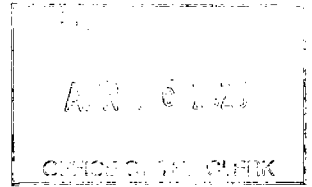


19-8551

No. _____

ORIGINAL
RECEIVED



IN THE

SUPREME COURT OF THE UNITED STATES

LONDRO E. PATTERSON III

— PETITIONER

(Your Name)

vs.

STATE OF KANSAS

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court Of The State Of Kansas

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Londro E. Patterson III

(Your Name)

PO Box 311

(Address)

El Dorado, KS 67042

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

Does a Life sentence, without right to parole, upon a Nineteen year old for killing committed by another cruel and unusual punishment, in violation of the Eighth Amendment of the United States Constitution?

LIST OF PARTIES

- ☐ All parties appear in the caption of the case on the cover page.
- ☒ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
CONCLUSION.....	21

INDEX TO APPENDICES

APPENDIX A Syllabus By Kansas Supreme Court Docket No. 118,180

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

Eighth Amendment.....	8,10-12, 15,16,20
§ 9 of the Kansas Constitution Bill of Rights	8,10,12,16,20
<i>State v. Ortega-Cadelan</i> , 287 Kan. 157, 194 P.3d 1195 (2008).....	8-9
<i>State v. Freeman</i> , 223 Kan. 362, 573 P.2d 950 (1978).....	9,10,12-25
<i>State v. Hawkins</i> , 285 Kan. 842, 176 P.3d 174 (2008)	9
<i>State v. Williams</i> , 298 Kan. 1075, 319 P.3d 528 (2014).....	10
<i>State v. Allen</i> , 283 Kan. 372, 53 P.3d 488 (2007)	10
<i>State v. Seward</i> , 289 Kan. 715, 217 P.3d 443 (2009)	10
<i>State v. Gant</i> , 288 Kan. 76, 201 P.3d 673 (2009).....	10
<i>State v. Mossman</i> , 294 Kan. 901, 281 P.3d 153 (2012).	11,22
<i>Ewing v. California</i> , 538 U.S. 11, 155 L. Ed. 2d 108, 123 S. Ct. 1179 (2003).....	11
<i>Harmelin v. Michigan</i> , 501 U.S. 957, 115 L.Ed.2d 836, 111 S. Ct. 2680 (1991).....	11
<i>Graham v. Florida</i> , 560 U.S. --, 176 L. Ed. 2d 825, 130 S. Ct. 2011, 2021 (2010).....	11,16-19
<i>Weems vs. United States</i> , 217 U.S. 349, 54 L. Ed. 793, 30 S. Ct. 544 (1910).	11
<i>Enmund v. Fla.</i> , 458 U.S. 782, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982)	11
<i>State v. McDonald</i> , No. 114,385, 2016 WL 3856305 (2016).....	11
K.S.A. 21-5403(a).....	14
K.S.A. 21-6804(a)	14
K.S.A. 21-5404(a)(2).....	14
K.S.A. 21-5402(a)(2)	14
K.S.A. 22-3717(b)(2).	14
Md. Code Ann., Crim. Law § 2-304.....	14
D.C. Code Ann. § 22-2101.....	14
W. Va. Code Ann. § 61-2-2.....	14
N.C. Gen. Stat. Ann. § 14-17(a)	14
Fla. Stat. Ann. § 782.04(b)	14
Fla. Stat. Ann. § 921.141(3)	14
Ga. Code Ann. § 16-5-1(c) and (d)	14
Tenn. Code Ann. § 39-13-202(a)(2)	14
Tenn. Code Ann. § 39-13-204.....	14
Ind. Code Ann. § 35-42-1-1.....	14

Ind. Code Ann. § 35-50-2-3	14
Ind. Code Ann. § 35-50-2-9	14
La. Stat. Ann. § 14:30.1(A)(2) & (B)	14
Mo. Ann. Stat. § 565.021.1(2) & § 565.021.2	14
Mo. Ann. Stat. § 558.011	14
Minn. Stat. Ann. § 609.19.2(1)	14
S.D. Codified Laws § 22-16-4 & § 22-6-1.1	14
Neb. Rev. Stat. Ann. § 28-303 and § 29-2520	14
K.S.A. 21-5402(a)(2)	14
K.S.A. 22-3717(b)(2)	14
Okla. Stat. Ann. tit. 21, § 701.7.B & 21, § 701.9.A	14
Wyo. Stat. Ann. § 6-2-101(b)	14
Colo. Rev. Stat. Ann. § 18-3-102(1)(b) & § 18-1.3-1201(1)(a) & § 17-22.5-104	15
Utah Code Ann. § 76-5-2029(1)(d) & § 76-3-207.7 (2)(a)	15
Ariz. Rev. Stat. Ann. § 13-1105.A.2	15
Ariz. Rev. Stat. Ann. § 13-751.A.3	15
Mass. Gen. Laws Ann. ch. 265, § 1	15
<i>Commonwealth v. Brown</i> , 477 Mass. 805, 81 N.E.3d 1173 (2017)	15
Conn. Gen. Stat. Ann. § 53a-54c; 53a-35a(2)	15
N.Y. Penal Law § 125.25(a)(3)	15
N.Y. Penal Law § 70.00(3)(a)(i)	15
Or. Rev. Stat. Ann. § 163.115(1)(b) & (3); § 163.115(5)	15
Wash. Rev. Code Ann. § 9A.32.030 (1)(c) & § 9A.20.021(1)(a).	15
Wis. Stat. Ann. § 940.03	15
Mont. Code Ann. § 45-5-102(1)(b) & (2)	15
Alaska Statutes § 11.41.100(a) and § 11.41.110(a)(3)	15
Alaska Stat. Ann. § 12.55.125(b)	15
<i>State v. Goodseal</i> , 220 Kan. 487, 553 P.2d 279 (1976)	16, 17
<i>State v. Underwood</i> , 228 Kan. 294, 615 P.2d 153 (1980)	16
<i>State v. Dull</i> , 302 Kan. 32, 351 P.3d 641 (2015)	18
<i>Miller v. Alabama</i> , 567 U.S. 460, 183 L.Ed.2d 407, 132 S.Ct. 2455 (2012)	18, 20
Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy,” Journal of Adolescent Health (2009)	18
Understanding the Teen Brain,” University of Rochester Medical Center.....	18
Mariam Arain, et al., “Maturation of the adolescent brain,” Neuropsychiatric Disease and Treatment (2013).....	18
Anup Malani, “Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data,” Virginia Law Review (2002).....	19

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- ☐ reported at _____; or,
☒ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 1/10/2020.
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

EIGHTH AMENDMENT TO THE U.S. CONSTITUTION

K.S.A. 21-5403

K.S.A. 21-6804

K.S.A. 21-5404

K.S.A. 22-3717

STATEMENT OF THE CASE

A jury convicted Londo E. Patterson of one count each of first-degree felony murder, an off-grid felony; conspiracy to commit aggravated robbery, a severity level five person felony; attempted aggravated robbery, a severity level five person felony; and aggravated battery, a severity level seven person felony. The district court sentenced Mr. Patterson to a lifetime prison sentence (Hard 25) for the first-degree murder count, to run consecutively to a controlling ninety-four-month prison sentence for the remaining counts. Mr. Patterson appealed.

STATEMENT OF THE ISSUE

A life sentence imposed upon a nineteen-year-old for a killing committed by another is cruel and unusual punishment, in violation of the Eighth Amendment of the United States Constitution and §9 of the Kansas Constitution Bill of Rights.

STATEMENT OF THE FACTS

A robbery at "She's a Pistol"

On January 9, 2015, Rebecca Bieker and her husband, Jon Bieker, were working at She's a Pistol, gun and ammunition store owned and operated by Ms. Bieker. (R. 14: 80). The couple was working in the back office of the store, when a customer entered. (R. 14: 81). Ms. Bieker left the back office and greeted the customer, who was wearing a camouflage hoodie, a black wig with red stripes, and make up. (R. 14: 81-82). The customer, who was later identified as De'Anothy Wiley, appeared nervous, paced back and forth, and was fidgeting. (R. 14: 83). Wiley asked if the store sold rifles and then asked to see a handgun. (R. 14: 83-84). Wiley gave the handgun back to Ms. Bieker and then began to speak into a cell phone that he had pulled out of his pocket. (R. 14: 86). According to Ms. Bieker, seconds later, three men, including Londro Patterson, came through the front door. (R. 14: 86-87). Wiley and Mr. Patterson pointed guns at Ms. Bieker. (R. 14: 87). Ms. Bieker recalled one of the men demanding money, and her telling the men that she could not reach the cash register. (R. 14: 87-88).

The next thing Ms. Bieker remembered was waking up on the floor behind the counter. (R. 14: 88). Ms. Bieker stood up and saw her husband and Wiley lying on the floor at the front of the store. (R. 14: 90). Mr. Bieker, who was lying next to Wiley, had been shot and did not appear to be breathing. (R. 14: 89-90, 94). Ms. Bieker called 911. (R. 14: 89-91). While on the phone, Ms. Bieker saw Wiley moving slightly and, believing that he was reaching for a gun, yelled at him

to stop moving before shooting him. (R. 14: 89-90). When Wiley continued to move, Ms. Bieker hit him with her gun. (R. 14: 92-93). Mr. Bieker ultimately died as a result of a gunshot wound in his chest. (R. 14: 128-29, 132).

Officers arrived at the scene just after the shooting and found Mr. Patterson lying in the grass in front of the store. (R. 16: 20-21, 24, 29). Mr. Patterson, who had been shot and was bleeding “profusely,” was yelling for help. (R. 16: 21-23, 25, 45-46). Mr. Patterson told the responding officer, “Hold my hand. I don’t want to die. . . . I have two kids. I don’t want to die.” (R. 16: 31).

The proceedings against Mr. Patterson

For his participation in the robbery at She’s a Pistol, the State charged Mr. Patterson with one count each of first-degree felony murder, conspiracy to commit aggravated robbery, attempted aggravated robbery, and aggravated battery. (R. 1: 33-34). Mr. Patterson proceeded to trial on all counts.

During voir dire, the prosecutor told potential jurors (1) that they had an “obligation to follow the law” and (2) that they jury could not “go back and debate” the law. (R. 23: 98-100). The prosecutor also elicited positive responses from any potential jurors who would disregard the law. (R. 23: 101). Next, during its preliminary instructions to the jury, the district court told jurors that “[a]t the end of the case, I will instruct you on the law that you **must** apply to the evidence in order to reach a verdict.” (R. 23: 180). (Emphasis added). Finally, at the close of evidence, the district court instructed the jury that (1) the jury had a “duty to consider and follow all of the instructions” and (2) if the jury had “no reasonable

doubt as to the truth of each of the claims required to be proved by the State, you **should** find the defendant guilty.” (R. 1: 16, 21.). (Emphasis added).

At trial, the State introduced surveillance video footage showing Mr. Patterson entering the store with two other men and pointing a gun at Ms. Bieker. (R. 29: State’s Ex. #68: 2:25-45). One of the men then hit Ms. Bieker on the head, and Ms. Bieker fell to the floor. (R. 29: State’s Ex. #68: 2:35-45). As Ms. Bieker fell down, Mr. Bieker emerged from the back room firing his gun. (R. 29: State’s Ex. #68: 2:44-50). The video showed Mr. Patterson and two other men running from the store, and Mr. Bieker appearing to fire his gun at Wiley. (R. 29: State’s Ex. #68: 2:45-3:19). The video showed Mr. Bieker appearing to fire his gun at Wiley and then falling to the ground by the front door. (R. 29: State’s Ex. #68: 02:50-3:19).

At trial, Mr. Patterson did not contest his participation in the aggravated robbery of She’s a Pistol. (R. 18: 20-28). But, his attorney argued, because he had already fled the store when Wiley killed Mr. Bieker, he was not guilty of felony murder. (R. 18: 26-31).

The jury ultimately convicted Mr. Patterson of one count each of first-degree felony murder, an off-grid felony; conspiracy to commit aggravated robbery, a severity level five person felony; attempted aggravated robbery, a severity level five person felony; and aggravated battery, a severity level seven person felony. (R. 1: 64-77; R. 18: 45-46). The district court sentenced Mr. Patterson to a lifetime prison sentence (Hard 25) for the first-degree murder

count, to run consecutively to a controlling ninety-four-month prison sentence for the remaining counts. (R. 1: 70; R. 15: 57). Mr. Patterson filed a timely notice of appeal. (R. 1: 63).

REASONS FOR GRANTING THE PETITION

A life sentence imposed upon a nineteen-year-old for a killing committed by another is cruel and unusual punishment, in violation of the Eighth Amendment of the United States Constitution and §9 of the Kansas Constitution Bill of Rights.

Introduction

In this case, the jury convicted Mr. Patterson of first-degree murder based upon his co-defendant's killing of Mr. Bieker. Imposing a lifetime prison sentence upon a nineteen-year-old for a killing committed by another is unconstitutionally disproportionate punishment to Mr. Patterson's culpability. As a result, this Court must reverse and remand for resentencing.

Preservation

Mr. Patterson did not object to the imposition of a lifetime prison sentence on cruel and unusual punishment grounds. Kansas appellate courts have generally held that failure to object and prompt the district court to make factual and legal findings bars review of a case-specific challenge under the Eighth Amendment or § 9 of the Kansas Constitution Bill of Rights. *State v. Ortega-Cadelan*, 287 Kan. 157, 160-1, 194 P.3d 1195 (2008); *State v. Freeman*, 223 Kan.

362, 573 P.2d 950 (1978). A case-specific challenge to the constitutionality of a sentence typically requires district court findings on the following:

(1) The nature of the offense and the character of the offender should be examined with particular regard to the degree of danger present to society; relevant to this inquiry are the facts of the crime, the violent or nonviolent nature of the offense, the extent of culpability for the injury resulting, and the penological purposes of the prescribed punishment;

(2) A comparison of the punishment with punishments imposed in this jurisdiction for more serious offenses, and if among them are found more serious crimes punished less severely than the offense in question the challenged penalty is to that extent suspect; and

(3) A comparison of the penalty with punishments in other jurisdictions for the same offense.

Ortega-Cadelan, 287 Kan. at 160-61 (quoting *Freeman*, 223 Kan. at 367).

Nevertheless, this Court can reach Mr. Patterson's case-specific challenge for the first time on appeal because this challenge "involves only a question of law on proved or admitted facts." *Ortega-Cadelan*, 287 Kan. at 159 (citing *State v. Hawkins*, 285 Kan. 842, 845, 176 P.3d 174 [2008]). Here, the facts in this case are not in dispute and were established at Mr. Patterson's jury trial and sentencing. Thus, the only remaining question is strictly legal: whether those facts show that imposition of lifetime prison sentence are disproportionate when compared to the facts of the case. Further, the remaining *Freeman* factors are purely legal questions. *Ortega*, 287 Kan. at 161 (noting the second and third factors laid out *Freeman* are "legal determinations.") In other words, because district court factual findings are not needed to assess the first *Freeman* factor,

and the two remaining *Freeman* factors are purely legal, this Court can address Mr. Patterson's case-specific challenge.

Finally, even if this Court believes it cannot review Mr. Patterson's case-specific challenge, this does not bar a categorical cruel and unusual punishment challenge. A categorical cruel and unusual challenge presents purely legal questions, which this Court can review for the first time on appeal. *State v. Williams*, 298 Kan. 1075, 319 P.3d 528, 536 (2014).

Standard of Review

Appellate courts generally exercise unlimited review over a constitutional challenge to a statute. *State v. Allen*, 283 Kan. 372, 374, 153 P.3d 488 (2007). However, the analysis of whether a particular punishment constitutes cruel and unusual punishment under § 9 of the Kansas Constitution Bill of Rights or the Eighth Amendment presents a mixed question of law and fact. *State v. Seward*, 289 Kan. 715, 719, 217 P.3d 443 (2009) (using the *Freeman* analysis). The first *Freeman* factor is "inherently factual, requiring examination of the facts of the crime and the particular characteristics of the defendant," while the two remaining factors depend solely upon "legal determinations." *Seward*, 289 Kan. at 719 (quoting *Ortega*, 287 Kan. at 161. Thus, appellate courts apply a bifurcated standard of review in these cases, reviewing a district court's legal conclusions de novo and the factual findings for substantial competent evidence. *State v. Gant*, 288 Kan. 76, 80, 201 P.3d 673 (2009).

When considering a categorical challenge to a sentence under the United States and Kansas Constitutions, this Court's review is de novo. *State v. Mossman*, 294 Kan. 901, 925, 281 P.3d 153 (2012).

Arguments and Authorities

A. Proportionality principles

The Eighth Amendment to the United States Constitution protects against cruel and unusual punishment. That protection contains a narrow proportionality principle that applies to noncapital sentences. *Ewing v. California*, 538 U.S. 11, 20, 155 L. Ed. 2d 108, 123 S. Ct. 1179 (2003) (O'Connor, J., concurring) (citing *Harmelin v. Michigan*, 501 U.S. 957, 996-97, 115 L.Ed.2d 836, 111 S. Ct. 2680 [1991]). "The concept of proportionality is central to the Eighth Amendment to the United States Constitution. Embodied in the cruel and unusual punishments ban is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Graham v. Florida*, 560 U.S. 48, 59, 176 L. Ed. 2d 825, 130 S. Ct. 2011 (2010) (quoting *Weems vs. United States*, 217 U.S. 349, 367, 54 L. Ed. 793, 30 S. Ct. 544 [1910]).

The focus on whether a sentence is proportionate is on the defendant's own culpability, not on the culpability of the defendant's accomplices. *Enmund v. Fla.*, 458 U.S. 782, 798, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982). A proportionality analysis requires a focus on "relevant facets of the character and record of the **individual** offender." *Enmund*, 458 U.S. at 798. (Emphasis added).

B. A lifetime prison sentence is disproportionate under the facts of this case.

Kansas Courts have consistently applied the three factors outlined in *State v. Freeman*, 223 Kan. 362, 573 P.2d 950 (1978), to determine whether a punishment is cruel or unusual under § 9 of the Kansas Constitution Bill of Rights and Eighth Amendment. *Mossman*, 294 Kan. at 908-21; *State v. McDonald*, No. 114,385, 2016 WL 3856305, *1 (2016) (unpublished opinion) (addressing both a Kansas and United States constitutional challenge as the analysis and factors are the same).¹ In *Freeman*, the Court held that “[p]unishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” *Freeman*, 223 Kan. at 367. To aid in applying this principle, the Court outlined three factors for courts to consider:

The nature of the offense and the character of the offender should be examined with particular regard to the degree of danger present to society; relevant to this inquiry are the facts of the crime, the violent or nonviolent nature of the offense, the extent of culpability for the injury resulting, and the penological purposes of the prescribed punishment;

A comparison of the punishment with punishments imposed in this jurisdiction for more serious offenses, and if among them are found more serious crimes punished less severely than the offense in question the challenged penalty is to that extent suspect; and

A comparison of the penalty with punishments in other jurisdictions for the same offense.

¹ Under Rule 7.04(g), counsel has attached a copy of *State v. McDonald* to this brief as Appendix A.

Freeman, 223 Kan. at 367.

First, under the facts underlying the offense and the character of the particular offender, lifetime postrelease is disproportionate in this case. In this case, although Mr. Patterson did not dispute that he planned to rob She's a Pistol with his co-defendants and Mr. Patterson brought a gun with him into the store, it is undisputed that Mr. Patterson did not fire his gun and had fled the store ^{before} when Wiley shot Mr. Bieker. (R. 17: 185; R. 18: 20-28; R. 29: State's Ex. #68: 2:45-3:19). Because Mr. Patterson did not kill Mr. Bieker, his culpability is less than that of Wiley's. It is also undisputed that, at the time of the offense, Mr. Patterson was only nineteen years old, had two young children, and minimal criminal history. (R. 2: 30, 58-59; R. 8: 159-66). Thus, requiring Mr. Patterson to serve a life sentence is disproportionate to the circumstances of his crime and his culpability and does not serve the penological purposes of retribution, deterrence, incapacitation, and rehabilitation. (See discussion under "judicial exercise of independent judgment" below).

Under the second factor, this Court compares Ms. Patterson's prison sentence with those prison sentences imposed in Kansas for more serious offenses. *Freeman*, 223 Kan. at 367. Kansas punishes intentional murder and reckless homicides—which require a finding that the defendant was aware of the risk of death but disregarded that risk—less severely than felony murder. For a person with Mr. Patterson's criminal history score of "F," the presumptive sentence for a person convicted of intentional second-degree murder is 203 to

226 months imprisonment. K.S.A. 21-5403(a); K.S.A. 21-6804(a). The reckless homicide crimes of unintentional second-degree murder and involuntary manslaughter are punishable by presumptive prison sentences of 152 to 168 months and forty-one to forty-seven months. K.S.A. 21-5403(a); K.S.A. 21-5404(a)(2); K.S.A. 21-6804(a). Thus, Kansas punishes the more severe crimes of an intentional killing and reckless killings less severely than the punishment for felony murder, which requires a mandatory lifetime (Hard 25) prison sentence. K.S.A. 21-5402(a)(2); K.S.A. 22-3717(b)(2).

The third *Freeman* factor requires “a comparison of the penalty with punishments in other jurisdictions for the same offense.” *Freeman*, 223 Kan. at 367. Of the states that do not require the jury to find a mental state applicable to the felony murder, eighteen states impose a penalty upon a person other than the killer in a felony murder as or more harshly than Kansas. Md. Code Ann., Crim. Law § 2-304; D.C. Code Ann. § 22-2101; W. Va. Code Ann. § 61-2-2; N.C. Gen. Stat. Ann. § 14-17(a); Fla. Stat. Ann. § 782.04(b); Fla. Stat. Ann. § 921.141(3); Ga. Code Ann. § 16-5-1(c) and (d); Tenn. Code Ann. § 39-13-202(a)(2); Tenn. Code Ann. § 39-13-204; Ind. Code Ann. § 35-42-1-1; Ind. Code Ann. § 35-50-2-3; Ind. Code Ann. § 35-50-2-9; La. Stat. Ann. § 14:30.1(A)(2) & (B); Mo. Ann. Stat. § 565.021.1(2) & § 565.021.2; Mo. Ann. Stat. § 558.011; Minn. Stat. Ann. § 609.19.2(1); S.D. Codified Laws § 22-16-4 & § 22-6-1.1; Neb. Rev. Stat. Ann. § 28-303 and § 29-2520; K.S.A. 21-5402(a)(2); K.S.A. 22-3717(b)(2); Okla. Stat. Ann. tit. 21, § 701.7.B & 21, § 701.9.A; Wyo. Stat. Ann. § 6-2-101(b); Colo. Rev.

Stat. Ann. § 18-3-102(1)(b) & § 18-1.3-1201(1)(a) & § 17-22.5-104; Utah Code Ann. § 76-5-2029(1)(d) & § 76-3-207.7 (2)(a); Ariz. Rev. Stat. Ann. § 13-1105.A.2; Ariz. Rev. Stat. Ann. § 13-751.A.3. Five states impose similar penalties as Kansas, but permit a defendant to assert an affirmative defense showing a lesser degree of culpability. Mass. Gen. Laws Ann. ch. 265, § 1, *Commonwealth v. Brown*, 477 Mass. 805, 812-13, 81 N.E.3d 1173, 1182 (2017); Conn. Gen. Stat. Ann. § 53a-54c; 53a-35a(2); N.Y. Penal Law § 125.25(a)(3); N.Y. Penal Law § 70.00(3)(a)(i); Or. Rev. Stat. Ann. § 163.115(1)(b) & (3); § 163.115(5); Wash. Rev. Code Ann. § 9A.32.030 (1)(c) & § 9A.20.021(1)(a). Three states give discretion to judges to punish felony murder less severely than Kansas. Wis. Stat. Ann. § 940.03; Mont. Code Ann. § 45-5-102(1)(b) & (2); Alaska Statutes § 11.41.100(a) and § 11.41.110(a)(3); Alaska Stat. Ann. § 12.55.125(b). (See Appendix B).

Thus, the majority of states either require an additional *mens rea* requirement by a jury to punish a defendant for felony murder, provide affirmative defenses, or punish felony murder less severely than Kansas. In this case, all three *Freeman* factors weigh in favor of finding that Mr. Patterson's lifetime (Hard 25) sentence is grossly disproportionate to his level of participation in the crime. Thus, his sentence is unconstitutional under both § 9 of the Kansas Constitution Bill of Rights and the Eighth Amendment.

C. A lifetime prison sentence imposed upon a nineteen-year-old for a killing committed by another is categorically disproportionate.

As noted above, even if this Court were to find that a case specific challenge cannot be raised on appeal, it can consider a categorical challenge under the Eighth Amendment. When conducting a categorical analysis, appellate courts consider:

‘objective indicia of society’s standards, as expressed in legislative enactments and state practice’ to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by ‘the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose,’ the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.

Graham, 560 U.S. at 61. (Citations omitted).

i. National consensus against life imprisonment

In 1976, this Court held that a lifetime sentence for felony murder did not constitute cruel and unusual punishment. *State v. Goodseal*, 220 Kan. 487, 493-94, 553 P.2d 279, 286 (1976), overruled by on other grounds by *State v.*

Underwood, 228 Kan. 294, 615 P.2d 153 (1980). This Court conducted a cursory analysis, holding,

The felony murder rule represents a long standing policy of this state. We have already indicated its rationale-to furnish an added deterrent to the perpetration of felonies which, by their nature or the attendant circumstances, create a foreseeable risk of death. ‘The legislature, acting in the exercise of the police power of the state, is empowered to enact measures in furtherance of the public welfare and safety, and its enactments in such areas are not to be judicially curtailed where they reasonably relate to the ends sought to be attained. Classifications honestly designed to protect the public from evils which might otherwise arise are to

be upheld unless they are unreasonable, arbitrary or oppressive[.]’ The felony murder rule, designed as it is to protect human life, represents sound public policy, is reasonably related to the end sought to be accomplished and is not constitutionally impermissible.

Goodseal, 220 Kan. at 493-94. (Citation omitted). The *Goodseal* Court did not evaluate any of the factors articulated in *Graham*. As a result, Mr. Patterson argues that this Court should revisit *Goodseal*.

As stated above, there is not a national consensus for imposing a life sentence upon a nineteen-year-old for a killing committed by a co-defendant. (See Appendix B). The majority of states either require an additional *mens rea* requirement by a jury to punish a defendant for felony murder, provide affirmative defenses, or punish felony murder less severely than Kansas.

ii. The judicial exercise of independent judgment

In the second step of a categorical analysis, this Court exercises of its own independent judgment to determine whether a sentence violates the Federal and State Constitutions. In this inquiry, this Court considers whether a challenged sentencing practice serves legitimate penological goals of retribution, deterrence, incapacitation, and rehabilitation. *Graham*, 560 U.S. at 67-68.

A lifetime sentenced imposed upon a nineteen-year-old for a killing committed by another does not serve the penological purpose or retribution. “The heart of the retribution rationale is that a criminal sentence must be **directly related to the personal culpability of criminal offense.**” *Graham*, 560

U.S. at 71. (Emphasis added). Both the United States Supreme Court and this Court have recognized the diminished culpability of a juvenile:

Roper and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, ‘they are less deserving of the most severe punishments.’

State v. Dull, 302 Kan. 32, 51–52, 351 P.3d 641 (2015) (quoting *Miller v. Alabama*, 567 U.S. 460, 471, 183 L.Ed.2d 407, 132 S.Ct. 2455 [2012]). At the time of the crimes in the present case, Mr. Patterson was nineteen years old. (R. 2: 87; R. 22: 45-46). Although not a “juvenile” under Kansas law, recent research has shown that a young person’s brain continues to develop until age twenty-five. Sara Johnson, et al., “Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy,” *Journal of Adolescent Health* (2009), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2892678/> (adolescent brain continues to develop into a person’s twenties); “Understanding the Teen Brain,” University of Rochester Medical Center (<https://www.urmc.rochester.edu/encyclopedia/content.aspx?ContentTypeID=1&ContentID=3051>), access on May 24, 2018 (“The rational part of a teen’s brain isn’t fully developed and won’t be until age 25 or so.”); Mariam Arain, et al., “Maturation of the adolescent brain,” *Neuropsychiatric Disease and Treatment* (2013), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3621648/> (brain maturation occurs during ages 10 to twenty-four years old). Thus, at age nineteen, Mr. Patterson shared characteristics with juveniles.

Further, when a juvenile does not kill or intend to kill the victim, he “has a twice diminished moral culpability.” *Graham*, 560 U.S. at 50. Here, although Mr. Patterson was involved in the robbery, he did not commit the killing in the present case, and there is no evidence that he assisted Wiley in killing Mr. Bieker. Given the nature of the offense, society’s need for retribution is considerably less than for a case where the defendant actually committed a killing, whether intentional or reckless.

Nor can deterrence justify a lifetime sentence. There is little evidence that felony murder statutes actually deter killings committed during inherently dangerous felonies. See Anup Malani, “Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data,” *Virginia Law Review* (2002), available at <http://www.law.virginia.edu/pdf/malani/felonymurder021111rand.pdf> (“[T]he felony-murder rule does not substantially improve crime rates.”) In addition, in Kansas, an offender’s criminal history already serves to deter him or her from committing additional crimes by increasing his or her potential sentence for any future crimes committed. In this case a lifetime prison sentence, does not have the desired deterrent effect.

Recidivism “is a serious risk to public safety, and so incapacitation is an important goal.” *Graham*, 560 U.S. at 72. To the extent that a lifetime prison sentence may be justified to protect society from those with a high risk to offend, its mandatory imposition upon those convicted of felony murder, regardless of intent or the degree of participation in the actual killing, undermines this

purpose. This sentencing scheme would be on much firmer constitutional footing if imposition of a lifetime sentence were discretionary, rather than mandatory. *See Miller v. Alabama*, 567 U.S. 460, 471, 183 L.Ed.2d 407, 132 S.Ct. 2455 (2012) (holding that statutorily mandated life without parole sentences for juvenile homicide defendants were unconstitutional, although such defendants could be discretionarily sentenced to life without parole). As asserted above, given the underlying facts of this case, a lifetime prison sentence is grossly disproportionate to the conviction in this case.

Finally, a lifetime sentence inherently undermines the penological goal of rehabilitation by not permitting Mr. Patterson to resume work, support his family, and receive any necessary treatment. In short, a lifetime sentence imposed upon a nineteen-year-old for a killing committed by another does not further any legitimate penological goals. It is grossly disproportionate and overbroad. This Court must reverse the imposition of Mr. Patterson's life (Hard 25) sentence.

Conclusion


A lifetime prison sentence imposed upon a nineteen-year-old for the killing of another is grossly disproportionate under the Eighth Amendment of the United States Constitution and §9 of the Kansas Constitution Bill of Rights. This Court must vacate Mr. Patterson's sentence and remand for resentencing.

Kansas among many other states have establish public norm and Law that a young adult does not have the ability to choose whether or not he or she can drink alcohol or use tobacco products until the age of 21, how then can he have the mental capacity to know the full reasonable foreseeable consequences of a venture leeding to the death of another when that was never his intent?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 4/6/2020

STATE OF KANSAS)
) SS:
COUNTY OF BUTLER)

SUBSCRIBED AND SWORN TO BEFORE ME on this 6th day of April, 2020.



Notary Public

My Commission Expires: 1/26/2022

