Petition Appendix

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 retroactive 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 consensus 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 circumstances 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 factfinder 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]

[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.

* * *

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 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 punishment 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.

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, Chief Justice

09 CR 270

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 106,981

STATE OF KANSAS,
Appellee,

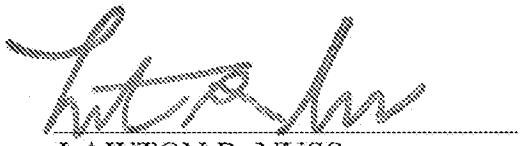
v.

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.



LAWTON R. NUSS,
Chief Justice

Rosen, J., recused.

Amy Hanley, #20623
Assistant Attorney General
Criminal Litigation Division
120 SW 10th Ave., 2nd Floor
Topeka, Kansas 66612
(785) 296-2215

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

STATE OF KANSAS, **Plaintiff,** **v.** **JAMES KRAIG KAHLER,** **Defendant.**	**Case No. 09 CR 270**

DEATH WARRANT

THE DISTRICT COURT OF OSAGE COUNTY, KANSAS, TO THE SECRETARY OF CORRECTIONS OF THE STATE OF KANSAS:

WHEREAS, the defendant, JAMES KRAIG KAHLER, was convicted of the offense of **CAPITAL MURDER** pursuant to jury trial held from August 15, 2011, through August 25, 2011.

WHEREAS, said jury reconvened on August 29, 2011, at which time the penalty phase of the trial was conducted. On that date, said jury returned a unanimous decision sentencing the defendant, JAMES KRAIG KAHLER, to death.

WHEREAS, ON October 11, 2011, formal sentencing was conducted in the above-captioned matter.

Doc. ~~16~~ 7

NOW on the 11th day of October, 2011, the court, having been fully advised in the premises, affirms the sentence of death imposed by the jury and sentences the defendant, JAMES KRAIG KAHLER, to death by lethal intravenous injection for the offense of CAPITAL MURDER.

The Sheriff of Osage County, Kansas, is forthwith ordered to transport said JAMES KRAIG KAHLER to a state correctional institution to be designated by the Secretary of Corrections of the State of Kansas. The Secretary of Corrections shall receive and safely keep said JAMES KRAIG KAHLER until the time of execution or until otherwise ordered by other competent authority.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendant, JAMES KRAIG KAHLER, be sentenced to death by lethal intravenous injection as provided by law for the offense of CAPITAL MURDER of Karen Kahler, Emily Kahler, Lauren Kahler, and Dorothy Wight.

IT IF FURTHER ORDERED, ADJUDGED AND DECREED that said sentence be administered at a time to be set by the Supreme Court of the State of Kansas.

Honorable Phillip M. Fromme
District Court Judge

IN THE DISTRICT COURT OF OSAGE COUNTY, KANSAS
FOURTH JUDICIAL DISTRICT

STATE OF KANSAS,

Plaintiff,

v.

JAMES KRAIG KAHLER,

Defendant.

Case No. 09 CR 270

2011 AUG 29 AM 8:48
CLERK OF THE DISTRICT COURT
OSAGE COUNTY KANSAS

VERDICT:

Capital Murder:

We, the jury, find the defendant James Kraig Kahler, guilty of Capital Murder.

Karen L. Walker
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

STATE OF KANSAS,

Plaintiff,

v.

JAMES KRAIG KAHLER,

Defendant.

Case No. 09 CR 270

2011 AUG 29 AM 8:49
CLERK OF THE DIST. COURT
OSAGE COUNTY KANSAS

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.

Karen C. Walker
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

STATE OF KANSAS,

Plaintiff,

v.

JAMES KRAIG KAHLER,

Defendant.

Case No. 09 CR 270

CLERK OF THE DISTRICT COURT
OSAGE COUNTY KANSAS
2011 AUG 29 AM 8:49

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.

Ramon C. Walker
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

STATE OF KANSAS,

Plaintiff,

v.

JAMES KRAIG KAHLER,

Defendant.

Case No. 09 CR 270

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.

Karen C. Walker
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

STATE OF KANSAS,

Plaintiff,

v.

JAMES KRAIG KAHLER,

Defendant.

Case No. 09 CR 270

2011 AUG 29 AM 8:49
CLERK OF THE DISTRICT COURT
OSAGE COUNTY KANSAS

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.

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

STATE OF KANSAS,

Plaintiff,

v.

JAMES KRAIG KAHLER,

Defendant.

Case No. 09 CR 270

VERDICT:

Aggravated Burglary:

We, the jury, find the defendant James Kraig Kahler, guilty of Aggravated Burglary.

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

IN THE DISTRICT COURT OF OSAGE COUNTY, KANSAS

STATE OF KANSAS, Plaintiff,)
v.) Case No. 09 CR 270
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.

A P P E A R A N C E S

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.

I N D E X

A. The test (sic) would help him perform better. They're not tests that are sedative -- medicines are sedative or would blunt his thinking. If anything, they would be helpful to improve his attention, improve his ability to concentrate.

Q. And sometimes, doctor, we use previous tests as kind of a signpost to look at and compare with tests that are being conducted, did you find that at any time Mr. Kahler had ever received any of those tests before?

A. I didn't find any evidence of prior psychological testing, and all the way back to his high school transcript sometimes there is if a child has an IEP or Individualized Education Program there is a detailed assessment. His grades were very high. His test scores were very high. There was no such program for him.

Q. And did you find any evidence in any of the testing that you did that Mr. Kahler was at all malingering, sir?

A. What do you mean by malingering actually?

Q. That's a bad term.

Mr. Kahler was attempting to falsify or fake any of the test answers or results?

A. I did not find any evidence that he was advancing

false or falsely exaggerating psychiatric systems. Malingering is a term in the DSM-IV. It's used to indicate that a person does not have a mental illness but is advancing criminal behavior or lying for the purpose of monetary gain or escaping criminal penalty or escaping military service, that sort of thing. I didn't find any evidence of that nor did I find any evidence of elevated scales that suggested malingering or false reporting on either the PAI or MMPI.

Q. And you also interviewed Pat and Wayne Kahler, who have testified, where was that interview conducted?

A. In their kitchen.

Q. In their home in Meriden?

A. Yes.

Q. About how long was that interview?

A. 1.75 hours.

Q. And when was that done?

A. August 10, 2011.

Q. And we have in your evaluation actually summaries of each of the interviews that you conducted with Mr. Kahler when you met with him, Kraig Kahler?

A. Yes.

Q. And during those interviews was Kraig, use his first name keep from confusing with his father, was Kraig

aware that he had no doctor patient privilege with you as a physician and a psychiatrist?

A. Yes.

Q. And for the jury's benefit that means what, if a psychiatrist is talking to an individual and there is no privilege, what does that mean?

A. Well, it means a couple things. A forensic evaluation is an evaluation, it's not treatment. It means that there are specific limitations on privacy of the information. I tell everybody who I evaluate forensically pretty much the same thing that is that I'm not their treater, I do a lot of treatment so some of our questions might seem like treatment but it's not. I'm not going to trick them, confuse them, try and anger them or upset them. They're free to ask me questions about anything that I'm asking them, if I can answer it I will. If I can't because either it's not appropriate in my judgment or I don't have the answer I won't. They also understand that anything I learn about the individual interviews and, for that matter, anything from the assessment could appear in the report that I write and then could be discussed in open Court. So there isn't any penalty for not answering questions.

Q. And, doctor, for the psychological testing that you

did, let's take first the Shipley evaluation or Shipley testing you did; and were the results of that significant in any way, sir?

A. Yes.

Q. And can you tell the jury what you gleaned from your psychological examination?

A. In terms of the Shipley, like I said, it's a rapid IQ test. This showed that Kraig Kahler's IQ was in the upper average range, perhaps his IQ was 110. The average IQ is 100 IQ points plus or minus 15 so the average IQ is 85 to 115. Anybody in that IQ range is considered average IQ. Above that is above average or superior or higher. He had an IQ of 110. Relative to what he did in terms of being an engineer and director of a water and electrical power grid that's relatively low for his achievements. So I thought that it was a low measure of his IQ based on what I ultimately discerned was severe depression.

Q. So severe depression could depress or downgrade -- come up with a lower result than a nondepressed IQ test essentially?

A. Yes.

Q. If I'm oversimplifying stop me. I have a tendency to do that.

The second test that you performed, the PAI

test, were its results significant in any way?
A. Yes.
Q. And how so?
A. The PAI is a general personality test, comes up with a diagnosis about the person. PAI essentially said that Mr. Kahler provided a valid effort on the test, that he was -- that his responses were consistent with a couple of things. One of them was a very high potential for suicide. The second was that he was experiencing single episode major depressive disorder. Third thing that he may be suffering from post-traumatic stress disorder. And fourth that he had some personality fragmentation called mixed personality disorder.
Q. Can you explain that a little bit as to what that actually means?
A. Which that? I'm sorry.
Q. The multi or the third one you mentioned after his possible post-traumatic stress disorder, your next was what?
A. Okay. I said mixed personality disorder. In psychiatry there is a five axis diagnosis system. Axis I is the primary problem the person comes to get care, they're depressed, they're hearing voices, they have mood swings.

Axis II diagnoses are the general personality functioning of the person that's not based on their immediate psychiatric problem. What's their personality style. Okay. Somebody can have such an extreme personality problem that they are antisocial, that they are a criminal. You've got antisocial personality disorder. Or they are so socially impaired, they are so avoidant of others, they are so frightened around other people that they have an avoidant personality. They don't socialize in a normal way. Personality disorders are evidence of abnormal behavior, in other words something that's outside the range of what would be expected for their culture.

Q. And were there any other significant findings you made as a result of the PAI?

A. The most significant findings I had were that first that Kraig Kahler was depressed severely. Second, that he was evidencing some anxiety that suggested post-traumatic stress disorder. And third, that he had a personality style in which he presented himself as in control, the leader, the person who knew what was going on, but that would be his social facade but he was more likely also to have enormous amounts of self-doubt which he would not express. And that two

more things which are relevant to me in my assessment, one of them is that the PAI assesses a whole body of behaviors. One of them is whether or not the person demonstrates any antisocial behaviors. In other words, criminal behaviors, precriminality, that sort of thing, and there was no consistent -- there was nothing that looked like he had an antisocial mindset underlying all of this.

Q. Did you find Mr. Kahler had any history of criminal problems in the past at all?

A. Okay. That's a great question.

No, I did not. I mean, he was a model student. He was an obedient son. He rose up through the ranks in his profession extremely well, high levels of personal responsibility. Prior to the breakup of his relationship with his wife Karen, there was no criminal involvement in the criminal Court. The only thing was domestic battery during the process of the divorce. So prior to the process of divorce there was no evidence of precriminality. And also no evidence of like an underlying antisocial personality that just hadn't been discovered yet.

And there was one last thing that was particularly important for me and I'll explain it in the diagnosis but it's worth mentioning at this

point. Kraig Kahler's demeanor is quite unusual. He is focused on proving that he was not wrong. He's focused on avoiding, at least in the psychiatric context, discussing his children, the death of his daughters. In a way that is extremely odd for a man who was devoted to these children and devoted to his family up until this whole process. I believe that the PAI tapped into the traumatic aspect of post-traumatic stress disorder that is that his actions during this traumatized him and that in part contributes to why he is -- his affect is bland or sullen. And I'm not saying that he has post-traumatic stress disorder from a war experience or collapse of a building, or something like that, but the actual events themselves have caused him psychological harm.

Q. Doctor, did you find that Mr. Kahler had any previous psychopathology of significance?

A. Starting at what point?

Q. Prior to his divorce?

A. You mean the filing of the divorce?

Q. If the divorce would have been filed approximately January of 2009, that there was anything in Mr. Kahler's past that you reviewed that led you to believe he was something other than what he appeared

to be to other people?
A. I'm sorry, that's pretty vague question.
Q. His functioning as a father and prior to the divorce?
A. I found nothing that indicated severe psychopathology. The Kahler household was quite orderly, quite rigid about its rules. And there were expectations about behavior in the family that I think spoke of Kraig Kahler's personality style, but there was no evidence of physical abuse or sexual abuse within the family.
Q. And Mr. Kahler's physiological or psychological makeup as an engineer, would that tend to make him oriented one way or another to, for example, problem solving, task solving?
A. Well, if you're talking about, yes, there is lots of different ways to answer. There is lots of different kinds of engineering personalities.
Q. Mr. Kahler's personality rather than generic.
A. I know. But in Kraig Kahler's situation, he very much fits the caricature of the engineer, a person who is not about emotions, not about personal interactions, but about external success, external results. If there is a problem it's fixed within three days or it needs to be addressed immediately. The finishing of the task is more important than the

emotions about the task.

Also based on talking with him, there is a fair amount of, pardon me, he thinks in black and white ways, yes or no, right or wrong. You do what you say or not; is it fixed, is it not; that sort of thing. Without going into other details, he's not the kind of man in this engineering mindset who is going to understand a lot about emotions or delve deeply into them. That's not part of his personality.

Q. He's going to try and fix the marriage, get it back together?

A. In terms of finding solutions, that's a different thing. Finding solutions are going to be focused on what's the problem at hand, how is it the most expedient, most efficient, the least expensive to get things the way they should to work. And in this case it's based on what his definition of what right is.

Q. Was finding emotional solutions to problems or tasks something Mr. Kahler was brought up with?

A. No, he wasn't, really.

Q. And in that regard, what basically Mr. Kahler's personality, why was emotion not something that he was going to take into account at that point?

A. I'm not sure I understand your question.

Q. Would he value efforts over emotions?

A. In terms of my talking with his parents, Pat and Wayne Kahler love their son. They were pleased that he was very intelligent. He was hardworking. In fact, one of the things about Kraig that they especially enjoyed, especially his dad enjoyed, was that Kraig could learn anything. He could drive a tractor, he could learn how to fix things at a very young age without needing a lot of supervision. He also was very reliable. His dad told me that you only had to tell Kraig once and then he would know it, he would do it, he would do it right every time after that. Not a lot of fights in the family, no physical abuse, but also not a lot of demonstrative emotionality.

So I would say that it's kind of hard to characterize an entire family growing up, but one of the things that really is clear about this family is that in the Kahler family one was expected to do what they were required to do. And again, that's not a negative judgment of the family. They grew up -- this is a farm and ranch, you can easily understand how emotions are set aside when, you know, the cattle have to be taken care of in the winter and summer, doesn't matter how you feel you have to go out and do it or the cattle don't live. So that hardworking

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

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

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 reassurance. 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

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

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

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

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 humiliating 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

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

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

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.

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

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?

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

depressed, they're unable to go to work, they're not taking care of their hygiene, they are involved in criminal process or civil process, or they have lost a child. It's very stressful. Those sorts of things would go into Axis IV psychological stressors.

Q. And Axis V indicate serious impairment of communications or judgment?

A. Yes, Axis V is a hypothetical given the underlying hypothetical continuum of health to disease in psychiatry. The bottom is number one. The person is persistently in danger of harm to self or others. The top is one hundred. In other words, virtually perfect functioning. Most people are somewhere in the middle. 30 means his functioning was severely impaired, kind of the cutoffs as you think about it at least the conventional cutoffs are persons who are hospitalized are often hospitalized when their GAF is 40 or lower. And often people who have Social Security Disability awarded to them, their functioning has to be 70 or lower. So there is some conventional benchmarks.

In this case I believe that Mr. Kahler still has evidence of severe psychiatric illness and his impairment -- his judgment is impaired at times. His capacity to rationally think is impaired at times.

Q. And ultimately it's the jury's decision to decide what Mr. Kahler's state of mind was on November 28th, 2009?

A. Yes. The difference -- the role of the psychiatrist is to provide an understanding of their diagnosis and then walk away.

Q. Okay. Thank you. Nothing further.

THE COURT: All right. I think probably we ought to take a break or do you want to go a little bit?

MS. HANLEY: That's all right. We can break.

THE COURT: All right. It's 3:00 or thereabouts, it's a good time for a break. And I'll let you all rise and take a break. We'll take approximately fifteen minute break this time.

And I'll remind you of your admonition not to discuss the case or allow others to discuss the case with you. And you may take your break at this time.

(The jury left the courtroom, after which the following proceedings were had.)

THE COURT: I'll ask that those in the gallery remain here until those that need to take a break have been allowed to go downstairs. Just wait

a few minutes, if you would please. You can sit down and be relaxed. After they've had their opportunity to go down, you may go out.

You can be seated.

(A recess was taken, after which the following proceedings were had in the presence of the jury, all parties present.)

THE COURT: I'll note for the record we're back from the 3:00 break on Tuesday, second week of the trial.

And Dr. Peterson is on the stand. We've completed direct examination. We're ready to proceed with cross examination of the witness. Counsel and the parties and the defendant are present. The jury is seated.

You may continue.

MS. HANLEY: Thank you, Your Honor.

CROSS EXAMINATION

BY MS. HANLEY:

Q. Dr. Peterson, in addition to the final report that you prepared and we admitted into evidence today, you also had a preliminary report that you prepared, correct?

A. Yes.

Q. And you indicate that you do different reports at different stages, right?
A. No, I didn't discuss that. I usually do not do that. I put those thoughts together after I finished my diagnostic assessment of him.
Q. Okay. But your preliminary report reflects your thoughts and notes from the interview, correct?
A. Yes, but it's not a complete report.
Q. Correct.

MS. HANLEY: May I approach, Your Honor?

THE COURT: You may.

MS. HANLEY: I'm handing the witness what's been marked for identification as State's 364.

Q. (By Ms. Hanley) Doctor, that is a true and accurate copy of the preliminary report that you prepared in this matter, correct?
A. Yes.

MS. HANLEY: Your Honor, at this time State would move to admit 364.

MR. HANEY: No objection.

THE COURT: State's 364 is admitted.

Q. (By Ms. Hanley) I want to visit with you about a section that is included in both of your reports, the preliminary and the final, where the defendant claims not to recall any of the events of November 28th of

2009; are you familiar with that section?
A. I have to look in the preliminary report, but I am familiar with what he said to me so yes.
Q. Well, the preliminary report I can direct you is on Page 10.

And it's an accurate statement that the defendant told you he does not recall any of the events from that date, correct?
A. Yes, he says that. Although I believe that he just was choosing not to tell me.
Q. So you doubt this amnesia claimed by the defendant, correct?
A. I didn't say that he had amnesia. In my opinion I'm saying that he is preferring not to discuss it rather than claiming he doesn't have amnesia -- claiming that he has amnesia which is a medical condition.
Q. So you believe the defendant does recall what he did on November 28, 2009, correct?
A. Well, I believe he recalls at least some of it especially since I reviewed all the material including his lengthy interview with the officer.
Q. And you believe that he's choosing only to talk about some of it before he left that day and then after arrest, correct?
A. Yes, that is correct.

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DIAGNOSTIC INTERVIEW REPORT

James Kraig Kahler
(DOB: 01/15/1963)

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.

DEFENDANT'S EXHIBIT
51 09 CR 270

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 be 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 me 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 e-mail
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 McNew
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! I am 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. Sean 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 he had been, waiting 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 and. 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 came 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 Institute 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 average.

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 time 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 MMPI-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 naïve 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 are 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 naïveté 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 naïve, 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. Kahler'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. He 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-IV-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 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 wife 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 be. 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 and 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 be 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, GAF 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 NGRI, 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 (externalized) 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. <u>All</u> 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 strife 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, felt 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 attitude 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.

Stephen E. Peterson, MD
Diplomate, American Board of Psychiatry and Neurology 1992
ABPN Subspecialty in Forensic Psychiatry 1994; Recertified March 25, 2003

Signed: 06/03/2011

LOGAN & PETERSON, PC

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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: 01/15/1963; SSN: 509-86-4312)

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,

William S. Logan, M.D.

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