22-7048

CAPITAL CASE

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Scott P. Roeder, Individually and as Next Friend of Unborn and Partially Born Individuals under Sentence of Death,
Petitioner,
v.
Dan Schnurr, Warden, Hutchinson Correctional Facility,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Scott P. Roeder #65192
Pro Se and as Next Friend
Hutchinson Correctional Facility
P.O. Box 1568
Hutchinson, KS 67504-1568

Petitioner

March 2023

Questions Presented

Petitioner Scott P. Roeder shot and killed a state-sponsored domestic terrorist named Dr. George Tiller to prevent him from carrying out his scheduled plans to lethally execute unborn individuals the next morning. As an ancillary to collateral review of his murder conviction, he sought a stay of execution of sentence of death on behalf of the unborn and partially born. Both the stay and his own habeas corpus cause were denied. The questions presented are:

1. Whether *United States v. Vuitch*, 402 U.S. 62 (1971), should be overruled in favor of equality with the unborn?
2. Whether a habeas corpus petitioner is entitled to a free copy of the record on appeal or at least a list of the documents forming the record?
3. Whether state and federal courts must be forced to contend with a properly developed postconviction record to satisfy the Suspension Clause on collateral review, notwithstanding judicial economy?

PARTIES TO THE PROCEEDING

Petitioner, individually and as next friend of unborn and partially born individuals under sentence of death, is Scott P. Roeder.

Respondent, acting in his official capacity as Warden of the Hutchinson Correctional Facility located in Hutchinson, Kansas, is Dan Schnurr.

RELATED PROCEEDINGS

Collateral Review

Individually and as Next Friend:

United States Court of Appeals for the Tenth Circuit, No. 22-3152, *Roeder v. Schnurr*, judgment entered Dec. 14, 2022, rehearing denied Jan. 4, 2023.

United States District Court for the District of Kansas, No. 5:20-CV-03275-JAR, *Roeder v. Schnurr*, judgment entered Aug. 5, 2022.

Kansas Court of Appeals, No. 119,503, *Roeder v. Kansas*, judgment entered Jul. 19, 2019, rehearing denied Aug. 21, 2019.

District Court of Sedgwick County Kansas, No. 17-CV-2373, *Roeder v. Kansas*, judgment entered Nov. 1, 2017, reconsideration denied Nov. 28, 2017.

Kansas Supreme Court, No. 119,503, *Roeder v. Kansas*, petitions for review denied Sept. 29, 2020.

United States Supreme Court, No. 20-6653, *Roeder v. Kansas*, petition for certiorari denied Feb. 22, 2021. (See note on p. v.)

As Next Friend:

Kansas Supreme Court, No. 7-118601-S, *Roeder v. Schmidt*, petition for habeas corpus dismissed Dec. 20, 2017.

United States Supreme Court, No. 17-1407, *Roeder v. Schmidt*, petition for certiorari denied Jun. 11, 2018, rehearing denied Aug. 6, 2018. (See note on p. v.)

Trial and Direct Appeal

Kansas Supreme Court, No. 104,520, *Kansas v. Roeder*, judgment entered Oct. 24, 2014.

District Court of Sedgwick County Kansas, *Kansas v. Roeder*, No. 09-CR-1462, judgment entered Apr. 2, 2010, resentencing on remand entered Dec. 8, 2016.

United States Supreme Court, No. 14-8767, *Roeder v. Kansas*, petition for certiorari denied May 18, 2015, rehearing denied Jul. 20, 2015. (See note on p. v.)

United States Supreme Court, No. 14A1166 (14-8767), *Roeder v. Kansas*. application for stay of execution of sentence of death, addressed to Justice Sotomayor, denied May 12, 2015. (See note on p. v.)

United States Supreme Court, No. 14A1225 (14-8767), *Roeder v. Kansas*. application for stay of execution of sentence of death, addressed to Justice Sotomayor, denied Jun. 4, 2015, refiled and submitted to Justice Alito and referred to the Court, denied Jul. 20, 2015. (See note on p. v.)

Habeas Corpus Ruled Unripe for Collateral Review

Kansas Court of Appeals, No. 119,503, *In the Matter of Scott Roeder*, judgment entered, after rehearing, Nov. 23, 2010, second rehearing denied Jan. 13, 2011.

District Court of Sedgwick County Kansas, No. 10-CV-0882, *Roeder v. Kansas*, judgment entered Jun. 4, 2010.

Kansas Supreme Court, No. 119,503, *In the Matter of Scott Roeder*, petition for review denied Dec. 19, 2011.

United States Supreme Court, No. 11-10468, *Roeder v. Kansas*, petition for certiorari denied Oct. 1, 2012, rehearing denied Dec. 3, 2012. (See note below.)

United States Supreme Court, No. 12A192 (11-10468), *Roeder v. Kansas*. application for stay of execution of sentence of death, addressed to Justice Sotomayor, denied Sep. 4, 2012, refiled and submitted to The Chief Justice, denied as moot Oct. 1, 2012. (See note below.)

United States Supreme Court, No. 12A525 (11-10468), *Roeder v. Kansas*. application for stay of execution of sentence of death, addressed to Justice Sotomayor, denied Nov. 27, 2012. (See note below.)

NOTE

Deputy Clerk Cynthia Rapp retired from this Court in 2018. Ever since she stopped handling emergency applications, the Clerk of this Court has suddenly no longer allowed petitioner to file not by counsel applications for stay of execution of sentence of death individually and as next friend of unborn and partially born individuals under sentence of death. This explains why No. 11-10468 and No. 14-8767 in this Court are linked to applications for stay of execution, in contrast to No. 17-1407, No. 20-6653, and the present petition, in which the Clerk did not allow petitioner to file applications for stay of execution; in the present case, petitioner presented applications for stay of execution for filing by the Clerk in contemplation of a petition for certiorari before judgment in the United States Court of Appeals for the Tenth Circuit under Supreme Court Rule 11. See App. V1-2.

SUPREME COURT RULE 29.4(b)

In accordance with Supreme Court Rule 29.4(b), it is stated that 28 U.S.C. § 2403(a) may apply with respect to an Act of Congress, namely, Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132, 110 Stat. 1214, enacted April 24, 1996. The Tenth Circuit did not certify to the Attorney General pursuant to 28 U.S.C. § 2403(a) the fact that the constitutionality of an Act of Congress was drawn into question.

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Petitioner respectfully requests that the Court grant certiorari to review the judgment below.

OPINIONS BELOW

The unpublished opinion of the Tenth Circuit directly at issue in this appeal is reproduced at Appendix A. The unpublished decision of the district court from which the appeal to the Tenth Circuit was taken is reproduced at Appendix B. The order of the Tenth Circuit denying rehearing is reproduced at Appendix C.

JURISDICTION

The Tenth Circuit decision denying a certificate of appealability was entered on December 14, 2022. Petitioner's timely-filed petition for rehearing was denied on January 4, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

Set forth in Appendix W are relevant provisions of the Constitution of the United States, including the Suspension Clause and the Fifth, Sixth, Eighth, and Fourteenth Amendments; Title I of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA); Kansas Constitution Bill of Rights §§ 9 and 10; and, K.S.A. §§ 21-5419, 22a-235, 22-2802(1), 22-2802(14), 60-1501(a), and 60-1507.

STATEMENT OF THE CASE

Petitioner Scott P. Roeder shot and killed a state-sponsored domestic terrorist named Dr. George Tiller to prevent him from carrying out his scheduled plans to lethally execute unborn individuals the next morning. A Kansas jury convicted him of first degree murder for Tiller's death and two counts of aggravated

assault for waving off two men while armed with a gun who attempted to take control of his person in the aftermath of the shooting. His convictions were upheld on direct appeal and, after remand, he was resentenced to 25 years to life on the murder conviction plus two 12-month sentences to be served consecutively for the assault convictions. As an ancillary to the timely-filed collateral review of his convictions, he sought a stay of execution of sentence of death on behalf of the unborn and partially born. The Kansas district court ("trial court"), Kansas Court of Appeals, federal district court, and Tenth Circuit each denied his habeas corpus petitions as well as his applications for a stay of execution.[1]

In criminal proceedings, petitioner was ***not*** represented by counsel during critical proceedings before the magistrate, but was thereafter represented by appointed counsel through direct appeal. In collateral review proceedings, he was not represented at the trial court, was ***partially*** represented by appointed counsel at the Kansas Court of Appeals,[2] and was not represented at the federal district court or the Tenth Circuit.

Though petitioner never asserted a right to self-representation, he was at various times left to represent himself either in whole or in part. During collateral proceedings, petitioner's requests to the trial court, Kansas Court of Appeals, federal district court, and Tenth Circuit for appointment of counsel ad litem to

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[1] More precisely, the Tenth Circuit denied the stay and a certificate of appealability.

[2] Here one says "partially" because appointed counsel dismissed herself from briefing the stay of execution issue *without leave* from the court and *without prior notice* to the petitioner. See Br. Appellant (No. 119,503 Kan. Ct. App. filed Oct. 19, 2018) at 4.

represent unborn and partially born individuals under sentence of death all went unheeded.

What is so offensive about this case is the recurring pattern of extreme indifference shown by each of the lower courts, not only for petitioner's rights, but also for those of unborn and partially born individuals under sentence of death. What is most upsetting is that the lower courts felt entitled—even obligated—to show such indifference. The reason? It was only because the rights of the unborn are involved. Had petitioner's been a garden variety murder trial, he would have likely been shown usual regard for his rights. But because the rights of the unborn are involved, courts below were unwilling to gamble with due process.

For example, in Kansas there is a state constitutional right to bail which the state legislature interprets as commencing at a criminal defendant's first appearance before the magistrate. See Kan. Const. Bill of Rights § 9 ("All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great."); 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 upon the execution of an appearance bond in an amount specified by the magistrate....") But instead of honoring the Kansas constitutional and statutory right to bail, the magistrate denied bond to give a public impression—on national television—that petitioner was somehow exceptionally more dangerous than the usual murder defendant.

To give another example, under the section heading of "factual and procedural background," the opinion on direct appeal could not resist digressing in prejudicial commentary: "From the record, one cannot discern whether Roeder grasped the irony of his testimony, *i.e.*, the only way that Roeder could kill the doctor in the name of his own God was to commit the murder in the house of Dr. Tiller's God." *State v. Roeder*, 300 Kan. 901, 906 (2014). It is as if the Kansas Supreme Court could not contain its prejudice for a more appropriate section of the opinion, thus showing that its decision was not based on law and facts alone.

From examples such as these there can be no reasonable doubt that Kansas had it in for petitioner, not because he killed a man, but because he killed an abortion doctor.

To appreciate why this pattern of legal indifference spilled over into the state and federal collateral review proceedings, one need only consider the alternative: That a legal system that habitually executes unborn and partially born babies would suddenly have to bring it all to an end just because petitioner's case has come up for review—lest petitioner's legal rights somehow be offended.

Put another way, courts that stoop to cheating babies out of their lives are not going to hesitate to cheat the likes of petitioner—and cheat they did.

Nonetheless, by way of this petition, petitioner gives this Court yet another opportunity to redress such egregious wrongs.

Because the most important thing is to stop the execution of babies, the petition begins with a request for the Court to recognize equality with the unborn.

In turn, such recognition will vindicate petitioner for doing his own part to stop the executions.

All-in-all, the petition invites a look into two matters which the Court, in the past, has been unwilling to deal with: equality with the unborn and the need to completely revamp postconviction habeas corpus.

REASONS FOR GRANTING THE WRIT

Petitioner claims violation of his rights under the Suspension Clause and the Fifth, Sixth, Eighth, and Fourteenth Amendments—as to habeas corpus, due process, public proceedings, compulsory process, effective assistance, excessive bail, and equal protection; and, as next friend, he further claims violation of the rights of unborn and partially born individuals under the Suspension Clause and the Fifth, Sixth, Eighth, and Fourteenth Amendments—as to habeas corpus, due process, effective assistance, cruel and unusual punishment, and equal protection.

1. **Whether *United States v. Vuitch*, 402 U.S. 62 (1971), should be overruled in favor of equality with the unborn?**

The abortion policy set forth in *Roe v. Wade*, 410 U.S. 113 (1973), has its fundamental roots in *Vuitch*. See *Roe*, 410 U.S. 158-159. Recently, in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___, 142 S.Ct. 2228 (2022), the Court overruled *Roe* and its sequelae. Yet *Dobbs* did nothing to disturb the roots of abortion policy supplied by *Vuitch*. In support of overruling *Vuitch* in favor of equality with the unborn, the policies announced in *Roe*, *Dobbs*, and *Vuitch* are addressed as follows.

A. The policy announced in *Roe*.

A succinct rendition of the tripartite *Roe*-era policy on pregnancy abatement was given by Justice Douglas: I) As the path of least resistance, let women make the "basic" decision to volunteer;[3] II) if given not enough volunteers or, conversely, too many, let states override that decision;[4] and III) muster a brigade to perform the abatement by creating a safe haven for physicians not competent enough to stay in practice otherwise.[5] *Doe v. Bolton*, 410 U.S. 179, 209-221 (1973) (Douglas, J., concurring).

Roe was particularly concerned that volunteerism would underwhelm, especially among the drug-crazed women of the era. As Justice Marshall reflects on this concern two months later in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 100-101 (1973) (Marshall, J., dissenting):

> Recently, in *Roe v. Wade*, 410 U. S. 113, 152-154 (1973), the importance of procreation has, indeed, been explained on the basis of its intimate relationship with the constitutional right of privacy which we have recognized. Yet the limited stature thereby accorded any "right" to procreate is evident from the fact that at the same time the Court reaffirmed its initial decision in *Buck v. Bell*. See *Roe v. Wade*, *supra*, at 154.

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[3] "[A] woman is free to make the basic decision whether to bear an unwanted child." 410 U.S. at 214.

[4] "Such reasoning [in favor of a woman's autonomy] is, however, only the beginning of the problem. The State has interests to protect. [A. The state has an interest in overriding her decision if a lack of volunteers threatens an epidemic of unwanted births.] Vaccinations to prevent epidemics are one example, as *Jacobson*, *supra*, holds. The Court held that compulsory sterilization of imbeciles afflicted with hereditary forms of insanity or imbecility is another. *Buck v. Bell*, 274 U. S. 200. Abortion affects another. [B. The state also has an interest in overriding her decision if, conversely, a surplus of volunteers threatens a healthy fertility rate.] While childbirth endangers the lives of some women, voluntary abortion at any time and place regardless of medical standards would impinge on a rightful concern of society. The woman's health is part of that concern; as is the life of the fetus after quickening. These concerns justify the State in treating the procedure as a medical one." 410 U.S. at 215.

[5] "In short, I agree with the Court that endangering the life of the woman or seriously and permanently injuring her health [at the hands of incompetent physicians given free reign to practice under a safe haven] are standards too narrow for the right of privacy that is at stake." 410 U.S. at 220-221.

Authored by Justice Douglas for a unanimous Court, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), modified the initial decision in *Buck v. Bell*, 274 U.S. 200 (1927), to prohibit involuntary measures to control of reproduction based on crime or poverty. But seeing that this limitation would prevent states from pressuring women to abort on the basis of criminal drug use, *Roe* quietly disavowed *Skinner's* applicability to abortion so as to revert to the *initial* decision in *Buck v. Bell*. See *Roe*, 410 U.S. at 159 ("The situation [of pregnancy] therefore is inherently different from ... procreation ... with which ... *Skinner* ... [was] concerned.")

Joined by Justice Douglas, the point Justice Marshall was making in *San Antonio* was that, in addition to using criminal drug use as a basis for pressuring women to abort, another aspect of disavowing *Skinner* for abortion is that states can also pressure them to abort on the basis of poverty. In other words, rather than allowing states to provide separate quality schools for rich and poor children, Justice Marshall was suggesting that states take the alternative of pressuring poor women to abort. See *San Antonio*, 411 U.S. at 100-101.

In *Casey*, Justice O'Connor's plurality predicted that, given a *Dobbs*-like decision, "the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it...." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 859 (1992). In contrast, states under *Roe* were required to at least observe a basic preference for volunteerism. In the wake of *Dobbs*, however, several states have made haste to codify into law their newly expanded authority to

restrict a woman's right to choose to carry a pregnancy to term, much as *Casey* had predicted.

For example, the California Constitution, Art. I, Sec. 1.1, was amended to recognize a "fundamental right to choose or refuse contraceptives." According to the canons of statutory interpretation, here the addition of the term "refuse" means that the "right to choose" is interpreted to not inherently include the "right to refuse." This situation leaves the right to refuse an abortion conspicuously absent, given that the amendment only recognizes a "fundamental right to choose to have an abortion...." *Ibid.* To give an analogy, under present policy a man has the right to choose military service, but not the right to refuse being drafted. *Cf. Buck v. Bell*, 274 U.S. at 207.

To give another example, the Michigan Constitution, Art. 1, Sec. 28, Cl. 1, was amended to recognize that "[a]n individual's right to reproductive freedom shall not be denied, burdened, nor infringed upon unless justified by a compelling state interest achieved by the least restrictive means." To give yet another example, the Vermont Constitution, Ch. I, Sec. 22, was similarly amended to recognize that "an individual's right to personal reproductive autonomy ... shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means." Both amendments contain the identical "compelling State interest" caveat, which serves to codify into law the state's authority to override a woman's volunteerism in either alternative.

As Justice Douglas reflects on his own support for the extreme measures undertaken in *Roe* to ensure pregnancy abatement, *Doe v. Bolton*, 410 U.S. at 220-221:

> In short, I agree with the Court that endangering the life of the woman or seriously and permanently injuring her health [at the hands of incompetent physicians given free reign to practice under a safe haven] are standards too narrow for the right of privacy that is at stake.

Yet if *Roe* had truly sought a right of privacy for the *individual* woman, then neither such risks nor the authority to restrict her right to choose to carry a pregnancy to term would have ever been put on the table. Instead, such extreme measures were legalized because what *Roe* really sought was the *collective* privacy of the Nation as a whole, by disposing of women's pregnancies in private to limit the public's growing embarrassment.

Because *Roe* viewed this collective perception of privacy as what was ultimately "at stake" for the Nation, the decision sought to ensure pregnancy abatement one way or another, even at the risk of "endangering the life of the woman or seriously and permanently injuring her health"[6] and even by pressuring women to abort in connection with crime and poverty by reaffirming "the initial decision in *Buck v. Bell*."[7] But by no means was *Roe* alone in this attitude of extreme desperation.

For example, when issuing its first policy statement supporting abortion-on-demand in 1970, the American College of Obstetricians and Gynecologists (ACOG)—in the same policy statement—reaffirmed support for the forced

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[6] *Doe v. Bolton*, 410 U.S. at 220-221.
[7] *San Antonio*, 411 U.S. at 101.

sterilization of women.[8] And, the year before, the ACOG withdrew its age-parity restriction on sterilization so that young women could be sterilized indiscriminately.[9]

That the ACOG reaffirmed support for forced sterilization in the same policy statement announcing support for abortion parallels Justice Marshall's observation that, in *Roe*, "the limited stature thereby accorded any 'right' to procreate is evident from the fact that at the same time the Court reaffirmed its initial decision in *Buck v. Bell*." *San Antonio*, 411 U.S. at 101. It is thus evident that, at the time of *Roe*, key members of both the medical and legal professions thought extreme measures were necessary "in order to prevent our being swamped with [female sexual] incompetence." *Buck v. Bell*, 274 U.S. at 207.

Hence, though clothed as an expansion of women's rights, the policy announced in *Roe* was in fact nothing short of a pregnancy abatement program.

B. The policy announced in *Dobbs*.

Roe and *Dobbs* both share with *Dred Scott v. Sandford*, 19 How. 393 (1857), the fundamental proposition that the beings in question are "beings of an inferior order ... and so far inferior, that they [have] no rights which [others of us are] bound to respect...." 19 How. at 407. Regarding the unborn, "no Member of the Court has

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[8] "College policy on abortion and sterilization," ACOG Nurses Bulletin, 1970 Fall; 4: 2, PubMed ID: 12305531 ("In cases of sterilization, a recorded opinion of a knowledgeable consultant should be obtained, unless the procedure is requested by the patient."); see also, "College policy on abortion and sterilization," ACOG Newsletter, 1970 Sept.; 14: 2.

[9] Caress B, "Sterilization: Women fit to be tied," Health PAC Bulletin, 1975 Jan-Feb; 62: 1-6, at 4, PubMed ID: 10237673 ("Official accommodation to liberalization of sterilization practices in the US came in 1969, when the American College of Obstetricians and Gynecologists (ACOG) withdrew its age-parity formula."); see also, Porter CW Jr, Hulka JF, "Female sterilization in current clinical practice," Family Planning Perspectives, 1974 Winter; 6(1): 30-38, at 30, PubMed ID: 4282075.

ever questioned this fundamental proposition." *Casey*, 505 U.S. at 913 (Stevens, J., concurring in part and dissenting in part.) Nor has the Solicitor General ever questioned it either regarding the unborn. See 505 U.S. at 932 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part.)

As was done in *Dred Scott* with slavery, *Dobbs* allows states to regulate abortion. A notable difference is that *Dred Scott* specifically voided the authority of Congress to prohibit slavery in certain territories of the United States, 19 How. at 452, whereas *Dobbs*, 142 S.Ct. at 2243, by contrast, left the door open for Congress to regulate abortion. See also 142 S.Ct. at 2303 (Thomas, J., concurring); and, at 2305 (Kavanaugh, J., concurring). In contrast, *Roe* took the more radical approach of giving private individuals basic control over abortion, irrespective of Congress or the states.

Ironically, if with slavery the Court had initially taken *Roe's* more radical approach, the decision in *Dred Scott* would have been subsequently celebrated for the same reasons that *Dobbs* is being celebrated today. This shows in an historical light why *Dobbs* is better than *Roe*, but no better than *Dred Scott*.

Yet what is particularly disturbing—and what really makes *Dobbs* worse than *Dred Scott*—is that the decision was handed down despite the advent of the Fourteenth Amendment. *Dobbs* attempts to summarily evade the subject of whether the Fourteenth Amendment applies to the unborn by disappearing into a rabbit hole: that the Constitution does not require the Court to adopt a "theory of life." 142

S.Ct. at 2261. Yet the Fourteenth Amendment does not require the Court to adopt a theory of life any more than a theory of evolution.

Imagine if the Thirteenth Amendment had abolished abortion instead of slavery. In such an event, it would be quite the irony if the Fourteenth Amendment, written word-for-word as it is today, was held inapplicable to African Americans.

The Court posited in *Roe*, 410 U.S. at 162, that "the unborn have never been recognized in the law as persons in the whole sense." Yet the same could be said of African Americans prior to the Fourteenth Amendment, as the Three-fifths Compromise makes evident, being that three-fifths is less than "whole." See U.S. Const., Art. I, Sec. 2, Cl. 3. Indeed, prior to the Fourteenth Amendment, the Court's opinion of African Americans was quite opposed to recognizing them in the law as persons in the whole sense. See *Dred Scott*, 19 How. at 407:

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect....

And for more than half a century after the Fourteenth Amendment was ratified, women were still denied the right to vote. See U.S. Const., Amend. XIX. It would thus be hard to say that women had been recognized in the law as persons in the whole sense prior to the Nineteenth Amendment.

From this it is evident that having already been recognized in the law as a person in the whole sense cannot be a prerequisite to one's inclusion under the Fourteenth Amendment, or else neither women nor African Americans would have ever been included. Accordingly, given that the Fourteenth Amendment is dedicated

to inclusion, the Constitution should be interpreted to apply equally to the unborn members of the population as well.

C. The policy announced in *Vuitch*.

The relevance to *Roe* of the policy announced in *Vuitch* was an inferential one—at least ostensibly.[10] As stated in *Roe*, 410 U.S. 158-159:

> Indeed, our decision in *United States v. Vuitch*, 402 U. S. 62 (1971), inferentially is to the same effect [of persuading us that the word "person," as used in the Fourteenth Amendment, does not include the unborn], 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.

Rather than denying that the unborn had ever been recognized in the law as persons, *Roe* fabricated an indefinite standard, which it called persons in the "whole" sense, and declared that for this standard the unborn did not qualify. 410 U.S. at 162 ("In short, the unborn have never been recognized in the law as persons in the whole sense.")

In support of this standard, *Roe* recalled that, in the history of the English statutory law, the use of the term "unlawfully" in the Offences Against the Person Act of 1861, 24 & 25 Vict., c. 100, §§ 58 and 59 ("unlawfully ... procure the miscarriage of any woman"), was interpreted in a 1939 case to imply that the mother's condition was the sole determinant of the lawfulness of an abortion. 410 U.S. at 136-137. See also 410 U.S. at 157-158 & n. 54:

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[10] As if testing the waters, the Court may have used *Vuitch* to see whether the Nixon Administration would invoke the Fourteenth Amendment on behalf of the unborn, which it did not. Though *Roe* and *Doe v. Bolton* were both on the docket before *Vuitch*, the Court did not agree to hear them until the day after *Vuitch* was decided. Both relied on *Vuitch*.

> But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the [Fourteenth] Amendment's command?

In former times, however, the definition of murder often included the word "unlawfully" in the statute. For example, as the Tennessee Supreme Court stated its law in 1923, *Morgan v. State*, 148 Tenn. 417, 420 (1923):

> The definition of murder contained in our Code is as follows:
> "If any person of sound memory and discretion, unlawfully kill any reasonable creature in being, and under the peace of the state, with malice aforethought, either express or implied, such person shall be guilty of murder." Thompson's-Shannon's Code, § 6438.
> This is the same definition given by Lord Coke, Co. 3 Inst. 47, and by Blackstone, 4 Bl. Com. 195, except that in England the act is committed "under the king's peace" and here it is committed "under the peace of the state."

Hence, though some killing may be taken to be lawful according to such a statute—or at least not murder—it bears not at all on whether the victim is a person having constitutional rights. Accordingly, whether a particular exception comports with the Constitution is a completely different question than whether the victim is a person.

Using exceptionally weak reasoning, *Roe* posited as its fundamental proposition that the unborn are beings so far inferior that they have no rights which others of us are bound to respect. Yet *Dobbs* did the same. *Dobbs* did nothing to disturb *Roe's* most egregious wrong: the denial of our equality with the unborn. Instead, having accepted from *Roe* the fundamental proposition of inequality, *Dobbs* did no more than to reassign to elected representatives the control *Roe* claimed over the unborn.

Accordingly, to redress this egregious wrong at its roots, the Court should overrule *Vuitch* in favor of equality with the unborn.

2. **Whether a habeas corpus petitioner is entitled to a free copy of the record on appeal or at least a list of the documents forming the record?**

The federal district court transmitted the record on appeal to the Tenth Circuit, but in so doing omitted critical documents. Being an inmate confined to an institution, petitioner's only way of knowing this was thanks to being alerted by his outside legal paperwork assistant, who had used PACER. When confronted, the district court agreed to file the missing documents, but refused to provide petitioner with a free copy of the record on appeal. Instead, the district court offered to provide petitioner with a copy of the district court docket, from which he could choose to order copies at a fee. App. Q. However, the Court is alerted that the docket itself does not inform petitioner of which documents were—or were not—filed in the Tenth Circuit as the record on appeal.

Petitioner then alerted the Tenth Circuit to the problem. The Tenth Circuit likewise refused to provide petitioner with a free copy of the record on appeal. App. O. As to the problem of not knowing which documents had actually been filed by the district court as the record on appeal, the Tenth Circuit instructed petitioner to rely on his outside legal paperwork assistant. App. O2 ("he has access to the portion of the record available on PACER 'by way of an outside legal paperwork assistant'"). But as petitioner alerted the Tenth Circuit, only the federal portion of the record is

available on PACER. No member of the public has any idea of what documents from the state record were actually filed.

Petitioner argued before the Tenth Circuit that making the entire record available to the public is in the constitutional interest of public proceedings. See Petitioner's Motion for Copy of Record on Appeal (Dkt. No. 10944264) at 2(#3). Accordingly, both procedural and substantive constitutional issues are involved here under the Sixth Amendment.

A key issue of petitioner's habeas corpus cause is that he has been the victim of an ongoing pattern of legal indifference for his rights. Not only did the federal district court omit any mention of the legal indifference issue when denying a certificate of appealability (App. B), but it conspicuously omitted from the record on appeal all of the key district court documents (Dkt. Nos. 4, 4-1, 5, 9, and 10) relating to this appealable issue. In his opening brief before the Tenth Circuit, petitioner argued that the "[the federal district court's] reliance on Doc. 10 in support of judgment establishes [its] pertinence to [the] appeal under 10th Cir. R. 10.4(C)(4))" (citing the district court order). For the citation to Doc. 10 made in the district court opinion, see App. B14 & n. 61. For the reference to this in petitioner's opening brief before the Tenth Circuit, see Appellant's Combined Opening Brief and Application for a Certificate of Appealability (Dkt. No. 10946882) at 27.

As petitioner's opening brief argues before the Tenth Circuit, "By omitting any discussion of the [legal indifference] issue, and by omitting from the record on appeal key documents relating to it, it appears that the FDC has stooped to

legerdemain to hinder this Court's review." *Ibid.* Yet the Tenth Circuit ignored the problem.

An important interest of the public proceedings clause of the Sixth Amendment is to combat legerdemain of this sort. The foremost member of the public concerned with this interest is the petitioner himself. Because this interest is served by making the record on appeal available to the public—or, at the very least, a list of its contents—this question is certworthy.

The district court's failure to faithfully transmit the record on appeal is a great departure from the accepted and usual course of judicial proceedings. Because the Tenth Circuit sanctioned such conduct, the supervisory authority of this Court is invoked.

3. **Whether state and federal courts must be forced to contend with a properly developed postconviction record to satisfy the Suspension Clause on collateral review, notwithstanding judicial economy?**

The most conspicuous thing about the Suspension Clause is that it contains no exception for judicial economy. Yet, outside of matters of habeas corpus, this Court seldom recognizes an exception to justice for the sake of judicial economy. For example, in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 596 U.S. ___ (2022), the Court said nothing to the effect that there has to be some finality in lost-and-found matters in the interest of judicial economy.[11] In contrast, finality in criminal matters in the interest of judicial economy has become the mantra of

[11] The plight of Lilly Cassirer, who sacrificed a painting in return for an exit visa, closely parallels that of the criminal defendant who, though believing she is innocent, sacrifices something of value in a plea bargain to escape what may potentially be a greater loss of freedom at the hands of a government which she fears may treat her unjustly.

federal habeas corpus practice under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

Recently in *Shinn v. Martinez Ramirez*, 596 U.S. ___, 142 S.Ct. 1718, 1735 (2022), the Court reasserted an essential element of this mantra, namely, that "a state prisoner is responsible for counsel's negligent failure to develop the state postconviction record." But, as the present case shows, blanket attribution to the prisoner of postconviction counsel's incompetence has created a loophole: By appointing counsel with a known history of incompetence, the state can dependably declare a procedural default which the federal courts will likely enforce.

Justice demands that the state be forced to contend with a properly developed postconviction record, without which there is no point to habeas corpus in the form of collateral review. Yet AEDPA and its state analogs are designed to assist state efforts to dodge such contention in the bulk majority of cases. In such cases, the assertion of such concepts as a statutory bar, procedural bar, procedural default, entitlement to deference, comity, failure to brief, or a waiver of claim or argument is typically enough to allow the courts to dodge a petitioner's claims for relief without ever addressing the merits.

Such concepts serve as legal buzzwords to give the appearance of dutiful review, even when they are applied in a non-dutiful manner. Being guided by the erroneous presumption that finality in criminal matters favors, whenever possible, the dodging of collateral review in the interest of judicial economy, the courts tend to stretch the legal notion of such possibility by invoking such buzzwords even when

they do not apply. This results in decisions that read much differently on the surface than established law and the facts of the case would actually have them read in reality.[12]

There are two aspects to forcing the courts to contend with a properly developed postconviction record: first and foremost, the postconviction record must be properly developed; second, the courts must dutifully contend with it.

Requiring the postconviction record to be properly developed will eliminate the most frequent excuses for reviewing the merits of timely petitions, such as failure to brief and comity. For under this new standard, if a meritorious claim is presented for the first time at a later stage of collateral review, it thereby proves that the postconviction record was not fully developed at earlier stages. Hence, the new standard would force both the state and federal courts to bear the consequences of any lower court's failure to ensure that the postconviction record they have to contend with is properly developed. Moreover, eliminating excuses for dodging the merits of a claim will also eliminate the problem of courts which falsely invoke excuses to avoid addressing the merits. For without excuses, there will be no issue of whether such excuses are properly invoked in the first place.

As to the second aspect—requiring the courts to contend dutifully with the record—only integrity and skill will prevent a miscarriage of justice.

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[12] Having stated without further qualification that "[i]n his combined opening brief and application for a COA, Mr. Roeder raises eight issues in rambling fashion, rather than in a succinct and clear manner," it would appear that the Tenth Circuit had hoped to dissuade anyone from bothering to review petitioner's opening brief for a better reading of the law and facts. App. A3.

The present case is especially worthy of review because it evidences not only the rampant problem of faulty excuse-making, but also the failure to address with skill and integrity the merits of any remaining claims.

Two additional considerations are also presented. One is whether a right to the effective assistance of counsel on collateral review flows naturally from the duty of the courts to contend with a properly developed postconviction record. The other is whether the Kansas legislature recognizes the duty of the state courts to contend with a properly developed postconviction record.

But before proceeding any further, it is important to reflect on what this case is really about.

Below is a photo of a five-year-old boy whose parent wrote petitioner a letter in prison to say thank you for saving him from his scheduled execution. To protect his identity, petitioner will call him by the pseudonym "Sam" and a bar has been placed over his eyes. Now Sam is a young teenager. There are other children like Sam who petitioner saved by shooting their would-be executioner.

"Sam"

Can everyone agree that this is a beautiful child?[13]

Unfortunately, the Clerk now refuses to file petitioner's applications to stay the lethal execution of unborn and partially born individuals, like Sam once was, despite having filed such applications in the past. App. V. *Cf.* Related Proceedings, pp. iii-v, *supra*. Accordingly, the Court is asked to interpret the present petition as an application for stay and to appoint a guardian ad litem.[14]

A. Five examples of the Tenth Circuit falsely invoking legal buzzwords to excuse its refusal to address the merits of various claims for relief.

The following examples evidence the rampant problem of the Tenth Circuit falsely invoking legal buzzwords to dodge the merits of the claims. The Court is asked to keep in mind that, under the proposed new standard of collateral review, there is no issue of whether legal buzzwords are falsely versus dutifully invoked by the reviewing court, given that the new standard eliminates the use of buzzwords entirely, thereby eliminating the problem altogether. Instead, the stringent new standard forces courts to contend with a properly developed postconviction record, including every meritorious claim no matter how or when it was raised.

Examples 1 & 2

For example, in the present case the Tenth Circuit invokes the concept of waiver in a non-dutiful manner, as follows (App. A8):

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[13] *Cf. Cassirer*, 596 U.S., Tr. of Oral. Arg. 61(17-18) ("Can everyone agree that this is a beautiful painting?") (Breyer, J.).

[14] "There is certainly nothing novel about the practice of permitting a next friend to assert constitutional rights on behalf of an incompetent patient who is unable to do so. See, e. g., *Youngberg v. Romeo*, 457 U. S. 307, 310 (1982); *Whitmore v. Arkansas*, 495 U. S. 149, 161-164 (1990)." *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 352 (1990) (Stevens, J., dissenting).

> Mr. Roeder claims that his appointed appellate counsel on collateral review was ineffective given her history of failing to brief cases, and that Kansas wanted to attribute this ineffectiveness to him (Sixth Issue). Mr. Roeder in his final scattershot claim also alleges a violation of the Suspension Clause and seemingly challenges federal habeas procedure writ large (Eighth Issue). ... Because Mr. Roeder did not raise either claim in the district court "we adhere to our general rule against considering issues for the first time on appeal" and decline to address Mr. Roeder's newly raised arguments. *United States v. Viera,* 674 F.3d 1214, 1220 (10th Cir. 2012).

But, the truth be told, not only did petitioner raise these arguments at the federal district court, it suffices to say that the district court *responded* to them.

As to the Eighth Issue, the district court states (on the first page of its decision no less): "Petitioner raises constitutional challenges to AEDPA, arguing that it gives too much deference to the state courts." App. B1-2 & n. 4.

As to the Sixth Issue, the district court states (in an order denying reconsideration of the order denying petitioner's motion to supplement the petition): "Petitioner also argues that his appointed counsel's incompetence in the state [collateral] proceedings caused the procedural default, citing *Martinez v. Ryan,* 566 U.S. 1 (2012)." App. E2.

Example 3

To give another example, in the present case the Tenth Circuit invokes the concept of a procedural default in a non-dutiful manner, as follows (App. A8-9):

> Mr. Roeder also claims he is the victim of a pattern of legal indifference (Seventh Issue). The district court held this claim was procedurally defaulted as the KCOA deemed the issue waived for failing to brief it. I R. 59, 66. ... Mr. Roeder argues he did brief the issue before the KCOA in his pro se supplemental brief and merely wished to add arguments to his claim in a reply brief [which the KCOA refused to file]. However, Mr. Roeder's supplemental brief offered no legal analysis other than to say that the denial of his right to be physically present with counsel at his initial appearance

was one example of the deliberate legal indifference he suffered. Thus, any substantive briefing in support of the claim was only contained in the reply brief.

But, the truth be told, that is not what the record shows. On the contrary, in support of his legal indifference claim, petitioner's pro se supplemental brief before the Kansas Court of Appeals cited the substantive briefing contained in the trial court record; under Tenth Circuit precedent, such citation to the record is a valid form of appellate briefing, as was argued in Appellant's Combined Opening Brief and Application for a Certificate of Appealability (Dkt. No. 10946882) at 22-23:

> Importantly, in addition to raising the issue in his pro se supplemental brief under the specific heading of "Pattern of Legal Indifference," under the same heading petitioner also directed the KCOA to a *citation of the record* in support of his contention. See *Roeder v. State*, KCOA Case No. 119,503, Pro Se Supplemental Brief of Appellant, filed 11/20/2018, p. 9 ("as detailed in the Movant's Brief in Support of the Motion Attacking Sentence, he has been subjected to an arms-length pattern of deliberate legal indifference.") Cursory examination of the "Movant's Brief in Support of the Motion Attacking Sentence" shows that it has a table of contents, which lists first under "Arguments" the topic "Claim 1: Roeder has been the victim of a pattern of legal indifference" and identifies the topic as starting at page 2 of the brief. See KDC, Case No. 17CV2373, Movant's Brief in Support of the Motion Attacking Sentence, filed 10/17/2017, pp. i, 2-8. Accordingly, in view of the *mention* in petitioner's brief before the KCOA that he has been the victim of a pattern of legal indifference, and having directed the KCOA to a *citation in the record* to support this contention, it cannot be fairly said that the KCOA would have had to comb through the summary-judgment record for evidence supporting petitioner's arguments. See *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1246, n.13 (10th Cir. 2003) (explaining that the judiciary need not comb through the summary-judgment record for evidence supporting the plaintiffs' arguments, provided that "plaintiffs do not mention this in their briefs on appeal, and they direct us to no citation in the record in support of this contention.")

As was stated in Appellant's Combined Opening Brief and Application for a Certificate of Appealability (Dkt. No. 10946882) at 21: "Let the Court note that a

pattern of legal indifference, being unnecessary to achieve and maintain a legitimate conviction, militates in favor of habeas corpus." Hence, because a pattern of legal indifference militates in favor of habeas corpus, the non-dutiful manner in which the Tenth Circuit enforced a procedural default to dodge having to address the merits of this claim is particularly concerning.

Example 4

To give yet another example, in the present case the Tenth Circuit invokes the concept of a procedural bar in a non-dutiful manner, as follows (App. A5):

> As for Mr. Roeder's emergency motion to protect the unborn (Claim 5), the KCOA dismissed this claim as outside the scope of § 60-1507, as it only permits a state prisoner to petition for his own release. Mr. Roeder failed to adduce a single Kansas case allowing a prisoner to move for relief on behalf of others under § 60-1507. From this, the district court concluded that the KCOA's dismissal was based on an independent and adequate state law ground. Thus, the district court's conclusion of procedural bar is not reasonably debatable. Nor is its conclusion that even if the claim were not procedurally barred, it would be outside the scope of a § 2254 petition.

As an initial matter, the condition the Tenth Circuit seeks to impose—that legal support can only be adduced from a precedent case—is plainly illogical, given that some case must inevitably be *first*. Hence, jurists of reason could debate whether (or, for that matter, agree that) petitioner's case is simply the first of its kind in Kansas. Moreover, in focusing only on the purported absence of predicate Kansas cases, the Tenth Circuit overlooked petitioner's reliance on K.S.A. § 60-1501(a), under which habeas corpus, including K.S.A. § 60-1507, can be prosecuted by a next friend, as well as *Whitmore v. Arkansas*, 495 U.S. 149 (1990), in which this Court recognized that a prisoner may have dual standing to prosecute habeas

corpus both individually and as next friend of one under sentence of death. See Appellant's Combined Opening Brief and Application for a Certificate of Appealability (Dkt. No. 10946882) at 15-19, section 4.5 (Fifth Issue).

The opinion of the Kansas Court of Appeals was not precedential and—as the Tenth Circuit concedes—it had no Kansas precedent to rely on. App. A5. See Kansas Supreme Court Rule 7.04(a) (2021 Kan. Ct. R. Annot. 46) ("Disposition by memorandum, without a published formal opinion ... means the case does not involve a new point of law or is otherwise considered as having no value as precedent.") It was therefore non-dutiful of the Tenth Circuit to receive that opinion as evidence of an adequate and independent state law rule as required to enforce a procedural bar. See *Beard v. Kjndler*, 558 U.S. 53, 60-61 (2009) (quoting *Lee v. Kemna*, 534 U.S. 362, 376 (2002)) (To be an "adequate" procedural ground, a state rule must be "firmly established and regularly followed.")

Example 5

And to give yet another example, in the present case the Tenth Circuit likewise invokes the concept of a procedural bar in a non-dutiful manner in another instance as well, as follows (App. A4-5):

> As for Mr. Roeder's claim of ineffective assistance of trial counsel for agreeing to nonpublic jury selection (Claim 4), the district court's conclusion is not reasonably debatable. Mr. Roeder did not raise this claim at trial and thus the KCOA considered it waived. Under Kansas law arguments presented for the first time on appeal, including constitutional grounds for reversal, are waived. *Trotter v. State*, 200 P.3d 1236, 1245–46 (Kan. 2009). Thus, where a state appellate court determines that a claim is waived, this constitutes a procedural bar to federal habeas review. *Cone v. Bell*, 556 U.S. 449, 465 (2009); *Blaurock v. Kansas*, 686 F. App'x 597, 608 (10th Cir. 2017) (unpublished).

In other words, the Tenth Circuit is saying that, on federal review of state habeas corpus, a procedural bar is simply the state's for the asking. But, the truth be told, that is not what either *Cone* or *Blaurock* says. On the contrary, in *Cone*, for example, the Court states, 556 U.S. at 465-466:

> That does not mean, however, that federal habeas review is barred every time a state court invokes a procedural rule to limit its review of a state prisoner's claims. We have recognized that "'[t]he adequacy of state procedural bars to the assertion of federal questions' . . . is not within the State's prerogative finally to decide; rather, adequacy 'is itself a federal question.'" *Lee*, 534 U. S., at 375 (quoting *Douglas v. Alabama*, 380 U. S. 415, 422 (1965)); see also *Coleman*, 501 U. S., at 736 ("[F]ederal habeas courts must ascertain for themselves if the petitioner is in custody pursuant to a state court judgment that rests on independent and adequate state grounds").

In other words, a procedural bar is not simply the state's for the asking. Instead, it depends on the "adequacy" of the state's procedural rule.

Similarly, in *Blaurock* the Tenth Circuit enforced a procedural bar not merely because the state had asked for one, but because "[i]n addition, Mr. Blaurock did not argue before the district court or in his application for a COA that the Kansas rule against raising arguments for the first time on appeal is not an adequate and independent state procedural ground." 686 F. App'x at 608.

In contrast, in the present case, and as the federal district court acknowledged, "Petitioner responds that Kansas's waiver rule is not an 'independent and adequate state procedural rule' sufficient to bar federal habeas review because the KCOA cited as authority a case that did not involve a § 60-1507 appeal." App. B8. Petitioner also raised this argument before the Tenth Circuit in his combined opening brief and application for a COA. See Appellant's Combined

Opening Brief and Application for a Certificate of Appealability (Dkt. No. 10946882) at 7-9, section 4.2 (Second Issue). Hence, for failure to consider whether jurists of reason could debate whether (or, for that matter, agree that) Kansas' waiver rule is not an "independent and adequate state procedural rule" sufficient to bar federal habeas review, it is evident that the Tenth Circuit invoked the concept of a procedural bar in a non-dutiful manner.

Noted is that petitioner specifically argued in his opening brief before the Tenth Circuit that *Trotter* does not apply here, given that petitioner chose to raise the nonpublic trial issue at the Kansas Court of Appeals in a manner consistent with *Edgar v. State*, 294 Kan. 828 (2012). See Appellant's Combined Opening Brief and Application for a Certificate of Appealability (Dkt. No. 10946882) at 8:

> On the authority of *Trotter v. State,* 200 P.3d 1236, 1245-46 (Kan. 2009) (discussing general rule that "issues not raised before a district court, including constitutional grounds for reversal, cannot be raised for the first time on appeal," and exceptions, in the context of a § 60-1507 motion), the FDC concluded that "Kansas's waiver rule, and its limited exceptions, are firmly established and regularly followed in all Kansas cases-civil, criminal, and habeas cases alike." R.1.245. However, in relying on *Trotter,* the FDC overlooked petitioner's citation of *Edgar v. State,* 294 Kan. 828 (2012), and the fact that *Edgar* ***post-dates*** *Trotter.* R.I.140(##C-F); R.I.147(##2-3). According to *Edgar,* 294 Kan. at 836-837, the "de novo standard of review [of the KDC's summary denial of a K.S.A. 60-1507 motion] requires an appellate court to determine whether the motion, files, and records of the case conclusively show the movant is not entitled to any relief" and that such review of the record must address every claim the petitioner chooses to present on appeal even when, 294 Kan. at 844, "in posing the issue he makes only a very limited argument...." ... Hence, in view of the conflict between the more recent decision in *Edgar* and the FDC's interpretation of *Trotter,* it is evident that Kansas' waiver rule is not firmly established and regularly followed when it comes *specifically to* appeals from the summary denial of K.S.A. § 60-1507 motions.

Because jurists of reason could debate whether (or, for that matter, agree that) *Edgar* trumps *Trotter* here, it was non-dutiful of the Tenth Circuit to rely on *Trotter* to enforce a procedural bar while ignoring petitioner's argument.

B. Even regarding those claims which the Tenth Circuit was willing to consider, it gave a non-dutiful treatment.

The foregoing examples show the rampant problem of faulty excuse-making being used to dodge claims on collateral review. Though this specific problem can be remedied simply by eliminating excuses altogether, nothing but skill and integrity will solve the problem evidenced by the examples to follow. For in each of the three cases where the Tenth Circuit did consider petitioner's claims, it gave them a non-dutiful treatment.

Example 1

In Kansas, there is a state constitutional and statutory right to bond, which the state legislature interprets as commencing at a criminal defendant's first appearance before a magistrate. See Kan. Const. Bill of Rights § 9 ("All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great."); 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 upon the execution of an appearance bond in an amount specified by the magistrate....")

In his opening brief before the Tenth Circuit, petitioner invoked the exception provided by *United States v. Cronic*, 466 U.S. 648, 659 & n. 25 (1984), because he was completely denied counsel during proceedings in which his state constitutional

and statutory right to bond was denied. See Appellant's Combined Opening Brief and Application for a Certificate of Appealability (Dkt. No. 10946882) at 4-7, section 4.1 (First Issue).

The Tenth Circuit states correctly that "[a]t the appearance, he was apprised of the charges against him, his right to an attorney, and he was denied an appearance bond." App. A5.

A page later, the Tenth Circuit flatly contradicts itself by stating incorrectly that, "[h]ere, no rights were waived or lost as Mr. Roeder merely was informed of the charges against him and his right to counsel." App. A6-7. In so doing, the Tenth Circuit dodged the fact that petitioner ***lost*** his state constitutional and statutory right to bond during proceedings held by the magistrate, thereby dodging *Hamilton v. Alabama*, 368 U.S. 52, 53-54 (1961) (a pretrial arraignment can be critical where certain rights can be waived or lost). App. A6.

Without dodging *Hamilton*, the Tenth Circuit would have been forced to conclude that the right to counsel attached to those proceedings under *Rothgery v. Gillespie County*, 554 U.S. 191, 211-212 (2008) (An accused is entitled to counsel at any critical stage of proceedings once attachment occurs—i.e., "when the government has used the judicial machinery to signal a commitment to prosecute.") App. A6. And without dodging *Rothgery*, the Tenth Circuit would in turn have been forced to conclude that reasonable jurists could debate whether (or, for that matter, agree that) the exception under *Cronic* applies because petitioner was completely denied counsel during a critical stage of proceedings.

In Kansas, there is a state constitutional right such that "the accused shall be allowed to appear and defend in person...." Kan. Const. Bill of Rights § 10. The Kansas Supreme Court interprets this right to be distinguished from mere physical presence, such that, in order to be *constitutionally* present, the accused must be *informed* about the proceedings so he or she can assist in the defense. See *State v. Calderon*, 270 Kan. 241, 245 (2000) ("To be 'present' requires that a defendant be more than just physically present. It assumes that a defendant will be informed about the proceedings so he or she can assist in the defense. *United States v. Mosquera*, 816 F.Supp. 168, 172 (E.D.N.Y. 1993).") In turn, the state legislature interprets this right to constitutional presence to include: 1) proceedings before the magistrate, and 2) the right to be personally (i.e., physically) present in the courtroom, as opposed to by videoconference. See K.S.A. 22-2802(14).[15] Additionally, the Kansas Court of Appeals interprets denial of the twin rights of counsel and constitutional presence as structural error not subject to harmless error analysis. See *State v. Carver*, 32 Kan. App. 2d 1070, 1071 (Kan. Ct. App. 2004).

Neither respondent nor courts below dispute that petitioner was not informed in advance that his state constitutional and statutory right to bond could be lost in the proceedings before the magistrate. It is therefore evident that petitioner was not *constitutionally* present at proceedings before the magistrate under the standard of

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[15] K.S.A. 22-2802(14): Proceedings before a magistrate as provided in this section to determine the release conditions of a person charged with a crime including release upon execution of an appearance bond may be conducted by two-way electronic audio-video communication between the defendant and the judge in lieu of personal presence of the defendant or defendant's counsel in the courtroom in the discretion of the court. The defendant may be accompanied by the defendant's counsel. The defendant shall be informed of the defendant's right to be personally present in the courtroom during such proceeding if the defendant so requests. Exercising the right to be present shall in no way prejudice the defendant.

Calderon. It follows that petitioner was denied the twin rights of being constitutionally present and being represented by counsel at proceedings made critical by the loss of his state constitutional and statutory right to bond.

As to physical presence per se, the Tenth Circuit concluded that (App. A6):

> The benefit of his physical presence would have been but a shadow and thus the district court's decision that the KCOA's holding [that petitioner failed to demonstrate that his lack of physical presence affected his initial appearance or any subsequent bond hearings] was a reasonable application of federal law is not reasonably debatable.

Respectfully, there are two faults with this conclusion. First, focus only on *physical* presence dodges the broader issue of *constitutional* presence. Second, physical presence before the magistrate is more than a "shadow" in Kansas—it is a state constitutional and statutory right in and of itself.

Accordingly, in proceedings before the magistrate, petitioner ***lost***: 1) his state constitutional and statutory right to bond, 2) his state constitutional and statutory right to be physically present in the courtroom as opposed to by videoconference, and 3) for failure to inform him in advance that the magistrate would seek to deny his right to bond during the proceedings, his right to be constitutionally present under the standard of *Calderon* even by way of videoconference—all while being completely denied counsel.

Noted is that both the Kansas Court of Appeals and the federal district court questioned whether petitioner had actually appeared by videoconference. App. B17-18 & n. 75-76. Because the district court raised this question despite being provided with a YouTube link to a videotape of the televised appearance—available at

https://youtu.be/C5_hZln8Gn0—petitioner asked the Tenth Circuit to exercise its supervisory authority.[16] See Appellant's Combined Opening Brief and Application for a Certificate of Appealability (Dkt. No. 10946882) at 7. Though the Tenth Circuit acknowledged that petitioner had appeared by videoconference, it did not exercise its supervisory authority. App. A6.

Of petitioner's appearance before the magistrate, the Tenth Circuit states that "[h]e was informed of his rights and was able to meaningfully participate in the bond determination at the initial appearance through video." App. A6. However, the transcript shows that the word "right" or "rights" was never mentioned, and clearly petitioner was not informed of his right to bond. Instead, the magistrate declared: "You have been charged, formally now, with one charge of Murder in the First Degree, two charges of Aggravated Assault; you're going to be held, at this point, with no bond permitted." See *Roeder v. State*, Kansas Court of Appeals, No. 119,503, Pro Se Supplemental Brief of Appellant, filed 11/20/2018, p. B-2, lines 9-12. Hence, the Tenth Circuit opinion belies what the transcript and videotape show.

Examples 2 & 3

Petitioner asserts that he is actually—i.e., legally and factually—innocent: as to first degree murder, because of the necessity of saving children as an innocent third party from their scheduled executions; and, as to two counts of assault,

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[16] When a court acts as if the answer to a material question is unknowable despite it being readily knowable, it comes shamefully close to the "exculpatory no" forbidden by *Brogan v. United States*, 522 U.S. 398 (1998). See also *Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.")

because, having acted lawfully to defend an innocent third party from death, he retained the right to maintain control of his person, and at every step he acted to minimize collateral damage. He therefore requests a certificate of innocence.

1. Counsel's Ineffectiveness—Criminal Trial

In accord with his asserted innocence, petitioner sought permission from the trial court to put on necessity related defenses, which was denied.[17] Petitioner claims trial counsel's ineffectiveness was responsible for the denial. See Appellant's Combined Opening Brief and Application for a Certificate of Appealability (Dkt. No. 10946882) at 9-12, section 4.3 (Third Issue).

In Kansas, the standard of a necessity defense is that "[t]he harm or evil which a defendant, who asserts the necessity defense, seeks to prevent must be a legal harm or evil as opposed to a moral or ethical belief of the individual defendant." *City of Wichita v. Tilson*, 253 Kan. 285, 289-290 (1993). Homicide is always a legal harm or evil, whether the law considers it justified or not. In Kansas, the coroner is the one to provide "competent evidence" of the legal harm or evil of homicide under K.S.A. 22a-235.

K.S.A. 21-5419 "Alexa's Law" defines "unborn child" as a living individual organism of the species Homo sapiens, in utero, at any stage of gestation from

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[17] Petitioner's own decision to lay himself out to seek necessity related defenses clearly became the logical strategy, given that the trial court had already decimated the presumption of his innocence, for example, by the magistrate denying him bond to make him look like a terrorist on national television, by the trial judge later setting excessive bond saying he doubted petitioner would not "enact any more violence," by the prosecutor saying a reasonable person would believe he engaged in "alleged acts of American terrorism," and by the Sheriff subjecting his mail to irregular scrutiny in jail and publishing the names of his visitors as if preparing a blacklist of those who dare to associate with him. This pattern of legal indifference for the presumption of his innocence thus had a "substantial and injurious effect or influence" in shaping the course of the trial and, hence, in determining the jury's verdict. *Kotteakos v. United States*, 328 U.S. 750, 776 (1946).

fertilization to birth. The law specifies that "person" and "human being" shall also mean an unborn child as used in K.S.A. §§ 21-5401 through 21-5406 and 21-5413, which define murder in the first and second degrees, voluntary and involuntary manslaughter, battery, aggravated battery, capital murder, and involuntary manslaughter while driving under the influence of alcohol or drugs.[18]

Hence, there can be no question in view of K.S.A. 22a-235 that the coroner is professionally capable of providing "competent evidence" of homicide of the unborn child under K.S.A. 21-5419. To be clear, the standard of *Tilson* only requires a showing of a legal harm or evil. It makes no difference under *Tilson* whether the legal harm or evil is considered necessary, justified, or even legal. Accordingly, had the coroner testified that Dr. Tiller was in the business of subjecting unborn and/or partially born children to the legal harm or evil of homicide, petitioner would have satisfied the requirement of *Tilson* for a necessity defense.

Given the great esteem the Kansas legislature has for the findings of the coroner under K.S.A. 22a-235, the question of how the trial court would have judged the reasonableness of petitioner's actions in light of a coroner's finding on the legal harm or evil of child homicide is "sufficient to undermine confidence in the outcome" under the standard of *Strickland v. Washington*, 466 U.S. 668, 669, 691-696 (1984). Unfortunately, like a sitting duck, absence of such testimony from the coroner left petitioner to rely only on that which *Tilson* regards as insufficient, namely, his own moral, religious, or ethical beliefs.

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[18] See National Conference of State Legislatures, "State Laws on Fetal Homicide and Penalty-enhancement for Crimes Against Pregnant Women," May 1, 2018. https://perma.cc/3XTG-WDLB

The right to compulsory process for obtaining witnesses guaranteed by the Sixth Amendment includes witnesses required in support of pre-trial proceedings such as a motion to put on necessity related defenses. As petitioner argued before the Tenth Circuit (see Appellant's Combined Opening Brief and Application for a Certificate of Appealability (Dkt. No. 10946882) at 11):

> Put more simply, what judge in a murder trial would hesitate to find the prosecutor incompetent for failure to call the coroner as a witness to make a factual determination of whether the deceased was in fact a victim of the legal harm or evil of *homicide?* In the same way, trial counsel was *Strickland* ineffective for failure to call the coroner as a witness to make a factual determination of whether babies killed by performing an abortion are in fact victims of the legal harm or evil of *homicide,* in support of *counsel's own chosen strategy* of seeking to put on a defense based on necessity and/or imperfect defense-of-others. Accordingly, there can be no doubt that petitioner has made a substantial showing of the denial of a constitutional right, such that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.

But rather than addressing this argument, the Tenth Circuit twisted matters around by saying that "counsel strategically did not call the coroner as necessity related defenses had been precluded in a pretrial ruling." App. A7. In other words, the Tenth Circuit is saying there was no need to call the coroner ***after*** the trial court had ruled against the necessity related defenses.

But petitioner's argument is that counsel was ineffective for failure to call the coroner as a supporting witness ***before*** the trial court ruled on counsel's motion to put on necessity related defenses. It was thus non-dutiful for the Tenth Circuit to deny the certificate of appealability by twisting matters around.

2. Counsel's Ineffectiveness—Direct Appeal

As to the handling of the issue of the necessity related defenses on direct appeal, petitioner claims appellate counsel was ineffective for conceding a time-based standard of imminence rather than pursuing an action-based standard. See Appellant's Combined Opening Brief and Application for a Certificate of Appealability (Dkt. No. 10946882) at 12-15, section 4.4 (Fourth Issue).

As petitioner argued before the Tenth Circuit (*id.* at 14):

> In essence, the act of scheduling an abortion with Dr. Tiller was no different in principle or effect than the formal issuance of a warrant of execution by the state. Hence, the definition of imminence based on the *action* of scheduling a lethal execution applies here. See *Martinez-Villareal v. Stewart,* 118 F.3d 625, 627 (9th Cir. 1997) ("the determination of whether an inmate is competent to be executed cannot be made before the execution is imminent, i.e., before the warrant of execution is issued by the state"), affd, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998). See also *Nguyen v. Gibson,* 162 F.3d 600, 602 (10th Cir. 1998), Briscoe, C.J., dissenting. In view of *Martinez-Villreal,* it is evident that the Ninth Circuit intended to define the term "imminent" as applying to a lethal execution once scheduled. See *Edwards Lifesciences LLC v. Cook Inc.,* 582 F.3d 1322, 1334 (Fed. Cir. 2009) ("use of 'i.e.' signals an intent to define the word to which it refers."); see also *Abbott Labs. v. Novopharm Ltd.,* 323 F.3d 1324, 1330 (Fed. Cir. 2003) (holding that a patentee "explicitly defined" a term in U.S. Patent No. 4,895,726, col. 1, lines 35-38, where "i.e." was used followed by an explanatory phrase). Accordingly, applying the definition of imminence provided by *Martinez-Villareal,* it follows that an abortion is imminent for as long it remains scheduled, as is true of any lethal execution. R.I.114(#1); R.I.129(##2-3).

Without addressing petitioner's argument, the Tenth Circuit concluded that "the concession [by counsel that an abortion scheduled six months in the future is not imminent] was not deficient given that the Kansas Supreme Court decided against Mr. Roeder's imminence arguments and held the facts showed Mr. Roeder did not hold an honest belief that any harm he sought to prevent was imminent." App. A8. In so doing, the Tenth Circuit expressly "inverted the statutory order of

operations" in the manner prohibited by *Buck v. Davis*, 580 U.S. ___, 137 S.Ct. 759, 774 (2017), by "first decid[ing] the merits of an appeal, ... then justif[ing] its denial of a COA based on its adjudication of the actual merits."

What is especially disturbing is that the Tenth Circuit did so even despite the petitioner's citation to *Buck v. Davis* in his opening brief as a reminder that "the process of resolving whether he is entitled to a certificate of appealability should not devolve into a determination of the merits." See Appellant's Combined Opening Brief and Application for a Certificate of Appealability (Dkt. No. 10946882) at 4, section 4 (Statement of Issues and Arguments). Such deliberate departure from the accepted and usual course of judicial proceedings shows that the Tenth Circuit was intent on "plac[ing] too heavy a burden on the prisoner *at the COA stage*." Emphasis in original. *Buck v. Davis*, 137 S.Ct. at 774.

Instead, at this point, for obtaining a certificate of appealability it suffices to say in view of *Martinez-Villareal* and *Nguyen v. Gibson* that reasonable jurists could debate whether (or, for that matter, agree that) an abortion is imminent for as long it remains scheduled, as is true of any lethal execution.

C. Whether a right to the effective assistance of counsel on collateral review flows naturally from the duty of the courts to contend with a properly developed postconviction record?

In contemplating this related question, two issues are brought to the Court's attention. Each of these issues in its own way asks the Court to reconsider whether it fully understood the implications of *Shinn v. Martinez Ramirez*, 142 S.Ct. at 1735,

when holding that "a state prisoner is responsible for counsel's negligent failure to develop the state postconviction record."

1. Refusal to File a Pro Se Reply Brief

On collateral review before the Kansas Court of Appeals, after filing a pro se supplemental brief, petitioner moved to file a pro se supplemental reply brief on the following grounds (see *Roeder v. State*, Kansas Court of Appeals, No. 119,503, Motion to File Pro Se Supplemental Reply Brief, filed 03/04/2019, p. 1):

> A pro se supplemental reply brief is especially warranted because: 1) the appellee's brief addresses movant's previously filed pro se supplemental brief and so the movant pro se is in the best position to reply, and 2) the appellee's brief argues that movant's counsel is unreliable and unable to properly brief the Court.

The Kansas Court of Appeals denied the motion (App. S) and denied reconsideration (App. T). The Kansas Supreme Court denied interlocutory review. App. U.

If a state's unexplained refusal to file a pro se supplemental reply brief does not void the authority of the federal courts to enforce a procedural default (App. E), then it means the petitioner is expected to silently acquiesce to counsel's negligent briefing failures, at least insofar as court filings are concerned.

2. Appointed Counsel Had a History of Incompetence

As in petitioner's case, a peculiar thing in Kansas is that counsel is seldom appointed at the trial court when collateral review ends with summary denial, but is typically appointed on appeal to the Kansas Court of Appeals. In other words, the initial petition is filed pro se with the trial court, and counsel is not appointed who might move to amend the petition to develop it further. Then what happens next, as

shown here, is that counsel is appointed with a known history of being incompetent to fully brief the appeal. The Kansas Court of Appeals then declares a procedural default based on failure to brief (App. H4-5), which is then enforced by the federal district court despite ample evidence of counsel's incompetence (App. E). An added wrinkle in this case is that counsel dismissed herself without leave and without prior notice to petitioner from briefing the issue of the emergency motion to stay the execution of unborn and partially born individuals under sentence of death. See Appellant's Combined Opening Brief and Application for a Certificate of Appealability (Dkt. No. 10946882) at 19-21, section 4.6 (Sixth Issue).

The policy of attributing collateral review counsel's negligent performance to the petitioner has created precisely this sort of loophole for Kansas to exploit.

D. Whether the Kansas legislature recognizes the duty of the state courts to contend with a properly developed postconviction record?

In contemplating this related question, the Court is reminded of the opinion in *Harris v. Nelson*, 394 U.S. 286, 290-291 (1969):

> The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its pre-eminent role is recognized by the admonition in the Constitution that: "The Privilege of the Writ of Habeas Corpus shall not be suspended. . . ." U.S. Const., Art. I, § 9, cl. 2. The scope and flexibility of the writ — its capacity to reach all manner of illegal detention — its ability to cut through barriers of form and procedural mazes — have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

The Kansas legislature would appear to have jealously guarded the writ by instructing the trial court not to summarily dismiss a motion attacking sentence

under K.S.A. 60-1507 "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief...." K.S.A. 60-1507(b). Accordingly, all matters contained in "the motion and the files and records of the case" must be considered as being properly before the trial court; and, by instructing the trial court to conclusively show that the prisoner is entitled to "no relief," the legislature has thereby added to every K.S.A. 60-1507 motion an *omnibus* claim encompassing any and every possible ground for relief.

Unfortunately, state and federal courts appear not to have guarded the Great Writ as jealously as the Kansas legislature. In view of such authorities as *Trotter*, the federal district court found that "Petitioner's interpretation of § 60-1507 would eviscerate these authorities, allowing review of any claim that is potentially supported by the record below." App. B9. Nonetheless, review of any conceivable claim that is potentially supported by the record—effectively an omnibus claim—is precisely what the Kansas legislature mandates under K.S.A. 60-1507(b).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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