

No. 09 CR 1462

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS,

Plaintiff,

v.

SCOTT P. ROEDER,

Defendant.

**BRIEF OF *AMICI CURIAE* THE NATIONAL ABORTION FEDERATION,
THE AMERICAN CIVIL LIBERTIES UNION, AND THE AMERICAN CIVIL
LIBERTIES UNION OF KANSAS AND WESTERN MISSOURI,
IN SUPPORT OF THE STATE'S MOTION TO EXCLUDE IRRELEVANT
EVIDENCE**

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INTEREST OF AMICI CURIAE

The National Abortion Federation (“NAF”), a non-profit organization founded in 1977, is the professional association of abortion providers in the United States and Canada. Its members include 400 nonprofit and private clinics, women’s health centers, hospitals, and private physicians’ offices. NAF’s members care for over half the women who choose abortion each year in the United States. NAF works closely with law enforcement to ensure the safety of its members.

The American Civil Liberties Union (“ACLU”) is a nationwide nonpartisan organization of nearly 600,000 members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the United States Constitution. The ACLU of Kansas and Western Missouri is a local affiliate of the ACLU. The ACLU and its affiliates have long been active in protecting, generally, the rights of privacy and equality guaranteed by the Constitution and, specifically, the right of a woman to decide whether to continue or end a pregnancy. Constitutional protection for that right precludes those who murder abortion providers from seeking diminished culpability and punishment, on the basis of their sincere belief that, contrary to almost forty years of U.S. Supreme Court precedent, abortion should be illegal.

PRELIMINARY STATEMENT

If a man, with premeditation, tracks down the person he wishes to kill, follows that person into his church, and shoots that person dead, the man has committed first degree murder – whether he acted for pecuniary gain, revenge, political belief, or any other motivation. Under the laws and constitution of this State and of the United States, the Defendant here cannot be acquitted of the murder of Dr. Tiller or convicted of a lesser

included offense simply because he acted out of genuine opposition to legal abortion. Allowing the Defendant to assert that his beliefs should diminish his culpability – either entirely through a necessity defense or significantly through a voluntary manslaughter defense – would violate longstanding state and federal precedents and undermine basic constitutional principles. Moreover, the plain terms of the voluntary manslaughter statute foreclose such an argument. This Court thus correctly precluded the Defendant, charged with first degree murder, from mounting a “necessity defense” and arguing that Dr. Tiller’s murder was justified. And, for substantially the same reasons, this Court should preclude his proof of the lesser included defense of voluntary manslaughter based on those same beliefs.

Amici appreciate that a defendant’s ability to defend against criminal prosecution should be limited only in the narrowest circumstances. Nonetheless, it is the uncontroverted law of this State that a defendant’s sincerely held political beliefs cannot absolve him of liability or garner him more lenient treatment for the commission of a criminal act – here, murder – that is explicitly designed to obstruct other individuals’ exercise of their constitutional rights. Accordingly, *Amici* submit this brief to urge this Court to preclude the Defendant from arguing his anti-abortion beliefs in support of a lesser included charge of voluntary manslaughter.

ARGUMENT

I. THE KANSAS SUPREME COURT'S DECISION IN *CITY OF WICHITA v. TILSON* AND THE U.S. CONSTITUTION PRECLUDE A VOLUNTARY MANSLAUGHTER DEFENSE TO POLITICALLY MOTIVATED MURDERS.

Defendant's opposition to abortion does not entitle him to nullify the constitutionally protected rights of those with whom he disagrees. To allow the Defendant to argue for leniency for gunning down Dr. Tiller, on the basis that he sincerely believes abortion should be illegal, would render the right to abortion virtually meaningless. Indeed, consistent with the reasoning of the Kansas Supreme Court nearly two decades ago in *City of Wichita v. Tilson*, 253 Kan. 285 (1993) (per curiam), neither the U.S. Constitution nor the law of this State countenances such a result.

In *Tilson*, the defendant was arrested for criminal trespass after blocking the entrance to the Wichita Family Planning Clinic. 253 Kan. at 286. At trial, the defendant admitted blocking the entrance to the clinic, but asserted that her actions were justified by necessity, arguing that "abortion takes the life of an unborn baby, and I wanted to prevent that." *Id.* at 287. The district court judge accepted the defense and held that the defendant was absolved of any criminal liability for her actions on the basis of her opposition to abortion and her belief that her actions were necessary to save human lives. *Id.* at 287-88.

The Kansas Supreme Court reversed, holding that even to assert the necessity defense, "[t]he harm or evil which a defendant . . . seeks to prevent must be a legal harm or evil as opposed to a moral or ethical belief of the individual defendant." *Id.* at 289-90. Recognizing that "[e]very appellate court to date which has considered the issue has held that abortion clinic protesters . . . are precluded, as a matter of law, from raising a

necessity defense,” *id.* at 292-96 (citing cases), the Court affirmed that “[w]hen the objective sought is to prevent by criminal activity a lawful, constitutional right, the defense of necessity is inapplicable,” *id.* at 296 (emphasis added). The Court’s holding was unambiguous:

To allow the personal, ethical, moral, or religious beliefs of a person, no matter how sincere or well-intended, as a justification for criminal activity aimed at preventing a law-abiding citizen from exercising her legal and constitutional rights would not only lead to chaos but would be tantamount to sanctioning anarchy.

Id. at 296.

The same logic applies here. Culpability for the murder of Dr. Tiller cannot be mitigated on the basis of the Defendant’s opposition to legal abortion—no matter how genuine his beliefs. *See id.* (“If every person were to act upon his or her personal beliefs in this manner, and we were to sanction the act, the result would be utter chaos.”) (internal citation omitted). As this Court has recognized, *Tilson* precludes the Defendant from asserting the necessity defense, but for the same reason, *Tilson* precludes the voluntary manslaughter defense as this Defendant formulates it: that killing an abortion provider is less serious than first degree murder solely because the killer was motivated by opposition to abortion. Disagreement with the constitutional right to abortion cannot justify criminal conduct and acts of violence directed at those who provide that constitutionally protected service—nor could it without undermining the very constitutional right at issue.

And it “is established, beyond any argument, that since 1973,” the U.S. Supreme Court has recognized the constitutional principles that protect a woman’s right to end a pregnancy. *Id.* at 291. In an unbroken line of cases – reaching from *Griswold v.*

Connecticut, 381 U.S. 479 (1965), in 1965 to *Lawrence v. Texas*, 539 U.S. 558 (2003), in 2003 – the U.S. Supreme Court has repeatedly affirmed these principles: that the right to decide whether and when to have a child is within the zone of privacy protected from undue government interference; that it is essential to dignity, self-determination, and women’s equality; and that the Due Process Clause of the U.S. Constitution therefore protects a woman’s right to choose abortion. Today, no less than sixteen years ago, when *Tilson* was decided, decisions surrounding abortion involve “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,” and “central to the liberty protected by the Fourteenth Amendment.” *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

Hence, allowing the Defendant to try to prove diminished culpability for murder, solely because the victim was a physician who provided abortion care that the Defendant opposes, would be inconsistent with clear precedent of the Kansas Supreme Court and the United States Supreme Court. “In a society of laws and not of individuals, we cannot allow each individual to determine, based upon his or her personal beliefs, whether another person may exercise her constitutional rights.” *Tilson*, 253 Kan. at 296 (quoting *Com. v. Wall*, 372 P.A. Supr. 534, 543-44 (1988)).

II. THE VOLUNTARY MANSLAUGHTER STATUTE WAS NEVER INTENDED TO, AND CANNOT, MITIGATE CULPABILITY BASED ON POLITICAL BELIEFS.

Even if the Defendant’s assertion of the voluntary manslaughter defense, on the basis of his opposition to abortion, were constitutionally permissible (which it is not), it is

plain that neither the Kansas courts nor the Kansas legislature ever intended the voluntary manslaughter statute to be used in this manner.

The voluntary manslaughter defense, also known as “the imperfect self-defense,” mitigates the culpability of a defendant for the “intentional killing of a human being committed . . . upon an unreasonable but honest belief that circumstances existed that justified deadly force,” KAN. STAT. ANN. § 21-3403, to defend a “third person against such other’s imminent use of unlawful force,” KAN. STAT. ANN. § 21-3211. By definition, the murder of Dr. Tiller in order to prevent him from performing abortions does not meet the basic statutory requirements. That is true for several reasons. First, under Kansas law, a fetus is not a person for purposes of abortion. KAN. STAT. ANN. § 21-3452.

Second, the term “unreasonable belief,” as used in the voluntary manslaughter statute, does not refer to the defendant’s world view, or raise the question of whether the defendant genuinely disagrees with state and federal law. As used in the statute, the term “unreasonable belief” refers to an honest, even if unreasonable, misunderstanding of the circumstances that led to the use of deadly force. *See, e.g., State v. Carter*, 284 Kan. 312 (2007) (defendant argued he was entitled to voluntary manslaughter defense for intentional killing because he mistakenly believed he was about to be robbed); *State v. Jones*, 27 Kan. App. 2d 910 (Kan. Ct. App. 2000) (defendant entitled to voluntary manslaughter instruction where he intentionally shot and killed individual who was part of a mob descending on his family, and he mistakenly believed that individual had a gun). The defense is not, however, a vehicle through which the Defendant can attempt to prove that an intentional murder was a voluntary manslaughter because of his honest

belief that abortion should not be constitutionally protected or that a fetus should be considered a person in the context of abortion under Kansas law. In other words, the imperfect self defense charge is available only when the defendant makes an honest mistake about the legal or factual circumstances that justify deadly force; it is not available where, as here, he simply disagrees with the law governing self-defense.¹

Accordingly, the Defendant's reading of the voluntary manslaughter statute, for which he cites no support, is unprecedented, as would be any decision allowing him to attempt to argue that his anti-abortion beliefs justify the "imperfect self-defense" in this case.

CONCLUSION

For the reasons set forth above, *Amici* ask this Court to preclude the Defendant from arguing his anti-abortion beliefs in support of a lesser included charge of voluntary manslaughter.

¹ In addition, the Defendant even fails to meet one of the basic statutory requirements of the defense: the imminence requirement. *See* KAN. STAT. ANN. 21-3211. There is no conceivable evidence, let alone evidence that a jury would find credible, that the Defendant honestly believed the performance of an abortion was *imminent* when he shot Dr. Tiller, on a Sunday, in the lobby of his church. The Kansas Supreme Court has plainly held that voluntary manslaughter is unavailable unless there is evidence of "an *actual* fear of an *imminent* harm." *State v. White*, 284 Kan. 333, 352 (2007) (internal citations omitted). "Without this finding, imperfect self-defense [voluntary manslaughter] is no defense." *Id.*

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Brief was served by facsimile on this 27th day of January, 2010, upon:

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