No. 18-6135

IN THE

Supreme Court of the United States

JAMES KRAIG KAHLER,

Petitioner,

v.

KANSAS,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

JOINT APPENDIX

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May 31, 2019

PETITON FOR CERTIORARI FILED SEPTEMBER 28, 2018
CERTIORARI GRANTED MARCH 18, 2019

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OSAGE COUNTY DISTRICT COURT

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Case: 2009-CR-000270

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STATE OF KANSAS,

v.

JAMES KRAIG KAHLER,

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11/30/2009	Complaint (#1) Image Name: Complaint Image ID: 117177
	* * *
12/10/2009	Amended Complaint-Information (#7) Image Name: Complaint Image ID: 118538
	* * *
5/19/2010	Hearing result for Motion held on 5/19/2010 01:30 PM: STATE BY B. DISNEY, A. HANDLEY, B. JONES, DEF W/B. DISNEY, B. STUDER; MOTION HG; STATE PRESENTS EVIDENCE; ARGUMENTS; MOTION TO ALLOW CHILD TO TESTIFY BY CLOSED CIRCUIT TV IS GRANTED; ORDER COVERING 5/10/10 PHONE CONFERENCE IS SIGNED; DEF PLANS TO FILE ADDITIONAL MOTIONS PRIOR TO PRELIM; MOTIONS HEARING SET FOR 6/14/10 AT 1:30 PM; NO

DATE	PROCEEDINGS
	ADDITIONAL ISSUES. Hearing Scheduled (Motion 06/14/2010 01:30 PM)
	* * *
11/22/2010	Hearing result for Hearing held on 11/22/2010 10:00 AM: Hearing Held-ST BY B. DISNEY, AMY HANLEY, AND B. JONES, DEF IN PERSON W/T. HANEY AND AMANDA VOGELSTERG?, TESTIMONY OF DAVID GOWAN TAKEN BY L. SPROUT IN ADVANCE OF AND PRELIM EXAM, WHO IS TODAY ENDORSED AS WITNESS
	* * *
12/21/2010	Hearing result for Preliminary held on 12/21/2010 09:00 AM: STATE BY A. HANLEY, B. JONES, DEF W/T. HANEY; STATE PRESENTS EVIDENCE; 4 AUTOPSY REPORTS W/EXHIBITS 1-35 & 41-48 ADMITTED; STATE RESTS; PROBABLE CAUSE FOUND; DEF BOUND OVER TO APPEAR FOR ARRAIGNMENT ON 2/7/11 AT 9:30 AM; EXHIBITS RETURNED TO STATE
	* * *
2/7/2011	Hearing result for Arraignment held on 02/07/2011 09:30 AM: Hearing Held. DEF W/TOM HANEY AND AMANDA VOGELSBURG; ST. BY B. JONES AND AMY HANLEY. DEF REMAINS SILENT AND COURT ENTER PLEAS OF NOT GUILTY.

DATE	PROCEEDINGS
	* * *
2/10/2011	Notice (#63) Image Name: Written Notice of Defendant's Intention to Assert Lack of Mental State Defense Image ID: 159865
	* * *
3/17/2011	Email Sent Date: 03/17/2011 08:32 am To: brenda.albright@ksag.org File Attached: STATE'SMOTIONFORANIN DEPENDENTEVALUATIONOFTHEDE FENDANT Name of Document: State's Motion for An Independent Evaluation of the Defendant, P
	* * *
3/17/2011	Hearing result for Motion(s) – 1/2 Day held on 03/17/2011 01:30 PM: Hearing Held. STATE BY A. HANLEY & B. JONES. DEF W/T. HANEY; MOTIONS; DEF ORDERED TO FILE DR. PETERSON'S REPORT W/COURT BY 3/21/11 AND ALLOW STATE COPY ; DR. LOGAN APPROVED; MOTION TO COMPELL OUT OF STATE WITNESSES GRANTED BUT LIMITED TO NECESSARY EXPENSES ONLY & ADVANCE EXPENSES LIMITED TO TRAVEL COSTS ONLY; COURT APPROVES NUMBERING FILINGS IN CASE – PARTIES TO AGREE; CLERK TO NUMBER EXISTING FILINGS & COUNSEL TO FILE NUMBERS ON ALL FUTURE PLEADINGS AND MOTIONS.

DATE	PROCEEDINGS
	* * *
6/2/2011	Motion (#100) Image Name: Motion Challenging the Constitutionality of Kansas Death Penalty Image ID: 171428
	* * *
6/15/2011	State's Response (#112) Image Name: State's Response to Defendant's Motion Challenging the Constitutionality of Kansas Death Penalty Image ID: 173110
	* * *
7/27/2011	Hearing result for Pretrial Conference held on 07/27/2011 09:30 AM: Hearing Held "FINAL PRETRIAL"
	* * *
8/1/2011	State's Proposed Jury Instructions (#144) Image Name: State's Proposed Jury Instructions Image ID: 178496
	* * *
8/3/2011	Defendant's Proposed Jury Instructions (146) Image Name: Defendant's Proposed Jury Instructions Image ID: 178545
	* * *
8/26/2011	State's Proposed Jury Instructions (156) Image Name: State's Proposed Jury Instructions for Sentencing Phase Image ID: 181325
	* * *
	Defendant's Proposed Capital Punishment Sentencing Instructions (158) Image

DATE	PROCEEDINGS
	Name: Defendant's Proposed Capital Punishment Sentencing Instructions Image ID: 181334
	* * *
8/29/2011	Jury Instructions Image Name: Jury Instructions Image ID: 181360
	* * *
8/29/2011	Hearing Scheduled (Sentencing 10/11/2011 09:30 AM)
	Jury Instructions (separate sentencing) Image Name: jury Instructions Image ID: 181519
	* * *
9/8/2011	Defendant's Motion For New Trial Filed (161) Image Name: Motion Image ID: 182709
	* * *
10/6/2011	Defendant's Sentencing Memorandum (164) Image Name: Defendant's Sentencing Memorandum Image ID: 185552
10/7/2011	State's Response (165) Image Name: State's Response to Defendant's Motion for New Trial Image ID: 185645
10/10/2011	State's Response (166) Image Name: State's Response to Defendant's Sentencing Memorandum Image ID: 185651
	* * *

DATE	PROCEEDINGS
10/11/2011	Death Warrant (167) Image Name: Death Warrant Image ID: 185757 * * * Journal Entry (169) Image Name: Journal Entry of Judgment Image ID: 185760 * * * Notice of Appeal (170) Image Name: Notice of Automatic Review and Appeal to the Supreme Cour Image ID: 185766 * * *

KANSAS APPELLATE COURTS

106981
09CR270

STATE OF KANSAS,

v.

JAMES K. KAHLER,

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
22-MAR-19	CLERK NOTE WITH DOCUMENT(S) / Petition for Writ of Cert. granted on 3/18/19 by U.S. Supreme Court
	* * *
23-JAN-19	CLERK NOTE WITH DOCUMENT(S) / Record Request from U.S. Supreme Court
18-JAN-19	CLERK NOTE WITHOUT DOCUMENT / Record on Appeal transmitted to the Supreme Court of the United States
	* * *
05-OCT-18	CLERK NOTE WITH DOCUMENT(S) / Petition for Writ of Certiorari placed on 09/28/2018 Docket: U.S. Supreme Court
	* * *

DATE	PROCEEDINGS
01-MAY-18	ORDER BY THE COURT / Corrected: Denied, Aplnt's Motion for Rehearing/ Modification. J Rosen recused
	* * *
26-APR-18	MOT FOR REHEARING OR MODIFICATION-DENIED / by Appellant, James K. Kahler
	* * *
26-FEB-18	ORDER BY THE COURT / Granted: Aplnt's mtn for EOT to file for Rehearing/ Modification. Mtn due 4/2/18.
12-FEB-18	MOTION / Motion for EOT to File Motion for Rehearing or Modification by Aplnt, Kahler
09-FEB-18	JUDGMENT DOCKETED - PUBLISHED OPINION / Affirmed. Per Curiam.
	* * *
21-OCT-16	CAUSE SCHEDULED FOR HEARING / Friday, December 16, 2016 @ 9:00 am, SCt ctrm,. 301 W. 10th Ave, Topeka
	* * *
19-JAN-16	RECORD RECEIVED - CLERK, DISTRICT COURT / 51 volumes + 1 yellow CD and 15 ASCII CDs; Osage County
12-JAN-16	RECORD ORDERED FROM CLERK, DIST. CT. / CLERK, OSAGE COUNTY

DATE	PROCEEDINGS
12-MAY-14	REPLY BRIEF / JAMES K. KAHLER
	* * *
28-MAR-14	BRIEF RECEIVED / STATE OF KANSAS
	* * *
17-JUN-13	BRIEF RECEIVED / & Appx - JAMES K. KAHLER - Aple Brf Due 10/15/2013
	* * *
29-NOV-11	ORDER APPOINTING COUNSEL
29-NOV-11	DISTRICT COURT DOCUMENTS / (2)
29-NOV-11	NOTICE OF APPEAL FILED - MOT DOC OOT / (10/11/11) JAMES K. KAHLER
29-NOV-11	DOCKETING STATEMENT / JAMES K. KAHLER

IN THE DISTRICT COURT OF OSAGE COUNTY,
KANSAS FOURTH JUDICIAL DISTRICT
(CRIMINAL DIVISION)

Case No. 09-CR-270

STATE OF KANSAS,

Plaintiff,

vs.

JAMES KRAIG KAHLER,

Defendant.

MOTION CHALLENGING THE
CONSTITUTIONALITY OF
KANSAS DEATH PENALTY

COMES NOW the defendant, James Kraig Kahler, by and through Thomas D. Haney and Amanda S. Vogelsberg of Henson, Hutton, Mudrick & Gragson, L.L.P., and files this motion challenging the constitutionality of the Kansas death penalty scheme (K.S.A. 21-4624 *et seq.*) as violative of the Constitution of the State of Kansas and the Constitution of the United States. In support hereof, the movant will show the Court the statutory scheme is unconstitutional for the following reasons:

1. The death penalty in Kansas is unequally applied and discriminatory.

The current death penalty in the State of Kansas is applied disproportionately. The law is applied overwhelmingly to defendants who have been convicted of killing Caucasian women.

comes to issues of determining death or life. Death, it has long been recognized, is quantitatively different than other forms of punishment with a greater need for reliability of the process at which a death sentence is arrived at. *See e.g., Woodson v. North Carolina*, 428 U.S. at 303-305. When the death penalty is under consideration, discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Greg v. Georgia*, 428 U.S. at 189 (op. of Stewart, Powell, and Stevens, JJ). Jurors in death penalty cases often believe, erroneously, that once an aggravating factor has been found, death is mandatory. *See e.g*., Ubentele and W. J. Bowers, "How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse," 66 Brooklyn L. Rev 1011, 1031-41 (2001).

5. Kansas has unconstitutionally abolished the insanity defense and in its stead enacted an unconstitutional partial mental illness defense.

Since the attempted assassination of Ronald Reagan, four states have abolished the insanity defense, including Montana, Utah, Idaho and Kansas. In its place, the State of Kansas has provided for a "defense" of lack of mental state. *See* K.S.A. 22-3219. The defense of not guilty by reason of insanity which existed in the common law since the 12th century and has its roots in Ancient Greece. (Feigl 1995, 191). It has existed through various tests, including the M Naughten Rule, Irresitible Impulse Test, the Durham Rule, and the ALI Model Penal Core Test. The present scheme in Kansas allows an individual suffering from serious mental

disease and defect who cannot tell the difference between right and wrong or cannot conduct himself or herself accordingly, to still be found guilty of criminal conduct including capital murder and be put to death. Such would, and has, included those suffering from mental illness and disease including schizophrenia, paranoia, manic depression and other mental illness. it is respectfully submitted that to abolish the defense in the State of Kansas denies the defendant and others similarly situated due process of law both procedurally and substantively. The longstanding law established in *Ford v. Wainright,* 106 S. Ct. 2595 (1986) and *Atkins v. Virginia,* 122 S. Ct. 2242 (2002) stand the test of time. In *Ford, supra,* the Court states:

> Now that the Eighth Amendment has been recognized to affect significantly both the procedural and substantive aspects of the death penalty, the question of executing the insane takes on a wholly different complexion. The adequacy of the procedures chosen by the State to determine sanity, therefore, will depend upon an issue that this Court has never addressed: where the constitution places a substantive restriction on the State's power to take the life of an insane prisoner.

The Court notes that "[t]he bar against executing a prisoner who has lost his sanity bears impressive historical credentials; the practice consistently has been branded 'savage and inhumane'." *Citing* 4 W. Blackstone, Commentaries * 24 * 25. It is incongruous that the English common law could have such strong traditions in preventing the execution of the insane and yet allow the State to abolish a

defense based upon insanity and allow conviction and execution of the insane. The State's procedure for determining mental illness and lack of specific intent are inadequate to preclude federal redetermination of the constitutionality issue. The Supreme Court additionally states:

> Today we have explicitly recognized in our law a principle that has long resided there. It is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications.

Ford, supra.

From *Atkins v. Virginia,* the Court additionally clarifies the special treatment afforded those subject to the criminal justice system dealing with mentally retarded criminals. Although the defendant makes no claim of mental retardation, the principles established and discussed in *Atkins* are material. Justice Stevens, in delivering the opinion of the Court states:

> Those mentally retarded persons who met the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment and control over their impulses, however, they do not act with a level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants.

The same can easily be said for Mr. Kahler's mental illness which should not put him in the same category as those committing crimes for motivation such as money, greed, murder for hire, or as part of a separate criminal enterprise. In the instant case the defendant, if the allegations of the State are to be believed, simply cracked under extreme pressure of a contested and contentious divorce and acted impulsively and violently.

6. Kansas has no means by which a defendant may compel the attendance of witnesses from without the State of Kansas in order to provide an adequate defense.

The Kansas Bureau of Investigation in the State of Kansas in conducting its investigation into the instant case has interviewed material witnesses in the State of Kansas, the State of Missouri and the State of Texas and other states. The undersigned has been advised by witnesses in the State of Texas and the State of Missouri, who are deemed material, that they will not cooperate nor appear in the State of Kansas unless compelled to do so. The District Court of the Fourth Judicial District does not have authority to compel these witnesses to appear regardless of materiality and the defendant must rely on the Uniform Act to Secure the Attendance of Witnesses Without a State in Criminal Proceedings. This Act is cumbersome, time-consuming and unreliable. To seek the death penalty in a case in which witnesses are located outside of the jurisdiction of the Court and for which

* * *

[1] IN THE DISTRICT COURT OF
OSAGE COUNTY, KANSAS

Case No. 09 CR 270

STATE OF KANSAS,

Plaintiff,

v.

JAMES KRAIG KAHLER,

Defendant.

TRANSCRIPT OF MOTION HEARING

Proceedings had before the Honorable Phillip M Fromme, District Judge of the District Court of Osage County, Kansas, on the 16th day of June, 2011.

APPEARANCES

The plaintiff appeared by Ms. Amy Hanley, Office of the Kansas Attorney General, 120 SW 10th Avenue, 2nd Floor, Topeka, Kansas 66612-1597, and Mr. Brandon L. Jones, Osage County Attorney, Courthouse, 717 Topeka Avenue, Lyndon, Kansas 66451.

The defendant appeared in person and by Mr. Thomas D. Haney and Ms. Amanda Vogelsberg, Henson, Hutton, Mudrick & Gragson, 100 SE 9th Street, 2nd Floor, P.O. Box 3555, Topeka, Kansas 66601-3555.

* * *

[72] * * * MS. HANLEY: Your Honor, would the Court like to hear further argument on constitutionality issue? I believe the defendant concedes there is

well established precedent out there. The State would stand on all of the arguments made in its lengthy response. And I don't see the need to rehash those unless you would like me to.

THE COURT: Well, I don't intend, I guess, to make a long list of specific findings. I did read both briefs and it's my understanding that the law as it exists now is settled at least in the State of Kansas in which through different cases, the *Mims* [73] case and all that the present method and the law as it stands on the death penalty is approved. And the U.S. Supreme Court and Kansas Supreme Court both approved the language and the method and all the arguments that it addressed, as I understand it, that were raised in the briefs. And this Court is not willing to strike down the death penalty today. And I will just state that the law is settled at this time and the death penalty is legal and I'll deny that much. And you have your record.

* * *

IN THE DISTRICT COURT OF
OSAGE COUNTY, KANSAS
FOURTH JUDICIAL DISTRICT
(CRIMINAL DIVISION)

Case No. 09-CR-270

STATE OF KANSAS,

Plaintiff,

vs.

JAMES KRAIG KAHLER,

Defendant.

DEFENDANT'S PROPOSED JURY INSTRUCTIONS

COMES NOW the defendant, James Kraig Kahler, by and through Thomas D. Haney and Amanda S. Vogelsberg of Henson, Hutton, Mudrick & Gragson, L.L.P., and notifies the Court of its requested jury instructions.

1. Defendant requests standard Patterned Instructions for Kansas – Criminal, Third Edition (PIK Crim.), including the following instructions:

a. 51.01 – Instructions before Introduction of Evidence

b. 51.01A – Note taking by jury

c. 51.02 – Binding application of instructions

d. 51.04 – Consideration of Evidence

e. 51.05 – Rulings of Court

f. 51.06 – Statements and arguments of counsel

g. 51.07 – Sympathy or prejudice favor against a party

h. 51.08 – Form of Pronoun

i. 51.11 – Cameras in courtroom

j. 52.01 – Information = Indictment

k. 52.02 – Burden of Proof

l. 52.05 – Stipulations and Admissions

m. 52.08 – Affirmative Defense

n. 52.13 or 52.10 – However, the word "failure" should not be a part of this instruction. Because a defendant relies on his rights under the Constitution, he does not fail. The instruction should read "Defendant did not testify" or have no heading at all.

o. 52.20 – Eye witness identification

p. 53.00 – Definitions

Intentional:

[*]q. 54.10 – Mental disease or defect

[*]r. 54.10A – Commitment

[*]s. 54.12B – Diminished capacity

[*]t. 56.00A – Elements

1.

2.

3. F

u. 56.00B – Capital murder (prior to evidence)

v. 56.04 – With premeditation (as modified, see Defendant's Motion for Jury Instructions)

---

[*] No PIK definition is provided.

Feloniously:

Heat of passion:

Reasonable Belief:

[**]Cruel: Devoid of human feeling

[**]Heinous: Extremely hateful, wicked, shockingly evil

Atrocious: Extremely vile

w. 59.18 – Aggravated battery

x. Premeditation – See Motion for Jury Instruction Correctly Defining "Premeditation" and "Intentional."

y. Intentional – See Defendant's Motion for Jury Instructions Correctly Defining "Premeditation" and "Intentional."

2. Lesser included offenses:

a. 53.06 – 2nd degree murder

b. 56.05 – Voluntary manslaughter

c. 56.06 – Involuntary manslaughter

3. In addition, the defendant proposes the following instructions:

a. 52.04 – Reasonable Doubt. Although the Committee recommends that there be no separate instruction given defining reasonable doubt, this wholly fails to enlighten the jury as to the most important findings they must make. The concept of reasonable doubt is the constitutional cornerstone of the criminal justice system. The defendant requests:

[**] Defendant objects to the lack of constitutionality of the death penalty and of the State's lack of insanity defense. Definitions suggested by Merriam Webster, www.merriam-webster.com

> A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. Reasonable doubt exists if there is any doubt of such substance as to cause a prudent man to hesitate and pause before acting in matters of importance in his or her own affairs. A defendant is not to be convicted on mere suspicion or conjecture.
>
> A reasonable doubt may arise not only from the evidence produced, but also from lack of evidence. Since the burden is always upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. Defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution. The law does not impose upon a defendant the burden or duty of producing any evidence.

Standard Instruction, United States District Court for the District of Kansas. United States Constitution Amendment 14, 5, 6, 8, Kansas Constitution Bill of Rights, Section 10.

b. 52.14 – Expert Witness. Although the Committee recommends that there be no separate instruction given as to the expert as a witness, the defense proposes: The defendant requests:

> During the trial you heard the testimony of _____ who expressed opinions concerning _____. In some cases, such as this one, scientific, technical, or other specialized

> knowledge may assist the jury in understanding the evidence or in determining a fact in issue. A witness who has knowledge, skill, experience, training or education, may testify and state an opinion concerning such matters.
>
> You are not required to accept such an opinion. You should consider opinion testimony just as you consider other testimony in this trial. Give opinion testimony as much weight as you think it deserves, considering the education and experience of the witness, the soundness of the reasons given for the opinion, and other evidence in the trial.

10th Circuit Court of Appeals Pattern Criminal Jury Instruction 1.17.

4. Verdict Forms

a. 68.01 – Concluding instruction

b. 68.02 – Guilty verdict

c. 68.03 – Not guilty verdict

d. 68.07 – Multiple counts

e. 68.08 – Multiple counts

f. 68.09B – Multiple acts

g. 68.14B – Premeditated murder and felony murder in the alternate

h. 68.17 – Capital murder

Respectfully submitted,

/s/ Thomas D. Haney

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[1230] IN THE DISTRICT COURT OF
OSAGE COUNTY, KANSAS

Case No. 09 CR 270

STATE OF KANSAS,

Plaintiff,

v.

JAMES KRAIG KAHLER,

Defendant.

TRANSCRIPT OF JURY TRIAL

(Volume 6 of 9, Page 1230-1444)

Proceedings had before the Honorable Phillip M Fromme, District Judge of the District Court of Osage County, Kansas, on the 22nd day of August, 2011.

APPEARANCES

The plaintiff appeared by Ms. Amy Hanley, Office of the Kansas Attorney General, 120 SW 10th Avenue, 2nd Floor, Topeka, Kansas 66612-1597, and Mr. Brandon L. Jones, Osage County Attorney, Courthouse, 717 Topeka Avenue, Lyndon, Kansas 66451.

The defendant appeared in person and by Mr. Thomas D. Haney and Ms. Amanda Vogelsberg, Henson, Hutton, Mudrick & Gragson, 100 SE 9th Street, 2nd Floor, P.O. Box 3555, Topeka, Kansas 66601-3555.

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* * *

[1245] his – the divorce he was going through and things that I felt like would help him to get through that.

Q. And from working with him on a daily basis prior to what I'll call the divorce initiation, how did he change, if he did, after the divorce proceeding was filed or initiated?

A. In regards to?

Q. How he related to employees, how he reacted on the job, with you?

A. He was definitely more distracted while he was going through the divorce proceedings.

Q. Did he show you any photo albums?

A. He did.

Q. Explain to the jury what that was all about.

A. I think it was an attempt to show to me that they had had a happy family and they no longer had a happy family. And he would show the photographs to

me and say, you know, this is the way we used to be, type of things.

Q. And did you describe to the KBI that Mr. Kahler couldn't absorb what was happening in his personal life?

A. I don't think I necessarily used the term absorb. I might have, it's been awhile back. But he was having a hard time accepting what was going on in his life, [1246] that's the way I would phrase it.

MR. HANEY: Could I have Exhibit Number 35 – 36.

Q. (By Mr. Haney) Let me hand you Exhibit Number 36, if I can, sir, does that look like the album that Mr. Kahler was going through on the job?

A. Yes.

Q. And when he would bring out this album and go through these family pictures and go through these family pictures, what would he say to you, why was he doing this?

A. I don't know that I know why he was doing it, but what he would say to me was, doesn't this look like we were happy and we had good times, and comments along those lines. Do they look unhappy to you? Those would be the kind of questions and statements he would make to me.

Q. Mr. Schmitz, did you describe to the KBI that Mr. Kahler was obsessed with trying to keep his family together?

A. I think obsessed would correctly describe that.

Q. If you could explain to the jury and for our benefit, what about Mr. Kahler's actions, what he was saying and what he was doing, led you to conclude that he was obsessed with keeping his family together?

[1247] A. Well, as I said earlier he was distracted from work and he seemed very intent on keeping his family together. And he was under the opinion – in my opinion he was under the opinion that he could convince his ex-wife Karen to stay with him.

Q. And did you describe to the KBI also that the divorce was hitting him hard?

A. It was hitting him hard. I feel like it was.

Q. All right. And other than what the KBI reported, can you explain to the jury what you observed, what you personally saw that led you to that conclusion the divorce was hitting him hard?

A. Well, just his demeanor, you know, where he seemed to be focused on it quite a bit and, you know, that sort of thing.

Q. And as your supervisor, how did you notice that this was affecting his performance on the job, if it was?

A. The primary reason, I would say, was his attention to his Blackberry.

Q. Was that the city Blackberry or personal?

A. It was. It was a city issued Blackberry. And he seemed in that day and age I didn't know anybody who texted on a regular basis. Okay. And he had it with him all the time, even in meetings and stuff he would be paying to his Blackberry, noticeably paying

* * *

[1322] January, February of '09, how was he, was he the same man, different man?

A. Different.

Q. How, why?

A. Well, you could just tell it in his voice that he was hurting.

Q. Okay. And I know as a father you can obviously tell, but as best you can express to the jury what about Kraig led you to feel to say he was hurting?

A. Well, I kept telling him to move out, get away from it. And he said, I got to save my family, dad, got to try to save the marriage.

Q. Do you know whether he went through counseling, marriage counseling?

A. Yes, sir.

Q. And did you know at the time he actually sought the help of a physician in Columbia?

A. Yes, sir.

Q. And after January when the divorce was filed, January of '09, did you ever have a time where Karen and the girls and Sean and Kraig were back up at the farm after that, were they ever back?

A. No, sir, I don't believe so.

Q. And . . .

A. The kids were, though.

[1323] Q. The kids were?

A. Yes.

Q. Are you aware when Kraig was arrested in Missouri, would have been March 16, 2009, and Karen charged him with battery?

A. Yes, sir.

Q. How did he take that?

A. Well, he told me, I just hugged her. And he told me it sure looked bad with the picture in the paper.

Q. And when Kraig lost his job, I take it you had conversations with Kraig about what was going on in his life and how he felt?

A. Yes, sir.

Q. At one point in time you moved him from Columbia back to Meriden?

A. Yes, sir.

Q. And, Mr. Kahler, when would that have been about?

A. I would say six to eight weeks before New Year's.

Q. And what had happened then where you decided you got to get Kraig back?

A. Well, I talked to him in the morning or noon, something like that, and he was very depressed, I could tell it from the way he was talking. And stay right there, we're coming down.

Q. And, of course, the jury doesn't know Kraig, they [1324] don't know anybody in this case. But as best you can tell us about the way Kraig was talking, what was different that you knew he was depressed?

A. Well, that's hard to explain.

Q. I know it is. Just do the best you can.

A. Just talking to him you knew he was down in the dumps.

Q. And you went to Missouri to help him pack up?

A. Yes, sir.

Q. By then Karen had already moved out of the house?

A. Yes, sir.

Q. And this was a big house in Missouri?

A. Yes, sir.

Q. Anybody else living there with Kraig?

A. No.

Q. When you got there can you describe what kind of shape the house was in, were there curtains up, what was in the house basically?

A. Well, everything that was there that Karen did not take with her. But the girls' rooms, if they didn't want it they just threw it on the floor.

Q. And who all went down to help Kraig move back?

A. My wife and I went down the first day.

Q. Okay.

A. And we brought – Kraig had some things in his [1325] vehicle.

Q. This Explorer that he was driving?

A. Yes. And he put some items in it. We put a little bit of stuff in my wife's car. And we come back to Meriden.

And we – Kraig and my other son and I, got up at 3:30 or 4:00 the next morning, drove down, packed everything up, rented a U-Haul truck, and took two pickups, and brought everything back to Meriden.

Q. And by everything, I take it you're talking about any furniture that was there back?

A. Yes, sir.

Q. Any clothes that Kraig had was back?

A. Yes, sir, right.

Q. And whatever kitchen including canned goods came out of there?

A. Yes.

Q. And two trips. And how many vehicles did you have, you had Kraig's, your son Kris had a vehicle?

A. He had a pickup.

Q. And you had a vehicle?

A. I had a pickup.

Q. So that's three vehicles. Any more involved?

A. We rented a U-Haul truck and Kraig drove it back.

Q. Okay. And when you got Kraig back on the farm, how

* * *

The Columbia Daily Tribune

City utilities director charged with misdemeanor assault

By Joe Meyer

Saturday, March 28, 2009

Columbia Water and Light Director Kraig Kahler was charged yesterday with third-degree domestic assault in connection with his arrest last week.

Kraig Kahler

Kahler, 46, is scheduled for arraignment on the misdemeanor offense Monday in front of Boone County Associate Circuit Judge Deborah Daniels, according to court records. If convicted, he could face up to a year in jail.

According to a sworn statement seeking a court order of protection filed by Kahler's wife, Karen Kahler, the two were discussing her decision to file for divorce on March 16 when the alleged abuse occurred. Kraig Kahler allegedly blocked her from leaving the room, cornered her and got her in a "bear hug," resulting in scrapes and bruises.

Police arrested Kraig Kahler later that night after a Columbia City Council meeting.

According to court records, Karen Kahler filed for divorce on Jan. 28, and a court issued an order of protection against her husband the same day as his arrest. In the request for the protective order, Karen Kahler described her husband as having a bad temper and as "controlling" and "capable of using force."

Kahler returned to work the day after his arrest and was not suspended. City Manager Bill Watkins did not respond to a phone message seeking comment yesterday evening.

"I think if there is a conviction, that's a much more serious issue than just an arrest," Watkins told the Tribune last week. "We're going to continue to monitor every day."

Kraig Kahler moved to Columbia with his wife and three minor children in July to run the city utilities department. He previously headed the municipal utility system in Weatherford, Texas

Reach Joe Meyer at 573-815-1718 or e-mail jmeyer@columbiatribune.com.

[1445] IN THE DISTRICT COURT OF
OSAGE COUNTY, KANSAS

Case No. 09 CR 270

STATE OF KANSAS,

Plaintiff,

v.

JAMES KRAIG KAHLER,

Defendant.

TRANSCRIPT OF JURY TRIAL

(Volume 7 of 9, Page 1445-1637)

Proceedings had before the Honorable Phillip M Fromme, District Judge of the District Court of Osage County, Kansas, on the 23rd day of August, 2011.

APPEARANCES

The plaintiff appeared by Ms. Amy Hanley, Office of the Kansas Attorney General, 120 SW 10th Avenue, 2nd Floor, Topeka, Kansas 66612-1597, and Mr. Brandon L. Jones, Osage County Attorney, Courthouse, 717 Topeka Avenue, Lyndon, Kansas 66451.

The defendant appeared in person and by Mr. Thomas D. Haney and Ms. Amanda Vogelsberg, Henson, Hutton, Mudrick & Gragson, 100 SE 9th Street, 2nd Floor, P.O. Box 3555, Topeka, Kansas 66601-3555.

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* * *

[1460] A. Yes, ma'am.

MS. VOGELSBERG: May I approach, Your Honor?

THE COURT: You may.

MS. VOGELSBERG: Thank you.

Q. (By Ms. Vogelsberg) Miss Williams, I'm going to hand you what's been marked Defendant's Exhibit 26, 26a, and they're labeled here with stickers, 26b, and 26c, and 26d; and I'm going to ask you some questions about these. And if we can refer to them by their sticker number that would be best for the record.

A. Okay.

Q. Miss Williams, on 26 do you recognize that photo?

A. Yes, that's the pancake supper.

Q. And what is the pancake supper?

A. It raises money for scholarships for the college kids in Weatherford.

Q. Okay. And do you see Mr. Kahler in that photo?

A. Yes.

Q. Okay. And is that a Rotary type function?

A. Yes.

Q. What about 26a, were you aware of Mr. Kahler's involvement with his children?

A. This is where – I believe this is where he coached Sean in baseball.

[1461] Q. And that's reflected in 26b as well?

A. I believe that's correct, yes.

Q. Okay. And were you aware of Mr. Kahler's activities with regard to the Peach Festival?

A. The last thing that I remember Kraig having to do with Peach Festival was when the girls were playing in the band Daze Off and he was instrumental in getting everything set up and making sure the stage was good that's as far as I can remember.

Q. Okay. So with regard to Emily and Lauren and their activities with their band which is called?

A. Daze Off.

Q. Daze Off. Okay. He would help set them up for their gigs and be kind of an active watcher of their band and listen to their music?

A. Correct.

Q. Do you know if he had any other activity with the band?

A. I know Karen did the recordings. I know Kraig would make sure everyone got a CD of the CD when it was cut.

Q. When you say everyone, do you just mean people that you guys worked with?

A. Correct.

Q. When Kraig was at work, did he talk a lot about his [1462] kids?

A. Yes.

Q. Could you tell what kind of father he was from your experience as a secretary with his involvement with his family?

A. Well, I don't think I ever told him this but they reminded me of the Stepford family. They were just so perfect. They were always doing things together. I mean just like the perfect family, just I mean, he always had pictures. He was always passing along pictures. He always had the albums.

Q. When you and Mr. Kahler would talk at work, what were some of the topics of conversation that would come up most often?

A. Most of the time, of course, we were talking business, the office business. But he would always talk about what they did that weekend because they were always, always doing things on the weekend, I mean, it was just as a family.

Q. When – if you were to rank Mr. Kahler's priorities in life before January of '09, what would you say his priorities were?

A. Number one, his family and his parents.

Is that what you . . .

Q. Is that all?

[1463] A. Are you talking about what I think his goals were or . . .

Q. Sure. If you know.

A. Kraig just always – he wanted his family and he wanted to retire and go home and take care of his parents and Karen's grandmother.

Q. Okay. Miss Williams, in 26d do you recognize that photo?

A. Yes, that was the ribbon cutting at the marina.

Q. I'm sorry, it was a ribbon cutting for what?

A. The marina.

Q. And that's there in Weatherford?

A. (Witness nods.)

Q. Is that a public marina or private club type marina?

A. It was leased. I think the lake got to be Kraig's passion. He put a lot into doing things at the lake and being involved in the lake and the water supply at the lake.

Q. Okay.

MS. VOGELSBERG: Judge, I move for the admittance of Exhibits 26, 26a, 26b, 26c, and 26d.

MR. JONES: No objection, Your Honor.

MS. VOGELSBERG: May I publish those, Your Honor?

THE COURT: Defendant's Exhibits 26, a, b,

* * *

[1603] mentality, when somebody works it means they're doing well.

Q. And in your report in your evaluation did you find that Mr. Kahler was emotionally rigid?

A. Yes.

Q. And what does that mean?

A. He means that he's unlikely to understand the nuances of emotions, especially like in the complications of a divorce or dealing with teenage girls in terms of their conflicting emotions. It means that he's likely to use the tools that he knows that work, that's engineering problems, that's delegating authority and expecting things to be done as opposed to focusing on the process.

A good example of that is in there is some family couple sessions with Mr. McGavock and Kraig thought that even in the couple – the fact they had three sessions and nothing had changed meant that the treatment was useless. Well, in terms of human behavior things often take much longer time than changing a pump or changing a flat. Kraig wasn't skilled with the emotional part, the emotional processing part.

Q. And when you were interviewing Mr. Kahler, Kraig, was he – did he describe to you that he had a perfect [1604] family?

A. Yes, multiple times.

Q. Multiple times.

Perfect wife, do you remember?

A. Yes.

Q. Perfect children?

A. Yes.

Q. And his life was essentially perfect?

A. Yes.

Q. And what significance did you put on that that Mr. Kahler kept repeating that sort of information to you?

A. Well, I attribute a couple things. The first one is that Kraig Kahler was trying to understand the complexities of the divorce even after – even when he was in jail. He didn't understand why these things happened to him. That the external presentation of a socially acceptable family with good money and a beautiful wife and healthy, beautiful, intelligent children, those were the external trappings of success and he did not understand that that might be very different from their internal emotional life.

This was significant to me, three time frames. The first one was that in the events that led up to [1605] the breakup that led up through January 1, 2009, Kraig Kahler would have been unable to understand the complexities of the relationship between his wife and Sunny Reese. He might have been titillated by the idea of a bisexual or homosexual interaction as long as it didn't go out of control because control is very important to him in a rigid way.

The second time period is that as the divorce process went forward, he continued to try and advance tactics, I guess, is the best way, or events to bring Karen back to him to bring her to understanding that she really wanted to be with him. That meant even though they're in the middle of the divorce, he still felt sexually close to her, he still wanted sexual reassur-

ance. If that wasn't going to get her back, then he would humiliate her publicly to bring her back.

Those are the kind of solutions that show he is very unsophisticated psychologically because women in that sort of situation, they don't come back unless the man is nurturing, they don't come back unless they feel emotionally safe, they feel an emotional commitment, and he wasn't offering that. He was offering to sort of psychologically bludgeon her back into the relationship. Didn't work. And he still [1606] doesn't understand that.

And then the last part is subsequent to the killings, the charged offense, Kraig is still so depressed and I think traumatized about what happened, what he did, that he cannot let himself feel the emotional impact of what happened and what he did so . . .

Q. Mr. Kahler's reactions in this courtroom are seemingly without emotion; would that surprise you?

A. Actually not in the courtroom because attorneys often instruct their clients to stay calm. Okay. But in our – my interviews away from here, seven different interviews, seven different times, that emotion has been consistent. And it has the diagnostic feel of being – of giving evidence of major depression as well as trauma because remember from January, 2009, all the way through the entire assessment process Mr. Kahler has been seen as having major depression, by me, by Dr. Hagemann, by Mr. McGavock, by Karen, by his parents, by people who knew him from Weatherford, Texas, and he showed deteriorating behavior.

In addition, the flat affect, the separation – emotional separation is also indicative of that. He cannot allow himself to understand or feel what he did to his

daughters especially because these are [1607] children that he held up on a pedestal and loved and was devoted to and now he barely acknowledges their humanity. And he wasn't antisocial before and he wasn't physically abusive before. He wasn't sexually abusive before. This is a change about him that evidences in my mind that he is still mentally ill. He's still suffering mental illness and it's impacting his functioning day-to-day.

Q. Did you find from your evaluation as part of your opinion that Mr. Kahler has a major depressive disorder?

A. Yes.

Q. And what is that?

A. Major depression is one of the psychiatric diagnosis. It means that the person is not functioning normally, first off. They – everything about their day-to-day functioning is abnormal. They sleep more poorly. They feel hopeless. They feel helpless. Their daily routine is disrupted. They have problems with concentration. They may have problems doing day-to-day functioning such as cooking or cleaning or going to work or taking care of themselves. They also may entertain thoughts of suicide or homicide, suicide.

Severe – very, very severe depression also [1608] includes psychotic decompensation where the person experiences auditory hallucinations telling them to kill themselves or kill somebody else. I didn't see that about Mr. Kahler but that's the whole range. In other words, it's a severe impairment. You can think of the gradation of severity is there are people who are depressed every day, they are suffering a mild version of depression, they are functional but not happy. Maybe not as efficient but all the way to the point

where, say, the person can have such severe depression that a police officer or a family member may petition for a 96 hour hold because they've become a danger to themself or others.

Q. And, doctor, is this a man who is just very sad or does he have a serious mental illness?

A. Major depression is a serious mental illness. I mean, that's maybe because I deal with people who are depressed everyday doesn't seem as emotionally impactful but think of where Mr. Kahler was before the crumbling of his marriage. He was the director of water and power in Columbia. He was deeply devoted to his children. He preferred his son more than his daughters mainly because his son like to hunt and fish, his daughters are more into girl oriented things which he wasn't in so much. But he [1609] was functioning very, very well and now he's not functioning at that level. I mean, through the whole process of January to November, 2009, he basically lost everything in terms of what he thought was important to him.

Q. How would this illness, as you describe it, in your opinion affect his ability to control his conduct, his acts?

A. A more milder seriousness not so much but a severe major depression, persons like that are put in the hospital or they have involuntary commitments for treatment because they have lost their judgment about what's safe and what's not. I believe that I diagnosed him with severe major depression.

Q. How would that affect his ability, his rational thought process?

A. Well, that's different for each person. But in Mr. Kahler's case he became obsessively focused on humil-

iating Karen to come back to him. He tracked her, he – on the computer. He went down to see where she was in Wichita. He became so focused on, you know, reigniting the relationship. But the techniques he used were things that would only kill the relationship even further. He lost focus in work. He ended up being fired, I think, in September [1610] because of lack of production because he was not able to attend to his important duties.

The degree of depression also I think is manifest even though he was in the middle of this divorce process he couldn't hear the therapist who said don't argue through your children, don't include them in the process. He would obsessively try to get information from his daughters about what his wife was doing. He couldn't let go. In other words, he had become – consumed him. That's very serious depression.

Q. Someone with this depression you discussed, how would you explain to the jury or advise us that a person with a serious mental illness such as major depressive disorder could drive a car, could walk, could feed himself or herself, would it affect those sort of functions?

A. Well, let's see, in terms of driving a car, I've treated people who have to ask about whether or not they think about running their car into something when they drive away from my office or to my office. So it's an individualized thing. Persons with severe major depression don't tend to activities of daily living, they don't bathe, they don't shave, they don't fix their hair, they don't eat well, they lose [1611] weight, they sleep poorly. Those are all symptoms that are commonly expressed during severe major depression.

The other thing that happens is some people put up the front of functionality but they actually are severely depressed inside and people don't know. However, in Mr. Kahler's case the fact that he completely lost focus in his job and was fired, he completely became obsessed with haranguing his wife back into a relationship completely not understanding that was going to fail, suggests that he lost a great deal of his judgment.

Q. And how would that affect someone's ability to make rational thought and planning with that illness?

A. Persons with major depression can become so impaired that they actually are psychotic and impaired to the point they do not have judgment. That's normal.

Q. And, doctor, you did hear the Life Alert recording, we've had that played here in Court earlier, I think you were provided that and even a potential transcript to review?

A. Yes, I've listened to the tape and I've read the transcript.

Q. And the man's voice – is there a man's voice that appears in that tape other than the operator, of [1612] course?

A. Yes.

Q. And listening to that were you able to discern what that voice was saying?

A. Not very well. Okay. But between the three modalities, I was able to. I think I understood it as well as anybody else who listened.

Q. And what did that, what did you understand it as best you could hear?

MS. HANLEY: Your Honor, I'm going to object. The tape's in evidence. The jury will listen to it and that's the evidence of what's on the tape.

THE COURT: Your response, counsel.

MR. HANEY: Response is he can state what he thought it said and how he interprets that.

THE COURT: He doesn't have any special expertise for interpreting the tape, does he?

MR. HANEY: No, other than listen to it.

THE COURT: Well, I'll sustain the objection. I think they can play it for themselves.

MR. HANEY: Let me rephrase it.

Q. (By Mr. Haney) The words you heard on that tape by the male speaker?

A. Yes.

[1613] Q. Was that significant to you, the words that were said?

A. Yes, it was one of the things I considered as significant.

Q. In what way, why was it significant?

A. I thought it was significant because it wasn't, in my hearing, wasn't a command. It felt as though this man felt compelled and that he was in great conflict about what he was doing. And that I concluded that it was, in fact, Kraig Kahler and that it meant that he had basically for that at least that short period of time completely lost control.

Q. And, doctor, in your report in your evaluation on November 28th of 2009, was Mr. Kahler suffering major depressive disorder at that time?

A. Yes.

Q. And how on that date would that illness along with the other findings you made have affected Mr. Kahler's ability to make rational decisions – rational thought?

A. I believe that his capacity to make rational decisions was heavily influenced by his major depression. It was not normal thinking. It was at a time in which – at a time in which he had been striving as hard as he could to rekindle his [1614] relationship with his wife and his kids in a very maladaptive way. And this was the last paycheck the week before the property division, it was a very intense time and that he basically became overwhelmed so that – he wasn't psychotic that I could tell, he wasn't hearing voices, but his capacity to manage his own behavior had been severely degraded so that he couldn't refrain from doing what he did.

Q. So what you have studied, what you've heard and reports, etc., was Mr. Kahler at that day at his emotional end?

A. Yes.

Q. Also of lesser, I shouldn't say lesser importance, but I do want to mention for the jury's benefit some of these other things that you have indicated an Axis II, which if I understand your testimony Axis II is not the principal issue that a person may have but it is an issue?

A. Yes, it's the personality style that a person has separate from any mental health problem.

Q. Other than the major depressive disorder and possible post-traumatic stress disorder, Axis II would include a personality disorder?

A. Yes.

Q. What is that?

[1615] A. Personality disorders are disorders of cognitive functioning affectivity which is control of emotions, interactions of people with interpersonal relationships, and disorders of impulse control. It used to be that they were all kind of written in stone, but they're not really written in stone. People can have more than one personality disorder overlapping or especially traits of personality disorders.

Q. And in all fairness that is not a mental illness, is it?

A. Well, it can rise to a mental illness. But in this case his personality traits are – they are evidence of how much his thinking had deteriorated, his functions had deteriorated. He could not have been functioning at such a high level for years before January, '09, with the kind of functions he demonstrated to me in the interviews.

Q. And in Axis IV and V, Axis IV is extreme multiple psychosocial stressors; what is that?

A. It means that Axis IV and V are things that doctors, psychologists, psychiatrists, social workers use to track a person's functioning in treatment. So the psychosocial stressors are the things that impact a person's functioning such as somebody that's

* * *

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DIAGNOSTIC INTERVIEW REPORT

James Kraig Kahler
(DOB: [redacted])

KS v. Kahler
Case# 09-CR-270: Osage County, Kansas

INTRODUCTION AND PURPOSE:

On February 5, 2010, Thomas Haney, Esq., attorney for James Kraig Kahler, contacted this writer for a psychiatric assessment. 46-year-old Mr. Kahler had been charged with the November 28, 2009 quadruple murder of his wife Karen Kahler, teenage daughter Emily Kahler, teenage daughter Lauren Kahler, and Karen's grandmother, Dorothy Wight. This took place at Dorothy Wight's home. At the time of the shootings, Sean Kahler, his 10-year-old son, was not injured and fled from Dorothy Wight's home.

The specific Osage County, Kansas charges were Premeditated (Capital) Murder of Karen Kahler, Emily Kahler, Lauren Kahler, and Dorothy Wight. In the alternative, he was charged with first-degree murder of Karen Kahler, Emily Kahler, Lauren Kahler, and Dorothy Wight. There was an additional count of aggravated burglary.

At the scene, .223 caliber rifle casings were found. Mr. Kahler was thought to have owned a .223 caliber rifle. After about a 13-hour disappearance, Kraig Kahler was discovered walking about one half-mile from the location of his abandoned vehicle. He approached an officer stating he was the man the police were looking for. At arrest, Kraig Kahler was armed with a handgun and knife, but offered no struggle.

At the beginning of the consultation, it was discussed openly with Tom Haney that the Kansas Atty. Gen. had already informally contacted William S. Logan M.D. of Logan & Peterson, PC. The Kansas Attorney General had not formally engaged Dr. Logan. On agreement by Mr. Haney and Dr. Peterson, a "firewall" would be put up between Dr. Peterson and Dr. Logan about all attorney communications and psychiatric opinions regarding the Kahler matter. That assured separation of information *if* the Kansas Atty. Gen. formally consulted Dr. Logan. Eventually the Kansas Atty. Gen. contacted Dr. Logan. An information firewall has been maintained at Logan & Peterson, PC between Dr. Peterson and Dr. Logan about the Kahler matter.

The primary focus of the assessment was presence or absence of relevant mental disease and mitigating circumstances regarding Kraig Kahler's behavior leading up to/during/since the quadruple homicide. Mr. Haney noted that in the one-year prior to the

charged offense, Kraig Kahler was faced with an affair between his wife and a lesbian lover, petitioned for divorce, arrested for spousal abuse, lost his challenging employment with the City of Columbia, Missouri, lost contact with his family, and suffered serious financial setbacks. Mr. Kahler had no known history of drug abuse, psychiatric treatment, or criminal history. Prior to the strife with his wife, Mr. Kahler had an outstanding community reputation, describing his life as "perfect" with a wife and three children.

DESCRIPTION OF THE EVALUATION:

Substantial medical, legal, family, and mental health records of Mr. Kahler have been reviewed. This included extensive psychiatric interviews of Mr. Kahler, plus paper-and-pencil self-report objectively scored psychological tests. Additional information is anticipated. If such information is relevant, an addendum may be justified.

The interview time of Kraig Kahler so far has totaled 11.82 hours from sessions on:

April 1, 2010	Psychiatric Interview	1.50 hours
May 6, 2010	Psych. Testing	MMPI-2, PAI, SILS
June 3, 2010	Psychiatric Interview	2.75 hours
July 2, 2010	Psychiatric Interview	2.66 hours
July 22, 2010	Psychiatric Interview	2.00 hours
August 31, 2010	Psychiatric Interview	1.58 hours
September 30, 2010	Psychiatric interview	1.33 hours
	Total:	11.82 hours

At the beginning of this assessment, Kraig Kahler understood the usual doctor-patient confidentiality

did not apply during this assessment as part of his criminal defense. He adjusted there be no effort to trick, anger, confuse, or upset him. He also understood that nothing learned during the assessment was private, could be reported to his attorney Tom Haney "who was his voice in court, and could he discussed in open court, He understood that questions were welcome at any time, He had no questions about the scope of the evaluation.

INDEX OF MATERIAL:

A. Law Enforcement and Court Documents –

1. 53 DVDs and CDs of law enforcement discovery

2. Composition notebook from Lauren Kahler's purse (unreadable)

3. FAFSA application

4. June 3, 1985 "All-Purpose Love Letter" from Karen to Kraig

5. Log of sexual activity between Kraig and Karen, kept by Kraig (Bates 901816-901827)

6. Birthday card from Kraig to Karen

7. January 1, 2009 (Bates 902137-902172) Journal entries (probably by Karen)

8. January 2, 2009 photo "Karen also hit me on the right leg with a saucepan on Sunday, March 1."

9. January 2, 2009 phone text to Kraig Kahler from Sunny Reese

10. January 5, 2009 "damage control" e-mail by Sunny Reese to Karen Kahler

11. January 11, 2009 "Working things out on my own" Sunny Reese e-mail to Karen Kahler

12. January 13, 2009 Columbia Police Follow-up Report

13. January 16, 2009 Columbia Police Offense Report (third-degree misdemeanor domestic assault)

14. January 28, 2009 City of Columbia, Missouri Employee Performance Evaluation of Kraig Kahler

15. January 30, 2009 Boone County Restraining Order Karen vs. Kraig Kahler

16. February 9, 2009 phone text to Kraig Kahler "it was fun but I'm happy to coming home to you. Thanks for being such a great husband. I love you!"

17. February 9, 2009 text "love you a whole bunch! Call me if you need to. You have been and still are the perfect wife. :)"

18. March 1, 2009 Missouri Coalition against domestic violence Sunny Reese e-mail to Karen Kahler

19. March 1, 2009 NNEDV e-mail from Sunny Reese to Karen Kahler

20. March 16, 2009 Order of Protection (09 BA-FCE 00486) Boone County

21. April 6, 2009 Columbia Police Department Incident Report (annoying calls)

22. July 6, 2009 Probationary Report

23. September 4, 2009 City of Columbia Acknowledgment of resignation by Kraig Kahler

24. November 3, 2009 Bill Hetrick e-mail to Kraig Kahler

25. November 3, 2009 Karen Kahler

26. November 5, 2009 e-mail from Karen Kahler to Dan "I have discovered that the e-mails were not isolated . . ."

27. Undated handwritten letter by Kraig "in regards to your comparison to your father"

28. I have been putting on the happy face" pages by Karen

29. "Kraig did not have a problem . . ." Note

30. Summary of AT&T minutes used # 817-597-8118, Karen Kahler (March, 2009, April 2009)

31. November 29, 2009 Osage Sheriff report

32. November 29, 2009 KBI crime scene report

33. November 30, 2009 Osage County Affidavit (09 CR 270)

34. December 10, 2009 Osage County Amended Complaint (09 CR 270)

35. January 4, 2010 handwritten letter to Doug by Kraig

36. January 4, 2010 handwritten letter to Marianne by Kraig

37. Undated letter to Jaquita by Kraig.

38. January 6, 2010 letter to Kraig by Jaquita Price

39. January 11, 2010 KBI interview of Todd Price

40. January 11, 2010 KBI interview of Christine Williams

41. January 11, 2010 KBI interview of Byron Rice

42. January 11, 2010 KBI Columbia interview of Marilyn Thorpe.

43. January 11, 2010 KBI Columbia interview of Stephanie Brown

44. January 11, 2010 KBI Columbia interview of Michael Schmitz

45. January 11, 2010 KBI canvas of Weatherford Texas neighborhood

46. January 11, 2010 KBI neighborhood canvas information from Pat Fletcher

47. January 11, 2010 KBI interview of Kaitlyn Holthaus

48. January 11, 2010 KBI interview of Carl Tunink

49. January 11, 2010 KBI interview of Paige Shipma

50. January 11, 2010 KBI interview with Sarah Tesoro

51. January 11, 2010 KBI interview of Cheney Coles (Weatherford, Texas)

52. January 11, 2010 KBI interview of Shelley Hey

53. January 11, 2010 KBI interview of Jim Windsor

54. January 11, 2010 KBI interview of Cheri Lockhart Coles and Joe Coles

55. January 11, 2010 Osage officer report interview of Robin Lutz

56. January 12, 2010 KBI interview of Marina Colter

57. January 12, 2010 KBI interview of Tina Mc New

58. January 12, 2010 KBI interview of Lesli Edwards

59. January 12, 2010 Scott Ferris e-mail

60. January 12, 2010 Scott Ferris e-mail "another weekend with the lesbian Sunny"

61. January 12, 2010 KBI interview of Holly Marie Wood

62. January 13, 2010 KBI interview of Jaquita Price

63. January 13, 2010 KBI interview of Elizabeth McAuley

64. January 13, 2010 KBI interview over Rebecca Goodwin

65. January 13, 2010 KBI interview of Chris Thurman (Weatherford, Texas)

66. January 13, 2010 KBI interview of Christina Worley

67. January 13, 2010 KBI interview of Hiram W Watkins

68. January 14, 2010 handwritten letter to Tim by Kraig

69. January 14, 2010 KBI interview of Charles Edwards (Oklahoma)

70. January 21, 2010 KBI interview of Jennifer Hamel

71. January 21, 2010 KBI interview Anthony St. Romaine

72. April 13, 2010 Karen Kahler e-mail to Shannon Pendleton

73. January 11 and 12, 2010 Osage County officer report (lead C-9, C-11

74. January 12 KBI interviewer Sharon Hayes

75. January 16 letter to Sean by "Dad" through Tim and Lynn Denton

B. Medical Records –

1. March 26, 2009-June 1, 2009 medical records of Siamac Vahabzadeh, M.D.

2. January 7, 2009-December 31, 2009 Boone Hospital Center EAP records of Robert McGavock, MEd, LPC

3. January 7, 2009-August 12, 2009 Boone Hospital Center EAP records of Robert McGavock, MEd, LPC / Lynn Ogden (Karen), with Letter by Kraig.

C. Miscellaneous –

1. Undated typewritten narrative by Kraig Kahler (prior to November 28, 2009)

2. Jefferson West high school transcript of Kraig Kahler with academic achievement scores

3. Sunny Reese e-mail to Bill Halvorson (February 15, 2010)

4. Kahler timeline, provided by Tom Haney

5. document description (Bates numbers)

6. Transcription of audio file (Bates 002640-002641) "Operator 55"

7. 10 Days to Self-Esteem workbook pages

SELECTED REVIEW OF MATERIAL:

Medical Records

March 26, 2009 Columbia Family Medical Group questionnaire noted that Kraig Kahler was "going through a divorce." He reported depression and emotional problems. He was not being treated with any medications. He reported health problems related to depression, anxiety, high stress, sleep disturbance, suicidal or homicidal thoughts."

He reported that depression had onset three months earlier related to relationship problems. His description was consistent with major depressive episode. He had no family history relevant. He was only a social drinker. System review was notable for irritability, anxiety, depression, inability focus, psychiatric symptoms, and sleep disturbance. He was prescribed 0.5 mg Klonopin per day and 100 mg Zoloft per day.

June 1, 2009 follow-up at Columbia Family Medical Group indicated Kraig Kahler wanted to discuss that he had "bad sexual side effects and had to stop medication." Usual anxiety or depression was evident. Assessment was depression not otherwise specified for which Zoloft would be changed to Wellbutrin.

January 7, 2009 through June 2, 2009, progress notes by Robert McGavock covered 14 clinical contacts:

On January 27, 2009, Kraig wondered if Karen was experiencing a midlife crisis. She may not have been verbally forthright about her unhappiness. One intervention was to stop pressuring Karen for daily sex or badger her if he didn't get the daily sex. He brought scrapbooks to show and "prove to me" how happy Karen seemed throughout the marriage.

On January 29, 2009, Karen had filed for divorce two weeks earlier. He felt his family was falling apart and was baffled. He thinks "the affair situation got out of hand" and Karen changed during the affair. Later on January 29, Kraig seemed to be "continuing to build a case against her implying that their problems are her fault or originate with her."

On February 2, 2009, Karen had told Kraig she was unhappy for many years, feeling he would not listen to her or honor her needs. He did not agree that he used sex as a stress reliever. He appeared very analytical,

very type A, and the prognosis for the marriage was not good. Kraig appeared to feel angry. Referral to a physician for anxiety medicines was made.

March 20, 2009 entry indicated that Kraig felt frustrated, angry, humiliated, and embarrassed by the filing of the divorce as well as a domestic violence arrest at a city meeting. Kraig continued to deny responsibility for demise of the marriage, blaming Karen for the affair with a woman. He had intercepted cards, expressing affection between the two women. Kraig continued to believe his marriage had been "perfect" for all those years, feeling Karen had gone off the deep end. This was despite that he encouraged and approved of the affair, even asking to observe them having sex which happened at least once. Kraig was encouraged not to bad mouth Karen in front of the children.

March 25, 2009 progress note indicated Karen had withdrawn $50,000 from their account after things flared up over the New Year's Eve party. There had been shoving and holding/hugging triggered the assault arrest. Kraig believed his girls were more aligned with Karen. Later, Kraig was referred to Columbia Family Medical Group for treatment of depression.

April 3, 2009 progress note indicated Kraig was feeling very frustrated about his "very happy" marriage disintegrating. He brought in phone records of his wife talking or texting constantly to her female lover. He intercepted E-cards. Kraig took some blame for the demise of the relationship but felt "he should never have agreed to her having the affair." Kraig did not recognize that any problems existed between his wife and him prior to the affair. Though medications had been prescribed, Kraig had not taken either. He

believed Karen had gone off the deep end and was crazy. He believed that the female lover had tried to break up the family, denying there were any problems prior to New Year's Eve.

April 10, 2009 note indicated that Kraig was under an ex parte order so wouldn't try to contact Karen. The importance of keeping the children out of the middle was discussed. Kraig felt like starting a new family life.

April 24, 2009 entry indicated that Kraig drove 150 miles to Wichita to catch his wife with her female lover after intercepting an e-mail. Kraig continued to insist that divorce was strictly Karen's fault despite the therapist attempts to have him look at his part.

May 8, 2009 entry indicated Kraig thought of discreetly seeing other women. Kraig was focused on Karen seeing her lover.

May 22, 2009 indicated that Kraig continued to obtain e-mail information about Karen and her female lover. He was "building his case for the divorce proceedings." He wondered if he had personally failed in the marriage, felt his girls were lost to him, had spent some time with Sean, and did not feel he was depressed. It was recommended that Kraig stay involved with his children's lives.

Law Enforcement and Court Documents

Transcript of audio file (Operator 55) noted that the male suspect said, "Oh shit! going to kill her . . . God dam it!" Later he tells a sobbing voice to "stop crying."

November 29, 2009 crime scene report identified Kraig Kahler as the shooter. Karen, Emily, and Lauren had all been pronounced dead. Dorothy Wight had been hospitalized in serious condition.

January 4 (2010) Kraig Kahler letter to Marianne noted he "joked with the ex if we ever needed counseling it was probably too late anyway." He thought his counseling was a waste of time.

January 11, 2010 KBI interview of Todd Price indicated Kraig Kahler had approached him to have Sonny Reese killed. At the 2008-2009 New Year's Eve party, Karen and Sunny kissed all over him. Kraig was angry about Karen's behavior. Apparently, Karen had wanted the fling with Reese but she was to come back to Kraig. Kraig may have already started dating other women.

January 11, 2010 interview Christine Williams noted that Kraig Kahler did not like women in a position above him. He was very active with his daughters. He was very smart and expected everyone and everything to be punctual. He was hard to get to know. It was beyond him to comprehend something like the complications of a divorce. Kraig Kahler wanted to send you be within the norm, He was very worried that Lauren might have ADD and "was not perfect." Kraig was a "tightwad." He borrowed rather than purchase tools. At times, he was thought of as being "vindictive" or holding a grudge. She suspected he might have had a five-year relationship with an oriental woman. He seemed to "lack so much personality."

January 11, 2010 interview of Michael Schmitz noted that Kahler changed during the separation and divorce, becoming obsessed with the proceedings. He was trying to build a case against Karen. Kahler had a better relationship with his son than with his daughters.

January 11, 2010 interview of Sarah Teroso indicated Karen Kahler had not been happy in the marriage for the last two years.

January 12, 2010 interview of Hollie Wood noted that Kraig Kahler was creepy, standoffish, and unapproachable.

January 12, 2010 Interview of Sharon Hayes noted that Kraig Kahler was described as an introvert. He always seemed to try to get something free including trips to strip bars. The Kahler family was "robotic like." Karen seemed to act as if she was expected to be the center of attention. Kahler seem to be very controlling. It was likely that Kahler believed his daughters abandoned him with his wife.

January 12, 2010 interview of Marina Coulter noted that Kraig continued to blame everything on Karen. There was a concern about Karen's safety due to Kraig's aggressiveness, access to weapons, and Emily having to get between Karen and Kraig.

January 12, 2010 interview of Tina McNew focused on Kraig's belief that Karen had a "lesbian wife." Kraig seemed to have "gone off the deep end and even his parents were concerned for him."

January 12, 2010 interview of Lesli Edwards noted that Kraig wanted Karen and Sunny to be together so he could watch. When the relationship took off, Kraig could not handle it.

January 13, 2010 Interview of Jaquita Price indicated the relationship between Karen and Kraig always seem to be perfect. Kraig was a good person. The nightly sex between Kraig and Karen was a myth, then a rumor, and then thought to be true. Price thought that Kraig was a sex addict.

January 13, 2010 interview of Elizabeth McCauley indicated Karen was a "trophy wife." Karen felt she had to live "to a certain standard for Kraig as if it was a show." Karen was described as very proud but insecure. Karen was expected to be very frugal, even once saying she had to account for the purchase of tampons. Karen and Sunny became involved sexually.

BACKGROUND INFORMATION FROM INTERVIEW:

April 1, 2010

At the April 1, 2010 visit, Kraig Kahler immediately noted that his "perfect life" prior to 2009 had fallen apart. Dr. V. prescribed Zoloft, Wellbutrin, and a sleep aid but Kraig did not take them. He was concerned about taking medications due to his "big job."

After his wife filed for divorce, January 28, 2009, he was arrested at a City Council meeting, his family life was falling apart, he was losing his mind, and he could not concentrate at work. He attempted to save his marriage and his family. Then, he was only sleeping three or four hours per night, versus the usual eight or nine hours.

Since arrest, Kraig gave notable symptoms of depression. He was not doing much, had very poor sleep, and focused on having "lost it all." He noted that he had $180,000 per year job and 240 employees, which fell apart. At times, he was tearful. He felt suicidal. During 2009, he felt life was not worth living quite often. Kraig immediately focused on family albums, showing that they "did everything together," and many pictures of a happy family. Kraig Kahler indicated they had made seven or eight years of family calendars, showing their positive relationship. He felt he treated his kids well but Karen went nuts.

Kraig was not alerted to any medications, foods, or mold. He had been the "picture, of health" except for having two basal cell carcinomas removed. He reported daily exercise, low blood pressure, low cholesterol, and proportional weight to his thinner frame.

He had hunted with his son and camped with his girls and wife. Yet, it was quite difficult for him to find a reason that he should continue living. He was able to see that it was valuable for him to stay alive for his son's well-being.

Kraig Kahler frequently focused on his perfect marriage, before the affair between Karen and Sunny.

An antidepressant was recommended, through a local psychiatrist.

May 6, 2010

The antidepressant had improved his mood somewhat. He believed he was "mellowed out." Once again, Kraig focused on family pictures. He was reading a nuclear energy textbook, to pass the time. He worked hard, taking the psychological tests.

June 3, 2010

Kraig indicated the antidepressant had been increased to two pills per day, which was helping, especially with his sleep.

He denied any fractured bones, loss of consciousness, or injury during a motor vehicle accident.

He described himself as "type A" including enjoying skydiving and climbing 14,000 foot mountains in Colorado. He was very careful with his firearms, having been raised around guns. Proudly, he noted that his son shot his first year when he was seven years old. By nine years old, his son had hunted four deer. Again,

he showed photos of his son, which reinforced their relationship.

Kraig reported farm exposure to "245 T" which was identical to Vietnam Agent Orange. He denied exposure to solvents through huffing. He denied seizures.

Kraig did not have a regular doctor. Before New Year's Eve, 2009 he had not seen a psychiatrist or psychologist. Then he went to see Rob McGavock starting in January 2009. At the same time, Karen went to Lynn Ogden but she "came out worse." With Rob, Greg was trying to save his marriage. During that time, the kids saw Heidi B. Scan may not have gone. At that point, Kraig had been losing interest as Karen had already filed for divorce.

Rob helped him but it did nothing to save his relationship with Karen. That was even after some joint sessions with Karen. He believed some of Karen's problems or that she had placed him on a pedestal. This was especially because her father had been an alcoholic, overweight, did not make good money, and was not supportive of the family. He believed that Karen did not react well to his "telling the truth" about her family.

Kraig had not been hospitalized as an adult. He had no major surgeries. He had a vasectomy after their "contract" for one more child. It is notably about this contract (a preconception agreement), he wrote it, but they both signed.

Kraig had no tattoos or piercing. After Karen met her girlfriend, she had her navel pierced. Neither of the girls had tattoos.

Kraig denied any high-risk activities such as intravenous drug use. Before he was married, there was

some sex with women he did not know well. After he married Karen, he denied any extramarital sex until they separated. During the separation, he met women through the Internet but kept it discreet.

Kraig denied any sexually transmitted diseases, group sex, threesomes, or sex with men. He believed Karen lied about a threesome between them and Sunny.

Kraig emphasized that in Weatherford, Texas no one had a better life than they did. There were no arguments.

Kraig not sought any emergency room care or any physical care prior to January 2009. He thought their relationship was "all good" until January 2009. Then they use the boat, camped, and did family things "all summer."

Kraig got his "type A" behavior was just good intelligence, good health, and a lot of drive.

July 2, 2010

After the New Year's Eve party in which Karen and Sunny were overly affectionate front of their friends, Kraig believed he gave Karen "11 months to come to her senses." Even so, he felt she "became her mother" and he was unable to reunite the family.

At this appointment, Kraig focused on how positive his family had been before January 2010. He was the "highest paid" city official in Columbia, Missouri. Everyone was treated well. He was treated well. He had "worked 25 years to get there." He recited financial success as many responsibilities.

He felt Karen turned to Status against him such as Lauren statement dated "bio horror and get over it." He believed things were falling apart "bad" because he

found photos of Lauren in her underwear, which she apparently sent to boys.

He believed that Karen did a "180" for having been "well taking care of. Kraig made jewelry for her, bought Cadillacs, and washed her cars on the weekends.

He gave many instances in which Karen and Sunny were together, which felt very wrong to him. The "making out" with Sunny seemed out of control to Kraig but Karen denied that it was. At the New Year's Eve party, he gave Karen the ultimatum of "me or Sunny." Karen left with Sunny and Kraig was very upset. He felt Karen chose Sunny over him and that became a full-blown love affair between them. After that, Karen took $50,000 from their joint account, neither was happy, and he put a key logger on her computer because she "messed with the wrong guy." He was mad because he was hurt. He does not feel Karen ever knew how he built the case against her by accessing her computer. It hurt him terribly that Emily stopped being interested in seeing him. He felt Karen staged the arrest at city Council.

Because of his skills computer he checked Karen's e-mail and the girls e-mail. He also accessed e-mails through other accounts. He wanted to embarrass Karen to stop the relationship with Sunny.

He felt Karen's homosexual affair when against their moral teaching and against the marriage they had for almost 23 years.

In his mind, he lost opportunities with Lauren and Emily and "they became their mom." This is in great contrast to all the family vacations, spending summers at the state park on the boat. He had photo albums to prove it.

At times, in the interview Kraig was totally focused on how Karen and Sunny destroyed his financial his assets. He could not even entertain the idea that his anger at his daughters was a psychological defense mechanism to project blame. That made no sense to him.

July 22, 2010

At this appointment, Kraig discussed his family life. First, Emily, their firstborn, was a beautiful young woman and an excellent student. She never caused any problems at all. Her surgery for appendicitis in second grade was not visible. They had a fun relationship. He taught her how to drive the Explorer and work on cars. She enjoyed that.

His relationship with Emily did not change until March 2009 "after they moved out." Then she sided with Karen. This was very frustrating to Kraig, especially since his girls did not seem to care about it their mom being with another woman. He tried to stay away from them, though had a Private Investigator watch but Karen and Sunny were doing. His relationship with Emily soured and she "lost unlike her mother did." To Kraig "when Karen lost her mind her daughters went with her."

Lauren, their second daughter, was a B student and very social. At times, she seemed to feel inferior to Emily but she was more rambunctious. She was less mature than Emily was. She had a great personality and focused on social interactions. She seemed to be a better athlete than Emily was, especially in tennis, track, and cross-country.

When Karen left, Lauren "left with her mom." One of the things that really angered Kraig was that Lauren told him to "get a whore and get over it."

It was extremely difficult for Kraig Kahler to understand the loyalty bind his daughters might feel. He seemed to understand that it would be very important to Sean for him to stay alive, thus not commit suicide, and try for a non-capital sentence.

August 31, 2010

At this appointment, Kraig Kahler's ability to empathize with his daughters seemed to have deteriorated. He described them as just "rotting corpses." He had extreme difficulty trying to develop an emotional connection with them. He emphasized how patient be had been, wailing for Karen and his daughters to come to their senses. It all blurred into how he had provided for his wife and family with a $180,000 a year job and a 4300 ft^2. home. He could not focus on more than that he had done what he was supposed to do "to the nth degree" meaning take care of his family. He quickly added how humiliated Karen had made him feel in front of his family and friends on New Year's Eve.

Again, she denied any sexual involvement between Karen, Sunny, and himself. He became so preoccupied with the relationship between Karen and Sunny that "Karen should have known better." He felt she should have understood that she really had a "perfect life" with him.

Kraig Kahler emphasized that after his children the left with Karen and Sunny they said terrible things about him. Before that "my kids did not do anything wrong." He just could not see why there was a reason for them to divorce.

In retrospect, the only way for Karen to have solved the difficulties was for her to stay away from the "train wreck." Karen should have had psychotherapy and should have left the kids with him. He wanted Karen

to "stop screwing up his children" and sleeping with a woman in front of their kids at a hotel. It was extremely difficult for him to look away from Karen's actions which caused his "23 year career" to end. He felt everything any work for was "gone." Before that, his first priority had been his family.

September 30, 2010

Kraig Kahler remained quite angry at Sunny and Karen. For example, he sent a salacious e-mail to embarrass Karen to everyone Karen knew in Weatherford, Texas. He remained fixated on Karen having slept with another woman in front of their children. It made him angrier and angrier.

Kraig was sorry for what happened but he could not cry about it. He could not let himself feel any emotions about their deaths. He believed he must have "snapped" after he had "enough." He was unable to reconstruct anything between leaving his parents house and surrendering. Immediately, Kraig derailed to all "the happy" vacations he and his family had.

DISCUSSION OF EVENTS RELATED TO THE LEGAL SITUATION:

Kraig Kahler maintained that he had no recollection of the events of the charged offense. He denied recalling anything between leaving his parents' house to get supplies and when he encountered the Sheriff's Deputy stating to the effect, "I'm the man you're looking for."

At arrest Kraig was wearing regular clothes, carrying a .38 special revolver (South American Smith & Wesson knockoff), and had his hunting knife. Other than that, he felt "I am not going to remember a whole lot."

The pistol was probably loaded but he had no extra rounds or a speed loader.

His vehicle had a lot of his camping/hunting gear in it, something that it had always had.

That morning he had gone trout fishing with Sean. His children and Karen were to spend Thanksgiving with Sunny. On the day, he cashed his last paycheck. He took the entire paycheck in cash, as he did not want Karen to get it. He had been setting aside cash all summer in a "very safe place." He did this because it was the end of his career. He thought he would never get a similar position as someone would just "Google his name" and learn about the arrest. He would never have as much prestige again.

To manage distress, he had been working on the ranch such as painting the barn, painting the entrance, and helping wherever he could. He could not understand why they would not have Thanksgiving with him, especially letting Sean stay longer. Kraig emphasized all the things he did was Sean.

He believed the KBI was "lucky I decided not to go against them." He had three or four rifles and ammunition for each. That was hunting equipment, which he had together in duffel bags "for years,"

Notably, he felt that he could have "taken out at least a handful" of Sheriff Deputies because he had "the ability and the tools." Somewhere before then, he carne to his senses.

Though he had been asked numerous times, he did not know where the alleged rifle was.

SUMMARY OF May 6, 2010 PSYCHOLOGICAL TESTING:

SILS

The Shipley lnstifute of Living Scale, a rapid IQ test, indicated Kraig Kahler's IQ was approximately a WAIS-R of 110. This is the upper average range, bordering above averagc.

Given his present level of distress, the IQ score is likely low relative to his premorbid functioning. For example, Kraig Kahler maintained a 3.88 to 3.10 GPA of 4.0 during high school. He was ranked first or second of 58 students at Jefferson West High School. In addition, His career in city planning and engineering sciences strongly indicated that his IQ was at least in the above average or superior range.

Thus, the WAIS-R IQ of 110 indicates that his cognitive functioning is somewhat impaired, likely due to major depression. The antidepressant was unlikely to have negatively impacted his cognitive functioning.

His successful higher education and current interest of reading "nuclear engineering" while on pre-trial detention suggests a high-level or superior IQ. In addition, the focus on nuclear engineering also suggests an underlying grandiosity.

PAI

The PAI indicated considerable defensiveness, a high potential for suicide, Single Episode Major Depressive Disorder, possible Posttraumatic Stress Disorder, and possible Mixed Personality (borderline, narcissistic, and paranoid features). At the lime of testing, Mr. Kahler had thought of killing himself. There was considerable distress including anxiety.

Kraig completed all the items of the protocol. He may not have answered completely forthrightly as he tended to portray himself as relatively free of common shortcomings or minor faults. Potentially, he denied problems with drugs or alcohol as individuals with this protocol type tend to report greater involvement with alcohol or drugs. There was no evidence to suggest he was motivated to portray himself more negatively or pathologically than clinically warranted.

Clinically, there was a marked elevation of depression. He endorsed worthlessness, hopelessness, and thoughts of personal failure. He openly admitted sadness, a loss of interest in normal activities, and a loss of sense of pleasure in things he previously enjoyed. He appeared relatively free of physiological signs of depression. That is, there was no evidence of changed energy, appetite, weight, or sleep pattern due to depression.

He admitted occasional experiences or mild maladaptive behavior aimed at controlling anxiety. He reported a disturbing traumatic event that continued to distress him and produced recurrent episodes of anxiety. While the specific event(s) could not be identified by the PAI protocol, victimization or other life-threatening event could have occurred.

Kraig endorsed uncertainty and indecisiveness about many major life issues. He reported little sense of direction or purpose. He appeared more wary and sensitive interpersonally than the average adult did. Others might view him as tough minded, skeptical, and somewhat hostile.

His self-report did not include significant problems with unusual thoughts or peculiar experiences, antisocial behavior, problems with empathy, unusually

elevated mood or heightened activity, marked anxiety, difficulties with health or physical functioning, and no significant problems alcohol or drug abuse or dependence.

His self-concept was generally negative and may vary from harsh self-criticism and self-doubt, to periods of relative of self-confidence and intact self-esteem. These were likely to fluctuate as a function of current circumstances. During stressful times, he was likely to be self-critical, pessimistic, and dwell on past failures. He was likely to dwell on lost opportunities with considerable uncertainty and indecision about the future. Given the self-doubt, he tended to blame himself for setbacks and see any future prospects as dependent on actions of others.

Interpersonally, Kraig was likely to appear self-assured, confident, and dominant. He was likely to present a leader-like demeanor. He was socially comfortable but not likely to mix indiscriminately, preferring to interact with others during situations over which he could exercise some measure of control.

From a therapeutic standpoint, Kraig reported intense and recurrent suicidal thoughts, typical of those placed on suicide precautions. His temper was within normal limits. He appeared more motivated for treatment than adults not being seen in a therapeutic setting. His responses suggested an acknowledgment of important problems as well as understanding the possibility of personal change, the value of therapy, and the importance of personal responsibility.

Kraig endorsed nine of 27 PAI critical items. Critical items have very low endorsement rates, reflect serious pathology, and while not diagnostic can suggest important areas for inquiry. He listed 4 for Potential

for Self-harm, listed 2 for Potential Aggression, and listed 3 for Traumatic Stress.

Potential for Self-Harm

- Plans for how to kill myself
- No interest in life
- Death would be a relief
- Considering suicide

Potential for Aggression

- Temper explodes and I completely lose control
- Sometimes, I am very violent

Traumatic Stressors

- I keep reliving something horrible happened
- Some horrible experiences make me feel guilty
- Since a very bad experience, no longer interested in some things once enjoyed

MMPI-2

The MMPI 2 suggested chronic psychological maladjustment, considerable suspiciousness, considerable hidden hostility, rigid present adjustment, and high reliance on repression/projection to protect a vulnerable self-concept. Possible psychiatric diagnoses from the MMP1-2 included histrionic or paranoid personality, paranoid disorder, and depressed mood. He was so psychologically defensive that it was unlikely he would consider psychological causes of his problems. There was notable underlying depression, histrionic reactivity, and suspiciousness/paranoia.

The MMPI-2 indicated Kraig was open and cooperative. The profile was probably a good indication of his present functional level.

Symptomatically, he exhibited chronic psychological maladjustment. He was suspicious and hostile but tried to hide this with bland defensive behavior, usually unsuccessfully. If he felt threatened, he may become angry, hostile, and argumentative. Somatic complaints were possible. He may appear perfectionistic and "overly concerned with issues of morality."

He tended to lack cultural interests characteristic of men with his educational level. He appeared to prefer mechanical things or practical activities to artistic or cultural pursuits. He appeared interpersonally insensitive and intolerant of others. He was likely to be viewed as somewhat narrow-minded, closed, and disinterested in the expression or discussion of feelings.

He expressed low morale, depressed mood, preoccupation with feeling guilty and unworthy, and believed he deserved to be punished for wrongs he committed. He was regretful and unhappy about life and seemed plagued by anxiety about the future. He had difficulty managing routine affairs. He endorsed items that suggested poor memory, concentration problems, and an inability to make decisions. He appeared too immobilized and withdrawn with no energy for life. He endorsed items consistent with suicidal ideation. Even though he denied suicide attempt, his current mood dictated that suicide potential should be evaluated. He viewed the world as threatening, felt unjustly blamed for the problems of others, believing he was getting a raw deal from life.

The profile configuration 36/63 was very rare in the normative sample, occurring in less than one percent of normal men. His profile may include more behavioral elements on retest. Upon retesting, acting-out, aggressive, and irresponsible behavior may become more prominent.

Interpersonally, Kraig may first seem positive and cooperative but his bitterness quickly rises to the surface. He may show a "gullibility paradox," appearing naive and trusting but quickly becoming indignant and hostile. Such individuals are usually in difficult interpersonal relationships and are frequently worried about not being treated fairly. Individuals in this profile tend to feel insecure in relationships. When feeling neglected or threatened, increased psychological symptoms may occur. Periods of intense behavior such as angry outbursts are to be expected.

Diagnostically, the MMPI-2 suggested Somatoform disorder in a Histrionic or Paranoid Personality. The possibility of Paranoid Disorder should be considered. A self-reported tendency towards depressed mood should be considered.

From a treatment perspective, such persons are typically defensive so may not seek psychological treatment on their own, They may seek medical solutions before difficulties. They are unmotivated for psychological treatment and seek symptom relief through medical procedures. They arc typically unwilling to entertain the possibility of psychological causes to their problems. Symptomatic problems may center on relationships difficulties. They may not be able to enter into a productive trusting psychological treatment relationship Initial naivete and gullibility may quickly turn to mistrust, anger, or indignation.

John R. Graham, in *MMPI*: *Assessing Personality and Psychopathology*, Third Edition, discusses that the "36/63" two-point code type is notable for "deep, chronic feelings of hostility toward family members." These feelings are not expressed directly. Much of the time, they do not even recognize the hostile feelings. When they become aware of their anger, they try to

justify it in terms of the behavior of others. Generally, such individuals are defiant, uncooperative, and hard to get along with, They may express mild suspiciousness, resent others, are very self-centered and narcissistic. They deny serious psychological problems and "express a very naive, Pollyannaish attitude toward the world."

Kraig Kahler's current behavior fits the 36/63 code type. This is likely a deterioration from much higher psychological functioning. The deterioration of his functioning was brought on by the collapse of his "perfect" world brought on by the demise of his marriage.

MENTAL STATUS EXAMINATION (June 3, 2010):

Kraig initially became quite depressed, after the charged offense. He was suicidal. That was a worsening of the pre-November 28, 2009 events. For example, he had been working very hard at his father's farm to get his mind off his troubles, a common coping mechanism.

His mental status still strongly suggested major depression. This was despite some response to the antidepressant medication. His mindset had hardened toward Lauren, Emily, and Karen. He really had very few feelings or thoughts about Dorothy Wight.

He also demonstrated severe symptoms of Obsessive-Compulsive Personality. He was overly orderly and somewhat perfectionistic. He demonstrated substantial mental and interpersonal control at the expense of flexibility. He was preoccupied with details so that the point of a major activity was lost. Often, he wanted to know "how I would like him to answer" mitigation questions so he could tailor answers to what I need or want he thinks is strategic. He presented the defense

process not as truth seeking process but almost pure manipulation of the court system to his ends.

Before November 28, 2009, he was so preoccupied with Karen and Sunny that he was unable to complete work duties as he became increasingly devoted to proving how wrongly Karen and Sunny were behaving toward him. He remained enormously inflexible about matters of morality (homosexuality), the blameworthiness of his daughters (they were victims of the divorce process, not prime movers, and independently intelligent enough to see through some of his manipulations), and felt unable to participate in the evaluation process without knowing "exactly" how it will come out.

On June 3, 2010, Kraig Kahler had a severe affect. He was very serious. His body posture changes were very controlled. He was conversant and goal directed. Generally, he wanted to focus the conversation on how his life had been perfect prior to January 2009.

He reported an average mood without emotional surges. He reported adequate appetite and no noticeable changes in his weight. His energy level was not remarkable. He preferred isolation to watch television, read textbooks, or occasionally make phone calls.

He understood the potential impact of the trial a while to "get out and help his folks at the ranch. He emphasized he was not a "bad guy, as he had no previous problems."

He reported a strong sex drive, using masturbation to soothe himself. Kraig emphasized that he and Karen had made love most days in an active sex life. He felt he could "prove" the adequacy of their sex life by showing an "X-rated letter" he kept in his briefcase. He emphasized how very beautiful Karen had been not

during college they were "pretty much together" all the time.

Kraig emphasized that Karen's mother broke up their family, much the same way, Karen had broken up his family. He wondered if this was "hereditary." He believed that Karen's involvement with Sunny made Lauren marked her Facebook that she was "bisexual." That angered him. This was when he had access to their e-mails and Facebook.

He believed that sex in a relationship dependent on the health of the couple. He felt any assertion that he "made her" have sex every night was not true. Kraig emphasized that prior to January 2009, they were very happy. Karen had not had cosmetic surgeries. She exercised and "wanted to be a trophy wife." Before 2009, she was a "great wife and mother" and did not have negatives about each other.

Kraig only felt life was not working living after he was arrested at the City Council meeting. He denied suicidal ideation, plan for suicide, staging a suicide to look like an accident, or ever wanting to provoke someone to harm him or kill him. He denied homicidal ideation or plan for homicide. He denied ever laying in wait to harm anyone.

He denied any episodes of hallucinations.

The only time Kraig ever slept poorly was after the "family breakup" when his wife was sleeping with her girlfriend. Her actions embarrassed, humiliated, and destroyed his professional reputation, "costing him his career." His worst difficulties with sleeping were after Karen took the three kids "away from him" approximately March 16, 2010. The dreams were about the family breakup, his kids being damaged, and Karen in a hotel with her girlfriend. He knew these things were

happening because he had access to their e-mail. Lately, his dreams had not been as disturbing.

Kraig denied ever experiencing ESP or the ability to predict the future. He denied special messages from the television or radio. He denied thought insertion or thought withdrawal. After the separation, his thoughts raced but they were usually about how well he was doing at his position. When his personal life fell apart impacted his professional life. After the breakup, he had repetitive thoughts about how his wife destroyed their marriage, his life, his career, and their kids. It really disturbed him to see a photo of Karen, Sunny, Emily, and Lauren "cheek to cheek." He really felt aggrieved by Karen having taken $50,000 from their "joint marital estate."

He denied any calming rituals. Kraig had a very regular schedule. He believed that Karen "destroyed me."

Kraig noted that he and his wife had sex every night between 8:30 and 9:30 PM, after the kids went to bed. Sex was usually four or five times per week. Occasionally if one of them was tired, there would be no sexual activity. However, if they missed three or four nights of lovemaking then he felt left out. He does not think that happened ever. Before they had kids, their sexual frequency was higher.

Kraig Kahler was oriented to time, person, and the situation. His attention and concentration was adequate. His recognition memory was normal for immediate recall but at 1 min. and 5 min., he could only recall two of three objects. He did not confabulate. His categorical reasoning (similarities) was abstract and concrete. His social judgment (reasoning through hypothetical

situations) was normal. His abstract reasoning (interpretation of proverbs) was abstract.

His digit span, a clinical test for organic impairment was normal. As he could repeat six digits forward and six reverse. His spontaneous sentence was a grammatically correct, "the squeaky wheel gets the grease." There was no constructional apraxia or visual neglect.

At the end of the mental status examination, he had some questions about compulsive behaviors, noting that one of his managers said he had "obsessive compulsive traits," In addition, Sunny had sent an e-mail to Karen stating "how to divorce a narcissist." He was curious what those phrases meant.

In summary, Mental status examination on June 3, 2010 confirmed the degree of major depression, indicated a number of obsessive-compulsive behaviors, severely rigid/impaired judgment, histrionic/narcissistic personality adjustment, and emotional trauma (consistent with Acute Stress Disorder then Posttraumatic Stress Disorder). His psychiatric difficulties had been ongoing. After Lexapro, an antidepressant, was started, by a local psychiatrist (Dr. Hagerman), only his suicide potential reduced somewhat.

DIAGNOSTIC FORMULATION:

At the time the charged offense, Kraig Kahler was suffering Mental Disease.

It was in the form of Single Episode Major Depression and Major-Depression mediated worsening of Personality Disorder (obsessive-compulsive, histrionic, narcissistic, and paranoid). Obsessive, Narcissistic and Paranoid features may have worsened after the perfect "social image" of success and marital bliss was pierced. Before that, there appeared to be an external

image of family calm success. However, Kraig Kahler also was very controlling of Karen. This was in such areas as putting her on the pedestal of being a trophy wife, having to appear sexually attractive, nearly nightly sex, and tight control over the public image of the family.

There was no evidence of drug, alcohol, gambling, pornography, or other addiction contributing to the marital strife or events of the offense. There were some suggestions of a lengthy affair in Texas by Kraig and an expectation of a threesome between Kraig, Karen, and Sunny.

He had no prior psychiatric care.

The extreme nature of a quadruple homicide, precipitated by last paycheck, affront over Sean returning to the "gay household," suggests the kind of irrational "last straw" rage divorcing spouses experience. There is some suggestion of this in the Operator 55 transcript that Kraig recognized that he could not stop from killing his family save Sean.

The haphazard shooting (evidenced by the autopsies) suggests marked intrapersonal disorganization for Kraig at the time of the shootings. Having spared his son but killing his teenage daughters speaks of some decision-making but also a deep pathological detachment from his prior pride of them. That is, Kraig appeared impaired by depression and overwhelmed with obsessive-compulsive preoccupation brought on by the divorce that he tried to preserve those aligned with him and eliminate those who are not. Sean was more attached to him at the end. The girls were more attached to Karen. He preserved Sean's life though does not seem to know why at this point.

Dorothy Wight's role in this remains unclear. She may have been just in the wrong place. Alternatively, Ms. Wight may also have been "fused" with the other women in Kraig's mind.

Mr. Kahlcr's DSM-IV-TR diagnosis is as follows:

Axis I: Major Depressive Disorder, single episode, severe

DSM-IV-TR Major Depression requires at least five of nine criteria present within the same two-week period that represent a change from previous functioning. One of the symptoms must be depressed mood or loss of interest or pleasure. The nine criteria are:

- Depressed mood most of the day,

- Markedly diminished interest or pleasure in almost all activities,

- Significant weight change,

- Change in sleep pattern,

- Psychomotor agitation or retardation,

- Fatigue or loss of energy,

- Feelings of worthlessness or inappropriate guilt,

- Diminished ability to think or concentrate, and

- Recurrent thoughts of death or suicidal ideation or suicide attempt or plan for suicide

(N.B.: homicidal ideation is not uncommon during major depression and severe divorce discord)

At the time the charged offense, Kraig Kahler was at the end of a yearlong period of severe distress. Ile lost his idealized family, lost control of his wife, lost control of the relationships with his children, lost his job, was severely depressed, was preoccupied with

preventing psychological damage to his children, and felt his public image was utterly destroyed. He was in psychotherapy but not taking recommended antianxiety or anti-depressant medicines. He was excessively preoccupied that Karen and Sunny destroyed his marriage and his children. He had been functioning so poorly that he lost his job. He just had been cashing his paychecks to protect assets from divorce court. These fulfill the criteria of depressed mood, markedly diminished interest in activities, altered sleep pattern, psychomotor agitation, feelings of worthlessness, impaired thinking, and feeling life was not worth living.

At the first interview, Mr. Kahler was still severely depressed, continuously focused on the loss of his family and personal prestige. Only thinking about an ongoing relationship with his son Sean, and parents, kept him going. As the evaluation progressed, his thinking became quite hardened. He projected virtual all blame onto Karen and his daughters. This was something that Rob McGavock had been trying to address in therapy, with little success.

Posttraumatic Stress Disorder (probable), severe

Effectively, Kraig Kahler did not experience PTSD until *after*, or potentially during, the shootings.

Kraig Kahler appeared unable to discuss the events of the killings, claiming no recall or "it's pretty vague." His poor recall was completely inconsistent with his personality type, exquisite recall of events in every other aspect of his life (especially how Karen and his daughters *harmed* him), rational functioning up until the time he left to get supplies, and rational approach to the arresting deputy. The possibility of stress induced short-term dissociation is not ruled out.

DSM-1V-TR Posttraumatic Stress Disorder requires exposure to a traumatic event in which the person experienced, witnessed, or was confronted with events that involve actual or threatened death or serious injury or threat to the physical integrity of self or others *and* the person's response involved intense fear, hopelessness, or horror.

In addition the person must persistently reexperiencing the traumatic event in at least one of five ways

Recurrent and intrusive distressing recollections

Recurrent distressing dreams

Acting or feeling as if the traumatic event for recurring (including sensory reliving, illusions, hallucinations, and dissociative flashbacks)

Intense psychological distress at exposure to internal or external cues that symbolize the traumatic event

Physiological reactivity on exposure to stimulus or cues that resemble the traumatic event

There must be persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness by at least three of seven criteria.

The seven criteria are:

Avoidance of content associated with the trauma

Avoiding activities places or people that arouse recollections

Inability to recall an important aspect of the trauma

Markedly diminished interest or participation in activities

Feeling detachment or estrangement from others

A restricted range of affect (unable to have loving feelings)

A sense of a foreshortened future (not have a normal lifespan)

There must be persistent symptoms of increased arousal (not present before the trauma) by at least two of five criteria.

The five criteria are:

Difficulty falling or staying asleep

Irritability or outbursts of anger

Difficulty concentrating

Hypervigilance

Exaggerated startle

The symptoms must have a least one-month duration and cause clinically significant distress or impairment in important areas of functioning. Chronic indicates three or more months of symptoms.

Kraig Kahler's hardened condemnatory stance toward his daughters and Karen does not arise from an antisocial mindset. It appears to arise as a protective defense against acknowledging them, especially his formerly beloved and cherished daughters. Such hardening/dehumanizing of victims sometimes occurs after traumatic experiences such as shooting family members. The inability to acknowledge the deaths may be a combination of paternal horror at and detachment from his actions. He certainly remains hypervigilant to any assertion that his family was not perfect, that he is blameless, and that he no longer loves his daughters.

Axis II: Personality Disorder NOS (histrionic, narcissistic, and obsessive-compulsive features), severe

Personality Disorders are enduring patterns of inner experience and behavior that deviates markedly from the expectations of an individual's culture. There must be at least two of four elements. The four elements are

- Disturbance of cognition (ways of perceiving self and interpreting others),

- Affectivity (range, intensity, lability, appropriateness of emotional response),

- Interpersonal functioning,

- Impaired in impulse control

These difficulties must be inflexible and pervasive, leading to clinically significant distress or impairment. Kraig Kahler demonstrates a combination of overlapping personality disorders. Features of these are as follows.

Obsessive-Compulsive Personality Disorder, severe

This is a pervasive pattern of pre-occupation with orderliness, perfectionism, mental and interpersonal control at the expense of flexibility, openness, and efficiency beginning by early adulthood. Four of eight criteria are necessary:

1 Preoccupation with details, rules, lists, order, organization, or schedules to the extent that the major points of the activity is lost

2 Perfectionism that interferes with task completion (overly strict standards prevent completion)

3 Excessive devotion to worker productivity to the exclusion of the leisure activities and friendships

4 Over conscientiousness and inflexibility about matters of morality, ethics, or values

5 Inability to discard worn-out- or worthless objects of no sentimental value

6 Reluctance to delegate tasks to others unless they submit exactly to his or her way of doing things

7 Miserly spending style towards self and others anticipating catastrophe

8 Rigidity and stubbornness

Overall, Kraig Kahler demonstrated obsessive preoccupation with sexual activity with Karen (detailed sex log in college) and highly rigid approach to nightly sex. The family habituated to the routine. He showed preoccupation with appearing as an orderly family, with extreme inflexibility about social mores, (especially homosexuality) even if he fostered it as a tryst, exacting expectations of his wish for her appearance, desirability, and "perfect" family life. A miserly attitude toward saving money ($1 million) was reported, and he imposed stubborn controls of his family.

As his relation with Karen deteriorated, the obsessive pattern worsened. He became preoccupied with the divorce process, key logging Karen's computer, destroying her public image, tracking Karen, following Karen/Sunny, feeling overly fearful about homosexuality, feared his daughters were becoming homosexuals, and he was unable to focus on normal activities. In his mind, he fused Sunny, Karen, Emily, and Lauren. He could not grasp the complexity of their divorce process, insisting that Karen, Emily, and Lauren should just come to their senses, see their errors, and rejoin with him. His introverted and very black-and-white nature greatly impaired the ability to consider more flexible

and adaptive solutions despite counseling. He could not let go of his idealized notion of what the relationship should he. He holds grudges.

Narcissistic Personality features include a pervasive pattern of grandiosity (in fantasy or behavior), need for admiration, and lack of empathy beginning early adulthood and present in a variety of contexts. At least five of nine criteria. are required.

1 Grandiose sense of self-importance

2 Preoccupation with unlimited success, power, beauty, brilliance, or ideal love

3 Belief that one is "special" and unique

4 Requires excessive admiration

5 A sense of entitlement (unreasonable expectations of especially favorable treatment or automatic compliance with his or her expectations)

6 Interpersonal exploitative (taking advantage of others to achieve ends)

7 Lack of empathy or unwillingness to recognize or identified with the feelings and needs of others

8 Envious of others or believes others are envious of him or her

9 Arrogance and haughty behaviors or attitudes

Kraig Kahler thrived on the sense of self-importance, community prestige, and being perceived as an ideal or perfect marriage. He appeared to believe his family was an extension of his social image, especially Karen as a "trophy wife." He required (or actually contracted) "trade-offs," from her such as jewelry, cars, and a nicer house in exchange for a third child (a son). He required nightly sex. Discussion of the

threesome/tryst with Karen and Sunny had an interpersonally exploitative aspect but he lost control when Sunny arid Karen became emotionally and sexually attached without him. Before that, he felt that he had arrived socially, was at the top of the social pyramid in Columbia, and greatly identified his self-worth by his salary, investments, savings, and social prestige. Kraig Kahler was also socially introverted, having had difficulty interacting with coworkers, especially women he perceived in power.

Histrionic Personality Disorder includes a pervasive pattern of excessive emotionality and attention seeking. At least five of eight criteria are necessary.

1 Need to be the center of attention or becomes uncomfortable

2 Inappropriate sexually seductive or provocative conduct with others

3 Rapidly shifting and shallow expression of emotions

4 Consistently uses physical appearance to draw attention to self

5 A style of speech that is excessively impressionistic

6 Self dramatization, theatricality, and exaggerated expression of emotion

7 Suggestibility

8 Considers relationships more intimate than they actually are

Kraig Kahler needed to he the social, psychological, and sexual center for his wife Karen. When she was not subservient to him, he felt quite uncomfortable. He tended to value the public appearance of a "perfect"

relationship, virtually unable to grasp long-standing dissatisfaction that Karen had about their relationship. It was though, because he was happy she should be happy.

Axis III: No contributory (physical or medical or brain damage) diagnoses

Axis IV: Extreme multiple psychosocial stressors as discussed previously.

Axis V: Current GAF is 30 (Serious impairment of communication or judgment). At the time of the charged offense, GAP was 10 (Persistent danger severe harm to self or others).

DISCUSSION:

Mental Disease or Defect

At the time the charged offense, Kraig Kahler was desperate. He had lost all-important forms of his social identity. He felt humiliated, emasculated, and helpless to reform his marriage. At times, he felt life was not worth living. His judgment was so impaired that he fused his daughters with his estranged spouse, as though they were one. He had a diagnosable major depression and mixed personality disorder which persist. The events of Thanksgiving were the last straw.

Until a reasonable chronology of the events around the November 28, 2009, shootings can be discerned from Kraig, Diminished Capacity (extreme emotional disturbance), not NGRl, describes his actions. The Diminished Capacity arises from severe-and-worsening Major Depressive Disorder, during extreme marital distress, conflicts over custody/visitation, and decompensation of Obsessive-Compulsive/Narcissistic/ Histrionic Personality Disorder.

It is not known if he experienced short-term dissociation, but that has yet to be ruled out.

The "last straw" was his not being able to stay longer with Sean, Karen/Sunny having Thanksgiving with Lauren and Emily, and the "last paycheck" (end of his career) from the City of Columbia, etc. The background for the last straw was the increasing internal pressure in Kraig. This included his trying to thwart Karen/Sunny, trying to hide money from divorce attorneys, tracking Karen, extreme offense at what he thought was budding homosexual behavior in his daughters, "building" consequences of the fracturing of the "perfect family," and his irrational belief that he could turn it all around by force of his will or shaming Karen into giving up Sunny. At his core, he felt he "controlled circumstances" and the entire situation had gone out of his control.

Discussion

Kraig most certainly did not believe that the tryst between Sunny and Karen would have caused the collapse of his marriage with Karen. It is likely that before January 1, 2009, the marriage was in some distress and Kraig was somewhat depressed. He did not grasp Karen's dissatisfaction. It was highly unlikely that he would readily acknowledge any such difficulties existed. Then he likely convinced himself that by "force of will" or "letting out some reign" for Karen to explore with Sunny that he could save the marriage.

Kraig was used to winning, overcoming, being the best, being the most privileged, and having the "perfect" social facade. He would not have been able to tolerate being told "no" by Karen either sexually or in maintaining their relationship.

Kraig Kahler's insistence on the perfect marriage, incessantly showing how great the marriage was, and apparent inability to take any responsibility for problems with Karen suggests his thinking is deeply influenced by psychological defenses. This reaction is very consistent with Mixed Personality with strong obsessive-compulsive features before November 28, 2009 lasting to the present day.

As he became more depressed, Kraig externalized the source of all the marital problems, meaning onto Karen/Sunny, blaming only them. His obsessive-compulsive style (the engineer's mindset, keeping a log of daily sex acts, previous contract for a son, computer key logging, closely following Karen and Sunny, impersonating Karen on the Internet, copying Karen's P.O. Box key without her knowledge, and vicious Internet messages, . . .) combined with high intelligence became a psychological downfall for him.

His problems dealing with the marital difficulties resulted in termination from work. Kraig indicated he separated the two, but he was unable. He became increasingly depressed and focused on Karen to the detriment of his duties.

Kraig's claim of nearly nightly highly pleasurable sex with Karen was probably true for him. At some point, it became tiresome for Karen. It is hard to tell (when or if that happened) as he has not talked in detail about this. Karen indicated two years of marital trouble. Regardless, after January 1, 2009 the commodity of sexual soothing between Karen and Kraig was no longer there. That would have been a tremendous stressor for him since part of her being a "trophy wife" was also her willingness and ability to participate sexually. He denied that he was a willing participant in the sexual relationship between Karen

and Sunny. Some reports indicate he was for it until he felt left out or Karen and Sunny became serious. Then, Kraig developed increasing resentment of Karen's "faggot" sexual activity with Sunny.

Somewhere along the way, he projected (externialized) all the blame for the marital difficulties onto Karen and Sunny. He focused all of his anger on Karen. His daughters, through an expected loyalty bind, sided with Karen. When that happened, Emily and Lauren became fused in his mind with Karen.

Separate from the events related to dissolution of the marriage, Kraig cherished Emily and Lauren. He could not see how they were caught in the middle between warring parents. Through worsening depression clouded judgment and obsessive need to find fault (Or an external cause, also likely a psychological defense mechanism), Kraig objectified his daughters. All their actions became merely the extension of or equivalent to Karen and Sunny.

Kraig maintains very negative descriptions of Emily and Lauren. It had not been his personality to objectify his daughters before the strife with Karen. Before the stile with Karen, he talked about their beauty, creativity, successes, and of his love for them. After they aligned with Karen, he had nothing good to say about them, especially after he could not convince them to be loyal to him. This is a common difficulty in tumultuous divorces. However, his lack of antisocial mindset (in the psychological testing or his day-to-day life) suggests Kraig's persisting extremely harsh, unforgiving, and condemnatory attitude toward them is evidence of severe major depression and obsessive-compulsive/ narcissistic personality deterioration. It is also well within medical probability, that his extremely negative thoughts about them reflect psychological

defensiveness consistent with acute stress or posttraumatic stress. That is, he can no longer see them as his beautiful children because it is too traumatic for him to believe what he did to his beloved and cherished daughters.

Mitigation

A number of elements mitigate penalty for Kraig Kahler.

First, at the time the charged offense, he was at the "end of his rope" psychologically. He was severely depressed, fell humiliated, felt hopeless, felt helpless, and had lost his ability to separate his wife from his daughters. His parents and others thought he had gone off the "deep end" and brought him home to structure his time and so they could monitor him more closely.

Second, Kraig Kahler's judgment was so impaired that he became obsessively preoccupied with destroying Karen's social image, disrupting her communications with Sunny, and was unable to see any of his own responsibility for the demise of his marriage. He became obsessed with cyber attacks under pseudonyms. He only viewed his relationship with Sean as positive. Kraig was so impaired that he thought that only Karen had gone "off the deep end."

Third, Kraig had been recommended for antidepressant and antianxiety medication, but was not in active treatment. Even small amounts of antidepressant-have been helpful in pretrial custody to partially restore his thinking.

Fourth, he remains severely angry, the kind of irrational anger that is a psychological defense mechanism against acknowledging what he did to his wife and

daughters. This may be why he cannot recall what happened before he was arrested, such as a short-term dissociative episode. His constant use of family pictures, love letters, and "love" cards to "prove" how good their relationship demonstrates obsessive preoccupation in the face of information to the contrary.

Fifth, Kraig Kahler's psychological makeup was such that he had great difficulty understanding the nuances of complex relationships. According to one coworker, he could not even relate to her feelings during divorce. Even now, psychological testing suggests that his cognitive functioning is below normal for him, he is socially naïve, he overreacts to interpersonal slights, and he can become overwhelmed when things do not go his way. Psychological testing was also consistent with long-standing personality dysfunction and deep feelings of anger or resentment at family. In view of his constantly reciting how "perfect" the family was before January 2009, it just could not have been the way he described.

Sixth, despite his dehumanizing altitude toward his daughters and estranged wife, there was no prior evidence of antisocial personality. His hard-heartedness to his daughters suggests that some of his attitude is a consequence of untreated emotional trauma,

Seventh, there may be long-term emotional value for Sean Kahler to eventually work through the death of his mother and sisters with his father. If Kraig Kahler is executed, working through and resolution for Sean will not be possible.

Thank you for consulting Logan & Peterson PC. As above, development of additional information is anticipated as is an addendum.

/s/ Stephen E. Peterson, MD
Stephen E. Peterson, MD
Diplomate, American Board of Psychiatry and Neurology 1992
ABPN Subspeciality in Forensic Psychiatry 1994: Recertified March 25, 2003

Signed: 06/03/2011

[1638] IN THE DISTRICT COURT OF
OSAGE COUNTY, KANSAS

Case No. 09 CR 270

STATE OF KANSAS,

Plaintiff,

v.

JAMES KRAIG KAHLER,

Defendant.

TRANSCRIPT OF JURY TRIAL
(Volume 8 of 9, Page 1638-1768)

Proceedings had before the Honorable Phillip M Fromme, District Judge of the District Court of Osage County, Kansas, on the 24th day of August, 2011.

APPEARANCES

The plaintiff appeared by Ms. Amy Hanley, Office of the Kansas Attorney General, 120 SW 10th Avenue, 2nd Floor, Topeka, Kansas 66612-1597, and Mr. Brandon L. Jones, Osage County Attorney, Courthouse, 717 Topeka Avenue, Lyndon, Kansas 66451.

The defendant appeared in person and by Mr. Thomas D. Haney and Ms. Amanda Vogelsberg, Henson, Hutton, Mudrick & Gragson, 100 SE 9th Street, 2nd Floor, P.O. Box 3555, Topeka, Kansas 66601-3555.

* * *

[1680] We are ready to hear from the State. Do you have rebuttal?

MS. HANLEY: We do, Your Honor. The State calls Dr. William Logan.

WILLIAM LOGAN,

called as a witness in behalf of the State, having been first duly sworn, testified as follows:

THE WITNESS: I do.

MS. HANLEY: For the media, Your Honor, Dr. Logan will allow publishing of photos and audio.

THE COURT: Will allow, okay.

DIRECT EXAMINATION

BY MS. HANLEY:

Q. Please state your name for the jury.

A. William Logan.

Q. And what is your profession?

A. I'm a physician that specializes in psychiatry which is the study of nervous and mental diseases.

Q. Are you both a forensic and clinical psychiatrist?

A. Yes.

Q. What is the difference between the two, if there is any?

A. Clinical psychiatrist is primarily one who diagnoses and treats his patients in the office or hospital, while a forensic psychiatrist will do evaluations and

* * *

[1685] A. Well, at least on the average I would say three or four times a month.

Q. When you are consulted by the State or the defendant, do you end up working more often for the State or the defendant?

A. More commonly for the defendant. It can be a public defenders office or a private attorney or even the Federal public defenders office.

Q. What's the current ratio of your testimony in Court either for the State or the defendant?

A. I would say 75 percent is for defendants, maybe 25 percent for the State.

Q. And you've obviously testified in Court before?

A. Yes. I testify sometimes either in trial or depositions or hearings about 25 times a year on average.

Q. And at my request have you reviewed materials in this case in preparation for your testimony?

A. Yes, I have.

Q. Can you tell the jury in general what you've reviewed?

A. I reviewed witness statement, crime scene evidence, seen a videotape of the interrogation of Mr. Kahler. Those are the primary things that I was interested in. There were other things, autopsy reports that I [1686] looked at as well.

Q. Did you interview the defendant?

A. Yes, I did.

Q. When was that?

A. I believe that was back in March for about three hours and twenty minutes and that was here.

Q. And that would have been March of this year, correct?

A. Yes.

Q. Did you prepare a written report noting your conclusions based on your review of the materials and your interview of the defendant?

A. I did.

Q. Can you take a look at what's laying on the witness stand and been marked for identification as State's 365; is that your report, doctor?

A. Yes.

Q. Is that a true and accurate copy of your report in this case?

A. It appears to be, yes.

MS. HANLEY: Your Honor, at this time State would move to admit 365.

MR. HANEY: No objection.

THE COURT: State's Exhibit 365 is admitted.

Q. (By Ms. Hanley) Doctor, are you aware that [1687] Dr. Peterson was consulted by the defendant in this case and has testified before the jury?

A. Yes.

Q. And you know that he wrote two reports, a preliminary and a final report, correct?

A. Yes.

Q. Have you reviewed them both?

A. I did.

Q. And you testified that you looked at witness statements, photos, and recordings, And I want to go through some of the information from those materials.

Specifically were you aware of the fact that the defendant cashed two checks on November 28th of 2009, the date of the murders, and deposited none of the money?

A. Yes.

Q. Was that fact significant to you in any way?

A. I thought it was unusual behavior in that his money generally went into a joint account with his father and since it was, I think, over $7,600.00 that was an awful lot of money to just carry on one's person.

Q. Were you aware of the fact that the defendant drove one hour or more from Meriden to Burlingame on the date of the murders?

A. Yes. I'm familiar with the area. I lived in Topeka [1688] for a number of years. I know the approximate distance, and an hour is about right.

Q. Did that fact have any significance to you?

A. It had significance in that, you know, well, the combination of facts as he drove directly to Dorothy Wight's house, in other words, this wasn't a random occurrence. It appeared purposeful.

Q. Were you aware that the defendant knew of the family gathering at Dorothy Wight's and knew that Karen, his daughters, and Dorothy Wight would be there?

A. From various sources, yes.

Q. And does that have the same significance to you that ties in with the hour drive from Meriden?

A. Well, sure. I mean, he was going there to Dorothy Wight's house. He had been there some years previously but not recently. And he knew who was going to be in attendance or who was going to be present at the house or at least some of the ones that were present.

Q. Were you aware that in the defendant's Explorer there was found to be camping equipment, clothing, and food items?

A. Yes.

Q. And again you're aware this was on the date of the murders, November 28th of 2009?

[1689] A. Yes.

Q. Did that fact have any significance to you?

A. Yes, in the sense it looked like he could have been preparing for a trip.

Q. Were you aware that a jacket that had the defendant's business card was found outside by a shed that was near the kitchen area of Dorothy Wight's home?

A. Yes.

Q. Any significance to that fact?

A. It appeared that he had been outside watching for at least some period of time.

Q. Now the reports that you reviewed, did they indicate that a firearm was used for these murders?

A. Yes, all the victims were shot.

Q. Was there any significance to you that what was used was a firearm?

A. Only that Mr. Kahler was very familiar with firearms.

Q. Were you aware of whether the defendant had access to the firearms?

A. Yes.

Q. And tell us what you know in that regard.

A. Well, he had multiple firearms at his father's farm slash ranch that were accessible to him. Apparently they routinely carried at least four guns in the vehicle he drove.

[1690] Q. Were you aware of the fact that Karen Kahler, Emily Kahler, Lauren Kahler, and Dorothy Wight were all found in different rooms?

MR. HANEY: Your Honor, I object. These are all leading questions.

MS. HANLEY: I'm asking if he's aware and if it's significant.

MR. HANEY: Suggesting the answer.

THE COURT: I think I'll allow it. Go ahead.

Q. (By Ms. Hanley) Were you aware of that fact?

A. Well, I think Dorothy Wight and Emily were found in the same room. One was upstairs, Lauren. And his wife Karen was in the kitchen.

Q. Was there any significance to that fact to you?

A. Yes, in the fact that the shootings had to occur over a longer period of time and he would have had to pursue at least some of them to different rooms in the house in order to do the shooting.

Q. Were you aware of the fact that there were no missed shots or no shell casings found that didn't correlate with the number of wounds in the victims?

A. Right. There are no random shots. In other words, this wasn't somebody who came in firing wildly and you've got bullets in random locations like in the [1691] wall or furniture or anything like that. Each bullet hit its intended target.

Q. Were you aware from the reports that you reviewed that the firearm thought to be used was never found?

A. Yes.

Q. Did that have any significance to you?

A. Appeared that it was the only major thing that wasn't found. It appeared to have been disposed of somewhere. Never been located.

Q. Were you aware of a statement made by the defendant to law enforcement the next morning of I'm the one you're looking for?

A. Yes.

Q. What, if anything, does that statement indicate to you?

A. It indicates to me an awareness that the police were looking for him and some indication of his knowing the reason why.

Q. Do you have knowledge that the defendant was seen returning to his vehicle the night of the murders and was spotted by neighbors who yelled and shined a flashlight at him?

A. Yes.

Q. What does that fact indicate to you, if anything?

A. It indicates at the time that if he was in such a [1692] deranged state that he would have fired at anyone. He did not fire at those neighbors.

Q. Was there other evidence that you reviewed or found in the materials that you saw from that night that shows choice making on the part of the defendant?

A. Yes.

Q. Specifically what?

A. He did not park in front of the house. He did not knock on the door. There was one person in the house that was spared, that was his son Sean the one with whom he had the closest relationship. He apparently had I think we mentioned some of these, had spent some time outside the house watching before he decided to enter. He left, did not linger, did not call 911 or attempt to render any aid to the victims who had been shot. He left the scene, had a number of hours that he was in the woods before he was found by the police, made the statement that we mentioned when he saw the police and agreed to talk to them.

Q. Now you indicated that you watched the videotaped interview of Bill Halvorsen interviewing the defendant, correct?

A. Yes, I did.

Q. And you're aware that interview occurred the morning after the murders, right?

[1693] A. Yes, I am.

Q. Now is it a fair statement that this is the first time that we are able to see the defendant, see and hear what he's saying close to the time of the murders?

A. Right. There is no recording of him prior in close time prior to the murders but this is the first time to actually have a recording of him.

Q. In reviewing that recording, did you see any evidence of despondency on the part of the defendant?

A. No.

Q. Did you see any evidence of inability to comprehend or answer questions?

A. No. His speech was relevant. He attended the officer's questions and answered relevantly.

Q. Did you see any evidence of extreme agitation on the defendant's part?

A. No. He was calm.

Q. Did you see anything in that interview that suggested to you that he lacked the capacity to premeditate or form the intent to kill?

MR. HANEY: Objection. That's a legal question. Province of the jury. He can testify to medical issues and findings, but not invade questions of law for the jury.

* * *

[1696] may answer the question. You'll need to restate the question again.

(Thereupon, the following proceedings continued in the hearing of the jury.)

Q. (By Ms. Hanley) Doctor, I'll repeat my question. When watching the interview of the defendant, did you see anything that suggested to you that he lacked the capacity to premeditate or form the intent to kill?

A. I did not.

Q. Now I want to discuss some topics from your interview of the defendant and also Dr. Peterson's interviews of the defendant.

Did you have a discussion about the defendant's initial agreement to allow Karen and Sunny to be together?

A. Yes, I went over that.

Q. Thank you. What did he tell you about that?

A. He told me that he had never required fidelity as a requirement of the marriage. He saw this as some harmless mid-life experimentation on the part of his wife. At the time he was – his attention was rather focused on a new job he had just obtained in Columbia and a move there. He thought since they would soon be moving several States away that the relationship would peter out, kind of lose significance with time. [1697] And he was not terribly concerned about it.

Q. Did the defendant bring up to you or Dr. Peterson the various gifts that he had given Karen during the marriage?

A. Yes.

Q. In what context?

A. In the context is the fact that he felt he was a good provider for his family, that he had always worked, had a history of achievement, had brought in a good salary. The couple had a good sexual relationship, he believed. He had made jewelry for her. They had taken expensive vacations and gone on various trips, done activities with the children. He thought they had the perfect marriage. He could not understand why Karen was leaving the relationship.

Q. Did you discuss counseling that the couple had with Rob McGavock in Missouri, with the defendant?

A. Yes.

Q. And how did the defendant describe that counseling for you or what did he say about it?

A. He didn't find either counseling or church or any of the things they went through including Karen's own counseling helpful at all. He had hoped that someone would intervene and convince Karen that she was being foolish in what she was doing and that she had a [1698] responsibility to him as her husband and to her family.

Q. Did he have any specific comments about the therapist who conducted the counseling or feelings about the therapist's actions?

A. As I recall, he thought they were worthless.

Q. Did the defendant make any statements to you about the medication that he was prescribed?

A. Yes.

Q. What did he say?

A. Basically he was prescribed antidepressants, I believe, by Dr. Vahabzadeh. And the first antidepressant was prescribed in late March. It was Zoloft. There were sexual side effects, which are not unusual with that particular antidepressant, so he took it a very short time and elected to discontinue it. He was again prescribed an antidepressant, this time a different one from a different class, called Wellbutrin around June 1st. He went to the pharmacy, found out it was expensive and did not elect to fill the prescription.

Q. Did you or Dr. Peterson or both discuss with the defendant his anger toward his daughters?

A. I believe yes, both of us did.

Q. And did the defendant explain the reason for that?

[1699] A. Yes.

Q. What did he say?

A. He thought the daughters in the impending divorce had rather aligned with their mother unjustly. One daughter had made a hostile comment to him and was maligned against him. I think she told him to just get a whore and get over it and that really angered him.

He was angered by his wife and older daughter's decisions in several regards. She had gone to a very expensive pharmacy school in St. Louis when she could have gone to a much cheaper pharmacy program at the University of Missouri in Columbia, where they already lived. And he was also angry that Karen had made a purchase for Emily of a $7,000.00 Mustang that belonged to her girlfriend Sunny's parents.

Q. Did you discuss the defendant's feelings about Dorothy Wight with him?

A. Yes, I did.

Q. What did he say?

A. He felt that Dorothy's husband George had been alive that they would have brought Karen in line, that they would have spoken to her and convinced her and told her that she was making a huge mistake and would have convinced her not to leave him. He thought not only [1700] Dorothy but also Karen's sister had an obligation to keep her in the marriage and convince her she was making a mistake.

Q. Let's discuss some of the actions that the defendant was doing while the divorce was pending. Did he tell you about the e-mail monitoring?

A. Yes. I think he had a key logger on Karen's account as early as February.

Q. Does that fact have any significance to you?

A. It showed me that he was engaging, that wasn't the only behavior that showed me this, but he was engaging in some stalking behavior and the effect of it was it caused him to be absolutely obsessed with what was going on in Karen's relationship and kind of built up injustices that she had done evermore increasing his sense of anger and betrayal step-by-step.

Q. Did he talk to you about any actions that he was taking to assist his divorce attorney to make the case?

A. He said he had organized over 3,000 pages of material for his divorce attorney.

Q. Did you find that significant?

A. Well, it certainly indicated that he had the capacity to do that which was significant and it also [1701] indicated a degree of his preoccupation with the issue.

Q. Did the defendant discuss with you relationships with other women?

A. Yes.

Q. Specifically what did he tell you?

A. He told me he had relationships with five other women. I knew this because the KBI interviewed several of them as well.

Q. During what time period?

A. From the time of the separation from his wife which occurred after I suppose his arrest at the city council meeting including the city council meeting, up

through the time he went to live with his parents in Meriden.

Q. What, if anything, do those facts indicate to you?

A. That he had a need to be with somebody, that he was – felt injured by the divorce. That is not uncommon to see people in a divorce situation rebound and select somebody to be with relatively quickly.

Q. Did the defendant discuss with you a decision that he made about not working any further?

A. Yes.

Q. Did he tell you why he made that decision?

A. Yes. He could collect unemployment and, number two, [1702] he didn't want to give his wife any more money in the divorce settlement. He wanted to deprive her of getting a significant alimony check.

Q. Did the defendant discuss with you all of the things that he was doing at his parents farm once he moved back to Meriden up until November 28 of 2009?

A. Yes, he did.

Q. What did he tell you he was doing?

A. A whole variety of chores. He helped build a barn. He helped with – build a chicken coop. He put in hedge posts. He put in posts around his mother's garden, helped build an entryway, collected firewood.

And on his brother's old computer he continued to monitor Karen's activities on her Facebook page.

Q. What significance, if any, did that have to you?

A. It had significance to me in the sense that somebody who is severely depressed generally has very little energy, very little interest in activities, they

tend to be slowed down and lethargic and not capable of doing the kind of things that he was doing at the time.

Q. Did you ask the defendant during your interview of him if he had ever had any homicidal thoughts?

A. Yes.

Q. How did he respond?

[1703] A. Initially said no, but then he said he did have some homicidal thoughts but no plans.

Q. Did you have a discussion with the defendant about his parents' attempts to get custody of Sean Kahler?

A. Yes, that came up later in the interview.

Q. What occurred between you and the defendant during that discussion?

A. He was mentioning that he had wanted to have more input into some of the decisions that were being made about Sean, his parents at the time said they were not always sure you make the best decisions. And then he commented, at least I get results.

Q. What was the defendant's reaction once he made that statement to you?

A. He asked me not to write it down. He realized that he said something that was probably not appropriate for the context of the interview.

Q. Are you aware of the defendant's statement that The KBI was lucky I decided not to go against them?

A. Yes.

Q. Do you have any significance that you attribute to that at all?

A. Well, he himself admitted it was kind of grandiose.

But he, I think, was trying to cast himself in a better light by saying he could have shot and killed [1704] a number of officers had he wanted to. That indicated another ability to choose. He did not choose to do that but instead cooperated when he was arrested.

Q. Now you indicated that you have reviewed Dr. Peterson's preliminary report, correct?

A. Yes.

Q. And that has been admitted into evidence so I'll read a portion to you and I want to know if that has any significance to you.

Dr. Peterson writes: With me he wants to know how I would like him to answer some of the mitigation questions so he can tailor answers to what I need or want is strategic. He also presented his defense attorney's role as not a truth seeking process at all but almost pure manipulation of the Court system to his ends.

Does that statement have any significance to you?

A. Yes.

Q. What is that?

A. Number one, my assessment of that is that he's a cynical individual.

Number two, he's also someone, and I have this from other sources, too, that doesn't trust people [1705] and wants to maintain control.

And number three, that he was actively involved in his own defense. Told me other things such as making summaries for his attorney. He wanted to very much take responsibility for his own future and also wanted

to tailor information that he gave Dr. Peterson to that that would be helpful to him.

Q. Were you aware of a statement to Dr. Peterson that the defendant made referencing his daughters, and I'm referring to a statement made on August 31st of 2010 and was included in Dr. Peterson's report?

A. Yes.

Q. Do you know which statement I'm talking about?

A. Yes, because I was kind of surprised by it.

Q. What was it?

A. It was another situation in which he made a somewhat inappropriate statement. I think he referred to his daughters as rotting corpses in the grave.

Q. What significance, if anything, did that have to you?

A. Seemed to be a callous thing to say about one's own children.

Q. Doctor, after your review of the evidence and the interview, did you arrive at a conclusion regarding the defendant's mental state at the time of these murders?

[1706] A. Yes.

Q. What is your conclusion?

A. My conclusion was that he was depressed but that he still retained the ability to premeditate and . . .

MR. HANEY: Objection. Same objection, Your Honor.

THE COURT: Noted. Go ahead.

A. And also retained the – or he did not lack the capacity to form intent.

Q. (By Ms. Hanley) And 1 take it from your responses that you are aware of Dr. Peterson's diagnosis of severe depression, correct?

A. I am.

Q. Do you agree with that diagnosis?

A. No.

Q. For what reason do you disagree?

A. Well, I concur that there was depression. I did not see it as severe primarily because of his activities on the farm. I asked him about some vegetative signs of depression that go along with severe depression such as sleep and appetite loss. He denied any kind of weight loss. He had slept well the night before this occurred.

Also people who are familiar with him, such as his brother Kris and his father Wayne, said they [1707] really had not noticed any particular difference in him through noon of the day when this occurred. He additionally had been functional and done a number of things with his son who had been visiting for several days before noon on November 28. So he did not appear to be someone who met the criteria of depression including severe depression every day, lack of interest in activities he normally would have enjoyed, somebody who had no energy, had decreased sleep, had lost a significant amount of weight because of decreased appetite, had no motivation.

There were some signs of . . .

Q. And to stop you, to make sure what you're reciting for us right now are they the symptoms of severe or major depression?

A. Right.

Q. And did the defendant exhibit any of those on or near the time of the murders?

A. Certainly he exhibited some feelings of worthlessness. He also, I'm sure, probably had fleeting suicidal thoughts at times. He admitted some homicidal thoughts. Those are significant.

Q. But did he exhibit what you were explaining diminished interest or pleasure in activities, significant weight loss, loss of energy; did he [1708] exhibit those?

A. I did not see signs of those.

Q. Does having a mental disorder like depression make one unable to form the intent to kill or premeditate?

MR. HANEY: Objection.

THE COURT: Overruled. You may answer.

A. In and of itself the mental illness alone does not do that, it depends on the severity.

Q. (By Ms. Hanley) Doctor, is there any evidence that you saw through your review and the interview with the defendant that he just snapped and committed these crimes?

MR. HANEY: Objection. This witness has not seen the evidence.

MS. HANLEY: Same response as before.

THE COURT: All right. I'll overrule. You may answer.

A. Usually when someone refers to snap, it's a sudden act that occurs in a short period of time. There was evidence that this occurred over an extended period of time, involved actions of some complexity, so I would not classify it as just snapping.

Q. (By Ms. Hanley) And, doctor, so we're clear, you agree that the divorce for the defendant certainly did make him depressed?

[1709] A. Certainly. Very depressed. Very unhappy.

Q. But did that depression make him incapable of premeditating murder?

A. In my opinion, no.

Q. Did that depression make him incapable of intending to kill his wife, his two daughters, and Dorothy Wight?

MR. HANEY: Objection.

THE COURT: Overruled. You may answer.

A. It did not render him incapable of having the ability to do those things.

MS. HANLEY: No further questions.

THE COURT: You may cross.

CROSS EXAMINATION

BY MR. HANEY:

Q. Doctor, when were you first contacted by the State of Kansas or Attorney General's Office to—

A. I believe it was in December.

Q. —can I finish – to assist them in this case?

A. I'm sorry. I believe it was December of '09 or, excuse me, yes, '09.

Q. And at that point when the Attorney General contacted you they advised you that they didn't think that Mr. Kahler had a valid mental illness defense, didn't they?

* * *

[1747] Q. Part of it is interpreting results?

A. Is there a partial degree of interpretation? Yes, I agree with that.

Q. And part of it is providing your opinion?

A. That's correct, too, in this context.

Q. And, doctor, can you tell the jury, may seem like a silly question, but what an opinion is?

A. Diagnostic conclusion, an opinion about some other issue.

Q. And is it fair to say that doctors who are good doctors and psychiatrists can differ in their opinions?

A. Of course.

Q. And in your report you have also opined that mental disorders alone do not equal insanity?

A. Right.

Q. Are you aware when the last time was insanity was even an issue in the State of Kansas?

A. Well, mid-nineties there was a change in the Kansas law where it became an issue of intent as opposed to older definitions which had to do with knowing right from wrong, recognizing consequences of your behavior, in some States collusional capacity.

Q. But my question was, it was last even used in the mid-nineties?

* * *

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May 16, 2011

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Re: State v. James Kraig Kahler
District Court of Osage County
Case No. 09-CR-270
(Dob: [redacted]; SSN: [redacted])

Dear Mr. Jones and Ms. Hanley:

It is my understanding that Mr. Kahler is charged with Capital Homicide in the shooting deaths of four family members on November 28, 2009. The homicide occurred at approximately 6:15 pm at the home of Dorothy Wight where members of the family had gathered to celebrate Thanksgiving. Those who died included Karen Kahler, age 44, Mr. Kahler's estranged wife; Emily Kahler, age 18, Mr. Kahler's daughter; Lauren Kahler, age 16; Mr. Kahler's daughter; and Dorothy Wight, age 89, Karen Kahler's maternal grandmother. Mr. Kahler's son, Sean, age 10, escaped from the residence and fled to the home of a neighbor. Sean was not physically harmed in the incident. Each victim was shot twice in various locations in the home.

Your request was for an evaluation of Mr. Kahler and opinion concerning his mental state at the time of the homicides. Information sources initially consisted of newspapers accounts. This was followed by slightly less than 5,000 pages of discovery material from various law enforcement agencies and other sources. This material included information concerning Mr. Kahler's arrest, crime scene investigation including property seized at various locations, information concerning prior disputes between the couple in Columbia, Missouri where the family resided and where Mr. Kahler had held the position of Director of the Water and Light Department; divorce records; computer records; and numerous witness statements from former employees, family members, neighbors of Ms. Wight, Sunny Reese, with whom Mrs. Karen Kahler was in a relationship; and members of the Kahler family, as well as autopsy findings. This was following by a psychiatric examination of Mr. Kahler for three

hours and twenty minutes in Lyndon, Kansas on March 28, 2011. Lastly I was able to examine the preliminary report of Stephen E. Peterson, M.D., a forensic psychiatrist retained by Mr. Kahler's attorney Thomas A. Haney of Topeka, Kansas. Opinions and findings included in this report may be modified or altered by additional information which may become available prior to trial.

Examination of Mr. Kahler on March 28, 2011

Mr. Kahler was aware of my partnership in a psychiatric and forensic psychiatric practice with Dr. Peterson. Mr. Kahler was aware that I had been retained by the prosecution, and that my report would go to the prosecution and was therefore not confidential. Mr. Kahler was aware the examination was for legal not treatment purposes. Mr. Kahler had not been aware of the exact date of the examination. He postponed the start of the examination to consult with his attorney before agreeing to continue. Mr. Kahler consulted and shared some documentation of his own from his personal computer during the examination. Mr. Kahler was aware that my objective was to render an opinion concerning his mental state at the time of the homicides. At the time of the examination Mr. Kahler was receiving an antidepressant, Lexapro 20 mg a day, which was prescribed by a local physician in consultation with Dr. Peterson. Mr. Kahler denied any suicidal thoughts since beginning medication.

Mr. Kahler knew he was required to participate in this evaluation if he wished to present a mental defense at trial. He reported a collaborative relationship with Mr. Haney. Mr. Kahler could not think of any advice Mr. Haney had given him that he had not followed. Mr. Kahler was aware of his status as a defendant in capital proceeding and that I would

potentially testify at either the guilt or penalty phases of his trial.

Mr. Kahler previously took an antidepressant Zoloft prescribed by a doctor in Columbia the previous spring of 2009. He stopped the medication after a week due to side effects. The family practice doctor next prescribed generic Wellbutrin. Mr. Kahler did not fill the prescription after learning of the cost.

Mr. Kahler noted his current level of depression as a five on a scale of 1 to 10, with 1 feeling normal and 10 feeling suicidal. His sleep is satisfactory as he sleeps all night. His appetite is also satisfactory. He complained of no outside recreation but does watch TV, reads and works puzzles. He did not complain of concentration problems. He denied any suicide attempts since his arrest. He would consider suicide as a failure. He views his depression as expected "considering all I lost."

Mr. Kahler is aware his son Sean now lives with his wife's family in Wichita. Sean also visits Mr. Kahler's parents at their house in Meriden. His parents provide him information about Sean, but he does not have communication with Sean. He spoke with pride about his sons accomplishments including that Sean killed his first deer at age 7. Mr. Kahler does not recall any thoughts of killing Sean, "one way or the other." He stated he has been cut off from Sean for a year and half. He has written Sean, but knew Sean would not receive the letters or be able to read them until Sean is age 18 or slightly before this.

Mr. Kahler has written a narrative which explains the situation which lead to the homicides. He stated before the events which lead to the homicide he had been married for 23 years and had three happy

beautiful children and a beautiful wife. He had been hired for a position in Columbia, Missouri at a good salary and could anticipate a substantial retirement income from prior positions in Lee's Summit, Colorado Springs, Greenville, Texas, Duncan, Oklahoma and Weatherford, Texas where he retired after working there nine years. He decided to move to Columbia, Missouri to be closer to home where they could take care of their parents in their later years if there was need.

Mr. Kahler denied any prior mental health treatment. He stated he was "healthy as a horse." He had routine company physicals. He recalled his cholesterol level was 130, while his blood pressure was 108/65. He attended to his cardiovascular status through exercise and physical activity. He played and coached baseball with his nine year old son. He took his son on campouts and to Nascar races, as well as fished, hunted, and went to water parks. Some of these activities he did with all the family. His wife similarly did multiple activities with their daughters. He recalled the family went on numerous trips including trips to Austin, San Antonio, Georgia, New Orleans, Washington, D.C., Los Angeles, Santa Fe, New Mexico and Galveston, Texas. He liked to make jewelry which his wife wore. The sexual relationship was good and they had sex almost nightly. He felt close to his wife. He described they had the perfect family. He had gone on trips with his wife alone to San Juan, Puerto Rico; Scottsdale, Arizona and Anchorage, Alaska. The family went camping and played baseball during the summers.

Mr. Kahler attributed the downfall of the family to his wife's decision to "become homosexual." His wife told him she wanted to experiment, but he would "always be #1" during a trip to Possum Kingdom Lake.

This occurred in June 2008. He had never made fidelity a requirement. He knew they would soon be moving from Weatherford, Texas to Columbia three states away. Still he worried as other couples they knew had experienced difficulties. One married man in their fishing group had run off with another man's wife and left his two sons. This upset him. He had already accepted a job in Columbia in May 2008. He had taken Karen with him to meet the City Manager, Bill Watkins. He had asked his wife and daughters about the move. Karen worked as a personal trainer. She was interested in a sexual relationship with Sunny Reese, another personal trainer with whom Karen had worked for quite a while.

Mr. Kahler dismissed Karen's request as her going through a midlife crisis. He had enough worries about his new job, which would involve a substantial raise in salary. He believed the relationship with Sunny would not continue once Karen moved to Columbia. After the move, Karen would take weekend trips in the car. Karen didn't say why. Mr. Kahler denied ever participating in any threesomes with Karen and Sunny.

When Mr. Kahler moved to Columbia in July 2008, Karen stayed behind. Karen and their children moved to Columbia at the end of August 2008. During the fall of 2008, Mr. Kahler could not recall any cause for concern.

Karen and the girls wanted to return to Weatherford, Texas for New Years. Mr. Kahler agreed. There was to be a New Year's Eve party at the home of their former neighbors, Dan and Mariana Colter, who lived about three houses away. They were to spend Christmas 2008 with Mr. Kahler's family in Kansas. All of them missed their friends in Texas but Mr. Kahler didn't want to drive. Mr. Kahler became angry at the party

that Karen and Sunny were making "a spectacle of themselves in front of the neighbors." He described, "They were making fools of themselves, all at the party noticed." Mr. Kahler had seen erotic pictures of Sunny on the computer several hours earlier but thought it was "no big deal." Still he felt "humiliated" by their behavior. One of their best friends asked him "what's going on?" This was Barry Goodwin. Mr. Kahler recalled that they had been drinking. He usually had a couple of drinks at parties. He asked Karen to come outside where he told her she was making a fool of herself and to get herself under control.

In the months leading up to this, Karen had taken trips first to see Sunny at Sunny's parents home from 8/15-18/2008; then Sunny drove to see Karen at Dorothy Wight's house near Burlingame from 10/17-19/2008. Karen had visited Sunny in Weatherford, Texas from November 14 to 16, 2008. Sunny flew to Columbia from December 6-7, 2008. Still Mr. Kahler trusted his wife and his image of Karen. Also there had been no change in their sex life. Sunny was three states away.

Mr. Kahler was most upset by Karen's behavior "in front of others." During the confrontation, Mr. Kahler pushed Karen. He explained "she made a fool of us in front of everybody." Karen denied they were making out. Mr. Kahler believed "she lost her mind and went nuts." He hoped the neighbors would forget. He pushed Karen because "She lied to my face." He pushed Karen because "he was upset with her." They did not have many problems previously. He trusted her to be a wife and mother. He had no reason to distrust her up to that point.

Karen said she hit her head on the lawn. Karen went back to the party, but was aloof. Karen usually got

drunk if upset, while Mr. Kahler tended to sulk. They went home and slept together. Sunny left as she had to work the next morning.

On January 1, 2009, Mr. Kahler took his son fishing. Barry Goodwin and his two daughters went with them. Mr. Goodwin mentioned Karen's behavior, but Mr. Kahler "blew it off." Mr. Kahler explained that he was a professional with a high profile and was in a public position. He could not afford gossip. He told Karen she had to make a choice. Karen left Sunny. He believed their relationship had progressed to a "full blown love affair." He was "pretty upset." He sent Sunny a text message that the relationship needed to end for the good of the kids and that Karen "doesn't love you." He showed Karen the message. Karen told Sunny to cool it, that their relationship was only causing problems and needed to stop.

Mr. Kahler and Karen had some counseling sessions with Rob McGarvick and Lynn Ogden through the EAP. Mr. Kahler believed their first counseling session together occurred on January 14, 2009. He wanted to keep their family together. He had seen a neighbor family with two boys going through an affair. Karen thought there was something going on with Jody. Mr. Kahler and Karen had gone on trips together to Key West and San Diego prior to 2008. In 2009 he offered to take Karen and the family with him on trips to Salt Lake City; Jacksonville, Florida; Atlanta and Washington, D.C. Karen refused and said "it was over."

After a couple of sessions together, Karen continued counseling with Lynn Ogdon. There were old differences that emerged. Mr. Kahler wanted a perfect career and family. Karen was satisfied with two children, but he wanted more. Karen wrote out a contract that she would have one more child and then have her

tubes tied. Mr. Kahler instead had a vasectomy. His son Sean made his life "complete." He had wanted 6 or 7 children. Three children was a compromise. Still he was happy. He believed he could do more with his son than his daughters.

The next major event was Karen filing domestic battery charges against Mr. Kahler on March 16, 2009. Mr. Kahler stated he had only hugged Karen before he went to a city council meeting. He had just made a presentation when three cops arrested him. The police chief was his friend. He tried to hug Karen several times but she pulled away. He denied that he ever hit her. He was charged with 3rd degree battery. Karen filed a restraining order against him. He received divorce papers while he was in jail.

Karen slept in a separate bedroom after January 28, 2009. Mr. Kahler used a key logger to monitor Karen's emails, phone calls, credit charges and bank accounts. He knew money was missing in February 2009. Karen told him she had filed for divorce on January 28, 2009, but he did not receive any papers until after he was arrested. Karen wanted the car and the house. He believed Karen told him about the divorce at the end of February 2009. Mr. Kahler tried to get Karen to "come to her senses." He couldn't understand as Karen had been a good mother to their children, while he took care of her through work. They had friends. Others were jealous of their relationship. He thought perhaps Karen had a hormonal imbalance and was going through menopause. He talked to Mr. McGarvick about this and wanted to have Karen tested. As he was the highest paid city employee in Columbia, his arrest made the front page of the newspaper. He thought Karen had "lost her mind."

Mr. Kahler noted the Assistant City Manager Tony St. Romain's wife had an affair which devastated him and his family. They were to go to court to decide custody the week after Thanksgiving 2009. Mr. Kahler pleaded guilty to the assault charge and received a year of unsupervised probation.

Mr. Kahler received the prescriptions for Zoloft and Wellbutrin after his arrest.

Karen moved to another house and cleaned out Mr. Kahler's house, a 4300 square foot mansion overlooking a lake. After the separation he missed the 10th, 16th and 18th birthdays of the children. The children came by occasionally. He took Sean fishing. He believed that Karen turned their daughters against him. Lauren told him to "get a whore and get over it."

Karen bought a car that summer from Sunny's parents who lived in New Mexico for their oldest, Emily. Karen used $20,000 of their retirement to send Emily to a college of Pharmacy in St. Louis where the tuition was $32,000 while the University of Missouri was less expensive. Karen handled the checkbook and paid all the bills since they lived in Weatherford. He denied he was tight with their finances. He gave Karen whatever she wanted. He would have let her have the E-trade accounts and access to their other accounts, but his attorney told him not to do this.

Mr. Kahler continued his sessions with Rob McGarvick and his family physician as the City Manager required this. His job ended at the end of the summer. He was still fine at work, but was depressed. The city manager fired him and said it was not working out, even though he had been going to work early and staying late.

Mr. Kahler stated he was "so frustrated" with his employer, landlord, friends and family. He was aware Karen spent the weekend with Sunny in Wichita with the kids present. He wrote narratives for his divorce attorney.

Mr. Kahler left Columbia in September 2009. He spent the next two months at his folks place near Meriden, Kansas. He wanted to help his folks. He didn't want to go to work and give Karen more money before the divorce was finalized on December 24, 2009. He and his dad went Elk hunting in Colorado. He inquired about unemployment about the time he moved back to Kansas.

Karen was afraid he would kidnap Sean, but he said why would he do that to his son. Still Mr. Kahler felt Sean would have been happier out on a hunt where they would live day by day. His life had been "all planned out." Now everything was "up in the air." He did not believe he would ever get another job like the one he had. Despite everything he had done, his arrest was the most prominent.

Mr. Kahler believed Karen's behavior with Sunny should be taken into account and the divorce modified to no fault. Their daughter Lauren, had declared she was bisexual on her Facebook page, meaning she was a Lesbian. Mr. Kahler felt his perfect family was "in shreds." He had worked hard for 25 years and gone to four universities, but now felt it was for nothing. Divorce also went against his Catholic beliefs. He had contacted Karen's family and friends about her affair with Sunny. He had seen people die of cancer and questioned whether God would intervene. He felt both counseling and church were a waste of time.

He had been told while Karen and Sunny were in Texas they had slept together with the kids there. They also spent three days together at the Days Inn in Wichita around Halloween, where Karen's family had welcomed Karen and Sunny. He recalled Karen's parents separated when Karen was in high school when her mom began living with another woman. Now Karen and Sunny were visiting her sister, Lynn Denton, and her husband Tim at their place in Wichita. They also had stayed with Karen's grandmother, Dorothy Wight. He blamed Karen's family for supporting her relationship with Sunny. He believed if Dorothy's husband George had been alive he would not have permitted this. It was noted, however, that George could not prevent his daughter (Karen's mother's) relationship with another woman. All he had wanted and worked to achieve, the "perfect life," was now gone.

Mr. Kahler stated he had organized 3,349 pages of material which his attorney reviewed. He had made an index which he emailed on November 3, 2009. He also sent the material to his friends landlord, and bosses. He focused on Karen and Sunny's lesbian relationship. He knew they had stayed together at the Hawthorn Hotel. He had been putting on a "happy face" after his arrest. He knew Karen had been on Prozac before Sean was born. He didn't like Karen going to counseling with Heide Blackston in February and March 2009 as he believed the counselor contributed to Karen turning against him. He believed their joint counseling session came too late.

Since their separation he had slept with five women, but nothing made it better. None of the relationships were serious. He mentioned a relationship with Mary Ann, describing her as a nice lady who had visited him at his parent's ranch too soon.

Mr. Kahler stated despite his distress he could not recall having any homicidal thoughts. He then modified this stating homicidal thoughts had entered his mind, but he had made no plans.

Although Karen changed passwords about the time he lost his job, he had access to everything on Karen's Facebook account up to that point. He also still had access to his daughter's Facebook accounts after this. He didn't have access to Emily's account, but did have access to Lauren's account, which is how he found out about Halloween. He knew the whole family stayed with Lynn and Tim including Lauren and Sean who also were there. He knew Lynn and Tim were upset with Karen. Tim would not put up with that behavior, but still had Karen and Sunny stay at a hotel in Wichita.

While at his parent's ranch, Mr. Kahler worked on building a barn. He put in hedgeposts, and built a big entry for the ranch. He hunted elk and turkeys. He gathered firewood. He fixed his parents chicken shed. He put in posts to protect his mom's garden. He tried to keep track of Karen's activities on Facebook on his brother's old computer, but it was full of viruses.

Sean spent a week with him at his folks. Sean left on Saturday, November 28, 2009. Earlier in the week they canoed and fished at a pond of a Topeka dentist across from his dad's property. He found out Sunny and her mom came up for Thanksgiving at Lynn and Tim's place. Sean had asked to stay with him longer, but Karen said, "no." He was in the house and overheard their conversation. That Saturday he and Sean had worked on the ranch finishing the entry way.

Sean had to be back before noon. He had hoped to see Sean before he left. His mother, however, took

Sean to see Karen and the girls in Topeka. They were to meet at a hotel on Wannamaker, off I-70. He didn't want to be anywhere near them as it would only remind him of his loss. The previous night he slept okay. He did not think he had lost any weight. He enjoyed the visit with Sean.

Up to that point there was no custody arrangement. He had driven to Columbia twice in connection with his assault charge and to see a child custody mediator. He assumed he could get custody of Sean. He believed he would have to pay $3,530/month; $2,030 for child support and $1500 in alimony.

Karen had filled out a form for financial aid, stating her income was only $12,000/year. Karen had her attorney ask for more money from him and believed they had $300,000 in assets. He believed Karen had stolen between $50,000 and $100,000 from their accounts. He believed Karen had "lost her f'n mind."

Mr. Kahler knew Sean would go to Dorothy's house. He had received his last paycheck. His mother told him that when they met in Topeka that both of his daughters were there. He had seen a text message from Karen stating they were going to Dorothy's house.

Mr. Kahler told his mother he was going to get some concrete. Everything after this is "fuzzy" until he was picked up by the police the next day. The weapon had been purchased when they lived in Greenville, Texas and was a MAC-90. It was kept in his parents' house. He carried a pistol and a couple of knives with him all the time.

Mr. Kahler believed he left intending to get concrete. After this he has "total amnesia." He believed he had a "breakdown". He had everything. He stated, "a man can only take so much." He had intercepted messages

that Karen and Sunny had told others he had choked Karen. Karen told Emily they were getting by, raising three kids on $1,000/month. Emily was going to an expensive college, while Lauren told him "to get a whore and get over it." Sunny, Karen, Emily and Lauren had gone on a canoe trip that summer. He and his father had driven to Wichita to confirm they were at a Day's Inn. They drove in his dad's car so Karen could not describe his car if she saw them. He could not understand, as he had given Karen all she had ever wanted.

When Mr. Kahler talked to police there was no discussion about what had happened the prior week or two. He remembered running through the woods that night. He stated he was "just crazy." He believed he had "hallucinations." He had been having bad dreams about losing his wife and career. He believed his life was over including all he had worked for the last 25 years. He believed Karen had turned the children against him too. He listed all the good things he had done with Sean, but believed he too would eventually turn against him. While Lauren had issues with her grades, Sean was making straight As. He believed "everything was destroyed" and his "career was over." He believed Sean would turn out to be "another messed up kid from a broken family."

Mr. Kahler was aware Sean had made it out of the home. Although he admitted it seemed too grandiose, he stated he was good at what he does. He had outrun 150 officers, dogs, a swat team and a helicopter. He had 27 rounds of ammunition and could have defended himself. When asked if he spared Sean, Mr. Kahler replied, "I could have."

Mr. Kahler believed he could have pleaded guilty to a Class C Misdemeanor in Columbia but his family, life and career were gone.

Mr. Kahler was pleased he came from a good family. His parents stayed together. He was raised in a stable loving home where he was taught to be independent and self-reliant. It all started when he first met Karen at Kansas State. Karen had a full ride Air Force scholarship but quit to marry him. Her figure was a 36-24-36. Karen modeled when they lived in Colorado Springs for TV and magazines. Karen "adored me", "she would do all for me."

Mr. Kahler did not see how he could start over. He had a vasectomy and had lost his career.

After Karen left, he had hired a private investigator. He believed Karen also had an affair with Jennifer Hamel. Karen would take time off on Saturday to go to parks, time that she usually spent with the family.

Mr. Kahler again mentioned that George, Dorothy's husband and would have straightened Karen out if he had been alive, but admitted he could not stop Karen's mother from having a lesbian affair. Karen's dad had been an alcoholic. Karen had looked at an Adult Children of Alcoholic's website. Pat lived with her partner in Branson. They came to Columbia for medical care and did not even look Karen up. He noted Sunny was an alcoholic, while Sunny's mother had a history of drug abuse and took lidocaine, blood pressure medicine and pills.

Concerning his own history, Mr. Kahler was born on January 15, 1963 in Topeka, Kansas and is 48 years old. He remained in Topeka through kindergarten. His family moved to Meriden when he was in first grade. His dad, Wayne, had been a meat cutter at Falley's,

but retired. Wayne was very frugal. He is now 69 years old. His mother is Pat. His brother Kris is two years younger. Mr. Kahler continued to live in Meriden until he graduated from high school in 1981. He attended Junior High in Osakie. For brief periods of time they lived in Jackson County in Mayetta and Potawatomie. He attended Jefferson West High School. They raised cows, calves and row crops on someone else's farm. He was kicked a few times helping his dad brand cattle. His dad had one knee replaced and has had two kidney stones. Pat is in excellent health. Her mother lived to age 99, and lived in her own house and drove until age 98.

Mr. Kahler reported he has a good relationship with his brother, Kris, who visited him this week. Kris is married to Carol. Kris has two children by a previous marriage named Denton and Karce. He married his first wife Michelle in a "shot gun wedding." Denton is in their wedding pictures. Kris and Carol also have two children named Heather, age 2 to 3 months and Carson, age 3 or 4.

Mr. Kahler has made a will. His folks are his Executor and Guardian. He is upset with Karen's family in Wichita. He doesn't want her family to receive anything from his estate as they are "white trash."

Mr. Kahler played sports in junior high, and half a year as a senior. In high school he was more interested in car mechanics and worked on his 1969 pickup and 1967 Monterrey.

Mr. Kahler attended Kansas State from 1981 to 1985. He met Karen in 1983 or 1984 at his brother's dorm. Kris didn't do well in college. Mr. Kahler was good in math and science. He focused on graduating and making money as he was tired of being poor. He

majored in Electrical Engineering. He graduated with honors and had a 3.6 GPA. He played intermural sports and joined a fraternity his junior year. He graduated in December 1985. He and Karen married on December 28, 1985 in Burlingame. She bought their wedding rings.

Mr. Kahler's first job was in Colorado at a nuclear power plant. They next lived in Lee's Summit for a year. They next were in Colorado Springs for five years. Emily was born on April 8, 1991. Karen had a long labor, over 24 hours. She had an epidural but didn't do well, but Sean's birth was a "piece of cake." In Colorado he worked 10 hours a day and had three day weekends. He completed an MBA at the University of Colorado and canoed and fished. They lived there from 1987 to 1992.

They next lived in Greenville, Texas from 1992 to 1998. He had to build up the department from the ground up. Lauren was born there in May 1993.

They next went to Duncan, Oklahoma where Mr. Kahler was the Electric Utilities Director. They lived there in 1998 and 1999. Sean was born on 3/25/99. Karen wrote the contract herself. He was happy to have another child.

They next lived in Weatherford, Texas where he was the head of all the utilities. They had a new two story house in a nice neighborhood of young couples with a big rec room. He played basketball every night. Karen worked little jobs. In college Karen was in engineering, but it was hard for her. They would visit his parents on the weekends and in the summer.

In college one girl caused difficulties named Janet. She went to Kansas State but was a loose woman who had too much freedom.

Mr. Kahler denied any illicit drug use. He did not drink alcohol except homemade wine with his dad. They would get "buzzed," but they were never intoxicated.

Mr. Kahler described himself as a dedicated husband, father and provider. After his arrest in Columbia he felt guilty. He did not know his neighbors there, who were older people with grandchildren. When he was fired by the city manager, he was caught off guard and didn't know why. He was given no concrete reason. He attributed his termination to politics. He thought he could have been sabotaged by friends of his wife such as Terry St. Romain and Bill Watkins. Mr. Watkins, who recently retired, seemed to be supportive and told him to let him know if he needed a letter. His attorney talked to Mr. Watkins this week.

Mr. Kahler blames everything on Karen. He believes something happened to her. He noted Karen objected when he gave his mom rubies. He took all the jewelry he made for Karen out of the house when she left. He believed someone on the city council was against him. He mentioned Tracy Wilson-Kleecamp.

Mr. Kahler believes his perfect family, career and kids was ended by Karen "messing around." He felt his life was over. He felt like a failure and thought of killing himself. He tried everything to save the situation that he could have done. He recalled Karen took a picture that had hung in his office for seven years. Karen had hired someone to paint it.

Mr. Kahler recently has mentioned to his family that he would like to have more of a role in raising his son. They responded that they don't like the way he handles things. Mr. Kahler wryly responded, "at least I get results."

Diagnostic Discussion by Dr. Peterson:

In Dr. Peterson's preliminary draft report he has not provided any background information from his interviews of Mr. Kahler yet.

Testing included the Shipley Institute of Living Scale with an estimated WAIS-R IQ of 110, which Dr. Peterson notes is a likely reduction due to a major depression and possibly his antidepressant medication. On a diagnostic instrument, the Personality Assessment Inventory, Mr. Kahler was defensive but endorsed items indicating depression and a disturbing traumatic event. Mr. Kahler's responses also indicated increased interpersonal sensitivity and considerable variations in his self-esteem. The diagnosis on this instrument was a Major Depressive Disorder, Single episode and a dysthymic disorder. Personality features included elements of borderline personality, narcissism and paranoia. It was noted his suicide potential was high.

On a second diagnostic instrument, the Minnesota Multiphasic Personality Inventory-2, Mr. Kahler's responses indicated psychological maladjustment with suspiciousness, a high reliance on repression/ projection, a vulnerable self-concept and a rigid present adjustment. He believed he was unjustly blamed for the problems of others and deserved to be "funded" "for the wrong she committed." The MMPI-2 suggested a diagnosis of Somatoform Disorder in someone with a histrionic or paranoid personality. It was noted his responses indicated "deep chronic feelings of hostility toward family members" and that angry outbursts are to be expected.

From the history reviewed, Dr. Peterson also believed Mr. Kahler's behavior was consistent with an Obsessive-Compulsive Personality Disorder.

Stressors identified by Dr. Peterson included being told "no" by Karen both in their marriage and sexual relationship; the termination of his employment; his resentment of Karen's relationship with Sunny; and his negative assessment of his daughters.

Dr. Peterson noted the severity of Mr. Kahler's harsh, unforgiving and unmitigating attitude as evidence of the severity of his depression and obsessive compulsive, narcissistic personality deterioration. These diagnoses are elaborated in Dr. Peterson's mental status examination and preliminary diagnostic formulation.

Dr. Peterson notes the stressors of receiving his last paycheck, and Sean's return to a "gay" household precipitated an irrational rage, not uncommon during major depression and divorce. Dr. Peterson further opines interpersonal disorganization at the time of the shooting is manifested by Mr. Kahler's "extraordinarily poor marksmanship" shown in the autopsy reports. That he spared his son while killing his daughters indicates some decision making, but also a "deep pathological attachment." Dr. Peterson noted the quadruple homicide itself indicates the severity of Mr. Kahler's depression.

Dr. Peterson also noted the presence of post-traumatic stress disorder with no recall or vague recall, which likely occurred after the homicides. Dr. Peterson notes Mr. Kahler's lack of recall is inconsistent with Mr. Kahler's personality, as well as Mr. Kahler's rational functioning up to the time he left to get supplies and his rational approach to the arresting deputy.

Dr. Peterson concludes that Mr. Kahler had a mental disease or defect that resulted in Diminished Capacity or extreme emotional disturbance at the time of the offense, resulting from a major depressive disorder and the decompensation of his obsessive-compulsive and narcissistic personality disorder. Mr. Kahler's ultimate disorganization resulted from his son's departure, his last paycheck, his failure to end the relationship between Karen and Sunny, and his daughter's budding homosexual behavior that fractured his "perfect family."

Discussion and Opinion:

Mr. Kahler undoubtedly has an obsessive-compulsive adjustment and a high narcissistic need to view himself as perfect, as evidenced by his perfect career, material attachments, perfect wife and children. The series of events, including his wife's relationship with Sunny, her filing for divorce; financial decisions of which he did not approve, his arrest; humiliation and the termination of his job; and in his view career; were overwhelmingly stressful and were aggravated by his daughters estrangement, his inability to control or rectify the situation, and his growing pessimism about continuing a relationship with his son despite their week together.

Undoubtedly Mr. Kahler was depressed and was suffering from a Major Depressive Disorder of moderate severity that affected his reasoning in the sense it made him pessimistic about his future. This combined with his inability to see any fault in himself and his focusing his hatred and blame on Karen, and by extention of his daughters and his wife's family for supporting her, also contributed to the quadruple homicides on 11/28/2009.

Thus said, mental disorders alone do not equal insanity or a lack of ability to form intent. To the contrary, Mr. Kahler engaged in Compulsive monitoring of his wife and family for months with ever increasing anger and rage, and at times inappropriate behavior such as when he sent numerous emails concerning Karen's behavior to others inappropriately shortly before losing his job.

Still, Mr. Kahler was able to engage in purposeful behavior. He elicited not to seek employment so he would not provide more money to his wife in the divorce settlement. He planned to seek custody of his son. He engaged in numerous projects at his parents' ranch, which he did competently.

There was no disorganization or decompensation evident in Mr. Kahler's behavior on the afternoon of the homicides. He knew exactly where his family would be. His vehicle was seen prior to the homicide. He brought a weapon. He spared the member of the family in whom he was most invested, and in his view had the least blame. He blamed Karen for the destruction of his life; his daughters for siding with her; and her grandmother for supporting her.

Mr. Kahler's behavior is consistent with a clear motive of revenge. His behavior was far from disorganized. He tracked down all four family members, shooting each one twice. He fled the scene and successfully eluded law enforcement until the next day. No behavioral disorganization is evident in his behavior either before, during or after the homicides. Despite claiming no memory, Mr. Kahler continues to be proud of his ability to elude the police, and that he is a man who gets results/retribution for perceived wrongs against him.

It is my opinion that despite suffering from a major depressive disorder that Mr. Kahler retained the ability to form intent at the time he shot and killed his estranged wife Karen, daughters Emily and Lauren, and Karen's grandmother, Mrs. Wight in the late afternoon/early evening of November 28, 2009. While Mr. Kahler surely was and continues to fell aggrieved by his life's turn of events, the quadruple homicide in and of itself is not evidence of a lack of intent or diminished capacity to form intent.

Mr. Kahler continues to see himself as the victim, and that he was driven to commit the homicides. In his view, the homicides have justification because of the wrongs done to him.

Sincerely,

/s/ William S. Logan, MD
William S. Logan, MD
Diplomate, American Board of Psychiatry and Neurology 1982
Diplomate, American Board of Forensic Psychiatry 1987
Subspecialty in Forensic Psychiatry by the American Board of Psychiatry and Neurology 1994 and 2003

WSL/sg

IN THE DISTRICT COURT OF
OSAGE COUNTY, KANSAS
FOURTH JUDICIAL DISTRICT
(CRIMINAL DIVISION)

Case No. 09-CR-270

STATE OF KANSAS,

Plaintiff,

vs.

JAMES KRAIG KAHLER,

Defendant.

DEFENDANT'S PROPOSED CAPITAL PUNISHMENT SENTENCING INSTRUCTIONS

COMES NOW the defendant, James Kraig Kahler, by and through Thomas D. Haney and Amanda S. Vogelsberg of Henson, Hutton, Mudrick & Gragson, L.L.P., and respectfully submits the following proposed instructions for sentencing phase of the trial in the above-captioned matter.

Respectfully submitted,

/s/ Thomas D. Haney
Thomas D. Haney, #7685
Amanda S. Vogelsberg, #23360
HENSON, HUTTON, MUDRICK & GRAGSON L.L.P.
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(785) 232-3344 (facsimile)
Attorneys for James Kraig Kahler

CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing document was sent, via facsimile and by U.S. Mail, on this 26th day of August, 2011, to:

Amy Hanley
Office of the Kansas Attorney General
120 SW 10th Avenue, 2nd Floor
Topeka, KS 66612-1597
785-291-3875 (facsimile)

Brandon Jones
Osage County Attorney
717 Topeka Avenue
P.O. Box 254
Lyndon, KS 66451-0254
785-828-3150 (facsimile)

and a Chamber's copy to:

The Honorable Phillip M. Fromme, Chief Judge
c/o Osage County District Court
P.O. Box 549
Lyndon, KS 66451
785-828-4704 (Lyndon facsimile)
620-364-8535 (Burlington facsimile)

/s/ Thomas D. Haney
Thomas D. Haney

- PIK3d 56.00-B
- PIK3d 56.00-C as modified by adding to A, "but which are above and beyond the elements of the crime itself" and striking from paragraph I "or created a great risk of death to" and providing the defendant's definition of heinous, atrocious and cruel.
- PIK3d 56.00-D as modified to clearly state the correct burdens of proof and mitigating circumstances.
- PIK3d 56.00-E
- PIK3d 50.00-F to add "solely" in the third line between "determined" and "by".
- PIK3d 56.00-G. Strike "shall" from third line and adding unanimity of jurors is not required as to any mitigating circumstance.
- Instruction No. ___ Mitigating Evidence is not offered . . .

INSTRUCTION NO.

Mitigating evidence is not evidence offered as an excuse for the crimes of which Mr. Kahler has been found guilty. Rather, it is any evidence, which in fairness and mercy, may serve as a basis for a sentence other than death.

A mitigating circumstance is that which in fairness or mercy may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, although it does not justify or excuse the offense. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case.

The appropriateness of the exercise of mercy can itself be a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty should be imposed.

The defendant contends that mitigating circumstances include, but are not limited to, the following:

1. The defendant has no Significant history of prior criminal activity.

and/or

2. The crime was committed while the defendant was under the influence of extreme mental or emotional disturbance.

and/or

3. The defendant acted under extreme distress

and/or

4. The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.

and/or

5. A term of imprisonment is sufficient to defend and protect the people's safety from the defendant.

and/or

6. The defendant had the opportunity to inflict harm on several witnesses and law enforcement officers, and did not do so.

and/or

7. The defendant did not rape or commit other acts of violence against the victims.

and/or

8. The defendant, on November 28, 2009 suffered from serious mental illness impairing his ability to think and control his actions.

and/or

9. If the defendant is sentenced to death, the defendant's son will not have an opportunity to contact his father at his own will at some time in the future.

and/or

10. If the defendant is sentenced to death, the defendant's retirement of approximately $3,500.00 per month from the City of Weatherford will cease. The retirement is assigned to the benefit of Sean Kahler, and to be used on Sean Kahler's education and is not available to the defendant.

and/or

11. For the majority of defendant's life, he positively contributed to and volunteered in the communities in which he resided.

and/or

12. A life sentence is a harsher penalty for this particular defendant given his suicidal tendencies and ideation, and his preference for the outdoors.

You may consider as mitigating any circumstance which tends to justify the penalty of life in prison. You must consider all evidence of mitigation. Mitigation may be established by any evidence introduced by either party. You May not refuse to consider any evidence in mitigation. The law requires you to consider all mitigating evidence. Therefore you are not permitted to refuse to consider such evidence.

Mitigating circumstances need to be proved only to the satisfaction of the individual juror in the juror's sentencing decision and not beyond a reasonable doubt but only by a preponderance (or greater weight) of the evidence and mitigating circumstances do not need to be found by all members of the jury in order to be considered in an individual juror's sentencing decision.

INSTRUCTION NO. 1

It is my duty to instruct you in the law that applies to this case, and it is your duty to consider and follow all of the instructions. You must decide the case by applying these instructions to the facts as you find them.

PIK 3d 51.02

INSTRUCTION 2

In your fact finding you should consider and weigh everything admitted into evidence. This includes testimony of witnesses, admissions or stipulations of the parties, and any admitted exhibits. You must disregard any testimony or exhibit which I did not admit into evidence.

PIK 3d 51.04

INSTRUCTION 3

A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference of guilt from the fact that the defendant did not testify, and you must not consider this fact in arriving at your verdict.

PIK 3d 52.13

INSTRUCTION NO. 4

At times during the trial, I have ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done.

PIK 3d 51.05

INSTRUCTION NO. 5

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded.

PIK 3d 51.06

INSTRUCTION NO. 6

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.

PIK 3d 52.09

INSTRUCTION NO. 7

During this trial, evidence was presented by the playing of video recordings of testimony of the following witnesses taken under oath at another time: Brittin McMahon and William Halvorsen. Such testimony is to be weighed by the same standards as other testimony.

PIK 3d 52.12 (modified)

INSTRUCTION NO. 8

Admitted into evidence are various audio and video recordings. Some of these recordings have been edited to redact small portions consistent with the rules of evidence. This has been done after consulting the attorneys and with the approval of the Court. You must not concern yourselves with the fact that certain portions of the recordings have been redacted, nor should you draw any inferences either for or against the defendant or the State because of this.

INSTRUCTION NO. 9

Your only concern, at this time, is determining if the defendant is guilty or not guilty. The disposition of the case thereafter is not to be considered in arriving at your verdict.

PIK 3d 51.10-A

INSTRUCTION NO. 10

The defendant is charged with one count of capital murder for the combined deaths of Karen Kahler, Emily Kahler, Lauren Kahler, and Dorothy Wight (as set forth in Instruction 11 below) and four counts of murder in the first degree for the individual deaths of Karen Kahler, Emily Kahler, Lauren Kahler, and Dorothy Wight (as set forth in Instructions 14, 16, 18, and 20 below). You should consider and reach a verdict for the capital murder charge and each first degree murder charge.

INSTRUCTION NO. 11

The defendant is charged with the crime of capital murder. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally killed Karen Kahler;
2. That the killing of Karen Kahler was done with premeditation;
3. That the defendant intentionally killed Emily Kahler;
4. That the killing of Emily Kahler was done with premeditation;
5. That the defendant intentionally killed Lauren Kahler;
6. That the killing of Lauren Kahler was done with premeditation;
7. That the defendant intentionally killed Dorothy Wight;
8. That the killing of Dorothy Wight was done with premeditation;
9. That the killings of Karen Kahler, Emily Kahler, Lauren Kahler, and Dorothy Wight were part of the same act or transaction, or two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct; and
10. That all of these acts occurred on or about the 28th day of November, 2009 in Osage County, Kansas.

PIK 3d 56.00-A

INSTRUCTION NO. 12

The State has the burden to prove the defendant is guilty. The defendant is not required to prove he is not guilty. You must presume that he is not guilty unless you are convinced from the evidence that he is guilty.

The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find the defendant not guilty. If you have no reasonable doubt as to the truth of each of the claims required to be proved by the State, you should find the defendant guilty.

PIK 3d 52.02

INSTRUCTION NO. 13

The offense of murder in the first degree with which the defendant is charged for the individual deaths of Karen Kahler, Emily Kahler, Lauren Kahler, and Dorothy Wight includes the lesser included offense of murder in the second degree.

Regarding the individual deaths of Karen Kahler, Emily Kahler, Lauren Kahler, and Dorothy Wight, you may find the defendant guilty of murder in the first degree, murder in the second degree, or not guilty.

When there is a reasonable doubt as to which of two offenses defendant is guilty, he may be convicted of the lesser offense only.

Your presiding juror should mark the appropriate verdict.

PIK 3d 68.09

INSTRUCTION NO. 14

The defendant is charged with the crime of murder in the first degree for the death of Karen Kahler. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally killed Karen Kahler;
2. That such killing was done with premeditation; and
3. That this act occurred on or about the 28th day of November, 2009 in Osage County, Kansas.

PIK 3d 56.01

INSTRUCTION NO. 15

If you do not agree that the defendant is guilty of murder in the first degree for the death of Karen Kahler, you should then consider the lesser included offense of murder in the second degree.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally killed Karen Kahler; and
2. That this act occurred on or about the 28th day of November, 2009 in Osage County, Kansas.

PIK 3d 56.01

INSTRUCTION NO. 16

The defendant is charged with the crime of murder in the first degree for the death of Emily Kahler. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally killed Emily Kahler;
2. That such killing was done with premeditation; and
3. That this act occurred on or about the 28th day of November, 2009 in Osage County, Kansas.

PIK 3d 56.01

INSTRUCTION NO. 17

If you do not agree that the defendant is guilty of murder in the first degree for the death of Emily Kahler, you should then consider the lesser included offense of murder in the second degree.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally killed Emily Kahler; and
2. That this act occurred on or about the 28th day of November, 2009 in Osage County, Kansas.

PIK 3d 56.01

INSTRUCTION NO. 18

The defendant is charged with the crime of murder in the first degree for the death of Lauren Kahler. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally killed Lauren Kahler;
2. That such killing was done with premeditation; and
3. That this act occurred on or about the 28th day of November, 2009 in Osage County, Kansas.

PIK 3d 56.01

INSTRUCTION NO. 19

If you do not agree that the defendant is guilty of murder in the first degree for the death of Lauren Kahler, you should then consider the lesser included offense of murder in the second degree.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally killed Lauren Kahler; and
2. That this act occurred on or about the 28th day of November, 2009 in Osage County, Kansas.

PIK 3d 56.01

INSTRUCTION NO. 20

The defendant is charged with the crime of murder in the first degree for the death of Dorothy Wight. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved;

1. That the defendant intentionally killed Dorothy Wight;
2. That such killing was done with premeditation; and
3. That this act occurred on or about the 28th day of November, 2009 in Osage County, Kansas.

PIK 3d 56.01

INSTRUCTION NO. 21

If you do not agree that the defendant is guilty of murder in the first degree for the death of Dorothy Wight, you should then consider the lesser included offense of murder in the second degree.

To establish this charge, each of the following claims must be proved:

1. That the defendant intentionally killed Dorothy Wight; and
2. That this act occurred on or about the 28th day of November, 2009 in Osage County, Kansas.

PIK 3d 56.01

INSTRUCTION NO. 22

The defendant is charged with the crime of aggravated burglary. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant knowingly entered a dwelling at 905 S. Topeka Avenue, Burlingame, Kansas;
2. That the defendant did so without authority;
3. That the defendant did so with the intent to commit capital murder, a felony, therein;
4. That at the time there was a human being in the dwelling; and
5. That this act occurred on or about the 28th day of November, 2009, in Osage County, Kansas.

The elements of capital murder are set forth in Instruction No. 11.

PIK 3d 59.18

INSTRUCTION NO. 23

As used in these instructions:

Intentionally means conduct that is purposeful and willful and not accidental. Intentional includes the terms "knowing," "willful," "purposeful" and "on purpose."

PIK 3d 56.04(d)

INSTRUCTION NO. 24

Premeditation means to have thought the matter over beforehand, in other words, to have formed the design or intent to kill before the act. Although there is no specific time period required for premeditation, the concept of premeditation requires more than the instantaneous, intentional act of taking another's life.

PIK 3d 56.04(b)

INSTRUCTION NO. 25

Evidence has been presented that the defendant was afflicted by mental disease or defect at the time of the alleged crime. Such evidence is to be considered only in determining whether the defendant had the state of mind required to commit the crimes.

When considering capital murder, you are instructed the defendant is not criminally responsible for his acts if, because of mental disease or defect, the defendant lacked premeditation and/or the intent to kill.

When considering murder in the first degree, you are instructed the defendant is not criminally responsible for his acts if, because of mental disease or defect, the defendant lacked premeditation and/or the intent to kill.

When considering murder in the second degree, you are instructed the defendant is not criminally responsible for his acts if, because of mental disease or defect, the defendant lacked the intent to kill.

When considering aggravated burglary, you are instructed the defendant is not criminally responsible for his acts if, because of mental disease or defect, the defendant lacked the intent to commit capital murder.

PIK 3d 54.10

INSTRUCTION NO. 26

If you find the defendant not guilty solely because the defendant, at the time of the alleged crimes, was suffering from a mental disease or defect which rendered the defendant incapable of possessing the required criminal intent, then the defendant is committed to the State Security Hospital for safe-keeping and treatment until discharged according to law.

PIK 3d 54.10-A

INSTRUCTION NO. 27

Each crime charged against the defendant is a separate and distinct offense. You must decide each charge separately on the evidence and law applicable to it, uninfluenced by your decision as to any other charge. The defendant may be convicted or acquitted on any or all of the offenses charged. Your finding as to each crime charged must be stated in a verdict form signed by the Presiding Juror.

PIK 3d 68.07

INSTRUCTION NO. 28

When you retire to the jury room you will first select one of your members as presiding juror. The person selected will preside over your deliberations, will speak for the jury in Court, and will sign the verdicts upon which you agree.

Your verdicts must be founded entirely upon the evidence admitted and the law as given in these instructions.

Your agreement upon the verdicts must be unanimous.

/s/ [Illegible]
District Judge

August 25, 2011

PIK 68.01

IN THE DISTRICT COURT OF OSAGE COUNTY,
KANSAS FOURTH JUDICIAL DISTRICT

Case No. 09 CR 270

STATE OF KANSAS,

Plaintiff,

v.

JAMES KRAIG KAHLER,

Defendant.

VERDICT:

Capital Murder:

We, the jury, find the defendant James Kraig Kahler, guilty of Capital Murder.

/s/ [Illegible]
Presiding Juror

We, the jury, find the defendant James Kraig Kahler, not guilty of Capital Murder.

Presiding Juror

If your verdict was not guilty, answer the following special question:

Do you find the defendant was not guilty solely because the defendant, at the time of the alleged crime, was suffering from a mental disease or defect which rendered the defendant incapable of possessing the required criminal intent?

Yes ☐ No ☐

Presiding Juror

Dated August 25, 2011

IN THE DISTRICT COURT OF OSAGE COUNTY,
KANSAS FOURTH JUDICIAL DISTRICT

Case No. 09 CR 270

STATE OF KANSAS,

Plaintiff,

v.

JAMES KRAIG KAHLER,

Defendant.

VERDICT:

Murder in the First Degree - Karen Kahler:

We, the jury, find the defendant James Kraig Kahler, guilty of Murder in the First Degree - Karen Kahler.

/s/ [Illegible]
Presiding Juror

We, the jury, find the defendant James Kraig Kahler, guilty of Murder in the Second Degree - Karen Kahler.

_____
Presiding Juror

We, the jury, find the defendant James Kraig Kahler, not guilty.

_____
Presiding Juror

If your verdict was not guilty, answer the following special question:

Do you find the defendant was not guilty solely because the defendant, at the time of the alleged crime, was suffering from a mental disease or defect which rendered the defendant incapable of possessing the required criminal intent?

Yes ☐ No ☐

_____

Presiding Juror

Dated August 25, 2011

IN THE DISTRICT COURT OF OSAGE COUNTY,
KANSAS FOURTH JUDICIAL DISTRICT

Case No. 09 CR 270

STATE OF KANSAS,

Plaintiff,

v.

JAMES KRAIG KAHLER,

Defendant.

VERDICT:

Murder in the First Degree – Emily Kahler:

We, the jury, find the defendant James Kraig Kahler, guilty of Murder in the First Degree – Emily Kahler.

/s/ [Illegible]
Presiding Juror

We, the jury, find the defendant James Kraig Kahler, guilty of Murder in the Second Degree – Emily Kahler.

_____
Presiding Juror

We, the jury, find the defendant James Kraig Kahler, not guilty.

_____
Presiding Juror

If your verdict was not guilty, answer the following special question:

Do you find the defendant was not guilty solely because the defendant, at the time of the alleged crime, was suffering from a mental disease or defect which rendered the defendant incapable of possessing the required criminal intent?

Yes ☐ No ☐

_____

Presiding Juror

Dated August 25, 2011

IN THE DISTRICT COURT OF OSAGE COUNTY,
KANSAS FOURTH JUDICIAL DISTRICT

Case No. 09 CR 270

STATE OF KANSAS,

Plaintiff,

v.

JAMES KRAIG KAHLER,

Defendant.

VERDICT:

Murder in the First Degree – Lauren Kahler:

We, the jury, find the defendant James Kraig Kahler, guilty of Murder in the First Degree – Lauren Kahler.

/s/ [Illegible]
Presiding Juror

We, the jury, find the defendant James Kraig Kahler, guilty of Murder in the Second Degree – Lauren Kahler.

Presiding Juror

We, the jury, find the defendant James Kraig Kahler, not guilty.

Presiding Juror

If your verdict was not guilty, answer the following special question:

Do you find the defendant was not guilty solely because the defendant, at the time of the alleged crime, was suffering from a mental disease or defect which rendered the defendant incapable of possessing the required criminal intent?

Yes ☐ No ☐

_____

Presiding Juror

Dated August 25, 2011

IN THE DISTRICT COURT OF OSAGE COUNTY,
KANSAS FOURTH JUDICIAL DISTRICT

Case No. 09 CR 270

STATE OF KANSAS,

Plaintiff,

v.

JAMES KRAIG KAHLER,

Defendant.

VERDICT:

Murder in the First Degree – Dorothy Wight:

We, the jury, find the defendant James Kraig Kahler, guilty of Murder in the First Degree – Dorothy Wight.

/s/ [Illegible]
Presiding Juror

We, the jury, find the defendant James Kraig Kahler, guilty of Murder in the Second Degree – Dorothy Wight.

_____
Presiding Juror

We, the jury, find the defendant James Kraig Kahler, not guilty.

_____
Presiding Juror

If your verdict was not guilty, answer the following special question:

Do you find the defendant was not guilty solely because the defendant, at the time of the alleged crime, was suffering from a mental disease or defect which rendered the defendant incapable of possessing the required criminal intent?

Yes ☐ No ☐

_____

Presiding Juror

Dated August 25, 2011

IN THE DISTRICT COURT OF OSAGE COUNTY,
KANSAS FOURTH JUDICIAL DISTRICT

Case No. 09 CR 270

STATE OF KANSAS,
Plaintiff,

v.

JAMES KRAIG KAHLER,
Defendant.

VERDICT:

Aggravated Burglary:

We, the jury, find the defendant James Kraig Kahler, guilty of Aggravated Burglary.

/s/ [Illegible]
Presiding Juror

We, the jury, find the defendant James Kraig Kahler, not guilty of Aggravated Burglary.

Presiding Juror

If your verdict was not guilty, answer the following special question:

Do you find the defendant was not guilty solely because the defendant, at the time of the alleged crime, was suffering from a mental disease or defect which rendered the defendant incapable of possessing the required criminal intent?

Yes ☐ No ☐

Presiding Juror

Dated August 25, 2011

INSTRUCTION NO. 1

The laws of Kansas provide that when a defendant has been found guilty of capital murder, a separate sentencing proceeding shall be conducted to determine whether the defendant shall be sentenced to death. At the hearing, the trial jury shall consider aggravating or mitigating circumstances relevant to the question of the sentence.

It is my duty to instruct you in the law that applies to this sentencing proceeding, and it is your duty to consider and follow all of the instructions. You must decide the question of the sentence by applying these instructions to the facts as you find them.

PIK 3d 56.00-B

INSTRUCTION NO. 2

In your determination of sentence you should consider and weigh everything admitted into evidence from the guilt phase or penalty phase of this trial that bears on an aggravating or mitigating circumstance. This includes testimony of witnesses, admissions or stipulations of the parties, and any admitted exhibits. You must disregard any testimony or exhibit which I did not admit into evidence.

INSTRUCTION NO. 3

Aggravating circumstances are those that increase the enormity of the crime of capital murder or add to its injurious consequences.

The State of Kansas contends that the following aggravating circumstances are shown from the evidence:

1. That the defendant knowingly or purposely killed or created a great risk of death to more than one person.

   and/or

2. That the defendant committed the crime of capital murder in an especially heinous, atrocious or cruel manner. As used in this instruction, the following definitions apply:

   - "heinous" means extremely wicked or shockingly evil;
   - "atrocious" means outrageously wicked and vile; and
   - "cruel" means pitiless or designed to inflict a high degree of pain, utter indifference to, or enjoyment of the sufferings of others.

   In order to find that the crime of capital murder is committed in an especially heinous, atrocious, or cruel manner, the jury must find that the perpetrator inflicted serious mental anguish or serious physical abuse before the victim's death. Mental anguish includes a victims' uncertainty as to her ultimate fate

In your determination of sentence, you may consider only those aggravating circumstances set forth in this instruction.

PIK 3d 56.00-C

INSTRUCTION NO. 4

Mitigating circumstances are those that in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or that justify a sentence of less than death, even though they do not justify or excuse the offense.

The appropriateness of exercising mercy can itself be a mitigating circumstance in determining whether the State has proved beyond a reasonable doubt that the death penalty should be imposed.

The determination of what are mitigating circumstances is for you as individual jurors to decide under the facts and circumstances of the case. Mitigating circumstances need not be proved beyond a reasonable doubt, and need only be proved to the satisfaction of the individual juror in that juror's sentencing decision. The same mitigating circumstances do not need to be found by all members of the jury in order to be considered by an individual juror in arriving at his or her sentencing decision.

The defendant contends that mitigating circumstances include, but are not limited to, the following:

1. The defendant has no significant history of prior criminal activity.

and/or

2. The crime was committed while the defendant was under the influence of extreme mental or emotional disturbance.

and/or

3. The defendant acted under extreme distress.

and/or

4. The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.

and/or

5. A term of imprisonment is sufficient to defend and protect the people's safety from the defendant.

and/or

6. The defendant had the opportunity to inflict harm on several witnesses and law enforcement officers, and did not do so.

and/or

7. The defendant did not rape or commit other acts of violence against the victims.

and/or

8. The defendant, on November 28, 2009 suffered from serious mental illness impairing his ability to think and control his actions.

and/or

9. If the defendant is sentenced to death, the defendant's son will not have an opportunity to contact his father at his own will at some time in the future.

and/or

10. If the defendant is sentenced to death, the defendant's retirement of approximately $2,100.00 net per month from the City of Weatherford will cease. The retirement is assigned to the benefit of Sean Kahler, and to

be used on Sean Kahler's education and is not available to the defendant.

and/or

11. For the majority of defendant's life, he positively contributed to and volunteered in the communities in which he resided.

and/or

12. A life sentence is a harsher penalty for this particular defendant given his suicidal tendencies and ideation, and his preference for the outdoors.

You may further consider as a mitigating circumstance any other aspect of the defendant's character, background, or record, and any other aspect of the offense that was presented in either the guilt or penalty phase which you find may serve as a basis for imposing a sentence less than death.

Each of you must consider every mitigating circumstance found to exist.

PIK 3d 56.00-D

INSTRUCTION NO. 5

The State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances found to exist.

PIK 3d 56.00-E

INSTRUCTION NO. 6

In making the determination whether aggravating circumstances exist that are not outweighed by any mitigating circumstances found to exist, your decision should not be determined by the number of aggravating or mitigating circumstances that are shown to exist.

PIK 3d 56.00-F

INSTRUCTION NO. 7

If you find unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances found to exist, then you shall impose a sentence of death. If you sentence the defendant to death, you must designate upon the appropriate verdict form with particularity the aggravating circumstances that you unanimously found beyond a reasonable doubt.

However, if one or more jurors are not persuaded beyond a reasonable doubt that aggravating circumstances are not outweighed by mitigating circumstances, then you should sign the appropriate alternative verdict form indicating the jury is unable to reach a unanimous verdict sentencing the defendant to death. In that event, the defendant will not be sentenced to death but will be sentenced by the court to imprisonment for life with no possibility of parole.

PIK 3d 56.00-6

INSTRUCTION NO. 8

The defendant is entitled to the individual opinion of each juror. Each of you must consider the evidence for the purpose of reaching a verdict. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors. Do not decide any question in a particular way simply because the majority of jurors, or any of them, favor such a decision.

INSTRUCTION NO. 9

At the conclusion of your deliberations, you shall sign the appropriate verdict form.

You have been provided two verdict forms that provide the following alternative verdicts:

A. Finding unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances found to exist, and sentencing the defendant to death;

OR

B. Stating that the jury is unable to reach a unanimous verdict sentencing the defendant to death.

PIK 3d 56.00-H

INSTRUCTION NO. 10

Your presiding juror will continue to preside over your deliberations in this proceeding. He or she will speak for the jury in Court and will sign the verdict upon which you agree.

Your verdict must be founded entirely upon the evidence presented and the law as given to you in these instructions.

Your agreement upon a verdict sentencing the defendant to death must be unanimous.

/s/ [Illegible]
DISTRICT JUDGE

Dated 8-29-11

PIK 3d 68.01-A

IN THE DISTRICT COURT OF OSAGE COUNTY,
KANSAS FOURTH JUDICIAL DISTRICT

Case No. 09 CR 270

STATE OF KANSAS,

Plaintiff,

v.

JAMES KRAIG KAHLER,

Defendant.

VERDICT:

We, the jury, impaneled and sworn, do upon our oath, or affirmation, unanimously find beyond a reasonable doubt that the following aggravating circumstances have been established by the evidence and are not outweighed by any mitigating circumstances found to exist. [The Presiding Juror shall place an X in the box in front of such aggravating circumstance(s).]

☒ That the defendant knowingly or purposely killed or created a great risk of death to more than one person.

☒ That the defendant committed the crime in an especially heinous, atrocious or cruel manner.

and so, therefore, unanimously sentence the defendant to death.

/s/ [Illegible]
Presiding Juror

Date of this Verdict, 8-29-11.

IN THE DISTRICT COURT OF OSAGE COUNTY,
KANSAS FOURTH JUDICIAL DISTRICT

Case No. 09 CR 270

STATE OF KANSAS,

Plaintiff,

v.

JAMES KRAIG KAHLER,

Defendant.

VERDICT:

We, the jury, impaneled and sworn, do upon our oath or affirmation, state that we are unable to reach a unanimous verdict sentencing the defendant to death.

_____
Presiding Juror

Date of this Verdict _____.

IN THE SUPREME COURT
OF THE STATE OF KANSAS

No. 106,981

STATE OF KANSAS,

Appellee,

v.

JAMES K. KAHLER,

Appellant.

SYLLABUS BY THE COURT

1.

Under the first step of the two-part test for prosecutorial error set forth in *State v. Sherman*, 305 Kan. 88, 378 P.3d 1060 (2016), an appellate court analyzes whether the prosecutor's statements fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial.

2.

It is within a prosecutor's permissible latitude to object that the defense is about to go beyond the admitted evidence in its summation to the jury.

3.

An appellate court will review allegations of judicial misconduct that were not preserved at trial when the defendant's right to a fair trial is implicated. Further, K.S.A. 2016 Supp. 21-6619(b)

provides the authority for this court to notice unassigned errors in death penalty appeals.

4.

The appellate standard of review on claims of judicial misconduct is unlimited. The reviewing court will examine the particular facts and circumstances of the case to determine whether the judicial conduct, including comments other than jury instructions, manifests bias, prejudice, or partiality, or otherwise significantly undermines the fairness or reliability of the proceedings.

5.

A district judge is charged with preserving order in the courtroom and with the duty to see that justice is not obstructed by any person. A judge may caution venire persons to refrain from making comments that could contaminate the jury pool, but the better practice would be to clarify that panel members will be provided an opportunity to raise any personal concerns they may have outside the presence of the other venire members.

6.

A trial judge has broad discretion to control the courtroom proceedings, but when it is necessary to comment on a counsel's conduct, especially in the jury's presence, the judge should do so in a dignified, restrained manner; avoid repartee; limit comments and rulings to those reasonably required for the orderly progress of the trial; and refrain from unnecessarily disparaging persons or issues. Specifically, when a judge finds it necessary to request that counsel complete a voir dire examination more quickly, the better practice would be for the judge to

make the request out of the presence of the venire panel.

7.

It is misconduct for a judge, after having admonished defense counsel during opening statement about making statements without witness support, to give a special instruction after the opening statements, advising the jury that statements, arguments, and remarks of counsel are not evidence and may be disregarded if not supported by the evidence, when the instruction is prefaced by the judge's remark that the court normally does not do so.

8.

While the trial court is allowed to question witnesses from the bench in order to fully develop the truth, the better practice is for the judge to discuss the matter with counsel outside the presence of the jury and request counsel to pose the questions necessary to clarify the matter.

9.

A trial judge's erroneous ruling on a party's objection, standing alone, is not grounds for a finding of judicial misconduct. A trial judge's statement "it's improper" when ruling on an objection is not per se misconduct.

10.

Remarks to the jury that are legally and factually accurate and that do not demonstrate bias, prejudice, or partiality to either party do not constitute judicial misconduct.

11.

The party asserting judicial misconduct has the burden to show that any misconduct found to exist actually prejudiced that party's substantial rights.

12.

Under the facts of this case, the district court erred when it refused to give the defense's requested instruction on expert witness credibility because the instruction was legally appropriate and factually supported. Therefore, the next step on appellate review is to apply the harmless error paradigm set out in *State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2011).

13.

K.S.A. 22-3220, replacing the traditional insanity defense with a mens rea approach, does not violate the defendant's right to due process under the United States or Kansas Constitutions.

14.

It is not legally appropriate to give a felony-murder instruction as a lesser included offense instruction for a capital murder charge, and a trial court does not commit clear error by failing to give such an instruction sua sponte.

15.

Prohibiting the defense from asking prospective jurors about their views on the death penalty in the presence of the other venire persons is not erroneous when defense counsel is permitted to make such an inquiry individually, outside the presence of the other venire persons.

16.

Cumulative trial errors, when considered collectively, may require reversal of a defendant's conviction when the totality of circumstances substantially prejudiced the defendant and denied the defendant a fair trial. The cumulative error rule does not require reversal if the evidence is overwhelming against the defendant.

17.

The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishments. The United States Supreme Court has identified three subcategories of categorical proportionality Eighth Amendment challenges: (1) Based on the nature of the offense; (2) based on the characteristics of the offender; and (3) based on a combination of the offense and the offender, implicating a particular type of sentence as it applies to an entire class of offenders.

18.

In analyzing an Eighth Amendment categorical proportionality challenge based on an offender's characteristics, the court first considers objective indicia of society's standards, as expressed in legislative enactments and state practice, to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by the standards elaborated by controlling precedents and by the court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose, the court must determine in the exercise of its own independent judgment whether the punishment in question is unconstitutionally cruel and unusual.

19.

Pursuant to our decision in *State v. Kleypas*, 305 Kan. 224, 335-37, 382 P.3d 373 (2016), we again decline to declare a categorical prohibition against imposing a death sentence based on the broad classification of mental illness.

20.

It is not unconstitutionally duplicative to use the same conduct of the defendant to establish both an element of capital murder and the existence of an aggravating circumstance.

21.

The aggravating factor that the crime was committed in a heinous, atrocious, or cruel manner is not so vague and duplicative that it fails to narrow the class of persons who are constitutionally death penalty eligible.

22.

The standard of review on appeal as to the sufficiency of evidence regarding an aggravating circumstance is whether, after review of all of the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the existence of the aggravating circumstance beyond a reasonable doubt.

23.

Shooting deaths are not inherently heinous, atrocious, or cruel. But where a defendant previously electronically stalked, threatened physical harm, and allegedly battered one of the victims, before methodically going through a house shooting each of

the victims in turn; and where the victims were conscious long enough to suffer the physical pain of their injuries and the mental anguish of their impending death; while also being aware that other victims were being shot, the evidence was sufficient to support the jury's verdict that the capital murder was committed in a heinous, atrocious, or cruel manner.

Appeal from Osage District Court; PHILLIP M. FROMME, judge. Opinion filed February 9, 2018. Affirmed.

Meryl Carver-Allmond, of Capital Appellate Defender Office, argued the cause, and *Sarah Ellen Johnson*, of the same office, was with her on the briefs for appellant.

Kristafer R. Ailslieger, deputy solicitor general, argued the cause, and *Natalie Chalmers,* assistant solicitor general, and *Derek Schmidt*, attorney general, were with him on the brief for appellee.

PER CURIAM: A jury convicted James Kraig Kahler of aggravated burglary and capital murder under K.S.A. 21-3439(a)(6) for fatally shooting his wife, his wife's grandmother, and his two daughters. Kahler appeals the capital murder conviction and the ensuing sentence of death; our review is automatic under K.S.A. 2016 Supp. 21-6619.

Kahler raises 10 issues on appeal. Some of the raised issues present questions decided unfavorably to Kahler in prior cases, and Kahler presents no new argument or authority that would persuade us to change our holdings on those issues. Likewise, Kahler fails to convince us that his other challenges warrant a reversal of his capital murder conviction or

a vacation of his death sentence. We summarize our specific holdings as follows:

- The State did not commit prosecutorial error by objecting during Kahler's closing argument.
- The district court judge engaged in one incident of judicial misconduct that does not require reversal.
- The district court judge erred in refusing to give a requested expert witness instruction, but the error was harmless.
- K.S.A. 22-3220, which adopted the mental disease or defect defense, did not unconstitutionally abrogate Kansas' former insanity defense.
- Because felony murder is not a lesser included offense of capital murder, the district court judge did not err in failing to give a lesser included instruction on felony murder.
- The district court judge did not prohibit defense counsel from questioning prospective jurors during voir dire about their views on the death penalty.
- The cumulative effect of trial errors did not substantially prejudice Kahler so as to deny him a fair trial.
- The Kansas death penalty is not a categorically disproportionate punishment for offenders who are severely mentally ill at the time they commit their crimes.

- The two aggravating factors relied upon by the State to support the death penalty are not unconstitutionally vague or duplicative.
- There was sufficient evidence presented by the State to establish that the killings in this case were committed in a heinous, atrocious, or cruel manner.

Consequently, we affirm Kahler's capital murder conviction and his sentence of death.

FACTUAL AND PROCEDURAL BACKGROUND

A recitation of some family history preceding the murders is necessary to put Kahler's crimes in context. In 2008, the Kahler family—husband, Kahler; wife, Karen; teenage daughters, Emily and Lauren; and 9-year-old son, Sean—was living in Weatherford, Texas. Kahler was the director of the public utilities department, and Karen was a personal trainer. Both adults had successful careers. Acquaintances described the Kahlers as a perfect family. Kahler was extremely proud of his family; it was his top priority.

That summer, Kahler took a new job as the director of water and light for the city of Columbia, Missouri. He moved to Columbia, while Karen and the children stayed in Texas, planning to follow him in the fall. Before Kahler left for Columbia, Karen told him she was interested in experimenting by engaging in a sexual relationship with a female trainer with whom she worked. Kahler assented to the sexual relationship.

Kahler thought the affair would end when Karen and the children moved to Missouri; however, it did not. At a New Year's Eve party in Weatherford, Kahler was embarrassed by Karen and her lover's

behavior, and the evening resulted in a shoving match between the Kahlers. The pair attempted marriage counseling, but by mid-January 2009, Karen filed for divorce. In mid-March, Karen made a battery complaint against Kahler, which resulted in an arrest warrant being served on Kahler at a city council meeting. Because Kahler held public office, his arrest was widely publicized. Shortly thereafter, Karen took the children and moved out of Kahler's residence.

The disintegration of his marriage and family relationships affected Kahler's conduct, both personally and professionally. Kahler's supervisor and another colleague both noted Kahler's increasing preoccupation with his personal problems and decreasing attention to his job. By August 2009, the city had fired Kahler. Concerned about Kahler's well-being, his parents traveled to Columbia and moved Kahler back to their ranch near Meriden, Kansas.

Later that year, at Thanksgiving, Sean joined Kahler at the family ranch in Meriden, while Karen and the girls went to Karen's sister's home in Derby. The family had a long-standing tradition of spending the weekend after Thanksgiving at the home of Karen's grandmother, Dorothy Wight, in Burlingame, Kansas. Arrangements had been made for Karen to pick up Sean in Topeka on Saturday, November 28, and take him to Wight's residence in Burlingame. That morning, Sean, who had been enjoying his time at the Meriden ranch, fishing and hunting with his father, called Karen to ask if he could stay at the ranch. Karen denied permission, and while Kahler was out running an errand, Kahler's mother took Sean to meet Karen in Topeka.

Between 5:30 and 6 that evening, in Burlingame, a neighbor of Wight's called police about a man in a red Ford Explorer near her home whom she suspected of criminal activity. The Explorer was later determined to be Kahler's vehicle. Around 6 p.m., Sean and Karen were standing in the kitchen of Wight's home, while Emily, Lauren, and Wight were elsewhere in the house. Kahler entered Wight's house through the back door, into the kitchen, and started shooting. He shot Karen twice but did not attempt to harm Sean. After Kahler moved through the kitchen to shoot the other victims, Sean ran out the back door and to a neighbor's home where the police were called.

About the same time, Wight's Life Alert system activated a call for emergency assistance and that in turn resulted in a 911 call to law enforcement. The system also created a recording of the events in the house.

When officers arrived, Karen was lying on the kitchen floor, unconscious and barely breathing. Emily, who had also been shot twice, was dead on the living room floor. Wight was sitting in a chair in the living room, suffering from a single gunshot wound to the abdomen, but conscious. Lauren, who had been shot twice, was found upstairs, conscious but having trouble breathing. Kahler was no longer in the house, but both Wight and Lauren told the first responders that Kahler was the person who had shot them. Karen and Lauren died from their wounds later that evening. Wight survived a few days but ultimately succumbed to her wounds as well.

Kahler managed to elude law enforcement that evening but was found walking down a country road the next morning. He surrendered without incident. The State charged Kahler with one count of capital

murder, or, in the alternative, four counts of premeditated first-degree murder, as well as one count of aggravated burglary for the unauthorized entry into Wight's house.

At trial, the defense did not dispute that it was Kahler who shot the victims. Rather, the defense attempted to establish that severe depression had rendered Kahler incapable of forming the intent and premeditation required to establish the crime of capital murder. The defense presented testimony from Dr. Stephen Peterson, a forensic psychiatrist, who testified that Kahler was suffering from severe major depression at the time of the crime and that "his capacity to manage his own behavior had been severely degraded so that he couldn't refrain from doing what he did." Defense counsel, however, did not specifically ask Dr. Peterson whether Kahler had the capacity to premeditate or to form the requisite intent to commit the crimes. The State countered with the expert testimony of Dr. William Logan, also a forensic psychiatrist, who opined that Kahler was capable of forming the requisite intent and premeditation.

During closing arguments, defense counsel asserted that Kahler was incapable of forming the requisite premeditation or intent at the time of the killings. In return, the State argued that the defense expert had failed to specifically address that point, while the State's expert had directly stated that Kahler *was* capable of premeditating the murder and forming the requisite intent to kill.

The jury convicted Kahler of capital murder. After hearing additional evidence in the penalty phase, the same jury recommended the death sentence.

As noted, Kahler raised 10 issues on appeal, all of which are argued in the context of the capital murder conviction and the ensuing death sentence. Consequently, we will review only that conviction and sentence and will address each issue in the order presented.

I. PROSECUTORIAL ERROR

In his first issue, Kahler alleges that the prosecutor engaged in prosecutorial misconduct when she objected during defense counsel's closing argument. Defense counsel was discussing the recording produced during the commission of the crime by the Life Alert system. A male voice, presumably Kahler's, had been captured on the recording. Defense counsel was about to state the words spoken by that male voice, when the prosecutor interrupted, objecting that defense counsel's argument constituted improper unsworn testimony based on what defense counsel *thought* the voice had said. The district court sustained the objection.

Standard of Review / Error Analysis

At oral argument, both parties acknowledged that this court's decision in *State v. Sherman*, 305 Kan. 88, 378 P.3d 1060 (2016), although decided after the briefs in this case were filed, now controls the analysis of this issue. *Sherman* ended the practice followed by *State v. Tosh*, 278 Kan. 83, 91 P.3d 1204 (2004) *overruled by Sherman*, 305 Kan. 88, of attempting to factor a prosecutor's ill will and gross misconduct into the prejudice step of the two step error/prejudice analysis when reviewing an allegation of prosecutorial misconduct on appeal. *Sherman* substituted an analysis that is focused on the defendant's due process right to receive a fair trial.

Sherman continues to utilize a two-step error/prejudice framework and the first step—the error analysis—remains the same. See *State v. Kleypas*, 305 Kan. 224, 316, 382 P.3d 373 (2016). "Under the first step, we will continue to analyze whether the prosecutor's statements 'fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial.'" 305 Kan. at 316 (quoting *Sherman*, 305 Kan. 88, Syl. ¶ 7). If error occurred, the State must prove beyond a reasonable doubt that "'the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict.'" *Kleypas*, 305 Kan. at 316 (quoting *Sherman*, 305 Kan. 88, Syl. ¶ 8).

Analysis

Kahler maintains that his right to a fair trial was violated when the prosecutor objected to defense counsel's attempt in closing argument to repeat what was said by the male voice on the Life Alert recording. The prosecutor's objection was based on the assertion that defense counsel was not allowed to state his opinion of the content of the tape and doing so amounted to improper testimony.

At oral argument, Kahler argued that the objection was error because it was motivated by bad faith and attempted to liken it to a misstatement of law. In other words, Kahler attempts to move the bad faith analysis previously conducted under the prejudice step to the error step. But ill will has never been part of the error determination. And *Sherman* is clear that measuring prejudice by attempting to discern the prosecutor's motivation has been problematic in the

past and is no longer appropriate to our analysis of prosecutorial error within a criminal appeal. Thus, the question before the court under *Sherman*, as it was under previous caselaw, is simply whether making an objection, even one based on an erroneous application of law, was outside the wide latitude afforded the prosecutor in making her case to the jury.

We conclude that it is within the prosecutor's permissible latitude to object that the defense is about to go beyond the admitted evidence in its summation to the jury. As we discuss below, the district court's ruling on the prosecutor's objection may have been erroneous. But this fact has no bearing on the determination of whether the objection itself was prosecutorial error.

II. JUDICIAL MISCONDUCT

Kahler alleges that the district court judge engaged in misconduct throughout the trial, which cast his defense in a bad light, favored the State's case, and denied him his right to a fair trial. Kahler points to six specific instances to illustrate his argument.

At trial, defense counsel failed to object to any of the claimed misconduct. But an appellate court will review allegations of judicial misconduct that were not preserved at trial when the defendant's right to a fair trial is implicated. *State v. Kemble*, 291 Kan. 109, 113, 238 P.3d 251 (2010); *State v. Tyler*, 286 Kan. 1087, 1090, 191 P.3d 306 (2008); *State v. Brown*, 280 Kan. 65, 70, 118 P.3d 1273 (2005). In addition, we are statutorily obligated to review this issue because of the death sentence imposed. K.S.A. 2016 Supp. 21-6619(b) (court shall review all asserted errors in a death sentence appeal).

Standard of Review

Our standard of review on claims of judicial misconduct is unlimited. We examine the particular facts and circumstances of the case to determine whether judicial conduct including comments, other than jury instructions, rise to the level of judicial misconduct. *Kemble*, 291 Kan. at 113.

Analysis

The Kansas Code of Judicial Conduct (KCJC) requires a judge to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Canon 1, Rule 1.2 (2017 Kan. S. Ct. R. 431); see *State v. Miller*, 274 Kan. 113, 128, 49 P.3d 458 (2002) ("judge should be the exemplar of dignity and impartiality, should exercise restraint over judicial conduct and utterances, should suppress personal predilections, and should control his or her temper and emotions").

An erroneous ruling by a judge, standing alone, will not establish judicial misconduct. Canon 2, Rule 2.2, Comment [3] (2017 Kan. S. Ct. R. 433) (good-faith errors of fact or law do not violate KCJC). Rather, the reviewing court will look for conduct that manifests bias, prejudice, or partiality, or otherwise significantly undermines the fairness or reliability of the proceedings. Cf. Canon 2, Rule 2.3, Comment [1] (2017 Kan. S. Ct. R. 434) ("judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute"). The complaining party has the burden to establish that judicial misconduct occurred and that the misconduct prejudiced the party's substantial rights. *Kemble*, 291 Kan. at 113. "'If a proper and reasonable construction will render the remark

unobjectionable, the remark is not prejudicial.'" *Brown*, 280 Kan. at 70 (quoting *Miller*, 274 Kan. at 118).

With those ground rules to guide us, we turn to the individual instances alleged by Kahler to be judicial misconduct, followed by a consideration of their cumulative effect.

A. *Warning a voir dire panel against outbursts of opinion*

Kahler first complains of remarks the district judge made to a panel of the jury pool during voir dire. Four panels of venire members were questioned. The remarks Kahler finds objectionable were made to the third panel and were part of the district judge's preliminary remarks explaining voir dire. In addition to asking the panel members to speak clearly for the court reporter and to pay attention to all the questions asked whether directed specifically to them or not, the district judge added the following caution:

> "It's also important that you be careful. We want you to talk frankly, we want you to answer questions and speak from your heart, but we don't want any outbursts of opinions that might prejudice the rest of this panel so before you speak in any manner like that, think twice. And I warned you, anyway, regarding that, regarding your personal opinions."

Kahler argues these remarks to the third panel dissuaded the panel members from expressing their opinions and inhibited the voir dire process. The State counters that, put in context, the district judge's remarks were nothing more than a reasonable admonition to prevent one of the potential jurors from tainting the rest of the panel and were well

within the district judge's responsibility to control the courtroom. We agree with the State.

A district judge is charged with preserving order in the courtroom and with the duty to see that justice is not obstructed by any person. *State v. Rochelle*, 297 Kan. 32, 36-37, 298 P.3d 293 (2013). The record establishes that throughout the voir dire of the first two panels, the district judge had expressed concern about questioning by the defense that might elicit panel members' views on the death penalty. We have approved of similar remarks in other cases where the district judge sought to prevent contamination of the jury pool. See, e.g., *State v. Aikins*, 261 Kan. 346, 365, 932 P.2d 408 (1997) (trial court warned potential jurors not to "blurt out" any information they might have about the case), *disapproved on other grounds by State v. Warrior*, 294 Kan. 484, 277 P.3d 1111 (2012); *State v. Hayden*, 281 Kan. 112, 130, 130 P.3d 24 (2006) (district judge cautioned jurors to tread carefully so that other potential jurors would not be prejudiced by intemperate comments and asked very specific questions so that venire members did not spontaneously volunteer unnecessary prejudicial information).

We note, however, that the better practice would have included a clarification by the district judge that panel members would have an opportunity to raise any personal concerns outside the presence of the other venire members. Cf. *Aikins*, 261 Kan. at 365 (defense counsel encouraged potential jurors to approach judge individually if they had racial prejudices which they did not want to express in front of panel). But it is clear that the district judge's failure to include such a clarification to the third panel was

an oversight, as his comments to the fourth panel included just such a statement.

In sum, we find no misconduct in the district judge's comments to the third panel.

B. *Asking defense counsel to move along*

Kahler complains that the district judge committed misconduct when he asked defense counsel to speed up his voir dire questioning. During the defense voir dire of the third panel on the second morning of jury selection, the district judge told defense counsel, "we need to move through this a little faster if we can. I realize you have a right to all your questions but we're running behind now." Kahler argues this shows bias because the judge did not make a similar request of the State and the defense questioning had not exceeded the time afforded the prosecutor.

The trial judge has broad discretion in controlling the courtroom proceedings. *Rochelle*, 297 Kan. at 37; *Kemble*, 291 Kan. at 114. "When it is necessary to comment on counsel's conduct, especially in the jury's presence, the trial court should do so in a dignified, restrained manner; avoid repartee; limit comments and rulings to those reasonably required for the orderly progress of the trial; and refrain from unnecessarily disparaging persons or issues." *State v. Hudgins*, 301 Kan. 629, 638, 346 P.3d 1062 (2015).

Kahler argues that his counsel took no more time for voir dire than the prosecution had taken. For support, Kahler compares the number of transcript pages that contain voir dire questioning by the prosecutor to the number taken by defense counsel's questioning. This method of quantifying time is inherently unreliable. Cf. *Hudgins*, 301 Kan. at 637 (trial judge requested defense counsel to "pick up the

pace" after defense counsel was silent for about 3 minutes). More to the point, however, there is nothing in the district judge's comments that reflects negatively on defense counsel's conduct. The statement concerned the orderly progress of the trial, and nothing suggests that the statement was delivered in anything less than a dignified and restrained manner. The statement was a request, not an order, and clearly recognized that defense counsel was entitled to ask his questions.

We once again note the better practice, which would have the district judge make such administrative requests out of the presence of the venire panel. Nonetheless, merely requesting trial counsel to move a little faster, if possible, does not amount to judicial misconduct. Cf. *Hudgins*, 301 Kan. at 638-39 (remark, at worst, was a mild warning within the proper exercise of a district court's authority to control voir dire and avoid undue delay).

C. *Comments on instructing the jury following opening statements*

Both parties gave relatively straightforward opening statements. The prosecutor gave a brief overview of the shootings and then summarized testimony he expected to elicit from each of the State's witnesses about the crime and the crime scene. The defense focused on painting a picture of the events that led up to the crime: Kahler's professional success, the many happy years of the Kahlers' marriage and family life, the breakdown of the marriage, and Kahler's obsession with saving it.

There were no objections during the State's opening; however, the State objected three times during Kahler's opening. After defense counsel had

attributed statements to Karen, the prosecutor asked to approach the bench. At the bench, the prosecutor lodged an objection based on hearsay. The district judge sustained the objection and instructed Kahler's counsel to set out the expected evidence and not to testify. The objection and discussion were had out of hearing of the jury.

Almost immediately after the bench conference, the prosecutor objected a second time, saying only "same objection" when counsel for Kahler again attributed statements to Karen. This time the district judge responded within hearing of the jury: "All right. [Defense counsel], we talked. Unless you intend to call witnesses to support what you're saying, they're not allowed."

Later, the prosecutor requested to approach the bench again to lodge an objection to defense counsel using the word "crazy" to describe Kahler's behavior. The discussion and the judge's admonition not to use the word were outside the jury's hearing.

Immediately following Kahler's opening statement, the district judge said:

> "All right. Ladies and gentlemen of the jury, I'm going to read an instruction to you at this time. *I normally don't do this, but I am going to ask that you listen carefully.* This is one of the instructions that will be given to you later but I wish to give it to you now also. That statement is: Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded." (Emphasis added.)

Kahler argues the district judge's comments prior to the actual instruction showed bias—particularly the comment that the judge did not normally give the instruction but wished to do so this time. Kahler argues that it amounted to a negative comment on defense counsel's credibility.

The State focuses only on the instruction and ignores the judge's comments preceding the instruction. It argues the instruction itself was a fair and accurate statement of the law. It also points to K.S.A. 2016 Supp. 22-3414(3), which provides "the judge, in the judge's discretion, after the opening statements, may instruct the jury on such matters as in the judge's opinion will assist the jury in considering the evidence as it is presented." But the State fails to acknowledge that the district judge gave the jury a set of instructions prior to opening statements, which included an instruction on considering only testimony and exhibits admitted into evidence and an instruction that it is up to the jury to determine the weight and credit to be given the testimony of each witness.

Given the context of the prosecution's objections during the defense's opening statement, the judge's comment undoubtedly brought special attention to the instruction. Moreover, given the timing of the district court's comment, the jury's attention would undoubtedly have been directed to the defense's opening argument. The jury had just heard the district judge admonish defense counsel by saying, "Unless you intend to call witnesses to support what you're saying, they're not allowed." When the district judge commented immediately on the heels of the opening statements, he underscored his suspicion that the defense would not be able to introduce evidence that would allow the jury to attribute certain

statements to Karen. This belief should not have been revealed to the jury.

This court has previously warned district judges to "limit[] comments and rulings to what is reasonably required for the orderly progress of the trial, and refrain[] from unnecessary disparagement of persons or issues." *State v. Miller*, 274 Kan. 113, 128, 49 P.3d 458 (2002). Here, the comment added nothing to the orderly progress of the trial—the instruction could have been given without editorial comment or explanation. The district judge erred in making the comment.

Error alone does not require reversal, however. "'The question is whether [the defendant]'s substantial rights to a fair trial were prejudiced by the court's statements.'" *State v. Cheever*, 306 Kan. 760, 793-94, 402 P.3d 1126 (2017). Here, the district judge's isolated comment did not show the type of judicial bias that denies a fair trial. See *Miller*, 274 Kan. at 129 (finding district judge's numerous statements accumulated to deny a fair trial). On occasion, district judges reveal, usually unintentionally, a bias on an issue. Consequently, district judges routinely instruct the jury, as the judge did in this case, that "I have not meant to indicate any opinion as to what your verdict should be by any ruling that I have made or anything that I have said or done." See PIK Crim. 4th 50.060. Nothing suggests the judge's isolated comment here influenced the jury's consideration or misdirected the jury's focus.

Indeed, the instruction given after the judge's ill-advised comment pointed the jury exactly where it needed to go: The instruction focused the jury on the evidence. That is the point of the instruction, which is often given repeatedly through a trial. Consequently,

we hold the judge's comment to be harmless error under either the constitutional or nonconstitutional harmless error standard. See *State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2011).

D. *Personally questioning a witness*

The prosecution's theory at trial was that Kahler shot the victims with a .223 caliber rifle or "long gun." Shell casings found at the scene and bullets found in a clip near where Kahler was arrested were .223 caliber. The gun used in the murders, however, was never found. During testimony, a Shawnee County deputy testified that she was asked to look for a "long gun" in Kahler's impounded vehicle as part of the investigation. She testified that she was unable to find a gun but did find an empty box for a Remington .223. She testified she left the box in the car. The district judge apparently did not think this testimony was clear, and at the end of the prosecutor's questioning, questioned the witness himself:

> "BY THE COURT: Q. And I will ask this just as a matter of clarification before the break; you mentioned an empty box Remington .223 caliber, is that correct, caliber?
>
> "A. It was told to me that it was a Remington .223.
>
> "Q. All right. Now when you said that, are you talking about a gun itself, or the bullet, or caliber of gun?
>
> "A. It was the box for a gun.
>
> "Q. Okay. You don't know whether it was a Remington brand gun or some other brand?
>
> "A. I was told that it was a Remington .223.

"THE COURT: Counsel, you want to try to clarify that with her?

"[Prosecutor]: Sure.

. . . .

"[Prosecutor]: Q. You didn't find a weapon in the vehicle, did you?

"A. No.

"Q. You found a box that appeared to be a gun box?

"A. Yes.

"Q. And it listed a caliber of the weapon at the end of it?

"A. Yes.

"Q. And what was the caliber of the gun?

"A. It would have been .223.

"Q. And REM, is that reference to the caliber or the brand of gun?

"A. The brand of gun."

Later testimony clarified that the box was for a long gun and the serial number of the gun that would have come in that box was registered to Kahler. Kahler maintains the district judge aided the State in proving its theory that a long gun was used in the crime and the assistance had the effect of bolstering the State's case and credibility.

This court has allowed questioning of witnesses from the bench "based upon the premise that one of the functions of a trial judge is to accomplish the full development of the truth." *Kemble*, 291 Kan. at 114-15 (citing *State v. Hays,* 256 Kan. 48, 51, 883 P.2d

1093 [1994]). But we have cautioned that the practice must not result in the slightest suggestion of partiality or bias. *Kemble*, 291 Kan. at 114-15. For decades, we have expressed our view that the better practice is for the district judge to discuss the matter with counsel outside the presence of the jury and ask counsel to pose the questions necessary to clarify the matter. See *State v. Boyd*, 222 Kan. 155, 159, 563 P.2d 446 (1977); see also *Kemble*, 291 Kan. at 115; *Hays*, 256 Kan. at 52; *State v. Hamilton*, 240 Kan. 539, 547, 731 P.2d 863 (1987) (quoting *Boyd* and noting such a procedure will accomplish the full development of the truth without direct participation by the trial judge in the examination of the witness and hence any question as to the judge's bias may be avoided).

Although the better practice would have been for the district judge to follow the procedure set out in *Boyd*, we see no misconduct here because there was no suggestion of partiality. Although Kahler contends that the judge's questioning aided and bolstered the State's case, it is just as probable that by stepping in to clarify and suggesting to the prosecutor that he follow up with additional questions, the district judge's comments reflected negatively on the State's presentation. Kahler does not argue that the questions asked were improper, and they drew no objection from defense counsel at the time. We also note that the importance to the State's case regarding the type of gun used was nearly nonexistent given Kahler's defense was not based on denying the shootings. Ultimately, the judge did not assume the role of an advocate; he merely attempted to clarify a point he apparently felt was unclear—a point that was of virtually no importance to the trial. Consequently, we find no misconduct.

E. *Sustaining objection to closing comments about voice on tape*

We rejected Kahler's argument above that the prosecutor committed prosecutorial error by objecting to defense counsel's attempt to quote the male voice on the Life Alert recording. Here we address his argument that the district judge committed misconduct by sustaining the objection.

The transcript reflects the following:

> "[By Defense Counsel]: . . . you're going to hear a male voice during this absolute chaos say . . .
>
> "[Prosecutor]: Your Honor, I'm going to object. The tape's in evidence. And counsel's not allowed to testify and tell the jury what he thinks is on that tape.
>
> "[Defense Counsel]: Your Honor, I can say what I think's on that tape. They've got the tape and if it doesn't say it—counsel just said what all these witnesses said. I'm certainly allowed to say what the tape says.
>
> "THE COURT: I think it's improper. You cannot say what you think is on the tape.
>
> "[Defense Counsel]: Well, can I say what is on the tape, Your Honor?
>
> "THE COURT: They can listen for themselves.
>
> "[Defense Counsel]: All right."

Kahler argues the district judge committed misconduct in two ways: first, by erroneously sustaining the objection and, second, by labeling defense counsel's conduct "improper."

The State maintains that counsel for Kahler was about to misrepresent the evidence. It argues there was no testimony as to what the male voice on the tape specifically said. And noting that the voice itself is barely discernible, the State argues anything counsel would have said in regard to content would not have been based on the evidence. Accordingly, the State contends the district court was correct to sustain the objection.

We disagree. The district court sustained the objection in error, if for no other reason than because it was premature. The record does not contain a proffer of the words that defense counsel thought were on the tape, so we cannot know for sure whether they comported with the admitted evidence. But we do know there was more evidence than the State acknowledges. In addition to the original recording itself, the record includes Dr. Peterson's report and the transcript contained on the enhanced CD, which indicate that the voice said, "I am going to kill her." So, if defense counsel was going to state that the male voice on the tape said "I am going to kill her," it would have been entirely proper for defense counsel to discuss that statement and any reasonable inferences to be drawn from it. See *State v. Irving*, 217 Kan. 735, 739-40, 538 P.2d 670 (1975) ("[a]rgument of counsel is to be confined to the questions at issue and the evidence relating thereto and such inferences, deductions and analogies as can reasonably be drawn therefrom."); cf. *State v. Bollinger*, 302 Kan. 309, 320-22, 352 P.3d 1003 (2015) (prosecutor's statement, during closing argument, asking jury to draw inferences from indistinct sound in background of 911 call that subjectively sounded like someone calling out, "help me," was not an impermissible comment on facts not in evidence, so as to amount to prosecutorial

misconduct), *cert. denied* 136 S. Ct. 858 (2016); *State v. Schumacher*, 298 Kan. 1059, 1070-72, 322 P.3d 1016 (2014) (prosecutor did not improperly comment on a fact not in evidence when, during closing argument in murder prosecution, he suggested that clicking sound heard when gun was cocked in courtroom was the same clicking sound heard on video just prior to defendant's shooting of victim).

But an erroneous ruling by the district judge, standing alone, is not grounds for finding judicial misconduct. Canon 2, Rule 2.2, Comment [3] (2017 Kan. S. Ct. R. 433) (good-faith errors of fact or law do not violate KCJC). Something more is required. Here, Kahler argues that the words the district judge used in ruling on the objection denigrated the defense. But the words used to sustain the objection did not denigrate counsel personally. The phrase "it's improper" appears to be a reference to the form of the argument counsel was attempting to use. These are the words our opinions frequently use to characterize argument or conduct of counsel as impermissible. See, e.g., *Kleypas*, 305 Kan. at 316-17 (discussion with district court indicated prosecutor was making an effort to find the line between "proper and improper argument" on mercy); *Sherman*, 305 Kan. at 101 (noting that this court places the burden on trial courts to set aside verdicts that are based on "improper arguments"); *State v. Marshall*, 294 Kan. 850, 861, 281 P.3d 1112 (2012) ("[A] prosecutor's *improper comment* or *argument* can be prejudicial, even if the misconduct was extemporaneous and made under the stress of rebutting arguments made by defense counsel." [Emphasis added.]); *State v. Pabst*, 268 Kan. 501, 506, 996 P.2d 321 (2000) ("Our rules of conduct clearly and unequivocally say that it is improper for a lawyer to comment on a witness'

credibility."); *Irving*, 217 Kan. at 740 ("It is improper for counsel in his argument to the jury to comment on evidence which was excluded by the court when offered.").

Granted, when we issue an opinion we are not speaking within earshot of the jury. But we believe juries can be expected to understand that objections will be made and ruled upon in terms of what is proper and what is or is not allowed without assuming nefarious purposes by counsel, at least not those beyond normal trial advocacy. We cannot fault the district judge for framing his ruling—although erroneous—in commonly used terms.

Accordingly, we find no judicial misconduct. We do, however, find that the district court's sustaining of the State's objection was an unassigned trial error. See K.S.A. 2016 Supp. 21-6619(b) (in death penalty appeal, court is authorized to notice unassigned errors). Given the record and the arguments before us, we do not find this error requires reversal standing alone.

F. *Discouraging the jury from asking questions during deliberations*

For his final allegation of judicial misconduct, Kahler alleges that, before sending the jurors to deliberate at the end of the guilt phase, the district judge discouraged them from asking any questions they might have during deliberations. The particular remarks Kahler complains of concerned what the jurors should do in the event they had questions. The judge stated:

> "The bailiff will be outside the door here and if you have any questions you can knock on the door and communicate with her.

> "Now I have given you the instructions[,] that's the law of the case. Counsel has presented the evidence, the facts of the case. You should apply the law to the facts. You have everything you need to decide this case. You should review the instructions for the answers to any questions you might have. *You should not have to ask any questions.* However, if you have a question there is a process that we must go through and you should be aware of that process. You can't just ask the bailiff to tell me your question so that I can run back there and give you an answer.
>
> "The process that we must follow requires that any question that you might ask be in writing. And the presiding juror must prepare that question in writing, hand it to the bailiff, and I must then assemble counsel and the defendant and we must discuss the question to decide whether we are able to give you an answer and, if so, what that answer should be. *My experience as a Judge has been that although sometimes we are able to give jurors answers, for the most part the answer you're going to receive to most questions will be refer to your instructions for advice.*" (Emphasis added.)

Kahler focuses on the italicized comments and argues they demonstrated impatience with the steps necessary to meet the due process and Eighth Amendment requirements of a capital case. He points to K.S.A. 22-3420(3) to argue the jury had a right to ask questions. At the time of trial, K.S.A. 22-3420(3) provided:

> "After the jury has retired for deliberation, if they desire to be informed as to any part of the law or evidence arising in the case, they may

> request the officer to conduct them to the court, where the information on the point of the law shall be given, or the evidence shall be read or exhibited to them in the presence of the defendant, unless he voluntarily absents himself, and his counsel and after notice to the prosecuting attorney."

The remarks in this case were both legally and factually accurate; the jury was informed that questions could be asked; and the process that would be used to answer them was explained. The comment that the jury should not have to ask any questions, in context, appears to be a statement that the jury had the necessary information to reach a decision. The statement was an encouragement to the jurors to review the instructions before asking a question rather than a discouragement from asking any questions at all. The statement informed the jurors that most questions would likely be answered by referring the jury back to the instructions. Nothing in the comments demonstrated bias, prejudice, or partiality toward either party. We find no misconduct.

G. *No cumulative prejudicial effect*

As noted above, we have typically required the party asserting judicial misconduct to show that any misconduct found to exist actually prejudiced that party's substantial rights. Kahler urges us to apply the constitutional harmless error test set out in *Ward*, 292 Kan. 541 (constitutional error may be declared harmless where party benefiting from error proves beyond a reasonable doubt that error complained of did not affect the outcome of the trial in light of the entire record, i.e., proves there is no reasonable possibility that the error affected the verdict). But having found only one instance of

misconduct that was not reversible standing alone, the cumulative error rule is inapplicable here.

In the process of reviewing the judicial misconduct claims, we noted some instances in which the district judge could have applied a better practice to the situation at hand. Nonetheless, we discern no pattern of conduct that manifested bias, prejudice, or partiality against the defendant, and Kahler's claim of judicial misconduct fails.

III. EXPERT WITNESS INSTRUCTION

Prior to trial, Kahler requested that the district court give the jury an instruction on how it may consider the opinion testimony of experts. The State objected and the district court declined to give the proffered instruction because expert opinion instructions are not recommended by the criminal Pattern Instructions for Kansas (PIK). See PIK Crim. 3d 52.14 (1995 Supp.), Comment ("The Committee believes that an expert should be considered as any other witness as set forth in PIK [Crim.] 3d 52.09, Credibility of Witnesses."). Kahler claims that the district court's ruling was erroneous.

Standard of Review

> "For jury instruction issues, the progression of analysis and corresponding standards of review on appeal are: (1) First, the appellate court should consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; (2) next, the court should use an unlimited review to determine whether the instruction was legally appropriate; (3) then, the court should determine whether there was sufficient evidence, viewed in the light most favorable to

> the defendant or the requesting party, that would have supported the instruction; and (4) finally, if the district court erred, the appellate court must determine whether the error was harmless, utilizing the test and degree of certainty set forth in *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012)." *State v. Plummer*, 295 Kan. 156, Syl. ¶ 1, 283 P.3d 202 (2012).

Analysis

The requested instruction, based on the Tenth Circuit Court of Appeals Pattern Criminal Jury Instruction 1.17, reads as follows:

> "During the trial you heard the testimony of _____ who expressed opinions concerning _____. In some cases, such as this one, scientific, technical, or other specialized knowledge may assist the jury in understanding the evidence or in determining a fact in issue. A witness who has knowledge, skill, experience, training or education, may testify and state an opinion concerning such matters.
>
> "You are not required to accept such an opinion. You should consider opinion testimony just as you consider other testimony in this trial. Give opinion testimony as much weight as you think it deserves, considering the education and experience of the witness, the soundness of the reasons given for the opinion, and other evidence in the trial."

Although the State objected to the instruction at trial, it concedes on appeal that the instruction accurately states the law. The PIK Committee, however, continues to recommend that a separate

instruction on expert opinion testimony not be given. See PIK Crim. 4th 51.170 (2013 Supp.).

The district judge did give the standard instruction on witness testimony, which states: "It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified." PIK Crim. 3d 52.09 (1996 Supp.). Neither party objected to this instruction. The State contends that this instruction adequately covers the substance of the requested instruction.

This court has frequently emphasized the wisdom of following the PIK Committee recommendations. See *State v. Cox*, 297 Kan. 648, 662, 304 P.3d 327 (2013); *State v. Dixon*, 289 Kan. 46, 67, 209 P.3d 675 (2009). On the other hand, we have also said that the failure to use the exact language of a PIK instruction is not fatal. *State v. Bernhardt*, 304 Kan. 460, 470, 372 P.3d 1161 (2016). Moreover, a district court should not hesitate to modify or add to pattern instructions where appropriate in a particular case. 304 Kan. 460, Syl. ¶ 1.

In *State v. Willis*, 240 Kan. 580, 587, 731 P.2d 287 (1987), this court considered the giving of an expanded instruction on witness credibility. The *Willis* court concluded there was no clear error in the giving of the expanded instruction but noted "it would certainly have been the better practice to give an instruction along the lines of PIK Crim. 2d 52.09." 240 Kan. at 587. The expert witness instruction requested here, although contained in a separate instruction, was, in effect, an expanded version of the witness credibility instruction.

Then, in *State v. Hunt*, 257 Kan. 388, 395, 894 P.2d 178 (1995), this court stated that it "has continually disapproved the giving of an expanded version of the credibility instruction," although it had also continually held that to do so was not clearly erroneous. Later, in *State v. Adams*, 292 Kan. 151, 159, 254 P.3d 515 (2011), the district judge provided a witness credibility instruction based on PIK Crim. 3d 52.09 that also included wording from a civil pattern jury instruction regarding expert witnesses. See PIK Civ. 4th 102.50. The added language, like the language in the federal instruction Kahler requested, instructed the jury that testimony of experts was to be considered like any other testimony and should receive the same weight and credit as the jury deemed it entitled to when viewed in connection with all the other facts and circumstances. The defendant alleged the instruction was erroneous because the district court did not follow the PIK Committee's recommendation not to give an expert witness instruction in criminal trials. The *Adams* court observed:

> "The instruction accurately stated the law as it stands in Kansas. The jury should weigh expert witness testimony in the same manner it weighs all testimony. . . .
>
> "In addition, Adams' jury would not reasonably have been misled by the instruction. Had the first paragraph of the hybrid stood alone, the jury still would have been instructed as to how to assess credibility of all witnesses, regardless of expertise." 292 Kan. at 166.

But this case highlights that there is a fundamental difference between an ordinary witness' testimony as to the facts of a case and an expert's opinion testimony as to what those facts mean. Indeed,

opinion evidence from experts is admissible precisely because the jurors' common knowledge and experience would not permit them to properly understand the circumstances of the case. "Where the normal experience and qualifications of jurors permit them to draw proper conclusions from given facts and circumstances, expert conclusions or opinions are not necessary." *Sterba v. Jay*, 249 Kan. 270, Syl. ¶ 6, 816 P.2d 379 (1991). Yet, the general instruction in PIK Crim. 3d 52.09 recites, in part: "You have the right to use common knowledge and experience in regard to the matter about which a witness has testified." If a witness has been permitted to give an expert opinion because the subject matter is beyond the common knowledge and experience of the jurors, how does a juror use his or her nonexistent common knowledge and experience to assess the expert's testimony?

Moreover, an expert witness is permitted to share his or her opinion with the jury only after the trial judge has reached the legal conclusion that the witness is, indeed, an expert on the topic about which he or she is going to opine. The regular witness credibility instruction does not clarify for the jurors that they may reject the expert opinion even though it has been stamped with the judge's imprimatur. In short, there is nothing generic about opinion testimony from expert witnesses, and the jury's assessment of the credibility of that testimony should not be left to the insufficient direction contained in the generic PIK instruction.

Consequently, the district court erred when it refused to give the defense's requested instruction on expert witness credibility because the instruction was legally appropriate and factually supported. But that does not end the discussion; the error is subject to a

harmlessness analysis. In that regard, notwithstanding that the legal substance of the requested instruction was not adequately covered by the general instructions that were given, there is no reasonable possibility that the error affected the jury's guilty verdict. In other words, the error was harmless.

IV. CONSTITUTIONALITY OF K.S.A. 22-3220

For his fourth issue, Kahler contests the constitutionality of K.S.A. 22-3220. The statute provides:

> "It is a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense."

At trial, Kahler based his defense on mental disease or defect. He filed a motion alleging that the statute unconstitutionally deprived him of the ability to assert a defense based on insanity. The district court denied the motion, and the jury was instructed in accord with the statute. On appeal, Kahler continues to assert his constitutional challenge.

Standard of Review

Whether a statute is constitutional raises a question of law over which this court exercises unlimited review. *State v. Reed*, 306 Kan. 899, 903-04, 399 P.3d 865 (2017).

Analysis

Before the enactment of K.S.A. 22-3220, the *M'Naghten* rule was the proper test for the defense of insanity in Kansas. See *State v. Lamb*, 209 Kan. 453, 472, 497 P.2d 275 (1972); *State v. Nixon*, 32 Kan.

205, Syl. ¶ 1, 4 P. 159 (1884) (adopting rule). The *M'Naghten* rule provided that

> "the defendant is to be held not criminally responsible (1) where he does not know the nature and quality of his act, or, in the alternative, (2) where he does not know right from wrong with respect to that act. Under the 'right and wrong' test of criminal insanity, it must be proved that at the material time the accused did not know that what he was doing was contrary to law." *State v. Baker*, 249 Kan. 431, 450, 819 P.2d 1173 (1991).

But the Kansas legislature abandoned the *M'Naghten* rule through enactment of K.S.A. 22-3220, which became effective January 1, 1996. The statute adopted what is known as the "mens rea approach." The mens rea approach allows evidence of mental disease or defect as it bears on the mental element of a crime but abandons lack of ability to know right from wrong as a defense. See *State v. Jorrick*, 269 Kan. 72, 81-83, 4 P.3d 610 (2000). Kahler argues that by doing so the statute violates the Due Process Clause because it offends a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. See *Patterson v. New York,* 432 U.S. 197, 201-02, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).

The same arguments made by Kahler were considered and rejected by this court in *State v. Bethel,* 275 Kan. 456, 66 P.3d 840 (2003). The *Bethel* court conducted a thorough review of the pertinent decisions of the United States Supreme Court and other states that had considered the issue. Ultimately, the *Bethel* court concluded that "K.S.A. 22-3220 does not violate

the defendant's right to due process under the United States or Kansas Constitutions." 275 Kan. at 473; see *State v. Searcy*, 118 Idaho 632, 798 P.2d 914 (1990) (finding mens rea approach of state statute did not violate due process); *State v. Korell*, 213 Mont. 316, 690 P.2d 992 (1984) (same); *State v. Herrera*, 895 P.2d 359 (Utah 1995) (same). Kahler relies on *Finger v. State*, 117 Nev. 548, 569, 27 P.3d 66 (2001), in which the Nevada Supreme Court held legal insanity is a fundamental principle of the criminal law of this country. But the *Bethel* court considered and rejected the reasoning of the Nevada Supreme Court in *Finger*, and we adhere to our *Bethel* decision.

Although Kahler has added no new arguments to those this court considered and rejected in *Bethel*, he directs our attention to a written dissent from a denial of certiorari by three justices in *Delling v. Idaho*, 568 U.S. 1038, 133 S. Ct. 504, 184 L. Ed. 2d 480 (2012) (Breyer, J., dissenting, joined by Ginsburg and Sotomayor, JJ.). The dissent was critical of the mens rea approach because it allows conviction of an individual who had no capacity to know that what he or she was doing was wrong. The dissent would have granted the petition for certiorari to consider whether Idaho's modification of the insanity defense is consistent with the Fourteenth Amendment's Due Process Clause. 568 U.S. at 1041 (Breyer, J., dissenting). As part of its discussion, the dissent cited *Bethel* and noted that Kansas is one of only four states that have adopted the mens rea approach. While we are cognizant of the three justices' position, the *Delling* dissent has no effect on our *Bethel* decision.

The parties have thoroughly set out the arguments and cases in their briefs. Nonetheless, Kahler has offered no new reason to reconsider the arguments

previously and thoughtfully rejected by this court. Thus a review of those arguments or of *Bethel* is not warranted.

V. LESSER INCLUDED OFFENSE INSTRUCTION ON FELONY MURDER

Kahler did not request an instruction that would have permitted the jury to convict him of felony murder, as a lesser included offense of capital murder. He claims on appeal that it was clearly erroneous for the district court to fail to give that lesser included offense instruction on its own.

Standard of Review

To determine whether the district court's failure to sua sponte give an unrequested jury instruction was clearly erroneous, the reviewing court must first determine whether there was any error at all. "To make that determination, the appellate court must consider whether the subject instruction was legally and factually appropriate, employing an unlimited review of the entire record." *State v. Williams*, 295 Kan. 506, Syl. ¶ 4, 286 P.3d 195 (2012).

Analysis

Kahler's brief was filed after this court's decision in *State v. Cheever*, 295 Kan. 229, 259, 284 P.3d 1007 (2012), *vacated and remanded on other grounds* 571 U.S. ____, 134 S. Ct. 596, 187 L. Ed. 2d 519 (2013), held that felony murder was a lesser included offense of capital murder and, consequently, that an instruction to that effect should be given in a capital case where warranted by the evidence. Although no felony murder instruction was requested or given in Kahler's case, he argued in his opening brief,

pursuant to *Cheever*, that one was warranted and that it was clear error not to give it.

By the time the State filed its responsive brief, the legislature had amended K.S.A. 2012 Supp. 21-5402, in response to *Cheever*, to specifically provide that felony murder was not a lesser included offense of capital murder. See L. 2013, ch. 96, § 2; K.S.A. 2016 Supp. 21-5402(d). While the State raised a number of arguments, it primarily argued that K.S.A. 2016 Supp. 21-5402(d) applied retroactively by its specific terms to overcome Kahler's argument. Anticipating Kahler's reply, the State also argued that K.S.A. 2016 Supp. 21-5402(d) was neither unconstitutional under the Ex Post Facto Clause of the United States Constitution nor precluded by due process under *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

As anticipated, Kahler's reply brief focused on arguments against the constitutionality of K.S.A. 2016 Supp. 21-5402(d) based on *Beck* and the Ex Post Facto Clause. Two months after the reply brief was filed, this court considered and decided the same arguments in *State v. Gleason*, 299 Kan. 1127, 1160-61, 329 P.3d 1102 (2014), *rev'd and remanded on other grounds sub nom. Kansas v. Carr*, 577 U.S. ____, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016).

Gleason concluded:

> "K.S.A. 2013 Supp. 21-5402(d), by its express language, applies retroactively, foreclosing Gleason's claim that the district court erred in refusing Gleason's request for a felony-murder instruction. Further, the 2013 amendments do not violate Gleason's constitutional right to due process, as interpreted in *Beck,* nor does retroac-

tive application violate the prohibition against ex post facto laws." 299 Kan. at 1160-61.

In *State v. Carr*, 300 Kan. 1, Syl. ¶ 31, 331 P.3d 544 (2014), *rev'd and remanded* 577 U.S. ___, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016), this court held the ruling in *Gleason* eliminated any need to address the argument that a lesser included offense instruction for felony murder was supported by the evidence admitted at trial. And, subsequently in *Cheever*, 306 Kan. at 770, again considering the same arguments, this court held "[t]he reasoning of the *Gleason* and *Carr* cases applies with equal force and effect to this case and requires us to conclude that Cheever was not entitled to a felony-murder lesser included offense instruction. The trial judge did not err when he did not give one."

Gleason controls this case and dictates the conclusion that the district judge did not err by failing to give a felony-murder lesser included offense instruction because such an instruction was not legally appropriate.

VI. LIMITATIONS ON DEFENSE VOIR DIRE

Kahler alleges the district court denied him a fair trial by prohibiting his counsel from questioning prospective jurors during voir dire about their views on the death penalty.

Standard of Review / Analytical Framework

The purpose of voir dire is to enable the parties to select jurors who are competent and without bias, prejudice, or partiality. The nature and scope of voir dire examination is entrusted to the sound discretion of the trial court; however, appellate tribunals have the duty to make an independent evaluation of the

circumstances of voir dire in determining whether the district court has taken sufficient measures to ensure the accused is tried by an impartial jury free from outside influences. *State v. Reyna*, 290 Kan. 666, 686, 234 P.3d 761 (2010); *Hayden*, 281 Kan. at 128-29; *Aikins*, 261 Kan. at 365-66. An adequate voir dire is essential to protect a defendant's right to an impartial jury guaranteed by the Fifth and Sixth Amendments to the United States Constitution. *State v. Robinson*, 303 Kan. 11, 135, 363 P.3d 875 (2015), *cert. denied* 137 S. Ct. 164 (2016).

We will find an abuse of discretion if the trial court has unconstitutionally restricted a capital defendant's questioning during voir dire. 303 Kan. at 135-36. Mindful that this is a capital case in which the jury has imposed the death penalty, we have carefully examined the record of the district court's conduct of voir dire. Simply put, we find no support for Kahler's argument in the record.

The district judge consistently took the position that Kahler's counsel could not question prospective jurors about their views on the death penalty in the presence of other venire members. Clearly, the district judge was concerned that an individual panel member's comments could prejudice other members and wished to avoid a situation in which it might become necessary to disqualify an entire panel. But discussions between counsel and the district judge prior to commencement of trial, along with the written order covering the conduct of voir dire, made clear that counsel were entitled to question venire members individually when their in-court answers indicated a need to delve into matters outside the hearing of the rest of the panel. At oral argument, counsel for Kahler acknowledged that Kahler's trial

counsel was not prevented from making an individual inquiry of each venire person's death penalty views. In fact, trial counsel never made a request to question any of the venire members individually. Consequently, while an absolute prohibition against inquiry in front of the rest of the venire panel might be an unnecessary precaution against the risk of tainting the entire panel, it was not error here.

VII. CUMULATIVE ERROR DURING THE GUILT PHASE

Kahler claims that his guilt phase convictions must be reversed because cumulative trial errors denied him a fair trial.

Standard of Review / Analytical Framework

"'Cumulative trial errors, when considered collectively, may require reversal of the defendant's conviction when the totality of circumstances substantially prejudiced the defendant and denied the defendant a fair trial.'" *Kleypas*, 305 Kan. at 345. No prejudicial error may be found under the cumulative error doctrine if the evidence against the defendant is overwhelming. *Dixon*, 289 Kan. at 71.

"For errors to have a cumulative effect that transcends the effect of the individual errors, there must have been more than one individual error. [Citation omitted]." *State v. Cruz*, 297 Kan. 1048, 1074, 307 P.3d 199 (2013). We have agreed with Kahler that the trial judge should not have told the jury, "I normally don't do this," before giving PIK Crim. 4th 50.070 after opening statements and that the trial judge erred in refusing to give the expert witness instruction requested by the defense. In the process of our review, we also noted an erroneous ruling by the district court on an objection the State

lodged during defense counsel's closing argument. In short, there was more than one trial error.

But the touchstone is whether the defendant received a fair trial, not whether he received a perfect trial. See *Cruz*, 297 Kan. at 1075 (defendant entitled to fair trial, not a perfect one). Moreover, we have declined to find reversible error under the cumulative error rule where "'the evidence is overwhelming against the defendant.'" 297 Kan. at 1074. On the record before us, we are firmly convinced beyond a reasonable doubt that the guilty verdict would not have changed if the errors had not been committed.

We also note that the errors identified during the guilt-phase proceeding are not the type that we would expect to impact the sentencing determination when the same jury decides both guilt and sentence. See *Cheever*, 306 Kan. at 800. Accordingly, we do not revisit this error in our penalty-phase discussion.

VIII. EIGHTH AMENDMENT CATEGORICAL CHALLENGE TO DEATH PENALTY

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." Kahler claims that a sentence of death violates that constitutional right when it is imposed upon a severely mentally ill person.

Although Kahler relies on a motion he filed in the district court as having raised this issue below, that motion did not set out a categorical proportionality argument based on mental illness. Nevertheless, this court has held that a categorical proportionality challenge under the Eighth Amendment may be raised for the first time on appeal. *State v. Ruggles*, 297 Kan. 675, 679, 304 P.3d 338 (2013) (analysis does

not require review of district court factual findings; claim presents question of law determinative of case).

Standard of Review / Types of Categorical Challenges

"A categorical proportionality challenge under the Eighth Amendment implicates questions of law, and this court has unlimited review." *State v. Dull*, 302 Kan. 32, 40, 351 P.3d 641 (2015).

> "The United States Supreme Court identifies three subcategories of categorical proportionality challenges. The first considers the nature of the offense, such as a prohibition on capital punishment for nonhomicide crimes against individuals. *Graham*, 560 U.S. at 60-61 (citing *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 [1982]). The second considers the characteristics of the offender, such as a categorical rule prohibiting the death penalty for juveniles. *Graham*, 560 U.S. at 61 (citing *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 [2005]). The third, which was first recognized in *Graham*, combines the two because it 'implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes.' 560 U.S. at 61." *State v. Williams*, 298 Kan. 1075, 1086, 319 P.3d 528 (2014).

Analysis

Kahler's claim fits within the second subcategory of offender characteristics. He proposes a categorical rule prohibiting the death penalty for offenders who were severely mentally ill at the time of their crimes.

In analyzing claims under this second category, the United States Supreme Court employs a two-part test:

> "The Court first considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue. *Roper*, [543 U.S.] at 563. Next, guided by 'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose,' *Kennedy,* 554 U.S., at 421, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution. *Roper*, [543 U.S.] at 564." *Graham v. Florida*, 560 U.S. 48, 61, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

See *Williams*, 298 Kan. at 1087 (identifying two-factor test for analyzing categorical proportionality challenge).

We recently considered and rejected a nearly identical argument in *Kleypas*, 305 Kan. at 328-37. In fact, Kahler's brief is, with the exception of those portions pertaining directly to Kahler himself, nearly word for word the same brief that was submitted on this issue in *Kleypas*.

In *Kleypas*, we said that the defendant had not shown the kind of legislative consensus that the Supreme Court relies upon in the first part of its test. Then, in exercising our independent judgment under the second part of the test, we opined as follows:

> "As to the second-prong of the test, we explained in *Williams* that 'community consen-

sus is entitled to great weight but it is not determinative.' 298 Kan. at 1087. And in *State v. Mossman*, 294 Kan. 901, 281 P.3d 153 (2012), we observed:

> "'In accordance with the constitutional design, "the task of interpreting the Eighth Amendment remains [the Court's] responsibility." [Citation omitted.] The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. [Citations omitted.] In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals. [Citations omitted.]' *Mossman,* 294 Kan. at 929 (quoting *Graham,* 560 U.S. at 67-68).

"*Atkins* and *Roper* both identify retribution and deterrence as the 'legitimate penological goals' served by the imposition of the death penalty on those who commit the worst crimes. See *Roper*, 543 U.S. at 571; *Atkins*, 536 U.S. at 319. Both conclude that the characteristics of juveniles and the mentally retarded, respectively, make offenders in those categories less culpable than the 'average murderer.' *Atkins*, 536 U.S. at 319. And being less culpable and less amenable to deterrence, the death penalty is inappropriate for their crimes.

"In support of his argument, Kleypas simply states '[t]he culpability of the severely mentally ill is diminished in the same manner as juveniles and the mentally retarded.' He cites language quoted from the ABA recommendation report to

illustrate that some severe disorders result in hallucinations or delusions. But the ABA report itself recognizes that diagnosis alone is not a sensible basis for the exemption and, consequently, a case-by-case determination will be required. The report recognizes that *Atkins* left the definition of 'mental retardation' to the states. See 536 U.S. at 317. The report continues:

> "'*Atkins* held the death penalty excessive for *every* person with mental retardation, and the Supreme Court therefore dispensed with a case-by-case assessment of responsibility. However, for the disorders covered by this . . . part of the Recommendation, preclusion of a death sentence based on diagnosis alone would not be sensible, because the symptoms of these disorders are much more variable than those associated with retardation or the other disabilities covered by the Recommendation's first paragraph.' ABA Recommendation Number 122A at 671.

"In contrast, in *Roper*, the United States Supreme Court noted that '[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.' 543 U.S. at 572-73. And in *Atkins*, the Court noted that clinical definitions of mental retardation shared common features which ultimately bore on the determination of culpability. See 536 U.S. at 317-18.

"Mental illnesses present less discernable common characteristics than age or mental retardation. Caselaw relating to the implementation of *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct.

2595, 91 L. Ed. 2d 335 (1986), and *Panetti v. Quarterman,* 551 U.S. 930, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007), illustrates the difficulty in defining a discernable standard relating to mental illness. See *Panetti v. Quarterman*, 2008 WL 2338498 (W.D. Tex. 2008). As the ABA standard recognizes, case-by-case evaluations would be necessary; it follows that the level of culpability will vary on a case-by-case basis. While we recognize that some mental illnesses may make a defendant less culpable and less likely to be deterred by the death penalty, often such illnesses can be treated and may not manifest in criminal behavior.

"We also note the protections already in place, which protect the incompetent from trial and the 'insane' from execution. See K.S.A. 2015 Supp. 22-3302 (competency); *Ford,* 477 U.S. at 410 (Eighth Amendment prohibits executing those who are 'insane' at the time the sentence is carried out). In addition, a defendant may present a defense to the crimes based on a lack of capacity. K.S.A. 2015 Supp. 21-5209. Finally, as Kleypas did here, mental illness can be asserted as a mitigator. While we recognize a distinction between disqualification and mitigation, we also recognize that presenting mental illness as a mitigator allows the jury to consider culpability.

"Given these variables and considerations, in the exercise of our independent judgment, we reject a categorical prohibition based on the broad classification of mental illness, even as defined by the ABA standard, in favor of individualized assessments through the sentencing proceeding. See *Graham*, 560 U.S. at 58-61. We have

> confidence that Kansas juries can weigh a defendant's mental state at the time of the crime as a mitigating factor for consideration in the decision of whether to return a death penalty verdict.
>
> "We conclude that Kleypas fails to make the showing necessary under either prong of the two-part categorical proportionality analysis. We, therefore, deny his Eighth Amendment categorical proportionality challenge and conclude the Eighth Amendment does not categorically prohibit the execution of offenders who are severely mentally ill at the time of their crimes." 305 Kan. at 335-37.

We find this issue controlled by our decision in *Kleypas* and see no reason to revisit that holding.

IX. CONSTITUTIONALITY OF THE AGGRAVATING CIRCUMSTANCES

Kahler argues the two aggravating circumstances relied upon by the State to justify the death penalty failed to properly channel the jury's discretion as required by the federal and state constitutions. He argues that the "killing or creating a great risk of death to more than one person" factor is duplicative of the elements needed to prove capital murder. He argues that the "heinous, atrocious, and cruel" factor is vague and duplicative.

Standard of Review

The constitutionality of a statutory aggravating circumstance is a question of law subject to unlimited review. *Gleason*, 299 Kan. at 1186 (because challenge to constitutional validity of aggravating circum-

stances may require statutory interpretation, review is unlimited).

Analysis

Kahler acknowledges in his brief that this court has decided the questions raised in this issue against him. See *State v. Scott*, 286 Kan. 54, 110, 183 P.3d 801 (2008) (using the same conduct as element of capital murder and as aggravating factor not unconstitutional), *overruled on other grounds by State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016); *State v. Kleypas*, 272 Kan. 894, 1029, 40 P.3d 139 (2001) ("heinous, atrocious or cruel" aggravating circumstance, as defined and narrowed in sentencing jury instructions, narrows class of persons who are death eligible in constitutional manner), *overruled on other grounds by Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006). Kahler has raised no new arguments nor pointed to any caselaw which would provide a basis for reconsideration of those decisions, and we decline to do so.

X. SUFFICIENCY OF THE EVIDENCE OF AN AGGRAVATING CIRCUMSTANCE

For his final issue, Kahler argues there was insufficient evidence to support the jury's finding of the second aggravating factor argued by the State, *i.e.*, that the crime was committed in an especially heinous, atrocious, or cruel manner.

Standard of Review

The standard of review of the sufficiency of the evidence to support an aggravating circumstance was set out by this court in *Kleypas*, 272 Kan. at 1019, to-wit:

> "The standard of review on appeal as to the sufficiency of evidence regarding an aggravating circumstance is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the existence of the aggravating circumstance beyond a reasonable doubt."

Analysis

At the penalty hearing, the State relied in part on the evidence it had presented at the guilt phase trial. The State also put the coroner, Dr. Erik Mitchell, back on the stand to largely repeat his testimony from the guilt phase concerning the bullet wounds suffered by each of the victims. With respect to each victim, Mitchell described where each bullet entered the body, how the wound or wounds would have affected the victim's awareness and her ability to feel pain, and, ultimately, how they would have brought about her death. He testified that all of the women would have suffered the severe pain of being shot. He also concluded that all of them retained awareness long enough to know of the other shootings going on around them and to be cognizant of their own possible impending death.

The jury was instructed in accord with PIK Crim. 3d 56.00-C6 (2008 Supp.), on the heinous, atrocious, or cruel aggravating circumstance:

> "That the defendant committed the crime of capital murder in an especially heinous, atrocious or cruel manner. As used in this instruction, the following definitions apply:
>
> - 'heinous' means extremely wicked or shockingly evil;

- 'atrocious' means outrageously wicked and vile; and
- 'cruel' means pitiless or designed to inflict a high degree of pain, utter indifference to, or enjoyment of the sufferings of others.

"In order to find that the crime of capital murder is committed in an especially heinous, atrocious, or cruel manner, the jury must find that the perpetrator inflicted serious mental anguish or serious physical abuse before the victim['s] death. Mental anguish includes a victim's uncertainty as to her ultimate fate."

We have often held that shooting deaths are not inherently heinous, atrocious, or cruel. We compiled a number of those cases in *State v. Baker*, 281 Kan. 997, 1019, 135 P.3d 1098 (2006). See, e.g., *State v. Holmes*, 278 Kan. 603, 608, 638-39, 102 P.3d 406 (2004) (reversing hard 40 sentence because firing a single shot through the victim's heart was not especially heinous, atrocious, or cruel); *State v. Flournoy*, 272 Kan. 784, 794, 36 P.3d 273 (2001) (holding that the defendant's act of shooting the victim five times within 1 minute was not especially heinous, atrocious, or cruel); *State v. Cook*, 259 Kan. 370, 401-03, 913 P.2d 97 (1996) (reversing hard 40 sentence because the defendant's act of shooting the victim twice was not especially heinous, atrocious, or cruel); *State v. Reed*, 256 Kan. 547, 562-63, 886 P.2d 854 (1994) (concluding that shooting the victim in the head was not especially heinous, atrocious, or cruel and other testimony supporting the finding amounted to conjecture and speculation).

In *Baker*, we also reviewed a number of cases in which this court had found shooting deaths to be

especially heinous, atrocious, or cruel. 281 Kan. at 1019-20. See, e.g., *State v. Washington*, 280 Kan. 565, 571-72, 123 P.3d 1265 (2005) (shooting deaths were especially heinous, atrocious, or cruel when the victims attempted to flee after being shot and the defendants pursued the victims, continuing to shoot until the victims died); *State v. Perry*, 266 Kan. 224, 234, 968 P.2d 674 (1998) (defendant waved gun in front of his victims before shooting them and forced one of the victims to watch the defendant shoot her sister); *State v. Brady*, 261 Kan. 109, 123-24, 929 P.2d 132 (1996) (defendant forced two shooting victims to lie face down on floor with their heads close together while he paced around room for about 15 minutes holding a gun, then shot first victim in the head while second victim watched, then shot second victim in the head). We concluded in *Baker* that the "common thread" running between those cases in which we held a shooting death had been especially heinous, atrocious, or cruel was evidence of the infliction of mental anguish upon the victim prior to death. 281 Kan. at 1020.

A more recent case is factually similar to this case. In *State v. Hayes*, 299 Kan. 861, 327 P.3d 414 (2014), defendant Terry Ray Hayes was married to Tiffani Hayes for a little over a year. In April 2010, Tiffani moved out, and shortly afterward, Hayes filed for a divorce. He experienced depression and suicidal ideations following the breakup. There was evidence that Hayes continually contacted Tiffani electronically, at work and elsewhere, that he accused her of infidelity, and that he had told others he would kill her. On the day of the murder, Hayes lured Tiffani to his home by telling her he had some of her property that she needed to pick up. Tiffani arrived with a friend and approached Hayes who was in the driveway. The

friend witnessed Hayes confront Tiffani, heard Tiffani scream, and then saw Tiffani being chased down as she tried to escape from Hayes who had a gun. Hayes shot Tiffani in the back of the head when he caught up to her. In summing up the evidence supporting the aggravator, this court said there was "evidence that Hayes had threatened Tiffani in the past, that he lured her to his residence in order to kill her, and that he killed Tiffani as she tried to run away from him." 299 Kan. at 868.

Here, there was evidence that Kahler engaged in similar electronic stalking in which he sent emails to Karen, to Karen's lover, and to others. There was evidence Kahler was severely depressed and was obsessed with Karen's leaving. There was also evidence of a prior physical threat to Karen. Karen had previously had Kahler arrested for battering her, and she was aware of his obsessive behavior. In *Hayes*, the district court relied on similar evidence to establish that Tiffani had reason to fear Hayes and, as a result, suffered mental anguish at the time of her death. As in *Hayes*, it is reasonable to conclude that Kahler's prior behavior contributed to Karen's mental anguish when he walked into Wight's kitchen with a gun and shot her.

In addition to the evidence above, there is clear evidence from the Life Alert recording that Kahler methodically went through the house shooting each of the women in turn. The coroner's testimony established that the bullet wounds to each of the victims were not immediately fatal and would have left each victim conscious long enough to suffer the physical pain of her injuries in addition to the mental anguish of her impending death. The evidence clearly established that Wight and Lauren were aware of

others being shot before them and lived long enough to suffer seriously from their own wounds and to fear for their own lives. The Life Alert recording established beyond question that Lauren suffered severe mental anguish as her father went through the house shooting her family members as she lay mortally wounded fearing for her own life. Viewing this evidence in the light most favorable to the prosecution, we easily conclude that a rational fact-finder could have found beyond a reasonable doubt that Kahler committed the murders in an especially heinous, atrocious, or cruel manner.

We applied the same standard of review in *Gleason*, where we recognized our "independent duty to consider the sufficiency of the evidence to support the jury's findings on aggravating circumstances." 299 Kan. at 1189 (citing K.S.A. 2013 Supp. 21-6619[c][2], which provides this court "shall determine . . . whether the evidence supports the findings that an aggravating circumstance or circumstances existed").

Kahler does not contest the jury's finding that Kahler killed or created a great risk of death to more than one person. But under our independent duty to determine "whether the evidence supports the findings that an aggravating circumstance or circumstances existed," see K.S.A. 2016 Supp. 21-6619(c)(2), we have no problem determining that the evidence was sufficient to support this aggravating circumstance. With our determination above that sufficient evidence supported the heinous, atrocious, or cruel aggravating circumstance, we now must determine whether the evidence supports the finding that "mitigating circumstances were insufficient to outweigh the aggravating circumstances." K.S.A. 2016

Supp. 21-6619(c)(2). Again, we have no difficulty in determining that the jury's weighing determination and sentencing verdict were supported by the evidence.

CONCLUSION

Kahler's conviction of capital murder under K.S.A. 21-3439(a)(6) and his sentence of death are affirmed.

ROSEN, J., not participating.

MICHAEL J. MALONE, Senior Judge, assigned.[1]

* * *

BILES, J., concurring in part and dissenting in part: I agree with the majority's decision to affirm James K. Kahler's convictions and sentences but disagree with one conclusion reached by the majority. I would not characterize as misconduct the trial judge's aside that "I normally don't do this" before giving the pattern jury instruction about remarks of counsel. I think the majority reaches the wrong conclusion and in the process does a disservice to the trial bench. It slaps a "judicial misconduct" label on what, at worst, should be an opportunity for a simple "teaching moment" to caution judges about their banter with juries.

The comment in question came after defense counsel's opening statement. Recall there were three objections to defense counsel's opening statement with one admonition to defense counsel being overheard by the jury. And after counsel finished, the

[1] REPORTER'S NOTE: Senior Judge Malone was appointed to hear case No. 106,981 vice Justice Rosen under the authority vested in the Supreme Court by K.S.A. 20-2616.

district judge gave an admittedly proper preliminary jury instruction, saying:

> "All right. Ladies and gentlemen of the jury, I'm going to read an instruction to you at this time. *I normally don't do this, but I am going to ask that you listen carefully*. This is one of the instructions that will be given to you later but I wish to give it to you now also. That statement is: Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded." (Emphasis added.)

Kahler argues this passing comment about what normally occurs in a typical trial, along with its proximity to his counsel's opening statement and the State's objections, shows judicial bias requiring reversal of Kahler's convictions. The majority does not go that far, but it tags the comment as judicial misconduct. I disagree.

When addressing the merits of this alleged judicial misconduct—"I normally don't do this"—this court must consider the facts and circumstances surrounding the alleged misconduct to decide whether the remark manifested bias that impaired the trial's fairness. *State v. Hayden*, 281 Kan. 112, 116, 130 P.3d 24 (2006). In this case, the trial judge had a tough job. He was coping with a particularly heinous, high-profile death penalty case involving a quadruple homicide. Two victims were young girls.

In what was obviously an effort to maintain focus and order, the trial judge sandwiched both counsel's

opening statements between appropriate preliminary pattern jury instructions. Immediately before the State's opening remarks, the trial judge instructed jurors to consider only the testimony and exhibits admitted into evidence. Immediately after the defense's remarks, the trial judge cautioned the jury as recited above.

It is impossible for me to understand how the defense can cry foul when what the trial judge advised the jury about included a comment that explained the State and defense counsel's purpose in giving their openings was to help jurors understand the evidence and application of the law. Surely, no one would take the State seriously if it objected that its opening statement was diminished because it was preceded by the judge telling the jury to consider only the testimony and exhibits—effectively inviting the jury to disregard what it was about to hear. And the instruction that followed the opening statements here can objectively be seen as validating the purpose of opening statements, rather than degrading a particular speaker's integrity.

What we are left with is the trial judge's aside that he "normally" did not give the later instruction, but wanted the jury to hear it then, and would give it again later. What would a reasonable person take from this?

Indulging the majority's willingness to speculate, one obvious answer arises because these jurors knew they were hearing an abnormal, highly charged, multiple murder case in which an individual's life hung in the balance. And given that, they would have far more readily associated the judge's comment that he did not "normally" give a particular instruction with the serious business at hand and what was most

assuredly on everyone's minds, i.e., the grisly case being heard. Instead, the majority steadfastly conjectures that jurors "would" see the remarks "undoubtedly" as targeting the defense in some critical way. Slip op. at 20-21. That conclusion is too farfetched under the facts and circumstances presented.

I disagree with the majority's characterization of this remark as judicial misconduct and error. But I agree if the comment was error, it was harmless beyond a reasonable doubt.

STEGALL, J., joins the foregoing concurring and dissenting opinion.

* * *

JOHNSON, J., dissenting: I dissent. To effect synergy with the majority, I will address each of its issues in turn, including those with which I agree, followed by the unassigned error of unconstitutionally inflicting the cruel and/or unusual punishment of death.

ISSUE #1: PROSECUTORIAL ERROR

I agree with the majority's holding that it is within the prosecutor's permissible latitude to object on the ground that the defense's closing argument is about to go beyond the admitted evidence, even where the objection is based on the prosecutor's erroneous understanding of the law. I disagree, however, with the majority's suggestion that bad faith or ill will can never play any role in the error analysis. I would submit that a prosecutor does *not* have the wide latitude to intentionally seek to lure the trial court into erroneously excluding permissible defense arguments. Such bad faith conduct, manifesting ill will, does, indeed, constitute prosecutorial error. But I do not discern that the prosecutor in this case crossed that line.

ISSUE #2: JUDICIAL MISCONDUCT

I agree with the majority on its assessment of the judge's remarks to the third panel of venire persons warning against blurting out personal opinions. Although a more articulate admonition would have included the clarification that panel members could individually advise the court of their respective personal concerns about the death penalty outside the presence of the others that omission in this context did not rise to the level of misconduct.

Likewise, I agree with the majority that it would have been better if the venire panel had not heard the trial judge ask the defense to pick up the pace. See *State v. Kemble*, 291 Kan. 109, 114, 238 P.3d 251 (2010) ("[A] trial judge should be cognizant that jurors afford the presiding judge a great deal of respect and '"can be easily influenced by the slightest suggestion coming from the court, whether it be a nod of the head, a smile, a frown, or a spoken word."' [Citation omitted.]"). But I discern no judicial misconduct.

Further, I agree with the majority's finding of error regarding the third alleged incident of judicial misconduct during which the district judge told the jury that he normally did not give the instruction on counsel's statements not being evidence after the opening statements. The majority correctly discerns that, in context, the judge's comment brought special attention to the instruction and the jury could have concluded that the extra instruction was specifically aimed at the credibility of the defense opening statement.

With respect to the judge's questioning of the deputy, I would concur with the majority's determination that, although the better practice would have been for the district judge to ask the prosecutor to seek clarification of the testimony, there was no misconduct here. The judge's questions did not suggest partiality toward the State. Indeed, the questioning could be viewed as having cast some doubt on the deputy's thoroughness or expertise.

The alleged judicial misconduct set forth in II.E. is a corollary to the alleged prosecutorial error in the first issue. To reiterate, after the prosecutor objected to defense counsel's stating what the male voice was saying on the Life Alert tape, the district judge ruled: "I think it's improper. You cannot say what you think is on the tape." Kahler contends that it was misconduct for the judge to sustain the objection and it was also misconduct for the judge to state in front of the jury that the defense argument was improper.

I agree with the majority's assessment that the district court's ruling on the State's objection during the defense closing argument was legally infirm and constituted an unassigned trial error. But, as the majority correctly states, Kahler had to show more than an erroneous ruling on an objection to establish his assigned error of judicial misconduct. He did not do so here, even with the judge's use of the word "improper" to describe the legal status of the argument.

Kahler's complaint about the judge's remarks concerning jury questions during deliberations is similarly miscast as judicial misconduct. Even if the judge's comments were erroneous, Kahler does not explain how discouraging jury questions would inevitably result in bias, prejudice, or partiality that was

adverse to the defense. One can imagine that a jury could have some questions which, if left unresolved, would prejudice the State. Consequently, although I view the judge's remarks to be ill-advised and erroneous, especially in a death penalty case, I cannot say they rise to the level of being misconduct.

In sum, I concur with the majority that the record does not support the defendant's claim that the district judge engaged in a pattern of conduct that manifested bias, prejudice, or partiality against the defense. But defendant's arguments on this issue point out two unassigned errors, i.e., the district court erroneously sustained the State's objection during the defense closing argument, and the district court erroneously discouraged the jury from exercising its right, after retiring for deliberations, "to be informed as to any part of the law or evidence arising in the case." K.S.A. 22-3420(3).

Individually, the judge's erroneous instruction following defense counsel's opening statement and the two unidentified errors would not have changed the jury's guilty verdict. I discuss their cumulative prejudicial effect in Issue #7.

ISSUE #3: REQUESTED INSTRUCTION ON EXPERT WITNESSES

I agree with the majority that the district court erred in refusing to give the requested instruction on expert witness credibility, but that the error standing alone did not affect the jury's guilt-phase verdict.

ISSUE #4: CONSTITUTIONALITY OF K.S.A. 22-3220

In rejecting Kahler's constitutional challenge to this state's elimination of the insanity defense, in

favor of a mens rea approach, the majority leans heavily on its assessment that Kahler adds nothing new to the arguments that were rejected in *State v. Bethel*, 275 Kan. 456, 66 P.3d 840 (2003). While stare decisis is a valid tack, the majority conveniently overlooks a significant distinction between this case and *Bethel*. Although Bethel was convicted of capital murder, the death penalty was not involved. "Pursuant to an agreement of the parties, Bethel waived his right to a jury trial, the case was tried to the bench on stipulated facts, and the State did not pursue the death penalty." 275 Kan. at 457.

Recently, we acknowledged that this court is supposed to employ a higher degree of scrutiny in a death penalty case. We stated:

> "This court has, in several cases, noted that issues in a death penalty review are subject to a heightened reliability standard. See, *e.g.*, *Carr*, 300 Kan. at 284 (recognizing need for heightened reliability); *State v. Scott*, 286 Kan. 54, 76, 183 P.3d 801 (2008) (same); *State v. Green*, 283 Kan. 531, 545, 153 P.3d 1216 (2007) ('[I]n the context of a capital sentence, this court has required a heightened degree of reliability.'); *Marsh*, 278 Kan. at 525 ('[T]here is a heightened scrutiny of trial proceedings in a capital case.'); *Kleypas I*, 272 Kan. at 1036 (observing 'heightened reliability requirements' apply to capital sentencing under federal and state constitutions).
>
> "A sentence of death is different from any other punishment, and accordingly there is an increased need for reliability in the determination that death is the appropriate sentence. See *Beck*, 447 U.S. at 637-38 (recognizing that a death sentence is a "'different kind of punish-

> ment from any other which may be imposed in this country . . . in both its severity and its finality'" [quoting *Gardner v. Florida*, 430 U.S. 349, 357-58, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977)]; court has duty to set aside procedures that undermine the reliability of the jury's determination)." *State v. Kleypas*, 305 Kan. 224, 274-75, 382 P.3d 373 (2016), *cert. denied* 137 S. Ct. 1381 (2017).

At the very least, this court has the obligation to independently analyze whether the procedure of replacing the insanity defense with the mens rea approach undermines the reliability of the jury's determination to impose the death penalty. One might question whether a juror would be as likely to vote to kill a defendant who did not know that his or her murderous act was wrong.

ISSUE # 5: LESSER INCLUDED OFFENSE INSTRUCTION ON FELONY MURDER

The majority follows recent precedent to opine that the legislature retroactively eliminated felony murder as a lesser included offense of capital murder. One can certainly make a logical argument for the proposition that eliminating felony murder as a lesser offense of capital murder effectively changes the definition of the crime of capital murder, and, although the legislature is entitled to change the definition of a crime, it cannot redefine the crime after it is committed. Nevertheless, that is the settled law in this state now.

ISSUE #6: LIMITATIONS ON DEFENSE VOIR DIRE

I have no quibble with the majority's holding that the district court did not impermissibly limit the

defense's voir dire of the jury panels given the record before the court and defense counsel's failure to conduct individual voir dire of venire members.

ISSUE #7: CUMULATIVE ERROR DURING THE GUILT PHASE

I discern that the following judicial acts constitute multiple guilt-phase trial errors, to-wit: (1) Giving the jury instruction after opening statements with accompanying remarks about it being unusual; (2) sustaining the State's objection during the defense closing argument, thereby precluding argument on the admitted Life Alert tape recording; (3) discouraging the jury from submitting questions during its deliberations; and (4) refusing to give the legally appropriate and factually supported expert witness instruction proffered by the defense.

Notwithstanding the existence of more than one error, I would not hold that their collective effect requires reversal of the guilty verdict. But I strongly disagree with the majority's determination that the guilt-phase errors can be ignored when considering the same jury's penalty-phase decision. Our heightened reliability obligation mandates that we not approve a sentence of death that is obtained through erroneous procedures. I would hold that the errors made in this case undermined the reliability of the jury's death sentence, and I would require that it be vacated and remanded for a new sentencing trial. A death sentence that fails the unreliable procedures test cannot pass constitutional muster, even if the majority believes that a subsequent trial would yield the same result.

ISSUE #8: EIGHTH AMENDMENT CATEGORICAL CHALLENGE TO DEATH PENALTY

The majority relies exclusively on *Kleypas*, 305 Kan. 224, to reject Kahler's argument that it is cruel and unusual punishment under the Eighth Amendment to the United States Constitution for the State to kill a person who was severely mentally ill at the time of the capital murder. I did not specifically address this issue in my *Kleypas* dissent, but I do so now.

Fifteen years ago, in *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), the United States Supreme Court construed and applied the Eighth Amendment "in the light of our 'evolving standards of decency,'" and concluded that imposing the death penalty on a mentally retarded offender was excessive and "that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." While recognizing that a preferred label is intellectual disability, see *Hall v. Florida*, 572 U.S. ____, 134 S. Ct. 1986, 1990, 188 L. Ed. 2d 1007 (2014), in K.S.A. 2016 Supp. 21-6622, for clarity I will use the terms employed in *Atkins* and *Kleypas*, i.e., mental retardation and mentally retarded.

Part of the rationale for *Atkins*' holding was that the Court seriously doubted that either of the two justifications for the death penalty that it had recognized—retribution and deterrence—could be applied to mentally retarded offenders. 536 U.S. at 318-19 (citing *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S. Ct. 2909, 49 L. Ed. 2d 859 [1976] [joint opinion of Stewart, Powell, and Stevens, JJ.]). The Court opined that "[u]nless the imposition of the death penalty on a mentally retarded person 'measurably contributes

to one or both of these goals, it "is nothing more than the purposeless and needless imposition of pain and suffering," and hence an unconstitutional punishment.'" *Atkins*, 536 U.S. at 319; cf. *State v. Robinson*, 303 Kan. 11, 355-56, 363 P.3d 875 (2015) (Johnson, J., dissenting) (citing *Glossip v. Goss*, 576 U.S. ___, 135 S. Ct. 2726, 2764-68, 192 L. Ed. 2d 761 [2015] [Breyer, J., dissenting] "'the death penalty's penological rationale in fact rests almost exclusively upon a belief in its tendency to deter and upon its ability to satisfy a community's interest in retribution'"; if death penalty fails to reach the goals of deterrence or retribution, it is unconstitutional punishment), *cert. denied* 137 S. Ct. 164 (2016).

In reaching its conclusion that it was "not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty," *Atkins*, 536 U.S. at 321, the Court engaged in the following analysis:

> "With respect to retribution—the interest in seeing that the offender gets his 'just deserts'—the severity of the appropriate punishment necessarily depends on the culpability of the offender. Since *Gregg,* our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes. For example, in *Godfrey v. Georgia,* 446 U.S. 420 (1980), we set aside a death sentence because the petitioner's crimes did not reflect 'a consciousness materially more "depraved" than that of any person guilty of murder.' *Id.,* at 433. If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of

the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.

"With respect to deterrence—the interest in preventing capital crimes by prospective offenders—'it seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation,"' *Enmund,* 458 U.S., at 799. Exempting the mentally retarded from that punishment will not affect the 'cold calculus that precedes the decision' of other potential murderers. *Gregg,* 428 U.S., at 186. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders. The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face

> the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence." 536 U.S. at 319-20.

The *Kleypas* majority "recognize[d] that some mental illnesses may make a defendant less culpable and less likely to be deterred by the death penalty." 305 Kan. at 336. Notwithstanding the self-serving equivocation in that recognition, it nevertheless points out the logical fallacy in categorically protecting the mentally retarded but not the severely mentally ill. *Atkins* spoke about mentally retarded offenders being less morally culpable because of their "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses," as well as not being amenable to deterrence. 536 U.S. at 320. I fail to grasp how a severely mentally ill person possessing those same characteristics is not in the same less-morally-culpable category as the mentally retarded offender. If a person is incapable of understanding the nature and quality of their murderous act and/or did not know that the act was wrong, does it matter whether the cause of the cognitive deficiency is labeled mental retardation or chronic mental illness? The point is that, when executing a severely mentally ill person will not "measurably advance the deterrent or the retributive purpose of the death penalty," it becomes "nothing more than the purposeless and needless imposition of pain and suffering." 536 U.S. at 319, 321.

Kleypas strained to distinguish severe mental illness by declaring that the condition presents "less discernable common characteristics than age or mental retardation." 305 Kan. at 336. The apparent suggestion was that the courts might have to work

more diligently to identify which mentally ill persons are less culpable. That argument is unpersuasive, if for no other reason than the notion that a person's life—even a murderer's life—should not be taken away without this court's heightened scrutiny, even if that takes more effort.

But, more importantly, I do not accept the premise. This state has decades of jurisprudence applying the *M'Naghten* rule. Determining whether a person was so severely mentally ill at the time of the crime as to render him or her less culpable is not much of a leap from that former knowing-right-from-wrong jurisprudence. Likewise, the argument falters when one considers that intellectual disability in this state is not determined through a mathematical calculation, but rather the condition requires a case-by-case determination as well. See *State v. Corbin*, 305 Kan. 619, 620, 386 P.3d 513 (2016) (remanding for district court findings on matters beyond standardized intelligence tests).

Moreover, I must confess to being baffled by the point *Kleypas* attempted to make by stating that "often such [mental] illnesses can be treated and may not manifest in criminal behavior." 305 Kan. at 336. If the suggestion is that mental retardation and being underage *always* manifests in criminal behavior, that would, of course, be ludicrous. The fact that not all mentally ill persons engage in criminal activity is no more compelling than the fact that not all mentally retarded persons are criminals. Moreover, if the statement means to suggest that mentally retarded persons can never receive training that will permit them to peacefully exist in society, that, too, would be wrong-headed.

Finally, *Kleypas*' rationale that the problem of executing severely mentally ill persons is ameliorated because mental illness can be presented to the jury as a mitigator does not pass cursory consideration. Would telling a juror that the defendant suffers from a severe mental illness that resulted in him or her killing people without knowing it was wrong, suggesting that the defendant will always be a danger to society, make the juror more, or less, likely to vote for death? If it is morally and legally wrong to execute a person who is no more culpable than *Atkins*' "average murderer," the decision to do so should not be left in the emotionally charged hands of the jury.

ISSUE #9: CONSTITUTIONALITY OF TWO AGGRAVATING FACTORS

I concur with the majority's determination that the issues raised here were previously decided adversely to Kahler, and I see no reason to attempt to avoid the doctrine of stare decisis today.

ISSUE #10: SUFFICIENCY OF THE EVIDENCE OF AGGRAVATING CIRCUMSTANCE

I would agree with the majority's assessment that this case presents an exception to the general proposition that shooting deaths are not inherently heinous, atrocious, or cruel. A person who stalks and systematically shoots his wife and daughters, one after the other, whereupon each remains aware of her own impending death and the deaths of her relatives has committed capital murder in a heinous, atrocious, and cruel manner.

OTHER UNASSIGNED ERRORS

Kahler does not challenge the constitutionality of Kansas' death penalty law under our State Constitution. See Kan. Const. Bill of Rights, § 9

(prohibiting "cruel or unusual punishment"). But as noted above, we can—and should—consider unassigned errors that impact on fairness and justice. In *Robinson*, 303 Kan. at 351-57, I expressed my view that the death penalty violates the prohibition against cruel or unusual punishment in our State Constitution. I relied heavily on Justice Breyer's dissent in *Glossip*, 135 S. Ct. at 2755-77, which I summarized as follows:

> "The *Glossip* dissent opined that in 1976, when the United States Supreme Court upheld the death penalty, 'the Court thought that the constitutional infirmities in the death penalty could be healed,' and it 'delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems.' 135 S. Ct. at 2755 (Breyer, J., dissenting). But '[a]lmost 40 years of studies, surveys, and experience strongly indicate . . . that this effort has failed.' 135 S. Ct. at 2755 (Breyer, J., dissenting). The dissent related that the current administration of the death penalty 'involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose.' 135 S. Ct. at 2755-56 (Breyer, J., dissenting). Moreover, the dissent noted that, perhaps as a result of these constitutional defects in the death penalty, 'most places within the United States have abandoned its use,' which makes the penalty 'unusual.' 135 S. Ct. at 2756 (Breyer, J., dissenting)." *Robinson*, 303 Kan. at 351-52 (Johnson, J., dissenting).

The only thing I would add here is the obvious observation that a part of what makes the death penalty unfair and unjust is that the degree of certainty that a jury must possess to vote for the death penalty does not match the finality of the punishment, once executed. A jury can convict a person of capital murder without being certain that the person is guilty. Indeed, prosecutors frequently argue to juries that the beyond a reasonable doubt standard of proof does not mean beyond *all* doubt. Then, in the sentencing phase, the same less-than-certain standard is applied to the existence of aggravating factors, which must then be *outweighed* by mitigating circumstances. K.S.A. 2016 Supp. 21-6617.

But there is nothing uncertain about the punishment of death. There is no taking back a completed execution, even if we learn that the jury was hoodwinked by unscrupulous forensics, sandbagged by unethical prosecutions, or left less than fully informed by inconceivably incompetent defense counsel. In recent years, death row inmates have been found to have been wrongfully convicted for a plethora of reasons. Moreover, after a death sentence is executed, it matters not one whit whether the sentence was unconstitutionally imposed. For instance, there was no relief for all of the mentally retarded offenders put to death before the *Atkins* court announced that it was unconstitutionally cruel and unusual punishment to do so. Likewise, the 22 juvenile offenders put to death between 1985 and 2003 were not brought back to life by *Roper*'s epiphany that a state executing its children is categorically unconstitutional. See *Roper v Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

In short, when it comes to our death penalty, the scales of justice are not in equipoise. That is cruel.

Case 106981 CLERK OF THE APPELLATE COURTS
Filed 2018 Apr 26 PM 4:01

[LOGO]

Court:	Supreme Court
Case Number:	106981
Case Title:	STATE OF KANSAS, APPELLEE, V. JAMES K. KAHLER, APPELLANT.
Type:	Motion for Rehearing or Modification by Appellant, James K. Kahler

Considered by the Court and denied.

SO ORDERED.

/s/ Lawton R. Nuss

/s/ Lawton R. Nuss, Chief Justice

Electronically signed on 2018-04-26 16:00:58 page 1 of 14

Case 106981 CLERK OF THE APPELLATE COURTS
Filed 2018 May 01 PM 4:23

09 CR 270

IN THE SUPREME COURT OF THE
STATE OF KANSAS

No. 106,981

STATE OF KANSAS,

Appellee,

v.

JAMES K. KAHLER,

Appellant.

CORRECTED ORDER

The court has considered and denies Appellant's motion for rehearing or modification,

BY ORDER OF THE COURT this 1 day of May 2018.

/s/ Lawton R. Nuss
LAWTON R. NUSS,
Chief Justice

Rosen, J., recused.

Approved: May 23, 1994
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Michael O'Neal at 3:30 p.m. on February 9. 1994 in Room 313-S of the Capitol.

All members were present except:

Representative Tom Bradley – Excused
Representative Denise Everhart – Excused
Representative Rand Rock – Excused
Representative Candy Ruff – Excused
Representative Joan Wagnon – Excused

Committee staff present:

Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the committee:

Representative Elaine Wells
JoAn Turnbull, Wichita, Kansas
Bob Fairchild, Reno County
Allen Cox, Wichita, Kansas
Jim Clark, Kansas County & District Attorneys Association
Sheryl Tatroe, Kansas Alliance for the Mentally Ill
Ron Smith, Kansas Bar Association
Chip Wheelen, Kansas Psychiatric Society
Dean Raymond Spring, Washburn University

Others attending: See attached list

Hearings on HB 2328 – Guilty but mentally ill – were opened.

Representative Elaine Wells appeared before the Committee as the sponsor of the bill. She stated that fourteen states have Guilty But Mentally Ill (GBMI) legislation and three states have abolished the use of the insanity defense. HB 2328 defines mental illness and states that the verdict can be used only in felony cases. If the defendant was found to be GBMI he would spend his time in an institution for examination to determine treatment and when treatment should be terminated. When the defendant's treatment was finished he would then serve the remainder of his time in prison, (see attachment 1). She commented that in Michigan 80% of the cases of findings of guilty were pleas of GBMI. States that have GBMI show that the defendants are in treatment for a short period of time and serve the remainder of their sentence in prison. In the State of Utah they abolished the insanity defense believing that it would bring their state more in line with the Christian attitudes and values. The guilty but mentally ill approach would give a safer measure of protection, assure treatment and also provide for confinement.

JoAn Turnbull, Wichita, Kansas, appeared before the Committee as a proponent of the bill. She stated that her son was murdered in 1987. The criminal was found not guilty by reason of insanity. Doctors stated that he was deranged when he went into the Nautilus Center and killed her son. He was sentenced to Larned State Hospital and has the right to request a hearing every year to be released. Our society should be protected from people who commit such acts, (see attachment 2).

Chairman O'Neal commented that he was concerned that the District Attorney accepted the plea without a trial and questioned if the District Attorney shared with her the report of the State's psychiatrist. Ms. Turnbull responded that the family requested a copy of the report hut it was never sent.

Bob Fairchild, Reno County, appeared before the Committee as a proponent of the bill. He felt that defendants should have to do time for their crime and not be rewarded with time in a mental institution and then be released back into society. These criminals should have to serve their time in a prison after they have been found competent, (see attachment 3).

Allen Cox, Wichita, Kansas, appeared before the Committee as a proponent of the bill. He stated that in 1990 he was shot while he was driving to work. While the defendant was on the shooting spree: one person was killed and a total of ten people were shot 7 seriously. The defendant pled not guilty by reason of insanity and was sent to Larned State Hospital for treatment. Every year there is a competency hearing to see if he can be released, (see attachment 4).

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY. Room 313-S Statehouse, at 3:30 p.m. on February 9, 1994.

Chairman O'Neal stated that he was concerned that prosecutors were accepting these pleas without having hearings. He questioned if Mr. Cox knew why the prosecutor accepted the plea without a hearing. Mr. Cox responded that the defendant was a manic depressive and was on medication, but when he was on the spree he wasn't taking the medication. The Chairman commented that while he was on the medication the law presumed that he was competent, but if he chooses to be off the medication he can exercise his right to plea insanity for anything that may happen while he was off the medication.

Jim Clark, Kansas County & District Attorneys Association, appeared before the Committee as a proponent of the bill. He stated that recent developments in the law have made the additional verdict a matter of primary importance to those concerned with public safety. He is concerned with the recent U.S. Supreme Court decision in *Foucha v. Louisiana* which requires that to confine a person found guilty by reason of insanity the person must be found both dangerous and mentally ill. Kansas law is the same and will probably be ruled unconstitutional, (see attachment 5).

Chairman O'Neal asked Mr. Clark to explain why a District Attorney would be convinced that he should accept a plea of not guilty by reason of insanity. Mr. Clark responded that in insanity cases when experts state that the defendant was insane at the time of the crime feel there is the duty not to proceed forward with a trial. The Chairman questioned if there was the

option of the GBMI, would the plea bargain number come down. Mr. Clark replied that there probably wouldn't be a reduction in plea bargains but there would probably be a number of those kinds of cases that would have pled guilty by reason on insanity but change to GBMI. Chairman O'Neal commented that if the defendant was mentally ill before, during and after the crime, shouldn't temporary insanity be done away with. On the other hand there are those that are sane before and after the crime but for a period of time they act out in a bazaar way and commit a crime and can then hide behind the not guilty by reason of temporary insanity. The Chairman questioned if they were getting any feedback from the states that have the option of GBMI. Mr. Clark replied that Michigan feels that this option was working.

Representative Garner commented that this would give a fourth option to juries and could encourage more compromise verdicts. Mr. Clark commented that this does concern him but it was not a reason to refrain from passing this bill. Chairman O'Neal agreed that under this bill a plea of guilty but mentally ill was a verdict of guilty.

Sheryl Tatroe, Kansas Alliance for the Mentally Ill, appeared before the Committee as an opponent to the bill. She stated that this added option does nothing to reduce the likelihood that a person with a mental illness will commit fewer crimes. The bill that was being proposed today has more potential for confusion than for addressing the wrongs a person does and has no public policy merit that Kansas Alliance for the Mentally Ill can find. The fact that individuals do not take the medication that is needed to control their behavior is not unexpected, (see attachment 6).

Chairman O'Neal stated that the decision as to whether an individual was entitled to be acquitted by reason of insanity was done by a jury. The GBMI option would take nothing away from the jury but simply add another option which would cause the jury to differentiate between types of disabilities at the time the act was committed. They could find that at the time the act was committed there was true mental illness and continue to acquit by reason of insanity; or the defendant might not have proven true mental illness to the juries satisfaction but it is a person who obviously needs treatment and can be found guilty by reason of insanity. The Chairman questioned why wouldn't they want the same jury that is capable of making the decision of insanity making the distinction between insanity and a mental defect that should hold them responsible for their crime. Ms. Tatroe replied that their view was that this additional option was not needed. If they are guilty they should receive a verdict of guilty and if treatment is needed then they should receive treatment. The Chairman questioned how the guy driving down the street was protected from the person who chooses not to take their medication that day. Ms. Tatroe responded that there should be a provision that states that they are required to take their medication or not be released and if they are released be on medication monitoring. Chairman O'Neal stated if someone has proven time and time again that they cannot be trusted to take their medication, they need to be locked up. Ms. Tatroe commented that if someone can function in society and had a tool to be able to do so and had some support in using that tool then they should be allowed to function in society. However if someone had proven that they cannot take their medication, then there should be a provision that they stay in a mental health center.

Ron Smith, Kansas Bar Association, appeared before the Committee as an opponent to the bill. He stated that if this law was passed the jury makes the decision as to what verdict will be announced against the defendant. The GBMI would come out of those who are already guilty and have no other way to receive treatment for their illness.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY, Room 313- S Statehouse, at 3:30 p.m. on February 9, 1994.

Raymond Spring, Washburn University, appeared before the Committee as an opponent to the bill. He stated that Utah, Idaho, & Montana have abolished the insanity defense entirely. He believes that is the way the states should go. The issue of GBMI adds nothing to what the courts already have. If this proposed bill would make it safer for the public he would be in favor of the bill, but it doesn't do this, however, it does provide an incentive for those that plea insanity. He stated that the juries are already confused by the insanity defense because it tends to take the focus away from the issue of if they committed the crime. Adding GBMI would only add to the confusion. Section 2 of the bill shifts the burden of proof in insanity defense cases from the prosecution to the defense, (see attachment 7).

Chairman O'Neal commented that he has always assumed that abolishing the insanity defense was not constitutionally possible. He asked how the State would proceed if it decided to abolish the insanity defense. Mr. Spring replied that in Utah, Idaho & Montana, which have been held constitutional, have abolished the language of insanity and do not give jury instructions on the insanity defense. The jury is instructed that in order to find the defendant guilty they must find that the defendant intentionally killed another human being. The focus is now if the act was intentional. If there was evidence that the defendant was mentally ill, juries are directed to answer the question of whether the act was intentional. This clarifies the issue for juries.

Chip Wheelen, Kansas Psychiatric Society, did not appear before the Committee but requested that his testimony be included into the minutes, (see attachment 8).

Hearings on HB 2328 were closed.

Representative Mays had several requests for bill introductions. All four of the bills related to child custody. The first would make investigation and reports available to all parties in the proceedings. The second defines criteria for child custody cases for the courts to consider. The third would expand the facts that would be allowed at custody hearings that could be considered and the fourth expands the definition of interference in child custody cases.

Representative Mays made a motion to have these bill requests introduced as committee bills. Representative Plummer seconded the motion. The motion carried.

The Committee meeting adjourned at 6:00. The next meeting is scheduled for February 14, 1994.

STATE OF KANSAS

[LOGO]

TOPEKA

HOUSE OF REPRESENTATIVES

ELAINE L. WELLS
REPRESENTATIVE, FIFTY-NINTH DISTRICT
OSAGE AND NORTH LYON COUNTIES
RR 1 BOX 166
CARBONDALE, KANSAS 66414
(913) 665 7740

COMMITTEE ASSIGNMENTS
MEMBER ELECTIONS
INSURANCE
PENSIONS INVESTMENTS AND BENEFIT'S

TESTIMONY ON H.B 2328

"GUILTY BUT MENTALLY ILL"

They say the third time is a charm. Hopefully that will be the case with this legislation. It has passed the House several times by a wide margin, but it seems to hit a snag in the Senate Judiciary committee, because it was either too late in the session, or a chairman in the past six years did not see the merit of it. If you counted all the sponsors in the three sessions who signed on to this bill, (1988, 1990, and 1993) you'd come up with over sixty House members, an even number from both parties, and several from leadership of both parties.

Most of you know that the reason I have been so involved with this issue is because an 18 year old friend of my son's was murdered during my first term as a legislator. His murderer was acquitted in a "ten minute" trial by the insanity defense, and to this day,

the mother of that boy cannot put his death behind her. Every year she has to testify to keep his killer in a security institution.

Since then the public outcry continues to mount of the injustice that occurs whenever another insanity defense is used.

According to the information I have reviewed, fourteen states have the GBMI legislation and three states have abolished the use of the insanity defense. You'll hear that states who have the GBMI verdict have seen negative results, but to the contrary it is working in those states.

HB2328 defines mental illness, and then states the verdict can be used only in felony cases. It will waive the defendant's right to trial if the plea of GBMI is accepted. It gives the trial judge the right to refuse to accept the plea of GBMI. It establishes that if a defendant makes such a plea that it is an admission of the truth of the charge. After the finding or acceptance of a plea of GBMI the trial judge will order the defendant to be committed to an appropriate state or local institution for examination to determine treatment, and when the treatment terminates, the defendant will be required to serve the remainder of the sentence imposed. Finally, it provides for a screening investigation to determine if further treatment is necessary after the expiration of the sentence.

In previous years testimony, I quoted Professor Norvel Morris who wrote in the "Journal of Law and Health," "we don't really have a defense of insanity. What we have is a rarely pleaded defense that is pleaded in sensational cases, or in particularly ornate homicide cases where lawyers. the psychiatrists, and the community seem to enjoy their plunge into the moral debate.

The special defense of insanity is a rare genuflection to values we neither achieve nor seek elsewhere in the criminal justice system. I see it as a somewhat hypocritical tribute to a feeling that we had better preserve some rhetorical elements of the moral infrastructure of the criminal law. There is no legal definition of insanity, different standards apply both at different stages of the criminal process, and from one jurisdiction to another, at the same stage." This is still a good quote.

You'll hear that GBMI does not reduce the number of Not Guilty by Reason of Insanity verdicts, with the argument that in Michigan (the first state who enacted the GBMI legislation) the same number of persons were found not guilty by reason of insanity. An additional group, almost equal in number, were found GBMI. Of these new findings of "guilty," 80 percent were pleas of GBMI. What this proves is that an additional number of "guilty" felons were sentenced for the crimes they had committed. The result was to remove those violent offenders from the streets and ensure public safety.

Another argument you'll hear is that it will increase costs, with additional psychiatric care. Yet in the states that have the GBMI, results have shown that they are in "treatment" for a short period of time and serve the remainder of their institutionalization in the penal system. The public interest in safety from violent offenders is at an all-time high. We feel that they should be in prison, regardless of the cost. If they are guilty, they should serve time.

A third argument you'll hear is about recidivism. and that mentally ill defendants going to prison GBMI will serve the same amount of time under the sentencing grids regardless whether they cooperate in

their treatment, or whether they get treatment. Thus removing the incentive to get well. Yet under our current system an insanity acquittee here in Topeka committed another heinous crime last year, killing a therapist at Topeka state, after killing a co-ed in Emporia in 1986. Currently we do not track recidivism of insanity acquittees.

It is also argued that a judge can now order under K.S.A. 22-3430 and 3431 a person found guilty of a crime to a state hospital or security hospital for treatment, then bring them back for sentencing. The key words here are "found guilty." We are worried about those who are found innocent by reason of insanity, who are committed and according to statistics, remain in a security institution for only twenty months. I have attached information from Larned State Hospital with this information.

The final argument I believe you will hear is that GBMI changes 2,000 years of Judeao-Christian attitudes about punishment and mental illness. I have attached testimony heard in 1990 from Donald Kusmald, a Pastor in Emporia. He uses an Emporia Gazette quote from Dr. Walter Menninger stating that the application of the insanity defense is uneven. Pastor Kusmald also stated that three states, including Utah have abolished the insanity defense. Maybe Utah was more convinced that abolishing the insanity defense would bring their state more in line with Christian attitudes and values. Two thousand years ago insane people were locked up for years, not twenty months.

In the states that have enacted GBMI legislation practical changes have occurred. These were the findings in a telephone survey of eleven states who passed the bill. The 136 surveyed were legislators, attorneys, judges, mental health personnel, and correctional offi-

cials. The strengths of the GBMI legislation according to the respondents were: provisions for mental health treatment, increased control over and protection from mental ill offenders, and availability of an alternative verdict in criminal proceedings. Fifty-seven percent said that GBMI offenders are confined longer than NGRI acquittees.

In the last edition of the Kansas AMI News an article was written titled "Violent Behavior by Individuals with Serious Mental Illnesses." It stated that only 0.6% of the people studied with no psychiatric disorder reported incidence of violence, while 5.2% of those with schizophrenia, bipolar disorder or major depression in the study did commit acts of violence. The conclusion of the article was, "The unknowns of health care reform, the movement of state to managed care option on Medicaid, and continued downsizing and closing of state hospitals are rapidly changing the mental illness treatment process. If our community services are not improved and steps are not taken, we may be seeing more people with mental illness involved in acts of violence."

My final attachment is a letter from a taxpayer to Sen. Moran to asking him to support this bill. He writes about an "insane" man who hid assets following a shooting spree in Wichita.

Back in 1989 following the first hearings on this issue the Topeka Capital Journal printed an editorial titled "A plea for justice." I would like to close my testimony with the final paragraphs from that editorial.

"The guilty-but-mentally-ill approach would give a safer measure of protection. It would assure treatment, but it also would provide for confinement.

Kansas has had few crimes that would qualify for the death penalty. It has had several in recent memory where the insanity plea has played a part. In the broad picture, a change in the insanity plea will do more to assure public safety than the death penalty.

The Legislature should act accordingly."

Thank you. Mr. Chairman. I would be happy to respond to questions.

LARNED STATE HOSPITAL

MEMO TO: Senator Tim Emert

FROM: Brenda West Hagerman, SRS Legal counsel

SUBJECT: Statistics concerning patients found not guilty by reason of insanity admitted to State Security Hospital

DATE: February 5, 1993

Please find enclosed detailed information on the number of insanity acquittees admitted to State Security Hospital pursuant to K.S.A. 22-3428 since FY'89. A breakdown of this information reveals the following:

1. Insanity Admissions to State Security Hospital:

	Admissions	Discharges
admitted prior to FY '89 with continuous hospitalization	9	
FY'89	3	0
FY'90	8	3
FY'91	7	4
FY'92	8	2
FY'93 to date	4	4
	39	13

2. Insanity Acquittees at State Security Hospital on February 4, 1993 - 26

3. Median Length of Stay - 319.5 days

   Average Length of Stay- 441 days

   (information supplied by Medical Records)

4. Cases which were decided by:

Plea Bargain	35
Jury	4

5. Cases where M'Naghten evaluations were performed prior to finding/plea of insanity:

   Evaluations by SSH - 11 (7 positive and 4 negative findings)

   Evaluations by other mental health professionals - 13

6. Potential number of court ordered discharges/ conditional releases pursuant to *Foucha* - 7

7. Summary of charges of 39 patients:

Murder	12
Attempted 1st Degree Murder	5
Aggravated Assault/Battery	27
Rape	3
Kidnapping	2
Robbery	2

Please call my office at 316-285-4595 if I can provide any clarification of this information.

BWH:wm
Enc.
cc: Walter Menninger, M.D.
Randy Proctor
John Badger

BWH:wm

* * *

aquittee may not act violently toward other patients, but may toward persons on the outside with whom he holds a grudge.

I would also urge the committee to consider drafting a bill to abolish the insanity plea altogether in Kansas. Three other states have done so: Idaho, Montana and Utah.

This, I believe would be the simplest way to correct the inequities and abuses in the present system. That there are inequities in the use of the insanity defense is apparent. Dr. Walter Menninger in his testimony before this committee last October 21 was quoted in the *Emporia Gazette* of October 22. "Dr. Walt Menninger, representing the Kansas Psychiatric Association, said application of the insanity defense is uneven. He said he has examined some defendants who were clearly delusional but who went to prison.

"I have evaluated persons at the state security hospital (in Larned) who have been found not guilty by reason of insanity in a plea bargained decision where I could find little psychiatric justification for that decision," he added.

So under the present system some who are insane go to prison, while others who are sane wind up in the state security hospital. Why is this? There are several reasons for such inequity. One is the inexactness of psychotherapy as a science.

Edward F. Dolan Jr. in his book *The Insanity Plea* (1984) page 54, writes, "Psychiatry, remember, is not yet (and may never be) the exact science that other branches of medicine are. Diagnosis is very much a

matter of opinion on the part of the psychiatrists." Again, Dolan says, page 82, ". . . Even though it comes from medical personnel, much of the opinion must be looked

* * *

TESTIMONY ON SENATE BILL No. 3

unacceptable but criminal. Criminals are people with unresolved personal problems.

Juries are confused by the indefinability of mental illness. They have been known to find a person with severe emotional problems innocent by reason of insanity so that he can obtain psychiatric treatment, despite the fact that he is not legally insane. Abolition of the insanity plea would free the jury from such confusion and abuse of this defense. I strongly urge the committee to draft an amendment to abolish insanity as a defense in Kansas.

Finally, I would remind you that God is a God of Justice. "Righteousness and justice are the foundation of (God's) throne" Psalm 89:14. He holds each person accountable for his actions. Only those who have not yet reached the age of accountability, and those who have such an incapacity mentally that they cannot know the nature of their acts will escape the application of this universal truth: "Every one of us shall give account of himself to God" Romans 14:12.

Thank you. I will be glad to respond to any questions.

Donald L. Kusmaul, 1001 Elm, Emporia, Kansas 66801

KANSAS TAXPAYERS NETWORK
P.O. Box 20050
1081 S. Glendale, Wichita, KS 67208
316-684-0082
FAX 316-684-7527

February 2, 1994

Sen. Jerry Moran
State Capitol Rm 255-E
Topeka, KS 66612

Dear Sen. Moran:

I am writing this letter as a Kansas citizen and not in my official capacity for KTN. 20 years ago my family suffered as a cousin of mine was murdered. The criminal in this case was never found.

In the last few sessions your senate Judiciary Committee has killed bills to add "Guilty but mentally ill" to the choices juries can face in these matters. I urge you to have your committee consider and approve this type of legislation. Exhibit one is Vince Crenshaw.

Enclosed is a copy of the Eagle article about the "insane" Crenshaw hiding assets from civil action following his shooting spree. Crenshaw was in Judge Brooks courtroom in Wichita seeking to be released from maximum security in the mental hospital where he is currently confined. If Judge Brooks had ruled, Crenshaw could once again be walking the streets and fields of Kansas. Perhaps he might be staying in a half-way house in Hays.

Crenshaw will remain in a mental institution for 1994, but he might be out next year, or the year after that. He should be doing a hard 40 if he is no longer "mentally ill." It is outrageous that "crenshaws" in

the Kansas mental/criminal system are in and out all too quickly. This case is getting attention for two reasons; Crenshaw's crime was particularly heinous and the murder victim worked for the Wichita Eagle. How many others aren't being reported? I urge you to support Rep. Elaine Wells in this matter.

Sincerely,

Karl Peterjohn

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE:

I AM JOAN TURNBULL. MY SON MICHAEL WAS MURDERED FEBRUARY 26, 1997 IN A WICHITA, KANSAS NAUTILUS FITNESS CENTER.

GARY COX ENTERED THE NAUTILUS CENTER REACHED INTO HIS DUFFLL BAG PULLED OUT A GUN AND COMMENCED FIRING. HE FIRED SEVERAL SHOTS THEN HE YELLED NOW I AM GOING TO PUT IT ON AUTOMATIC. BUT INSTEAD HE PUT HIS GUN BACK INTO HIS BAG AND RAN OUT THE DOOR.

BESIDES MICHAEL'S DEATH, THREE OTHERS WERE WOUNDED ONE STILL REQUIRED MEDICAL TREATMENT. AS FAR AS ANYONE KNOWS COX KNEW NO-ONE IN THE NAUTILUS CENTER.

WHEN COX LEFT THE CENTER AFTER THE SHOOTING HE REGISTERED AT A MOTEL UNDER A FALSE NAME. THIS INDICATES TO ME THAT HE KNEW WHAT DONE AND HE WANTED TO AVOID BEING PICKED UP BY WICHITA AUTHORITIES

ON FEBUARY 10, 1988 GARY COX WAS FOUND NOT GUILTY BY REASON OF INSANITY.

ON THE DAY OF GARY COX'S TRIAL IN WICHITA, I WAS INFORMED BY THE DISTRICT ATTORNEY THAT THEY WOULD ACCEPT THE DEFENDANTS PLEA OF "NOT GUILTY BY REASON OF INSANITY BEFORE IT WAS EVER PRESENTED TO THE JUDGE.

WHEN THE HEARING COMMENCED, THE JUDGE ASK SOMEONE IF COX NEEDED TO BE PRESENT. THEY ANSWERED YES AND HE WAS BROUGHT INTO THE ROOM. THE DISTRICT

ATTORNEY SUBMITTED PAPERS TO THE JUDGE WHO SILENTLY STUDIED THEM FOR ABOUT TEN MINUTES. NEXT, THE JUDGE ASKED COX'S LAWYER AND THE DISTRICT ATTORNEY IF THEY AGREED WITH THE DOCUMENTS HE HELD AND THEY ANSWERED YES. COX WAS ASKED THE SAME QUESTION AND HE ANSWERED YES. THE JUDGE STATED HE ACCEPTED THEM AS PRESENTED. COX WAS ESCORTED FROM THE ROOM AND RECESS WAS CALLED.

IT SEEMED TO ME THAT GARY COX WAS TREATED ABOUT THE SAME AS SOMEONE WHO HAD COMMITTED A TRAFFIC VIOLATION.

A PSYCHIATRIST HIRED BY THE PROSECUTION SAID GARY COX WAS DERANGED WHEN HE SHOT UP THE NAUTILUS CENTER. UNDER CURRENT LAW THE DOCTOR'S DIAGNOSIS CARRIES SO MUCH WEIGHT THAT THE PROSECUTION HAD NO CHOICE BUT TO SEND GARY COX TO LARNED.

UNDER CURRENT LAW GARY COX HAS THE RIGHT TO A HEARING EVERY YEAR TO BE RELEASED, WHICH HE HAS EXERCISED.

TO ME CURRENT LAW VIOLATES THE BASIC TENET OF CRIMINAL JUSTICE (THAT SOCIETY SHOULD BE PROTECTED FROM PEOPLE WHO COMMIT HEINOUS ACTS) PSYCHIATRY IS AN INEXACT SCIENCE AND DOCTORS CAN GIVE NO GUARANTEE THAT A PATIENT WON'T COMMIT ANOTHER CRIME. THE PATTERN IS THAT DOCTORS TREAT A PATIENT FOR A FEW YEARS, WITH POTENT DRUGS AND THEN SAY THEY

CAN DO NO MORE AND ASK THAT HE BE RELEASED.

THE PRESENT INSANTITY DEFENSE WEAKENS TRUST IN THE JUDICIAL SYSTEM. THE IMPRESSION IS THAT GARY COX GOT AWAY WITH MURDER; THAT A PSYCHIATRIST NOT A JUDGE WAS IN CONTROL OF THE PROCESS. THE POSSIBILITY OF A GUILTY BUT INSANE JUDGMENT WOULD GIVE THE COURTS MORE OPTION TO DEAL WITH SPECIFIC CASES.

IF KANSAS HAD A GUILTY BUT INSANE VERDICT PEOPLE LIKE GARY COX COULD BE LOCKED UP FOR LIFE, AND WOULD PRESENT NO FUTHER DANGER TO THE PUBLIC. MOST KANSANS WOULD HAVE MORE CONFIDENCE IN PRISON BARS THAN IN PSYCHIATRIST TO ENSURE THAT PEOPLE LIKE GARY COX COMITT NO OTHER CRIMES.

A PSYCHIATRIST IS STILL IN CONTROL OF GARY COX'S FUTURE. HE HAD A HEARING ON DEC. 10 1993 ASKING TO BE RELEASED. NOW HE IS GOING TO HAVE ANOTHER HEARING ON FEBUARY 15, 1994 ASKING TO BE TRANSFERRED TO TOPEKA STATE HOSPITAL. FROM WHAT THE DISTRICT ATTORNEY OF WICHITA TELLS ME HE PROBABLY WILL BE TRANSFERRED.

TOPEKA STATE IS NOT A SECURE HOSPITAL SO GARY COX WILL BE ON THE STREET SOON. I JUST HOPE AND PRAY HE WILL NOT KILL SOMEONE ELSE.

THE LEGISLATURE SHOULD ADD A GUILTY BUT INSANE PROVISION TO THE CRIMINAL LAW. SOCIETY SHOULDN'T BE VICTIMIZED BY LAWS THAT DON'T PROTECT THE PUBLIC.

Testimony in Support of HB 2328
(Guilty but Mentally Ill Verdict)

by Bob Fairchild

We believe that with the abuse of the current law covering not guilty by reason of insanity verdicts within the last 20 to 25 years, that this statute needs to be changed. We are calling for you to pass House Bill 2328 which will change the law to guilty but mentally ill. It appears that when a defendant has undisputable evidence against him or her, it is an automatic defense of temporary insanity or insanity plea, and, when a defendant wins a temporary insanity or insanity plea, he or she is then awarded minimal institutionalization without any guilt put upon a defendant. We feel this is one of the biggest injustices or shams put upon society. We feel a defendant should have to do the time for his or her crimes and not he rewarded with six months to two years in a mental institution and then be released back into society.

We have found in our petition drive for reinstatement of the death penalty in the state of Kansas that the biggest majority of the 21,000 plus people we reached believe that the current law of not guilty by reason of insanity should be changed to guilty but mentally ill, and the defendant in these crimes should have to serve the time in the state prisons after they are found competent. This would help slow down the revolving door syndrome that we now have in the state.

The reason I have been asked to testify on this bill is the pending case involving our daughter, son-in-law and two grandchildren that were brutally murdered in Reno county on November the 5th last

year. The insanity plea is going to be used in this pending trial, and it would be a horrible injustice to society if this defendant was found not guilty by reason of insanity on these four murders. I would like to comment more on the facts involving the case, but due to the impending trial I had better not.

Again, I urge you to support and pass House Bill 2328. The state of Kansas needs it.

Testimony in Support of HB 2328 by Allen Cox

On the morning of March 8, 1990 I left my residence to go to my place of employment at Wolf Creek Nuclear Operating Corporation.

I was traveling east on Harry Street. I had the radio on in my Dodge Caravan mini-van and heard the report of a gunman that was shooting at vehicles on I-135.

As I approached the intersection of Harry and Woodlawn I had the green light to continue on through the intersection. There was a northbound vehicle stopped at the intersection with signal lights indicating a left hand turn to go west on Harry

As I proceeded through the intersection this other vehicle instead of making the mentioned left hand turn, it made a right hand turn and fell in right behind me. That was what first brought this vehicle to my attention. I was still listening to the radio but no description of the gunman's vehicle on I-135 had ever been given so I didn't think much about it.

As I approached Harry and Rock Road, I signaled to go north on Rock Road. The other car followed around the corner also. I signaled and switched to the outside curb lane between Harry and Lincoln. The other car followed over to that lane also. As I approached the corner of Rock Road and Kellogg or US-54 I had to stop for the red light. This other vehicle pulled up so close behind me that when I looked in my rear view mirror all I could see was his windshield. I wondered at the time what he was doing. There was other traffic on the streets but not a great amount as this was about 5:30 in the morning.

After the light turned green to proceed I started on North with the other vehicle following closely behind.

Before we reached the intersection of Douglas the other vehicle pulled into the center lane as if to pass. The light was red at Douglas but before I had to stop it had turned green so I resumed my normal speed. This other vehicle then pulled back in behind me again. The same circumstances occurred at each of the next two intersections which was Rock Road and Central then Rock Road and 13th Street North.

As I approached the intersection of Rock Road and 21st Street North there was a pick-up in the center lane approximately a block ahead of me. As I went through the intersection the vehicle behind me once again pulled into the center lane.

He, or the driver of the vehicle, pulled up along side of my vehicle and my thought process was "What does this idiot want". Just as I turned to my left to look out I saw the flash from the muzzle and the glass from the car door exploded in my face. This all occurred within the next 2 blocks north of 21st St. N.

I was able to get my car stopped. I noticed another car ahead of me and I thought it was him turning around to come back and maybe finish me off. I got out of my vehicle and got behind a brick fence there along side of Rock Road.

Before getting behind the fence there was a man jogging down the other side of Rock Road and I attempted to get his attention to get some help. As it turned out the other vehicle was the pick-up I mentioned earlier. As the other vehicle continued on up Rock Road he had also shot at this pick-up injuring the driver in the ear. He had made a U-turn to go back down to the Coastal Mart at 21st to report the incident.

As the gunman continued on north on Rock Road the next victim was the man filling the newspaper racks at Jimmies Diner just north of 29th St. and Rock Road.

In this entire shooting spree there was the one death and a total of 10 people shot of which 7 people was injured. One refused treatment at the scene and the other 6 required medical attention and was transported to various hospitals.

Mr. Brown, the victim shot at Jimmies Diner, and I was both transported to Wesley Medical Center. Mr. Brown died of head injuries.

As a result of the injuries I received I have had 5 surgeries on my face and numerous trips to the dentist to have dental work done. It is still going to require additional dental work to be done. The day I was shot I was in surgery approximately 7 hours. To this day I still carry a fragment of the bullet in my chin.

After Mr. Crenshaw, the gunman, was captured and when he went to court he was declared "Not Guilty By Reason Of Insanity" by the Judge Paul Clark and the entire trial did not last any longer than 5 minutes. He was then sent to Larned State Hospital for treatment.

Every year there is a competency hearing to see if he is able to be released from Larned.

Mr. Crenshaw seemed sane enough that the day after he was declared "Not Guilty By Reason Of Insanity" he signed all his property over to his ex-wife.

At the second competency hearing he and his attorney attempted to have it as a closed door hearing so the victims and news media could not be in the court room. Even though we are not able to make any comments.

Since then he has even tried to get the competency hearings transferred to Pawnee County to make it a little more difficult for the victims and news media to attend the hearing. So far this has never been accomplished and they have all been held in Wichita.

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EXECUTIVE DIRECTOR, JAMES W. CLARK, CAE
CLE ADMINISTRATOR, DIANA C. STAFFORD

Testimony in Support of the
GUILTY BUT MENTALLY ILL VERDICT
As Proposed in House Bill No. 2336

The Kansas County and District Attorneys Association appears in support of House Bill No. 2336. The bill is another attempt at instituting the additional verdict of guilty but mentally ill. While the proposition is not new to this Legislature, recent developments in the law have made the additional verdict a matter of primary importance to those of us concerned with public safety.

Our concern has been heightened by the decision of the U. S. Supreme Court, *Foucha v. Louisiana*, which requires that in order to confine a person found not guilty by reason of insanity, the person must be found both dangerous and mentally ill. Kansas law, like

Louisiana's, previously required only the finding of dangerousness, K.S.A. 22-3428 et seq., and was also probably unconstitutional. The Legislature's response was Senate Bill 10, which imposed the additional requirement of continued mental illness as well as dangerous in order to keep a person found not guilty by reason of insanity in custody. There is a fine line for government to walk, balancing the rights of the individual against the safety of the general public. In Senate Bill 10, the individual's interests were recognized, but at the expense of public safety.

Currently, a person found not guilty by reason of insanity by a judge or jury may be released within 120 days if a court finds by clear and convincing evidence that the defendant is not a mentally ill person. While HB 2336 does not eliminate that possibility, since the not guilty by reason of insanity verdict remains in the law, it may prevent situations where a person who has committed a heinous crime, and is a danger to society, is released back into the community. If such person is found guilty but mentally ill, that person is committed to an institution as long as there is a need for psychiatric care. Otherwise the person is sentenced in the same manner as any other defendant.

This additional, or alternative, verdict has withstood constitutional challenges, and is currently in effect in several other states, including Michigan; and we have attached a copy of the Michigan statute and the rationale behind it, taken from the case of *People v. Ramsey*, 71 ALR 4TH 661, which is the basis for an extensive annotation on the verdict of guilty but mentally ill. KCDAA feels that under the mandate of the *Foucha* decision, and the passage of SB 10, the safety of the public requires addition of the guilty but mentally ill verdict.

[LOGO] KANSAS AMI
KANSAS ALLIANCE FOR THE MENTALLY ILL
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TESTIMONY

TO: Members, House judiciary Committee

FROM: Sheryl Sanders Tatroe, Kansas Alliance for the Mentally Ill

DATE: February 9, 1994

SUBJECT: HB 2328, creating verdict of "Guilty But Mentally Ill"

The Kansas Alliance for the Mentally Ill is comprised of family and friends of persons with severe and persistent mental illnesses who meet together in groups around the state for mutual support and to advocate on behalf of their loved ones.

We are here today, as we have been in the past, to reiterate our strong opposition to introduction of the verdict "Guilty but Mentally Ill."

This verdict does nothing to reduce the likelihood that persons with mental illnesses will commit fewer violent acts. It does not improve on the already stringent M'Naughton Rule used in Kansas to determine sanity.

We propose that the committee examine Kansas statutes regarding criteria for involuntary psychiatric hospitalization, outpatient commitment, and provisions to monitor medication compliance of persons who have demonstrated past violent behavior and are being released into the community from hospitals, jails, or prisons.

Attached to testimony you will find excerpts and commentary on a paper titled, "Violent Behavior by Individuals with Serious Mental Illnesses," by Dr. E. Fuller Torrey, a researcher with the National Institute of Mental Health Neuroscience Center.

His proposals might necessitate changes in Kansas law but could positively impact the numbers of violent crimes by those with serious mental illnesses and the quality of their treatment. This is in sharp contrast to today's proposed legislation which has more potential for confusion than for redress of wrongs and has no public policy merit that we can find.

Violent Behavior by Individuals with Serious Mental Illnesses

Presented by Dr. E. Fuller Torrey at the APA Institute on Hospital and Community Psychiatry; Summary by Annie Saylor, AMI of Alabama.

This paper summarizing results from several studies on violent behavior in people with serious mental illness refutes the statements we AMI advocates have made over the years that "people with mental illness are no more dangerous than the rest of society." The overwhelming evidence is that people with mental illness who *are not compliant with psychotropic medication or abuse alcohol or drugs or have a history of violence* are, in fact, more prone to violence.

The studies reported included those of people who have been arrested, people who are in psychiatric hospitals, people who receive psychiatric services as outpatients, families with a seriously mentally ill member, and the general population. The population studies showed, for example, that 0.6% of people with no psychiatric disorder reported hitting a partner within the past year while people with schizophrenia,

bipolar disorder or major depression all reported approximately a 5.2% incidence, it should also be noted, however, that people who abuse drugs or alcohol and are not mentally ill are still more violent than people who are mentally ill.

Dr. Torrey proposes several steps to decrease the incidence of violent acts by people with serious mental illness: 1) Criteria for involuntarily hospitalization should include predictors of dangerousness, 2) The right to involuntarily medicate a patient should be automatically included with that to involuntarily hospitalize, 3) Outpatient commitment should be more widely used, 4) Provisions for monitoring to ensure that violent patients are compliant with their medications should be enacted before these patients are released into the community, and 5) Additional mechanisms to monitor medication compliance need to be developed. These steps would not be popular among protectors of civil liberties. However, in a society that is willing to incarcerate a person with TB who refuses to take medication (Alabama has one such case at present), these methods seem mild in comparison.

The unknowns of health care reform, the movement of states to managed care option on Medicaid (36 as of this date), and continued downsizing and closing of state hospitals are rapidly changing the mental illness treatment process. If our community services are not improved and steps such as those outlined above are not taken, we may be seeing more people with mental illness involved in acts of violence. Sometimes, when looking at the big picture, it's hard to tell if we are going forward, backward or in circles.

Reprinted from the Alabama Advocate, Nov/Dec, 1993

Insanity verdict shows prejudice

Just when we think that members of the Alliance for the Mentally Ill and members of Project Awareness for Major Mental Illness have done a fairly good job of communicating with the public about the true nature of serious long term mental illness, along comes a glaring newspaper headline to bring us to reality regarding public knowledge of these lifetime illnesses.

In the Jan. 16 Eagle, the headline "Getting tough on the mentally ill" brought disheartening news of proposed legislation for the current 1994 session in our state Legislature. Rep. Elaine Wells, Rep. Mike O'Neal and Sen. Jerry Moran, along with others, plan to add a new verdict to our existing judicial law, "guilty but mentally ill."

To secure this newly presented verdict, one would have to believe all the old superstitions and ignorant prejudices concerning biologically based mental illnesses. The bogus idea that persons with serious mental illness such as major depression, bipolar illness, schizophrenia, anxiety/panic do not have real illnesses. These persons should be made to "snap out of it" and be responsible citizens.

If these tormented individuals commit a crime, then the new proposed legislation would have them receive treatment in a secure mental-health facility. However, if ever they are judged cured, they would be sent to a prison to pay for an act they committed while insane. This makes no sense to me.

I pray for the day when some new medication will cure all or better ease the burden of the devastating symptoms of major mental illness. Family members support research for the cause and cure of mental illness. This is our hope for the future. We families

grieve for the sufferings of our relatives. We see the lost potential and productivity caused by mental illness. How can anyone discount the tremendous suffering and torment endured by persons with mental illness?

For many persons appropriate medications have already been discovered. We see these fortunate ones rejoining the work force, learning a new job skill and gaining the ability to build a new life because their illness has become more manageable. For many others, the agonizing wait for a medication research breakthrough continues. The road is more difficult for these persons, but with mental-health reform legislation in Kansas, the needed supports will be available. They, too, will be able to live in their home communities with the aid of case managers and other professional supports.

Mental-health advocates must continue to try to inform the public in every way possible about the true facts of major mental illness We commend the Kansas Bar Association for their opposition to this change in Kansas verdict.

JOAN NAVRAT
Wichita

Wichita Eagle – Feb. '94

STATE OF KANSAS
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE

HEARING ON H.B. 2328
February 9, 1994

SUMMARY OF TESTIMONY OF RAYMOND L. SPRING:

H.B. 2328 would introduce the verdict of "Guilty But Mentally Ill" as an alternative verdict in Kansas where a defendant asserts a defense of insanity under K.S.A. 22-3219. Such a change has been proposed several times in recent years and the Kansas Bar Association has consistently opposed this concept for three principal reasons:

a) Guilty but mentally ill is an undisguised attempt at an end run around the insanity defense. It was conceived (first in Michigan) in the idea that juries would substitute this finding for the finding of not guilty by reason of insanity; that persons who "did the deed" would be locked up under a criminal sentence even though they may not have been mentally responsible for their conduct, but that treatment for their mental illness in the correctional system would be mandated. The KBA recognizes that for over 2000 years civilized peoples have recognized that people whose thinking is so disorganized as a result of illness as to not be responsible for their actions are not criminals. In a state like Kansas, which applies the strict M'Naghten rule as the test of insanity, the *successful* use of the insanity defense is rare; in cases involving actual violence it is extremely rare. It has, and should retain, a legitimate place in our system of criminal law.

b) If it is argued that Guilty But Mentally Ill provides treatment for persons found guilty of crimes

which may reduce their predisposition to criminal conduct on their release, the simple answer is that our law already provides that. KSA 22-3430 and 3431 give the trial judge the authority to order a person convicted of a crime to a state hospital or security hospital for treatment pending sentencing.

c) In fact, the addition of the Guilty But Mentally Ill option did not work out in Michigan and other states as expected. What resulted in Michigan in the ensuing years was that essentially the same number of persons were found not guilty by reason of insanity as before, but an *additional* group, almost equal in number, were found Guilty But Mentally Ill. Many of that group were subsequently found not to be in need of mental treatment, and may well not have been sent for treatment or evaluation at all had the decision been made by the trial judge. A marked increase in the number of insanity pleas entered occurred after the adoption of "Guilty But Mentally Ill." It was not possible to determine what caused that increase, but a very likely cause was that "Guilty But Mentally Ill" presented a chance at a more palatable option to defendants in marginal insanity cases, and in fact an incentive to enter an insanity plea in cases where that otherwise would not have occurred. A "Guilty But Mentally Ill" verdict ensures that at least some, and possibly most or even all, of the defendant's sentence will be served in a hospital, rather than in prison. At the very least, the defendant avoids the stigma of a finding of unmitigated guilt. The result for Michigan was a substantial unforseen burden of psychiatric care placed on the state, creating a large unanticipated fiscal problem. Illinois appears to have had a comparable result. The remaining states that adopted a Guilty But Mentally Ill option (apparently 10) appear either to have no published studies of the results, or

adopted other changes in the law which invalidated comparison. See: Slobogin, "The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come," 53 *George Washinton Law Review* 494; Smith & Hall, "Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study," 16 *U. Mich. J.L. Ref* 77.

It is also worthy of note that the American Bar Association's Criminal Justice Mental Health Standards, the American Psychiatric Association's Statement on the Insanity defense, and the National Mental Health Association's Commission on the Insanity Defense all have recommended against adoption of Guilty But Mentally Ill.

H.B. 2328 would also, by virtue of language in New Section 2, shift the burden of proof in insanity defense cases from the prosecution to the defense. While it appears clear that the burden can be constitutionally so shifted (*Leland v. Oregon*, 343 U.S. 790 (1952), and several jurisdictions have done so, the issue remains controversial. In spite of the sweeping language of the Supreme Court in *Leland*, it is logically not so easy to separate "state of mind," or *mens rea*, issues (which must be proven beyond a reasonable doubt by the prosecution even under the *Leland* analysis; see *In re Winship*, 397 U.S. 358) from the question of insanity, at least where the M'Naghten rule of insanity applies, as in Kansas. Consider the logical quagmire in which a jury finds itself when instructed (as in a murder case) that in order to convict they must find that the defendant *intentionally* killed the victim, and that they cannot find the defendant not guilty by reason of insanity unless they are persuaded by a preponderance of the evidence that the defendant "because of mental disease or defect did not know what he was

doing, or if he did know it, did not know it was wrong" (the M'Naghten rule). If jurors have a reasonable doubt whether the defendant knew what he was doing, they could hardly find beyond a reasonable doubt that the defendant acted intentionally. Yet if they have *only* a reasonable doubt on that score, they cannot find the defendant not guilty by reason of insanity, either. The only choice left is *not guilty*, in which case the defendant walks completely free. This is clearly not what even the proponents of shifting the burden of proof have in mind.

Because the issue of insanity is necessarily tied to the issue of criminal intent, the Kansas Bar Association believes that the Kansas legislature has exercized sound wisdom previously in rejecting attempts to shift the burden of proof on this issue, and urges this body to do so again.

[LOGO]

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February 9, 1994

To: House Judiciary Committee

From: Chip Wheelen, KPS Lobbyist

Subject: House Bill 2328; Guilty but Mentally Ill

The Kansas Psychiatric Society urges the Legislature to consider HB2328 and similar proposals for a plea and finding of "guilty but mentally ill" very cautiously. Because enactment of this new verdict would create a heightened burden of proof for prosecutors who wish to prove guilt, the possibility exists that some defendants who are indeed mentally ill might be found not guilty. This is because of the requirement that the evidence prove beyond a reasonable doubt that the defendant was guilty.

A finding of not guilty by reason of insanity does not require the prosecutor to prove guilt, merely that defense counsel prove the existence of mental illness when a preponderance of the evidence indicates that the defendant probably committed the crime. Please do not overlook the fact that a verdict of not guilty by reason of insanity results in incarceration for an indefinite period of time. Only when the defendant can demonstrate that he or she is successfully treated for the mental illness can he or she be released.

It would appear that such legislation is based upon an ethic that punishment of those who commit crimes when mentally ill is a greater priority than treatment of the illness. The Kansas Psychiatric Society wishes to assert that appropriate treatment should be the public priority.

Thank you for considering our concerns about this very serious matter.

Approved: May 23, 1994
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Michael O'Neal at 12:45 on March 3, 1994 in Room 313-S of the Capitol.

All members were present except:

Representative Tim Carmody – Excused
Representative Gilbert Gregory – Excused
Representative Judith Macy – Excused
Representative John Wagnon – Excused

Committee staff present:

Jerry Ann Donaldson, Legislative Reseaerch Department
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

HB 2328 Plea or verdict of guilty but mentally ill.

Chairman O'Neal stated that in having hearings and discussing this legislation the idea was hit upon that maybe the Committee shouldn't be looking at adding an option of guilty but mentally ill but instead consider eliminating the verdict of "not guilty by reason of insanity." A balloon draft was handed out that would eliminate this option. (see attachment 1).

Dean Raymond Spring explained that this same direction has been taken by four other states. He had heard that today Colorado had approved this type of legislation, but hasn't had time to look into whether it's true or not. The idea under any justice system is that we do not hold people criminally responsible for their conduct, when they are not mentally capable of

understanding what they are doing. The idea of a separate defense of insanity grew out of the courts trying to define for juries what insanity meant. The McNaughten Rule, which is used in Kansas, states that a person is not guilty of a crime by reason of a mental illness because they do not know what they are doing. This focuses on the fact that if a person had criminal intent they are guilty of the crime but if they were so incapacitated that they could not have criminal intent, they would not be guilty of a crime.

The reasonable approach would be to abolish any reference to a separate defense of insanity but still permit the evidence as to the condition of the persons mind at the time of the act. This puts the focus where it should be: on whether or not they had criminal intent when the act was committed. There would not be a separate instruction of insanity. The jury simply finds the defendant "guilty" or "not guilty" and returns the verdict. If the jury finds the defendant "not guilty" then they are asked to answer a special question: "did you find the defendant not guilty solely because they lacked the capacity to form criminal intent." In which case, would trigger the mental hospital treatment. This would change the focus and be easier for the public and juries to understand that the focus is on the criminal intent.

Chairman O'Neal questioned if this would change the prosecutors focus, in that, there is a high incidence of pleas where the prosecutor accepted a report that stated that the defendant had a mental defect at the time of the act, so they accepted a plea of not guilty by reason of insanity. Under this approach they might be more likely to look at it in terms of the traditional concept of mens rea. Mr. Spring stated that the focus is on "can I get a conviction." This proposal isn't saying

that someone can't be suffering from a mental illness and not have criminal intent. There is a likely result the State may see more cases in which there are convictions of lesser offenses rather than a finding of not guilty.

The Chairman questioned what the jury instructions would look like. Mr. Spring stated that there would be no instructions at all, based upon mental illness, mental defect or mental condition.

Representative Everhart questioned if this is the way that other states are doing their jury instructions. Mr. Spring replied that it is to the best of his knowledge. Utah is different because they have retained the verdict of guilty by reason of insanity, but they say that not guilty by reason of insanity only means lack of criminal intent.

Chairman O'Neal stated that the mention of mental disease or defect was mentioned in the bill and questioned if it was defined. Mr. Spring stated that it is not defined and suggested not including a definition because the McNaughten Rule address the language. The Chairman then questioned if the PIK committee would suggest something similar to the language we currently have on mental illness or defect. Mr. Spring stated that they might. The only definition for mental disease he has seen tells what it isn't – not what it is.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY, Room 313-S Statehouse, at 12:45 on March 3, 1994.

Chariman O'Neal requested that Mr. Spring go over the main points of the bill with the Committee. Mr. Spring stated that New Section 1 was the key section that abolishes the insanity defense. New Section 2 triggers the post-verdict requirements. Mr. Spring had several proposed amendments to the bill and suggested changing the effective date so the Kansas Bar Association and courts could have time to get use to the change. (see attachment 2).

Representative Garner stated that this proposal does not eliminate the defense of insanity but eliminates the verdict option from the jury.

Chairman O'Neal stated that the House had sent to the Senate twice a "Guilty but Mentally Ill" version and they have rejected it each time. This proposal appears to represents a better approach. The idea that the juries won't be confused, the concept of the basic elements of criminal intent wouldn't be lost and refocused on the crime, not whether or not there was mental competency, makes good public policy.

Representative Adkins made a motion to adopt the balloon draft with Mr. Springs proposed amendments. Representative Robinette seconded the motion.

Representative Garner stated that this may be the best idea in this area but he doesn't feel comfortable voting in favor of the bill because there hasn't been enough opportunity to discuss this and see how it is working in other states. Representative Wells stated that this issue has been studied for the past seven

years. She stated that this is the year of crime and it should be addressed. Representative Plummer commented that since the guilty but mentally ill bill has been sent to the Senate twice and they have failed to enact on it both time, this would be a better option to send to them. The motion carried.

Representative Adkins made a motion to change the effective date to January 1, 1995. Representative Wells seconded the motion. The motion carried.

Representative Wells made a motion to report Substitute HB 2328 favorably for passage. Representative Adkins seconded the motion. The motion carried.

* * *

3 RS 2548

HOUSE BILL NO. ___

By Committee on Judiciary

AN ACT concerning criminal procedure; relating to the defense of lack of mental state; amending K.S.A. 12-736 and 38-1655 and K.S.A. 1993 Supp. 22-2913, 22-3219, 22-3428 and 22-3428a and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. It is a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense.

New Sec. 2. In any case in which the defense has offered substantial evidence of a mental disease or defect excluding the mental state required as an element of the offense charged, and the jury returns a verdict of "not guilty," the jury shall also answer a special question in the following form: "Do you find the defendant not guilty solely because the defendant was, at the time of the alleged crime, suffering from a mental disease or defect which rendered the defendant incapable of possessing the required criminal intent?"

* * *

STATE OF KANSAS
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE

PROPOSAL TO ELIMINATE THE VERDICT
OF "NOT GUILTY
BY REASON OF INSANITY"
March 3, 1994

SUMMARY OF COMMENTS OF RAYMOND L. SPRING:

I have reviewed a draft of the proposed legislation and believe that it will achieve the intended result. I would offer the following suggestions for amendments or additions, however:

1. I would suggest that section 6(1)(a) be rewritten to read as follows:

When a defendant is acquitted and the jury answers in the affirmative to the special question asked pursuant to section 2, the defendant shall be committed to the state security hospital for safekeeping and treatment. A finding of not guilty and the jury answering in the affirmative the special question asked pursuant to section 2 shall be prima facie evidence that the acquitted defendant is presently likely to cause harm to self or others.

2. I would suggest that in section 6(6) the word "required" be inserted in the second line thereof between the words "the" and "mental."

3. It would appear that a new section may be necessary as follows:

In any case in which the defendant is found not guilty of a charged crime, and the special question under section 2 is answered in the affirmative and the defendant is also found guilty of a lesser included

or otherwise charged offense, the court shall proceed in the manner authorized by K.S.A. 22-3429 et seq.

Approved: April 7, 1995
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Michael R. O'Neal at 3:30 p.m. on February 15, 1995 in Room 313-S-of the Capitol.

All members were present except:

Representative David Adkins - Excused
Representative Clyde Graeber - Excused
Representative Candy Ruff - Excused
Representative Vince Snowbarger - Excused

Committee staff present:

Jerry Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the committee:

Representative Jill Grant
Lisa Moots, Executive Director Kansas Sentencing Commission
Jim Clark, Kansas County & District Attorney Association

Others attending: See attached list

Hearings on HB 2424 - Rape increased to a severity level 1, person felony; criminal discharge of a firearm which results in bodily harm increased to a severity level 3, person felony & HB 2425 - Penalty for rape is increased to severity level 1; penalty for criminal discharge of firearm at an occupied building or vehicle which results in bodily harm, were opened.

Representative Jill Grant appeared before the attorney as a proponent of both the proposed bills. Both of the bills alter the severity level of two crimes: Rape would change from a severity level 2 to a level 1 and drive-by shooting resulting in bodily harm from a severity level 5 to a level 3. HB 2425 would also double the sentencing table numbers for severity levels 1 through 3 for all nine categories of criminal histories on the non-drug grid. These changes will require additional bed space but this issue is not something that would need to be considered at this time. (Attachment 1)

Jim Clark, Kansas County & District Attorneys Association, appeared before the committee as a proponent of HB 2424. This change is a recognition of the serious nature of both offenses. (Attachment 2)

Lisa Moots, Executive Director Kansas Sentencing Commission, appeared before the committee on both the proposed bills. She stated that doubling the sentences is consistent with the sentencing guidelines structure and much easier to deal with than the persistent offenders proposals. The Commission had concerns with the change of severity level of criminal discharge at an occupied building. They felt that it was inconsistent with the severity levels assigned to the various forms of aggravated battery. (Attachment 3)

Attorney General Carla Stovall and Representative Deena Horst did not appear before the committee but requested that their written testimony be included in the minutes. (Attachments 4 & 5)

Hearings on HB 2424 & HB 2425 were closed.

Hearings on HB 2331 - Repealing not guilty by reason of insanity; creating the defense of lack of mental state, were opened.

Chairman O'Neal explained that last year Dean Spring appeared on a similar bill and while explaining why guilty but mentally ill was not the way to go he suggested that the repeal of the insanity defense would be a better option. The committee liked his idea and the bill was amended to reflect the option. The bill passed the House but was held up in the Senate. Therefore, it was reintroduced again this year.

Ron Smith, appeared on behalf of Dean Spring as a proponent to the bill. He provided the committee with information as to what other states have done with the insanity defense. Currently, there are four other states that do not have the option of not guilty by reason of insanity." If the jury finds the defendant not guilty they are then asked if it was based upon the fact that he was suffering from a mental defect. If the answer is yes, they would be punished the same way as those found "not guilty by reason of insanity." There is no fundamental right to an insanity defense in criminal law. (Attachment 6)

Hearings on HB 2331 were closed.

TO: RON SMITH

FROM: RAY SPRING

RE: ABOLITION OF THE INSANITY DEFENSE

[House Judiciary 2-15-95 Attachment 6]

Enclosed herewith are materials relating to the issue which has come up since the hearing on the bill to introduce "guilty but mentally ill." I've included copies of the relevant Utah, Montana and Idaho statutes, along with the *Korell* case from Montana and the relevant part of the *Searcy* case from Idaho. These cases best explain the constitutionality of the statutes in question. The *Korell* case is particularly-well written, and also includes a dissent which presents the contrary view of constitutionality about as well, I think, as it can be presented.

For various reasons, none of the three state statutes seems to me to be the best possible approach to achieving the same result in Kansas with clarity and simplicity. I would propose an act which would read as follows:

Section 1. It is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense.

Section 2. In any case in which the defense has offered substantial evidence of a mental disease or defect excluding the mental state required as an element of the offense charged, and the jury returns a verdict of "not guilty," the jury shall also answer a special question in the following form: "Do you find the defendant not guilty solely because he/she was, at the time of the alleged crime, suffering from a mental

disease or defect which rendered him/her incapable of possessing the required criminal intent?"

It would also be necessary to amend K.S.A. 22-3219, 22-3428 and 22-3428a to eliminate the references to "not guilty because of insanity" and substitute therefor language referring to a finding of "mental disease or defect excluding criminal responsibility.

I think, on the rather quick review I've done in the relatively short time available, that this will get the job done if this is the direction the House Judiciary Committee wants to go.