life without parole with restitution, and only 30% supported the death penalty. See Testimony Before the Kansas House Judiciary Committee on H.B. 2529, 3-14-95, Attachment 10. See Appendix III-D.

More importantly, what Kansas has done in actuality in regard to the death penalty belies any purported acceptability of that punishment today. First degree murder was punishable by death under the territorial statutes of Kansas, and remained in effect when Kansas became a state in 1861. Barry, *Legal Hangings in Kansas*, XVIII Kansas Historical Quarterly 279, 280 (1950). Nine persons were executed under state law in Kansas between 1863 and 1872. *Id.*, at 279.

In 1872, however, the Kansas Legislature passed the so-called "Maine Law," ***557** which resulted in the *de facto* abolition of the death penalty in Kansas. The law, modeled after a similar law passed in the state of Maine, centralized all executions behind prison walls, required a one-year wait before execution of a death sentence, and required the governor to issue a warrant before an execution could be carried out. The provision requiring the governor's warrant stated that "no Governor shall be compelled to issue any order as herein provided for the execution of any convict..." Hougan, The Strange Career of the Kansas Hangman: A History of Capital Punishment in the Sunflower State to 1944 (1979), at 85-91 (unpublished Ph.D dissertation, Kansas State University)(on file with author)[hereinafter, The Strange Career]. During the thirty-five year span of the "Maine Law," no Kansas governor ever ordered an execution. XVIII Kansas Historical Quarterly, at 280. The law saved the life of Willie Sell, who, after serving twenty-one years on death row, was pardoned by the governor when new evidence surfaced which exonerated him. The Strange Career, at 86, 107-113.

The Kansas Legislature abolished the death penalty in 1907, and provided that persons convicted of first degree murder be sentenced to life imprisonment. Eight other states followed Kansas' example in the decade after 1907. During this time, "[a] great many citizens [of Kansas] were proud of the fact that their system of criminal justice did not impose capital punishment; indeed, it gave them a sense of moral superiority." The Strange Career, at 154-155, 160, 161. For the next twenty-eight years, Kansas did not have the death penalty. This strong tradition in Kansas against the death penalty came into conflict with the federal government on two occasions. In 1910, the impending execution of a soldier sentenced to death under federal law gave rise to a popular appeal for ***558** clemency to President Taft, on the basis that, since the death penalty had been abolished in Kansas, an execution by the federal government would be offensive to Kansas citizens. The Strange Career, at 161-165. Kansas Governor Stubbs took the position that an execution by the federal government in Kansas "would be a direct insult to the people of the state." *Id.*, at 164. Attorney General Fred Jackson stood up in protest as well. President Taft commuted O'Neal's sentence to life imprisonment. *Id.*, at 164-165. In 1920, Kansans again expressed their opposition to the scheduled execution of Robert Stroud, convicted under federal law of murdering a prison guard in Leavenworth Penitentiary. Petitions were sent to Washington, D.C., which included the signatures of then Governor Henry J. Allen, members of the state legislature and other elected officials, and many prominent citizens. President Wilson subsequently commuted Stroud's sentence to life imprisonment. *Id.*, at 171.

The legislature reenacted capital punishment in 1935 (see XVIII Kansas Historical Quarterly, at 281), largely in response to public outcry over brutal crimes committed by Prohibition-era gangsters, and thus abandoned "the state's

traditional moderation in dealing with its minimis." Kansas City Times, January 16, 1935. Even so, no death sentence was carried out under the new law until 1944. XVIII Kansas Historical Quarterly, at 298. Between 1944 and 1965, a total of fifteen persons were executed under state law. Bowers, *Executions in America*, in *Legal Homicide* 8, 10, 11 (Northeastern University Press 1984).

Though the death penalty law remained on the books, there were no executions in Kansas between 1965 and 1972, the year capital punishment was declared unconstitutional ***559** in *Furman v. Georgia*, 408 U.S. 238. Furthermore, even though capital punishment was reauthorized by the United States Supreme Court in 1976 (*Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976)), the Kansas Legislature in 1978 amended the existing death penalty statute, K.S.A. 21-4501, to require the imposition of a sentence of life imprisonment for first degree murder, and repealed the existing section (L. 1978, Ch. 120, §3), thus demonstrating a clear intent on the part of the legislature to affirmatively abolish the death penalty in Kansas once again.

In its 138 year history, Kansas has carried out a total of twenty-four executions under state law. The dearth of actual executions, and protest against the death penalty, not only by the public, but also by governors of this state and other elected officials bearing responsibility for administering the death penalty provisions, are strong indications that, throughout its history, the death penalty has been considered an impermissibly cruel punishment in Kansas.

Moreover, the cruelty which inheres in the dehumanization and degradation of the condemned prisoner awaiting execution is well-known. See *Furman*, 408 U.S. at 287-288(Brennan, J., concurring)("the prospect of an impending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death"). See also, *People v. Anderson*, 493 P.2d at 892, 894; *District Attorney...v. Watson*, 411 N.E.2d at 1283. Indeed, this "death row phenomenon" is a recognized cause of action in international tribunals, including the European Court of Human Rights and the Inter-American Commission on Human Rights, both of which have found that the adverse psychological effects suffered by the person on death row ***560** constitutes cruel or degrading treatment. See *Soering v. United Kingdom*, 11 E.H.R.R. 439, para. 11 (1989)(finding violation under Article 3 of the European Convention on Human Rights, which prohibits "inhuman or degrading treatment or punishment"; Court withheld extradition from Great Britain to United States of German national charged with capital murder in the United States); *In Re: William Andrews*, OAS/IACHR, Case 11.139, Report No. 57/96, paras. 48, 178 (1998)(finding violation of, *inter alia*, Article XXVI of the American Declaration of the Rights and Duties of Man, prohibiting "cruel, infamous or unusual punishment," by United States against Mr. Andrews, who was executed in the state of Utah in 1992).

As was stated so eloquently by Justice Liacos in a concurring opinion in *District Attorney...v. Watson*:
The condemned prisoner must confront this primal terror [of death] directly, and in the most demeaning circumstances. A condemned man knows, subject to the possibility of successful appeal or commutation, the time and manner of his death. His thoughts about death must necessarily be focused more precisely than other people's. He must wait for a specific death, not merely expect death in the abstract...The State puts the question of death to the condemned person, and he must grapple with it without the consolation that he will die naturally or with his humanity intact. A condemned person experiences an extreme form of debasement...

...The death sentence itself is a declaration that society deems the prisoner a nullity, less than human and unworthy to live. But that negation of his personality carries through the entire period between sentence and execution...

...The purpose of the cruel or unusual punishment prohibition is to guarantee a measure of human dignity even to the wrongdoers of our society. The Massachusetts Constitution recognized that there are some punishments so abhorrent, so offensive to evolved standards of decency, that no justification can support their employment. Inflicting upon a person the terror of death in a definite manner is such a punishment. My views would not change if stays on death row were made more pleasant, killing techniques less painful, or removal from death row more swift. This is a ***561** punishment antithetical to the spiritual freedom that underlies the democratic mind. What dignity can remain for the government that countenances its use?

411 N.E.2d at 1292-1294.

Finally, the rarity of executions and historical opposition to the death penalty in Kansas shows that the death penalty

is also an "unusual" punishment in this state, and is therefore unconstitutional under §9 of the Bill of Rights for this reason as well. Indeed, Kansas' abolitionist history is in accord with the trend toward world-wide abolition of the death penalty. As of 1998, more than one-half of the countries in the world have abolished the death penalty in law or practice, including all of the democracies of Europe. (See Amnesty International, The Death Penalty: List of Abolitionist and Retentionist Countries As of 31 March 1998 (April, 1998), AI Index: ACT 50/08/98)(also noting that in recent years, an average of two countries per year have abolished the death penalty). Thus, not only has the death penalty been historically unacceptable to the citizens of Kansas, it is currently unacceptable to most of the world. The death penalty is "now, literally, an unusual punishment among civilized nations." *People v. Anderson*, 493 P.2d at 899.

B) The death penalty violates the natural right to life enshrined in §1 of the Kansas Bill of Rights.

§1 of the Kansas Bill of Rights states:

> All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.

Section 1 in its present form was part of the original state constitution formed at the ***562** Kansas Constitutional Convention at Wyandotte in 1859. Kansas Constitutional Convention, at 283-285. It has been said that §1 is a part of the state constitutional counterpart to the 14th Amendment to the Constitution of the United States (see *Farley v. Engelken*, 241 Kan. 663, 740 P.2d 1058 (1987)). However, §1 of the Kansas Bill of Rights predates the 14th Amendment by nearly a decade, and is therefore of fundamental, and independent, importance.

Indeed, the language of §1 differs materially from the language of the 14th Amendment. While the 14th Amendment states that no one may be deprived of his life without due process of law,[104] §1 contains no such qualification. There is no provision for the permissible deprivation of the right to life under the Kansas Constitution. Indeed, in the debate on §1 at the Constitutional Convention of 1859, Samuel Kingman, the "John Marshall of Kansas" and future Chief Justice of the Kansas Supreme Court (see 69 Kan. vi, xii), who introduced the language of the present §1, stated clearly that, "A man's right to his life is inalienable in law under all circumstances." Kansas Constitutional Convention, at 282. The extinguishment of a person's life by the state is not contemplated by the Kansas Constitution. On the contrary, under §1 of the Bill of Rights, the right to life is a natural, inalienable right. The death penalty directly contradicts this fundamental right, and is therefore unconstitutional.[105]

104 U.S. Const., Amendment XIV, § 1 states in pertinent part: "...nor shall any State deprive any person of life, liberty, or property, without due process of law..."

105 Cf. *State v. Newlon*, 627 S.W.2d 606, 612 (Mo. 1982)(finding that death penalty does not violate Art. I, §2 of the Missouri Constitution stating in part "that all persons have a natural right to life, liberty, the pursuit of happiness...", noting that such a construction "flies in the face" of Art. I, §10 of the state constitution, which states that "...no person shall be deprived of life, liberty or property without due process of law").

***563** In addition, the unqualified right to life vested in every person under § 1 of the Bill of Rights is another factor which renders the death penalty cruel, and thus unconstitutional, under §9. As the Supreme Judicial Court of Massachusetts found in *District Attorney...v. Watson*, the death penalty is cruel "in its unparalleled effect on all the rights of the person condemned," particularly the right to life:

"There is little doubt that life is a fundamental right 'explicitly or implicitly guaranteed by the Constitution." San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (93 S.Ct. 1278, 1296-1297, 36 L.Ed.2d 16) (1973)...(T)he '...right to live...is the natural right of every man' (quoting from Camus, Reflections on the Guillotine, in Resistance, Rebellion and Death 131, 221 (1969)), encompassing as it does 'the right to have rights.' Trop v. Dulles,

356 U.S. 86, 102 (78 S.Ct. 590, 598, 2 L.Ed.2d 630) (1958). See Comment, the Death penalty Cases, 56 Cal.L.Rev. 1268, 1354 (1968)." [Commonwealth v. O'Neal, 369 Mass. 242] at 245-246, 339 N.E.2d 676 (Tauro, C.J., concurring). "The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose 'the right to have rights.' A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a 'person' for purposes of due process of law and the equal protection of the laws." Furman v. Georgia, 408 U.S. 238, 290, 92 S.Ct. 2726, 2752, 33 L.Ed.2d 346 (1972)(Brennan, J., concurring).

411 N.E.2d at 1282-1283.

* * *

"There is an impetus to respond in kind in punishing the person who has been convicted of murder, but the death penalty brutalizes the State which condemns and kills its prisoners." *District Attorney...v. Watson*, 411 N.E.2d at 1286. The State of Kansas, for ***564** most of its history, has been a role model for its citizens by engendering a culture of respect for human life and dignity. The death penalty extinguishes human life, and destroys human dignity. It is unconstitutional under the Kansas Constitution Bill of Rights, because it violates the natural right to life in §1, and the prohibition against cruel or unusual punishments in § 9. This court must declare the death penalty unconstitutional under the Kansas Constitution.

CERTIFICATE OF SERVICE

This is to certify that a copy of Appellee's Brief was sent via email to: Clayton Perkins, Capital Appellate Defender Office, cperkins@sbids.org, on this 15th day of October 2019.

/s/ David Lowden
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