

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

JAMES KRAIG KAHLER,)
KDOC # 0101355,)
Movant,) Case No. _____
) (To be supplied by the
) Clerk of the District Court)
vs.)
)
STATE OF KANSAS,)
Respondent.)
_____)

MOTION PURSUANT TO K.S.A. 60-1507
BY A PRISONER UNDER A SENTENCE OF DEATH

Movant James Kraig Kahler is a prisoner under sentence of death. A Journal Entry of Judgment reflecting the sentence imposed was filed on October 11, 2022 in underlying Case No. 09CR270. With motion under K.S.A. 60-1507, and as set out in Supreme Court Rule 183, Mr. Kahler claims he is entitled to relief from his convictions and sentence of death. He further requests this Court receive evidence on his claims for relief and vacate and set aside his convictions and death penalty sentence.

1. Place of detention:

El Dorado Correctional Facility, El Dorado, Kansas

2. Name and location of the court that imposed the sentence:

Fourth Judicial District, District Court of Osage County, Lyndon, Kansas

3. The case number and the offense or offenses for which sentence was imposed:

<u>Case Number</u>	<u>Offense</u>
09CR270	Capital Murder, K.S.A. 21-3439(a)(6)
	Aggravated Burglary, K.S.A. 21-3716

4. The date upon which sentence was imposed and the terms of the sentence:

<u>Date</u>	<u>Length of Sentence</u>
October 11, 2011	Capital Murder – Death
	Aggravated Burglary – 34 months

5. What was your plea?

Not Guilty

6. If you went to trial, what kind of trial did you have?

Jury

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

8. If you answered “yes” to (7), list

(a) the name of each court to which you appealed:

- i. Kansas Supreme Court (No. 106,981)
- ii. U.S. Supreme Court (No. 18-6135)

(b) the result in each court to which you appealed and the date of the court’s decision:

- i. *State v. Kahler*, 307 Kan. 374, 410 P.3d 105 (2018), decided February 9, 2018, motion for rehearing or modification denied April 26, 2018 – convictions and sentences affirmed.
- ii. *Kahler v. Kansas*, ___ U.S. ___, 140 S.Ct. 1021, 206 L.Ed.2d (2020), to Supreme Court of the United States, judgment of the Supreme Court of Kansas affirmed March 23, 2020.
- iii. The Kansas Supreme Court, in Case 106981, after the direct appeal of convictions and sentences in 09CR270, convictions and sentences affirmed, did issue a Mandate to the District Court of Osage County to cause execution to be had of the judgment of the Supreme Court in Case 09CR270 according to law, dated May 5, 2022 and filed the same day by

Douglas T. Shima, Clerk of the Appellate Courts, in Topeka, Kansas.

9. If you answered “no” to (7), state your reasons for not appealing:

Not applicable

10. The grounds on which you base your allegation that you are being held in custody unlawfully:

This Motion, pursuant to K.S.A. 60-1507, is James Kraig Kahler’s first motion for habeas relief.

Mr. Kahler alleges substantial violations of his Constitutional and statutory rights to receive the effective assistance of counsel, to receive due process of the law, to enjoy equal protection of the laws, to demand witnesses to testify on his behalf and to effectively confront the witnesses against him, to receive a fair trial conducted by an unbiased judge, and to have his evidence heard and decided by an unbiased and impartial jury. Further, Mr. Kahler alleges the State of Kansas has violated his Constitutional right to be free from cruel and/or unusual punishment. These claims raise violations of Mr. Kahler’s rights under the 5th, 6th, 8th, and 14th Amendments of the Constitution of the United States, and Sections 1, 9 and 10 of the Kansas Constitution Bill of Rights, as well as the Kansas statutes and regulations applicable to this case.

The following grounds for relief were founded on the preliminary investigations of Mr. Kahler’s assigned counsel. These investigations are incomplete. Mr. Kahler needs access to important material which is held by law enforcement agencies and significant material will require subpoenas be issued. After a complete investigation with court processes available in an active civil case additional and specific factual support will be identified and provided.

Therefore, Mr. Kahler alleges that his convictions and death sentence were imposed in violation of the Constitution of the United States, the Kansas Constitution Bill of Rights, the laws and regulations of the State of Kansas, and raises the following grounds for relief under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984):

- Ground 1: The State Board of Indigents' Defense Services and the district court violated Mr. Kahler's right to effective counsel in violation of his Sixth and Fourteenth Amendment rights and his Kansas statutory rights to qualified capital counsel.
- Ground 2: Mr. Kahler's trial counsel failed to conduct a meaningful capital case voir dire and failed to employ an effective, individualized method of jury selection, and, where the court discouraged honest responses from potential jurors resulted in a jury biased in favor of a death sentence and tainted with jurors who were personally connected to the homicide victims which violated the Sixth and Fourteenth Amendments to the Constitution of the United States and Section 10 of the Kansas Constitution Bill of Rights.
- Ground 3: Mr. Kahler's trial counsel were ineffective for failing to adequately support his motion for a change of venue and failing to renew that motion before or during voir dire due to the pervasive pretrial publicity and jurors' personal connections to the crime victims which had fixed juror opinions in favor of a death sentence and an unbiased jury could not be selected from the small pool of jurors available in Osage County.
- Ground 4: The trial court's failure to sequester and admonish the jurors generated instances of juror misconduct which denied Mr. Kahler a fair trial when jurors discussed the case and Mr. Kahler's guilt prior to jury deliberations.
- Ground 5: Mr. Kahler's trial counsel were ineffective when they offered a mental state (insanity) defense without expert foundation or evidentiary support which compromised and discredited the sole mitigation expert.
- Ground 6: Mr. Kahler's trial counsel were ineffective for failing to retain a forensic expert to rebut State witness Roger Butler's testimony purporting to re-enact the crimes.
- Ground 7: Mr. Kahler's trial counsel were ineffective for failing to conduct a capital case mitigation investigation and to present substantial mitigation evidence which if presented, would have resulted in a life sentence.
- Ground 8: Mr. Kahler's trial counsel developed a conflict of interest which adversely compromised an effective capital case investigation

and an effective development of Mr. Kahler's defense and mitigation case.

- Ground 9: Mr. Kahler's trial counsel was ineffective for failing to object to jury instructions on Heinous, Atrocious and Cruel (HAC) where the instructions did not require juror unanimity on the elements of that factor under the facts of this case.
- Ground 10: Mr. Kahler's appellate counsel were ineffective for failing to appeal the Constitutionality of the instruction on Heinous, Atrocious and Cruel (HAC) because the instruction as given rendered the factor vague and confusing and because it did not require juror unanimity on the elements.
- Ground 11: Mr. Kahler's trial counsel were ineffective for failing to object to and rebut the prosecution's misrepresentation of Mr. Kahler's purported "kill them both" statements to Wayne Kahler.
- Ground 12: Mr. Kahler's appellate counsel were ineffective for failing to correctly raise and brief the Eighth Amendment challenge to the Kansas death penalty which was raised by trial counsel in pretrial motions.
- Ground 13: The Kansas death penalty scheme violates the Eighth and Fourteenth Amendments to the Constitution of the United States and Sections 9 and 10 of the Kansas Constitution Bill of Rights because the penalty is so arbitrarily sought in Kansas that to impose the penalty under the facts of this case constitutes cruel and unusual punishment.
- Ground 14: Prosecutors committed error by failing to disclose critical mitigation evidence in sufficient time for Mr. Kahler's trial counsel to investigate and develop that witness for the penalty phase of the trial, and trial counsel were ineffective for failing to request a continuance to prepare the testimony for their case for life without parole for Mr. Kahler

Below Mr. Kahler presents substantial issues of fact showing he was denied his Federal and State Constitutional and Kansas statutory rights to due process and equal protection of the laws, to testify and to obtain witnesses in his favor, to effectively confront the witnesses against him, to receive a fair trial by an impartial jury, to receive effective assistance of counsel, and to be free from cruel

and/or unusual punishment.

11. This preliminary statement of grounds for relief from the death sentence are legally and factually sufficient to require the presentation of evidence at a full evidentiary hearing. See, *Bellamy v. State*, 285 Kan. 346, 172 P.3d 10 (2007).

Ground 1: The State Board of Indigents' Defense Services and the district court violated Mr. Kahler's Constitutional right to effective, qualified counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 10 of the Kansas Constitution Bill of Rights and under K.S.A. 22-4506.

The record of the case will show that after Mr. Kahler's arrest for these crimes, the district court appointed Ron Evans of the Death Penalty Defense Unit (DPDU), an office of the State Board of Indigents' Defense Services (SBIDS.) As established under Kansas law, SBIDS is required to provide for the effective representation of all persons charged with Capital Murder in Kansas. SBIDS is an agency funded and governed by the State of Kansas.

After Evans's appointment, SBIDS Executive Director, Patricia Scalia, filed a motion to interfere with Evans' appointment. At the time of the Motion to Intervene, SBIDS was out of money. The Kansas Legislature had not provided a budget for SBIDS to meet its statutory obligations. In SBIDS Motion, Ms. Scalia challenged Mr. Kahler's eligibility to be represented by Ron Evans and the DPDU as appointed counsel. Ms. Scalia asked the court to question Mr. Kahler's financial resources, and order him to hire private counsel.

At a hearing on SBIDS Motion, Mr. Kahler and Ron Evans appeared in person. Ms. Scalia appeared via telephone connection. Ms. Scalia questioned Mr. Kahler directly, and on the record, about his financial resources. Mr. Evans refused to speak on Mr. Kahler's behalf or offer Mr. Kahler any assistance with the court or Ms. Scalia. The court took the matter under advisement.

At some point after the hearing, Ms. Scalia obtained and reviewed documents filed in Mr. Kahler's Missouri divorce case. Ms. Scalia wrote a letter to Judge Fromme stating Mr. Kahler was not eligible for appointed counsel because her calculations indicated Mr. Kahler had over \$800,000 in assets. Based on those assertions, the district court removed Mr. Evans and the DPDU from the case. Then, the court handed Mr. Kahler a "list" of attorneys (provided to the court by Ms. Scalia). The court ordered Mr. Kahler to use the telephone at the jail to hire his own counsel.

Mr. Kahler will show that SBIDS is the Kansas agency tasked by statute to provide for effective defense representation. SBIDS has a special statutory duty to ensure that the State of Kansas identifies and provides effective counsel to persons charged with Capital Murder. SBIDS must provide adequate investigative and expert services in capital cases. Mr. Kahler will show that SBIDS violated their statutory mandates and agency regulations when they argued that Mr. Kahler could presently afford to hire qualified counsel to represent him through the trial process. Ms. Scalia and SBIDS removed the DPDU and Ron Evans from the case.

Mr. Kahler will provide evidence that Mr. Kahler did not have sufficient funds to raise an effective capital case defense. Mr. Kahler did not have adequate funds to pay for reasonable and necessary capital case investigative and expert defense services. SBIDS violated their statutory duty by failing to instruct the district court with a reasonable estimate of the number of hours of attorney time required by a capital case, or the costs of reasonable capital case investigations, or the costs of qualified forensic expertise, including psychological evaluations and testimony.

Mr. Kahler will show that SBIDS deprived him of his counsel of choice - Ron Evans – with whom he had developed an attorney/client relationship. Mr. Kahler will show that SBIDS denied him an effective capital case defense because he lacked sufficient funds to mount his defense. Mr. Kahler will show that SBIDS denied him an effective pretrial investigation and an effective mitigation

investigation because he lacked sufficient funds to mount such investigations. Finally, Mr. Kahler will show that SBIDS actions in removing Ron Evans denied him effective, qualified capital case representation because he lacked the funds to retain qualified capital case defense counsel.

The witnesses for this claim will include, but are not limited to, SBIDS Executive Director Heather Cessna, State of Kansas Division of the Budget personnel, Thomas Haney, Mark Manna, and Sean O'Brien.

Ground 2: In this case where the court discouraged honest responses from potential jurors, Mr. Kahler's trial counsel were ineffective when they failed to conduct a meaningful voir dire and failed to employ an individualized method of Constitutional jury selection, and those failures produced a jury biased in favor of a death sentence and tainted with jurors who were personally connected to the homicide victims in violation of Mr. Kahler's Sixth and Fourteenth Amendment rights under the Constitution of the United States and Section 10 of the Kansas Constitution Bill of Rights.

Mr. Kahler will show that his trial counsel had not tried a capital case and had no experience in capital case jury selection. Trial counsel did not obtain training on acceptable Constitutional methods of capital case jury selection and therefore could not effectively perform those methods. Trial counsel did not employ an expert to assist in selecting the jury. Mr. Kahler's counsel did not perform an individual voir dire on jurors' views of capital punishment, on their exposure to prejudicial pretrial publicity or personal connections to the case victims. Trial counsel did not voir dire on the jurors' ability to meaningfully consider mitigation in the case, respecting other jurors' consideration of mitigation evidence or consideration of mercy, which are all critical components of selecting a capital jury.

Mr. Kahler will show that the trial judge impeded defense counsel from asking basic, meaningful questions. He will show that the trial judge held defense counsel to unreasonable time limitations not imposed on State's counsel and those

limitations prevented trial counsel from conducting meaningful questioning. The trial judge intimidated and discouraged jurors from making prompt, honest and forthright responses to questions about pretrial influence by media exposure, and other disqualifying factors including fixed opinions in favor of the death penalty for all premeditated murders. Mr. Kahler will show that the trial judge's impatience and hostile attitude to defense counsel impeded defense counsel's attempts to voir dire jurors about case factors and mitigation evidence. The trial judge's obvious impatience extinguished a meaningful exchange of information between defense counsel and the individual jurors. As a result, biased and personally connected jurors were seated to decide Mr. Kahler's guilt and sentence.

Mr. Kahler will show that one jury member had direct, personal knowledge and experience inside the residence where the victims were killed and discussed this knowledge and experience during deliberations. Mr. Kahler will show that at least one juror knew at least one or more of the homicide victims in either a personal or a professional connection.

Trial counsel were shut down during voir dire by the trial court's rulings and interventions. Defense counsel were unable to elicit juror honest information related to the jurors' ability to meaningfully consider mitigating factors present in the case. The evidence will show that Mr. Kahler's counsel failed to conduct a reasonably effective Constitutional method of capital case voir dire of potential jurors. The jury seated to hear the case was uniformly biased in favor of a death sentence. More importantly, the jury was severely impaired from considering any evidence as mitigating against the death penalty in this case. Because the jury was selected in violation of the Constitution, the verdicts and determination of sentence are unreliable. Witnesses with evidence in support of this claim include, but are not limited to, Thomas Haney, Amanda Vogelsberg, Phillip Fromme, Sean O'Brien, and Rebekkah Higgs.

Ground 3: Mr. Kahler's trial counsel Mr. Kahler's trial counsel were ineffective for failing to adequately support his motion for change of venue and failed to renew the motion before or during voir dire due to the pervasive pretrial publicity and jurors' personal connections to the crime victims which had fixed juror opinions in favor of a death sentence and an unbiased jury could not be selected from the small pool of jurors available in Osage County.

Mr. Kahler will produce evidence to show that his Constitutional right to effective counsel was violated when his trial counsel failed to adequately support his motion for a change of venue, and then failed to renew the motion for change of venue after voir dire. Trial counsels were aware of the extensive pretrial media coverage of the case. The Topeka Capital Journal and other news outlets, including television media regularly reported on the progress of the pretrial proceedings. Despite knowledge of the media coverage, trial counsel did not conduct a venue study. Trial counsel did not compile and analyze media exposure of the case in Osage County which is sparsely populated.

Mr. Kahler will show that the Topeka Capital Journal regularly reported on the facts of the case, and then those accounts were picked up by local television stations and broadcast on nightly news programming across area networks. The media accounts adversely impacted and prejudiced the relatively limited pool of potential jurors. The media accounts were closely followed in the Osage County community because of homicide victim Dorothy Wight. Ms. Wight and her late husband were long-term residents and widely-known business owners in the Osage County community where the crimes took place. Mr. Kahler will show that jurors called to serve in the case had longstanding business or personal relationships with the Wight family. Many in the pool of jurors called to hear the case were familiar with the case and the crime scene.

Trial counsel were ineffective for failing to present a venue study, an

accounting of the negative and prejudicial media coverage, and to zealously pursue a change of venue. Trial counsel failed to hire a jury consultant and failed to gather information about potential jurors and to ask questions which would have revealed close relationships with Ms. Wight, her deceased husband, Karen Kahler or her siblings. Such familiarity with the victims in combination with extensive, negative pretrial publicity would have been reduced in a different venue. Finally, Mr. Kahler will establish that his counsel were ineffective for failing to renew their motion to change venue after a minimal voir dire indicated a sufficiently impartial jury could not be selected. Witnesses with information and evidence about this claim include, but are not limited to, Thomas Haney, Amanda Vogelsberg, Brett Dillingham, Sean O'Brien and Rebekkah Higgs.

Ground 4: The trial court's failure to sequester the trial jurors fostered juror misconduct and denied Mr. Kahler a fair trial when jurors discussed the case and Mr. Kahler's guilt before they were properly instructed and released to deliberate.

Mr. Kahler will show that the jury in this highly publicized prosecution was not sequestered. Media coverage of the trial was significant and obvious to the participants. Law enforcement personnel were prominently situated in and around the courthouse and the courthouse grounds. Mr. Kahler's security guards walked him to and from the county jail as he was monitored by trial observers.

Jurors traveled to the parking area for the daily proceedings. The parking lot is near to and surrounding the courthouse. Jurors parked within yards of the Courthouse square. Local businesses adjoin the streets around the Courthouse grounds and local residents and shoppers watched the daily court events from the sidewalks. Mr. Kahler's jurors traversed this scene several times a day, including for smoke breaks and lunch and at the end of the daily proceedings. The district court's admonishments to "not discuss the proceedings" were insufficient to shield these jurors from public scrutiny and public pressures. each other or were related to

The court did not enact limitations sufficient to prevent jurors from talking to each other about the evidence. Two seated jurors were a mother and her daughter and traveled to and from court proceedings in the same vehicle. Mr. Kahler is aware that one juror observed and overheard two jurors discussing and agreeing on Mr. Kahler's guilt before the guilt phase evidence was concluded. Trial jurors who can offer evidence in support of this claim are not identified in this pleading.

Ground 5: Mr. Kahler's trial counsel were ineffective by offering a mental state (insanity) defense without sufficient expert foundation or evidentiary support which discredited the expert's testimony in mitigation of sentence.

The trial record will show that Mr. Kahler's defense team filed a Notice that they would offer a defense under K.S.A. 22-3219, asserting Mr. Kahler lacked the mental state to commit premeditated capital murder. This defense is commonly characterized as "the insanity defense." When a criminal defendant declares he will rely on defense, the prosecution is entitled to retain an expert to conduct an "independent" psychiatric evaluation of the defendant.

Mr. Kahler's counsel failed to conduct a thorough, competent investigation of him as required by the circumstances of this case. His counsel failed to perform the required developmental, social and psychological background needed before choosing to offer the defense. Mr. Kahler's defense team did retain psychiatrist Dr. Stephen Peterson. Dr. Peterson reviewed law enforcement investigation materials and conducted some psychological assessments of Mr. Kahler. However, Dr. Peterson was not provided with information needed to develop an accurate opinion.

Mr. Haney's failure to competently investigate Mr. Kahler's background foreclosed an accurate mental state defense and opened the door to a forensic interrogation and damaging rebuttal testimony by a prosecuting psychiatrist, Dr. William Logan. Mr. Haney was ineffective for offering an unsupported mental state defense during the guilt phase of the trial and providing no additional factual support to the mitigation factors based on mental illness diagnoses.

Mr. Kahler will show that he was denied an effective guilt phase defense due to ineffective counsel and advice which prejudiced his pretrial preparation and an effective defense in the guilt phase of the case. The witnesses for this claim will include, but are not limited to, Thomas Haney, Amanda Vogelsberg, Dr. Stephen Peterson, Dr. William Logan, Meryl Carver-Allmond, Mark Manna.

Ground 6: Mr. Kahler's trial counsel were ineffective for failing to retain a forensic expert to rebut State witness Roger Butler's testimony purporting to re-enact the crimes.

Mr. Kahler received ineffective representation when his trial counsel failed to retain a forensic expert to investigate the law enforcement investigations and reports about the crime scene. Mr. Kahler's counsel were ineffective in cross-examining or rebutting the testimony of KBI Agent Roger Butler. Mr. Butler offered his opinions in the form of a "re-enactment" of the crimes. Mr. Butler claimed the evidence at the scene documented the movement and actions of Mr. Kahler as if those actions could be "proved" by the photographs and evidence collected. Mr. Butler offered his opinion that the observed patterns including "blood" and "shell casing distribution" patterns established Mr. Kahler's movements.

Mr. Kahler's defense team failed to adequately investigate the crime scene and failed to employ their own expert. Mr. Kahler will establish through expert testimony that Mr. Butler's re-enactment is not credible. Mr. Butler did not possess the education, training and forensic qualifications to offer his forensic conclusions and that those conclusions were not supported by the evidence. Expert testimony will establish the crime scene residence and surrounding areas were thoroughly disturbed and contaminated by dozens of responding law enforcement officers. If a forensic expert had been utilized by the defense, and proper objections were made, Mr. Butler's opinions would not have been admitted as reliable and scientifically sound.

Mr. Butler's testimony was offered not only as guilt phase evidence, but was

also argued by the prosecution in support of the aggravating factor. If the defense had offered testimony from a credible forensic crime scene expert, the jury would have rejected a major component of the prosecution's aggravating factor "Heinous, Atrocious and Cruel (HAC).

Witnesses who may provide evidence on this claim include, but are not limited to, Thomas Haney, Amanda Vogelsberg, Laura Schile and Roger Butler.

Ground 7: Mr. Kahler's trial counsel were ineffective for failing to conduct a capital case mitigation investigation and to present substantial mitigation evidence which if presented, would have convinced the jury to impose a life sentence.

Mr. Kahler will establish what facts and evidence a competent mitigation investigation would have uncovered. He will show his trial counsel were ineffective when they failed to conduct a mitigation investigation and failed to retain the assistance of a mitigation specialist to investigate all aspects of Mr. Kahler's background.

Trial counsel were aware of the 2003 ABA Guidelines for Capital Case Defense which set reasonable and appropriate standards for capital case defense. Modern standards of capital case defense always include a mitigation specialist as a necessary and critical member of the defense team. Mr. Kahler's trial team contacted mitigation specialists and investigators, but they did not retain one. Trial counsel did not investigate, identify and present important mitigation testimony and critical mitigation witnesses for the penalty phase. No mitigation case theory was developed. It appears that trial counsel merely repackaged the mental disease or defect (insanity) evaluations of Dr. Peterson from the guilt phase defense.

Mr. Kahler will present evidence and information about Mr. Kahler's long-standing psychological deficits. If a mitigation investigation had been done

trial counsel would have presented the evidence during the penalty phase of the case. The jury should have learned about the individual characteristics of Mr. Kahler from a social history perspective. If the jury had been provided an accurate account of Mr. Kahler's functioning within his intimate relationships and the specific challenges of his long-standing marriage and its acrimonious dissolution, the jury would have arrived at a life without parole sentence in this case.

An adequate and competent mitigation investigation would have produced information and witnesses who had evidence which would have convinced jurors to favor of a life sentence. Mr. Kahler's habeas counsel have located numerous witnesses who were not interviewed by any member of the defense team prior to trial. These important witnesses have significant information and details about Mr. Kahler's childhood, family history, social development, life history and marriage. Habeas counsel have located numerous witnesses who would testify about significant mental depression, anxiety and other major markers of Mr. Kahler's individual, immutable characteristics. These characteristics and mental illnesses will document his mental deterioration during the divorce proceedings and prior to the homicides.

Witnesses who will support of this claim include, but are not limited to Thomas Haney, Amanda Vogelsberg, Brandi Studer, Mary K. Poiror, Cyndy Short, Sean O'Brien.

Ground 8: Mr. Kahler's trial counsel developed a conflict of interest which compromised a competent, effective capital case investigation and Mr. Kahler's defense and mitigation case.

To support this claim, Mr. Kahler will show his trial counsel developed a conflict of interests with an effective capital case defense. Mr. Kahler's financial

resources were removed from his control after his arrest for the crimes. Kahler's father had a financial power of attorney over Mr. Kahler's assets and resources made all decisions concerning Mr. Kahler's defense expenditures. Legal conflicts developed among Karen Kahler's siblings and Kraig Kahler's parents. Surviving family members on both sides of the marriage were seeking custody of Mr. Kahler's surviving child. Multiple attorneys retained by the interested parties, and those assigned by the courts were active in efforts to preserve the Kahler's marital assets for future support of Mr. Kahler's minor son.

The assets Mr. Kahler set aside for his criminal trial defense were depleted quickly. In the months leading up to the trial, Mr. Haney and Ms. Vogelsberg were not being reimbursed for their services. Clearly, the necessary experts and investigative services were not obtained. Eventually, Mr. Haney informed the district court that Mr. Kahler was out of money and asked that the court appoint him. The district court refused.

Even though he knew a competent mitigation investigation had not been done, Mr. Haney did not contact SBIDS for resources to hire those investigative services. Mr. Haney did not ask for a continuance so that SBIDS counsel could be re-appointed and expert services obtained through SBIDS.

The financial constraints on Mr. Haney and Ms. Vogelsberg limited and compromised the mitigation investigation and the retention of necessary experts. Mr. Kahler's trial counsel had developed a financial conflict of interest. These constraints and conflicts affected the course of the trial and the ultimate presentation of mitigating evidence at sentencing. Witnesses with information about this claim include, but are not limited to, Thomas Haney, Amanda Vogelsberg, Pat Kahler, James Kraig Kahler, Doug Fincher, Craig Wetta, Dr. George Athey, Dr. Stephen Peterson, and Sean O'Brien.

Ground 9: Mr. Kahler's trial counsel was ineffective for failing to object to jury instructions on Heinous, Atrocious and Cruel (HAC) where the instructions did not require juror unanimity on the elements of that factor under the facts of this case.

Trial counsel for Mr. Kahler failed to raise and argue issues related to the sufficiency of the jury instructions regarding the prosecution aggravator evidence. The instructions about the appropriate burden of proof for penalty phase evidence, and the requirement of jury unanimity were insufficient to guide the jury in a proper consideration of the evidence. If trial counsel had objected to the instructions and made offer of correct statements of law regarding burden of proof and jury unanimity on specific elements of the heinous, atrocious and cruel aggravator, the jury would have received correct instructions and the outcome of the penalty phase would have been life without parole rather than a death sentence.

A more detailed briefing on this issue and identification of witnesses who have information in support will be provided to the Court after a more complete investigation.

Ground 10: Mr. Kahler's appellate counsel were ineffective for failing to appeal the Constitutionality of the instruction on Heinous, Atrocious and Cruel (HAC) because the instruction as given rendered the factor vague and confusing and because it did not require juror unanimity on the elements.

Appellate counsel representing Mr. Kahler failed to raise and argue issues related to the sufficiency of the jury instructions regarding the prosecution aggravator evidence. The instructions about the appropriate burden of proof for

penalty phase evidence, and the requirement of jury unanimity were insufficient to guide the jury in a proper consideration of the evidence. Appellate counsel failed to articulate an effective argument which if considered by the Kansas Supreme Court would have resulted in a different outcome on the penalty phase issues.

A more detailed briefing on this issue and identification of witnesses who have information in support will be provided to the Court after complete investigation.

Ground 11: Mr. Kahler's trial counsel were ineffective for failing to object to and rebut the prosecution's misrepresentation of Mr. Kahler's purported "kill them both" statements to Wayne Kahler.

This claim for relief involves statements Wayne Kahler - Mr. Kahler's father - made to KBI Agent William Halvorsen on the night of the homicides. Agent Halvorsen interviewed Wayne Kahler at the Shawnee County Law Enforcement Center. The interview was recorded. Despite having knowledge and information to the contrary, the prosecution engaged in improper questioning of Wayne Kahler during the trial. Compounding this error, the prosecution argued to the jury that Mr. Kahler had told Wayne Kahler that he had thoughts about killing his daughters. This is a misrepresentation of Wayne Kahler's statements to Agent Halvorsen. When Wayne Kahler was interviewed by Halvorsen the night of the homicides, Wayne talked about comments by Mr. Kahler's that he was despondent about the sexual affair between his wife and her lover. It was clear on the recordings that Wayne, and his interviewer Halvorsen understood Mr. Kahler's comment referred to the wife and her lover, not the two daughters. But the prosecution bullied Wayne Kahler into testifying that Mr. Kahler could have been referring to his daughters. Trial counsel Mr. Haney was ineffective for failing to adequately rebut the false statement through Wayne Kahler, his recorded statements and the recorded deposition testimony of William Halvorsen. Under the

circumstance of this death penalty prosecution, the misstatements were highly prejudicial and bolstered both the guilt phase premeditation evidence, but also aggravating factor “heinous, atrocious and cruel” offered in support of the death penalty. The prosecution’s error and the defense counsel’s failure to correct the error with effective cross-examination and/or rebuttal misled the jury. Without the false statement offered as evidence, the jury would have reached a different decision concerning the aggravation and returned a verdict of life without parole.

Ground 12: Mr. Kahler’s appellate counsel were ineffective for failing to correctly raise and brief the Eighth Amendment challenge to the Kansas death penalty which was raised by trial counsel in pretrial motions.

As noted by the Kansas Supreme Court, Mr. Kahler’s appellate counsel failed to offer any new evidence or new argument to the Eighth Amendment claim raised in Mr. Kahler’s appeal. Mr. Kahler’s trial counsel Ms. Vogelsberg properly raised this issue in pretrial proceedings. Trial counsel provided new evidence and argument demonstrating the Kansas death penalty scheme violates the Eighth Amendment of the Constitution of the United States and Section 9 of the Kansas Constitution Bill of Rights. Appellate counsel were in possession of substantial and available evidence in support of this issue, but failed to provide that evidence during the appellate process.

Had the evidence been properly gathered, reviewed and presented to the Kansas Supreme Court, the Court would have found the Kansas death penalty scheme does violate the Eighth Amendment prohibitions against cruel and unusual punishment and also violates Section 9 of the Kansas Constitution Bill of Rights.

Witnesses with information and evidence about this claim include, but are not limited to Thomas Haney, Amanda Vogelsberg, Sarah Johnson, and Meryl Carver-Allmond.

Ground 13: The Kansas death penalty scheme violates the Eighth and Fourteenth Amendments to the Constitution of the United States and Sections 1, 9 and 10 of the Kansas

Constitution Bill of Rights because the penalty is so arbitrarily sought in Kansas that to impose the penalty under the facts of this case constitutes cruel and unusual punishment.

Mr. Kahler has procured a comprehensive set of court and prosecution records documenting the Kansas prosecutions for Capital Murder since 1994. Only 15 prosecutions for Capital Murder have resulted in a death sentence with only nine people held under a death sentence today. Mr. Kahler will present the testimony of experts who will have completed a study of prosecutions under the Kansas death penalty scheme. The study will identify and analyzes a defined set of common factors which are measurable within the complete, finite set of cases in which Capital Murder was charged. After controlling for significant case variables, the study will show that the Kansas death penalty is imposed so rarely and so arbitrarily that it is cruel and unusual under currently recognized Constitutional standards and cannot be upheld in this case.

The data supporting this ground for relief is voluminous and is not presented here. Through the presentation of the data and testimony of experts in the field, Mr. Kahler will establish that his death sentence was imposed under an Unconstitutional scheme and it violates Mr. Kahler's rights under Sections 9 and 10 of the Kansas Constitution Bill of Rights and the Eighth and Fourteenth Amendments to the United States Constitution.

Witnesses with evidence and testimony on this claim may include, but are not limited to Mark Manna, Dr. Katherine Beckett, and Dr. Heather Evans.

Ground 14: Prosecutors committed error by failing to disclose critical mitigation evidence in sufficient time for Mr. Kahler's trial counsel to investigate and develop that witness for the penalty phase of the trial, and trial counsel were ineffective for failing to request a continuance to prepare the testimony for their case for life without parole for Mr. Kahler.

After Mr. Kahler's arrest, the State of Kansas placed Mr. Kahler's minor son into the care of the state while court review was completed. Residential custody of the son changed during the criminal proceedings. The paternal grandparents and the maternal siblings were involved in family law and estate matters. Mr. Kahler and his attorneys were blocked from communicating with Mr. Kahler's son.

Sometime before trial Mr. Kahler's son told prosecutors through a social media account that he did not want his father to receive the death sentence because he did not want to lose his entire family. Mr. Jones did not reveal this to the defense team until the penalty phase of the trial. The statement – as recounted by Mr. Jones - was provided to the jury in a written stipulation. Mr. Kahler's counsel interviewed the son, but did not fully develop this critical mitigating evidence and present it to the jury. The defense team did not have time to consult with qualified child advocates, or fully developed a meaningful plea for a life sentence for the jury to consider. Further, defense counsel did not ask for a continuance to competently retain experts to interview the son about his desire to save his father. But for the prosecution's error, the son's plea for his father's life would have been completely investigated and developed for the jury's consideration and their decision would have been for life in prison, rather than a death sentence.

12. With respect to this conviction, prior to this motion have you filed:

(a) any petitions in state or federal courts for habeas corpus?

No

(b) any petitions in the United States Supreme Court for certiorari other than petitions already specified in (8)?

(c) any other petitions, motions, or applications in this or any other court?

No

13. If you answered "yes" to any part of (12), list with respect to each

petition, motion, or application:

Not applicable

14. Has any ground set forth in (10) been presented previously to this or any other court in any petition, motion, or application that you have filed?

No

15. If you answered "yes" to (14), identify:

Not applicable

16. If any ground set forth in (10) has not been presented previously to any court set forth the ground and state concisely the reasons why the ground has not been presented previously:

The grounds presented relate to ineffective assistance of counsel, prosecutorial misconduct, and juror misconduct, which involve matters outside the trial and appellate record and cannot be raised on direct appeal.

17. Were you represented by an attorney at any time during the course of (a) your preliminary hearing?

Yes

(b) your arraignment and plea?

Yes

(c) your trial, if any?

Yes

(d) your sentencing?

Yes

(e) your appeal, if any, from the judgment of conviction or the imposition of sentence?

Yes

(f) preparation, presentation, or consideration of any petition, motion or application that you filed regarding this conviction?

Yes

18. If you answered "yes" to one or more parts of (17) list

(a) the name and address of each attorney who represented you:

- i. Ronald F. Evans
Death Penalty Defense Unit
c/o State Board of Indigents Defense
700 SW Jackson St, Suite 500
Topeka, Kansas 66603
- ii. Thomas D. Haney
Stevens & Brand, LLP (current)
4848 SW 21st St, Suite 201
Topeka, Kansas 66604
- iii. Brandi L. Studer
Death Penalty Defense Unit (current)
700 SW Jackson St, Suite 500
Topeka, KS 66603
Henson, Hutton, Mudrick & Gragson, LLP (former)
100 SE 9th St, 2nd Floor
Topeka, Kansas 66612
- iv. Amanda S. Vogelsberg
Henson, Hutton, Mudrick, Gragson & Vogelsberg, LLP (current)
3649 SW Burlingame Rd, Suite 200
Topeka, Kansas 66611
- v. Rebecca E. Woodman
Rebecca E. Woodman, Attorney at Law, LC (current)
1263 W 72nd Terr
Kansas City, MO 64114
Capital Appellate Defender (former)
700 SW Jackson St, Suite 903
Topeka, Kansas 66603
- vi. Sarah Ellen Johnson
The Johnson Law Group LLC (current)
810 Pennsylvania St, Suite 26
Lawrence, KS 66044

Capital Appellate Defender (former)
700 SW Jackson St, Suite 903
Topeka, Kansas 66603

vii. Meryl Carver-Allmond

Kansas State Board of Indigents' Defense Services (current)
700 SW Jackson St, Suite 500
Topeka, KS 66603

Capital Appellate Defender (former)
700 SW Jackson St, Suite 903
Topeka, Kansas 66603

viii. Reid T. Nelson

Capital Appeals & Conflicts
701 SW Jackson St, 3rd Floor
Topeka, Kansas 66603

ix. Clayton Perkins

Capital Appellate Defender
700 SW Jackson St, Suite 903
Topeka, Kansas 66603

x. Jeffrey T. Green

Sidley Austin, LLP
1501 K St NW
Washington, D.C. 20005

xi. Tobias Loss-Eaton

Sidley Austin, LLP
1501 K St NW
Washington, D.C. 20005

xii. Jennifer C. Rathmell

Sidley Austin, LLP
1501 K St NW
Washington, D.C. 20005

xiii. Sarah O'Rourke Schrup

United States Court of Appeals for the Seventh Circuit (current)
219 S. Dearborn St.
Chicago, Illinois 60604

xiv. Julia S. Spainhour

Kansas Capital Habeas Office
825 S Kansas Ave, Suite 530
Topeka, Kansas 66612

(b) the proceedings at which the attorney represented you:

- i. Proceedings in the District Court (approx. 12/01/09 – 01/19/10)
- ii. Proceedings in the District Court (approx. 02/01/10 – 10/11/11)
- iii. Proceedings in the District Court (approx. 02/03/10 – 10/04/10)
- iv. Proceedings in the District Court (approx. 11/05/10 – 10/11/11)
- v. Appellate proceedings before the Kansas Supreme Court
- vi. Appellate proceedings before the Kansas Supreme Court
- vii. Appellate proceedings before the Kansas Supreme Court and petition to the U.S. Supreme Court
- viii. Post-appeal motions before the Kansas Supreme Court
- ix. Petition to the U.S. Supreme Court
- x. Petition to the U.S. Supreme Court
- xi. Petition to the U.S. Supreme Court
- xii. Petition to the U.S. Supreme Court
- xiii. Petition to the U.S. Supreme Court
- xiv. Assisted in the preparation of this pro se motion

(c) whether the attorney was appointed by the court or of your own choosing?

Thomas D. Haney and his firm were retained by Mr. Kahler. All remaining counsel were court-appointed or assigned by SBIDS.

19. If your motion is based on the district court's refusal to appoint you counsel, attach the transcript of the proceedings which supports your allegation.

20.
Not applicable

21. If your motion is based on the failure of counsel to represent you adequately, state concisely and in detail what counsel failed to do in representing your interests: See response to (10).

22. Are you now serving a sentence from any other court that you have

not challenged?

No

21. If more than one year has passed since either the final order of the last state appellate court in your direct appeal, or the denial of a petition for writ of certiorari to the United States Supreme Court, or issuance of the United States Supreme Court's final order following the grant of a petition for writ of certiorari, whichever was last occurring, explain why the one-year statute of limitations in K.S.A. 60-1507(f) should be extended to prevent dismissal of your motion.

Not applicable

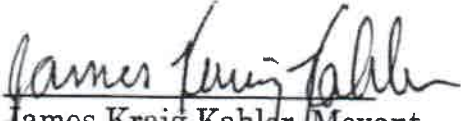
22. Are you seeking permission to proceed *in forma pauperis*?

Yes

If so, have you attached the completed affidavit and certified inmate account statement (see instructions, page 1 of this form)?

I, James Kraig Kahler, declare under penalty of perjury that the foregoing is true and correct.

Signed this day of _____ 2022.


James Kraig Kahler, Movant

CERTIFICATE OF SERVICE

I certify that on 01-19-2023, on behalf of James Kraig Kahler, I electronically filed the foregoing with the Clerk of the District Court using the electronic filing system, and that I served a true and accurate copy of the foregoing by electronic mail and by First Class Mail to:

Kris Kobach
Kansas Attorney General
120 SW 10th Ave, 2nd Floor
Topeka, Kansas 66612
Phone: (785) 296-2215
Fax: (785) 296-6296
general@ag.ks.gov

Tonya Vignery, #21637
Osage County Attorney
P.O. Box 254
Lyndon, Kansas 66451
Phone: (785) 828-4937
Fax: (785) 828-3150

and by First Class Mail to:

James Kraig Kahler, Inmate
#0101355
El Dorado CF-Central
P.O. Box 311
El Dorado, KS 67042

Respectfully submitted

/s/ Julia S. Spainhour
Julia S. Spainhour,
#17805