No. 20-6653

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

Scott P. Roeder,
Individually and as Next Friend of Unborn and Partially Born Individuals under Sentence of Death,

PETITIONER,

v.

STATE OF KANSAS,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE KANSAS COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Mr. Scott P. Roeder #65192
Hutchinson Correctional Facility
P.O. Box 1568
Hutchinson, KS 67504-1568

Pro Se and as Next Friend

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the notion of overturning *Roe v. Wade*, 410 U.S. 113 (1973), includes other possibilities besides leaving abortion up to the states?
2. Whether the prospect of new technology provides encouragement to renew inquiry into the legality of abortion?
3. Whether the unborn and partially born should be granted a stay of execution of sentence of death?
4. Whether Roeder was denied the twin rights of counsel and being present at a critical proceeding?
5. Whether but for ineffective assistance by trial and appellate counsel under *Strickland*, Roeder's convictions would not have been upheld?
6. Whether the pattern of legal indifference shown for Roeder's rights by courts below is sufficient to invoke an exercise of this Court's supervisory power?
7. Whether the Kansas Court of Appeals should have considered for the first time on appeal the suggestion of trial counsel's ineffectiveness for agreeing that the public need not be present during parts of jury selection?
8. Whether the Kansas Court of Appeals should have filed the *pro se* supplemental reply brief which was timely lodged in response to the state's brief?
9. Whether at least when counsel is court-appointed there is a right to effective or at least non-incompetent assistance on collateral review?

10. Whether to be legally recognized as persons in the whole sense under the United States Constitution and the Kansas Constitution it suffices to establish the purely secular suggestion of personhood for the unborn and partially born?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

State Collateral Review

Trial court: *Roeder v. State*, No. 2017-CV-2373. 18th Judicial District Court, Sedgwick County, Kansas. Judgment entered November 1, 2017 (reconsideration denied November 28, 2017).

Appeal: *Roeder v. State*, No. 119,503. Kansas Court of Appeals. Judgment entered July 19, 2019 (rehearing denied August 21, 2019; petition for review and *pro se* supplemental petition for review denied September 29, 2020).

Federal Collateral Review

Trial court: *Roeder v. Schnurr*, No. 20-CV-3275. U.S. District Court for the District of Kansas. Filed November 4, 2020 (case pending).

Criminal Proceedings

Trial court: *State v. Roeder*, No. 2009-CR-1462. 18th Judicial District Court, Sedgwick County, Kansas. Journal entry of resentencing after remand entered December 8, 2016.

Direct appeal: *State v. Roeder*, No. 104,520. Kansas Supreme Court. Judgment entered October 24, 2014.

U.S. Supreme Court: *Roeder v. Kansas*, 575 U.S. ____ (2015) (No. 14-8767). U.S. Supreme Court. Certiorari denied May 18, 2015 (rehearing denied July 20,

2015; Appl. No. 14A1166 denied by Justice Sotomayor May 12, 2015; Appl. No. 14A1225 denied by Justice Sotomayor June 4, 2015, then refiled and submitted to Justice Alito and denied by the Court July 20, 2015).

Other Proceedings

I.

A case was filed *pro se* which was not treated as a motion attacking sentence due to prematurity of the filing. The case history is listed here, however, to err on the side of caution.

Trial court: *In the Matter of Scott P. Roeder*, No. 2010-CV-882. 18th Judicial District Court, Sedgwick County, Kansas. Judgment entered June 4, 2010.

Appeal: *In the Matter of Scott P. Roeder*, No. 104,687. Kansas Court of Appeals. Judgment entered November 23, 2010 (rehearing denied January 13, 2011; petition for review denied December 19, 2011).

U.S. Supreme Court: *Roeder v. Kansas*, 568 U.S. ____ (2012) (No. 11-10468). U.S. Supreme Court. Certiorari denied October 1, 2012 (rehearing denied December 3, 2012; Appl. No. 12A192 denied by Justice Sotomayor August 24, 2012, then refiled and submitted to the Chief Justice and denied as moot October 1, 2012; Appl. No. 12A525 denied by Justice Sotomayor November 29, 2012).

II.

A habeas corpus case was filed *pro se* on the original jurisdiction of the Kansas Supreme Court as next friend of unborn and partially born individuals under sentence of death. On petition for certiorari, the Clerk of this Court refused to

file a timely application for a stay of execution of sentence of death for unborn and partially born individuals, stating that only an attorney can seek the stay on behalf of a third party, which is contrary to a long history of precedents. See *Califorrniaa v. Clinton*, 517 U.S. 1204 (1996) (No. 95-1556), Appl. No. A825; *Roeder v. Kansas*, 568 U.S. ____ (2012) (No. 11-10468), Appl. Nos. 12A192 and 12A525; *Grady v. United States*, 574 U.S. ____ (2014) (No. 13-10717), Appl. Nos. 14A219 and 14A553; and, *Roeder v. Kansas*, 575 U.S. ____ (2015) (No. 14-8767), Appl. Nos. 14A1166 and 14A1225.

Trial Court: *Roeder v. Schmidt*, No. 118,601. Kansas Supreme Court. Judgment entered December 20, 2017.

U.S. Supreme Court: *Roeder v. Schmidt*, 584 U.S. ____ (2018) (No. 17-1407). U.S. Supreme Court. Certiorari denied June 11, 2018 (rehearing denied August 6, 2018).

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

STATUTES AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the Kansas Court of Appeals, which is highest state court to review the merits, appears at Appendix A to the petition and is unpublished.

Its order denying rehearing appears at Appendix B.

The opinion of the trial court, the 18th Judicial District Court, Sedgwick County, Kansas, appears at Appendix C to the petition and is unpublished.

Its order denying reconsideration appears at Appendix D.

The order of the Kansas Supreme Court denying a petition for review and denying a *pro se* supplemental petition for review appears at Appendix E.

JURISDICTION

The date on which the Kansas Court of Appeals decided this case was July 19, 2019. A copy of that decision appears at Appendix A.

A timely motion for rehearing was thereafter denied on August 21, 2019, and a copy of the order denying rehearing appears at Appendix B.

A timely petition for review and a timely *pro se* supplemental petition for review were denied on September 29, 2020, and a copy of the order denying the

petition for review and denying the *pro se* supplemental petition for review appears at Appendix E.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves the following constitutional and statutory provisions, which are set forth in relevant part as follows:

U.S. Const. Amend I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * * *"

U.S. Const. Amend. V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; * * * nor be deprived of life, liberty, or property, without due process of law; * * * *"

U.S. Const. Amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

U.S. Const. Amend. VIII: "* * * nor cruel and unusual punishments inflicted."

U.S. Const. Amend. XIV § 1: "* * * nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Kan. Const. Bill of Rights § 9: "Bail; fines; cruel and unusual punishment. All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."

Kansas Statutes Annotated (K.S.A.) 22-2802(1): "Any person charged with a crime shall, at the person's first appearance before a magistrate, be ordered released pending preliminary examination or trial upon the execution of an appearance bond in an amount specified by the magistrate and sufficient to assure the appearance of such person before the magistrate when ordered and to assure the public safety. * * * *"

K.S.A. 60-1507(b): "*Hearing and judgment.* Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the county attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. * * * *"

STATEMENT OF THE CASE

As evidenced by the transcript of the second day of his Senate confirmation hearing, U.S. Attorney General designate John Ashcroft famously deferred to the mantra of the American attorney when asked by U.S. Senator Dianne Feinstein if

he would pursue due process of law on behalf of the unborn. Responding in the negative, Ashcroft pledged instead to be mindful of his "currency" with this Court in deference to what "[t]he Supreme Court has signaled very clearly it doesn't want to deal with" or is "unwilling to deal with"; to do otherwise, he explained, is "a losing proposition" and "devalues" an attorney's ability "to succeed on other issues" before the Court. Rather than trying to rub due process of law in the face of the presiding court, currency-minded American attorneys—ever-mindful of their social, political, and financial currency—look instead to what the presiding court has "signaled" it wants to deal with or is willing to deal with. As a consequence, true to his pledge, rather than pursing the most basic thing of due process, U.S. Attorney General John Ashcroft failed to call the medical examiner to testify as to child homicide in the partial-birth case of *Gonzales v. Carhart*, 550 U.S. 124 (2007). Instead, to please the Court, he limited himself to other latitudes.

Even cases which only touch upon the abortion issue tangentially are still badly disadvantaged before this Court. See *Gee v. Planned Parenthood*, 586 U.S. ___ (2018) (Thomas, J., dissenting). It would therefore be naïve to introduce the statement of this case without an awareness of the uphill battle being faced by petitioner in his quest to secure the right to due process of law for himself and for unborn and partially born individuals under sentence of death.

Directly related cases are listed under Related Cases, *supra.*

After a jury trial in which he was denied an affirmative defense, petitioner Scott P. Roeder was convicted of first-degree murder for fatally shooting Dr. George

Tiller to prevent him from performing scheduled abortions. Roeder was also convicted on two counts of aggravated assault for threatening to shoot two men if they did not refrain from impeding his departure from the scene of the shooting. His convictions were affirmed on direct appeal by the Kansas Supreme Court, and he was resentenced after remand to life in prison (with parole eligibility in 25 years) plus 24 months. This Court denied certiorari, rehearing, and two applications for a stay of execution of sentence of death for unborn and partially born individuals.

Roeder does not dispute that he fatally shot Tiller. The shooting occurred on May 31, 2009 and he was arrested the same day. The mandate of the Kansas Supreme Court on direct appeal issued on November 18, 2014. He was resentenced after remand on November 23, 2016. He did not appeal from the resentencing. The judgment of the trial court became final after the 14-day period under K.S.A. 22-3608(c) expired for appealing the sentence after remand which was entered on December 8, 2016. See *Baker v. State*, No. 100,501 (Kan. S. Ct. 2013). On October 16, 2017, Roeder filed a timely motion attacking his sentence, which the trial court construed as a motion for postconviction relief under K.S.A. 60-1507.

In his motion, Roeder claimed (1) he was the victim of a pattern of deliberate legal indifference, (2) he was denied the twin rights of being constitutionally present at all critical stages of a criminal prosecution and being free to retain counsel of choice, (3) he was denied effective assistance of counsel during the original proceedings in the trial court, and (4) he was denied effective assistance of counsel on direct appeal. Before the trial court ruled, Roeder also filed an emergency motion

for a stay of execution of sentence of death on behalf of unborn and partially born individuals under sentence of death. The trial court summarily denied the motions (Appendix C). Roeder filed a timely motion for reconsideration, which the trial court also denied (Appendix D). Counsel was not appointed.

Roeder timely filed a notice of appeal and counsel was appointed to appeal the dismissal of his motions to the Kansas Court of Appeals. This Court is alerted that appointed counsel dismissed herself from briefing the stay of execution issue without first obtaining leave from the Kansas Court of Appeals and without conferring with Roeder in advance; the Kansas Court of Appeals did not address counsel's decision to dismiss herself from briefing the stay of execution issue. The Kansas Court of Appeals affirmed the judgment of the trial court (Appendix A) and denied a timely motion for rehearing (Appendix B). On September 29, 2020, the Kansas Supreme Court denied a timely filed petition for review and denied a timely filed *pro se* supplemental petition for review (Appendix E).

Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Kansas Court of Appeals.

Petitioner believes that each of the federal questions raised in this petition was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. Additional matter submitted in compliance with Supreme Court Rule 14(g)(i) is set forth in Appendix I.

The statement of this case would not be complete without giving it a human perspective: Tiller was killed on a Sunday over 11 years ago, which means those

scheduled to be executed by him the following Monday now have their teens to look forward to, thanks to your petitioner who fought for their freedom.

REASONS FOR GRANTING THE WRIT

Whether the notion of overturning *Roe v. Wade*, 410 U.S. 113 (1973), includes other possibilities besides leaving abortion up to the states?

In posing a question to Vice President Mike Pence during the 2020 Vice Presidential Debate, moderator Susan Page of USA TODAY states: "A confirmation [of Judge Amy Coney Barrett] would cement the [U.S. Supreme Court's] conservative majority, and make it likely open ... even to overturning the landmark *Roe v Wade* ruling. Access to abortion would then be up to the states."

Though even the conservatives on the Court have yet to consider it, the notion of overturning *Roe v. Wade*, 410 U.S. 113 (1973), however, includes other possibilities besides leaving abortion up to the states.

The fundamental proposition of *Roe v. Wade* is precisely the same as that of *Dred Scott v. Sandford*, 19 How. 393, 407 (1857), namely, whether the beings in question are "so far inferior" that they have no rights which others are "bound" to respect. Rejecting this proposition leads to the Fourteenth Amendment's concept of due process based on equal protection, which in turn has reshaped the Fifth Amendment's concept of due process by reverse incorporation. See *Bolling v. Sharpe*, 347 U.S. 497 (1954). But in *Roe*, like in *Dred Scott* before it, the Court did the contrary by unanimously reaffirming this hateful proposition, holding that an abortion is not "the termination of life entitled to Fourteenth Amendment

protection." *Roe, id.* at 159. As Justice Stevens reflects some twenty years later: "From this holding, there was no dissent, see *id.*, at 173; indeed, no Member of the Court has ever questioned this fundamental proposition." *Planned Parenthood v. Casey*, 505 U.S. 833, 913 (1992) (Stevens, J., concurring in part and dissenting in part). *Roe's* author Justice Blackmun similarly reflects that not only has this been the unanimous view of the Court, but also that of the Republican Administration: "No Member of this Court—nor for that matter, the Solicitor General, see Tr. of Oral Arg. 42—has ever questioned our holding in *Roe* that an abortion is not 'the termination of life entitled to Fourteenth Amendment protection.' 410 U. S., at 159." *Casey, id.* at 932 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).[1]

Having affirmed the fundamental proposition of inequality, attention then turns to a secondary question: Who, then, should have primary control over the lives of those deemed so far inferior that they have no rights which others are bound to respect? Possibilities include the Congress, the states, and private individuals. In *Dred Scott*, the Court gave primary control to the states. But a more radical version of *Dred Scott* would have left it to the choice of private individuals. Had this been the case, lobbying for the Court to overturn the more radical version in favor of

---

[1] Also noted is *United States v. Vuitch*, 402 U.S. 62 (1971), in which the decision of the Republican Administration not to invoke the protections of the Fourteenth Amendment on behalf of the unborn allowed that case to promptly serve as the introit to *Roe v. Wade*. See *Roe, id.* at 159 ("Indeed, our decision in *United States v. Vuitch*, 402 U. S. 62 (1971), inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection.")

going back to the states' rights version upheld in *Dred Scott* would hardly be considered an anti-slavery or pro-freedom movement by today's standards. By analogy, lobbying for the Court to revise its answer to the secondary question of *Roe v. Wade* in favor of a state's rights should hardly be considered an anti-abortion or pro-life movement. Instead, the Court should overturn *Roe v. Wade* by overturning *Roe's* fundamental proposition in favor of equality.

Whether the prospect of new technology provides encouragement to renew inquiry into the legality of abortion?

Using a rigid trimester framework, *Roe* relied on the point of extrauterine viability as the fulcrum which shifts between the interests of the state versus those of the pregnant woman. *Id.*, at 147-165. In contrast, *Casey*, *id.* at 860, relied on the same fulcrum concept as *Roe*, but introduced an open-ended allowance for the fulcrum to slide toward the state in tandem with new advancements in technology:

> [W]hether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future ... the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided....

By introducing a sliding scale for extrauterine viability, the Court would appear to have unwittingly announced a natural terminus to *Roe*. For it stands to reason that if advancements in technology can cause the fulcrum to slide entirely toward the state, then *Roe's* central holding has become obsolete and must be revisited.

To be clear on this, the Court in *Casey* incorrectly assumed that enhancements in fetal respiratory capacity can only come via the pulmonary route. As a consequence, the Court wrongly anticipated that the terminus of the fulcrum's advancement would be limited to "some moment slightly earlier in pregnancy [than 23 weeks]," based on the well-known timeline of pulmonary development.

What the Court in *Casey* failed to appreciate (no doubt due to inadequate counsel from the medical profession), was that the baby's respiratory capacity can alternatively be enhanced via what is now being called the "alluvial" route as opposed to the pulmonary route, meaning, using liquid-phase ventilation of the egg or gestational sac as opposed to gas-phase ventilation of the lungs.

Advantageously, new technology for alluvial incubation purports the capacity to enhance the baby's respiratory capacity all the way down to conception. See U.S. Patent No. 10,245,075 (Califorrniaa), "Nondestructive means of ectopic pregnancy management," April 2, 2019. Hence, the viability fulcrum is no longer restrained as the Court had once assumed in *Casey*. As a consequence, *Casey's* modification of the central holding of *Roe* is doomed for obsolesce. The Court should therefore accept the prospect of this new technology as providing encouragement to renew its inquiry into the legality of abortion.

Whether the unborn and partially born should be granted a stay of execution of sentence of death?

Petitioner contends that the death penalty is being freakishly and arbitrarily applied in the United States to execute unborn and partially born individuals in

violation of the Eighth Amendment. Because abortion policy derives its asserted legality from judicial acts and is conducted under the protection of governmental powers, those condemned to death by abortion are under sentence of death. For purposes of a habeas corpus proceeding, one to be taken to an abortion clinic for lethal execution is a prisoner in custody. Because abortion policy is a federal policy, the custody is federal. See *Jones v. Cunningham*, 371 U.S. 236 (1963). Moreover, a formal death warrant is not required for this to be treated as a capital case. See *Holtzman v. Schlesinger*, 414 U.S. 1316 (1972). This Court has jurisdiction under 28 U.S.C. §§ 1651 and 2101(f) to grant the requested stay of execution of sentence of death on behalf of unborn and partially born individuals.

In cases such as *Roe* in which the unborn and partially born have been summarily condemned to death by abortion, they have never been represented by counsel. Instead, they have been treated as beings so far inferior that they have no rights which others are bound to respect, including the right to counsel in a capital case guaranteed by the Sixth Amendment and the Due Process clauses of the Fifth and Fourteenth Amendments. Such treatment results in a circular argument, as if to say that those who do not have the right to counsel do not have the right to life either. In a capital case, the absence of counsel for the defense provides sufficient grounds for granting the requested stay of lethal execution. See *Powell v. Alabama*, 287 U.S. 45 (1932); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

Petitioner asserts dual standing as an individual and next friend to seek the stay. He has individual standing to prosecute the stay because granting it would

help his habeas corpus cause by legally affirming the value of lives like the ones he saved; and, he also has standing as next friend because a prisoner is not prevented from serving as a relator on behalf of one condemned. See *Whitmore v. Arkansas*, 495 U.S. 149 (1990). The Court should therefore grant the requested stay.

Whether Roeder was denied the twin rights of counsel and being present at a critical proceeding?

In Kansas, denial of the twin rights of counsel and being present at a critical proceeding of a criminal prosecution is reversible error in which prejudice need not be shown. See *State v. Carver*, 32 Kan. App. 2d 1070 (Kan. Ct. App. 2004). In Kansas, to be 'present' requires that a defendant be more than just physically present; it assumes that a defendant will be informed about the proceedings. See *State v. Calderon*, 270 Kan. 241, 245, 13 P.3d 871 (2000) (citing *United States v. Mosquera*, 816 F.Supp. 168, 172 (E.D.N.Y. 1993)). Moreover, this Court has identified notice and an opportunity to be heard as the hallmarks of procedural due process, which is protected by the Due Process clause of the Fifth Amendment. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The Due Process clause of the Fourteenth Amendment is similarly invoked.

The right to bail is guaranteed by Kansas Constitution Bill of Rights § 9 ("All persons shall be bailable by sufficient sureties except for capital offenses....") The Kansas legislature interprets the right to bail as commencing at the time of the first appearance before the magistrate under K.S.A. 22-2802(1) ("Any person charged with a crime *shall* [emphasis added], at the person's first appearance before a

magistrate, be ordered released pending preliminary examination upon the execution of an appearance bond in an amount specified by the magistrate....")

In the criminal proceeding, the magistrate judge denied Roeder bond at his first appearance in absence of counsel. Because Roeder was not informed that his first appearance would be used as a proceeding to deny bond, he was not constitutionally 'present' at the first appearance. Being constitutionally entitled to bond under Kansas Constitution Bill of Rights § 9, the proceeding to deny bond at his first appearance rose to the level of a 'critical' proceeding. Having not been appointed counsel for the first appearance, he was denied the twin rights of counsel and being constitutionally present at a critical proceeding.

Under the Sixth Amendment, the right to the assistance of counsel for one's defense is a fundamental right; a defendant's constitutional right to be present during criminal proceedings stems from the Sixth Amendment right to confront witnesses and the Fifth and Fourteenth Amendment due process right to attend the critical stages of a criminal proceeding in which the defendant is not actually confronting the witnesses or evidence against him or her. See *Carver*, *supra*; *Calderon*, *id.* at 245.

Petitioner contends that because the first appearance, being first, cannot be repeated, the proceeding to deny bond in absence of counsel is fatal to the state's case, such that not only should his convictions be vacated, but that the charges against him should also be dismissed with prejudice; for this is the logical effect of judicial contumacy for the state constitutional right to bail at a first proceeding in

which the twin rights are also denied. He also contends he suffered irreparable harm from the event such as will not be erased simply by granting him a new trial, given that the combination of being denied bond while appearing by two-way communication on national television in jail clothes made him look like a terrorist who was too dangerous to be let into the actual courtroom let alone out on bail even despite what the state constitution says about bail.

The Kansas Court of Appeals states in its judgment (Appendix A, p. 9): "Even if we construed his first court appearance to be a critical stage of the criminal proceedings against him, Roeder does not allege, nor is there record evidence to establish, that Roeder was prejudiced in any way." Contrary to what that judgment states, Roeder plainly alleged, and there is clear record evidence to establish, that he was prejudiced. See Movant's Brief in Support of Motion Attacking Sentence, pp. 8-15. Not only that, but under the standard of *Carver*, he need not show prejudice anyway. *Id.*, at 1083-1086. The Court should therefore vacate his convictions with instructions to dismiss the charges against him with prejudice.

Whether but for ineffective assistance by trial and appellate counsel under *Strickland*, Roeder's convictions would not have been upheld?

In a criminal proceeding, a defendant has a Sixth Amendment right to the effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668 (1984). He or she also has the right to have compulsory process for obtaining witnesses in his or her favor under the Sixth Amendment and the Due Process clauses of the Fifth and Fourteenth Amendments. *Id.,* at 684-685.

The affirmative defense Roeder sought required him to show that he acted to prevent an imminent legal harm or evil. Roeder would have made the requisite showing, but for ineffective assistance. Because an abortion, like any other lethal execution, is 'imminent' so long as it remains scheduled, appellate counsel was ineffective under *Strickland* who arbitrarily conceded that six months out would not be imminent, and who ignored Roeder's written request for her to raise the U.S. Justice Department's own view of imminence as detailed in the Barron's memo.[2] Because homicide is always a 'legal harm or evil,' trial counsel was ineffective under *Strickland* who failed to call the coroner as a defense witness to testify as to whether performance of an abortion results in what must be ruled a homicide of the offspring, being that the coroner is the competent authority to make such a determination. But for counsels' ineffectiveness, Roeder would not be imprisoned for acting as he did to save offspring from the imminent legal harm or evil of their scheduled executions. The Court should therefore vacate his convictions.

Whether the pattern of legal indifference shown for Roeder's rights by courts below is sufficient to invoke an exercise of this Court's supervisory power?

The American Civil Liberties Union (ACLU), despite its asserted mission of advocating legal fairness, made an exception for Roeder's case, by barging onto the scene of the criminal proceedings mid-trial and lodging a paper styled as an *amicus*

---

[2] See U.S. Justice Department Memorandum of July 16, 2010, "Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi," a.k.a. Barron's Memo (declassified and first made public June 23, 2014).

brief, which presumed to spoon feed the trial court with legal theories adverse to the defense, even though such a filing is not allowed by the trial court rules. On direct appeal, the Kansas Supreme Court, as if inviting a spoon feeding of its own, filed an *amicus* brief in support of the state by the ACLU *et al.*, but refused to file any of the seven *amicus* briefs which were lodged in support of Roeder. It also denied Roeder's *pro se* motion for permission to file a *pro se* response to any *amicus* briefs that might be filed. This shows that even the ACLU supported a playing field which to Roeder's disadvantage was not level.

Legal indifference for Roeder's rights has been shown all around. Police video of his arrest posted on the internet shows that, as Roeder emerged from his vehicle, law enforcement presumed his guilt by calling out argumentatively, "Where's the gun?" While in county jail, the names and addresses of those who contacted him in custody were made public and he was subject to irregular mail scrutiny without justification, as if to presume his guilt in a manner that might scare others from rendering him assistance. He was made to look like a terrorist on national television by denying him the state constitutional right to bail in a proceeding in which the twin rights of counsel and being constitutionally present were also denied. After being denied bail, the trial court disparaged the presumption of his innocence as an excuse for setting excessive bail, by expressing doubt that he would not "participate or enact any more violence...." The state's attorney told the trial court that a reasonable person would believe Roeder engaged in "alleged acts of American terrorism." Appointed trial counsel spoke to the Press on television

without Roeder's authorization and in such a manner as to suggest disparagingly that Roeder's demeanor was a liability to the defense. The Kansas Department of Corrections has generated an arm's length list of disciplinary reports on him, which serve to impugn his reputation and dignity.

On appeal on collateral review, the Kansas Court of Appeals states in its judgment (Appendix A, p. 9): "Even if we construed his first court appearance to be a critical stage of the criminal proceedings against him, Roeder does not allege, nor is there record evidence to establish, that Roeder was prejudiced in any way." The Court is alerted that this statement is plainly contradicted by the Movant's Brief in Support of Motion Attacking Sentence, which states (p. 10):

> Roeder contends that the combination of being denied bond while appearing by two-way communication on national television in jail clothes made him look like a terrorist who was too dangerous to be let into the actual courtroom let alone out on bail. Since this egregious harm to his constitutional rights and the public's perception of him will not simply be erased by a new trial, his convictions must be reversed and the charges against him must be dismissed with prejudice on all counts.

The widespread pattern of legal indifference shown for petitioner's rights is attributable to the involvement of abortion politics. Yet to maintain the legitimacy of any legal system, politically-motivated indifference for a prisoner's rights requires a heightened level of legal scrutiny. A state prisoner's rights are protected from politically-motivated indifference by the Fourteenth Amendment. The pattern of legal indifference shown for petitioner's rights is so widespread and extensive that it renders the result of his trial and direct appeal unreliable. The Court should therefore exercise supervision and vacate his convictions.

Whether the Kansas Court of Appeals should have considered for the first time on appeal the suggestion of trial counsel's ineffectiveness for agreeing that the public need not be present during parts of jury selection?

Roeder raised the following claim for relief for the first time on appeal from the summary dismissal of his motion for collateral review, as stated in the Pro Se Supplemental Brief of Appellant (p. 9):

> New Matter
>
> Because Roeder's Motion Attacking Sentence was dismissed at the pleading stages, he raises for the first time on appeal new matter consistent with the original pleading which was not presented to the district court but which could have been added by amendment. Namely, he believes trial counsel was ineffective who agreed with the district court that the public should not be present during parts of the jury selection. Noted is that Roeder raised this issue in writing to his court-appointed attorney in the present appeal, but she did not raise it in his attorney-filed brief.
>
> The Court is therefore asked to consider de novo whether the district court's bar on public proceedings was reversible error.

In response, the Kansas Court of Appeals, despite having granted *de novo* review, states in its judgment (Appendix A, pp. 4-5):

> Roeder also raises a new issue for the first time on appeal. As a general rule, issues not raised before the trial court cannot be raised on appeal. See *State v. Kelly*, 298 Kan. 965, 971, 318 P.3d 987 (2014). Roeder does not argue any of the recognized exceptions to this rule. Therefore, we will not address the new issue.

The reliance of the Kansas Court of Appeals on *Kelly* is misplaced because *Kelly* was a direct appeal, unlike the present case which is an appeal on collateral review. The distinction is important, given that the Kansas legislature gives the courts specific directions to follow on collateral review, namely, that relief on

collateral review is not to be denied under K.S.A. 60-1507(b) "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief...."

In granting *de novo* review, the Kansas Court of Appeals admittedly assumes this responsibility of the trial court (Appendix A, p. 4):

> When the district court summarily denies a K.S.A. 2018 Supp. 60-1507 motion, an appellate court conducts de novo review to determine whether the motion, files, and records of the case conclusively establish that the movant has no right to relief. *Sola-Morales*, 300 Kan. at 881.

Hence, notwithstanding what may be required in other appellate proceedings, on collateral review Roeder need only point out or draw attention to some aspect of "the motion and the files and records of the case" in order for the relevant matter in question to be eligible for appellate consideration on *de novo* review, in which case the contrary treatment by the Kansas Court of Appeals is violative of the Due Process clause of the Fourteenth Amendment. The Court should therefore reverse the judgment of the Kansas Court of Appeals.

Whether the Kansas Court of Appeals should have filed the *pro se* supplemental reply brief which was timely lodged in response to the state's brief?

On collateral review, appellate counsel was appointed, but not trial counsel. The trial court addressed the issue of a stay of execution of sentence of death for the unborn and partially born. Appendices C & D. On appeal, appointed counsel dismissed herself from briefing the stay of execution issue, for reasons stated in the Brief of Appellant (p. 4):

> Counsel believes that pursuit of Roeder's motion on behalf of unnamed third persons is outside the scope of her appointment to represent him under the Indigent Defense Services Act, K.S.A. 22-4501 et seq., which provides for the appointment of counsel to represent indigent persons accused of crimes, indigent persons convicted of crimes on direct appeal, and indigent persons in custody under a sentence of imprisonment upon conviction of a felony on a petition for writ of habeas corpus or a motion attacking sentence under K.S.A. 60-1507 and any related appeals. Counsel has so advised Roeder in a letter sent with this Brief.

Counsel's argument that "unnamed" persons are not entitled to counsel in a capital case is contrary to past experience with capital cases. For example, Justice Douglas found the opposite in *Holtzman v. Schlesinger*, *id.* at 1317:

> But this case in its stark realities involves the grim consequences of a capital case. The classic capital case is whether Mr. Lew, Mr. Low, or Mr. Lucas should die. The present case involves whether Mr. X (an unknown person or persons) should die. No one knows who they are. ... The upshot is that we know that someone is about to die.

Though appointed counsel clearly lacked the discipline to face the stark realities of this case, the grim consequences of a capital case are nonetheless similarly involved in the lethal execution of unborn and partially born individuals: The upshot is that we know that someone is about to die.

The Court is alerted that appointed counsel dismissed herself from briefing the stay of execution issue without leave from the Kansas Court of Appeals and without conferring with Roeder in advance. Acting *pro se* and as next friend, Roeder addressed the stay of execution issue in the Pro Se Supplemental Brief of Appellant, which was filed upon motion. The state addressed the stay of execution issue in the Brief of Appellee. Appointed counsel filed the Reply Brief of Appellant, but again did not address the stay of execution issue.

Acting *pro se* and as next friend, Roeder timely lodged a Pro Se Supplemental Reply Brief of Appellant which specifically addressed the position of the Brief of Appellee on the stay of execution issue, but the motion to file submitted therewith was denied as was reconsideration. Appendices F & G. A Pro Se Petition for Review (interlocutory) was denied by the Kansas Supreme Court. Appendix H. The Kansas Court of Appeals addressed the stay of execution issue in its judgment (Appendix A), but did not comment on the decision of appointed counsel to dismiss herself from briefing it without leave and without conferring with Roeder in advance.

By refusing to file the Pro Se Supplemental Reply Brief of Appellant, the Kansas Court of Appeals abused discretion by forcing Roeder to default on making any reply to the position of the Brief of Appellee on the stay of execution issue, given that appointed counsel had already dismissed herself without leave from addressing the stay of execution issue. Put another way, in the Brief of Appellee the state first gave 'notice' of its position on the stay of execution issue, but Roeder was effectively denied 'an opportunity to respond.' However, notice and an opportunity to respond are the hallmarks of procedural due process, which is protected by the Due Process clause of the Fifth Amendment. See *Mullane v. Cent. Hanover Bank & Trust Co.*, *supra.* The Due Process clause of the Fourteenth Amendment is similarly invoked. The Court should therefore reverse the judgment of the Kansas Court of Appeals.

At least when counsel is court-appointed, whether there is a right to effective or at least non-incompetent assistance on collateral review?

In *Strickland, id.* at 669, the Court held that "[a] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Whether or not such an indulgence is rational or merely self-serving, however, has hardly been tested. Claims of ineffective assistance at trial are strategically reserved for collateral review to preserve the advantage of an evidentiary hearing; claims that the assistance of appellate counsel was ineffective have no other option than to await collateral review. The vast majority of motions or petitions seeking collateral review are prosecuted by the prisoner *pro se.* But even in those cases where the prisoner is represented on collateral review by private or court-appointed counsel, this Court has not as yet recognized any constitutional right to effective assistance on collateral review. Hence, it is fair to say that *Strickland's* indulgence has hardly been tested, given that prisoners have as yet no recognized right to challenge that indulgence (or the likelihood of its presumptions) with the aid of effective assistance on collateral review.

Put another way, if the prisoner was cheated out of effective assistance at trial or on direct appeal, he or she has as yet no recognized guarantee of effective assistance to prove it on collateral review. The case at hand presents an extreme example of the problem: The Kansas Appellate Courts appear to have made quite a racket out of appointing incompetent counsel on collateral review.

In the Brief of Appellee, the state evaluates the performance of appointed appellate counsel on collateral review as follows (pp. 4-5):

> In her brief: movant' s appellate counsel summarizes the ineffective assistance of counsel claims raised in movant's 1507 motion. (Appellant's

> Brief, 8-10.) However, counsel engages in no independent analysis of these claims, does not explain how the district court erred, and does not even cite the applicable ineffective assistance of counsel tests.
>
> It is well settled that simply pressing a point without pertinent authority, or without showing why it is sound despite a lack of supporting authority, is akin to failing to brief an issue; where appellant fails to brief an issue, that issue is waived or abandoned. See State v. Murray, 302 Kan. 478, 486, 353 P.3d 1158 (2015); State v. Gleason, 277 Kan. 624, 655, 88 P.3d 218 (2004). See also Rule 6.02(a)(5) (2013 Kan. Ct. R. Annot. 39) (appellant's brief must include "the arguments and authorities relied on"). Similarly, a point raised incidentally in a brief and not argued therein is also deemed abandoned. State v. Spraque, 303 Kan. 418, 425, 362 P.3d 828 (2015).
>
> Given counsel's failure to provide any support for the claim that the district court erred, this court should not reach the merits of the underlying ineffective assistance of counsel claims. See Pack v. State, No. 118,581, 2019 WL 325140 (Kan. App. 2019) (unpublished opinion).

Like the present case, the case of *Pack v. State* cited in the Brief of Appellee was also an appeal on collateral review, in which the appellant Ronald K. Pack was represented by appointed counsel Kristen B. Patty, who is the same attorney appointed to represent Roeder in the present appeal.

In *Pack*, the Kansas Court of Appeals evaluates the performance of appointed counsel as follows (*id.* at p. 3):

> On appeal, Pack raises 20 claims of ineffective assistance of trial counsel. However, except for references to the standard of review and the *Strickland* ineffective assistance of counsel test, Pack cites no authority suggesting the district court erred in denying his 60-1507 motion. Failure to support a point with pertinent authority or show why it is sound despite a lack of supporting authority or in the face of contrary authority is akin to failing to brief the issue. *State v. Pewenofkit*, 307 Kan. 730, 731, 415 P.3d 398 (2018). Because Pack cites no authority and does not explain how the district court erred, we find he has abandoned these issues.

Hence, it would have been known from *Pack* that appointed counsel Kristen B. Patty would unlikely be competent to brief Roeder's appeal. From this it is evident that the effectiveness of counsel appointed in Kansas on collateral review

can be dependably incompetent, such that the appointment of counsel works to the wrongful advantage of the state.

Even if the Court abstains in this instance from finding a right to effective assistance on collateral review, the Court should nonetheless find no less than a right to competent counsel whenever the state elects to appoint counsel. By analogy, there is a First Amendment right to tell the truth or say nothing at all, but no right to lie; hence, if the state elects to appoint counsel, counsel must be genuine, or at least not incompetent, that is to say, not a lie. Hence, the Court should at least find that to appoint counsel in name only in a state proceeding is violative of the Due Process clause of the Fourteenth Amendment. The Court should therefore reverse the judgment of the Kansas Court of Appeals.

Whether to be legally recognized as persons in the whole sense under the United States Constitution and the Kansas Constitution it suffices to establish the purely secular suggestion of personhood for the unborn and partially born?

Within the scope of his own collateral review proceeding, Roeder filed at the trial court an emergency motion for a stay of execution of sentence of death on behalf of unborn and partially born individuals under sentence of death, in which he purports to establish the suggestion of personhood on behalf of the unborn and partially born. See Emergency Motion for a Stay of Execution of Sentence of Death pp. 11-15, "Establishment of the Suggestion of Personhood." As the Kansas Court of

Appeals explains the purported relationship between the emergency motion and Roeder's cause (Appendix A, p-17):

> Roeder contends that he established in his emergency motion the right of unborn and partially born individuals to a stay of execution of sentence of death under Kansas law. The district court ruled that Roeder could not use a K.S.A. 60-1507 proceeding as a vehicle to file ancillary proceedings for unborn or partially born individuals. Roeder responds that the emergency motion was properly within the scope of his K.S.A. 60-1507 proceeding because (1) the legal proof of personhood fell within the scope of what was germane to establishing his own right to an evidentiary hearing on his K.S.A. 60-1507 motion and (2) lives urgently need to be saved from lethal execution under Kansas law.

The Kansas Court of Appeals agreed with the trial court (Appendices C & D) that the emergency motion was not properly within the scope of Roeder's K.S.A. 60-1507 motion. See Appendix A, p. 18 ("The statute permits a prisoner to challenge his or her sentence in the court which imposed the sentence, not to challenge anyone else's sentence. It does not matter if the issues involved are similar.") However, not only does that opinion run counter to *Whitmore v. Arkansas*, *supra*, it also contradicts, in part, the opinion of the trial court in denying reconsideration. See Appendix D, p. 2 ("If Petitioner seeks to advocate on behalf of the partially born or unborn individuals within this Court's venue and jurisdiction, Petitioner should pursue that remedy in a separate action.")

This Court recognizes the equitable principle that a case of such imperative public importance can present itself as to justify deviation from usual practice and require immediate determination. See Supreme Court Rule 11. With similar reasoning, Roeder, being in possession of legal proof of the suggestion of personhood

on behalf of the unborn and partially born, sought to present such proof in the form of an emergency motion. Petitioner presents such proof here, as below.

Establishment of the Suggestion of Personhood

Roe refused to promise that abortion, once legalized, would be incapable of interruption in the ordinary course of judicial affairs. Quite the contrary, having left the suggestion of personhood open to further consideration, the Court forewarned, *id.* at 156-157, "If this suggestion of personhood is established ... the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment." It follows that the legal authority to stay the execution of those sentenced to death by abortion has been preserved by the Court.

It goes without saying that the result of human procreation is a human individual. By excluding the pregnant state from the meaning of procreation, *Roe* defined procreation as being complete at conception. See *id.*, at 159 ("The situation [presented by the pregnant woman] therefore is inherently different from ... procreation....") Put another way, *Roe* narrowly defined procreation to include only the act of fertilizing and not the pregnant state. Hence, because procreation under *Roe* is complete once pregnancy begins, it follows that a human individual, as the logical result of human procreation, is present once pregnancy begins.

In *Mohamad v. Palestinian Authority*, 566 U.S. 449, 451-456 (2012), the Court found that the word "individual" refers unmistakably to a "natural person." See *id.*, at 454. Hence, in view of *Roe's* distinction between pregnancy and procreation, it follows from *Mohamad* that once pregnancy begins, viz. once

procreation is complete, then a human individual, viz. a natural person, is present as the result of procreation.

There are, of course, religious or philosophical concepts of the person which are perhaps more sublime than that of a natural person, such as that of a spiritual person, and some debate inevitably remains in this area. For example, the official belief of the Catholic Church is that while at least human (natural) life begins indisputably at conception, nonetheless human (spiritual) life requires the natural life to be infused with an immortal soul (Sacred Congregation for the Doctrine of the Faith, "Declaration on Procured Abortion," November 18, 1974, n. 19):[3]

> This declaration expressly leaves aside the question of the moment when the spiritual soul is infused. There is not a unanimous tradition on this point and authors are as yet in disagreement. For some it dates from the first instant; for others it could not at least precede nidation. It is not within the competence of science to decide between these views, because the existence of an immortal soul is not a question in its field. It is a philosophical problem from which our moral affirmation remains independent for two reasons: (1) supposing a belated animation, there is still nothing less than a human life, preparing for and calling for a soul in which the nature received from parents is completed, (2) on the other hand, it suffices that this presence of the soul be probable (and one can never prove the contrary) in order that the taking of life involve accepting the risk of killing a man, not only waiting for, but already in possession of his soul.

Yet despite the great esteem which is owed to religion and philosophy, it would nonetheless violate the separation of church and state embodied in the Free Exercise and Establishment clauses of the First Amendment for the Court to require consensus on the spiritual person as a prerequisite to legal recognition of the natural person. It is therefore germane to our Nation's secular province for the

[3] The Declaration would appear to correct the Court's apparent misapprehension of the official belief of the Catholic Church as set forth by the Court in *Roe*, *id.* at 160-161.

Court to uphold plenary constitutional respect for every natural person at every moment of life, regardless of religious or philosophical debates.

Hence, because applying *Mohamad* to *Roe* logically establishes the purely secular suggestion of personhood at conception, and because new technology, as stated above, serves to remove the obstacle of *stare decisis*, the Court should therefore grant certiorari to decide this case as a matter of imperative public importance and reverse the judgment of the Kansas Court of Appeals.

REQUEST FOR GUARDIAN *AD LITEM*

The Court is requested to appoint a guardian *ad litem* to represent unborn and partially born individuals under sentence of death.

REQUEST FOR CERTIFICATES OF INNOCENCE

The Court is requested to issue certificates of innocence for petitioner and for unborn and partially born individuals under sentence of death.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Scott P. Roeder - 65192

Mr. Scott P. Roeder #65192
Hutchinson Correctional Facility
P.O. Box 1568
Hutchinson, KS 67504-1568

Pro Se and as Next Friend

Date: 11-20-20, 2020.