Addendum

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

STATE OF KANSAS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 09-CR-270
	)	
JAMES KRAIG KAHLER,	)	
	)	
Defendant.	)	

MOTION CHALLENGING THE CONSTITUTIONALITY OF KANSAS DEATH PENALTY

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

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

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

Doc. 100

Reports regarding the current members on death row in the State of Kansas which are ten in number, show that of the ten, seven or eight have been convicted of killing Caucasian women.

- **Gary Kleypas**, convicted for the 1996 rape-murder of Carrie Williams, a Caucasian woman, in Pittsburg, Kansas. The Kansas Supreme Court, in its review of his case, found serious problems with the death penalty statute and required that the penalty phase of the Kleypas case be revisited. (Crawford County) The sentence was overturned in 2001, and the new sentencing trial was held in Wyandotte County in 2008. On September 15, 2008, a jury once again decided that death was the appropriate punishment in this case.

- **Reginald Carr**, convicted of capital murder for the December 15, 2000 murders of Jason Befort, Brad Heyka, Heather Muller, a Caucasian woman, and Aaron Sander and of first degree murder (non-capital) for killing Ann Walenta four days before the quadruple murder. (Sedgwick County)

- **Jonathan Carr**, convicted of the same five murders as his older brother Reginald. (Sedgwick County)

- **John E. Robinson, Sr.**, convicted of capital murder in the deaths of Izabel Lewicka and Suzette Trouten and of first degree murder in the case of Lisa Stasi, who disappeared in 1985 and was never found. (Johnson County)

- **Douglas Belt**, convicted in November, 2004 of capital murder, attempted rape and aggravated arson in the killing of Lucille Gallegos (she may be Hispanic) in west Wichita. (Sedgwick County)

- **Phillip Cheatham**, convicted in September 2005 of one count of capital murder, two counts of first degree murder and one count of attempted first degree murder in the deaths of Gloria Jones and Annette Roberson. A third victim, Annetta Thomas, played dead and survived with 19 gunshot wounds. (Shawnee County) In February 2010 a Shawnee County District Court Judge ruled that Cheatham should be resentenced due to inadequate representation of counsel during the penalty phase of his trial. (Victims were African American)

- **Sidney Gleason**, convicted in July 2006 in the shooting deaths of Miki Martinez and Darren Wormkey in February 2004. The other person accused in the case, Damian Thompson, actually murdered Martinez but he cut a deal and got a life sentence. Thompson will be eligible for parole in 2029. (Barton County)

- **Scott Cheever**, convicted in November 2007, of killing Greenwood County Sheriff Matt Samuels in January 2005. (Sedgwick County)

- **Justin Thurber**, convicted in the January 2007 killing of 19-year-old college student Jodi Sanderholm, and sentenced in March 2009. (Cowley County)

In the instant case, the defendant is accused of killing four members of his family, all of whom are Caucasian women. It is likely that the discriminatory application of the death penalty will apply in the instant case if Mr. Kahler is convicted.

In a memorandum in support of defendant's motion to strike the death penalty filed in *State of Kansas v. Terrence Watson*; Case No. 09-CR-156 pending in the 28th Judicial District in Saline County, Kansas, Richard Ney and Laura Shaneyfelt, attorneys for the defendant, pointed out to the Court the disparity in applying the death sentence in Kansas as follows:

> **b. The effect of race and gender of victim in the application of the Kansas death penalty.**
>
> For obvious reasons, a capital punishment scheme which explicitly provided that the death penalty is more appropriate where the victim is white or white and female would not be constitutional. On the question of race-of-victim, research that is consistent across decades has demonstrated that those who kill whites are more likely to face a sentence of death and to be sentenced to death than those who kill members of minority groups. A race of-victim effect has been repeatedly found to be present in capital prosecutions, including those in both state and federal systems.
>
> Recent studies have begun to demonstrate that there is also a gender-based irrationality to capital punishment schemes as well, with the net effect that those who are guilty of murdering white females are substantially more likely to face the death penalty and be sentenced to death than those who kill non-whites and males. This is further evidence of the arbitrary, capricious and biased nature of the death penalty.
>
> For a comprehensive discussion of the white-victim effect, *see* D. Baldus and G. Woolworth, "Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception," 53 DEPAUL L. REV. 1411, 1423-1428 (2004).

Utilizing statistics current at the time of the study, the authors noted that the nation-wide average for execution of those who killed whites was in the 83 percent range, while whites were victims of murder in only approximately 45 percent of all such cases. *Id.* at 1423. *See also*, K. McNally, "Race and the Federal Death Penalty: A Non-existent Problem Gets Worse," 53 DEPAUL L. REV. 1615 (2004).

Studies of state capital schemes have uniformly detected a significant race-of-victim effect. *See, e.g.* R. Paternoster, G. Pierce, & M. Radelet, "Race and Death Sentencing in Georgia, 1989-1998, in "American Bar Association: Evaluating Fairness and Accuracy in State Death Penalty Systems: The Georgia Death Penalty Assessment Report," appendix at S-6 (2006)[11] (with respect to capital prosecutions in Georgia, "[t]he data show that among all homicides with known suspects, those suspected of killing whites are 4.56 times as likely to be sentenced to death as those who are suspected of killing blacks"); Andrew Welsh-Huggins, "Death Penalty Unequal – Study: Race, Geography Can Make a Difference," *The Cincinnati Enquirer* (May 7, 2005) (analysis of death penalty verdicts in the state of Ohio from 1981 to 2002 reveals that "[o]ffenders facing a death penalty charge for killing a white person were twice as likely to go to death row [compared to those charged with having] killed a black victim. Death sentences were handed down in 18 percent of cases in which the victims were white, compared with 8.5 percent of cases when victims were black"); G.L. Pierce & M. Radelet, "The Impact of Legally Inappropriate Factors on Death Sentencing in California Homicides," 46 SANTA CLARA L. REV. 1 (2005) noting that the killers of whites were over three times more likely to be sentenced to death than defendants convicted of killing non-white victims. *See, e.g.*, Paternoster et al., "An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction," http://newsdesk.umd.edu/pdf/finalrep.pdf.)

As a result of these studies, and others, it is clear that "[d]eath row's racial disparity, however, is not the result of race-neutral application of the death penalty or a perverse form of affirmative action to favor black defendants. Rather, a racial hierarchy clearly exists among cases based upon who the victim is." *See* J. Blume, T. Eisenberg, and M. T. Wells, "Explaining Death Row's Population and Racial Composition," 1 JOURNAL OF EMPIRICAL LEGAL

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[11] Available on-line at: http://www.abanet.org/moratorium/assessmentproject/georgia/finalreport.doc

STUDIES 1, 167 (March 2004).

Although the significance of victim race in death sentencing outcomes has been discussed for at least twenty years, very little prior research has examined whether the combined effect of victim race and gender improperly skews sentencing outcomes in capital cases. This area has only recently gained the attention of researchers. Research has identified just three empirical studies, all very recent, that considered the joint effects of victim race and gender in capital prosecutions. Relying on state court data in Colorado, Georgia and Ohio, each study found that defendants were treated most harshly when a white female victim was present. A Colorado study examined prosecutors' decisions to seek the death penalty after conviction, while Georgia and Ohio studies looked at capital sentencing outcomes.

In a 2006 study of Colorado death penalty cases from 1980 to 1999, researchers found that prosecutors were more likely to seek the death penalty in cases involving white, female victims than they were in cases involving victims of any other race/gender combination. *See* Hindson, Potter and Radelet, "Race, Gender, Region and Death Sentencing in Colorado, 1980-1999," 77 COL. L. REV. 549 (2006). The authors concluded:

> the death penalty is sought for defendants who kill white females at a rate much higher than it is sought for any other victims. White females, who account for only 17.9 percent of all homicide victims, make up 34.5 percent of victims in death penalty cases. Thus, death sentences are pursued against those who kill white women at almost twice the rate of homicide victimization.

Id. at 577.

A November 2007 study analyzed state court data from Georgia cases in the 1970's and concluded:

> Defendants who murder females are more likely to receive a death sentence than defendants who murder males. Furthermore, we show that large differences exist in the likelihood of receiving a death sentence when the variables "victim race" and "victim gender"

> are considered jointly. Cases that involve white female victims are treated the most harshly . . . ."

Williams, DeMuth, Holcomb, 45 *Criminology* 885. In a 2004 Ohio study, the same research group found that death sentences were a product of a strong association between one victim race-gender group – white female victims – and the imposition of a death sentence. Holcomb, Williams, DeMuth, "White Female Victims and Death Penalty Research," 21 *Justice Quarterly* 877-902 (2004).

Based on an analysis of over 400 authorized federal capital cases, it was determined by a qualified expert statistician, Lauren Cohen Bell, Ph.D., that defendants in federal capital cases whose victims were white females were more than three times as likely to be sentenced to death than other federal capital defendants. This finding was, moreover, found to be "highly statistically significant, systemic, and not the result of chance." The examination of the cases revealed, as well, that as of December 2007, federal capital cases involving white female victims constituted 43 percent (26 of 61) of those sentenced to death in the federal system, but only 9 percent (61/626) of all potential defendants since 2000. Thus, the death-sentencing rate is many times higher than the death sentencing rate for non-white female victim cases.

The statistics in Kansas are similar and, in fact, far worse than other states and the federal government. All of those on death row in Kansas are there for killing a white victim or victims. Of the 12 men sentenced to death, all but one was sent there for killing white victims. The one defendant who was accused of killing African American victims has had his death sentence set aside on the basis of ineffective assistance of counsel. Of the 11 individuals sentenced to death in Kansas for killing white victims, 10 of those killed white females. The only defendant sentenced to death for killing only a white male was Scott Cheever, who killed a white police officer. Statistically that means that 91.6 percent of those sentenced to death in Kansas were sentenced for killing white victims and 83.3 percent for killing white females.

When the gender of the victim is considered, the evidence of an arbitrary and capricious operation of the Kansas death penalty becomes apparent. When the penalty decisions of juries are examined, the results are nothing short of astonishing. Although white females represent only 20 percent of Kansas murder victims,

white females were victims in 64 percent of cases of death cases actually tried, 83.3 percent of death sentences returned and 87.5 percent of the death sentences which currently exist in Kansas. Out of the four death cases pending trial, all of them, 100 percent, contain white female victims. Accordingly, this Court should find that the existence of a "white female victim" effect renders any death sentence in this case unconstitutional.

G. Conclusion: the Kansas death penalty experiment has failed.

The Kansas death penalty experiment is a failure and should be declared unconstitutional. This court should conduct a hearing at which time a full and searching inquiry of the data presented here can take place in order to determine whether there is a convincing and constitutionally sufficient justification for the past, current, and apparently enduring, arbitrary, cruel, invidious, and patently "unusual," state of the Kansas death penalty.

2. **The punishment of capital punishment is cruel and unusual.**

The Kansas Bill of Rights, Section 1, provides all Kansas citizens are entitled to the "right to life, liberty and the pursuit of happiness." By the imposition of the Kansas death penalty, the section deprives all Kansas citizens to the right to life and makes the right to life guarantee meaningless and changes it to a "privilege" of life. The imposition of the death penalty for a crime, given the historic inequities of its application and errors in conviction, makes the punishment to be cruel and unusual. In the State of Kansas, those convicted of capital murder (although not having had an execution in Kansas for 45 years) are incarcerated in solitary confinement, some for more than a decade, depriving them of the basic necessities of life including basic exercise and human contact and this constitutes cruel and unusual punishment.

3. **The manner in which the punishment is carried out is cruel and unusual.**

The Kansas death penalty is presumably carried out through lethal injection in a non-clinical

setting. To allow witnesses, some of whom are not consented to by the person being executed, constitutes cruel and unusual punishment in the last phase of one's life. The mental pain, delays, anxiety, ritualistic execution, and suffering constitutes cruel and unusual punishment.

4. **The Kansas laws provide lack of procedural and constitutional due process regarding jury instructions.**

Juries in Kansas are given no guidance as to how they should weigh mitigating and aggravating circumstances or how they determine the weight and credibility to be given such evidence. Pattern Instructions for Kansas 3d, 56.00-A provides in part capital murder a jury shall consider:

> **PIK 3d 56.00-B CAPITAL MURDER–PRE-VOIR DIRE INSTRUCTION**
>
> In the case for which you have been summoned for jury duty, the defendant is charged with the crime of capital murder. [Each of you received a questionnaire concerning your views on capital punishment.] I will now explain to you, in general terms, the manner in which capital murder cases are conducted in this state. The trial of a capital murder case is divided into two phases. In the first phase, the jury decides whether the defendant is guilty of capital murder and is instructed concerning the claims the state must prove in order to establish that charge. If the jury unanimously concludes that the defendant is guilty of capital murder, then the second phase begins in which the same jury decides whether the defendant should be sentenced to death. The jury will be separately instructed concerning the claims that must be proved in order for the death penalty to be imposed. The jury will also be instructed at that time that the defendant will be sentenced to imprisonment for life with no possibility of parole if a sentence of death is not imposed. A defendant found guilty of capital murder may not be sentenced to death unless the jury unanimously finds beyond a reasonable doubt that there are one or more aggravating circumstances present and that they are not outweighed by any mitigating circumstances found to exist.

* * * *

56.00-C CAPITAL MURDER—DEATH SENTENCE—AGGRAVATING CIRCUMSTANCES

Aggravating circumstances are those that increase the enormity of the crime of capital murder or add to its injurious consequences.

The State of Kansas contends that the following aggravating circumstances are shown from the evidence:

1. [That the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment, or death on another.]

and/or

2. [That the defendant knowingly or purposely killed or created a great risk of death to more than one person.]

and/or

3. [That the defendant committed the crime of capital murder for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.]

and/or

4. [That the defendant authorized or employed another person to commit the crime of capital murder.]

and/or

5. [That the defendant committed the crime of capital murder in order to avoid or prevent a lawful arrest or prosecution.]

and/or

6. [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 his or her ultimate fate.]

and/or

7. [That the defendant committed the crime of capital murder while serving a sentence of imprisonment on conviction of a felony.]

and/or

8. [That the victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.]

In your determination of sentence, you may consider only those aggravating circumstances set forth in this instruction.

* * * *

56.00-E CAPITAL MURDER—DEATH SENTENCE—BURDEN OF PROOF

The State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances found to exist.

* * * *

56.00-F CAPITAL MURDER—DEATH SENTENCE—AGGRAVATING AND MITIGATING CIRCUMSTANCES—THEORY OF COMPARISON

In making the determination whether aggravating circumstances exist that are not outweighed by any mitigating circumstances found to exist, your decision should not be determined by the number of aggravating or mitigating circumstances that are shown to exist.

* * * *

56.00-G(B) CAPITAL MURDER—DEATH SENTENCE—ALTERNATIVE SENTENCE

If you find unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances found to exist, then you shall impose a sentence of death. If you sentence the defendant to death, you must designate upon the appropriate verdict form with particularity the aggravating circumstances that you unanimously found beyond a reasonable doubt.

However, if one or more jurors are not persuaded beyond a reasonable doubt that aggravating circumstances are not outweighed by mitigating circumstances, then you should sign the appropriate alternative verdict form indicating the jury is unable to reach a unanimous verdict sentencing the defendant to death. In that event, the defendant will not be sentenced to death but will be sentenced by the court to imprisonment for life with no possibility of parole.

* * * *

56.00-H CAPITAL MURDER—DEATH SENTENCE—SENTENCING DECISION

At the conclusion of your deliberations, you shall sign the appropriate verdict form.

You have been provided two verdict forms that provide the following alternative verdicts:

A. Finding unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances found to exist, and sentencing the defendant to death;

OR

B. Stating that the jury is unable to reach a unanimous verdict sentencing the defendant to death.

The instructions to a Kansas jury are a mish-mash of confusing and inflammatory statements, including such concepts as providing no instructions to the jury whatsoever as to how mitigating or aggravating circumstances are to be weighed other than telling them the defendant is put to death if aggravating circumstances "outweigh mitigating circumstances." The instructions, particularly 56.00(B) provide that the aggravating circumstances are weighed more heavily than the mitigating circumstances. The instruction allows the jury to find one aggravating circumstance which would "outweigh" every other and multiple mitigating circumstances. This instruction favors the death penalty before a jury and provides that the aggravating circumstances are weighed more heavily than

mitigating circumstances thereby denying the defendant constitutional due process. This is particularly emphasized in 56.00(F) which instructs the jury that they should not be concerned with the number of aggravating or mitigating circumstances that are shown to exist. The jury is not instructed that one mitigating circumstance can outweigh a number of aggravating circumstances and this provides lack of fundamental due process. Instruction 56.00-C provides an aggravating circumstance of committing the crime of capital murder in a specially heinous, atrocious, or cruel manner and purports to define each word. The definitions as provided are circuitous and lack substantive definition. The language used is inflammatory, moralistic and does not speak in legal terms using such terms as "wicked," "evil," "vile," "pitiless".

The failure to properly instruct the jury in this regard provides that the mitigating circumstances which outweigh the aggravating circumstances will not be found so by the sentencing jury. The penalty phase of a capital case in Kansas is an invitation to jury misconduct not through individual misconduct of the jurors, but through the confusion which exists regarding instructions to the jury and the state of the law. The jury is instructed to use two different standards – one, beyond a reasonable doubt, and two, when finding aggravating circumstances the burden of preponderance of the evidence to determine mitigating factors. The denial of due process is further compounded by the jury being allowed to determine that one aggravating circumstance trumps all multiple mitigating circumstances. No proposed instruction is given to the jury as to how to weigh these conflicting circumstances nor how to make such a determination of death based upon these factors. The State of Kansas and the federal government long ago abandoned the concept of the independent exercise of judicial discretion when it comes to enacting sentencing guidelines. But now the State of Kansas has created unbridled, or rather uninstructed, jury consideration when it

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

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

Since the attempted assassination of Ronald Reagan, four states have abolished the insanity defense, including Montana, Utah, Idaho and Kansas. In its place, the State of Kansas has provided for a "defense" of lack of mental state. *See* K.S.A. 22-3219. The defense of not guilty by reason of insanity which existed in the common law since the 12th century and has its roots in Ancient Greece. (Feigl 1995, 191). It has existed through various tests, including the M Naughten Rule, Irresistible Impulse Test, the Durham Rule, and the ALI Model Penal Core Test. The present scheme in Kansas allows an individual suffering from serious mental disease and defect who cannot tell the difference between right and wrong or cannot conduct himself or herself accordingly, to still be found guilty of criminal conduct including capital murder and be put to death. Such would, and has, included those suffering from mental illness and disease including schizophrenia, paranoia, manic depression and other mental illness. It is respectfully submitted that to abolish the defense in the State of

Kansas denies the defendant and others similarly situated due process of law both procedurally and substantively. The longstanding law established in *Ford v. Wainright*, 106 S. Ct. 2595 (1986) and *Atkins v. Virginia*, 122 S. Ct. 2242 (2002) stand the test of time. In *Ford, supra*, the Court states:

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

The Court notes that "[t]he bar against executing a prisoner who has lost his sanity bears impressive historical credentials; the practice consistently has been branded 'savage and inhumane'." *Citing* 4 W. Blackstone, Commentaries * 24 * 25. It is incongruous that the English common law could have such strong traditions in preventing the execution of the insane and yet allow the State to abolish a defense based upon insanity and allow conviction and execution of the insane. The State's procedure for determining mental illness and lack of specific intent are inadequate to preclude federal redetermination of the constitutionality issue. The Supreme Court additionally states:

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

Ford, supra.

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

are material. Justice Stevens, in delivering the opinion of the Court states:

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

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

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

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

the accused has no right to compel their appearance is an additional violation of substantive and procedural due process in this matter.

7. **The relaxed evidentiary standards at sentencing allow the government to produce any evidence of aggravating factors without regard to its accuracy.**

K.S.A. 21-4624 provides procedures to determine if an individual convicted of capital murder shall be sentenced to death. At the sentencing procedure, "evidence may be presented concerning any matter that the Court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in K.S.A. 21-4625 . . . and any mitigating circumstances." The Court is given no guidance as to any prejudice flowing from the admission of such "matter" nor what constitutes a "matter." Additionally, the matter which becomes "evidence" when admitted simply has to pass a threshold test of "the Court deems [it] to have probative value" regardless of its legal admissibility under the Rules of Evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements."

WHEREFORE, defendant respectfully requests the Court declare the Kansas death penalty scheme unconstitutional.

Respectfully submitted,

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NOTICE OF HEARING

The above-referenced Motion Challenging the Constitutionality of Kansas Death Penalty is requested to be heard by the Court on June 16, 2011 at 9:30 a.m.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing document was sent, by U.S. Mail, on this 1st day of June, 2011, to:

Amy Hanley
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and a Chamber's copy to:

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CLERK OF THE APPELLATE COURT
CASE NUMBER: 106981

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS Plaintiff-Appellee	)County Appealed From: Osage)District Court Case No: 09 CR 270)Appellate Court No: 11-106981-S
vs.	)
JAMES K. KAHLER Defendant-Appellant	)

Motion to Supplement Oral Argument

A. *Background:* At Mr. Kahler's December 16th oral argument, several justices asked questions about the constitutionality of executing a person who could not appreciate the wrongfulness of his conduct. Counsel believes that some justices of this Court were, essentially, combining parts of Issue IV (unconstitutional to abrogate the insanity defense) and Issue VIII (death penalty is categorically disproportionate for defendants with a severe mental illness). The fact that the Court felt the need to do so may indicate that Issue VIII was not sufficiently clear, thus counsel is now filing this motion to supplement the argument.

B. *Authority:* Supreme Court Rule 5.01; K.S.A. 21-6618(b); *State v. J. Carr*, Case No. 03-90198-S, Flat File (State's Motion to Supplement Oral Argument, December 20, 2013).

C. *Request for relief:* Counsel respectfully requests this Court grant this motion and consider the clarification below in coming to a decision in Mr. Kahler's case.

D. *Reason:*

In Issue VIII, counsel cites to the 2006 position of the American Bar

Association defining mental illness. (Appellant's Brief, pg. 65.) The definition would prohibit the execution of a defendant who, at the time of his offense, "had a severe mental disorder or disability that significantly impaired their capacity to (a) appreciate the nature, consequences or wrongfulness of their conduct, (b) exercise rational judgment in relation to conduct, or (c) conform their conduct to the requirements of the law." See American Bar Association, *"Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, " 30 MENTAL & PHYSICAL DISABILITY L. REP. 668 (2006).

This definition is almost identical to the M'Naghten test, which is cited as part of Issue IV. See *e.g. State v. Harkness*, 252 Kan. 510, 521, 847 P.2d 1191 (1993) ("a defendant is to be held not criminally responsible where he does not know the nature and quality of his act or where he does not know right from wrong with respect to that act."). (Appellant's Brief, pg. 44.)

Thus, to the extent this Court would consider applying the historical insanity defense as outlined in Issue IV to the imposition of a death sentence, counsel believes that issue has been substantially raised and briefed in Issue VIII.

In plain language, Issue VIII asserts that it is unconstitutional to execute a person who a) has a severe mental illness (such as the severe depression, single episode major depressive disorder, and post-traumatic stress disorder Mr. Kahler was diagnosed with) *and* b) at the time of his offense cannot appreciate the nature or wrongfulness of his conduct (essentially the M'Naghten test).

As such, counsel believes this is an assigned error this Court must consider. If counsel is still misunderstanding this Court's concern, counsel would welcome the opportunity to file a supplemental brief as further directed by this Court.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was mailed to Brandon L Jones, County Attorney, Osage County Courthouse, PO Box 254, Lyndon, Ks 66451-0254 and Amy Hanley and Kristafer R. Ailslieger, Office of Attorney General, 120 SW 10th Ave. 2nd Floor. Topeka, Ks 66612-1597 on this 19th day of December 2016.

Meryl Carver-Allmond