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ACCUSED FILING #117

IN THE DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS,		
	Plaintiff,	Case No. 18 CR 640
	v.	
ANTOINE FIELDER,		
	Defendant.	

DEFENDANT ANTOINE FIELDER'S MOTION CHALLENGING CAPITAL PUNISHMENT AS APPLIED IN KANSAS AS UNCONSTITUTIONAL UNDER THE STATE AND FEDERAL CONSTITUTIONS

Comes now the accused, Antoine Fielder, by and through counsel and respectfully moves this Court to find unconstitutional the death penalty as applied in Kansas. For the reasons explained below and as set forth in detail in the expert reports appended to this Motion, application of the Kansas death penalty to Mr. Fielder would violate his rights to be free from cruel or unusual punishment pursuant to Section 9,his right to life under Section 1, and his jury trial rights under Sections 5 and 10 of the Kansas Constitution Bill of Rights, as well as his concomitant federal constitutional rights, including those contained within the Sixth, Eighth, and Fourteenth Amendments.

In support of this Motion, Mr. Fielder relies upon the attached Memorandum of Points and Authorities and the following expert reports included as exhibits:

Exhibit A: Mona P. Lynch (2023 Report)
Exhibit B: Wanda Foglia
Exhibit C: Scott Sundby
Exhibit D: Elisabeth Semel
Exhibit E: Shawn Leigh Alexander
Exhibit F: Jeffrey Fagan (2024 Deterrence Report)
Exhibit G: Charles Epp
Exhibit H: Frank R. Baumgartner (2024 Race Study Report)
Exhibit I: Tricia Rojo Bushnell
Exhibit J: Jeffrey Fagan (2023 Race Study Report)
Exhibit K: Brent M.S. Campney
Exhibit L: Carol Steiker
Exhibit M: Frank Baumgartner (2022 Media Report)
Exhibit N: Frank Baumgartner & Phil Cook (2023 Cost Report)

Dated: October 15, 2024

Respectfully submitted,

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Plaintiff,	)	Case No. 18 CR 640
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DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HIS CHALLENGE TO CAPITAL PUNISHMENT AS APPLIED IN KANSAS AS UNCONSTITUTIONAL UNDER THE STATE AND FEDERAL CONSTITUTIONS

TABLE OF CONTENTS

INTRODUCTION

Decades of experimentation under the modern death penalty regime compel the conclusion that Kansas's death penalty has outlived any conceivable use. It is imperfect in application, haphazard in result, and of negligible utility. A host of national and state experts have undertaken an unprecedented factual examination of the death penalty as applied in Wyandotte County and the State of Kansas. *See* Exhibits A-N. This examination reveals a system of capital punishment tainted by racial bias and arbitrariness, from charging and jury selection to convicting and sentencing.

Far from severing its historical ties to racial violence and terror, the death penalty continues to perpetuate racial discrimination. Racial bias drives jury selection, the use of discretion by prosecutors and police, and the imposition of jury verdicts. With no executions in the modern era, the Kansas death penalty has no valid penological purpose: it does not deter and it costs more than the alternative sentence, life in prison. These grave conclusions rest not on speculation or theory, but on the undisputable facts of the death penalty's record of application in Kansas and Wyandotte County since its reinstatement in 1994.

This challenge raises new issues of fact and law that have not been adjudicated by any court in this state.[1] Although the Kansas Supreme Court has declined to find that the death penalty violates Section 9 *per se*, it has never considered or decided

[1] Two prior challenges were brought in Sedgewick County—one by Cornell McNeal and a second by Kyle Young—but neither resulted in a ruling because in both cases, the motion became moot before trial. In Mr. McNeal's case, the State withdrew its notice of intent to seek death and in Mr. Young's case, the parties entered a plea agreement that resolved the case without the death penalty.

whether the record of the application of the death penalty in Kansas renders it unconstitutional. Moreover, past cases challenging the death penalty under Section 9 were decided before *Hodes*, a seminal case that structurally changed Kansas constitutional law. *See State v. Carr*, 502 P.3d 546, 578 (Kan. 2022) (explaining that *Kleypas* was decided "under a substantially different legal framework that predated this court's decision in *Hodes*"). Those decisions applied a presumption of constitutionality without analyzing whether Section 9 enshrined a fundamental right. *See*, *e.g.*, *State v. Kleypas,* 40 P.3d 139, 233 (Kan. 2001).

Accordingly, this question remains unresolved, and *Hodes* requires this Court to determine as a matter of first impression whether the death penalty violates Section 9 under the newly established fundamental right framework. *See, e.g.*, *Stewart Title of the Midwest, Inc. v. Reece & Nichols Realtors, Inc.*, 276 P.3d 188, 196 (Kan. 2012) (explaining that a law may "survive[] a facial interpretation" but nevertheless "fail[] under an 'as applied' interpretation"); *cf. Kleypas*, 40 P.3d at 223, 252 (deciding only that capital punishment does not amount to a *per se* violation of Section 9, but sustaining an as-applied challenge to the aggravating and mitigating factor weighing scheme). This Court should therefore accept the invitation to reconsider the relationship between Section 9 and the Eighth Amendment extended by the Kansas Supreme Court in *State v. Scott*: "[i]n [future challenges to § 9], we are free to further consider the historical record and decide whether § 9 should be interpreted in a manner which deviates from that given to the Eighth Amendment by the United States Supreme Court." 183 P.3d 801, 830 (Kan. 2008).

Mr. Fielder thus asks this Court to rule that Kansas's death penalty constitutes a legally prohibited cruel and unusual punishment prohibited by Sections 1, 5, 9, and 10 of the Kansas Constitution Bill of Rights, as well as the Sixth, Eighth, and Fourteenth Amendments to the federal constitution.

A BRIEF OVERVIEW OF THE KANSAS DEATH PENALTY

Kansas's modern death penalty statute (Kan. Stat. Ann. § 21-6617 et seq.) is explicitly modeled on the Model Penal Code. As in the Model Penal Code, the Kansas law bifurcates the guilt and sentencing determinations. As the Model Penal Code prescribes, the Kansas statute requires sentencing juries to unanimously find beyond a reasonable doubt that one or more statutory aggravating circumstances exists, and then to consider a list of statutory mitigating circumstances, as well as all relevant non-statutory mitigating evidence. Kansas's lists of aggravating and mitigating circumstances mirror those in the Model Penal Code. While there are some minor variances from the precise language of the Model Penal Code, the Kansas law is patterned closely on the model statute, sharing its evident faith that carefully worded guidance to capital sentencers would be able to address the problems of arbitrariness and discrimination that plagued the pre-*Furman* administration of capital punishment.

Kansas has a unique historical relationship to the death penalty, and its ambivalence about the death penalty runs deeper than that of most of the other

retentionist states. Kansas has not conducted an execution in almost 60 years.[2] It has only nine people currently under sentence of death—fewer, for example, than the less populous neighboring state of Nebraska. And of all 27 states that currently permit capital punishment, Kansas was the last to reauthorize the death penalty after the Supreme Court's invalidation of all prevailing statutes in 1972, not enacting its revised statute until 1994.

LEGAL STANDARD

Mr. Fielder challenges the death penalty as applied in Kansas under the federal constitution and Sections 1, 2, 5, 9, and 10 of the State Constitution.

A. Sections 1 and 5 (Rights to Life and Liberty, and to Trial by Jury)

The rights to life and liberty under section 1 and jury trial rights under Sections 5 of the Kansas Constitution have been recognized as "fundamental" rights and subject to strict scrutiny review. *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 499 (Kan. 2019) ("*Hodes I*"), *aff'd sub nom. Hodes & Nauser, MDs, P.A. v.*

[2] Today, only 27 states authorize the death penalty, and six of these states (Arizona, California, Ohio, Oregon, Tennessee and Pennsylvania) currently have gubernatorial moratoria in place. *See* Death Penalty Info. Ctr. ("DPIC"), *State by State*, https://deathpenaltyinfo.org/states-landing (last visited Oct. 15, 2024). Even among jurisdictions that formally retain the death penalty, there has been a substantial decline in its use. More than two-thirds of the states in the country have not carried out an execution in the past decade. *See* DPIC, *Number of Executions by State and Region Since 1976*, https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976 (last visited Oct. 15, 2024). Twenty years ago, in 2004, the average number of executions conducted in the prior three years was 67; today, that average is 18. DPIC, *Execution Database*, https://deathpenaltyinfo.org/database/executions?year=2003&year=2002&year=2001 (last visited Oct. 15, 2024). Even if one discounts the COVID years and averages the three years prior to 2020, the average is still only 23—a 65% decline. The decline in death sentencing is even more pronounced. The three-year average for death sentences between 2002-2004 was 151; today it is 20. Even discounting the COVID years, the three-year average is still only 39—more than a 70% decline. *See* DPIC, *Fact Sheet*, https://deathpenaltyinfo.org/facts-and-research/fact-sheet (last visited Oct. 15, 2024.

Kobach, 551 P.3d 37, 46 (Kan. 2024) ("*Hodes II*") (the right to personal autonomy is implicit in Section 1, fundamental, and thus triggers strict scrutiny review)); *Carr,* 502 P.3d at 569 ("Unlike the implicit right to personal autonomy recognized in *Hodes*, which found its source in the explicit rights of liberty and the pursuit of happiness, a natural right to life is explicitly enumerated as one of the natural rights protected by [S]ection 1."); *Hilburn v. Enerpipe Ltd*., 442 P.3d 509, 513 (Kan. 2019) (plurality op.) (right to jury protected by Section 5 is fundamental). Prior to *Hodes I*, Kansas courts typically applied a presumption of constitutionality in challenges brought under the state constitution, and therefore placed the burden of proof with the challenger. *See, e.g.*, *Farley v. Engelken*, 740 P.2d 1058, 1061 (Kan. 1987). This mirrored the federal approach to equal protection claims involving non-suspect classifications. *See, e.g.*, *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012). *Hodes I*, however, declared that "government infringement of a fundamental right is inherently suspect[,]" and therefore abolished the presumption of constitutionality. 440 P.3d at 499. Accordingly, when a challenger brings a claim involving "fundamental interests[,]" *id*., "courts peel away the protective presumption of constitutionality and . . . the burden of proof is shifted" to the State. *Id*. (internal quotations omitted).

The Kansas Supreme Court has specifically recognized that Section 1 of the Kansas Bill of Rights protects a capitally charged defendant's explicitly enumerated right to life, which is forfeited only after he is convicted of capital murder beyond a reasonable doubt. *See Carr*, 502 P.3d at 579. The Supreme Court has not determined the question raised here: whether a defendant cloaked in the presumption of

innocence, like Mr. Fielder, has forfeited this right. *Cf. id.* ("[W]here a defendant *has been lawfully convicted* of capital murder, the imposition of the capital sentence *no longer* implicates his or her inalienable natural rights under [S]ection 1.") (emphasis added).[3]

The answer to that question must be "no." To find otherwise would require this Court to assume guilt, which is prohibited. *See, e.g.*, *State v. Knox*, 603 P.2d 199, 207 (Kan. Ct. App. 1979) (reversing a trial court ruling that "apparently assumed guilt" because it was "decided before trial when the presumption of innocence still cloaked the defendant"). Therefore, Section 1 protects Mr. Fielder, the State bears the burden of proof, and review is subject to strict scrutiny. *See, e.g.*, *Hodes I*, 440 P.3d at 499 ("Presuming that any state action *alleged* to infringe [a fundamental right] is constitutional dilutes the protections established by [the State] Constitution."); *see*

[3] The *Carr* defendants appeared before the Supreme Court duly convicted of multiple capital murders. *See Kansas v. Carr*, 577 U.S. 108, 114-15 (2016). At the time they asserted the violation of Section 1, they retained "no [S]ection 1 protections at all." *Carr*, 502 P.3d at 630 (Stegall, J., concurring). Accordingly, the Court rejected their claim. *See id.* at 579. Mr. Fielder, by contrast, appears before this Court "presumptively innocent." *See, e.g.*, *Betterman v. Montana*, 578 U.S. 437, 442 (2016); *see also State v. Johnson*, 50 P. 907, 911 (Kan. Ct. App. 1897) (Mahan, P.J., concurring) ("[T]o this presumption [of innocence] every defendant put upon trial for a crime is entitled, and without qualification or restriction, but an absolute, full, and free presumption, without the power of the court to in the least modify or limit."). It is a bedrock principle of our legal system that the state cannot dislodge the absolute presumption of innocence with a bare allegation. *See, e.g.*, *In re Winship*, 397 U.S. 358, 363 (1970) (describing the "presumption of innocence" as "that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' ") (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)); *Coyne v. United States*, 246 F. 120, 121 (5th Cir. 1917) ("An indictment is a mere accusation, and raises no presumption of guilt. On the contrary, the indicted person is presumed to be innocent until his guilt is established, by legal evidence beyond a reasonable doubt . . . ."). Mr. Fielder, therefore, wears a "cloak of presumed innocence." *State v. Netherton*, 3 P.2d 495, 499 (Kan. 1931).

also id. (explaining that "the burden of proof is shifted" to the State once a Section 1 claim is alleged) (internal quotation omitted).[4]

Strict scrutiny review proceeds in two steps. First, "the State must establish a compelling interest"—*i.e.*, "one that is not only extremely weighty, possibly urgent, but also rare—much rarer than merely legitimate interests and rarer too than important interests." *Hodes & Nauser, MDs, P.A. v. Stanek* ("*Hodes III*"), 551 P.3d 62, 77 (Kan. 2024) (citing *Hodes I*, 440 P.3d at 493). Second, the State must "prove its action is narrowly tailored to serve that interest" and furthers that interest "not merely in theory, but in fact." *Id.* at 73, 79 (citing *Hodes I*, 440 P.3d at 696 (Biles, J., concurring)). State action is narrowly tailored only when it is neither overinclusive nor underinclusive, and achieves the compelling interest by the least restrictive means available. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1326-32 (2007); *see also Hodes I*, 440 P.3d at 493 (citing favorably to Fallon).

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[4] Strict scrutiny is the appropriate approach under *Hodes I.* However, the State would also have to make a substantial showing under the alternative standard urged by Justice Stegall in his *Hodes I* dissent: "rational basis with bite." 440 P.3d at 550-51 (Stegall, J., dissenting). While rational basis with bite accords the State *some* deference, it "does not load the dice—relentlessly—in government's favor." *Id.* (internal quotations omitted). Instead, "a court must examine the *actual* legislative record to determine the *real* purpose behind any law in question before it can conclude the law is within the limited constitutional grant of power possessed by the State." *Id.* at 551 (emphases in original). If the State's purpose is arbitrary, irrational, or discriminatory, the Court must prevent it from proceeding. *See id.* ("The people have not authorized the State to act in arbitrary, irrational, or discriminatory ways.").

Justice Stegall reiterated his position in *Carr*, arguing that rational basis with bite "is the test we should now apply to the death penalty . . . ." 502 P.3d at 631 (Stegall, J., concurring). He declined to do so in that case because the issue was not before the Court: "The lower courts have not inquired into the subject, the parties have not briefed the issue, and this court has declined to take it up." *Id.* Justice Stegall observed, however, that because the Kansas death penalty has never been subjected to rational basis with bite, no one yet knows "how such an inquiry would play out." *Id.* He therefore announced that, if the issue had been before the Court, he would have been "inclined" to "remand" for an evidentiary hearing. *Id.* Justice Stegall explained that close constitutional inspection is particularly important in the death penalty context because of "the monumental consequences of the State's exercise of this most final, most irreversible, and most grave use of power—killing a human person . . . ." *Id.*

By design, strict scrutiny is a difficult test. A "searching judicial inquiry" is required when the State implicates fundamental rights "as a way to smoke out illegitimate governmental action by assuring that the government is pursuing a goal important enough to warrant use of a highly suspect tool." *Id.* at 499 (internal quotations omitted). *See also id*. at 497 ("[B]y placing their acknowledgment of these individual rights in the first section of Kansans' Bill of Rights, the drafters and adopters of our Constitution made clear the rights are foremost.").

B. Section 9 (Freedom from Cruel or Unusual Punishments)

Whether the right to be free from cruel or unusual punishment under Section 9 is "fundamental" is an open question and depends on whether the right is explicitly enumerated and the provision's grounding in history. *See, e.g.*, *Hodes I*, 440 P.3d at 480; *Hilburn*, 442 P.3d at 513.

The right to be free from cruel or unusual punishment should be understood to be fundamental. The Kansas Supreme Court has readily accepted as fundamental those rights that the Constitution explicitly declares. *See, e.g.*, *Hilburn*, 442 P.3d at 513 ("[W]e have little difficulty deciding that the right protected by [S]ection 5 is a 'fundamental interest' expressly protected by the Kansas Constitution Bill of Rights."); *Carr*, 502 P.3d at 569 ("We have no hesitation recognizing a right to life

under [S]ection 1. Unlike the implicit right to personal autonomy . . . life is explicitly enumerated as one of the natural rights protected by [S]ection 1.").[56]

The scope of this right is broader than under the federal constitution, which prohibits the imposition of "cruel and unusual punishments." U.S. Const. amend. VIII. Kansas's text prohibits "cruel *or* unusual punishment," Kan. Const. Bill of Rights, § 9 (emphasis added). *See, e.g.*, *State v. Freeman*, 574 P.2d 950, 956 (Kan. 1978) (requiring proportionality review of long sentences under Section 9 even though such reviews are not required under the federal constitution);[7] *see also State v. Petersen-Beard*, 377 P.3d 1127, 1141 (Kan. 2016) (observing in another context that the word "or" in Section 9 is a "key distinction"); *State v. Albano*, 487 P.3d 750, 756 (Kan. 2021) (reaffirming that the "best and only safe rule" for constitutional interpretation is to presume a design for every word inserted or omitted) (internal quotation omitted); *cf*. *Hodes I*, 440 P.3d at 472-73 (discussing textual differences and

[5] Because Section 5 is "unquestionably" implicated here, *State v. Love*, 387 P.3d 820, 834 (Kan. 2017), the Court need not conduct the type of historical analysis normally required in Section 5 cases to determine whether the proceeding at issue was "triable to a jury under the common law extant in 1859." *Hilburn*, 442 P.3d at 514 (internal quotation omitted). Capital defendants have always enjoyed the right to a jury trial in Kansas. *See* Kan. Gen. Law, vol. 1. ch. 27 § 175, at 208 (1859).

[7] Although the Kansas Supreme Court's 2001 decision in *Kleypas* concluded that Section 9 was not broader than the Eighth Amendment, its decision rested in large part on the fact that—at that time—no state other than California or Massachusetts had engaged in different analyses of the Eighth Amendment when interpreting the cruel and/or unusual punishment clause under their state constitutions. *Kleypas*, 40 P.3d at 251. Two decades later, the landscape has shifted dramatically, and the foundation on which the *Kleypas* ruling was based no longer stands. *See infra* § I.B.1 (noting that at least Connecticut, Georgia, Louisiana, Nebraska, South Carolina, Tennessee, and Washington have interpreted their state constitutional protections more broadly than the federal constitution).

concluding that Section 1 of the Kansas Constitution Bill of Rights identifies rights that are distinct from and broader than the Fourteenth Amendment).[8]

Moreover, this right is deeply rooted in history. *Cf. Hodes I*, 309 Kan. at 440 P.3d at 472-80 (discussing the history of Section 1 and Lockean principles of natural rights). The history of Section 9 begins in 1689; the same year that Locke published his *Two Treatises on Government*, Parliament passed the English Bill of Rights and prohibited the King from inflicting "cruel and unusual punishments." Bill of Rights 1689, 1 William & Mary, 2d Sess., ch. 2 (Eng.). Americans later imported that exact language into the Eighth Amendment, and either adopted it verbatim or wrote slight variations on it into their state constitutions. *See Furman v. Georgia*, 408 U.S. 238, 242-44, 317-22 (1972) (per curiam) (Douglas & Marshall, JJ., concurring) (discussing the influence of the English Bill of Rights).[9] Kansas has similarly enshrined the right to be free from cruel or unusual punishments since its founding. Section 9 employs the terms "cruel" and "unusual" coined by the English Bill of Rights and tracked

[8] Kansas is not an outlier in this regard; many states have interpreted their state constitutional prohibitions on cruel and/or unusual punishments more broadly than the corresponding federal right. *See, e.g.*, *State v. Gregory*, 427 P.3d 621, 633-34 (Wash. 2018) (holding capital punishment violated state constitution); *State v. Santiago*, 122 A.3d 1, 73 (Conn. 2015) (same); *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008) (holding method of execution unconstitutional under state constitution); *Dawson v. State*, 554 S.E.2d 137, 144 (Ga. 2001) (same); *Van Tran v. State*, 66 S.W.3d 790, 804-10 (Tenn. 2001) (holding that executions of persons with intellectual disabilities violate the broader state constitution); *Fleming v. Zant*, 386 S.E.2d 339, 343 (Ga. 1989) (same); *Singleton v. State*, 437 S.E.2d 53, 61 (S.C. 1993) (holding forcible medication for competency to execute unconstitutional under the state constitution); *State v. Perry*, 610 So. 2d 762, 765-66 (La. 1992) (same). This Court should do the same.

[9] The right to be free from penal cruelty is also universally recognized in the United States today. The Eighth Amendment has protected all citizens since 1791, 48 state constitutions contain explicit prohibitions on penal cruelty, and the two remaining states have interpreted their constitutions as supplying implicit protection against cruel and unusual punishments. *See* William W. Berry III, *Cruel State Punishments*, 98 N.C. L. Rev. 1201, 1252 (2020); *State v. Burlington Drug Co.*, 78 A. 882, 885 (Vt. 1911); *Santiago*, 122 A.3d at 14 .

through the Eighth Amendment, to describe intolerable "punishments." Kansans today enjoy a modern version of the three-hundred-year-old right to be free from penal cruelty.

Because the Section 9 right to be free from penal cruelty is explicitly enumerated and historically grounded, it should be deemed fundamental, and subject to strict scrutiny.

C. Section 2 (Equal Protection)

Mr. Fielder's equal protection claims under Section 2 of the Kansas Constitution and the Fourteenth Amendment of the U.S. Constitution are also subject to strict scrutiny because they implicate a suspect classification.[10] Regardless of whether Section 2 grants broader rights than the Fourteenth Amendment, Kansas courts review equal-protection challenges under a three-step framework: (1) determine whether a statute treats similarly situated individuals differently; (2) identify the basis of the classification of groups treated differently to determine the level of judicial scrutiny for analyzing the challenged statute; and (3) review the statute with the appropriate level of scrutiny. *State v. Anderson*, No. 124, 727, 2023 WL 176658, *3-4 (Kan. Ct. App. 2023) (mem. opop.) (citing *State v. LaPointe*, 434 P.3d 850, 862 (Kan. 2019)). Statutes that implicate race or gender must pass strict

[10] At minimum, the Supreme Court of Kansas has held that Section 2's equal protection guarantees are "coextensive" with those under the Fourteenth Amendment. *See Rivera v. Schwab*, 512 P.3d 168, 180 (2022), *cert. denied sub nom. Alonzo v. Schwab*, 143 S. Ct. 1055 (2023); *but see id.* at 199 (J. Rosen, concurring in part and dissenting in part) ("The text and the historical distinction between the origins of [S]ection 2 and the Fourteenth Amendment make it plain" that Section 2 is "is a rich and generous declaration that guarantees the people of Kansas protections that are broader than those found in the federal Equal Protection Clause.").

scrutiny and intermediate scrutiny, respectively. *See, e.g.*, *State v. Voyles*, 160 P.3d 794 807 (2007) (citing *McLaughlin v. Florida*, 379 U.S. 184 (1964) (race is a suspect class requiring strict scrutiny)); *id.* (citing *Reed v. Reed*, 404 U.S. 71 (1971)) (gender is a quasi-suspect class requiring intermediate scrutiny). Kansas' death penalty statute implicates unequal treatment based on both race and gender, so Mr. Fielder's equal protection claims under Section 2 and the Fourteenth Amendment must be subject to strict scrutiny.

D. Section 10 (Right to Public Trial by Impartial Jury)

Mr. Fielder's jury claims arise under Sections 5 and 10. Section 10 guarantees the right to a speedy public trial by an impartial jury and encompasses—at a minimum—Section 5's right to trial by jury. *See In re Clancy*, 210 P. 487, 488 (Kan. 1922) (holding Section 10 includes the Section 5 jury trial right); *cf. State v. Albano*, 487 P.3d 750, 757 (Kan. 2021) (recognizing that the rights under Section 10 and Section 5 may not be purely duplicative of one another). Because Section 10 incorporates, at minimum, the fundamental jury right found in Section 5, Mr. Fielder's claims arising under both sections are subject to strict scrutiny. *See Hilburn*, 442 P.3d at 513.

E. Federal Constitutional Claims (Eighth & Fourteenth Amendments)

Mr. Fielder bears the burden of proving his federal constitutional claims. *See, e.g., Duren v. Missouri*, 439 U.S. 357, 364-68 (1979) (defendant bears the burden of establishing a prima facie violation of the Sixth Amendment before the burden shifts to the state) (citing *Taylor v. Louisiana*, 419 U.S. 522, 531-38 (1975)); *Graham v.*

Florida, 560 U.S. 48, 61 (2010) (courts analyze society's standards and the Eighth Amendment's text, history, meaning, and purpose to adopt a categorical rule that a punishment was unconstitutionally excessive).

ARGUMENT

The death penalty in Kansas is a cruel, unusual, and discriminatory lottery, where the only predictability is supplied by impermissible factors such as race, gender, and geography. With no executions—and exceptionally rare sentencing—the modern Kansas death penalty serves no legitimate penological purpose. The arbitrary application of the death penalty cannot be squared with the constitutional prohibition of death penalty schemes that "create a substantial risk that the punishment will be inflicted in arbitrary and capricious manner." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (citing *Furman*, 408 U.S. 238).

Three decades of experience with the modern Kansas death penalty have shown that the protections built into the State's death penalty scheme have failed to achieve the goals of reliable, rational, consistent, fair, non-arbitrary, and non-discriminatory application of the death penalty. New data and evidence that Mr. Fielder will present at the upcoming evidentiary hearing demonstrate that this State's most severe punishment—on the highly unusual occasions when it is inflicted—is arbitrary, racially discriminatory, unreliable, and unnecessary. It is therefore also unconstitutional.

I. The Kansas Death Penalty Is Cruel And/Or Unusual Within the Meaning of Section 9 of the Kansas Constitution Bill of Rights and the Eighth Amendment to the U.S. Constitution.

A. Kansas's Death Penalty is Unusual.

Kansas' death penalty is indisputably unusual. A punishment is "unusual" if it is "infrequently imposed" or "extraordinarily rare." *Furman*, 408 U.S. at 309 (Stewart, J., concurring) ("[I]t is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare."). *See also Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019) (defining "unusual" as "long disused"); *Trop v. Dulles*, 356 U.S. 86, 100 n.32 (1958) (plurality op.) (defining "unusual" as "different from that which is generally done"). It is hard to imagine a more unusual phenomenon in Kansas than an execution. Kansas has not executed anyone in more than a half-century. *See, e.g.*, Rep. of Jeffrey Fagan at 14 (Exhibit F). The odds of any Kansan convicted of murder being sentenced to death are "less than one tenth of one percent." *Id.* Executions in Kansas are "infrequent[][,]" *Furman*, 408 U.S. at 309 (Stewart, J., concurring), "extraordinarily rare[,]" *id.*, and "different from that which is generally done[,]" *Trop*, 356 U.S. at 100 n.32. By any definition, therefore, the death penalty in Kansas is highly unusual.

In addition to being unusual, Kansas' near total abandonment of capital punishment reflects a statewide consensus against the death penalty. The U.S. Supreme Court has directed that, when deciding whether a practice is compatible with evolving standards of decency, "review under those evolving standards should be informed by objective factors to the maximum possible extent[.]" *Atkins v. Virginia*,

536 U.S. 304, 312 (2002) (internal quotation omitted). Legislative authorization of a punishment is one objective indicia of society's standards, but "[t]here are measures of consensus other than legislation." *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008); *see, e.g.*, *Graham*, 560 U.S. at 62 (finding a societal consensus against juvenile life-without-parole sentences for non-homicide offenses even though the vast majority of jurisdictions formally authorized them). Courts looking for objective indicia of society's evolving standards emphasize actual sentencing to determine whether a practice "has become truly unusual." *Atkins*, 536 U.S. at 316; *see also Roper v. Simmons*, 543 U.S. 551, 563 (2005). In *Coker v. Georgia*, for example, the Court invalidated Georgia's death penalty for rape by observing that, in that state, "at least 9 out of 10" convicted rapists had not been sentenced to death. 433 U.S. 584, 597 (1977).

As it stands today, the death penalty has been imposed in less than 1% of all homicides in Kansas. Rep of Frank R. Baumgartner at 6-7 (Exhibit H). If nine out of 10 rapists avoiding the death penalty indicated that society no longer accepted that punishment for rape, *see Coker*, 433 U.S. at 597, then ninety-nine out of one hundred death-eligible murderers avoiding the death penalty in Kansas must similarly indicate that execution is no longer an acceptable punishment for murder in the State. There are no statistics on the rate of executions per murder under Kansas' reinstated death penalty, as Kansas has not carried out a single execution. Short of repeal, there could not be a more definitive societal repudiation of a criminal punishment.

Courts also look for "broader social and professional consensus" by consulting "organizations with germane expertise[.]" *Atkins*, 536 U.S. at 316 n.21. The professional organization most relevant to Kansas' death penalty is the American Law Institute, which wrote the Model Penal Code's capital punishment provision upon which Kansas' capital punishment statute was based. *See, e.g.*, Rep. of Carol Steiker ¶ 41 (Exhibit L). Here too, we find a repudiation of the death penalty; the organization has since repealed that provision due to "intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment." *Id.* ¶ 13 (internal quotation omitted).

The United States Supreme Court has "established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." *Roper*, 543 U.S. at 561 (quoting *Trop*, 356 U.S. at 100-01). Any honest look at the evolving standards of decency in Kansas will find that the death penalty is no longer acceptable. It is therefore cruel and/or unusual under Section 9 and the Eighth Amendment.

B. Kansas's Death Penalty is Arbitrary and Racially Discriminatory.

Kansas' death penalty is also arbitrary, across every relevant metric. "The arbitrary imposition of punishment is the antithesis of the rule of law." *Glossip v. Gross*, 576 U.S. 863, 915 (2015) (Breyer and Ginsburg, JJ., dissenting). For that reason, Justice Potter Stewart (who supplied critical votes for the holdings in *Furman* and *Gregg* found the death penalty unconstitutional as administered in 1972:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [death-eligible crimes], many just as reprehensible as these, the[se] petitioners are among a capriciously selected random handful upon which the sentence of death has in fact been imposed.

Furman, 408 U.S. at 309-10 (Stewart, J., concurring).

When the U.S. Supreme Court reinstated the death penalty in 1976, it acknowledged that the death penalty is (and would be) unconstitutional if "inflicted in an arbitrary and capricious manner." *Gregg*, 428 U.S. at 188. The Court has consequently sought to make the application of the death penalty less arbitrary by restricting its use to those whom Justice Souter called "'the worst of the worst.'" *Kansas v. Marsh II*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) (internal quotation omitted); *see also Roper*, 543 U.S. at 568 ("Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution") (internal quotation omitted).

However, despite the Court's "hope for fair administration of the death penalty," nearly 50 years "of further experience make it increasingly clear that the death penalty is imposed arbitrarily, i.e., without the 'reasonable consistency' legally necessary to reconcile its use with the Constitution's commands." *Glossip*, 576 U.S. at 917 (Breyer & Ginsburg, JJ., dissenting) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982)).

> Thorough studies of death penalty sentences support this conclusion . . . Such studies indicate that the factors that most clearly ought to affect application of the death penalty—namely, comparative egregiousness of the crime—often do not. Other studies show that circumstances that

> ought *not* to affect application of the death penalty, such as race, gender, or geography, often do.

Id. at 918 (emphasis in original).

> Thus, whether one looks at research indicating that irrelevant or improper factors—such as race, gender, local geography, and resources—*do* significantly determine who receives the death penalty, or whether one looks at research indicating that proper factors—such as "egregiousness"—do *not* determine who receives the death penalty, the legal conclusion must be the same: The research strongly suggests that the death penalty is imposed arbitrarily.

Id. at 920 (emphases in original). In short, "the constitutionality of capital punishment rests on its limited application to the worst of the worst . . . [a]nd this extensive body of evidence suggests that it is not so limited." *Id.* at 921. *See also Santiago*, 122 A.3d at 66 ("[Another] reason that our state's capital punishment system fails to achieve its retributive goals is that the selection of which offenders live and which offenders die appears to be inescapably tainted by caprice and bias . . . . To the extent that the ultimate punishment is imposed on an offender on the basis of impermissible considerations such as his, or his victim's, race, ethnicity, or socio-economic status, rather than the severity of his crime, his execution does not restore but, rather, tarnishes the moral order.").

As demonstrated below, each of the factors identified in *Glossip* as determinative of the issue of arbitrariness has relevance to the constitutionality of Kansas's death penalty scheme as administered. The "modern" Kansas death penalty has been in effect for 30 years—since 1994. There currently are nine people under an

active sentence of death in Kansas,[11] some of whom were convicted decades ago.[12] Over the last several decades, Kansas' death penalty has revealed itself to be arbitrary, capricious, irrational, discriminatory in impact and, in the final analysis, fundamentally incapable of answering in a rational and predictable way the profound question of who should live and who should die. This Court should strike it down.

1. Race Discrimination Infects Kansas's Death Penalty.

Racial bias in the imposition of the death penalty is patently unconstitutional and "poisons public confidence in the judicial process." *Buck v. Davis*, 580 U.S. 100, 124 (2017) (internal quotation omitted); *see also id.* at 119 (explaining that "race [is] among [the] factors that are 'constitutionally impermissible or totally irrelevant to the sentencing process'") (quoting *Zant v. Stephens*, 462 U.S. 862, 885 (1983)); *Gregory*, 427 P.3d at 633 (holding the death penalty as-applied in Washington violated the cruel punishment clause of the state constitution because it was "administered in an arbitrary and racially biased manner"). Race unfortunately continues to have an enormous impact on capital charging, sentencing, and execution rates, in Kansas and elsewhere across the country. Robust academic research has shown that there is significant bias in favor of seeking the death penalty for the murder of White, as opposed to Black, victims in many jurisdictions, even those outside of the South and without strong histories of racialized vigilante violence. Black jurors, too, are underrepresented on capital juries.

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[11] *See, e.g.*, DPIC, *Kansas*, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/kansas (last visited Oct. 15, 2024).

[12] *See, e.g.*, Kan. Coal. Against the Death Penalty, *Death Row*, https://ksabolition.org/facts/death-row (last visited Oct. 15, 2024).

A comprehensive report on race and the death penalty in the United States released in 2020 collected voluminous data on the continuing influence of race on the administration of capital punishment. [13] The study reported evidence of bias based on the race of both victims and defendants, with the murders of white victims being more likely to be investigated and capitally charged, *id.* at 37, 61, and defendants of color being more likely to be sentenced to death, *id.* at 48, 64. The study also reported evidence of systemic exclusion of jurors of color from service in death penalty cases. *id.* at 33, 39 n.159, 66. Among the evidence referenced by the report was a 2015 meta-analysis of 30 studies showing that people accused of killing white victims were more likely than people accused of killing Black victims to face a capital prosecution, *id.* at 30; data showing that since executions resumed in 1977, 295 Black defendants have been executed for interracial murders of white victims, while only 21 white defendants have executed for interracial murders of Black victims, *id.* at 29; and data showing that the wrongful convictions of Black exonerees were 22% more likely to be linked to police misconduct. *Id.* at 48.

Other studies about race and the death penalty continue to show that race plays a role in capital charging, sentencing, and executions. For example, researchers recently updated the famous Baldus study from Georgia that formed the basis for the narrowly unsuccessful constitutional challenge considered by the United States

[13] *See* Ngozi Ndulue & DPIC, *Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty*, (Sept. 2020), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/enduring-injustice-the-persistence-of-racial-discrimination-in-the-u-s-death-penalty.

Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987).[14] The researchers added information about who among those sentenced to death in Georgia were actually executed, concluding that the disparities that Baldus had found in the sentencing phase were considerably exacerbated at the execution stage. *See* Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 Harv. C.R.-C.L. L. Rev. 585, 599 (2020) ("[W]e have documented how sentencing and execution contribute independently, and jointly, to racial disparities in capital punishment."). Other researchers have studied the effects of race on the capital punishment systems of North Carolina (2011),[15] Delaware (2012),[16] Colorado (2015),[17] Washington (2016),[18] Oklahoma (2017),[19] Texas

[14] The original Baldus study analyzed more than 2,000 murder cases in the state of Georgia in the 1970s. The study found that defendants accused of killing white victims were 4.3 times more likely to receive the death penalty than defendants accused of killing Black victims. *Id.* at 286-87. It also showed that Black defendants were more likely than white defendants to receive the death penalty. *Id.* at 287.

[15] *See* Glenn L. Pierce and Michael L. Radelet, *Race and Death Sentencing in North Carolina*, *1980-2007*, 89 N.C. L. REV. 2119 (2011).

[16] *See* Sheri Lynn Johnson et al., *The Delaware Death Penalty: An Empirical Study*, 97 Iowa L. Rev. 1925 (2012).

[17] *See* Meg Beardsley et al., *Disquieting Discretion: Race, Geography, & the Colorado Death Penalty in the First Decade of the Twenty-First Century*, 92 Denv. U. L. Rev. 431 (2015).

[18] *See* Katherine Beckett & Heather Evans, *Race, Death, and Justice: Capital Sentencing in Washington State, 1981-2014*, 6 Colum. J. Race & L. 77 (2016), https://journals.library.columbia.edu/index.php/cjrl/article/view/2314/1209.

[19] Glenn L. Pierce et al., *Race and Death Sentencing for Oklahoma Homicides Committed Between 1990 and 2012*, 107 J. Crim. L. & Criminology 733 (2017), https://scholarlycommons.law.northwestern.edu/jclc/vol107/iss4/5.

(2020),[20] and California (2024).[21] Each of these studies found strong race effects, consistent with virtually all earlier studies in these states and elsewhere.[22]

Two of the most influential state studies of race and the death penalty played key roles in the abolition of the death penalty in those states. Connecticut legislatively repealed its death penalty in 2012. At the legislative hearings, Professor John Donohue presented his research regarding racial disparities in the administration of the death penalty in Connecticut. During their debates, a number of the bill's supporters "expressed that Donohue's research was an important factor in their decision to vote to abolish the death penalty." *Santiago*, 318 A.3d at 94-95 (Norcott & McDonald, JJ., concurring) (citing the remarks of Senator Donald E. Williams, Senator Edwin A. Gomes, Representative Bruce V. Morris, and Representative Charlie L. Stallworth). The legislative repeal was prospective only, and three years later, the Connecticut Supreme Court found that the death penalty violated the Connecticut constitution and applied that ruling retroactively to clear the state's death row. *See generally id*. In doing so, the court relied on studies demonstrating racial bias to bolster broader arguments regarding "caprice and bias"

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[20] *See* Scott Phillips & Trent Steidley, *A Systemic Lottery: The Texas Death Penalty, 1976 to 2016*, 51 Colum. Hum. Rts. L. Rev. 1043 (2020), https://hrlr.law.columbia.edu/files/2020/05/6-Phillips_Final.pdf.

[21] *See* Catherine M. Grosso et al., *The Influence of the Race of Defendant and the Race of Victim on Capital Charging and Sentencing in California*, 21 J. Empirical Legal Stud. 482 (2024) (found an entrenched pattern of racial disparities in charging and sentencing that privileges white victim cases, as well as patterns of racial disparities in who is charged and sentenced to death in California courts).

[22] *See generally* Teliyah A. Cobb et al., *Race, Sex, and Age Disparities in Death Penalty Sentencing: A Systematic Review*, 22 J. Ethnicity in Crim. Just. 45 (2024) (reviewed 12 recent studies and found that the majority of these studies demonstrate disadvantaged death penalty sentencing outcomes for both minority defendants and minority victims); Gov't Accountability Off., *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, No. GGD-90-57 (1990), https://www.gao.gov/assets/ggd-90-57.pdf (federal review of 28 death penalty studies found robust evidence that race of the victim influenced capital charging and sentencing).

(i.e., arbitrariness) and the possibility of error. *Id.* at 66-67. The Court emphasized that the use of empirical studies when determining legal questions is appropriate, stating that "appellate courts tasked with determining the content of law and policy may take notice of constitutional and legislative facts, such as historical sources and scientific and sociological studies." *Id.* at 78.

Three years later, in 2018, the Washington Supreme Court also held that its state's death penalty violated its state constitution. *State v. Gregory*, 427 P.3d 621 (Wash. 2018). The Court relied on research by Professor Katherine Beckett from the University of Washington that demonstrated that capital cases "involving Black defendants were between 3.5 and 4.6 times as likely to result in a death sentence as proceedings involving non-Black defendants[.]" *Id.* at 633 (internal quotation omitted). The Court explained that "[t]he most important consideration is whether the evidence shows that race has a meaningful impact on imposition of the death penalty"— and concluded that it did. *Id.* at 634, 642. Unlike the Connecticut Supreme Court, which relied on a broader range of concerns about the administration of the death penalty, the Washington Supreme Court rested its constitutional decision squarely on the evidence of racial discrimination.

Unfortunately, Kansas has not escaped the plight of racial bias in the administration of the death penalty. Instead, research shows that bias infects every stage of the capital process in Kansas, and Black capital defendants in particular experience discrimination from the moment police begin investigating until the moment the jury sentences them to die, and at every step in between. As discussed

in more detail below, Black homicide defendants in cases with white or female[23] victims are more likely than their white counterparts to be charged capitally and then subjected to a death notice. *See generally* Rep. of Frank Baumgartner (Exhibit H). Thereafter, they are likely to watch the state exclude almost every Black prospective juror through death qualification, *see* 2023 Rep. of Mona Lynch ¶ 8 (Exhibit A), and peremptory strikes, *see* Rep. of Elisabeth Semel at 4-5 (Exhibit D). They are then more likely to be judged based on racial stereotypes, *see* 2023 Rep. of Mona Lynch ¶¶ 7, 9 (Exhibit A) and ultimately convicted and sentenced to die, *see* Rep. of Wanda Foglia at 21-23 (Exhibit B). In short, it is impossible to disentangle race from the administration of Kansas's death penalty.

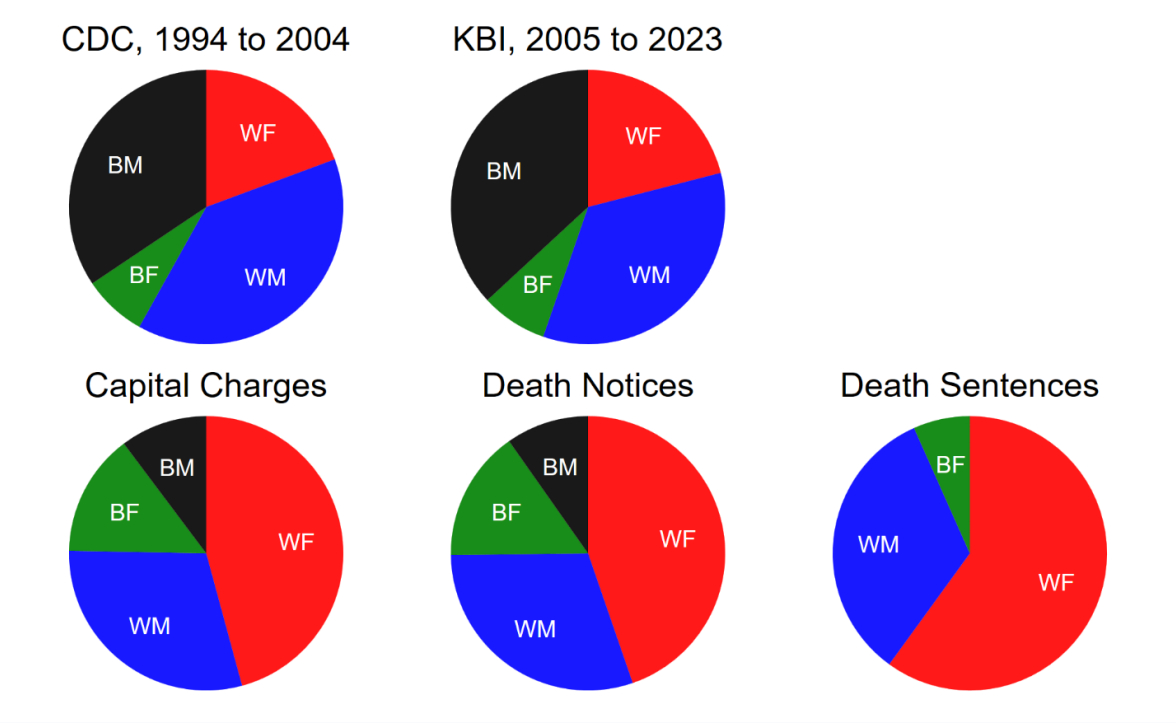
a) Charging decisions (and policing)

Start with charging decisions. Cases in which one or more victims are white are more likely to be capitally charged and more likely to be death-noticed than all other cases.Dr. Frank Baumgartner analyzed statewide capital prosecutions since Kansas reinstated the death penalty in 1994 and foundthat while the vast majority of homicide victims in this State are men, most death penalty cases involve white victims. Rep. of Frank Baumgartner at 1 (Exhibit H). *Id.* at 3, 9-10, 15-16. Defendants who murder Black men are almost certain to avoid the death penalty, *id.* at 19.

[23] It is well-settled that gender-based discrimination, like racial discrimination, is illegitimate. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 532-33 (1996); *see also State v. Robinson*, 363 P.3d 875, 1093 (Kan. 2015) (Johnson, J., dissenting) (observing that the death penalty would violate the Eighth Amendment if its imposition was based on factors "such as . . . gender") (internal quotation omitted). Moreover, given the death penalty's deep historical connection between Black defendants and "white female victims," *see* Rep. of Shawn Leigh Alexander at 2 (Exhibit E), data about race and gender in capital sentencing are inextricably linked, *see, e.g.*, Rep. of Frank R. Baumgartner at 20 (Exhibit H).

Though Black men account for roughly a third of all Kansas homicide victims, this State has never imposed the death penalty for the murder of a Black man. *See id.* at 30. Dr. Baumgartner summarized the stark role of race and gender in the capital process cases with the following figure:

Homicides and Capital Cases Compared: Victim Race and Gender.



Id. at 22 (Figure 3) (death charging and sentencing as compared to homicide data from the Center for Disease Control ("CDC") and Kansas Bureau of Investigation ("KBI"). WF = White Female; WM = White Male; BF = Black Female; BM = Black Male). As explained by Dr. Shawn Leigh Alexander in his report, this type of racial discrimination "follows a direct historical line of disproportionate police violence and lynchings against Black men." Rep. of Shawn Leigh Alexander at 2 (Exhibit E). *See also* Rep. of Brett Campney at 10-24 (Exhibit K) (discussing history of racialized violence in Kansas and Wyandotte County specifically). Moreover, evidence of racial

bias infecting law enforcement, *see generally* Rep. of Brett Campney (Exhibit K); Rep. of Tricia Rojo Bushnell (Exhibit I), reveals that the racially skewed process does not begin or end with discretionary decisions by prosecutors to seek death, but starts at the investigation and arrest stages of a case, and endures through the prosecution. Reporting by the Wichita Eagle in March 2022 uncovered astonishingly racist text messages exchanged between WPD officers. Rep. of Jeffrey Fagan (Exhibit J) at 28. These messages used racial slurs to describe Black citizens and "praised the 'hunting' and killing of Black people by police officers." *Id.* (quoting the Wichita Eagle). Racial bias in policing—undeniably present amongst at least some members of the Wyandotte Police Department—injects discrimination into the inception of the capital process by producing a racially skewed supply of capital-eligible defendants. *Id.* at 27. Until recently, Wyandotte County prosecutors used to pass a noose around the office when a prosecutor's case went to a hung jury—a practice District Attorney Mark Dupree publicly criticized and put an end to.[24]

b) Jury selection

As discussed in detail in the concurrently filed motion regarding death qualification, incorporated by reference herein, Wyandotte County jury panels tend to lack the racial and ethnic diversity of the County, thus further biasing outcomes according to race.

[24] Peggy Lowe, *Wyandotte County DA Says Task Force Snub Wasn't Racist, But He's Still Fighting 'Good Old Boy Traditions'*, KCUR (June 23, 2020), https://www.kcur.org/news/2020-06-23/wyandotte-county-da-says-task-force-snub-wasnt-racist-but-hes-still-fighting-good-old-boy-traditions.

2. Kansas' Death Penalty is Geographically Arbitrary.

Once race and gender are removed from the analysis, Kansas' death penalty utterly fails to provide any "meaningful basis for distinguishing the few cases in which the penalty is imposed from the many cases in which it is not." *Godfrey*, 446 U.S. at 427 (internal quotation and alteration omitted). "[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Id.* at 428. Kansas has not lived up to that responsibility, instead subjecting only a "capriciously selected random handful" of its murder defendants to capital procedures. *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring).

The frequency with which Kansas imposes the death penalty has no relationship to the murder rate. Evidence demonstrates that murders and death sentences fluctuate completely independently of one another in this State. *See* Rep. of Frank R. Baumgartner at 24 (Exhibit H) ("The complete lack of connection between homicides and death sentences suggests *no causal relation* between the two.") (emphasis added). Rather, the death penalty in Kansas is disparately doled out based on the inherently arbitrary fact of where the crime occurred. *See Perry*, 610 So.2d at 764 ("When an individual is singled out because of an accident of geography for unusually severe treatment, it seems particularly cruel."); *Glossip*, 576 U.S. at 918 (Breyer & Ginsburg, JJ., dissenting) (observing that geography "ought *not* to affect the application of the death penalty") (emphasis in original). In Kansas, geography plays a leading role in determining who will face the State's most severe punishment. A defendant's odds of being capitally charged, subjected to a death notice, or

sentenced to die all depend heavily on which of Kansas' counties is prosecuting him. *See* Rep. of Frank R. Baumgartner at 24-28 (Exhibit H). There is "very wide variability in the use of the death penalty across the geographic units of the [S]tate[.]" *Id.* at 27.

Such disparities render the death penalty cruel and unusual "in the same way that being struck by lightning is cruel and unusual"—because it is random. *See Furman*, 408 U.S. at 309 (Stewart, J., concurring). "These substantively large variations in rates of death penalty use, even controlling for the number of homicides, suggest a system that is substantially driven by random chance." Rep. of Frank Baumgartner at 30 (Exhibit H). "[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

3. Juror Confusion Compounds the Arbitrariness Problem.

Nearly 50 years of experience have also made clear that efforts to guide juror discretion have been ineffective in ensuring that the death penalty is meted out in a rational rather than arbitrary manner. A large body of empirical research by the Capital Jury Project ("CJP"), which conducted interviews with over a thousand capital jurors across 14 states, demonstrates that jurors often profoundly misunderstand the fundamentals of capital sentencing, in that they may mistakenly believe that a death sentence is required, fail to understand the meaning of "aggravation" and "mitigation," fail to consider mitigating evidence as mitigating (or

even consider it as aggravating), and decide the sentencing issue before the penalty phase even begins, among other misapprehensions of their role.[25] The hope that statutory reform would produce reasoned moral decisions by capital sentencing juries, rather than impulsive, arbitrary, or discriminatory ones, has not been realized in large part because jurors either misunderstand or ignore what they are instructed to do pursuant to modern capital statutes.

Although the data from the CJP remains the best and most comprehensive window into the comprehension of actual capital sentencing jurors, more recent studies have confirmed the CJP's findings. One such recent study used a real murder trial transcript to evaluate whether simplified jury instructions would improve jurors' understanding of key concepts. The study found that mock jurors do not understand aggravating and mitigating factors or the behaviors and circumstances that contribute to each, and that simplified instructions resulted in somewhat better but "still poor" understanding.[26] Other recent studies, too, have shown continued misunderstanding of key concepts by capital sentencing jurors, misconceptions that do not substantially improve with either simplified instructions or jury deliberation.[27] *See, e.g.*, Rep. of Wanda Foglia at 16-18 (Exhibit B).

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[25] William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L. J. 1043 (1996), https://www.repository.law.indiana.edu/ilj/vol70/iss4/2.

[26] Shana L. Maier et al., *Mock Jurors' Comprehension of Aggravating and Mitigating Factors: The Impact of Timing and Type of Sentencing Phase Instructions*, 16 Applied Psych. in Crim. Just. 65, 65 (2021).

[27] *See, e.g.,* Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 L. & Hum. Behav. 481, 481 (2009) (finding that jury deliberation "failed to improve characteristically poor instructional comprehension"); Amy E. Smith & Craig Haney, *Getting to the Point: Attempting to Improve Juror Comprehension of Capital Penalty Phase Instructions*, 35 L. & Hum. Behav. 339, 339 (2011) (finding that "significant comprehension

These issues have been well-documented in Kansas. Kansas journalists covering capital cases have written repeatedly about the difficulty that courts face in explaining the complex and sometimes counter-intuitive capital system to lay jurors. For example, in the capital prosecution of Cornelius Oliver, potential confusion arose even before the sentencing phase. At the guilt phase, the jury had to evaluate Oliver's responsibility for capital murder in a case involving multiple murder victims, and multiple possible killers, when the statute elevated premeditated murder to capital murder if it involved the "killing of more than one person as a part of the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct."[28] The jury had to "sort through a list of crimes that sound similar yet carry different weight in the legal system," explained the Wichita Eagle. "The state's theory is that [one victim] died first. So when [three others] died, the crime became capital." However, "if jurors choose instead to find Oliver guilty on four counts of [simple] premeditated murder, there is no penalty phase." And, "[i]f that's not complicated enough," continued the Eagle, "Oliver wasn't the only one in the Erie house who could have committed murder."[29] Coverage of the later capital prosecution of John Robinson emphasized the confusion that could arise in determining a capital defendant's responsibility for a murder "pursuant to a

problems" remained even after the implementation of simplified jury instructions); Marc. W. Patry & Steven D. Penrod, *Death Penalty Decisions: Instruction Comprehension, Attitudes, and Decision Mediators*, 13 J. Forensic Psych. Prac. 204, 204 (2013) (reporting findings consistent with previous research showing "low comprehension of capital penalty instructions").

[28] Kan. Stat. Ann. § 21-5401(6).

[29] Rep. of Carol Steiker ¶ 43 (Exhibit L) (quoting Ron Sylvester, *Oliver Jury Faces Array of Decisions*, Wichita Eagle, 1A (Dec. 29, 2001)).

contract or agreement to kill"[30] when the defendant hired someone else to do the killing and was guilty of capital murder only as an accomplice. "Prosecutors say aiding and abetting—which makes someone who helps plan a murder as guilty as the person who does the killing— can be difficult for jurors to comprehend, especially in cases where the death penalty is at stake."[31]

C. Kansas Suffers from Inadequate Resources for Capital Defense Counsel and Soaring Costs of Maintaining a Death Penalty Scheme.

Capital murder prosecutions cost substantially more than non-capital murder prosecutions, even when the cost of lifetime incarceration is included in the latter. As is the case with indigent defense funding generally, states and localities are reluctant or unable to cover the costs of capital litigation so as to ensure fairness and due process in the capital justice process. 2013 was the 50th anniversary of the Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1983), and it produced a tremendous outpouring of conferences, symposia, and speeches on the ongoing crisis in the provision of indigent defense services.[32] The state of indigent defense in capital cases is no better and often worse, given the greater complexity of capital cases, which demand greater expertise by counsel and greater resources at every stage. Recent

[30] Kan. Stat. Ann. § 21-5401(2).
[31] Rep. of Carol Steiker ¶ 43 (Exhibit L) (quoting Ron Sylvester, *Prosecutors Explain Aiding, Abetting to Jury*, Wichita Eagle, 3A (Sept. 28, 2008)).
[32] For just a few examples, *see, e.g.*, *The Invention of Courts*, 143 Daedalus 3 (2014) (special issue marking the anniversary of *Gideon v. Wainwright*); Symposium, *Gideon at 50: How Far We've Come, How Far to Go* (Sept. 20, 2013); *Answering Gideon's Call Outside the Courtroom: Integrated Policy Reform Strategies to Protect the Sixth Amendment Right to Counsel* (Mar. 18, 2013); Symposium, *The Gideon Effect: Rights, Justice, and Lawyers Fifty Years After* Gideon v. Wainwright, 122 Yale L. J. (Symp. Issue) 8 (2013).

studies continue to confirm that death penalty cases are vastly more expensive than non-capital ones. Upon reviewing fifteen state studies across the country between 2000 and 2016, researchers concluded that, on average, capital prosecutions impose $700,000 more in costs than non-capital prosecutions.[33] They added: "It is a simple fact that seeking the death penalty is more expensive. *There is not one credible study, to our knowledge, that presents evidence to the contrary*."[34]

As is the case in virtually every jurisdiction, the provision of indigent defense services faces substantial resource challenges in Kansas. A 2020 Report by the Board of Indigents' Defense Services ("BIDS") described "dangerously high caseloads, . . . long suppressed compensation, and a historic lack of resources"[35]—challenges that have been greatly exacerbated by the state budget crisis precipitated by the COVID - 19 pandemic. The need for resources is even greater in capital cases, as research has shown that in Kansas, as elsewhere, capital cases are substantially more expensive than non-capital prosecution of the same or similar matters. A 2014 report by the Judicial Council Death Penalty Advisory Committee found that both BIDS and the district courts "incur costs in trial cases that are 3 to 4 times higher in

[33] Peter A. Collins et al., *Proportionality, Cost, and Accuracy of Capital Punishment in Oklahoma*, in Report of the Oklahoma Death Penalty Comm'n, app. IB, at 228 (2017).
[34] *Id.* at 227 (emphasis in original); *see also Testimony Submitted to the Kentucky Senate: Hearings on the Costs of the Death Penalty Before the Standing Committee on Judiciary*, (statement of Richard Dieter, Exec. Dir., DPIC), 4–5 (2012), https://dpic-cdn.org/production/legacy/KYTestimony2012.pdf ("[A]ll of the studies conclude that the death penalty system is far more expensive than an alternative system in which the maximum sentence is life in prison") (emphasis omitted).
[35] BIDS, *A Report on the Status of Public Defense in Kansas*, 5 (Sept. 2020), https://www.kslegislature.gov/li_2022/b2021_22/committees/ctte_h_jud_1/documents/testimony/20210201_08.pdf .

cases where the death penalty is sought than in cases where it is not."[36] The Kansas report concluded that its findings were consistent with the findings from other jurisdictions that the costs of death cases are "significantly higher" than non-death cases.[37] Professors Philip Cook and Frank Baumgartner completed a study showing that, since the 2014 Judicial Council report, the cost of capital cases in Kansas remains dramatically higher than the cost on non-capital cases. *See generally* Rep. of Philip J. Cook and Frank R. Baumgartner on Cost (Exhibit N). Based on data from 2014-2018, Professors Cook and Baumgartner estimate that the death penalty costs Kansas taxpayers more than two million dollars every year. *Id.* at 33-36.[38]

At the same time, the cost of capital punishment has continued to rise even further because of the vastly increased cost of carrying out executions. As drug manufacturers increasingly have refused to permit the use of their drugs in executions, corrections departments have turned instead to compounding pharmacies to buy drugs for use in lethal injection.[39] The costs of these drugs have skyrocketed

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[36] Kan. Jud. Council, *Report of the Judicial Council Death Penalty Advisory Committee*, 15 (Feb. 13, 2014), https://kansasjudicialcouncil.org/Documents/Studies%20and%20Reports/2015%20Reports/death%20penalty%20cost%20report%20final.pdf.

[37] *Id.*

[38] Dr. Cook and Dr. Baumgartner noted that this figure is almost certainly an underestimate, as it excludes several categories of costs (such as the cost of holding death-sentenced inmates in administrative segregation) that could not be quantified with certainty. *See id.* at 36.

[39] *See, e.g.*, *Execution Costs Spike in Virginia; State Pays Pharmacy $66k*, CBS NEWS (Dec. 12, 2016), https://www.cbsnews.com/news/execution-costs-spike-in-virginia-state-pays-pharmacy-66k/; Sheila Burke, *Tennessee Supreme Court Upholds Lethal Injection Method*, APNews.com (Mar. 29, 2017), https://apnews.com/article/20c6abc124f2421eb3a56bcb651340b3; *Arizona Finds Pharmacist to Prepare Lethal Injections*, APNews.com (Oct. 27, 2020), https://apnews.com/article/arizona-doug-ducey-phoenixdf8203ee5c11d43ca84ce79c77616fdd.

over the past decade.[40] For example, in 2014, it cost Virginia $250 to receive drugs directly from pharmaceutical manufacturers.[41] In 2016, the state spent $66,000 to obtain the drugs necessary for the next two executions—assuming "legal appeals [didn't] continue beyond the drugs' early-2017 expiration dates."[42] Tennessee paid $190,000 to acquire midazolam, vecuronium bromide, and potassium chloride between 2017 and 2020—a period during which only two executions took place. Missouri spent over $160,000 on lethal injections between 2015 and 2020, a time period in which it executed ten inmates.[43] In 2020, Arizona paid $1.5 million for one thousand one-gram vials of pentobarbital sodium salt, to be shipped in "unmarked jars and boxes."[44] All of these states acquired their drugs through compounding pharmacies. Because of the difficulty of obtaining drugs for lethal injections, some states are now turning to alternative methods of execution, which generates the additional costs of litigation challenges.[45]

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[40] This is because lethal injection drugs are exponentially more difficult to acquire than they were a decade ago, in large part due to the 2011 export ban by the European Union, which severed U.S. prisons from the last large-scale manufacturers of sodium thiopental. *See, e.g.*, Matt Ford, *Can Europe End the Death Penalty in America?*, The Atlantic (Feb. 18, 2014), https://www.theatlantic.com/international/archive/2014/02/can-europe-end-the-death-penalty-in-america/283790/.

[41] *Virginia's Lethal Injection Costs Set to Skyrocket to $16.5K*, APNews.com (Sept. 30, 2016), https://apnews.com/general-news-3e88b2ad066847148849e51522a98533.

[42] *Execution Costs Spike in Virginia; State Pays Pharmacy $66k*, CBS NEWS (Dec. 12, 2016), https://www.cbsnews.com/news/execution-costs-spike-in-virginia-state-pays-pharmacy-66k/.

[43] Ed Pilkington, *Revealed: Republican-led States Secretly Spending Huge Sums on Execution Drugs*, The Guardian (Apr. 9, 2021), https://www.theguardian.com/world/2021/apr/09/revealed-republican-led-states-secretly-spending-huge-sums-on-execution-drugs.

[44] *Id.*

[45] *See, e.g.*, Alyssa Spady, *Lawsuit Challenges Alabama's Plan to Execute a Death Row Inmate with Nitrogen Gas*, CBS NEWS (Dec. 20, 2023), https://www.cbsnews.com/news/alabama-execution-nitrogen-gas-lawsuit; Michelle Liu, *Lawsuit Over South Carolina Execution Methods Allowed to Move Forward*, PBS (Apr. 14, 2022), https://www.pbs.org/newshour/nation/lawsuit-over-south-carolina-execution-methods-allowed-to-move-forward.

D. Kansas' Death Penalty Scheme is Impermissibly Politicized.

That capital punishment is a hotly contested political issue also contributes to its arbitrariness in application. *See generally* Rep. of Carol Steiker ¶¶ 27-28 (Exhibit L). A new study published earlier this year confirms that "courts' behavior changed in response to election cycles" in death penalty cases.[46] Specifically, "courts affirmed about *twice the number* of death sentences in election years compared to non-election years[.]"[47]

The practice of capital punishment is politicized in Kansas (and elsewhere) in two distinct but overlapping ways. First, it is politicized institutionally, in that some or all of the most important actors in the administration of capital punishment are elected, with the exception of lay jurors.[48] Although Kansas Supreme Court justices are nominated by a nonpartisan commission and formally appointed by the governor, they face retention elections after the first year and every six years thereafter.[49] In 2016, interest groups "spent more than $2.5 million on ads, mailers, and campaigns as five of the seven justices faced retention." These included an advertising campaign specifically urging voters to oust four justices who had voted to reverse death sentences.[50] As one judicial watchdog group commented on the 2016 Kansas race: "It's essentially created an arms race, where you have a lot of money going in and

[46] DPIC, *Lethal Injection: How the U.S. Electoral Process Increases the Arbitrariness of the Death Penalty*, 14, https://dpic-cdn.org/production/documents/Lethal-Election-Report_Spreads.pdf?dm=1719886362 (last visited Oct. 15, 2024).
[47] *Id.* (emphasis in original).
[48] *See generally id.*
[49] *Id.* at 13.
[50] *Id.*

interest groups basically trying to shape who's sitting on the courts and the decision that the courts are making."[51]

Capital punishment also is politicized symbolically, in that it looms much larger than it should in public discourse, because of its power as a focus for fears of violent crime and as political shorthand for support for "law and order" policies generally.

A 2014 study on judicial elections and the death penalty nationwide noted the continued salience of crime, even in times of declining murder rates. It found that:

> 64% of advertisements [in judicial election campaigns] paid for by state parties in 2010 focused on the issue of crime[,] and various studies have highlighted judges' incentives to avoid being labeled 'soft on crime.' The death penalty, in particular, has repeatedly been a flashpoint of campaigns, emerging in states from Ohio to Florida to California, among others.

Rep. of Carol Steiker ¶ 28 (Exhibit L). The same study found that "state supreme court decisions are considerably more likely to gain front page coverage in local newspapers if they involve the death penalty, holding other case characteristics constant." *Id.*[52] Judge William Fletcher of the Ninth Circuit Court of Appeals wrote an article detailing the effects that the politicization of the death penalty has had in California. He noted that after three justices of the California Supreme Court were recalled by the voters in 1986 because of their pro-defendant rulings in death penalty cases, the rate of reversal in capital cases dropped from 40% (prior to the recall) to a

[51] *Id.* (internal quotation omitted).
[52] (quoting Brandice Canes-Wrone et al., *Judicial Selection and Death Penalty Decisions,* 108 Am. Pol. Sci. Rev. 23, 25 (2014) (citations omitted)).

mere 3.8% (after the recall). *Id.*[53] Fletcher further argued that politicization of death penalty cases results in false convictions. *Id.* Two key ingredients are that "[t]he police are under heavy pressure to solve a high-profile crime" and prosecutors have a combination of wide discretion and "absolute immunity from damage suits for activities undertaken in connection with litigation." *Id.* (internal quotations omitted).

Kansas is unfortunately no stranger to the politicization of the death penalty. The gruesome horror of what has come to be known as the Wichita Massacre gave rise to a flood of media attention. *Id.* ¶ 45. The capital sentences of the Wichita defendants Jonathan and Reginald Carr were first (briefly) invalidated when the Kansas Supreme Court struck down the state's death sentencing provisions in *Marsh*. *See generally* 548 U.S. 163. After the U.S. Supreme Court reversed that ruling, the Kansas Supreme Court directly overturned the Carr brothers' death sentences on appeal, a ruling that was also reversed by the U.S. Supreme Court. The Kansas ruling in the *Carr* case led the Governor to renew calls for a state constitutional amendment to change the way justices are selected for the Kansas Supreme Court. Rep. of Carol Steiker ¶ 45 (Exhibit L).[54] The *Carr* case and the death penalty more generally motivated at least one appointment to the court, as the Governor himself acknowledged.[55] And they also became the focal point of the next gubernatorial

[53] (citing William A. Fletcher, *Our Broken Death Penalty*, 89 N.Y.U. L. Rev. 805, 821 (2014)).
[54] (citing Staff, *In Carr Brothers Case, Supreme Court Says Kansas Wrongly Overturned Death Sentences*, Wichita Eagle (Jan. 20, 2016), at 1A).
[55] Bryan Lowry, *Caleb Stegall to Take Seat on Kansas Supreme Court in December*, Wichita Eagle (updated Sept. 12, 2014), https://www.kansas.com/news/politics-government/election/article2092729.html (noting that Governor Brownback maintained that "Stegall, a former prosecutor, would bring a needed perspective to the court on death penalty cases").

contest, dominating the debates between Sam Brownback and Paul Davis.[56] Paradoxically, the infrequency of capital cases in Kansas heightens their sensitivity. "With death penalty cases so rare in Kansas," said the Wichita Eagle, "the resulting court cases have attracted strong public attention."[57] And, importantly, the pressures of high-profile capital cases are felt not only by public officials, but also by jurors. In the *Carr* case, for example, the community's influence was so powerful that one woman "said she'd find it difficult to vote for acquittal even if the state didn't prove its case, because of community pressure."[58]

E. Kansas's Death Penalty is Unreliable.

The finality of death creates a "qualitative difference" between the death penalty and other punishments (including life in prison). *Woodson v. State*, 428 U.S. 280, 305 (N.C. 1976) (plurality op.). That "qualitative difference" creates "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id*. "There is increasing evidence, however, that the death penalty as now applied lacks that requisite reliability." *Glossip*, 576 U.S. at 910 (Breyer and Ginsburg, JJ., dissenting).

> Unlike 40 years ago, we now have plausible *evidence* of unreliability that (perhaps due to DNA evidence) is stronger than the evidence we had before. In sum, there is significantly more research-based evidence today indicating that courts sentence to death individuals who may well be actually innocent or whose convictions (in the law's view) do not warrant the death penalty's application.

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[56] Dion Lefler, *Carr Brothers' Case Highlights Bitter Debate Between Sam Brownback and Paul Davis*, Wichita Eagle (Oct. 22, 2014), https://www.kansas.com/news/politics-government/election/article3204377.html#storylink=cpy.
[57] Ron Sylvester, *Oliver Seeks to Be Tried Elsewhere*, Wichita Eagle, 1B (Nov. 22, 2001).
[58] Ron Sylvester, *Six Inch Closer to Serving on Carr Jury*, Wichita Eagle, 3B (Sept. 24, 2002).

Id. at 915 (Breyer and Ginsburg, JJ., dissenting) (emphasis in original). *See also Marsh*, 548 U.S. at 207-11 (Souter, J., dissenting) (DNA exonerations constitute "a new body of fact" when considering the constitutionality of capital punishment); *Santiago*, 122 A. 3d at 66 ("In concluding that the death penalty is unconstitutional . . . we recognize that the legal and moral legitimacy of any future executions would be undermined by the ever present risk that an innocent person will be wrongly executed.").

This new research-based evidence has several different components. First, "despite the difficulty of investigating the circumstances surrounding an execution for a crime that took place long ago, researchers have found convincing evidence that, in the past three decades, innocent people have been executed." *Glossip*, 576 U.S. at 910 (Breyer and Ginsburg, JJ., dissenting).[59] *See also Santiago*, 122 A.3d at 65 ("Statistical analyses have demonstrated to a near certainty that innocent Americans

[59] (citing James S. Liebman, *Fatal Injustice; Carlos DeLuna's Execution Shows That a Faster, Cheaper Death Penalty is a Dangerous Idea*, L.A. Times, A19 (June 1, 2012) (describing results of a four-year investigation, later published as *The Wrong Carlos: Anatomy of a Wrongful Execution* (2014), that led its authors to conclude that Carlos DeLuna, sentenced to death and executed in 1989, six years after his arrest in Texas for stabbing a single mother to death in a convenience store, was innocent); David Grann, *Trial By Fire: Did Texas Execute An Innocent Man?*, The New Yorker, 42 (Sept. 7, 2009) (describing evidence that Cameron Todd Willingham was convicted, and ultimately executed in 2004, for the apparently motiveless murder of his three children as the result of invalid scientific analysis of the scene of the house fire that killed his children). *See also*, e.g., *Press Release: Gov. Ritter Grants Posthumous Pardon in Case Dating Back to 1930s*, 1 (Jan. 7, 2011) (Colorado Governor granted full and unconditional posthumous pardon to Joe Arridy, a man with an IQ of 46 who was executed in 1936, because, according to the Governor, "an overwhelming body of evidence indicates the 23–year–old Arridy was innocent, including false and coerced confessions, the likelihood that Arridy was not in Pueblo at the time of the killing, and an admission of guilt by someone else"); Rob Warden, *Wilkie Collins's The Dead Alive: The Novel, the Case, and Wrongful Convictions*, 157-58 (2005) (in 1987, Nebraska Governor Bob Kerrey pardoned William Jackson Marion, who had been executed a century earlier for the murder of John Cameron, a man who later turned up alive; the alleged victim, Cameron, had gone to Mexico to avoid a shotgun wedding)).

have been and will continue to be executed in the post-*Furman* era."). As the Connecticut Supreme Court held in *Santiago*,

> Of course, all punishment is tainted by the possibility of error. Capital punishment, however, is especially problematic. When we impose capital punishment on a convicted murderer, there cannot be any room for error since the murderer can never be brought back to life afterward if error is discovered at some later date. If there remains a substantial risk of error, as demonstrated by advances in scientific testing in cases [in which] a person has been sentenced beyond a reasonable doubt in a fair trial, then we have good reason on retributivist grounds to reject capital punishment in favor of an alternative sanction.

Id. at 65-66 (internal quotation omitted) (alteration in original).

Second, "the evidence that the death penalty has been wrongly imposed (whether or not it was carried out), is striking." *Glossip*, 576 U.S. at 911 (Breyer & Ginsburg, JJ., dissenting) (emphasis omitted). In deciding in 2002 that it is no longer constitutional to execute people who are intellectually disabled, the U.S. Supreme Court wrote that "we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated." *Atkins*, 536 U.S. at 320 n.25.

> At that time, there was evidence of approximately 60 exonerations in capital cases. . . . Since 2002, the number of exonerations in capital cases has risen to 115. . . . [or] . . . under a slightly different definition of exoneration, the number of exonerations since 1973 [has risen] to 154[.] Last year, in 2014, six death row inmates were exonerated based on actual innocence. All had been imprisoned for more than 30 years (and one for almost 40 years) at the time of their exonerations.

Glossip, 576 U.S. at 911.[60] Today, the number of death row exonerees stands at 200.[61]

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[60] (citing Nat'l Registry of Exonerations, *Exonerations in the United States, 1989-2012*, 6-7 (2012), https://www.law.umich.edu/special/exoneration/documents/exonerations_us_1989_2012_full_report.pdf ("Exonerations 2012 Report"); DPIC, *Innocence: List of Those Freed from Death Row*, http://www.deathpenaltyinfo.org/innocence-and-death-penalty).

[61] DPIC, *Innocence*, https://deathpenaltyinfo.org/policy-issues/innocence (last visited Oct. 15, 2024).

Third, and perhaps counterintuitively:

> exonerations occur far more frequently where capital convictions, rather than ordinary criminal convictions, are at issue. Researchers have calculated that courts (or State Governors) are 130 times more likely to exonerate a defendant where a death sentence is at issue. They are nine times more likely to exonerate where a capital murder, rather than a noncapital murder, is at issue.

Glossip, 576 U.S. at 912.[62] One factor explaining the higher rate of wrongful convictions in a capital case is that "the crimes at issue in capital cases are typically horrendous murders, and thus accompanied by intense community pressure on police, prosecutors, and jurors to secure a conviction. This pressure creates a greater likelihood of convicting the wrong person." *Id.* at 912-13.[63] *See also* Rep. of Tricia Rojo Bushnell at 13-15, 22 (Exhibit I).

Other factors also create a greater likelihood of wrongful conviction and sentencing in capital cases. One is the practice of death-qualification, which "'skews juries toward guilt and death.'" *Glossip*, 576 U.S. at 913.[64] *See generally,* Motion to Strike Death Qualification. Another is the more general problem of flawed forensic testimony." *Glossip*, 576 U.S. at 914. "The Federal Bureau of Investigation (FBI), for

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[62] (citing Exonerations 2012 Report at 15-16, nn. 24-26).

[63] (citing Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & C. 523, 531-533 (2005); Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. Empirical L. Studies 927, 956-57 (2008) (noting that, in comparing those who were exonerated from death row to other capital defendants who were not so exonerated, the initial police investigations tended to be shorter for those exonerated)); *see also generally* Brandon Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (2011) (discussing other common causes of wrongful convictions generally including false confessions, mistaken eyewitness testimony, untruthful jailhouse informants, and ineffective defense counsel).

[64] (quoting Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 Ariz. S.L.J. 769, 772-93, 807 (2006) (summarizing research and concluding that "[f]or over fifty years, empirical investigation has demonstrated that death qualification skews juries toward guilt and death")).

example, recently found that flawed microscopic hair analysis was used in 33 of 35 capital cases under review; 9 of the 33 had already been executed." *Id.*[65]

Likewise, according to a 2014 report, DOJ learned in 1997 that that the FBI crime lab had engaged in massively flawed forensic work, including the "use of scientifically unsupportable analysis and overstated testimony by [13] FBI Lab examiners in criminal prosecutions." *See* DOJ, Off. of the Inspector Gen., *An Assessment of the 1996 Department of Justice Task Force Review of the FBI Laboratory*, i (July 2014) ("2014 OIG Report").[66] According to this report, a 1997 Office of the Inspector General ("OIG") report led to the deployment of a Criminal Division Task Force to identify, review, and follow-up on some 7,609 cases linked to the 13 problematic FBI examiners. *Id.* at 16. But the Task Force's and the FBI's process moved slowly, and the Task Force's findings were not disclosed to the public and to those individuals who had been convicted by that tainted evidence. The results were staggering: It took the FBI nearly five years to identify the 64 death-row defendants whose cases involved analysis or testimony from one or more of the 13 examiners – and with respect to the cases the FBI knew of, it only notified local prosecutors and allowed them to determine what should be disclosed to defendants. *Id.* at 14, 56.

At least three people were executed before their cases were identified for further review– for one of them, it literally cost him his life. *Id.* at 5 n.11. An

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[65] (citing FBI, *FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review*, (Apr. 20, 2015); *see also* Spencer Hsu, *FBI Admits Errors at Trials: False Matches on Crime–Scene Hair*, Washington Post, A1 (Apr. 19, 2015) (in the District of Columbia, which does not have the death penalty, five of seven defendants in cases with flawed hair analysis testimony were eventually exonerated)).

[66] *Available at* https://oig.justice.gov/reports/2014/e1404.pdf.

independent scientist later determined that the FBI lab analysis that led to the 1997 execution of Benjamin H. Boyle in Texas was scientifically unsupportable and the testimony incorrect. *See id.* at 51. Because the DOJ and the FBI did not immediately alert state authorities that Mr. Boyle's convictions might be called into question, prosecutors did not delay the execution. The OIG reports that "but for" that tainted testimony, "Boyle would not have been convicted of the capital offense that rendered him eligible for the death penalty." *Id.* at 51-52, 66-67, 86. Two other capital defendants, Michael Lockhart and Gerald Stano, were executed before their cases were identified for Task Force Review. *Id.* at 57

As of today, DPIC has recorded 200 exonerations in capital cases, using a strict definition of "exoneration."[67] Taken in context, this means that "one person wrongfully convicted and condemned to die has been exonerated for every 8.3 prisoners who have been executed."[68] The most authoritative estimate, published in the Proceedings of the National Academy of Sciences in 2014, presented "a conservative" calculation that 4.1% of capital verdicts between 1973 and 2004 were erroneous.[69] In other words, approximately one in 25 capital defendants in the United States are sentenced to death for crimes they did not commit. The National Academy of Sciences' study further explained that the current exoneration rate is an inapt proxy for the false conviction rate because courts convert most death sentences into

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[67] *See* DPIC, *Innocence*, https://deathpenaltyinfo.org/policy-issues/innocence (last visited Oct. 15, 2024).
[68] DPIC, *The Death Penalty in 2021: Year-End Report,* 16 (2021), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2021-year-end-report.
[69] Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 Proceedings of the Nat'l Acad. of Scis., 7230, 7231-32, 7234 (2014).

life sentences; life-sentenced defendants, in turn, do not receive the searching review provided to those on death row. "With an error rate at trial over 4%," the study concluded, "it is all but certain that several of the [then] 1,320 defendants executed since 1977 were innocent."[70]

There is also strong evidence that wrongful conviction and racial bias are intertwined. A recent study found that "African Americans are only 13% of the American population but a majority of innocent defendants wrongfully convicted of crimes and later exonerated."[71] This skewing is particularly pronounced in murder cases, as exonerations reveal that "innocent black people are about seven times more likely to be convicted of murder than innocent white people."[72]

Further, while there is likely room for argument as to whether the defendant in every cited exoneration case was factually innocent, DNA evidence has put the lie to any Pollyannaish view that innocent people are not convicted and sentenced to death. The notion that all these statistics and exonerations are wrong-headed is simply inconceivable. Innocent people have been, and there is no evidence suggesting they will not continue to be, convicted and sentenced to. And, more disturbingly, it is likely, if not certain, that innocent people have been executed. *See, e.g.*, *Glossip*, 576 U.S. at 910-11. Just as the presence of one juror on the panel who would automatically vote for the death penalty is "one too many," *Morgan v. Illinois*, 504 U.S. 719, 734,

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[70] *Id.* at 7235.
[71] *See* Samuel R. Gross et al., *Race and Wrongful Convictions in the United States*, Nat'l Registry of Exonerations, ii (Mar. 7, 2017), https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf.
[72] *Id.*

n.8 (1922), the wrongful conviction—much less execution—of even one person is "one too many." It is axiomatic that "the execution of a legally and factually innocent person would be a constitutionally intolerable event." *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring). Indeed, "[t]he execution of a person who can show [that] he is innocent comes perilously close to simple murder." *Santiago*, 122 A.2d at 65 (internal quotation omitted) (alterations in original).

As in the rest of the United States, the issue of wrongful conviction of the innocent has been a problem in Kansas. Since 1989, the Exoneration Registry has recorded 19 exonerations within the state of Kansas. *See* Rep. of Tricia Rojo Bushnell at 31 (Exhibit I).[73] Wrongful convictions in non-capital cases in Kansas have occurred in many counties and have occurred across the gamut of crimes. Some were robberies.[74] Others were rapes.[75] Many were murders.[76] And these wrongful

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[73] As Ms. Bushnell explains in her report, this number is indicative more of the level of resources available to innocent defendants than it is the number of innocent people convicted in Kansas. *See* Rep. of Tricia Rojo Bushnell at 31-32 (Exhibit I). While there has yet to be an exoneration of an individual sentenced to death in Kansas, that does not mean there is not a wrongfully convicted person on death row within this state's boundaries, or that this will never happen in the future. The same issues that led to the incarceration and execution of innocent individuals in other states exist in Kansas. In fact, of the four Kansans recently exonerated with assistance from the Midwest Innocence Project and its partners, three were convicted of crimes qualifying for capital murder: Floyd Bledsoe, Lamonte McIntyre, and Olin "Pete" Coones, Jr. *Id.* at 31-38.

[74] *See, e.g.*, Joe Robertson, *17 Years Later, She Laments About Mistakes That Led to the Wrong Man Getting Imprisoned*, Wichita Eagle (June 13, 2017), https://www.kansas.com/news/nation-world/national/article155939579.html ("Tamara Scherer . . . says she told investigators and prosecutors this all along — 'I didn't get a good look at his face.') (interal quotation omitted).

[75] *See, e.g.*, Hurst Laviana, *Settlement Reached in Wrongful Conviction*, Wichita Eagle (updated Aug. 8, 2014), https://www.kansas.com/news/local/crime/article1026672.html; *see also* Melissa Hellmann, *Kansas Weighing Rules for Handling Eyewitnesses to Crimes*, Wichita Eagle (Mar. 28, 2016), https://www.kansas.com/news/local/crime/article68588002.html.

[76] *See e.g.*, Associated Press, *Court Rejects Liberal Man's Murder Conviction Over Lie by Witness*, Wichita Eagle, 3B (Jul. 5, 2004); Luke Nozicka & Katie Bernard, *Family of Late Kansas Exoneree Says Jailhouse Informant Bill Could Have Saved His Life*, Wichita Eagle (Mar. 17. 2021), https://www.kansas.com/news/state/article249951764.html; Roxana Hegeman, *Kansas Has Paid 2 of 5 Claims for Wrongful Incarceration*, APNews.com (May 26, 2019),

convictions occurred across numerous Kansas counties: Clay,[77] Douglas,[78] Jefferson,[79] Johnson,[80] Riley,[81] Sedgwick,[82] Seward,[83] Shawnee,[84] and Wyandotte.[85]

Kansas' wrongful convictions, however, do not tell the whole story. For one thing, the State has also brought mistaken charges in capital cases. For example, prosecutors erred in originally seeking Gentry Bolton's death. When two slayings occurred at convenience stores in the span of a few days, fears mounted across the

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https://apnews.com/article/fee472c2f95747b9a41437866008eef4; *see also* Nat'l Registy of Exonerations, *Search*, https://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={b8342ae7-6520-4a32-8a06- 4b326208baf8}&SortField=State&SortDir=Asc&FilterField1=State&FilterValue1=Kansas (last visited Oct. 15, 2024).

[77] *See* Roxana Hegeman, *Kansas Has Paid 2 of 5 Claims for Wrongful Conviction*, APNews.com (May 26, 2019), https://apnews.com/article/fee472c2f95747b9a41437866008eef4; *see also* https://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={b8342ae7-6520-4a32-8a06- 4b326208baf8}&SortField=State&SortDir=Asc&FilterField1=State&FilterValue1=Kansas.

[78] Shaun Hittle, *Man Tries to Rebuild Life After Serving Time for Crime He Says He Didn't Commit*, Lawrence J.-World (Oct. 16, 2011), https://www2.ljworld.com/news/2011/oct/16/man-tries-rebuild-life-after-serving-time-crime-he/.

[79] *See* Luke Nozicka, *Kansas Man Will Get $7.5 Million From County Where He Said Officers Framed Him for Murder*, Kansas City Star (Apr. 28, 2023), https://www.kansascity.com/news/local/crime/article274828306.html.

[80] Joe Robertson, *17 Years Later, She Laments About Mistakes That Led to the Wrong Man Getting Imprisoned*, Wichita Eagle (June 13, 2017), https://www.kansas.com/news/nation-world/national/article155939579.html.

[81] *See* Hurst Laviana, *Settlement Reached in Wrongful Conviction*, Wichita Eagle (updated Aug. 8, 2014), https://www.kansas.com/news/local/crime/article1026672.html; Jim Suhr, *Freed Inmate Faces Compensation Challenge*, Wichita Eagle (Dec. 14, 2014).

[82] Derek Nester, *AG Derek Schmidt: Fourth Mistaken-Conviction Lawsuit Concluded*, Sunflower State Radio (Apr. 14, 2020), https://sunflowerstateradio.com/2020/04/14/ag-derek-schmidt-fourth-mistaken-conviction-lawsuit-concluded/ .

[83] Associated Press, *Court Rejects Liberal Man's Murder Conviction Over Lie by Witness*, Wichita Eagle 3B (July 5, 2004).

[84] *See* Melissa Hellmann, *Kansas Weighing Rules for Handling Eyewitnesses to Crimes*, Wichita Eagle (Mar. 28, 2016), https://www.kansas.com/news/local/crime/article68588002.html; *Settlement Approved With Wrongfully Convicted Kansas Man*, APNews.com (June 25, 2021), https://apnews.com/article/ks-state-wire-kansas-a775050e5a4069b6eb1dfc434d88c689.

[85] *See* Luke Nozicka & Katie Bernard, *Family of Late Kansas Exoneree Says Jailhouse Informant Bill Could Have Saved His Life*, Wichita Eagle (Mar. 17. 2021), https://www.kansas.com/news/state/article249951764.html; Roxana Hegeman, *Kansas Fights Claim of Man Wrongly Imprisoned for 23 Years*, APNews.com (Aug. 21, 2019), https://apnews.com/general-news-5f6cd02cf633461eb20338733a76d398.

State, and a manhunt ensued.[86] Prosecutors charged Bolton for both killings.[87] For one murder, they sought the death penalty.[88] But it turned out that Bolton was innocent in that case. Instead, "authorities conceded they had the wrong man and later charged" another.[89] Many factors have contributed to wrongful convictions in Kansas. Tricia Rojo Bushnell, Director of the Midwest Innocence Project who has studied Kansas' record of wrongful convictions, has identified some of the root causes. *See generally* Rep. of Tricia Rojo Bushnell (Exhibit I). These root causes include: eyewitness misidentifications, *id.* at 19-20, flawed forensic science and testimony, *id.* at 21-23, official misconduct, *id.* at 15-19, false confessions, *id.* at 23-25, and perjured jailhouse informant testimony, *id.* at 26. Wrongful convictions are also caused by intense public pressure in the wake of serious local crime, *see, e.g.*, *id.* at 13, which is in turn driven by sensational and biased local news coverage. A study of Kansas media outlets in particular showed consistent patterns of distorted and racialized reporting in capital cases. Rep. of Frank R. Baumgartner on Media at 18-19 (Exhibit M).

But there is more. Research suggests that having the death penalty as an option facilitates official behavior that increases the risk of wrongful convictions, even if the prosecutor chooses not to pursue capital charges. *See* Rep. of Tricia Rojo Bushnell at 16 (Exhibit I). False confessions occur at a higher rate when the accused is threatened with death, and prosecutors frequently leverage the threat of death to

[86] *See, e.g.*, *Killer Has Convenience Store Clerks on Edge,* Salina J., A3 (Jan. 4, 1998).
[87] *See Man Sought in Two Killings at KCK Convenience Stores*, Wichita Eagle, 10A (Jan. 2, 1998).
[88] Associated Press, *Death Penalty Sought Against Slaying Suspect*, Salina J., A5 (Jan. 14, 1998).
[89] *Man Convicted in Killing of Convenience Store Clerk*, Wichita Eagle, 23A (Dec. 13, 1998).

secure guilty pleas. *Id.* This tactic prioritizes efficiency over accuracy; when combined with the effectiveness of the threat of death in procuring confessions and guilty pleas, it ensures that as long as the death penalty remains a tool in the prosecutor's belt, there will be a greater risk of wrongful convictions, regardless of whether capital charges are ever filed.

And neither Kansas nor Wyandotte County is a stranger to official misconduct. *See, e.g.*, *id.* at 17-19, 38-43. As Ms. Bushnell details in her Report, Wyandotte County has a long history of police and prosecutorial misconduct in Wyandotte County that has gone unchecked. For decades, the Kansas City, Kansas Police Department (KCKPD) "had a practice of permitting officers to abuse their positions to bribe, coerce, manipulate, pressure, and sexually assault poor, Black women, particularly those involved in sex work, to create a network of informants." *Id.* at 38. The KCKPD used bribes to obtain information from informants such as clearing a warrant in place for the informant, dropping a municipal charge, or coordinating with the district attorney to "go easy on" the informant's family members. "More coercive tactics included forcing informants to engage in sexual acts, physically assaulting them, or threatening to arrest the informant or their family members." *Id.* at 38-39. "This network of informants allowed KCKPD officers to systemically falsify evidence during their criminal investigations whenever they desired to close cases, without concern for accuracy or probable cause." *Id.* at 39-40.

Much of this misconduct was well known. In the late 1980s and early 1990s, the FBI conducted an investigation of corruption within the KCKPD. "This

investigation, led by an FBI agent, uncovered evidence of longstanding and systemic corruption within the KCKPD, including finding that many supervising and commanding officers tolerated and covered up misconduct." *Id.* at 40-41. "Between 1996 and 2016, at least 20 civilian witnesses and 3 former law enforcement officials came forward to provide sworn testimony detailing allegations of corruption and other misconduct, including allegations of serious felonious activity by KCKPD officers." *Id.* at 41. *See also id.* at 42-43 (detailing many other incidents showing a "widespread culture of corruption").

In sum, the system on which a capital defendant's life or death depends is error-prone and unreliable, and therefore unconstitutional.

F. Kansas' Death Penalty Lacks Any Penological Purpose and is an Excessive Punishment.

When the infliction of capital punishment no longer serves a penological goal, its imposition represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." *Furman*, 408 U.S. at 312 (White, J., concurring). Any state that wishes to impose death must demonstrate that its capital system serves the two valid social ends of "retribution and deterrence of capital crimes by prospective offenders." *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (internal quotation omitted). "Unless the imposition of the death penalty . . . 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 (internal quotations omitted); *see also Kennedy*, 554 U.S. at 441. The evidence shows that the death penalty in

Kansas does not serve any valid penological goal, and thus is an excessive punishment.

Dr. Jeffrey Fagan recently undertook a comprehensive examination of whether the death penalty "measurably contributes" to deterrence in Kansas. *See Atkins*, 536 U.S. at 319 (internal quotation omitted). "[T]he 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." *Id.* at 320. Dr. Fagan analyzed homicide rates statewide, finding "no statistical correlation" between the death penalty and the frequency of murder. Rep. of Jeffrey Fagan at 2, 12-15 (Exhibit F). Rather, murder rates in both the county and State have continuously fluctuated independently of death sentences. *Id.* These results track national trends, which indicate that the death penalty has not curbed, or even affected, the rate of violent crime in America.[90] "The consensus in the scientific community, stated in the 2012 Report of the National Research Council on Deterrence and the Death Penalty, is that there is no reliable evidence of a deterrent effect of the death penalty on homicide rates." Rep. of Jeffrey Fagan at 2 (Exhibit F). Moreover, because this State imposes and carries out capital punishment so rarely, "[t]he death penalty is particularly ineffective as a deterrent in Kansas[.]" *Id.*

[90] *See also, e.g.,* Justin F. Marceau & Hollis A. Whitson, *The Cost of Colorado's Death Penalty*, 3 U. Denv. Crim. L. Rev. 145, 145 (2013) ("[S]ocial scientists increasingly agree that the deterrence benefits of the death penalty are entirely speculative"); Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99 J. Crim. L. & Criminology 489, 489-90 (2013).

Nor can retribution sustain Kansas' death penalty. While retribution may be considered alongside deterrence when evaluating the death penalty, *see Atkins*, 536 U.S. at 319, retribution may not, on its own, justify the imposition of the death penalty. *See, e.g.*, *Furman*, 408 U.S. at 345 (Marshall, J., concurring) ("The history of the Eighth Amendment supports only the conclusion that retribution for its own sake is improper."); *Williams v. New York*, 337 U.S. 241, 248 (1949) ("Retribution is no longer the dominant objective of the criminal law."); *Baze v. Rees*, 553 U.S. 35, 80 (2008) (Stevens, J., concurring) ("[O]ur society has moved away from public and painful retribution.").

Even assuming, *arguendo*, that retribution was a sufficient penological justification for the death penalty, Kansas' death penalty system does not meaningfully serve retributive ends. Kansas only subjects a vanishingly small and "capriciously selected random handful" of defendants to capital procedures. *See Furman*, 408 U.S. at 309-10 (Stewart, J., concurring). And, since 1965, it has not carried out a single execution. "[W]hen imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied." *Id.* at 311 (White, J., concurring). If any state has reached that "certain degree of infrequency," *id.*, it is Kansas; no other state that currently authorizes the death penalty has come anywhere close to fifty-seven years without using it.[91] Perversely, the only measurable impact the death penalty has had on Kansans is an economic one: the death penalty has cost Kansans millions

[91] *See, e.g.*, DPIC, *State By State*, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Oct. 15, 2024).

of dollars. *See* Rep. of Philip J. Cook and Frank R. Baumgartner on Cost at 3, 35-36 (Exhibit N).

Because the death penalty fails to measurably promote any of the principal penological goals over life imprisonment, it is excessive. *Furman*, 408 U.S. at 279 (Brennan, J, concurring) ("If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive") (internal citation omitted). This conclusion is underscored by the fact that the constitutional guarantee against excessive punishment is "not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910); *see also Hall v. Florida*, 572 U.S. 701, 708 (2014) ("The Eighth Amendment's protection of dignity reflects the [n]ation we have been, the [n]ation we are, and the [n]ation we aspire to be"); *United States v. Sampson*, 275 F. Supp. 2d 49, 86 (D. Mass. 2003) ("It will . . . be incumbent on courts in future cases to monitor the reactions of legislatures and juries to the mounting evidence that death penalty statutes have resulted in death sentences and executions of innocent individuals much more often than previously understood."); *United States v. Fell*, 217 F. Supp. 2d 469, 477 (D. Vt. 2002) (the Supreme Court has "acknowledged an ongoing 'obligation to re-examine capital-sentencing procedures against evolving standards of procedural fairness in a civilized society.' ") (*quoting Gardner v. Florida*, 430 U.S. 349, 357 (1977)); *People v. Seumanu*, 355 P.3d 384, 438 (Cal. 2015) ("The United States Supreme Court has recognized that the notion of cruel and unusual punishment is

not a concept carved in 18th-century stone, instead explaining that although 'the words of the [Eighth] Amendment are not precise, . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'") (internal quotation omitted) (alterations and omission in original).

II. Pursuing the Death Penalty Against Mr. Fielder Would Violate His Section 1 Right to Life.

As shown above, pursuing the death penalty against Mr. Fielder, a pre-trial capital defendant, implicates his natural right to life under Section 1, and thus triggers strict scrutiny. The State cannot satisfy this standard. Far from being narrowly tailored to achieve a compelling government interest, the death penalty utterly fails to advance any legitimate government interest. The only legitimate goals that the government may pursue with the death penalty are deterrence and retribution. *See, e.g.*, *Enmund*, 458 U.S. at 798. The Kansas death penalty advances neither.

Even if this Court concludes that rational basis applies instead of strict scrutiny, this State's death penalty would not pass constitutional muster because it does not achieve any legitimate penological goal. *See Romer*, 517 U.S. at 632 (explaining that a practice only survives rational basis review if it "can be said to advance a legitimate government interest"). Thus, under any standard of review, the State cannot justify seeking to execute Mr. Fielder consistent with his natural right to life.

III. Kansas' Death Penalty Violates the Federal Constitution.

In addition to the Eighth Amendment, discussed *supra* § I, Kansas' death penalty violates Mr. Fielder's Sixth and Fourteenth Amendment rights.

The death penalty violates Mr. Fielder's Fourteenth Amendment right to due process by denying him an unbiased jury, *see supra* § I.B.1.a, and unduly placing him at risk of wrongful conviction and execution, *see supra* § I.E. Finally, the death penalty violates Mr. Fielder's Fourteenth Amendment right to equal protection by subjecting him to a death qualification process with significant racial and gender bias, *see supra* § I.B.1.a., and a punishment doled out based on impermissible factors, including race, *see supra* § I.B.

CONCLUSION

For the foregoing reasons, Mr. Fielder moves this Court to conclude that death qualification and the death penalty as applied in Kansas are unconstitutional. Mr. Fielder seeks to present further evidence and testimony on these matters at an evidentiary hearing.

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CERTIFICATE OF SERVICE

Pursuant to Kansas Supreme Court Rule 116(d)(1)(D), I, Mark Manna, hereby certify that on October 15, 2024, I served a true and correct copy of the foregoing filing and the accompanying motion and memorandum of points and authorities in support thereof by email to all counsel of record:

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