REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF KANSAS

REPORTER:

SARA R. STRATTON

Advance Sheets, Volume 316, No. 1
Opinions filed in July – August 2022

"Advance Sheets of the Kansas Supreme Court and Kansas Court of Appeals" (USPS 007-480) are published every month except February, June, August, and October by the State of Kansas, Kansas Judicial Center, 301 West 10th, Topeka, Kansas 66612-1598. Periodical postage paid at Topeka, Kansas. POSTMASTER: Send address changes to "Advance Sheets of the Kansas Supreme Court and Kansas Court of Appeals," State Law Librarian, Kansas Judicial Center, 301 West 10th, Topeka, Kansas 66612-1598.

JUSTICES AND OFFICERS OF THE KANSAS SUPREME COURT

———

CHIEF JUSTICE:

HON. MARLA J. LUCKERT ..... Topeka

JUSTICES:

HON. ERIC S. ROSEN ..... Topeka
HON. DAN BILES ..... Shawnee
HON. CALEB STEGALL ..... Lawrence
HON. EVELYN Z. WILSON ..... Smith Center
HON. KEYNEN WALL JR. ..... Scott City
HON. MELISSA TAYLOR STANDRIDGE ……..…..... Leawood

OFFICERS:

Reporter of Decisions…….……SARA R. STRATTON
Clerk.....DOUGLAS T. SHIMA
Judicial Administrator ..... STEPHANIE BUNTEN
Disciplinary Administrator ..... GAYLE B. LARKIN

Page

Bruce v. Kelly 218
City of Olathe v. City of Spring Hill.....64
City of Wichita v. Trotter.....310
Delaware Township v. City of Lansing, Kansas.....86
In re Borich 257
In re Equalization Appeal of Walmart Stores, Inc.....32
In re Pistotnik.....96
In re Renkemeyer.....74
In re Whinery 119
Roll v. Howard.....278
State v. Bates.....174
State v. Betts 191
State v. Brown.....154
State v. Buchhorn.....324
State v. Collier 109
State v. Eubanks.....355
State v. Genson 130
State v. Hilyard 326
State v. Mulleneaux 75
State v. Valdez 1
State v. White.....208
State v. Zeiner 346

PETITIONS FOR REVIEW OF DECISIONS OF THE COURT OF APPEALS 316 Kan. No. 1

TITLE	DOCKET NUMBER	DISPOSITION	DATE	REPORTED BELOW
Belone v. State	123,374	Denied	08/26/2022	Unpublished
Bookter v. Knisley	123,972	Denied	07/07/2022	Unpublished
Cybertron International, Inc. v. Capps	122,439	Denied	07/06/2022	Unpublished
Degand v. Stormont Vail Healthcare, Inc.	123,526	Denied	07/22/2022	Unpublished
Flores v. State	123,212	Denied	07/05/2022	Unpublished
Gaines v. Norwood	124,255	Denied	08/12/2022	Unpublished
Harris v. State	122,314	Denied	07/05/2022	Unpublished
Haygood v. State	123,673	Denied	08/26/2022	Unpublished
In re A.H.	124,131	Denied	08/09/2022	Unpublished
In re C.H.	123,640	Denied	07/01/2022	Unpublished
In re C.H.	123,971	Denied	07/01/2022	Unpublished
In re C.N.	123,334			
	123,335			
	123,336	Denied	07/01/2022	Unpublished
In re Equalization Appeal of Kansas Star Casino	122,201	Denied	07/07/2022	Unpublished
In re I.O.	124,382	Denied	08/09/2022	Unpublished
In re L.W.	123,539	Denied	07/01/2022	Unpublished
In re M.S.	123,824	Denied	07/01/2022	Unpublished
In re Marriage of Murphy	123,569	Denied	07/07/2022	Unpublished
In re Marriage of Zillinger	123,563	Denied	07/07/2022	Unpublished
In re R.J.	122,230	Denied	08/09/2022	Unpublished
In re T.L.	124,196	Denied	07/01/2022	Unpublished
In re Z.J.	124,350	Denied	08/09/2022	Unpublished
Jaghoori v. Langford	124,242	Denied	08/09/2022	Unpublished
Johnson v. Ruiz	123,646	Denied	07/01/2022	Unpublished
Lacost v. Boot Hill Casino & Resort	123,873	Denied	07/06/2022	Unpublished
League of Women Voters of Kansas v. Schwab	124,378	Granted	08/26/2022	62 Kan. App. 2d 310
McConnell v. State	123,246	Denied	07/05/2022	Unpublished
McGregor v. McGregor	123,657	Denied	07/07/2022	Unpublished
Mitchell v. Kansas Dept. of Revenue	123,534	Denied	07/07/2022	Unpublished
Pyle v. Gall	123,823	Granted	08/26/2022	Unpublished
Raskie v. State	122,753	Denied	08/19/2022	Unpublished
Ridley v. State	123,566	Denied	07/01/2022	Unpublished
Russell v. Kansas Dept. of Revenue	123,380	Denied	07/07/2022	Unpublished
Schwarz v. Schwarz	123,444	Denied	07/07/2022	62 Kan. App. 2d 103
State v. Baggett	121,854	Denied	07/07/2022	Unpublished
State v. Barrett	122,410			
	122,411	Denied	07/05/2022	Unpublished

Title	Docket Number	Disposition	Date	Reported Below
State v. Bentley	123,185	Granted	08/01/2022	Unpublished
State v. Bilbrey	123,637	Granted	08/26/2022	Unpublished
State v. Bradley	123,177	Denied	08/19/2022	Unpublished
State v. Brown	123,106	Denied	07/05/2022	Unpublished
State v. Burkart	123,793			
	123,794	Denied	08/26/2022	Unpublished
State v. Byrd	122,458	Denied	08/19/2022	Unpublished
State v. Carpenter	123,481	Denied	08/26/2022	Unpublished
State v. Carson	123,287			
	123,288	Denied	08/26/2022	Unpublished
State v. Collier	123,582	Denied	08/26/2022	Unpublished
State v. Co	122,797	Denied	07/06/2022	Unpublished
State v. Cox	123,587	Denied	08/26/2022	Unpublished
State v. Dailey	123,010	Denied	08/19/2022	Unpublished
State v. Daily	123,538	Denied	08/26/2022	Unpublished
State v. Deck	123,807	Granted	08/26/2022	Unpublished
State v. Dunn	123,141	Denied	07/05/2022	Unpublished
State v. Eckert	120,566	Granted	07/08/2022	Unpublished
State v. Ellis	121,383	Denied	07/05/2022	Unpublished
State v. Epp	121,872	Denied	07/01/2022	Unpublished
State v. Fairchild	123,712	Denied	08/26/2022	Unpublished
State v. Ferguson	123,756	Denied	08/26/2022	Unpublished
State v. Fitzgerald	123,121	Denied	07/06/2022	Unpublished
State v. Frias	122,735	Denied	08/19/2022	61 Kan. App. 2d 234
State v. Gebremariam	122,958	Denied	08/19/2022	Unpublished
State v. Gray	123,730	Denied	07/06/2022	Unpublished
State v. Gray	123,281			
	123,282	Denied	08/26/2022	Unpublished
State v. Griffin	123,055			
	123,372	Denied	07/05/2022	Unpublished
State v. Gutierrez	122,585	Denied	08/19/2022	Unpublished
State v. Harbacek	124,513	Denied	07/07/2022	Unpublished
State v. Harrison	122,750	Denied	07/05/2022	Unpublished
State v. Heskett	123,560	Denied	07/05/2022	Unpublished
State v. Hughes	123,441	Denied	08/26/2022	Unpublished
State v. Jackson	121,827	Granted; summarily vacated in part; remanded to Ct. of App.	07/06/2022	Unpublished
State v. Jackson	123,286	Denied	07/05/2022	Unpublished
State v. Jackson	123,520	Denied	07/07/2022	Unpublished
State v. Kemp	123,245	Denied	07/05/2022	Unpublished
State v. Kennon	123,292	Denied	08/26/2022	Unpublished
State v. Kewish	121,793	Denied	07/05/2022	Unpublished
State v. Lara-Baca	123,261	Denied	08/19/2022	Unpublished
State v. Letterman	123,717	Denied	08/26/2022	Unpublished
State v. Littrell	122,982	Denied	07/07/2022	Unpublished
State v. Lopez	123,339	Denied	08/26/2022	Unpublished

Title	Docket Number	Disposition	Date	Reported Below
State v. Love	123,953			
	123,956	Denied	08/26/2022	Unpublished
State v. Malcolm	122,610	Denied	07/06/2022	Unpublished
State v. Markley	123,098			
	123,099	Denied	08/19/2022	Unpublished
State v. Martinez	121,204	Granted	07/22/2022	Unpublished
State v. McFadden	122,838	Denied	07/05/2022	Unpublished
State v. Mendoza	122,476	Denied	08/19/2022	Unpublished
State v. Meredith	120,793	Denied	07/01/2022	Unpublished
State v. Midgyett	121,868	Denied	07/05/2022	Unpublished
State v. Mork	121,859	Denied	08/19/2022	Unpublished
State v. Nelson	123,875	Denied	07/05/2022	Unpublished
State v. Newman-Caddell	121,956	Granted	08/26/2022	Unpublished
State v. Preece	123,326	Denied	08/26/2022	Unpublished
State v. Ruiz	123,260	Granted	08/26/2022	Unpublished
State v. Saenz-Ortiz	122,970	Denied	08/19/2022	Unpublished
State v. Sinclair	122,441	Denied	07/06/2022	Unpublished
State v. Slusser	121,460	Granted	07/22/2022	Unpublished
State v. Smith	122,432	Denied	07/05/2022	Unpublished
State v. Smith	123,783	Granted	08/26/2022	Unpublished
State v. Smith	123,452	Denied	08/26/2022	Unpublished
State v. Stone	123,846	Denied	08/26/2022	Unpublished
State v. Strong	121,865	Granted	07/22/2022	61 Kan. App. 2d 31
State v. Thompson	123,136	Denied	08/19/2022	Unpublished
State v. Wahquahboshkuk	123,404	Denied	08/26/2022	Unpublished
State v. Wheeler	123,365	Denied	08/26/2022	Unpublished
State v. Whitaker	123,293	Denied	07/05/2022	Unpublished
State v. Widener	122,591	Denied	07/05/2022	Unpublished
State v. Wills	122,493	Denied	07/07/2022	Unpublished
State v. Wood	123,683	Denied	07/05/2022	Unpublished
State v. Zimmerman	123,426	Denied	07/05/2022	Unpublished
Wheeler v. State	122,956	Denied	08/19/2022	Unpublished
Wimbley v. State	122,790	Denied	08/19/2022	Unpublished

SUBJECT INDEX
316 Kan. No. 1

PAGE

APPEAL AND ERROR:

Challenge to Court's Error of Law—Appellate Review Unlimited. When a party challenges a court's error of law, an appellate court's review of that error is unlimited. *City of Wichita v. Trotter* 310

Ineffective Assistance Claim Raised First Time on Direct Appeal—Evidentiary Hearing Not Required if Defendant Did Not Request. Absent a request from the defendant, this court need not remand a case for an evidentiary hearing to resolve an ineffective assistance claim raised for the first time on direct appeal. *State v. Hilyard* 326

Issue Raised First Time on Appeal—Appellate Review. In general, an appellate court will not address an issue raised for the first time on appeal, although there are limited exceptions. An appellate court's refusal to invoke an exception to this general rule will be reviewed for abuse of discretion. A court abuses its discretion when its exercise is based on an error of law or fact, or when no reasonable person would have taken the view adopted by the court. *State v. Valdez* 1

New Issue Raised Sua Sponte by Appellate Court—Opportunity to Brief Issue before Determination of Issue. When an appellate court raises a new issue sua sponte, counsel for all parties should be afforded a fair opportunity to brief the new issue and present their positions to the appellate court before the issue is finally determined. *City of Wichita v. Trotter* ... 310

Six Justices Equally Divided on Issues on Appeal—Judgment Must Stand. When one of the justices is disqualified to participate in a decision of the issues raised in an appeal or petition for review, and the remaining six justices are equally divided as to the proper disposition of the issues on appeal or review, the judgment of the court from which the appeal or petition for review is made must stand. *State v. Buchhorn* 324

Sua Sponte Consideration of Issue Not Raised by Parties–To Serve Justice or Prevent Denial of Fundamental Rights. Appellate courts do not ordinarily consider an issue not raised by the parties, but may do so sua sponte when the issue's consideration is necessary to serve the ends of justice or prevent the denial of fundamental rights after notice to the parties and allowing them an opportunity to address the issue raised by the court. *State v. Valdez*.....1

APPELLATE PROCEDURE:

Certified Questions Must Be Questions of Law of this State. Questions certified to the Kansas Supreme Court under K.S.A. 60-3201 must be questions of law of this state. In answering certified questions, this court will not decide questions of law outside the scope of the certified question, nor will this court decide any question of fact. *Bruce v. Kelly* 218

PAGE

ATTORNEY AND CLIENT:

Court's Duty to Inquire Into Claim Whether Counsel Provided Effective Assistance—Appellate Review. A defendant's articulation of a substantial allegation about counsel's effective assistance triggers a district court's duty to inquire into a potential attorney-client conflict. This duty derives from the defendant's right to effective assistance of counsel under the state and federal Constitutions. An appellate court reviews the district court's inquiry for abuse of discretion. *State v. Valdez* ……..…. 1

Disciplinary Proceeding—Disbarment. Attorney charged with felony charge of breach of privacy voluntarily surrendered his license to practice law in Kansas. That charge and the disciplinary complaint filed as a result of that charge both were both pending upon the filing of this opinion.
In re Renkemeyer ……..….74

— **One-year Suspension**. Attorney violated KRPC 1.2, 1.3, and 8.4(d) and (g) by failing to define the scope of his representation and failing to diligently give notice to parties of his power of attorney. The Supreme Court accepted summary submission agreement under Rule 223 and imposed a one-year suspension, though the Court stayed the suspension and placed attorney on probation for 18 months. *In re Whinery* ……119

—— Attorney was suspended from the practice of law for one year for violating Kansas Rules of Professional Conduct relating to conduct resulting in his conviction for three federal violations of 18 U.S.C. § 3, accessory after the fact in relation to 18 U.S.C. § 875(d). The Supreme Court ordered that Pistotnik undergo a reinstatement hearing before petition for reinstatement will be considered.
In re Pistotnik ……..……...…..…. 96

— **One-year Suspension, Subject to Conditions**. Attorney failed to represent his clients competently, charged his clients unreasonable fees, failed to account for how fees were generated, and engaged in dishonest communications with his clients. The Supreme Court disagreed with the hearing panel's recommended discipline and imposed a one-year suspension. The Court also ordered Borich to refund $47,000 in attorney fees to his clients and provided a stay on suspension if Borich repays the fees within 90 days of the suspension. *In re Borich* ……..……..…… 257

CITIES AND MUNICIPALITIES:

Elected Governing Body May Enter Contracts to Pay Sum Over Specified Time. An elected governing body may use its administrative or proprietary authority to enter into enforceable contracts to pay a specified sum over a specified time. *City of Olathe v. City of Spring Hill* …….. 64

Elected Governing Body May Not Bind Subsequent One to its Decisions. An elected governing body may not use its legislative power to constrain future governing bodies to follow its governmental, or legislative, policy decisions. *City of Olathe v. City of Spring Hill* …….. 64

PAGE

Governmental Agreements Compared to Proprietary Agreements. The development, introduction, or improvement of services are, by and large, considered governmental, but the routine maintenance of the resulting services is generally deemed proprietary.
City of Olathe v. City of Spring Hill.. ……...…. 64

Interlocal Agreement Made by Fire District is Enforceable—Not Void for Violating Public Policy. When an interlocal agreement governing the operation and management of a fire district is terminated by one of the parties under the terms of the agreement, and the district's assets are allocated under those terms, the fire district itself is not altered or dissolved as a legal entity. Provisions in such interlocal agreements permitting termination and asset allocation after sufficient notice are not void for violating public policy. *Delaware Township v. City of Lansing, Kansas* ……..…… 86

CIVIL PROCEDURE:

Mootness Doctrine—Determination if Case Is Moot. A case is moot when it is clearly and convincingly shown the actual controversy has ended, the only judgment that could be entered would be ineffectual for any purpose, and it would not impact any of the parties' rights. *Roll v. Howard* ……...…….. 278

Prevailing Party Entitled to Award of Costs and Fees under Federal Statute. In order to be entitled to an award of costs and fees under 42 U.S.C. § 1988(b) (2018), a party must demonstrate they are the prevailing party. *Roll v. Howard* ……...…….. 278

Prevailing Party Is Awarded Relief by Court on Merits of Claims—No Award of Fees if Case Dismissed as Moot. A "prevailing party" is the party that has been awarded some relief by the court on the merits of at least some of the claims. Generally, when a case is dismissed as moot without a judgment by the court on the merits of any of the claims or a court-ordered consent decree, there is no prevailing party entitled to an award of attorney fees even though a party may have achieved the desired result of the litigation. *Roll v. Howard* ……...…….. 278

CIVIL SERVICE:

Kansas Civil Service Act—Rights of Classified Employees and Unclassified Employees. Through its many procedural and substantive protections, the Kansas Civil Service Act, K.S.A. 75-2925 et seq., grants permanent classified employees the right of continued employment absent any valid cause for termination, and that right is a property right that may not be impaired without due process of law. In contrast, unclassified employees are at-will employees and thus have no property interest in continued employment. *Bruce v. Kelly* ……. 218

— Two Groups of Employees in Kansas –Classified and Unclassified Service. The Kansas Civil Service Act, K.S.A. 75-2925 et seq., divides state civil service employees into two groups: those in the unclassified service and those in the classified service. The unclassified service includes those

PAGE

positions specifically designated as in the unclassified service. The classified service includes those positions in state service not included in the unclassified service. Thus, positions in the state service are presumptively within the classified service unless otherwise specified.
Bruce v. Kelly ……. 218

Kansas Highway Patrol—Six Month Probationary Period Not Required if Return to Former Rank. K.A.R. 1-7-4 (2021 Supp.) does not require Kansas Highway Patrol superintendents or assistant superintendents to serve another six-month probationary period upon returning to their former rank in the classified service, as contemplated in K.S.A. 74-2113(a). *Bruce v. Kelly* ……. 218

— Statutory Requirement for Permanent Status in Classified Service. If Kansas Highway Patrol members attain permanent status in the classified service before being appointed superintendent or assistant superintendent within the unclassified service, then K.S.A. 74-2113 requires that they be "returned" to their former classified rank with permanent status after their term in the unclassified service ends. *Bruce v. Kelly* ……. 218

Kansas Highway Patrol Rank of Major—Classified Service under Statute. K.S.A.74-2113's plain language defines the rank of major in the Kansas Highway Patrol as within the classified service. *Bruce v. Kelly* …….. 218

CONSTITUTIONAL LAW:

Challenge to First Amendment as Overbroad—Personal Injury not Required by Challenging Party. A party challenging a law as overbroad under the First Amendment need not establish a personal injury arising from that law. *City of Wichita v. Trotter* …….. 310

Challenge to Potentially Overbroad Statute—Burden on Challenging Part—Requirements. Where a potentially overbroad statute regulates conduct, and not merely speech, the overbreadth must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. The party challenging the law bears the burden of showing (1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory method of severing the law's constitutional from its unconstitutional applications. *City of Wichita v. Trotter* …….. 310

First Amendment Overbreadth Doctrine. The First Amendment overbreadth doctrine may be implicated when a criminal statute makes conduct punishable, which under some circumstances is constitutionally protected from criminal sanctions. *City of Wichita v. Trotter* …….. 310

Fourth Amendment Right Protects against Unreasonable Searches and Seizures—Same Protections under Section 15 of Kansas Constitutional Bill of Rights. The Fourth Amendment to the United States Constitution protects the right of an individual to be secure and not subject to unreasonable searches and seizures by the government. Section 15 of the Kansas Constitution Bill of Rights offers the same protections. Under the Fourth

PAGE

Amendment and section 15, any warrantless search or seizure is presumptively unreasonable unless it falls within one of the few established and well-delineated exceptions to the warrant requirement. *State v. Bates* 174

Fourth Amendment Rights are Personal. Fourth Amendment rights are personal, and defendants may not vicariously assert them.
City of Wichita v. Trotter 310

CRIMINAL LAW:

Consent by Defendant Required to Use of Guilt-Based Defense. A defendant must consent to the use of a guilt-based defense, but that consent need not be on the record. *State v. Hilyard* 326

County or District has Broad Discretion in Controlling Prosecutions—Court Intervention Allowed When Appropriate. A county or district attorney is the representative of the State in criminal prosecutions and has broad discretion in controlling those prosecutions. But a prosecutor's discretion is not limitless, and the doctrine of separation of powers does not prevent court intervention in appropriate circumstances. *State v. Mulleneaux* 75

Determination if Dismissal of Criminal Charge with Prejudice Appropriate—Appellate Review. In determining if dismissal of a criminal charge with prejudice is appropriate, appellate courts apply an abuse of discretion standard. A district court abuses its discretion by (1) adopting a ruling no reasonable person would make, (2) making a legal error or reaching a legal conclusion not supported by factual findings, or (3) reaching a factual finding not supported by substantial competent evidence. *State v. Mulleneaux* 75

No Affirmative Duty by Statute to Order Mental Examination—Discretionary Decision of Court. K.S.A. 2021 Supp. 22-3429 imposes no affirmative duty for courts to raise the issue of whether to order a mental examination. If the issue is raised, the decision of whether to order such mental examination is discretionary. *State v. Hilyard* 326

Plea Agreements Similar to Civil Contracts—Appellate Review. Plea agreements are akin to civil contracts. The primary rule for interpreting a contract is to ascertain the parties' intent. We exercise unlimited review over the interpretation of contracts and are not bound by the lower court's interpretations or rulings. *State v. Eubanks* 355

Premeditation May be Shown by Circumstantial Evidence—Reasonable Inferences. Premeditation may be shown by circumstantial evidence, provided inferences from that evidence are reasonable.
State v. Hilyard 326

Restitution—Order of Restitution for Crimes of Conviction or by Agreement under Plea Agreements. A district court may only order restitution for losses or damages caused by the crime or crimes for which the defendant was convicted unless, under a plea agreement, the defendant has

PAGE

agreed to pay for losses not caused directly or indirectly by the defendant's crime. *State v. Eubanks* 355

Sentencing—Court Can Impose Supervision Period Only for Off-grid Crime. Under K.S.A. 1993 Supp. 21-4720(b), when a defendant is sentenced for both off-grid and on-grid crimes, the sentencing court only has authority to impose the supervision period associated with the off-grid crime. *State v. Collier* 109

— Illegal Sentence—Correct at Any Time. A sentence is illegal if it does not conform to the applicable statutory provisions, either in character or punishment. An illegal sentence can be corrected at any time. *State v. Eubanks* 355

— Restitution—No Statututory Requirement Restitution Paid as Condition of Postrelease Supervision. K.S.A. 2020 Supp. 22-3717(n) does not require the journal entry to specify that restitution be paid as a condition of postrelease supervision. *State v. Eubanks* 355

— Restitution is Part of Criminal Sentence—Due Immediately—Exceptions. Kansas law allows district courts to order restitution as part of a criminal defendant's sentence. Restitution includes, but is not limited to, damage or loss caused by the defendant's crime. Restitution is due immediately unless (1) the court orders the defendant be given a specified time to pay or be allowed to pay in specified installments or (2) the court finds compelling circumstances that would render restitution unworkable, either in whole or in part. *State v. Eubanks* 355

— Restitution Statutes Create Presumption of Validity. When read together, K.S.A. 2020 Supp. 21-6604(e) and K.S.A. 2020 Supp. 22-3717(n) permit the district court to specify in its sentencing order the amount of restitution to be paid and the person to whom it shall be paid as a condition of postrelease supervision in the event the Prisoner Review Board declines to find compelling circumstances that would render a plan of restitution unworkable. These two statutes create a presumption of validity to the court's journal entry setting the amount and manner of restitution. *State v. Eubanks* 355

Statute Permits Claim of Self-defense Immunity if Use of Deadly Force Justified—Exception. K.S.A. 2021 Supp. 21-5231(a) permits a criminal defendant in certain cases to claim self-defense immunity from prosecution for the justified use of deadly force. This statutory immunity is confined to circumstances when the use of such force is against a person or thing reasonably believed to be an aggressor. The statute does not extend immunity for reckless acts resulting in unintended injury to innocent bystanders while the defendant engaged in self-defense with a perceived aggressor. *State v. Betts* 191

Sufficiency of Evidence—Circumstantial Evidence. Sufficient evidence, even circumstantial, need not rise to such a degree of certainty that it excludes any and every other reasonable conclusion. *State v. Hilyard* 326

PAGE

INDICTMENT AND INFORMATION:

Statute Permits Amendment of Information Before Verdict if No Additional or Different Crime Charged and Rights Not Prejudiced. K.S.A. 2021 Supp. 22-3201(e) permits the State to amend an information at any time before a verdict if it charges no additional or different crime and if the defendant's substantial rights are not prejudiced. The State has considerable latitude in charging and amending the time periods during which a defendant is accused of sexually abusing children—even if the changes in the time frames are substantial—so long as the change would not prejudice the defendant. A district court does not abuse its discretion by allowing the State to amend an information in situations where the defendant has only minimally developed an alibi defense. *State v. White* ……..…208

KANSAS OPEN RECORDS ACT:

Strict Liability of Act—Protection of Public from Sexual and Violent Offenders—Not Unconstitutionally Arbitrary. The strict liability character of a KORA registration violation offense bears a rational relationship to the legitimate government interest of protecting the public from sexual and other violent offenders and is thus not unconstitutionally arbitrary. *State v. Genson* …… 130

MOTOR VEHICLES:

DUI Statutory Meaning of "Attempt to Operate" Means Attempt to Move Vehicle. Under K.S.A. 2021 Supp. 8-1567, the term "operate" is synonymous with "drive," which requires some movement of the vehicle. Consequently, an "attempt to operate" under the DUI statute means an attempt to move the vehicle. *State v. Zeiner* ……. 346

REAL PROPERTY:

Rule of Law Set Out by In re Prieb Properties, LLC, is Overruled—BOTA Is Fact-Finder in Appraising Real Property at Fair Market Value. The rule of law established by *In re Prieb Properties, LLC*, 47 Kan. App. 2d 122, 135-36, 275 P.3d 56 (2012), that holds rental rates from commercial build-to-suit leases do not reflect market conditions and may not be relied on by appraisers without adjustments is overruled. *Prieb*'s rationale invades the Board of Tax Appeals' longstanding province as the fact-finder in the statutory process for appraising real property at its fair market value. *In re Equalization Appeal of Walmart* ……..…….. 32

SEARCH AND SEIZURE:

District Court Ruling on Motion to Suppress—Bifurcated Standard of Review Applied by Appellate Courts. Appellate courts apply a well-settled, bifurcated standard of review when reviewing a district court ruling on a motion to suppress. Under the first part of the standard, an appellate court reviews a district court's factual findings to determine whether they are supported by substantial competent evidence. Substantial competent evidence

PAGE

is defined as such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion. Appellate courts do not reweigh the evidence or assess credibility of witnesses when assessing the district court's findings. Under the second part of the bifurcated standard of review, appellate courts review de novo the district court's conclusion of law about whether a reasonable suspicion justifies the investigatory detention.
State v. Bates 174

Exception to Warrant Requirement of Fourth Amendment—Investigatory Detention under Terry v. Ohio—Requirements. One exception to the warrant requirement of the Fourth Amendment to the United States Constitution is an investigatory detention under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). This exception applies to brief investigatory stops of persons or vehicles that fall short of traditional arrest. For this exception to apply, an investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. *State v. Bates* 174

Reasonable Suspicion Standard Requires Considering Totality of Circumstances—Particularized and Objective Basis Required for Suspecting Person Stopped for Crime. The reasonable suspicion standard requires consideration of the totality of the circumstances—the whole picture. Based on that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. A mere hunch is not enough to be a reasonable suspicion. But the particularized basis need not rise to the level of probable cause, which is the reasonable belief that a specific crime has been committed and that the defendant committed the crime. *State v. Bates* 174

STATUTES:

Severance of Unconstitutional Provision by Court—Intent of Governing Body—Requirements to Sever Portion of Ordinance. Whether a court may sever an unconstitutional provision from a statute or ordinance and leave the remainder in force and effect depends on the intent of the governing body that drafted it. A court may only sever an unconstitutional portion of an ordinance if, from examination of the ordinance, the court finds that (1) the act would have been passed without the objectionable portion, and (2) the ordinance would operate effectively to carry out the intention of the governing body that passed it with such portion stricken.
City of Wichita v. Trotter 310

TAXATION:

Board of Tax Appeals –Highest Administrative Tribunal for Assessing Property for Ad Valorem Tax Purposes. The Board of Tax Appeals is the highest administrative tribunal established by law to determine controversies relating to assessment of property for ad valorem tax purposes.
In re Equalization Appeal of Walmart 32

PAGE

Determination of Fair Market Value of Property— Question of Fact. A property's fair market value determination is generally a question of fact with the fact-finder free to decide whether one appraisal or methodology is more credible than another. *In re Equalization Appeal of Walmart* …….. 32

TRIAL:

Claim of Prosecutorial Error—Two-Step Framework. Appellate courts use a two-step framework to analyze claims of prosecutorial error. First, the appellate court considers whether the prosecutor stepped outside the wide latitude prosecutors are given to conduct the State's case in a manner that does not offend a defendant's constitutional right to a fair trial. Second, if error is found, the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial, using the traditional constitutional harmlessness inquiry demanded by *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Under this test, prosecutorial error is harmless if the State can show beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial given the entire record, that is, where there is no reasonable possibility that the error contributed to the verdict. *State v. Brown* …… 154

Closing Arguments—When Burden of Proof Not Shifted by Prosecutor. During closing arguments, a prosecutor does not shift the burden of proof to the defendant by pointing out a lack of evidence either to support a defense or to corroborate a defendant's argument about deficiencies in the State's case. Nor does a prosecutor shift the burden of proof by mentioning the lack of evidence to rebut testimony and other evidence presented by the State. *State v. Hilyard* ……..…… 326

Cumulative Error Test—Whether Errors Substantially Prejudiced Defendant and Denied Defendant Fair Trial—Totality of Circumstances. The test for cumulative error is whether the errors substantially prejudiced the defendant and denied the defendant a fair trial given the totality of the circumstances. In making the assessment, an appellate court examines the errors in context, considers how the district court judge addressed the errors, reviews the nature and number of errors and whether they are connected, and weighs the strength of the evidence. If any of the errors being aggregated are constitutional, the constitutional harmless error test of *Chapman* applies, and the party benefitting from the errors must establish beyond a reasonable doubt that the cumulative effect of the errors did not affect the outcome. *State v. Brown* ……..… 154

Exclusion of Evidence at Trial –Preservation of Issue for Appeal Requires Substantive Proffer—Two-Fold Purpose. When a district court excludes evidence at trial, the party seeking to admit that evidence must make a sufficient substantive proffer to preserve the issue for appeal. A formal proffer is not required, and we may review the claim as long as an adequate record is made in a manner that discloses the evidence sought to be introduced. The purpose of such a proffer is two-fold—first, to procedurally

PAGE

preserve the issue for review, and second, to substantively demonstrate lower court error. *State v. White* 208

Jury Determination of Weight and Credit Given to Testimony of Witness—Assessing Witness Credibility by Prosecutor. A jury determines the weight and credit to be given the testimony of each witness. While prosecutors are not allowed to offer personal opinions on credibility, a prosecutor may suggest legitimate factors for the jury to consider when assessing witness credibility. *State v. Hilyard* 326

Jury Instruction Claims—Failure to Object at Trial—Appellate Review. Under our four-part framework for analyzing jury instruction claims, a defendant's failure to object at trial does not prevent appellate review—it simply requires a higher degree of prejudice to be shown for reversal. *State v. Valdez* 1

Jury Instructions—Court May Modify or Add Clarification to PIK Instructions if Facts Warrant Change. A district court may modify or add clarifications to PIK instructions, even those which track statutory language, if the particular facts in a given case warrant such a change. *State v. Zeiner* 346

— Rebuttal Presumption Different than Permissive Inference. A rebuttable presumption has a different legal effect than a permissive inference. *State v. Valdez* 1

Invited Error Doctrine's Application to Jury Instructions—Question Whether Party's Action Induced Court to Make Instructional Error. Appellate courts do not ordinarily consider an issue not raised by the parties, but may do so sua sponte when the issue's consideration is necessary to serve the ends of justice or prevent the denial of fundamental rights after notice to the parties and allowing them an opportunity to address the issue raised by the court. *State v. Valdez* 1

Trial Error Reversible if Prejudices Defendant's Substantial Rights—Burden on Party Benefitting from Error. Under K.S.A. 2021 Supp. 60-261 and K.S.A. 60-2105, a trial error is reversible only if it prejudices a defendant's substantial rights. The party benefitting from an error violating a statutory right has the burden to show there is not a reasonable probability that the error will or did affect the outcome of the trial in light of the entire record. *State v. Brown* 154

No. 121,053

STATE OF KANSAS, *Appellee*, v. JOSEPH MIGUEL VALDEZ, *Appellant.*

(512 P.3d 1125)

SYLLABUS BY THE COURT

1. TRIAL—*Jury Instruction Claims—Failure to Object at Trial—Appellate Review*. Under our four-part framework for analyzing jury instruction claims, a defendant's failure to object at trial does not prevent appellate review—it simply requires a higher degree of prejudice to be shown for reversal.

2. SAME—*Jury Instructions—Rebuttal Presumption Different than Permissive Inference.* A rebuttable presumption has a different legal effect than a permissive inference.

3. APPEAL AND ERROR—*Issue Raised First Time on Appeal—Appellate Review.* In general, an appellate court will not address an issue raised for the first time on appeal, although there are limited exceptions. An appellate court's refusal to invoke an exception to this general rule will be reviewed for abuse of discretion. A court abuses its discretion when its exercise is based on an error of law or fact, or when no reasonable person would have taken the view adopted by the court.

4. TRIAL—*Invited Error Doctrine's Application to Jury Instructions—Question Whether Party's Action Induced Court to Make Instructional Error*. The invited error doctrine's application in the context of jury instructions turns on whether the instruction would have been given—or omitted—but for an affirmative request to the court for the outcome later challenged on appeal. The ultimate question is whether the record reflects a party's action in fact induced the court to make the claimed instructional error.

5. APPEAL AND ERROR—*Sua Sponte Consideration of Issue Not Raised by Parties—To Serve Justice or Prevent Denial of Fundamental Rights.* Appellate courts do not ordinarily consider an issue not raised by the parties, but may do so sua sponte when the issue's consideration is necessary to serve the ends of justice or prevent the denial of fundamental rights after notice to the parties and allowing them an opportunity to address the issue raised by the court.

6. ATTORNEY AND CLIENT—*Court's Duty to Inquire Into Claim Whether Counsel Provided Effective Assistance—Appellate Review.* A defendant's articulation of a substantial allegation about counsel's effective assistance triggers a district court's duty to inquire into a potential attorney-client conflict. This duty derives from the defendant's right to effective assistance of

counsel under the state and federal Constitutions. An appellate court reviews the district court's inquiry for abuse of discretion.

Review of the judgment of the Court of Appeals in an unpublished opinion filed April 9, 2021. Appeal from Saline District Court; JARED B. JOHNSON, judge. Opinion filed July 1, 2022. Judgment of the Court of Appeals affirming the district court is affirmed in part, reversed in part, and vacated in part. Judgment of the district court is affirmed in part, reversed in part, and vacated in part.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Alexander Driskell, assistant county attorney, argued the cause, and *Amy E. Norton*, assistant county attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

BILES, J.: A jury convicted Joseph Miguel Valdez of possession of more than 3.5 grams of methamphetamine with intent to distribute, possession of a firearm within 10 years of a prior felony conviction, and two counts of drug paraphernalia possession. He appealed raising various trial error claims. A Court of Appeals panel affirmed. *State v. Valdez*, No. 121,053, 2021 WL 1324023, at *3-6 (Kan. App. 2021) (unpublished opinion). We affirm in part and reverse in part. We hold the State presented insufficient evidence to support the firearm possession conviction and vacate its associated sentence. We affirm the remaining convictions and reject his challenge to the district court's handling of complaints he had about his trial counsel.

FACTUAL AND PROCEDURAL BACKGROUND

Valdez came out of a house in Salina yelling for help. He told a neighbor he was shot in the leg. The neighbor closed the front door to the house at his request and applied a tourniquet before paramedics arrived. Valdez at first would not give police his name or say what happened but denied shooting himself. He said he sometimes stayed at the house and had no permanent address.

Officers swept the house to make sure no one was injured or hiding inside. They saw a .380 handgun on a desk in the living room, a bullet hole in the door jamb, and women's clothing in the

only bedroom on the main floor. They got search warrants for the house, a car parked in the driveway, and Valdez' cell phone.

Returning inside the house after securing the warrants, officers located a spent .380 shell casing and a slug from the door jamb. On the floor near the desk with the handgun, they found a sunglasses case with five baggies of a crystalline substance, a digital scale with white residue on it, syringes, and empty baggies. In the basement, they discovered a bag with syringes, ammunition for a .45 caliber handgun, a water pipe, and men's clothing next to a bed. In this same area, there was another bag with more empty baggies.

Outside the house, police found a glass pipe on a chair. In the car, they came upon a syringe under the driver's seat. And in the jeans paramedics removed from Valdez at the scene, an officer found a baggie with a crystalline substance, money, and a syringe that appeared used.

On Valdez' phone, police recovered a message exchange from the day of the shooting in which Valdez said, "I want to shoot myself yo," and "stupid bitches man I hate feelings man I try to be good people and all I do is get fucked so you know anyone looking?" At trial, a detective with training in narcotics trafficking testified the phrase "anyone looking" is asking whether anyone was looking for a controlled substance.

KBI lab tests confirmed 14.18 grams of methamphetamine in the largest bag in the sunglasses case and 1 gram in the bag from the jeans pocket. A KBI forensic scientist testified a DNA profile from the sunglasses case reflected Valdez' DNA, with an estimated frequency in a random individual of 1 in 15 septillion in the southeast Hispanic population and 1 in 332 sextillion in the southwest Hispanic population. And a partial DNA profile from the gun also reflected a DNA sample from Valdez according to another KBI scientist, who testified the estimated frequency of this partial sample in a random individual would be extremely unlikely, e.g., 1 in 48 billion or 1 in 284 trillion depending on race.

After the jury returned guilty verdicts, the district court sentenced Valdez to 104 months' imprisonment for possession with intent to distribute and a consecutive 8-month term for criminal possession of a firearm with 36 months' postrelease supervision.

The court also imposed concurrent sentences of 11 months' imprisonment and 6 months' jail for the drug paraphernalia convictions. Valdez appealed. The panel affirmed. *Valdez*, 2021 WL 1324023, at *3-6.

This court granted Valdez' petition for review. He argues: (1) the panel erred by refusing to consider his jury instruction challenge to a permitted inference about his intent to distribute methamphetamine if the jury found he possessed more than 3.5 grams; (2) the evidence does not support his conviction for possession with intent to distribute; (3) the district court erred by not instructing on the lesser included offenses of possessing lesser quantities of methamphetamine with intent to distribute; (4) the panel erred by refusing to consider his constitutional challenge to the statute providing a rebuttable presumption for intent to distribute; (5) the panel erred by refusing to consider his constitutional challenge to the statute making a felon's possession of firearms illegal; and (6) the district court erred by not appointing conflict-free counsel when inquiring into his presentencing claims of ineffective assistance of trial counsel.

Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

THE INTENT-TO-DISTRIBUTE INSTRUCTION

Valdez argues the panel erred when it refused to consider for the first time on appeal the legal appropriateness of the intent-to-distribute instruction. He claims the instruction, which provided a permissive inference of intent based on the quantity of drugs he possessed, undermined his constitutional right to a conviction on proof of all the elements of the offense beyond a reasonable doubt. In his view, there was no rational connection between the quantity of drugs possessed and any inference that he intended to distribute those drugs. This, he claims, made the instruction legally inappropriate. He makes no claim the jury instruction was factually inappropriate.

We approach this issue incrementally. First, we hold the panel should have considered this as an instructional challenge using the

clear error standard of review. Second, we agree the instruction's permissive inference was legally inappropriate, but for a different reason that arrives at the same result. See *State v. Holder*, 314 Kan. 799, 806-07, 502 P.3d 1039 (2022) (holding instruction consistent with PIK Crim. 4th 57.022 was legally inappropriate because it provided for a permissive inference instead of the rebuttable presumption specified by statute). Finally, we explain why we are not convinced the jury would have reached a different verdict without this instructional error. As a result, we affirm the intent-to-distribute conviction.

Additional facts

The State charged Valdez with possession of methamphetamine with intent to distribute. See K.S.A. 2018 Supp. 21-5705. Subsection (e) provides "[i]n any prosecution under this section, *there shall be a rebuttable presumption of an intent to distribute if* any person possesses . . . 3.5 grams or more of heroin or methamphetamine." (Emphasis added.) At Valdez' trial, the court instructed the jury by first setting out the elements of possession with intent to distribute. Then, consistent with PIK Crim. 4th 57.022 (2013 Supp.), the court instructed,

"*If you find the defendant possessed 3.5 grams or more of methamphetamine, you may infer that the defendant possessed with the intent to distribute.* You may consider the inference along with all other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the intent of the defendant. This burden never shifts to the defendant." (Emphasis added.

The trial court also instructed the jury that,

"The State has the burden to prove the defendant is guilty. The defendant is not required to prove he is not guilty. You must presume that he is not guilty unless you are convinced from the evidence that he is guilty.

"The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find the defendant not guilty. If you have no reasonable doubt as to the truth of each of the claims required to be proved by the State, you should find the defendant guilty."

Valdez did not object to these instructions. But for the first time on appeal to the panel, he argued the permissive inference of intent to distribute stated in the jury instruction violated his due

process rights because "there was no evidence of a rational connection between possession of 3.5 grams of methamphetamine and an intent to distribute." The panel refused to consider this newly raised constitutional issue because the trial court did not have a chance to rule on it, explaining there was "insufficient evidence in the record to give this court a foundation for meaningful review." *Valdez*, 2021 WL 1324023, at *3.

The panel should have considered this claim as an instructional error.

K.S.A. 2020 Supp. 22-3414(3) provides:

"No party may assign as error the giving or failure to give an instruction, including a lesser included crime instruction, unless the party objects thereto before the jury retires to consider its verdict stating distinctly the matter to which the party objects and the grounds of the objection *unless the instruction or the failure to give an instruction is clearly erroneous*. Opportunity shall be given to make the objections out of the hearing of the jury." (Emphasis added.)

Our usual four-part framework for analyzing jury instruction claims does not prevent appellate review when a defendant fails to object at trial—it simply specifies a higher degree of prejudice to warrant reversal. Under this framework,

"'First, [the reviewing court] considers the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; next, it applies unlimited review to determine whether the instruction was legally appropriate; then, it determines whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and finally, if the district court erred, this court determines whether the error was harmless, utilizing the test and degree of certainty set forth in *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011), *cert. denied* 565 U.S. 1221 (2012).'

"However, if a defendant fails to object to the instructional error below, the clear error standard is applied to assess prejudice. Instructional error is clearly erroneous when '"the reviewing court is firmly convinced that the jury would have reached a different verdict had the instruction error not occurred."' [Citations omitted.]" *State v. Owens*, 314 Kan. 210, 235, 496 P.3d 902 (2021).

The crux of Valdez' argument is that the jury instruction relieved the State of its burden to prove every element of the intent-to-distribute charge beyond a reasonable doubt. See *County Court of Ulster County, N.Y. v. Allen*, 442 U.S. 140, 157, 99 S. Ct. 2213,

60 L. Ed. 2d 777 (1979) (noting a "permissive presumption . . . affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference"); *State v. Johnson*, 233 Kan. 981, 985, 666 P.2d 706 (1983) ("It has long been recognized that any instruction which shifts the burden of proof or of persuasion to the defendant is unconstitutional and is clearly erroneous.").

This court previously has treated arguments of this nature as jury instruction challenges reviewable for the first time on appeal. See, e.g., *State v. Cameron*, 300 Kan. 384, 395, 329 P.3d 1158 (2014) (applying "a clearly erroneous standard of review" to reject the defendant's argument, raised for the first time on appeal, that a jury instruction "unconstitutionally shifted the burden to him to prove that he was not guilty"); *State v. Holt*, 300 Kan. 985, 1005-06, 336 P.3d 312 (2014) (considering an issue raised for the first time on appeal that the reasonable doubt instruction given at trial "was erroneous because it lowered the State's burden of proof").

Valdez plainly disputes the legal appropriateness of the instruction permitting the jury to infer that he intended to distribute methamphetamine based on proof of certain quantities possessed. We hold the panel erred when it declined to address this claim's merits because it was raised for the first time on appeal. Appellate courts must review a jury instruction question even if it is unpreserved. The failure to object at trial simply requires a higher degree of prejudice to be shown before reversal can be justified. See K.S.A. 2020 Supp. 22-3414(3).

The permissive inference instruction was legally inappropriate.

"The Due Process Clause of the Fourteenth Amendment requires proof beyond a reasonable doubt of each element of the crime charged." *State v. Craig*, 311 Kan. 456, 462, 462 P.3d 173 (2020). Because of that, evidentiary devices like presumptions and inferences "must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *Allen*, 442 U.S. at 156. Valdez concedes the challenged instruction describes a permissive inference.

The *Allen* Court explained that "the entirely permissive inference . . . allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant." *Allen*, 442 U.S. at 157. It also noted,

"Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination." 442 U.S. at 157.

Valdez mostly argues in his brief that there was "no evidence of a rational connection between possessing 3.5 grams or more of methamphetamine and an intent to distribute," since "it is entirely possible that the person possesses some or all of the amount for personal use or some other intent or no intent." But at oral argument, and to some extent in his petition for review, he embraced an alternative path to error by suggesting the instruction did not fairly and accurately state the applicable law. He noted K.S.A. 2020 Supp. 21-5705(e) specifies a rebuttable presumption of intent to distribute when certain quantities of a controlled substance are found in the defendant's possession rather than the permissive inference instruction given at his trial. We generally agree with this latter viewpoint as explained in *Holder*, in which we held:

"A rebuttable presumption has a different legal effect than a permissive inference. [*State v. Harkness*, 252 Kan. 510, Syl. ¶¶ 13-14, 847 P.2d 1191 (1993)]. This means that even if we consider the jury instructions as a whole, we cannot hold they fairly and accurately reflect the applicable law specified by K.S.A. 2020 Supp. 21-5705(e), when measured narrowly against that statute." *Holder*, 314 Kan. at 806.

For the reasons discussed in *Holder*, the permissive inference instruction given at Valdez' trial was legally inappropriate. *Holder*, 314 Kan. 799, Syl. ¶ 4 ("PIK Crim. 4th 57.022 [2013 Supp.] provides a jury instruction with a permissive inference the jury may accept or reject about a defendant's possession with intent to distribute when that defendant is found to possess specific

quantities of a controlled substance. This permissive instruction does not fairly and accurately reflect the statutory rebuttable presumption specified in K.S.A. 2020 Supp. 21-5705[e]."); see *State v. Plummer*, 295 Kan. 156, 161, 283 P.3d 202 (2012) ("[A]n instruction must always fairly and accurately state the applicable law, and an instruction that does not do so would be legally infirm."); see also K.S.A. 20-203 ("A syllabus of the points of law decided in any case in the supreme court shall be stated in writing by the judge delivering the opinion of the court, which shall be confined to the points of law arising from the facts in the case, that have been determined by the court.").

And based on this, it is unnecessary to consider other reasons why the instruction might be legally inappropriate, such as Valdez' primary contention that the instruction had no rational connection between the quantities specified and an intent to distribute. It is enough to simply recognize, as we did in *Holder*, that the quantities stated in the instruction do not align with the larger amounts the evidence demonstrated Valdez possessed. See *Holder*, 314 Kan. at 806 ("But here the instructed permissive inference was not only unmoored from any statutory basis, its 450-gram threshold [of marijuana] had no connection to the evidence.").

Based on our determination that the instruction was legally inappropriate, we must consider next whether this error requires reversal of the intent-to-distribute conviction.

The jury would not have reached a different verdict.

Because Valdez did not object to the permissive inference instruction at trial, clear error is required to reverse. *Owens*, 314 Kan. at 235 (under clear error analysis, a reviewing court must be firmly convinced the trial's result would have been different without the error). The instructional error identified does not meet this threshold.

First, the permissive instruction given at Valdez' trial did not impose any defense burden to rebut the State's prima facie case, unlike the rebuttable presumption statute apparently would. See *Holder*, 314 Kan. at 805 (explaining a "rebuttable presumption means that once the State proved possession of [a certain amount of a controlled substance], the jury must infer [the defendant's]

intent to distribute unless [they] proved otherwise. This suggests some burden shifting . . . ."). Also, the State presented ample evidence Valdez not only possessed methamphetamine but intended to distribute it. For example, the evidence involved much more methamphetamine than the minimum 3.5 grams specified in the instruction to trigger the permissive inference. *Holder*, 314 Kan. at 806 ("In this context, a defendant's possession of a large quantity of narcotics certainly may support an inference that the defendant intended to distribute the narcotic."). And the evidence included empty plastic baggies and a digital scale to facilitate distribution. A detective experienced with drug trafficking also testified the text message Valdez sent to a friend asking "anyone looking" commonly meant "are you looking for some type of narcotic."

We are not firmly convinced the jury would have reached a different verdict if the instructional error had not occurred.

THE CONSTITUTIONAL CHALLENGE TO K.S.A. 2020 SUPP. 21-5705(e)

As an alternative to his argument that the permissive inference instruction was legally inappropriate, Valdez challenged for the first time on appeal K.S.A. 2020 Supp. 21-5705(e)'s constitutionality. As mentioned, that statute provides for a rebuttable presumption on a defendant's possession with intent to distribute when that defendant is found to have possessed specific quantities of a controlled substance. The panel declined to consider this constitutional challenge. *Valdez*, 2021 WL 1324023, at *3.

In general, an appellate court will not address an issue raised for the first time on appeal, although there are limited exceptions. See *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021). We review the panel's refusal to consider this constitutional statutory challenge for an abuse of discretion. *State v. Johnson*, 310 Kan. 909, 912, 453 P.3d 281 (2019). A court abuses its discretion when that exercise is based on an error of law or fact, or when no reasonable person would have taken the view adopted by the court. *Allen*, 314 Kan. at 284.

Valdez acknowledges this issue is unpreserved and suggests the panel could have reached it as being necessary to serve the

ends of justice or to prevent a denial of fundamental rights—a potential exception available when a party raises an issue for the first time on appeal. But Valdez does not explain how the panel abused its discretion by deciding not to address the merits, i.e., was there an error of law or fact, or does he contend no reasonable person would have taken the view adopted by the court?

Instead, he just complains the panel erred since he asserted a recognized exception. But this is not enough to carry the day. A reviewing court is not obligated to consider the unpreserved issue even when a party asserts a preservation exception in a procedurally correct way. The decision remains discretionary. *Allen*, 314 Kan. at 283-84. And the burden to show abuse of that discretion rests with the one who complains about its exercise. *State v. Randle*, 311 Kan. 468, Syl. ¶ 4, 462 P.3d 624 (2020). Given that Valdez does not better articulate his disagreement with the panel, we hold it did not abuse its discretion in declining to consider K.S.A. 2020 Supp. 21-5705(e)'s constitutionality.

SUFFICIENCY OF THE EVIDENCE

As a separate issue challenging the intent-to-distribute conviction, Valdez contends the evidence that he possessed methamphetamine was circumstantial and argues the permissive inference instruction led to impermissible inference stacking. That is, he claims the jury had to infer from circumstantial evidence that he possessed the drugs in the first place, which then "stacked" the instructional intent-to-distribute inference onto that. We disagree with this contention because the evidence shows different sets of multiple proven circumstances supported both his possession of methamphetamine and his intent to distribute it.

When the State asks a jury to make a presumption based on other presumptions, it does not carry its burden to present sufficient evidence to sustain a criminal conviction. *State v. Banks*, 306 Kan. 854, 859, 397 P.3d 1195 (2017). But this impermissible inference stacking does not occur when different circumstances are used to support separate inferences, or when multiple pieces of circumstantial evidence separately support a single inference. *Banks*, 306 Kan. 854, Syl. ¶ 3; see also *State v. Colson*, 312 Kan.

739, 753, 480 P.3d 167 (2021) (holding no inference stacking occurred when "the evidence supporting each inference [was] separate and distinct; no inference was necessarily presumed based on another presumption"). Rather,

"it is permissible for the State to rely on multiple circumstances to support an inference . . . so long as each circumstance has been proved, rather than presumed from another circumstance. In other words, while it is impermissible for a case to rely upon the theory that presumption A leads to presumption B leads to presumption C leads to fact D, it is perfectly proper for the State's case to be grounded upon a theory that presumption A, presumption B, and presumption C all separately point to fact D. [Citation omitted.]" *Banks*, 306 Kan. at 860-61.

In rejecting Valdez' sufficiency argument, the panel reasoned:

"When we view this record, even without the statutory presumption, a rational fact-finder could have found beyond a reasonable doubt that Valdez possessed the methamphetamine with an intent to distribute. Officers found far more than 3.5 grams of methamphetamine; the bag the KBI tested contained more than 14 grams and four other untested bags contained a similar looking substance. Officers also discovered scales with methamphetamine residue, many empty baggies, and some syringes. Valdez' DNA was the only DNA on the outside of the glasses case containing the drugs and paraphernalia. And Valdez sent a text shortly before he was shot asking an acquaintance if she knew of 'anyone looking,' which a detective testified was a phrase commonly used to refer to someone looking for narcotics." *Valdez*, 2021 WL 1324023, at *5.

As this shows, and as reflected in our clear-error analysis above, Valdez' possession of methamphetamine and his intent to distribute were independently supported by multiple, proven circumstances. And even though the circumstances supporting each element overlap, they are still different. Possession was supported by Valdez' DNA on the sunglasses case, the case's contents, and the drugs in his pocket. His intent to distribute was independently supported by his possession of the sunglasses case and its contents, the drugs in his pocket, the extra baggies in the basement, the digital scale, and the text message. We hold there was sufficient evidence to support the intent-to-distribute conviction, and this conviction did not rest on impermissible inference stacking.

THE LESSER-INCLUDED-OFFENSE CLAIM

Valdez next argues the panel erred by refusing to consider his claim that the district court should have instructed on the lesser

included offenses covering possession of less than 3.5 grams of methamphetamine with the intent to distribute it. He notes 1 gram of methamphetamine was found in his clothing, while multiple baggies were in the sunglasses case with one containing more than 14 grams. He argues this was an adequate factual basis to warrant the lesser included offense instructions. We agree with Valdez that the panel erred by rejecting this claim under an invited error rationale, and that the instructions should have been given. But we hold this does not warrant reversal.

Additional facts

At the jury instruction conference, Valdez' counsel asked that the jury be instructed on simple possession of methamphetamine as a lesser included offense of possession with intent to distribute. His theory was that the jury could conclude Valdez did not possess the contents of the sunglasses case but did possess for personal use the 1 gram in his jeans. The State asked whether the intervening lesser included offenses of possession with intent to distribute between 1 and 3.5 grams and possession with intent to distribute less than 1 gram needed to be given too. Defense counsel clarified:

"MS. EFFENBECK: I'm just asking for the simple possession, the level 5.

"THE COURT: So the theory being, from the defense's perspective, because there is a factual distinction between the pants located on the corner with one gram of methamphetamine in the Baggie that the jury could factually distinguish that possession from the 14 point some grams in the sunglass case located within the residence near the handgun along with the other distribution paraphernalia of empty Baggies, multiple syringes, et cetera? And so that factual distinction is what you're focusing on; is that your request?

"MS. EFFENBECK: Yes."

Defense counsel then offered,

"MS. EFFENBECK: I guess the jury could separate the pants from any items found in the house.

"THE COURT: And there is nothing in the house that would indicate it was less than 14 grams. That's the Court's thought initially, [prosecutor], is if they were to go with that theory it's either all or nothing. It's either all one gram was in his pants or nothing. I don't know any other way to characterize the evidence as less than 14 grams in the house."

The prosecutor agreed. The court then recapped defense counsel's position:

"THE COURT: Okay. And Ms. Effenbeck, so you're asking for obviously the level 2 [possession with intent to distribute] and then one lesser included for the simple possession of a level 5?

"MS. EFFENBECK: Yes."

The district court instructed the jury on simple possession of methamphetamine as a lesser included offense of the intent-to-distribute charge. It gave no other lesser included offense instructions.

For the first time on appeal, Valdez argued the district court should have instructed on possession of less than 3.5 grams of methamphetamine with intent to distribute as a lesser included offense of possession of 3.5 grams or more of methamphetamine with intent to distribute. But the panel refused, holding he invited the claimed error because his "decision not to seek the lesser included instruction . . . was a strategic decision in line with his theory of defense." *Valdez*, 2021 WL 1324023, at *4.

Valdez did not invite the claimed error.

This court recently synthesized its invited error caselaw relating to jury instructions in *State v. Douglas*, 313 Kan. 704, 707-09, 490 P.3d 34 (2021). The *Douglas* court explained that "the doctrine's application turns on whether the instruction would have been given—or omitted—but for an affirmative request to the court for that outcome later challenged on appeal." 313 Kan. at 708. The court recognized "[t]he ultimate question is whether the record reflects the defense's action in fact induced the court to make the claimed error." 313 Kan. at 708. The *Douglas* court noted,

"The [trial] court simply asked defense counsel, 'Do you believe any lesser included offenses are applicable or are you requesting any?' Counsel replied: 'I know that I am not requesting any lesser included offenses and indeed there may not be any applicable ones either.' The State then confirmed it was not asking for any lesser included instructions, and the court ruled, 'Based on the facts that we have today, I do not believe that there is any applicable lesser [included offenses], so I concur with your comments.'" 313 Kan. at 709.

The *Douglas* court ruled that "[u]nder these facts, we cannot conclude defense counsel induced the district court's decision not to give lesser included offense instructions." 313 Kan. at 709.

Likewise, the record here shows Valdez only requested a simple possession instruction. And nothing establishes that the omitted instructions would have been provided but for that limited request. Compare *State v. Walker*, 304 Kan. 441, 445, 372 P.3d 1147 (2016) (holding invited error did not occur when defendant merely confirmed he had not requested any lesser included offense instructions), with *State v. Jones*, 295 Kan. 804, 812-13, 286 P.3d 562 (2012) (determining invited error occurred when the record depicted the district court showed its willingness to instruct on the lesser included offense of the charged crime, but defendant objected to giving it). We hold Valdez did not invite the claimed error on appeal. The panel erred in this regard.

Two lesser included offense instructions should have been given.

Having determined this is an unpreserved—though not invited—instructional error, we move to the merits.

K.S.A. 2020 Supp. 21-5705(a)(1) provides: "It shall be unlawful for any person to distribute or possess with the intent to distribute . . . any stimulant designated in subsection . . . (d)(3) . . . of K.S.A. 65-4107." See K.S.A. 2020 Supp. 65-4107(d)(3) ("[m]ethamphetamine, including its salts, isomers and salts of isomers"). And K.S.A. 2020 Supp. 21-5705(d)(3) declares:

> "Violation of subsection (a) with respect to material containing any quantity of [methamphetamine] is a:
>
> (A) Drug severity level 4 felony if the quantity of the material was less than 1 gram;
>
> (B) drug severity level 3 felony if the quantity of the material was at least 1 gram but less than 3.5 grams;
>
> (C) drug severity level 2 felony if the quantity of the material was at least 3.5 grams but less than 100 grams; and
>
> (D) drug severity level 1 felony if the quantity of the material was 100 grams or more."

This statute contains two lesser forms of intent-to-distribute, but Valdez did not specify in his brief or petition for review which should have been given at trial. When asked at oral argument, his counsel said both, so we consider each possibility.

The State correctly concedes instructions for both possession of at least 1 but less than 3.5 grams of methamphetamine with intent to distribute it under K.S.A. 2020 Supp. 21-5705(d)(3)(B) and

possession of less than 1 gram of methamphetamine with intent to distribute it under subsection (d)(3)(A) would have been legally appropriate, as lesser degrees of the crime charged under subsection (d)(3)(C). See K.S.A. 2020 Supp. 21-5109(b)(1) ("Upon prosecution for a crime, the defendant may be convicted of either the crime charged or a lesser included crime, but not both. A lesser included crime is . . . [a] lesser degree of the same crime."); *State v. Armstrong*, 299 Kan. 405, Syl. ¶ 5, 324 P.3d 1052 (2014) ("The inquiry as to whether it would have been legally appropriate to give the instruction is answered by whether the lesser crime is legally an included offense of the charged crime.").

The nub of this question, then, is whether the trial evidence warranted these instructions. "'To be factually appropriate, there must be sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, to support the instruction.'" *State v. Liles*, 313 Kan. 772, 778, 490 P.3d 1206 (2021). And the facts here make application of the factual appropriateness inquiry a bit more complicated because the methamphetamine was found in two places: a 1-gram packet in Valdez' jeans pocket and multiple packets in the sunglasses case, one of which weighed 14 grams.

An instruction for possession of "at least 1 gram but less than 3.5 grams" with intent to distribute would have been factually supported on this record. The jury could have concluded Valdez possessed only the 1-gram packet, and that he intended to distribute it based on the supply of plastic baggies in the basement and his text to a friend inquiring if the friend knew "anyone looking." And this is true even though the State asserts the 1-gram packet in Valdez' jeans was "clearly tied back to the items in the house," so it should be considered collectively with the other drugs. We hold this instruction was both legally and factually appropriate. The district court erred by not giving it.

But would an instruction for possession of less than 1 gram of methamphetamine also have been factually appropriate? We resolved this in *State v. Scheuerman*, 314 Kan. 583, 589-93, 502 P.3d 502 (2022), by deciding that a defendant's stipulation to possessing "at least 3.5 grams of methamphetamine" was enough to sustain his conviction for possession of "at least 1 but less than 3.5

grams" of methamphetamine with intent to distribute it under K.S.A. 2020 Supp. 21-5705(d)(3)(B). So based on *Scheuerman*, an instruction for the less-than-1-gram offense was factually appropriate in Valdez' case as well.

The jury would not have reached a different verdict.

Under the clear error standard, a jury instruction error is reversible only if "'the reviewing court is firmly convinced that the jury would have reached a different verdict had the instruction error not occurred.'" *Owens*, 314 Kan. at 235.

Valdez asserts three reasons why the trial outcome would have been different had these instructions been given: (1) the evidence "is scant at best" about his intent related to the methamphetamine; (2) any evidence of intent to distribute beyond the quantity possessed "would support a finding of intent to distribute any amount" of the drug; and (3) a jury unsure about whether Valdez intended to distribute the drugs could have reached a compromise verdict by convicting him of possession of less than 3.5 grams of methamphetamine with intent to distribute. He claims these reasons raise "a real possibility" the jury could have returned a verdict for a lesser degree of intent-to-distribute.

We disagree. As discussed earlier, the evidence strongly shows Valdez possessed more than 3.5 grams of methamphetamine and intended to distribute it. We hold clear error is not demonstrated. His arguments for reversal are speculative and insufficient to carry his burden.

THE POSSESSION-OF-A-FIREARM CONVICTION

Valdez argues the panel abused its discretion when it refused to consider for the first time on appeal his argument that a conviction for possessing a firearm within 10 years of a prior felony conviction violated his right to bear arms under section 4 of the Kansas Constitution Bill of Rights.

As discussed earlier, this refusal would be reviewed for an abuse of discretion by the panel, but before oral argument this court suggested sua sponte a more basic question by asking whether the conviction is supported by sufficient evidence. See

State v. Adams, 283 Kan. 365, 367, 153 P.3d 512 (2007) ("Appellate courts do not ordinarily consider issues that are not raised by the parties. However, we have the power to address such issues in exceptional circumstances, where the consideration of the issue is necessary to serve the ends of justice or prevent the denial of fundamental rights."). We directed the parties to address this at oral arguments.

We hold there is insufficient evidence to support the firearm conviction, so we need not address the panel's avoidance of the unpreserved section 4 claim. Our conclusion about the evidence comes from reviewing the applicable statutes, the evidentiary stipulations at trial, and the jury instructions.

At the time of Valdez' crimes, K.S.A. 2018 Supp. 21-6304 provided,

> "(a) Criminal possession of a weapon by a convicted felon is possession of any weapon by a person who:
>
> (1) Has been convicted of a person felony . . . and was found to have been in possession of a firearm at the time of the commission of the crime;
>
> (2) within the preceding five years has been convicted of a felony . . . and was not found to have been in possession of a firearm at the time of the commission of the crime; or
>
> (3) within the preceding 10 years, has been convicted of a:
>
> (A) Felony under K.S.A. 2013 Supp. 21-5402, 21-5403, 21-5404, 21-5405, 21-5408, subsection (b) or (d) of 21-5412, subsection (b) or (d) of 21-5413, subsection (a) of 21-5415, subsection (b) of 21-5420, 21-5503, subsection (b) of 21-5504, subsection (b) of 21-5505, and subsection (b) of 21-5807, and amendments thereto; article 57 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto; K.S.A. 21-3401, 21-3402, 21-3403, 21-3404, 21-3410, 21-3411, 21-3414, 21-3415, 21-3419, 21-3420, 21-3421, 21-3427, 21-3442, 21-3502, 21-3506, 21-3518, 21-3716, 65-4127a, 65-4127b, 65-4159 through 65-4165 or 65-7006, prior to their repeal; an attempt, conspiracy or criminal solicitation as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 2013 Supp. 21-5301, 21-5302 or 21-5303, and amendments thereto, of any such felony; or a crime under a law of another jurisdiction which is substantially the same as such felony, has been released from imprisonment for such felony, or was adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of such felony, was not found to have been in possession of a firearm at the time of the commission of the crime, and has not had the conviction of such crime expunged or been pardoned for such crime. The provisions of subsection (j)(2) of K.S.A. 2013 Supp. 21-6614, and amendments thereto, shall not apply to an individual who has had a conviction under this paragraph expunged; or

(B) nonperson felony . . . and was found to have been in possession of a firearm at the time of the commission of the crime.

"(b) Criminal possession of a weapon by a convicted felon is a severity level 8, nonperson felony.

"(c) As used in this section:

. . . .

(2) 'weapon' means a firearm or a knife."

The jury instruction on this charge set out these elements:

"The defendant is charged in count three with criminal possession of a weapon by a convicted felon. The defendant pleads not guilty[.]

"To establish this charge, each of the following claims must be proved:

"1. The defendant possessed a weapon.

"2. The defendant within ten years preceding such possession has been convicted of a felony.

"3. The defendant was not found to be in possession of a firearm at the time of the prior crime.

"4. This act occurred on or about the 30th day of June, 2018, in Saline County, Kansas."

At trial, the parties stipulated to Valdez' possession of a firearm within 10 years of a prior conviction, and the jury was told:

"The following facts have been agreed to by the parties and are to be considered by you as true:

"(1) The defendant within ten years preceding June 30, 2018 has been convicted of a felony and has not had the conviction of such felony expunged or been pardoned for such felony.

"(2) The defendant was not found to be in possession of a firearm at the time of the prior felony.

"Evidence has been admitted tending to prove that the defendant had been convicted previously of a felony. It may be considered solely as evidence of the defendant's convicted felon status for count three and it should not be considered by you for any other purpose."

We note parenthetically that before trial, the district court may have received into evidence what is described in the record as a certified copy of Valdez' prior conviction. But it appears the court withheld this document from the jury, so it could not have played a role in its deliberations. Regardless, it is not in the appellate record.

Discussion

"'When the sufficiency of the evidence is challenged in a criminal case, we review the evidence in a light most favorable to the State to determine whether a

rational fact-finder could have found the defendant guilty beyond a reasonable doubt. An appellate court does not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses.'" *State v. Pearce*, 314 Kan. 475, 480, 500 P.3d 528 (2021).

Applying this standard to the evidence before Valdez' jury, a rational fact-finder could not have concluded all the elements of the statutorily defined crime had been proven. As can be seen, neither the instruction nor the stipulation specifies what Valdez' prior crime was, although the jury was told he was not found to be in possession of a firearm while committing it. These stipulations preclude conviction under both K.S.A. 2018 Supp. 21-6304(a)(1) and (a)(3)(B). Similarly, the evidence does not establish the prior crime was committed within five years, so this eliminates K.S.A. 2018 Supp. 21-6304(a)(2).

This means the only remaining basis for conviction is K.S.A. 2018 Supp. 21-6304(a)(3)(A), and it is limited to enumerated offenses. But the stipulation only specified that Valdez committed "a felony," so again there is no factual basis or inference to convince us the jury could have found the essential—yet missing—element from what it was given.

We hold the evidence before the jury would not have supported the finding, even if it were properly instructed. Valdez' conviction for criminal possession of a firearm by a felon must be reversed because of insufficient evidence, which necessitates vacating the associated sentence. But remand is not required because the firearm conviction was not the primary crime at Valdez' sentencing, the applicable postrelease supervision term is not affected, and the sentences for the remaining convictions all run concurrent.

THE CONFLICT-FREE COUNSEL CLAIM

Valdez argues the district court erred by failing to appoint substitute counsel to assist him when discussing his claim of ineffective assistance of trial counsel, and that the panel failed to apply the appropriate review to address that claim on appeal. We hold neither the allegation of ineffective assistance of trial counsel mentioned by Valdez nor the district court's questions to defense counsel required appointing substitute counsel.

Additional facts

Before sentencing, Valdez filed a pro se motion for downward dispositional departure. In it, he alleged, "Defendant and his counsel have not been in agreement on issues, and Defendant intends to [pursue] ineffective counsel options for appeal, hence the pro se motion." He did not elaborate on his intended course of action, and the only relief he requested was that he be afforded "treatment options versus imprisonment." The next day, defense counsel filed a parallel motion also seeking dispositional departure to probation.

At the sentencing hearing, the court first took up the pro se motion. It began by asking defense counsel how the pro se motion and its ineffective assistance of counsel assertion affected the hearing. Counsel responded,

"I guess that would be up to the Court. As you know Mr. Valdez has never been happy. I guess it would be up to him if he wants to I guess rest on his motion for dispositional departure or rely on mine. He's also made an argument regarding attorneys fee, which of course the State will do a *State v*[.] *Robinson* analysis no matter what. So I don't know if the Court feels—what the Court wants to do."

The court then had a long exchange with Valdez and defense counsel.

"THE COURT: Mr. Valdez, you assert ineffective assistance of counsel but don't give any grounds for it. What's the purpose of that?

"THE DEFENDANT: The grounds for ineffective counsel is I've asked my attorney to come speak to me on several occasions. She's not. I've asked her for motions of discovery for more evidence to see what they have to have—actually have grounds to prosecute me guilty of this case. She has not answered my letters properly. She's trying to say—she's threatened to say that she was going to have a mistrial because right before my trial she said that she was going to—I was on the verge of having a mistrial while we were picking the trial."

Valdez clarified the last remark referred to his attorney telling him before trial "she was on the verge of just saying that she wanted to go for a mistrial." The court asked how this affected his ineffective assistance claim, and Valdez responded: "[S]he has not done anything that complied with anything that I have asked her to do for me." The court asked for clarification as to "[w]hat specifically . . . she ha[d] not done that would render her ineffective." He answered "she has not even stated the evidence, she has

not given me really evidence on any of this stuff. She has not given me a motion of discovery, a motion of anything."

Defense counsel told the district court Valdez "received copies of the police reports." Valdez agreed, saying: "That's it, that's all I've had." Defense counsel responded, "Well, that would be the evidence, your Honor." The court sought more clarification from Valdez:

"THE COURT: What specifically—what other evidence do you think—we've been to a jury trial and the jury has convicted you beyond a reasonable doubt. All evidence has been presented in open court. What is it that you think—

"THE DEFENDANT: She has not complied with none of my legal services. She don't even come and visit with me about my stuff. She hasn't even tried to come over to build a case for myself. Like she didn't even try to fight. She didn't even have an opening for me."

The court asked counsel if she had visited with Valdez. She responded she had not since the trial and commented, "At that point there's not a lot I can do for him, your Honor, we had a jury trial." When Valdez then said counsel only visited him three or four times before trial, the court inquired of defense counsel:

"THE COURT: Ms. Effenbeck, I'd asked you that question. Did you see him before the trial?

"MS. EFFENBECK: Yes. And the Court was here, the Court did the jury trial. I was prepared for the jury trial, your Honor. The Court saw the evidence and saw what happened with the jury. You know, I don't know that I could have changed the outcome of this case."

Valdez then pointed out:

"THE DEFENDANT: Also at my preliminary we didn't even see the body cams or anything. Aren't you supposed to reveal all of the evidence of body cams and everything at your preliminary? We didn't see that at preliminary.

"THE COURT: Well, Mr. Valdez, I don't know where you're giving getting that information from. There is no requirement that cameras or video be shown at any stage of the proceeding. The State has the choice as to what evidence it presents in prosecuting your case and then the defense can respond as it sees fit. But there is no requirement that body cameras, video, anything be shown at preliminary hearing. In fact in Kansas the State's prosecutors office could elect to not even have preliminary hearings, could use a grand jury proceeding in which you would not have any ability to demand any of that. It would simply be the police report being read by a police officer. That's one end of the spectrum. And I don't know where you're getting this idea.

"THE DEFENDANT: I still believe I didn't have enough access to my attorney.

"THE COURT: Okay. And Ms. Effenbeck has indicated that she visited you on multiple occasions before the trial.

. . . .

"THE COURT: Other than you believe her contact hasn't been sufficient and she that has not given you the discovery, other than police reports,—

"THE DEFENDANT: I've called her number. She never answers her phone, never. I've wrote letters. She never pretends to acknowledge any of my letters."

The court asked if there was "an issue with responding to letters," to which counsel replied: "[M]ost of the letters aren't very constructive as you can imagine. So in this regard I've written him back . . . and told him and explained to him that I can't file a notice of appeal until after he's sentenced. I've gone through material like that."

The court then addressed Valdez, which led to a new complaint about defense counsel's performance at the trial:

"THE COURT: Your attorney makes all the strategic decisions regarding how to present the case. There are decisions you get to make, which is for example pleading not guilty, whether you testify. But what motions to file, what evidence to present at the trial, other than your testimony, that's the strategic decision of counsel.

"THE DEFENDANT: But she hasn't done none of that.

"MS. EFFENBECK: Your Honor, you were here for the jury trial. I participated, I was prepared.

"THE DEFENDANT: She was not prepared and she over exaggerated, over animated.

. . . .

"THE COURT: What do you mean by that?

"THE DEFENDANT: Well, she was waving her hand, signaling and all that stuff, you know what I'm saying?

. . . .

"THE DEFENDANT: Like all that. And be honest too, be honest too, you guys were all in cahoots, whatever. We had that little evidence thing. She wasn't even paying attention to that.

"MS. EFFENBECK: I was writing my closing statement.

"THE COURT: What are you talking about?

"MS. EFFENBECK: When he accused the court reporter and the bailiff of—

"THE DEFENDANT: I didn't accuse, I seen it. I seen it.

"MS. EFFENBECK: Okay. When he said he saw the court reporter and the bailiff tampering with the evidence."

After this exchange, the court ruled:

"There was no tampering. There is nothing there. It was just organizing exhibits, Mr. Valdez. I haven't heard anything that would give rise to the counsel being removed from the case. Mr. Valdez, everything the Court witnessed was that your attorney was prepared, presented a good defense, a jury of unbiased individuals listened to the evidence and found guilt beyond a reasonable doubt. It sounds like there may be some misconception regarding what you are entitled to. If you want your own attorney you can hire one and then you get to have more say in this situation possibly."

This caused Valdez to assert he should have "every say so" in his case, to which the court replied:

"[I]f you want to make every strategic decision you should have represented yourself. Counsel is trained in the legal profession to make decisions and to strategically approach your case. There are some decisions you and you alone can make, which I've gone over those with you, but other than that the attorney is the one who's trained in the legal field to make strategic decisions and to produce the evidence and prosecute the case as they see fit."

Valdez replied that he had already "said [his] grounds," and the court ruled:

"I haven't heard sufficient grounds to have her withdrawn. I also don't see a need for counsel to spend time post conviction. And preconviction it sounds like there was sufficient preparation. The number of meetings though may not have been sufficient for Mr. Valdez's liking but it was sufficient for the Court for competent counsel. And so for that reason that portion of the motion is denied."

The court then moved to sentencing, during which defense counsel unsuccessfully argued for a downward dispositional departure.

Before the panel, Valdez argued the trial court should have appointed new counsel and held an evidentiary hearing at which he could present evidence of defense counsel's deficiencies. But he also conceded new counsel likely would not have been necessary had the court reviewed the claims and summarily denied them. His argument, though, is that the colloquy transformed into an evidentiary hearing during which he was unrepresented while the court "allowed appointed trial counsel to present evidence to rebut Mr. Valdez' claims." He argued defense counsel "faced a conflict of interest and acted in her own self-interest, by arguing and presenting evidence against" his interests. Valdez asked for

remand to the district court with instructions to appoint new counsel and conduct an evidentiary hearing.

The panel disagreed. It reasoned the trial court properly discharged its duty to inquire into potential conflict raised by the pro se motion, applying *State v. Toothman*, 310 Kan. 542, 448 P.3d 1039 (2019), and noting,

"The court asked a series of open-ended questions to understand Valdez' claim. Valdez stated that his attorney had not visited him enough times, had not provided him with evidence, had not complied with his wishes, and had not advocated fervently enough on his behalf. The trial court asked Valdez' attorney several questions along the way, and she informed the court that she had given Valdez copies of the police reports, had visited him several times before the trial, and had replied to the letters that she had received from him. The court found that Valdez' attorney had been well prepared, presented a good defense, and adequately communicated with Valdez." *Valdez*, 2021 WL 1324023, at *5.

Discussion

A defendant's articulation of dissatisfaction with counsel triggers a district court's duty to inquire into a potential conflict. See *State v. Pfannenstiel*, 302 Kan. 747, 760, 357 P.3d 877 (2015). This duty derives from the defendant's right to effective assistance of counsel under the state and federal Constitutions. *Toothman*, 310 Kan. at 554. An appellate court reviews a district court's inquiry about a defendant's dissatisfaction with counsel for abuse of discretion. *Toothman*, 310 Kan. at 554.

As noted previously, an abuse of discretion occurs when judicial action is based on an error of law or fact or is unreasonable. 310 Kan. at 554. An appropriate inquiry requires the district court to investigate:

"'(1) the basis for the defendant's dissatisfaction with counsel and (2) the facts necessary for determining if that dissatisfaction warrants appointing new counsel, that is, if the dissatisfaction is "justifiable."' But this inquiry does not require 'a detailed examination of every nuance of a defendant's claim of inadequacy of defense and conflict of interest.' Instead, '[a] single, open-ended question by the trial court may suffice if it provides the defendant with the opportunity to explain a conflict of interest, an irreconcilable disagreement, or an inability to communicate with counsel.' [Citations omitted.]" 310 Kan. at 554.

To obtain new counsel, a defendant must show justifiable dissatisfaction with appointed counsel. *Pfannenstiel*, 302 Kan. at 759. To do that, the defendant may show "a conflict of interest, an

irreconcilable disagreement, or a complete breakdown in communication between counsel and the defendant." 302 Kan. at 759-60. In *Toothman*, the court held the trial court adequately inquired into the defendant's asserted discontent with counsel when it investigated "the basis for his dissatisfaction and ask[ed the defendant] an open-ended question to elicit additional facts." *Toothman*, 310 Kan. at 555. The *Toothman* court noted that in resolving the complaint, the trial court expressed confidence in defense counsel's judgment "but did not . . . simply assume she was correct. On the contrary, the judge gave [the defendant] the last word and a full opportunity to explain why he wanted new counsel." 310 Kan. at 555.

Here, the trial court gave Valdez an open-ended prompt to explain his ineffective assistance allegation. Valdez told the court: he was unhappy with the level of communication with defense counsel; he did not believe he had seen all the evidence; that counsel was unprepared for trial; and he should have had more control over strategic decisions. The court then explored each complaint in greater detail with both Valdez and defense counsel. After doing so, it concluded there were insufficient grounds to remove defense counsel, finding that her pretrial preparation and communication was "sufficient for . . . competent counsel."

Valdez does not appear to challenge the panel's conclusion that he had no right to relief under *Toothman*. Instead, he argues only that his allegation of ineffective assistance automatically created a conflict of interest with trial counsel, and by hearing defense counsel's "evidence to rebut [his] claims" the district court deprived him of assistance of counsel. He cites a portion of a concurring opinion in *State v. Stovall*, 298 Kan. 362, 380, 312 P.3d 1271 (2013) (Luckert, J., concurring), for the proposition that his and defense counsel's interests were automatically in conflict. But this is not supported by that case citation, and it is not a correct statement of law.

Neither an allegation of ineffective assistance nor defense counsel's participation in the justifiable dissatisfaction inquiry alone—or in combination—requires appointment of new counsel.

See *Pfannenstiel*, 302 Kan. at 766 (holding inquiry into dissatisfaction with counsel based on asserted ineffective assistance did not require appointment of conflict-free counsel).

"Rather than require automatic substitution of counsel at the hint of a potential conflict of interest, the United States Supreme Court has recognized that either a defendant or defense counsel might raise a potential conflict as the basis for seeking new counsel 'for purposes of delay or obstruction of the orderly conduct' of the proceedings. *Holloway v. Arkansas*, 435 U.S. 475, 486, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). An inquiry assures any delay is for good cause, thereby avoiding automatically delaying proceedings by discharging the current counsel and appointing new counsel for all motions seeking substitute counsel, regardless of the motion's merits." *Pfannenstiel*, 302 Kan. at 764.

When performing the justifiable dissatisfaction scrutiny "both the court and defense counsel" must "walk a delicate line in making [that] inquiry." 302 Kan. at 766. The judge must not improperly require disclosure of confidential communications, and counsel may simply recount facts truthfully, but must not go "beyond factual statements and advocat[e] against the client's position." 302 Kan. at 766. Otherwise, counsel's responses may create a conflict of interest requiring new counsel. But the simple fact there was a back-and-forth between counsel, the defendant, and the court does not inevitably disqualify counsel and require a new attorney.

The *Pfannenstiel* court held the trial court properly rejected the defendant's claim of ineffective assistance of counsel after an inquiry in which both the defendant and defense counsel participated without a need for new counsel. 302 Kan. at 766. The *Pfannenstiel* court observed defense counsel made two comments that "approached the line of advocating against" the defendant's position: First, by making "an evaluative statement regarding her strategy, indicating she felt Pfannenstiel's witnesses would not be helpful and might undermine his testimony"; and second, by saying the defendant had "'misunderstood some things'" she told him. 302 Kan. at 767. The *Pfannenstiel* court held both comments were acceptable, reasoning the former concerned a strategic decision, generally an appropriate area of inquiry; and the latter supported the defendant's allegation that communications had broken down and was immediately followed by counsel's request to grant defendant's motion. 302 Kan. at 767.

We hold the trial court did not err conducting this inquiry without appointing substitute counsel to represent Valdez. His defense counsel largely gave only factual responses during the colloquy but did offer some self-evaluation. She twice told the district court she was "prepared" at trial and did not believe she could have changed the outcome. She also told the court Valdez had "never been happy," and that his letters to her were not "constructive." But these insignificant remarks did not require new counsel.

Convictions affirmed in part and reversed in part, and sentence vacated in part.

* * *

STEGALL, J., concurring: The majority badly misreads and misapplies our recent decision in *State v. Holder*, 314 Kan. 799, 502 P.3d 1039 (2022). The majority cites to *Holder* for the proposition that "the permissive inference instruction given at Valdez' trial was legally inappropriate." 316 Kan. at 8. But *Holder* never held that a permissive inference instruction based on PIK Crim. 4th 57.022 (2013 Supp.) (the instruction at issue both here and in *Holder*) was legally inappropriate, and the majority is simply wrong to suggest otherwise. The entire relevant passage from *Holder* is as follows:

> "These definitions tell us Holder has a point when he complains about the apparent discrepancy between the permissive inference instruction given in his case and K.S.A. 2020 Supp. 21-5705(e)(1)'s rebuttable presumption of an intent to distribute if any person possesses 450 grams or more of marijuana. Applying the definitions adopted in *Harkness*, the statutory rebuttable presumption means that once the State proved possession of 450 grams or more of marijuana, the jury must infer Holder's intent to distribute unless he proved otherwise. This suggests some burden shifting, although the operative impact in a given case would depend on the jury instructions as a whole. See *State v. Wimbley*, 313 Kan. 1029, 1039, 493 P.3d 951 (2021) (when addressing a challenged instruction's legal appropriateness, an appellate court does not view the instruction's language in isolation but considers all the jury instructions as a whole).
>
> "The panel correctly noted the instruction given to the jury 'conforms to the instruction required under PIK Crim. 4th 57.020 . . . .' *Holder*, 2020 WL 6108359, at *6. But that misses the point because it ignores what K.S.A. 2020 Supp. 21-5705(e) specifies. And our law is clear that 'an instruction must always fairly and accurately state the applicable law, and an instruction that does not do so would be legally infirm.' *Plummer*, 295 Kan. at 161.

"A rebuttable presumption has a different legal effect than a permissive inference. *Harkness*, 252 Kan. 510, Syl. ¶¶ 13-14. This means that even if we consider the jury instructions as a whole, we cannot hold they fairly and accurately reflect the applicable law specified by K.S.A. 2020 Supp. 21-5705(e), when measured narrowly against that statute.

"But aside from that, we also should consider more broadly whether the instruction—framed as it was as a permissive inference—was nevertheless legally appropriate. To do this, we view the instructions as a whole to determine "'whether it is reasonable to conclude that they could have misled the jury.'" *Wimbley*, 313 Kan. at 1035 (quoting *State v. Liles*, 313 Kan. 772, 780, 490 P.3d 1206 [2021]). Instructions fail their purpose if they omit words that may be considered essential to providing the jury with a clear statement of the law. *State v. Andrew*, 301 Kan. 36, 42-43, 340 P.3d 476 (2014).

"In general, a jury may infer intent from '"acts, circumstances, and inferences reasonably deducible therefrom."' *State v. Ross*, 310 Kan. 216, 224, 445 P.3d 726 (2019) (quoting *State v. Barnes*, 293 Kan. 240, 264, 262 P.3d 297 [2011]). In this context, a defendant's possession of a large quantity of narcotics certainly may support an inference that the defendant intended to distribute the narcotic. See 1 Jones on Evidence § 5:42 (7th ed.). But here the instructed permissive inference was not only unmoored from any statutory basis, its 450-gram threshold had no connection to the evidence. Said differently, the jury was simply told out of left field that Holder's possession of 'more than 450 grams' of marijuana could support an intent-to-distribute inference—even though the evidence showed a much larger quantity and no other evidence explained why a 450-gram threshold to trigger this permissive inference was important to anything about the case." *Holder*, 314 Kan. at 805-07.

There is nothing in this passage I disagree with. Let's recapitulate the analysis one step at a time. First, the *Holder* court says a jury instruction must fairly and accurately state the law. Second, the court says that PIK Crim. 4th 57.022 does not accurately reflect K.S.A. 2020 Supp. 21-5705(e)(1) because while the statute includes a rebuttable presumption, the PIK instruction only describes a permissible inference. So *Holder* deduced that "when measured narrowly against that statute" the permissive inference instruction does not fairly and accurately state the law. 314 Kan. at 806.

But then, thirdly, the *Holder* court continued its analysis. We went on to "consider more broadly whether the instruction—framed as it was as a permissive inference—was nevertheless legally appropriate." 314 Kan. at 806. Why do that if we already decided the PIK instruction did not accurately reflect the statute? The answer is that we recognized that permissive inferences are perfectly legal and acceptable in criminal trials regardless of

whether a rebuttable presumption is on the books. In fact, such inferences, when reasonable, are the operative principle of circumstantial evidence and are generally the only way juries may use such evidence in criminal trials. See *State v. Kriss*, 232 Kan. 301, 304-05, 654 P.2d 942 (1982) ("Because [a] permissive [inference] leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.").

We said as much in *Holder* by explaining that the PIK permissive inference instruction might be "nevertheless legally appropriate" because "a defendant's possession of a large quantity of narcotics certainly may support an inference that the defendant intended to distribute the narcotic." 314 Kan. at 806. So fourthly, in *Holder*, we proceeded to analyze the permissive inference instruction given in that case *independently* of K.S.A. 2020 Supp. 21-5705(e)(1). And in so doing, we found the instruction to be error not because it was legally inappropriate (in fact we said the opposite—that depending on the evidence it may be a correct statement of the law), but rather because it was factually inappropriate. That is, we held that because the instruction did not match the *evidence in the case*, it was error to give it. That is a holding on factual appropriateness.

We ought to follow the same analytical path in today's case. But the majority chooses to simply say the instruction is legally inappropriate because it misstates the law. This mystifies me as it throws into doubt a bedrock principle of how juries may consider evidence. Does this mean a jury is no longer permitted to draw reasonable inferences about intent from the amount of illegal drugs possessed by a defendant? If a prosecutor tells a jury it may infer a defendant intended to sell drugs due to the large quantity in evidence, does that prosecutor commit error for misstating the law?

Instead of sowing such confusion, we ought to ask if the permissive inference instruction—standing alone—is a correct statement of the law. That is what we did in *Holder*. Clearly, it is. We know this because permissive inferences are always lawful so long as the facts make such inferences reasonable. We know that a prosecutor telling a jury it is permitted to draw reasonable inferences from the evidence is not prosecutorial error for misstating the law. See *State v. Timley*, 311 Kan. 944, 951, 469 P.3d 54 (2020) ("[W]e find it unnecessary to require the prosecutor to include the unspoken, but implicit, disclaimer inherent in all opening arguments, i.e., 'If you look at the evidence, a reasonable inference is that . . .'").

If I say "apples and bananas are fruit" and you reply "bananas are fruit," you have not contradicted me. In the same way, if the Legislature says "a jury should presume intent" and the trial judge says "a jury is permitted to infer intent," there is no contradiction. Just as a banana remains a fruit regardless of whether an apple is also a fruit, so too a permitted inference remains lawful even in the face of a statute declaring a presumption to also be lawful.

The majority is correct that in the present case Valdez failed to properly raise a factual appropriateness challenge to this instruction. Consequently, I would hold that the permissive inference instruction was legally appropriate and there was no error. *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021) (issue not briefed is deemed waived or abandoned).

LUCKERT, C.J., joins in the foregoing concurrence.

In re Equalization Appeal of Walmart Stores, Inc.

No. 122,162

In the Matter of the Equalization Appeals of WALMART STORES, INC.; WALMART REAL ESTATE BUSINESS TRUST; SAM'S REAL ESTATE BUSINESS TRUST; and TMM ROELAND PARK CENTER, LLC, for the Year 2016 in Johnson County; and WALMART REAL ESTATE BUSINESS TRUST and SAM'S REAL ESTATE BUSINESS TRUST for the Year 2017 in Johnson County.

(513 P.3d 457)

SYLLABUS BY THE COURT

1. TAXATION—*Board of Tax Appeals—Highest Administrative Tribunal for Assessing Property for Ad Valorem Tax Purposes*. The Board of Tax Appeals is the highest administrative tribunal established by law to determine controversies relating to assessment of property for ad valorem tax purposes.

2. SAME—*Determination of Fair Market Value of Property—Question of Fact*. A property's fair market value determination is generally a question of fact with the fact-finder free to decide whether one appraisal or methodology is more credible than another.

3. REAL PROPERTY—*Rule of Law Set Out by* In re Prieb Properties, LLC, *is Overruled—BOTA Is Fact-Finder in Appraising Real Property at Fair Market Value.* The rule of law established by *In re Prieb Properties, LLC*, 47 Kan. App. 2d 122, 135-36, 275 P.3d 56 (2012), that holds rental rates from commercial build-to-suit leases do not reflect market conditions and may not be relied on by appraisers without adjustments is overruled. *Prieb*'s rationale invades the Board of Tax Appeals' longstanding province as the fact-finder in the statutory process for appraising real property at its fair market value.

Review of the judgment of the Court of Appeals in 61 Kan. App. 2d 154, 500 P.3d 553 (2021). Appeal from the Board of Tax Appeals. Opinion filed July 1, 2022. Judgment of the Court of Appeals affirming the Board of Tax Appeals is reversed. Decision of the Board of Tax Appeals is reversed, and the case is remanded with directions.

Ryan L. Carpenter, assistant county counselor, argued the cause and was on the briefs for appellant Board of County Commissioners of Johnson County.

Barbara A. Smith, of Bryan Cave Leighton Paisner LLP, of St. Louis, Missouri, argued the cause, and *Samuel E. Hofmeier*, of the same firm, of Kansas City, Missouri, and *Linda Terrill*, of Property Tax Law Group, LLC, of Overland Park, were with her on the briefs for appellees Walmart Stores, Inc., et al.

David R. Cooper and *Andrew D. Holder*, of Fisher, Patterson, Sayler & Smith, LLP, of Topeka, were on the brief for amicus curiae Kansas Association of Counties.

Johnathan Goodyear, general counsel, and *Gerald N. Capps*, of Wichita, were on the brief for amicus curiae League of Kansas Municipalities.

R. Scott Beeler and *Carrie E. Josserand*, of Lathrop GPM LLP, of Overland Park, were on the brief for amicus curiae The Kansas Chamber of Commerce.

Jarrod C. Kieffer, of Stinson LLP, of Wichita, was on the brief for amicus curiae Institute for Professionals in Taxation.

Stephen R. McAllister and *Betsey L. Lasister*, of Dentons US LLP, of Kansas City, Missouri, were on the brief for amicus curiae Chamber of Commerce of the United States of America.

S. Lucky DeFries, of Morris, Laing, Evans, Brock & Kennedy, Chartered, of Topeka, was on the brief for amicus curiae Council on State Taxation.

The opinion of the court was delivered by

BILES, J.: This is an ad valorem property tax appeal for the 2016 and 2017 tax years involving 11 Walmart and Sam's Club "big box" stores in Johnson County that saw their valuations nearly double from 2015. The Board of Tax Appeals concluded the County's valuations were too high because they improperly relied on unadjusted sales and rental income data from other properties subject to build-to-suit leases. The County appealed, but a divided Court of Appeals panel agreed with BOTA. *In re Equalization Appeals of Walmart Stores, Inc.*, 61 Kan. App. 2d 154, 500 P.3d 553 (2021). On review, we reverse the panel and return the case to BOTA to reconsider the County's evidence.

This highly contested issue boils down to deciding whether appraisal opinions founded on unadjusted build-to-suit lease data are inadmissible as a matter of law to support valuations used in the process of ad valorem taxation. The alternative is to treat these opinions like other evidence. Here, BOTA dutifully followed a 2012 Court of Appeals decision that crafted this choice as a rule of law to exclude opinions based on this unadjusted data. See *In re Prieb Properties, LLC*, 47 Kan. App. 2d 122, 135-36, 275 P.3d 56 (2012) (holding rental rates from commercial build-to-suit leases "are not reflective of market conditions and may not be utilized for purposes of the income approach or the sales comparison

approaches to value for ad valorem tax purposes in Kansas without a disentanglement by adjustments"). Other Court of Appeals panels have taken a similar approach since *Prieb*, although at times they inject some ambiguity into what evidence is admissible. See, e.g., *In re Tax Appeal of Arciterra BP*, No. 121,438, 2021 WL 1228104, at *10 (2021 Kan. App.) (unpublished opinion) ("If, for example, an appraiser can show that a build-to-suit lease was motivated by market terms and can isolate above- or below-market rents to make the necessary adjustments, BOTA could find that a market rent determination is properly supported and based on appropriate, comparable leases."). This court has never considered the question.

We hold *Prieb*'s rationale invades BOTA's longstanding province as the fact-finder in the statutory process for appraising real property at its fair market value for ad valorem tax purposes. See, e.g., *Northern Natural Gas Co. v. Dwyer*, 208 Kan. 337, Syl. ¶ 2, 492 P.2d 337 (1971) ("The State Board of Tax Appeals is the highest administrative tribunal established by law to determine controversies relating to assessments of property for ad valorem tax purposes."). A property's fair market value is generally a question of fact with the fact-finder free to decide whether one appraisal or methodology is more credible than another. *City of Mission Hills v. Sexton*, 284 Kan. 414, Syl. ¶ 8, 160 P.3d 812 (2007). *Prieb*'s rule of law effectively prohibits BOTA from considering expert opinions based on unadjusted data, even when the experts argue their methodologies arrive at a fair market value appraisal in conformity with generally accepted procedures and standards as required by state law. See K.S.A. 79-503a. It does this by declaring "build-to-suit lease rental rates are not probative of market conditions." *Prieb*, 47 Kan. App. 2d at 124.

By following *Prieb*, BOTA imposed an exclusionary rule on the County's evidence—rather than simply considering its weight and credibility. BOTA held the Taxpayers' expert valuation "better adhered to the *Prieb* mandate regarding built-to-suit rental rates than the County appraisals." We remand this case to BOTA to reconsider the County's evidence without *Prieb*'s constraints. Though BOTA may reach the same result on remand, that decision

must be based on its own determinations of the facts and witness credibility.

FACTUAL AND PROCEDURAL BACKGROUND

Johnson County appraised these 11 Walmart and Sam's Club stores for tax years 2016 and 2017 at nearly double their 2015 tax values. The taxpayers are the Walmart Real Estate Business Trust, Sam's Real Estate Business Trust, and TMM Roeland Park Center, LLC. All stores are owner-occupied except one, which is leased to Walmart by TMM Roeland Park. Taxpayers unsuccessfully sought review at the county level, then appealed to BOTA, which held a 10-day evidentiary hearing. Valuation experts on both sides testified about their preferred methods for valuing these properties.

In finding the properties' values, BOTA adopted "the income approach," in which: (1) market rent is estimated; (2) market vacancy and collection rates are estimated; (3) appropriate, market expenses are deducted to determine the property's net income; and (4) the net income as determined in the previous steps is divided by a capitalization rate to arrive at that income's present worth. The dispute here mostly concerns the information from which the County's experts constructed their valuation estimates. In particular, the parties argue over the relevance of unadjusted sales and rental rates from other "big box" retail properties subject to build-to-suit leases.

To appreciate the legal issue presented and the conflicting valuation approaches, it is necessary first to detail each side's primary valuation evidence. Then, we will discuss the rulings by BOTA and the Court of Appeals panel before deciding the merits.

The County's case

Kyle Blanz, the County's BOTA specialist, explained how the County used the Valbridge Property Advisors Big Box Retail Market Study to estimate each store's market rental rate and expenses on a square-footage basis. The rental rates varied from $7.20 to $10 per square foot based on the County's view of each property's investment class; a 4% vacancy and collection loss rate;

operating expenses ranging from $.50 to $.70 per square foot depending on investment class; and capitalization rates from 7.5% to 7.75%, also depending on investment class.

Bernie Shaner, an appraiser who co-authored the Valbridge study, explained how he had trouble finding rental data for big box retail stores because they are seldom leased on the open market in the traditional sense of an existing building offered for rent. Instead, these properties are typically leased under build-to-suit arrangements in which the end user finds a location, develops plans, and hires a contractor in exchange for a lease. This meant the data for his Valbridge study was limited to what could be learned from second-generation leases of big-box properties and build-to-suit rents because big-box stores characteristically do not "changeover" often. But, he added, the rental rates for the first- and second-generation properties compared "[r]ather consistently" and that he expected rent for an older second-generation property to be less than for a new property, which is typically subject to a build-to-suit lease. He said that the fact the stores operating under build-to-suit leases are not "turning over" shows those locations remain viable. He also believed build-to-suit tenants have "done their homework" and analyzed each site to confirm the property's highest and best use as a big box retail store. For these reasons, Shaner typically looked for other build-to-suit leases because they dominate this particular lease market. In his opinion, these leases are very relevant for valuation purposes and represent the typical transaction for this property segment.

A second County expert, Peter Korpacz, appraised the six largest properties and presented his work as evidence supporting the County's valuations. He testified he selected his rental and sales comparables by size and trade area data, and adjusted them for size, year built or renovated, tenant quality, and net operating income per square foot. He testified that when valuing big box retail stores, he looked at rentals of other big box retail stores and for sales of properties occupied by the big box retailers. Like Shaner, Korpacz noted retailers "don't sell these first-generation stores . . . until they no longer have value to them . . . ." Accord-

ingly, he said, "we look for sales of properties that have similarities. They are occupied by retailers, and they are always going to be under a lease because those are the ones that sell."

In his testimony, Korpacz responded to arguments against using build-to-suit and sale leaseback data for these valuations. He disagreed with those who believe the sales of properties subject to build-to-suit leases values the tenant, not just the real estate. He explained that buyers purchase the fee simple subject to the lease, so they are buying everything including the rent income. He acknowledged that every purchase in which the buyer wants a lease has a credit component, i.e., the tenant's creditworthiness. But he said the reason high-credit tenants are at that site is "because the location brought them there." He added that market participants view the purchase as real estate with rent flow, which the marketplace views as income. He also said when he verified his sales data, the participants said they did not buy intangibles.

Korpacz disputed claims that rents for first-generation build-to-suit leases are based on the cost to build a particular property, and not the market rate for its use. He said a developer analyzes this before going to the marketplace any time a building is built to be leased as income property and tries to negotiate the maximum rent. He believed this is not amortizing construction costs but seeking a rate of return. And he said this is true with every property built to be leased because the property would not be built if the developer cannot see a return on the lease or a profit on the sale.

Korpacz dismissed the critique that rent under a build-to-suit lease is affected by how long a developer wants to wait to be paid back. He testified a developer is kept in check on the rent because the retailer can go to the market and find someone else who wants a normal rate of return over a normal period. For example, he could not imagine any major company willing to pay back the developer's investment in five years on a rental basis. And consistent with this, Shaner testified he would not consider a short, 10-year primary lease without renewals to be a market transaction. Korpacz believed his methodology reflected the normal way real estate development works and was not peculiar to a big box retailer.

Finally, Korpacz insisted build-to-suit lease data should not be excluded out of hand. Rather, he said, transactions should be verified with the parties involved. And in his view, if no non-realty components were in the rent, he would consider it to reflect the market. He said he would not discount a lease just because it was a sale-leaseback or build-to-suit. The bottom line, Korpacz testified, was that in his experience and training his methodologies reflected generally accepted appraisal practices.

Robert Marx valued the remaining five properties to support the County's valuations. He also recognized it was hard to find market rent data for big box retail stores because most are owner-occupied or build-to-suit and not built on speculation, unlike industrial office buildings. Part of his analysis was whether retailers were willing to lease previously occupied single-tenant structures. He found that for a good location, there would not be much difference in market rent because a good location will rent for more money. Marx looked for comparable properties with the same highest and best use as the subject properties in economically similar market areas. And for these properties, the highest and best use was as large single-tenant retail discount stores subject to a demand user.

Marx said when performing the income approach, properties are valued as if vacant, ignoring contractual income and assuming market rent, vacancy, expenses, and capitalization rates. He reviewed sales and leases on the national retail market. He defined "market rent" as the rate a willing lessor would accept and a willing lessee would pay, with consideration given to underlying expenses, in a transaction between a knowledgeable landlord and knowledgeable tenant. Marx said a building's design, age, and location are three major factors affecting the rental price. Older buildings and those that are functionally dated or obsolete tend to rent for less, while good buildings tend to rent for more. In addition, a long-term lease affects the rental rate, as longer leases typically have lower rent than short term ones.

Marx said he considered his assignment to be "a big data problem trying to parse out—I'll use the word to disentangle that leased fee from the fee simple. You've got to take the big picture." To do this, he performed what he called a qualitative analysis using

trendlines and bracketing to estimate fair market rent. He said the presence of build-to-suit rents put a "huge focus" on that disentanglement and he made significant efforts at disentangling the leased fee from the fee simple. As BOTA described his process, Marx

"separated the realty and non-realty components utilizing his market rent analysis technique, which involved an examination of each property's highest and best use, a regional rental survey of properties over 100,000 square feet in size, a local discount warehouse stores rental survey, a re-lease of a Home Depot located at 95th and Metcalf, and current rental listings."

Marx then discussed the construction process for big box stores, noting one valuation study concluded they can cost more than $100 per square foot, not including site preparation, land, or entrepreneurial incentive for the builder, with a discount store costing around $80 a foot. In his opinion, it is cheaper to build new than to retrofit and convert an older discount store. And he said by talking with a big-box contractor he learned it is a very active and competitive market for that formula-built real estate. He said big box retailers usually use the same set of engineers and architects, and there are traveling subcontractors that follow the projects, so the actual construction costs are sometimes less than what they would be if a single user wants to build a building.

Based on this, Marx believed reference data for construction costs of big-box retail stores that he reviewed may overstate what is happening, since big box retailers have an economy of scale that lowers costs. This causes rental rates to be somewhat below market because they are below what would be the cost otherwise. He also believed that, when all the other units of production are in place—land, labor, and capital entrepreneurial incentive—leased fee rents can be below or equal to market rent on build-to-suit properties.

Blanz, Korpacz, and Marx all testified they applied generally accepted appraisal practices in doing their work supporting the County's valuations.

The Taxpayers' case

Gerald Maier performed the Taxpayers' appraisals and testified before BOTA. He said the County's higher valuations for 2016 and 2017 resulted from increasing the market rent estimate

and decreasing the capitalization rate. Maier compiled cost, sales comparable, and income approaches to valuation, though he deemed the cost approach the least reliable. In his sales comparable analysis, he excluded build-to-suit and sale leaseback sales and excluded sales of second-generation leased properties, focusing solely on sales in which only the real property was transferred. He adjusted the sales for time, market conditions, location, quality, utility, and investment quality to determine a per-square foot value that he applied to the subject properties.

For his income approach, Maier believed second-generation rents were most probative of market value because the tenant entered the property when it was vacant and available for lease, as compared to build-to-suit and second-generation rents involving significant tenant improvements paid for by the property owner. He dismissed build-to-suit leases, which he characterized as financing agreements for the property's construction, so his analysis included some second-generation leases with minimum tenant improvements that he adjusted for. His estimates included a vacancy rate of 7.5%, which was greater than the County's proposal, because he assumed Walmart would vacate the properties at the time of sale—contrary to other evidence suggesting there would be no vacancy since the store is currently occupied. Expanding on his capitalization rate, Maier explained the subject properties carry risks that do not apply to a property subject to a long-term lease with a creditworthy tenant: the tenant may have poor credit; the property may sit vacant for a period before there is any net income; and property management would be more important. In sum, most of the elements of risk are higher for a "fee simple" situation than for a "leased fee" situation. He estimated a 10% capitalization rate, reflecting costs that the new owner would have to incur to re-lease the property, such as holding cost, tenant finish, and the time and risk associated with re-leasing.

BOTA's decision

BOTA adopted the Taxpayers' appraisal approach. It first concluded it needed to determine the fair market value of only the real estate. And to do so, it held valuing the properties as vacant and available to be rented at market rate was supported by substantial

competent evidence and complies with the Uniform Standards of Professional Appraisal Practice (USPAP). It decided it was permissible to determine the difference between the property's value under a hypothetical vacant condition and its value as occupied to isolate the taxable real estate's value from the value of the business conducted on it.

BOTA cited *Prieb* for the proposition that build-to-suit rental rates do not derive from the market, and as a matter of law cannot be used to establish a property's income-generating potential without disentanglements and adjustments to show the rent paid is for the real estate alone. It noted K.S.A. 74-2433(a) requires BOTA to "be bound by the doctrine of stare decisis limited to published decisions of an appellate court." And it observed, "We find *Prieb*'s admonition against the use of build-to-suit transactions to be clear and unambiguous."

BOTA then examined the County's evidence and observed its appraisals relied on unadjusted build-to-suit comparables and rental rates contrary to *Prieb*. BOTA concluded that neither the Valbridge study nor Korpacz made the adjustments required by *Prieb*'s rule of law. It also decided Marx's purported adjustments were "lacking and conclusory." It held the Taxpayers' analysis by Maier "better adhered to the *Prieb* mandate regarding build-to-suit rental rates than the County appraisals." And it decided Maier's income approach best reflected the properties' values.

But BOTA also held Maier's 10% and 10.5% capitalization rates were too high. It concluded substantial credible evidence supported an 8.5% rate for all but the Frontage Rd. and Roe Blvd. stores, for which a 9% rate was appropriate. This chart reflects the properties, the County's valuations, the Taxpayers' proposed valuations, and BOTA's valuations:

BOTA Docket Nos.	Taxpayer	Address	County 2016/ 2017	Taxpayers 2016/2017	BOTA 2016/2017
2016-2700 & 2017-4166	Walmart Real Estate Business Trust	5701 Silverheel, Shawnee	$17,751,000	$8,750,000/ $9,150,00	$10,153,000/ $10,548,000
2016-2698 & 2017-4172	Walmart Real Estate Business Trust	15700 Metcalf, Overland Park	$18,584,000	$10,000,000/ $10,500,000	$11,738,000/ $12,229,000
2016-2701 & 2017-4171	Sam's Real Estate Business Trust	1725 E Santa Fe, Gardner	$15,778,000	$10,150,000/ $10,650,000	$11,924,000/ $12,447,000
2016-2697 & 2017-4173	Walmart Real Estate Business Trust	16100 W 65th, Shawnee	$20,875,000	$10,150,000/ $10,700,000	$12,048,000/ $12,603,000
2016-2699 & 2017-4170	Walmart Real Estate Business Trust	395 N K7, Olathe	$21,558,000	$11,600,000/ $12,150,000	$13,578,000/ $14,137,000
2016-2694 & 2017-4169	Walmart Real Estate Business Trust	13600 S Alden, Olathe	$16,104,000	$11,350,000/ $11,900,000	$13,381,000/ $13,957,00
2016-2705	TMM Roeland Park Center, LLC	5150 Roe Blvd, Roeland Park	$9,264,000	$5,000,000	$5,700,000
2016-2696 & 2017-4167	Walmart Real Estate Business Trust	7701 Frontage Rd, Overland Park	$10,947,000	$5,350,000/ $5,650,000	$6,409,000/ $6,718,000

BOTA Docket Nos.	Taxpayer	Address	County 2016/ 2017	Taxpayers 2016/2017	BOTA 2016/2017
2016-2695 & 2017-4168	Walmart Real Estate Business Trust	11701 Metcalf, Overland Park	$13,977,000	$6,950,000/ $7,300,000	$8,144,000/ $8,471,000
2016-2702 & 2017-4175	Sam's Real Estate Business Trust	8300 W 135th, Overland Park	$15,648,000	$8,050,000/ $8,400,000	$9,356,000/ $9,712,000
2016-2703 & 2017-4174	Sam's Real Estate Business Trust	12200 W 95th, Lenexa	$13,150,000/ $14,756,000	$6,650,000/ $7,000,000	$7,838,000/ $8,183,000

The Court of Appeals panel's split decision

A divided Court of Appeals panel affirmed BOTA's decision. *In re Equalization Appeals of Walmart Stores, Inc*., 61 Kan. App. 2d 154, 168, 500 P.3d 553 (2021). The majority applied *Prieb*'s holding that "build-to-suit leases 'may not be utilized for purposes of the income approach or the sales comparison approaches to value for ad valorem tax purposes in Kansas without a disentanglement by adjustments . . . .'" 61 Kan. App. 2d at 166.

The *Walmart* majority began by explaining how the County sought to value the "fee simple subject to a lease" to tax both the properties' real estate value and other value created by a contract right, rather than valuing just the fee simple interest. 61 Kan. App. 2d at 164. Next, the majority decided BOTA did not prevent the County from presenting evidence that the unadjusted build-to-suit data reflected market conditions, nor prevent it from presenting evidence of any necessary adjustments. And it held the County "failed to meet its burden of proof because it made the decision to stand on its belief that the rental rates in its build-to-suit lease comparables inherently reflected the actual rental rates in an open and competitive market." 61 Kan. App. 2d at 168.

Addressing the County's bid to overrule *Prieb*, the majority held *Prieb* should be adhered to because it had been "relied on by courts, by BOTA, by attorneys, by appraisers, and by litigants for nearly a decade." 61 Kan. App. 2d at 169. It also reasoned the Legislature acquiesced in *Prieb*'s decision by failing to statutorily respond to it, "confirm[ing] that BOTA is required to decide valuation appeals based "upon a determination of the fair market value of the fee simple of the property." 61 Kan. App. 2d at 169. It also believed "the 2016 amendment to K.S.A. 74-2433 passed by the Kansas Legislature," which specified BOTA must determine the value of the "fee simple" in a tax appeal, suggested *Prieb* accurately reflected legislative intent. 61 Kan. App. 2d at 169-70. Finally, the majority said it was not clearly convinced *Prieb* was wrongly decided or no longer sound because of changing conditions. It observed, "[a]t most, we find that the County has presented an argument in support of its position in the ongoing policy dispute regarding the methodology to use in the appraisal of real property on which big-box retail stores or similar businesses are operated." 61 Kan. App. 2d at 170.

Given its rejection of the County's legal attack against *Prieb*, the panel majority held substantial competent evidence supported BOTA's decision because it

> "was based on Maier's valuation opinions that were supported by comparables that reflected market conditions in an open and competitive market. In rendering his opinions regarding valuation of the subject properties, Maier examined sales of nine properties utilized for big-box retail stores. However, he excluded build-to-suit leases and leaseback sales as well as the sales of second generation leased properties. Maier testified that he focused on fee simple sales and adjusted the sale price for time and market conditions, location, quality and utility, and investment quality to derive a square foot unit value that he then applied to each of the subject properties." 61 Kan. App. 2d at 172.

And in holding BOTA's decision reasonable, the majority advanced alternative rationales. It held the County waived any argument that BOTA's decision was unreasonable, arbitrary, or capricious by failing to support it with factual argument or legal authority. It then held that even if the argument was not waived, BOTA adequately explained its decision. Finally, the panel concluded BOTA reasonably adopted Maier's valuations with the adjusted capitalization rates because the County failed to show his

"appraisal methodology was inconsistent with Kansas law or the USPAP." 61 Kan. App. 2d at 173.

Judge Steve Leben dissented. He argued for *Prieb* to be overturned and the case remanded to BOTA for full consideration of the County's evidence. He said *Prieb* went outside the bounds of proper judicial review by holding build-to-suit leases generally may not be used in the sales comparison and income approach. He reasoned no statute permitted a reviewing court to determine what was generally accepted appraisal practice. *Walmart*, 61 Kan. App. 2d at 175 (Leben, J., dissenting). And, he noted, *Prieb*'s rejection of the agency fact-finder's acceptance of one expert's valuation over another was highly unusual. He asserted this could not have been done in *Prieb* without first imposing improper legal limits on what could be considered generally accepted appraisal practices to justify excluding some expert testimony. 61 Kan. App. 2d at 175. Judge Leben continued:

"The essence of *Prieb* is that the leases now in place and generating an income stream for the owner of the buildings housing these big-box stores—leases that may be in place for many years to come—must be ignored altogether. That makes no sense to me either under Kansas law or based on real-estate appraisal principles." 61 Kan. App. 2d at 181.

In support of this, Judge Leben quoted from a concurring opinion in the same Wisconsin case cited by the *Prieb* panel:

"Property is assessed at the amount the property would sell for as a result of arm's-length negotiations in the open market between an owner willing to sell and a buyer willing to buy. A buyer generally would pay more for real property that has a high stream of income from a lease than for property with a lower stream of income from a lease. Because the sum at which a property will be bought and sold is dictated in part by the income from a lease attaching to the property, the actual income stream from the lease should be capitalized to reach the assessed value of the property." (Emphasis added.) *Walgreen Co. v. Madison*, 311 Wis. 2d 158, 209, 752 N.W.2d 687 (2008) (Abrahamson, C.J., concurring).

Finally, Judge Leben argued stare decisis did not compel continued adherence to *Prieb*. He believed any reliance interest in *Prieb* is not strong, given big-box retailers' sophistication and their awareness that the proper method to appraise their stores is a hotly contested issue. And he pointed out *Prieb* is only an intermediate appellate court decision, so he dismissed any legislative acquies-

cence argument as weak rationale for reaffirming *Prieb*, as compared to legislative acquiescence in a Supreme Court decision. 61 Kan. App. 2d at 182-83.

The County asked for our review of the panel's split decision, which we granted. Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

DISCUSSION

As seen from the conflicting views, this case presents two basic alternatives for big box store valuations: continue to consider unadjusted build-to-suit lease data inadequate as a matter of law when it is used to support a valuation opinion; or acknowledge that data's use simply goes to the credibility and persuasive weight of an opinion founded upon it. We consider first *Prieb* and its application to the County's valuations.

Standard of review

The Kansas Judicial Review Act controls our review of BOTA decisions. See K.S.A. 74-2426(c). The County, as the party challenging BOTA's decision, carries the burden to show its invalidity. K.S.A. 77-621(a). The KJRA permits judicial relief only for statutorily enumerated reasons, three of which are raised here:

> "(4) the agency has erroneously interpreted or applied the law;
>
> . . . .
>
> "(7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or
>
> "(8) the agency action is otherwise unreasonable, arbitrary or capricious." K.S.A. 77-621(c).

A court's review of BOTA's application and interpretation of the law is unlimited and performed without deference to the agency. *In re River Rock Energy*, 313 Kan. 936, 944, 492 P.3d 1157 (2021).

"As to whether BOTA's decision was based on factual determinations unsupported by the record as required for relief under K.S.A. 77-621(c)(7), a reviewing court must determine whether the evidence supporting the agency's factual findings is substantial when considered 'in light of the record as a whole.' K.S.A. 77-621(d) defines substantial evidence "'in light of the record as a whole"' to include evidence both supporting and detracting from an agency's findings. But if BOTA's findings of fact are determined to be so supported, 'the findings cannot be disregarded or contradicted on appeal.' *In re CIG Field Services Co.*, 279 Kan. 857, Syl. ¶ 2, 112 P.3d 138 (2005); see also K.S.A. 77-621(d) ('[T]he court shall not reweigh the evidence or engage in de novo review.').

"Finally, as to whether BOTA's decision was 'otherwise unreasonable, arbitrary or capricious' as required for relief under K.S.A. 77-621(c)(8), we review those questions for abuse of the agency's discretion." *River Rock*, 313 Kan. at 945.

General statutory background

The County attacks *Prieb* as judicial overreach unsupported by legal or statutory authority. Taxpayers defend *Prieb* as legally correct and shielded by stare decisis. Our statutes control much of this debate.

State law requires each parcel of real property to be appraised for ad valorem property taxation purposes "at its fair market value in money, the value thereof to be determined by the appraiser from actual view and inspection of the property." K.S.A. 79-501.

"'Fair market value' means the amount in terms of money that a well informed buyer is justified in paying and a well informed seller is justified in accepting for property in an open and competitive market, assuming that the parties are acting without undue compulsion. . . . For the purposes of this definition it will be assumed that consummation of a sale occurs as of January 1." K.S.A. 79-503a.

And when valuing real property,

"Sales in and of themselves shall not be the sole criteria of fair market value but shall be used in connection with cost, income and other factors including but not by way of exclusion:
"(a) The proper classification of lands and improvements;
"(b) the size thereof;
"(c) the effect of location on value;
"(d) depreciation, including physical deterioration or functional, economic or social obsolescence;
"(e) cost of reproduction of improvements;
"(f) productivity taking into account all restrictions imposed by the state or federal government and local governing bodies, including, but not limited to, restrictions on property rented or leased to low income individuals and families as

authorized by section 42 of the federal internal revenue code of 1986, as amended;

"(g) earning capacity as indicated by lease price, by capitalization of net income or by absorption or sell-out period;

"(h) rental or reasonable rental values or rental values restricted by the state or federal government or local governing bodies, including, but not limited to, restrictions on property rented or leased to low income individuals and families, as authorized by section 42 of the federal internal revenue code of 1986, as amended;

"(i) sale value on open market with due allowance to abnormal inflationary factors influencing such values;

"(j) restrictions or requirements imposed upon the use of real estate by the state or federal government or local governing bodies, including zoning and planning boards or commissions, and including, but not limited to, restrictions or requirements imposed upon the use of real estate rented or leased to low income individuals and families, as authorized by section 42 of the federal internal revenue code of 1986, as amended; and

"(k) comparison with values of other property of known or recognized value. The assessment-sales ratio study shall not be used as an appraisal for appraisal purposes.

"The appraisal process . . . shall conform to generally accepted appraisal procedures and standards which are consistent with the definition of fair market value unless otherwise specified by law." K.S.A. 79-503a.

In addition, the Director of Property Valuation is statutorily required to "adopt appraiser directives prescribing appropriate standards for the performance of appraisals in connection with ad valorem taxation," and those directives "shall require, at minimum . . . [t]hat appraisals be performed in compliance with the uniform standards of professional appraisal practice, commonly referred to as 'USPAP,' promulgated by the appraisal standards board of the appraisal foundation." K.S.A. 79-505.

Finally, K.S.A. 74-2433(g) requires valuation appeals before BOTA must be decided "upon a determination of the fair market value *of the fee simple* of the property." (Emphasis added.)

Valuing large, big box retail properties under Prieb

All agree big box retail properties like the ones here present unique appraisal problems. As one commentator noted:

"[O]nly four to five real users of these vacant big-box stores exist: Walmart, Target, Lowe's, Home Depot, and Costco. Because each one of these retailers' use of the actual big-box building is specific to the individual retailer, each prefers

to build its own, new store rather than take someone else's box and try to retrofit it for its footprint.

"The build of the physical structure and outward appearance of these national retailers is just as much a part of their identity as the goods they sell. This idea, known as Build-to-Suit, constitutes a construction or alteration of a property to the specifications of the property owner or tenant. These big-box 'properties are never built speculatively and then placed on the market for either sale or rent.' Rather, they are custom built to suit the needs of a particular entity. With every retailer comes a very specific design for their racking and in-store layout." Grant, *Who's Afraid of the Dark?: Shedding Light on the Practicality and Future of the Dark Store Theory in Big-Box Property Taxation*, 38 Va. Tax Rev. 445, 451-52 (2019).

And as a New Jersey Tax Court judge recently observed:

"[I]ssues and pitfalls . . . have plagued the courts in accepting build-to-suit lease agreement[s] as evidence of market or economic rent. Some of those considerations have included: (i) how the rental rate was arrived at; (ii) whether the property was adequately exposed to the marketplace; (iii) whether the contract rent represents a full or partial repayment of the development and construction costs; (iv) whether the lease terms were comparable to and competitive with other retail leases in the marketplace; and (v) whether the tenant was unusually motivated to enter the marketplace." *W. Orange Twp. v. Westrange LLC CVS*, No. 005443-2015, 2022 WL 682250, at *11 (N.J. Tax Ct. 2022) (unpublished opinion).

Prieb represents a judicial attempt to address these concerns by simply announcing a rule of law. In that case, the owner of a 45,000 square foot Best Buy store appealed Shawnee County's valuations for the 2006 and 2007 tax years. Best Buy occupied the building under a build-to-suit lease. In resolving the dispute, BOTA's predecessor, the Court of Tax Appeals,

"took a hybrid approach to the valuation issue, concluding that for 2006 tax year, the Taxpayer's appraisal approach would be endorsed with a replacement of the rental rate of $7 per foot with $8.50 per foot—which was apparently derived from the County's appraisal for 2007—and appeared to be based upon the lease rate for a single property that was subject to a second-generation build-to-suit lease. For the 2007 tax year, COTA embraced the County's appraisal approach and value, even though that approach utilized as comparables three big box properties with first generation tenants." *Prieb*, 47 Kan. App. 2d at 129.

The taxpayer appealed, arguing build-to-suit lease rental rates as a matter of law do not reflect market conditions. The *Prieb* panel generally agreed with the taxpayer and reversed the agency. The panel held "rental rates contained in or reflected by commercial build-to-suit leases are not reflective of market conditions and

may not be utilized for purposes of the income approach or the sales comparison approach[] to value for ad valorem tax purposes in Kansas without a disentanglement by adjustments that is beyond the scope of this appeal." 47 Kan. App. 2d at 135-36.

To get to its holding, the *Prieb* panel concluded Kansas law requires the "fee simple interest" in real estate to be valued. And it defined this as "'[a]bsolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat.'" 47 Kan. App. 2d at 130 (quoting The Appraisal of Real Estate, p. 114 [13th ed. 2008]). The panel then distinguished a fee simple interest from a "leased fee estate," which it defined as "a lesser estate in property [that] includes only the landowner's right to receive rents during the term of the lease, plus the value of the reversion upon its expiration." 47 Kan. App. 2d at 132.

Next, the *Prieb* panel held build-to-suit rental rates do not reflect market rent as a matter of law. It took what it characterized as a "common-sense approach to the problem," and reasoned

> "such a lease is essentially a financing agreement between a lessor and lessee, and the rental rates therein are based in large part upon the revenue needed to amortize the investment required for the required construction—plus a measure of profit—over the lease term or extensions thereof. Accordingly, when one takes a snapshot view of rental rates at any time during such a lease, these rates are not reflective of market rent, but rather just reflective of the rate required in that specific situation to continue an agreed revenue stream to amortize the lessor's investment, subject to a host of financial risks. In other words, contract rents in a build-to-suit lease are not designed to capture market value for each period within the lease term, but rather are designed to amortize an investment made at the outset and may vary dependent on factors that are unrelated to the real estate market thereafter. Reliable source material is in agreement with this overview." 47 Kan. App. 2d at 132-33.

The *Prieb* panel believed its perspective was supported by The Appraisal of Real Estate (13th ed. 2008), which "recognize[d] the essential difference in build-to-suit rental rates and true market rentals." Adding:

> "'Like all contracts, a real estate lease depends on the actual performance of all parties to the contract. A weak tenant with the best of intentions may still be a high risk. The same is true of a financially capable tenant who is litigious and

willing to ignore lease terms, break a lease, and defy lawsuits. If the tenant defaults or does not renew a lease, the value of the underlying property does not change, but the value of the leased fee may be seriously affected.

"'Because a leasehold or a leased fee is based on contract rights, the appraiser needs special training and experience to differentiate between what is generally representative of the market and other elements of a contract that are not typical of the market. An understanding of the risks associated with the parties and the lease arrangement is also required. A lease never increases the market value of real property rights to the fee simple estate. Any potential value increment in excess of a fee simple estate is attributable to the particular lease contract, and even though the rights may legally "run with the land," they constitute contract rather than real estate rights.' (Emphasis added.) The Appraisal of Real Estate, p. 447." *Prieb*, 47 Kan. App. 2d at 133.

The *Prieb* panel also quoted this from an article in The Appraisal Journal:

"'Direct capitalization seems to be the preferred model to develop an opinion of value for custom commercial properties via the income capitalization approach. To apply this approach properly, support is needed for its three major ingredients: potential gross income, operating expenses, and overall capitalization rate. The same issues arise with its application as with the sales comparison approach when the appraisal problem involves estimating the market value of the fee simple interest of the custom-built property.

"'The first step in applying the income capitalization approach is to determine the market rent. In order to properly develop the market rent, sufficient market evidence must be found of the amount that a willing lessee would pay a willing lessor to occupy the space. A search of sources usually available to appraisers (such as CoStar, NNNEx.com, or similar services) will quickly reveal many leases. When these leases are scrutinized, however, it will be apparent that almost every one is a lease to the original tenant based on a rate that was driven by that tenant's custom-construction specifications. As such these lease rents have little in common with the rent a second-generation tenant would be willing to pay for the space. Evidence of this is both obvious and available.

"'For example, when the fast-food franchise Roy Rogers Restaurants closed, many of its stores went to other fast-food franchises or to local restaurants. However, the buyers stripped the restaurants to their shells, removing all evidence of the prior user, and then rebuilt the restaurants to their own prototypical specifications. The buyers clearly did not want—nor were they willing to pay for—the sometimes expensive custom features of the original construction. So, it quickly becomes apparent that what may look like a substantial pool of potential leases that might be used as comparables in an estimate of market rent for the subject is really of no use whatsoever in determining how much a second-generation tenant would be willing to pay in rent for these custom-built properties.'" 47 Kan. App. 2d at 133-34 (quoting Lennhoff, *You Can't Get the Value Right If You Get the Rights Wrong*, The Appraisal Journal 55, 57 [Winter 2009]).

Aligning with these secondary sources, the *Prieb* panel discussed the Wisconsin decision, *Walgreen Co. v. City of Madison*, 311 Wis. 2d 158, 752 N.W.2d 687 (2008), that held a fee simple interest in a property subject to a build-to-suit lease must be valued based on market rents rather than an above-market contract rent specified in the lease. That Wisconsin court explained,

"'[F]reestanding drug stores are typically developed on a build-to-suit basis between a developer, acting as the landlord, and the planned tenant. In these instances, the developer is responsible to construct the premises to the specifications provided by the tenant. Construction costs often include a higher than average entrepreneurial profit to guarantee against cost overruns and time delays. Subsequently, the rental rate is an amortization over the lease term of the expenses incurred to construct the tenant-specific improvement.

"'These long-term build-to-suit leases typically do not allocate any marketing or leasing expenses. Also, vacancy rates are likely understated because these single-tenant properties require a longer leasing period to find a suitable tenant . . . . By factoring in these associated costs the resulting rate is most often well above the open market rate commanded by other similar retail properties in the same area.'

"The appraisals conclude: 'Similar to a sale-leaseback transaction, a build-to-suit lease is really a financing tool used by companies to keep capital available for other core business purposes. As such, we will estimate a market rent for the subject building rather than rely on the current contract rent.'" *Walgreen*, 311 Wis. 2d at 189-90." *Prieb*, 47 Kan. App. 2d at 134-35.

Finally, the *Prieb* panel reasoned,

"with a very few exceptions, it is generally recognized that build-to-suit lease rental rates are not reflective of market conditions. See, e.g., *Grant County Assessor v. Kerasotes*, 955 N.E.2d 876 (Ind. Tax Ct. 2011); *Federated Retail Holdings, Inc. v. County of Ramsey*, Nos. 62-CV-08-5061, CO-07-4069, 2011 WL 3821296 (Minn. Tax Ct. 2011) (unpublished opinion); Shapiro, *Big–Box Retailers Beware How Assessors Overvalue Your Property*, National Real Estate Investor (Sept. 2000) (http://www.aptcnet.com/articles/big_box_ retailers.htm); Lennhoff, *You Can't Get the Value Right If You Get the Rights Wrong*, The Appraisal Journal, pp. 55-60; Lennhoff, *Fee Simple? Hardly*, The Appraisal Journal, pp. 400-02; c.f. *Rhodes v. Hamilton Cty. Bd.*, 117 Ohio St.3d 532, 533-35, 885 N.E.2d 236 (2008); see also *Matter of Eckerd Corporation v. Burin*, 83 A.D.3d 1239, 1241-43, 920 N.Y.S.2d 824 (2011) (finding that the weight of evidence supported appraiser's finding that build-to-suit properties were not truly reflective of market value); *Matter of Rite Aid of New York No. 4928 v. Assessor of Town of Colonie*, 58 A.D.3d 963, 964-66, 870 N.Y.S.2d 642 (2009) (finding that the lower court's decision crediting one appraiser who utilized build-to-suit leases went to the weight of the evidence, not its competency, and affirming the lower court's decision)." 47 Kan. App. 2d at 135.

Other Court of Appeals panels have embraced *Prieb* or rejected challenges against its holding. See *In re Walgreen Co*, No. 119,684, 2021 WL 4929099, at *7 (Kan. App. 2021) (unpublished opinion); *In re Equalization Appeal of Kansas CVS Pharmacy,* No. 119,683, 2021 WL 4929096, at *1 (Kan. App. 2021) (unpublished opinion); *In re Tax Appeal of Arciterra BP*, No. 121,438, 2021 WL 1228104, at *9 (Kan. App. 2021) (unpublished opinion); see also *In re Equalization of Target Corporation*, 55 Kan. App. 2d 234, 244, 410 P.3d 939 (2017) (holding County failed to adequately brief argument that BOTA misapplied *Prieb*).

The fee simple/leased fee red herring

Taxpayers argue *Prieb* is supported by the statutory requirement that tax value must be based on "the fair market value of the fee simple of the property" and not "fee simple subject to a lease." See K.S.A. 74-2433(g). They suggest the County aims to add value attributable to contract rights the owner of a similar property might hold under a build-to-suit lease, rather than simply valuing their real estate.

This discussion about the definition of fee simple relates mostly to the Taxpayers' evidence implementing the "dark store theory" in their sales-comparable valuations. Under this approach,

> "the owners or retailers that occupy these large plots of property consider the recent trend of big-boxes selling for significantly less than the cost of construction as an appropriate set of market data to utilize when attempting to pinpoint their true market value for tax purposes. At the heart of this new strategy is the contention that using vacant properties as comparable sales for the valuation of big-box stores is viable under generally accepted appraisal methods.
>
> "Conversely, the property tax assessing community argues that if the big-box store were owner-occupied at the start of the year, then stores that were closed at the start of the year should not be used as comparable properties to show market value." Grant, *Who's Afraid of the Dark?*, 38 Va. Tax Rev. at 464.

But the parties' dispute here over defining the interest to be valued for ad valorem tax purposes as the "fee simple" or the "fee simple subject to a lease" appears to be largely a red herring. The County's BOTA specialist, Blanz, testified the County used only the cost and income approaches to fix the subject properties' 2016

and 2017 values. And although Korpacz, Marx, and Maier all testified about sales comparison approaches, BOTA disagreed with the Taxpayers' sales comparison valuations because Maier's comparables were "generally much older and situated in less desirable locations than the subject stores." In doing so, BOTA rejected the so-called "dark store" sales comparison method based on the evidence presented, even though the "dark store" theory is reflected in the rents, vacancy and expense, and capitalization rates proposed by the Taxpayers flowing from Maier's premise that the properties should be valued as if vacant and available to be leased.

In any event, our focus here is on *Prieb*'s condemnation of the County's efforts to use unadjusted build-to-suit rents to determine the market rental rate of the subject properties. The Appraisal of Real Estate 471 (15th ed. 2020), recognizes "[t]he remaining term of a lease, the creditworthiness of the tenants, the influence of atypical lease clauses and stipulations, and other factors can affect the value of the sum of the parts, causing the sum to be greater or less than the value of the fee simple, sometimes significantly so." In other words, it acknowledges a particular lease can bring the market value of a property subject to that lease out of line with the real estate's fair market value. And the County concedes this, agreeing that "'a real property assessment should not be based on factors such as unusual financing or above market rent that are not normal conditions of sale reflected in the sale of the fee simple property interest.'"

Similarly, neither party disputes that "earning capacity as indicated by lease price" and "rental or reasonable rental values" are both factors that may be considered when valuing real estate. See K.S.A. 79-503a(g), (h). So while 10 of the 11 properties here are owner-occupied, the possibility of leasing "constitutes—as a purely factual matter—one method of realizing the value of legal ownership of the property." *Meijer Stores Ltd. Partnership v. Franklin Cty. Bd. of Revision*, 122 Ohio St. 3d 447, 452-53, 912 N.E.2d 560 (2009). Before BOTA, of course, both parties put on evidence of the properties' income generating capacity, and the agency based its valuation determination on its view of what that was.

Moreover, Kansas law requires BOTA to value the fee simple interest. See K.S.A. 74-2433(g). And as the USPAP's author, the Appraisal Foundation, explains in The Appraisal of Real Estate:

"Income-producing real estate is usually leased. Once a lease is created the fee simple estate is split into two partial interests: the landlord's interest (i.e., the leased fee) and the tenant's interest (i.e. the leasehold). The interest to be valued depends on the intended use and intended user of the appraisal. *Federal or state law often requires appraisers to value leased properties as fee simple estates, not leased fee estates, for eminent domain and ad valorem taxation. When the fee simple interest is valued, the presumption is that the property is available to be leased at market rates*. When an appraisal assignment involves the valuation of the fee simple interest in a leased property, the valuation of the entire bundle of rights applies. The value of a leasehold estate may be positive, zero, or negative, depending on the relationship between market rent and contract rent, the remaining term of the lease, and other factors, as explained in Chapter 7. The difference between the market rent and contract rent may be capitalized at an appropriate rate or discounted to present value to produce an indication of the leasehold value, if any, without consideration of the value of the leased fee estate.

"Appraisers should not assume that the sum of the values of the two partial interests equals the value of the fee simple as this is often not the case. In some instances the sum of the values of the partial interests may equal the value of the fee simple, but each partial interest represents a different ownership interest that must be valued on its own merit . . . . This comparison is particularly important when contract benefits or detriments are substantial. Detrimental aspects of a lease may result in a situation in which either or both of the parties to the lease, and their corresponding value positions, may be diminished.

"It is possible that in some cases both the leaseholder and the leased fee owner are at an advantage or disadvantage because of the terms of the lease. In other cases, there may be an apparent advantage of one party over the other when compared with other leases. . . .

"Like all contracts, a real estate lease depends on the actual performance of all parties to the contract. A weak tenant with the best of intentions may still be a high risk to the lessor. The same is true of a financially capable tenant who is litigious and willing to ignore lease terms, break a lease, and defy lawsuits. If the tenant defaults or does not renew a lease, the value of the leased fee may be seriously affected.

"Because a leasehold or leased fee interest is based on contract rights, appraisers differentiate between lease provisions that are generally representative of the market and other elements of a contract that are not typical of the market. An understanding of the risks associated with the parties to the lease and the lease arrangement is also required. *A lease never increases the market value of real property rights to the fee simple. Any potential value increment in excess of a fee simple estate is attributable to the particular lease contract, and even though the rights may legally 'run with the land' they constitute contract rather than real property rights*." (Emphases added.) The Appraisal of Real Estate 415.

And the USPAP Standards Rule 1-4 requires appraisers encountering leased fees to consider the lease terms' effect on value:

> "(a) When a sales comparison approach is necessary for credible assignment results, an appraiser must analyze such comparable sales data as are available to indicate a value conclusion;
>
> . . . .
>
> "(c) When an income approach is necessary for credible assignment results, an appraiser must:
>
> (i) analyze such comparable rental data as are available and/or the potential earnings capacity of the property to estimate the gross income potential of the property;
>
> (ii) analyze such comparable operating expense data as are available to estimate the operating expenses of the property;
>
> (iii) analyze such comparable data as are available to estimate rates of capitalization and/or rates of discount; and
>
> (iv) base projections of future rent and/or income potential and expenses on reasonably clear and appropriate evidence.
>
> . . . .
>
> "(d) *When developing an opinion of the value of a leased fee estate or a leasehold estate, an appraiser must analyze the effect on value, if any, of the terms and conditions of the lease(s)*." (Emphasis added.) USPAP 2016-17, p. 20.

The point to all this is that deciding whether build-to-suit lease rates reflect market rent—like any rental rate—does not turn on whether the "fee simple" or the "leased fee" is being valued. And while contract rental rates necessarily reflect upon the value of the "leased fee," more analysis is always required when deciding whether that contract rate is the market rate and whether the leased fee reflects the fee simple value. See The Appraisal of Real Estate, 437-38 (non-arm's length transactions often not reliable indicators of market rent; parties may have motives not typical of the market). This is true for any lease, not just sale-leaseback and build-to-suit lease arrangements. As a result, the fee/leased-fee distinction does not compel *Prieb*'s rule of law singling out build-to-suit rental rates as necessarily requiring a "disentanglement by adjustments" before they can be used to support an appraisal.

Persuasiveness of these appraisals is a credibility question

The County argues *Prieb* improperly requires BOTA to consider only a single appraisal methodology that rejects build-to-suit

rents even if expert witnesses testify there are no rights to disentangle from a build-to-suit lease rate. The Taxpayers respond that *Prieb* and its progeny do not categorically reject or prohibit the use of build-to-suit leases. Instead, their argument continues, these cases simply require any build-to-suit rent comparables be adjusted to reflect market rent so that the resulting value derived from them reflects fair market value. We agree with the County.

In our reading, *Prieb* effectively prohibits BOTA from relying on any expert opinion that build-to-suit rents reflect the market rent for a property unless the expert "adjusted" or "disentangled" the data. As BOTA observed, "In no uncertain terms, *Prieb* instructs that an income approach based on build-to-suit rental rates was improper 'without a disentanglement by adjustments.'" *Prieb*'s dictate makes no allowance for when an expert testifies adjustments are unnecessary under the circumstances. And as argued by the Kansas Association of Counties in its Amicus Brief, this dictate "requires the assumption of a nonmarket hypothetical as the starting point," by skewing appraisers against sale-leaseback and build-to-suit projects that "comprise a majority of the market activity" for these types of properties; and ignores "a majority of the behavior of market participants active in this property use group."

The *Walmart* panel's majority decision illustrates this point well. It suggests *Prieb*'s rule does not apply when "'an appraiser can show that a build-to-suit lease was motivated by market terms and can isolate above- or below-market rents to make the necessary adjustments, [in which case] BOTA could find that a market rent determination is properly supported and based on appropriate, comparable leases.'" *Walmart*, 61 Kan. App. 2d at 168 (quoting *In re Arciterra*, 2021 WL 1228104). As summarized by the *Walmart* majority,

> "[O]ur caselaw simply recognizes that build-to-suit leases do not—in and of themselves—represent actual market conditions. As a result, taxing entities seeking to use the rental rates in build-to-suit leases as part of their valuation process should be prepared to either come forward with evidence to establish that they are equal to actual market rents or show that appropriate adjustments have been made to bring the lease rates in line with the actual conditions in an open and competitive market." *Walmart*, 61 Kan. App. 2d at 168.

But here, qualified experts testified that income-generating property comparable to the subject properties are typically covered by build-to-suit lease agreements, and that the build-to-suit lease data they used were probative of the market rental rate for the subject properties. For example, Shaner testified a property should be valued using its market rent at its highest and best use and assuming it is leased at market terms and market occupancy. And in his view, the terms of a build-to-suit lease reflected the market for big-box retail properties because it is the typical transaction in that property segment. And in supporting the County's appraisals, Korpacz testified rents under build-to-suit leases reflect market rent when the lease rate is for the realty alone. He concluded the cost-plus-return formula for build-to-suit lease rates was indistinguishable from a developer setting rent rates for a building built on speculation. He also testified the developer's need to recoup its expenses and make a profit is the normal way real estate development works and is not peculiar with a big box retailer.

Yet despite this evidence, the panel majority held "the County failed to meet its burden of proof because it made the decision to stand on its belief that the rental rates in its build-to-suit lease comparables inherently reflected the actual rental rates in an open and competitive market." 61 Kan. App. 2d at 168. And so despite the relief valve the panel majority claimed to read into *Prieb*, it still applied *Prieb*'s rule of law to declare inadequate the County's experts' explanations about why appraisals using the build-to-suit comparables were "equal to actual market rents" consistent with generally accepted appraisal practices.

We also find support in statute for a departure from *Prieb*. BOTA is not "bound by technical rules of evidence, but shall give the parties reasonable opportunity to be heard." See K.S.A. 77-524. And under the Kansas Code of Evidence,

> "If scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if: (1) The testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has reliably applied the principles and methods to the facts of the case." K.S.A. 2021 Supp. 60-456.

There is no question the direct capitalization income approach to valuation is a "reliable principle[ ] and method[ ]" of forming an opinion about property value. So when an expert's opinion is based on "experiential, rather than experimental reliability," the fact-finder is within its discretion to receive it when reasonable minds could differ whether the data relied on was enough to establish an opinion. See *State v. Aguirre*, 313 Kan. 189, 206-07, 485 P.3d 576 (2021). But *Prieb* limits the data an appraiser may employ to form an acceptable opinion, because it sees this disagreement as a legal question, even though both parties' experts testified their methods complied with the USPAP and generally accepted appraisal practice. *Cf. In re Appeal of ANR Pipeline*, 276 Kan. 702, 720-21, 79 P.3d 751 (2003) (upholding BOTA's exclusion of actual earnings beyond valuation date in income approach, when experts who testified in the case and other authorities agreed actual income figures may not be considered).

So based on the record here, there was evidence tending to show reasonable minds can differ on whether the build-to-suit data was enough to support the County's experts' valuation opinions. And that conflict should be resolved by BOTA—the agency statutorily charged with the decision-making.

The Appraisal of Real Estate, 436-38, describes the detail in estimating market rent:

> "An investigation of market rent levels starts with the subject property and the property's attributes. . . .
>
> "When a market rent estimate for the subject property is required, comparable rental data is gathered, compared, and adjusted. The parties to each lease should be identified to ensure that those held responsible for rent payments are actually parties to the leases . . . . It is also important to ascertain that the lease represents a freely negotiated, arm's length transaction. A lease that does not meet these criteria—such as a lease between related entities (e.g., the landlord and the tenant have common ownership or common interests)—often does not provide a reliable indication of market rent. Sale-leaseback transactions must be used with caution because the lease is usually negotiated as part of the sale rather than as an independent, market-based lease negotiation. Sale-leasebacks that are negotiated as financing vehicles may reflect motivations of the tenant and landlord that are not typical of the market.
>
> ". . . Comparable rents may be adjusted just as the transaction prices of comparable properties are adjusted in the sales comparison approach. Recently executed and pending leases for the subject property may be a good indication of

market rent, but lease renewals or extensions negotiated with existing tenants should be analyzed with caution. . . .

"The amount of data needed to support a market rent estimate for a subject property depends on the complexity of the appraisal problem and the availability of directly comparable rentals. When sufficient, closely comparable rental data is not available, an appraiser should include other data, preferably data that can be adjusted. When analyzed properly, a reasonably clear pattern of market rents should emerge."

We also observe that other jurisdictions are split on the utility of using raw build-to-suit lease data in determining value and that contributes to a conclusion BOTA should decide this. For example, in *West Orange* the New Jersey Tax Court—a trial-level tribunal—found an appraiser's income-based valuation for a Walgreen's drug store using build-to-suit leases lacked credibility:

"Without having conferred with any of the lease transaction participants and conducted an in-depth examination and inquiry into the marketing, negotiation, and motivations of the parties in executing the leases, West Orange's expert's conclusion that these five build-to-suit lease agreements reflect market rent lacks credibility. Moreover, West Orange's expert's exclusive reliance on build-to-suit leases, without evidence of other retail pharmacy rents in the marketplace, leaves the court unable to accurately gauge whether the build-to-suit leases represent accurate evidence of market or economic rent in the subject property's competitive market area.

"Accordingly, without credible evidence of economic or market rent, the court accords West Orange's expert's conclusions of value under the income capitalization approach no weight." 2022 WL 682250, at *13.

And at the appellate level, New York courts have approved valuations of big box retail stores based on approaches much like those taken by both parties here. In one instance, the court affirmed a decision that "chose to credit the testimony of the [taxing authority's] expert over that of the [taxpayer]," reasoning that the decision was "a credibility determination." *Rite Aid of New York No. 4928 v. Assessor of Town of Colonie*, 58 A.D.3d 963, 966, 870 N.Y.S.2d 642 (2009); but see *Home Depot U.S.A. Inc. v. Assessor of Town of Queensbury*, 129 A.D.3d 1427, 1429-30, 12 N.Y.S.3d 364 (2015) (affirming fact-finder's decision to adopt taxpayer's valuation). See also *Meijer Stores Ltd. Partnership v. Franklin Cty. Bd. of Revision*, 122 Ohio St. 3d 447, 453, 912 N.E.2d 560 (2009) (approving the use of build-to-suit comparables to determine the value of large, big-box retail stores and adopting a theory

of fee simple value in line with the one advanced here by the County); *Rite Aid of Ohio, Inc. v. Washington Cty. Bd. of Revision*, 146 Ohio St. 3d 173, 180, 54 N.E.3d 1177 (2016) (limiting *Meijer* to "special-purpose" cases in which the property's highest and best use is "continued use by the current occupant in its ongoing business").

Even in *Walgreen Co. v. City of Madison*, the case *Prieb* most prominently relied on, the facts were undisputed that the properties were subject to build-to-suit leases under which Walgreens engaged a developer to find and purchase the sites, buy out existing businesses, and develop the property with "'super adequacies' to suit Walgreens' needs," and that the lease payments included compensation to the developer for the land acquisition, construction, development and financing costs, and a profit margin. *Walgreen Co. v. City of Madison*, 311 Wis. 2d 158, 166, 752 N.W.2d 687 (2008). And the parties also did not dispute that including the costs in the lease terms led to higher than market rental rates. So based on that, as well as a provision in a binding state assessment manual requiring assessors to examine financing terms and determine whether sale price accurately reflects market value, the court applied the same principles to hold "tax assessors must refrain from including creative financing arrangements under a specific property's lease in their valuations of that property." 311 Wis. 2d at 191-92.

We conclude from all of this that the weight of authority does not support *Prieb*'s rule of law that "build-to-suit lease rental rates are not probative of market conditions." 47 Kan. App. 2d at 124. "The determination of the fair market value of property—whether real or personal—is generally a question of fact." *Hutson v. Mosier*, 54 Kan. App. 2d 679, Syl. ¶ 8, 401 P.3d 673 (2017). And this court has recognized in the condemnation context that when "an expert utilizes a legally accepted methodology" to determine value,

> "the question as to whether the legally acceptable methodology most appropriately measures fair market value under the facts of the case and any deficiencies in the expert's analysis can be explored through cross-examination. Ultimately, the weight to be given an expert's opinion is left in the hands of the jury. Without question, a factfinder can find one expert opinion more credible than another. It is not this court's duty to pass on the credibility of witnesses, including expert witnesses." *City of Mission Hills v. Sexton*, 284 Kan. 414, 415, 160 P.3d 812 (2007).

BOTA is the highest administrative tribunal established by statute to determine controversies relating to assessments of property for ad

valorem tax purposes. *Prieb*'s rationale invades BOTA's longstanding province as the fact-finder in the statutory process of appraising real property at its fair market value.

Principles of stare decisis do not bind this court to Prieb

Stare decisis recognizes that once a point of law has been established by a court, that point of law will generally be followed by the same court and all courts of lower rank in later cases when the same legal issue is raised. *McCullough v. Wilson*, 308 Kan. 1025, 1032, 426 P.3d 494 (2018). This means stare decisis does not bind this court to follow lower court decisions. And even though the Legislature has not acted to reject *Prieb*, we find this an unpersuasive reason to adhere to its rule of law for the reasons described. After all, this court

"should observe legislative inaction with a gimlet eye. Legislative inaction is not necessarily indicative of legislative intent. See *Board of Leavenworth County Comm'rs. v. McGraw Fertilizer Serv., Inc.*, 261 Kan. 901, 916, 933 P.2d 698 (1997) (the court can draw many contradictory inferences from the legislature's failure to pass a bill); *Higgins v. Cardinal Manufacturing Co.*, 188 Kan. 11, 25, 360 P.2d 456 (1961) (it is 'highly speculative' to conclude legislature's failure to pass a bill on the subject at hand to be indicative of legislative intent; legislature may have considered the legislation unnecessary in light of current state law)." *USD 501 v. Baker*, 269 Kan. 239, 246-47, 6 P.3d 848 (2000).

As Judge Leben's dissent suggests, the ongoing controversy surrounding valuation of big-box retail properties should have cautioned against strong reliance interests being formed based on the *Prieb* panel's decision. See *Suesz v. Med-1 Sols., LLC*, 757 F.3d 636, 649-50 (7th Cir. 2014) ("[A] prior decision of one intermediate appellate court does not create the degree of certainty concerning an issue of federal law that would justify reliance so complete as to justify applying a decision only prospectively in order to protect settled expectations."). This is especially true when, as here, the valuation of these properties occurs anew every tax year. See K.S.A. 79-503a (property to be appraised at value on January 1 of tax year); K.S.A. 79-1412a *Second* (county appraiser's duty to supervise listing and appraisal of real estate annually as of January 1).

The County's remaining issues

In its petition for review, the County broadly asked in the closing paragraph that "the Court grant this Petition for Review for analysis on

the issues raised at the Court of Appeals and in this petition for review." But besides the challenge to *Prieb*, those other issues were not addressed more specifically either in the petition for review or the County's Supplemental Brief. We understand those issues to be (1) whether BOTA's decision was supported by substantial competent evidence considering the record as a whole; and (2) whether BOTA's decision was unreasonable, arbitrary, and capricious.

We conclude the County created a preservation and waiver problem by handling these issues as it did. "A party aggrieved by a decision of the Court of Appeals on a particular issue must seek review in order to preserve the matter for Kansas Supreme Court review." *Castleberry v. DeBrot*, 308 Kan. 791, 795, 424 P.3d 495 (2018). In *Castleberry*, the court held a litigant preserved for review only items expressly listed in the petition, even though the litigant wrote through introduction that he "believes all of the issues raised in this appeal should be considered." We explained this introductory phrase was insufficient for the unlisted issues to be "'fairly included' in the petition," so permitting the litigant to raise the issues after the petition was granted "would do a disservice to the other parties who must decide whether to oppose review." 308 Kan. at 796. We hold the County failed to preserve its sufficiency of the evidence and arbitrariness claims by not addressing them more fully in its petition for review or supplemental briefing.

Judgment of the Court of Appeals affirming the Board of Tax Appeals is reversed. Decision of the Board of Tax Appeals is reversed, and the case is remanded with directions.

No. 124,156

CITY OF OLATHE, *Appellant/Cross-appellee*, v. CITY OF SPRING HILL and JAMES HENDERSHOT, City Administrator, City of Spring Hill *Appellees/Cross-appellants*.

(512 P.3d 723)

SYLLABUS BY THE COURT

1. CITIES AND MUNICIPALITIES—*Elected Governing Body May Not Bind Subsequent One to its Decisions*. An elected governing body may not use its legislative power to constrain future governing bodies to follow its governmental, or legislative, policy decisions.

2. SAME—*Elected Governing Body May Enter Contracts to Pay Sum Over Specified Time*. An elected governing body may use its administrative or proprietary authority to enter into enforceable contracts to pay a specified sum over a specified time.

3. SAME—*Governmental Agreements Compared to Proprietary Agreements*. The development, introduction, or improvement of services are, by and large, considered governmental, but the routine maintenance of the resulting services is generally deemed proprietary.

Appeal from Johnson District Court; RHONDA K. MASON, judge. Opinion filed July 1, 2022. Affirmed; temporary stay of judgment lifted.

Anthony F. Rupp, of Foulston Siefkin LLP, of Overland Park, argued the cause, and *Matthew D. Stromberg* and *Sarah E. Stula,* of the same firm, and *Christopher M. Grunewald* and *Ronald R. Shaver*, of City of Olathe, were with him on the briefs for appellant/cross-appellee.

Curtis L. Tideman, of Lathrop GPM LLP, of Overland Park, argued the cause and was on the briefs for appellees/cross-appellants.

Greg L. Musil and *Brett C. Randol*, of Rouse, Frets, White, Goss, Gentile, Rhodes PC, of Leawood, was on the brief for amicus curiae Bonita Station Investments, LLC.

The opinion of the court was delivered by

ROSEN, J.: This is a tale of two cities. On March 23, 2006, the cities of Spring Hill and Olathe entered into a written agreement (Agreement) to restrict their future growth by establishing boundaries for annexing land lying adjacent to the two cities. Olathe agreed not to seek annexation of property south of the boundary line, while Spring Hill agreed not to seek to annex property north

of the line. Each city reserved the right to annex land within their respective boundary lines. The cities cited several goals they hoped to achieve through the Agreement, including:

- Avoiding annexation and zoning disputes that could lead to illogical or premature annexations and unwanted development;
- Avoiding duplication of planning and provision of extraterritorial services; and
- Providing property owners clear indication of future city plans for annexation, provision of services, and comprehensive development.

The Agreement had no fixed expiration term. Instead, it was to "remain in effect until terminated," and termination could "occur only upon mutual consent of the parties."

In addition to the agreement with Spring Hill, Olathe entered into similar agreements in 1983 with Lenexa, in 1988 with Gardner, in 1989 with Gardner and DeSoto, and in 2005 with Overland Park.

On March 10, 2021, Olathe filed a petition in district court requesting declaratory judgment, a temporary restraining order, and preliminary and permanent injunctive relief. The petition alleged that on March 1, 2021, Spring Hill notified Olathe of its intent to annex land north of the boundary line. Spring Hill stated its plan was to pursue a commercial site development known as Project Extract. The Spring Hill Planning Commission discussed Project Extract at a public meeting on March 4, 2021. The narrow objective of the project was to annex land for development by a private enterprise, Carvana, that had already contracted with a property owner to purchase land on the Olathe side of the boundary for commercial development. The annexation project was set on the Spring Hill City Council agenda for March 11.

The petition further alleged that Olathe had recently instituted a comprehensive development plan designating residential and employment areas and planning for traffic flow and provision of services in a planned expansion that included land subject to the Agreement. Olathe asserted various harms that would result from Project Extract, including redesigning Olathe's development

plans, undermining the future provision of services to the land lying within Olathe's Agreement boundaries, promoting uncertainty to both landowners and city planners, and opening Johnson County up to chaotic land grabs by municipalities seeking to protect their future growth options from their neighboring municipalities.

On that same day, March 10, the district court conducted a hearing on the motion for temporary restraining order and application for preliminary injunction. After hearing arguments from the parties, the court took the matter under advisement. On March 11, the district court granted a temporary restraining order pending an evidentiary hearing. The order restrained Spring Hill from annexing the disputed property or from undertaking actions in preparation for annexation. On May 19, the district court conducted an evidentiary hearing on Olathe's injunction request at which several witnesses testified.

On June 14, the district court entered judgment holding the Agreement unenforceable as a governmental action that could not bind subsequent City Councils. The court denied the request for injunctive relief. Hours later, the Spring Hill City Council adopted an ordinance to annex the land designated as Project Extract. The district court subsequently entered final judgment, referring back to the June 14 decision, and held the petition failed to state a cause of action upon which relief could be granted. The court then dismissed the suit.

Olathe and Spring Hill filed timely notices of appeal and cross-appeal and docketed their respective appeals with the Court of Appeals. While the appeal was pending, the district court entered an order staying its judgment pending appeal. The order enjoined the parties from pursuing land annexations beyond the boundary line set out in the Agreement. Then, on August 19, Spring Hill filed a motion with the appellate courts to stay, modify, or vacate the district court's stay pending appeal. On September 2, the Court of Appeals denied the motion, and, in the alternative, issued its own stay and injunction during the pendency of this appeal. On September 23, this court granted Olathe's motion to transfer the case to the Supreme Court.

Discussion

The enforceability of municipal contracts and their legal effect may be determined de novo by the appellate courts regardless of the

construction by the trial court. See *Jayhawk Racing Properties, LLC v. City of Topeka*, 313 Kan. 149, 153-54, 484 P.3d 250 (2021).

At the core of this appeal, and governing our decision, is a longstanding common law rule that an elected governing body may not use its legislative power to constrain future governing bodies to follow general policy decisions. This is a rule that extends across the various jurisdictions in this country and has long been recognized in Kansas.

As early as 1872, this court has held that "in deciding what past laws shall stand, and what be repealed, each legislature is free and absolute. . . . 'One legislature cannot abridge the powers of a succeeding legislature." *Gilleland v. Schuyler*, 9 Kan. 569, 580, 1872 WL 660 (1872). As recently as 2021, this court reiterated this principle in holding that "[o]ne [C]ity [C]ouncil may not bind a subsequent one to its political decisions involving the exercise of government functions." *Jayhawk Racing*, 313 Kan. 149, Syl. ¶ 6.

As this court has explained, in the context of federal constitutional law, "the Contract Clause does not require a state to adhere to a contract that surrenders an essential attribute of its sovereignty," such as contracts that limit a state's power to act in the future. *Partners v. U.S.D. No. 214,* 284 Kan. 397, Syl. ¶ 3, 403, 160 P.3d 830 (2007).

In *Edwards County Comm'rs v. Simmons*, 159 Kan. 41, Syl. ¶ 6, 151 P.2d 960 (1944), this court held:

> "In determining the question of validity of a contract made by a board or other governmental agency extending beyond the official term of the contracting board or officials, one test generally applied is whether the contract is an attempt to bind successors in matters incident to such successors' administration and responsibilities, or whether it is a commitment of a sort reasonably necessary for protection of the public property, interests or affairs being administered. In the former case the contract is generally held to be invalid and in the latter case valid."

The *Simmons* court held that a municipal legislative body lacks the authority to make "'a contract longer than [its] life'" when "'no necessity exist[s].'" 159 Kan. at 53 (quoting *Fisk v. Board of Managers*, 134 Kan. 394, 398, 5 P.2d 799 [1931]).

The essence of this rule lies in the fundamental philosophy of American democracy. Within the constraints of constitutionally

protected rights, it is the will of the electorate that determines policy decisions. If an elected governing body is allowed to bind future bodies to a particular course of action, the effect is to silence the will of voters in the future. The Commonwealth Court of Pennsylvania explained the doctrine that an elected entity may not enter into contracts the duration of which extends beyond the terms for which the members of the entity were elected:

"[T]he doctrine here at issue has its roots in our fundamental notions of democratic government. We select public officials, legislative or executive, whom [*sic*] we believe will carry out the policies intended by the electorate. If they fail to do so, or if the people conclude that new policies are in order, they can be voted out of office. To allow an elected body to perpetuate its policies beyond its term of office would frustrate the ability of the citizenry to exercise its will at the ballot box." *Lobolito, Inc. v. N. Pocono Sch. Dist*., 722 A.2d 249, 252 (Pa. Commw. Ct. 1998), *aff'd in part, rev'd in part* 562 Pa. 380, 755 A.2d 1287 (2000).

To hold otherwise would invite elected governing bodies to make their policies permanent, defeating the ability of future voters to set their own courses, leading to archaic legislation, stagnation, and an inability to respond to changed circumstances.

The Pennsylvania Supreme Court set out this reasoning in this way:

"The obvious purpose of the rule [that a legislative body cannot take action that will bind its successors in the performance of governmental functions] is to permit a newly appointed governmental body to function freely on behalf of the public and in response to the governmental power or body politic by which it was appointed or elected, unhampered by the policies of the predecessors who have since been replaced by the appointing or electing power. To permit the outgoing body to 'hamstring' its successors by imposing upon them a policy—implementing and to some extent, policymaking machinery, which is not attuned to the new body or its policies, would be to most effectively circumvent the rule." *Mitchell v. Chester Housing Auth*., 389 Pa. 314, 324-25, 132 A.2d 873 (1957).

As we explained in *Jayhawk Racing*, certain kinds of government obligations may be binding on the bodies that enter into them. So-called "administrative" or "proprietary" obligations may be enforced against a governing body. "Governmental" or "legislative" agreements, on the other hand, are not binding on subsequent elected bodies. 313 Kan. at 152-53, 156-57.

At times, differentiating between the governmental and administrative functions can be challenging for parties and courts. This is not such a situation.

A contract to pay a specified sum over a specified period of time is an example of an administrative or proprietary function. *Jayhawk Racing*, 313 Kan. at 156-57. In a general sense, governmental or legislative powers relate to affairs of political jurisdiction and promoting the public welfare at large. Such powers involve policymaking, and such a function cannot be contracted away: one legislative body cannot bind its successor to its policy commitments. 313 Kan. at 153.

In *McAlister v. City of Fairway*, 289 Kan. 391, 403-04, 212 P.3d 184 (2009), this court provided four guidelines for determining whether an action by a governing body is governmental or proprietary, and the district court in this case relied on those guidelines to conclude that the Agreement between Olathe and Spring Hill was governmental in nature. We agree with the district court's conclusion, but we deem it unnecessary to break the analysis down into the *McAlister* steps.

The development, introduction, or improvement of services are, by and large, considered governmental, but the routine maintenance of the resulting services is generally deemed proprietary. *Jayhawk Racing*, 313 Kan. at 158.

The Agreement in the present case clearly relates to the former category. At most, it addresses the development, introduction, or improvement of services, and it reflects quintessential policy considerations. As a governmental function, it cannot be considered a contract with a binding effect on future elected councils.

Cases from other jurisdictions support the conclusion that annexation and community development are policy decisions that cannot bind future elected leaders. See, e.g., *City of Leeds v. Town of Moody*, 294 Ala. 496, 319 So. 2d 242 (1975) (agreement purporting to bind city to relinquish its police jurisdiction over any territory in county outside its corporate limits and to refrain from accepting any petitions in future for annexation of land in that county was void); *City of Centerville v. City of Warner Robins*, 270 Ga. 183, 188-89, 508 S.E.2d 161 (1998) (Carley, J., dissent-

ing) ("The annexation power is strictly legislative. [Citation omitted.] Thus, an agreement between two municipalities for each to refrain from accepting annexation petitions without the consent of the other is null and void."); *CHW-Lattas Creek, LP by GP Alice Lattas Creek, LLC v. City of Alice*, 565 S.W.3d 779, 786-87 (Tex. App. 2018) ("[W]e conclude community development . . . is a governmental function" and "the purpose of the Development Agreement was to promote economic development [so] the City was engaged in a governmental function when it entered into the Development Agreement."); *Pitzer v. City of Abilene*, 323 S.W.2d 623, 626 (Tex. Civ. App. 1959) ("The annexation of territory by a municipality is the exercise of a governmental power. As a general rule the governing body of a municipal corporation may not by contract bind successors in office in the exercise of a purely governmental power."); *Town of Brockway v. City of Black River Falls*, 285 Wis. 2d 708, 726, 702 N.W.2d 418 (2005) (in determining validity of agreement relating to annexation, rationale for principle that a municipality may not contract away its governmental powers is that municipality is wholly creature of legislatively delegated power and therefore cannot by ordinance or contract bargain away that portion of the state's sovereignty).

In addition, we observe that the Agreement in the present case bears no hallmarks of being a contract for the provision of services or to carry out any particular undertaking with respect to either the property-owners in the unincorporated land or the other party to the Agreement. The Agreement did not call for either party to provide any particular services or even to annex the land in question. If neither party were to take any action at all with respect to that land, no party could claim a breach of contract. Olathe cannot argue that the Agreement governs the provision of essential services because the Agreement does not establish who would provide services, what those services would be, when those services would be provided, or even *if* those services would be provided.

The Agreement is simply a promise not to do something for an indeterminate length of time. It is very different from an agreement to provide "routine maintenance" of services, an administrative function. See *Jayhawk Racing*, 313 Kan. at 158. It instead re-

lates to "the development, introduction, or improvement of services," a governmental function. 313 Kan. at 158. We therefore conclude that the Agreement is an unenforceable attempt to bind future City Councils to a governmental policy decision.

This conclusion governs the result in this case. The Agreement is not binding.

Olathe argues that two statutory provisions authorize municipalities to enter into agreements such as the present one: K.S.A. 2021 Supp. 12-2908, concerning municipal contracts to perform governmental services, activities, or undertakings; and K.S.A. 12-101, enabling the home-rule amendment to the Kansas Constitution.

Assuming—without deciding—that K.S.A. 2021 Supp. 12-2908 authorizes agreements relating to annexations, such as this one, we nevertheless conclude that the statute does not overrule or undermine the democratic principle that an elected governing body may not bind its successors to policy decisions.

K.S.A. 2021 Supp. 12-2908(b) states:

> "Any municipality may contract with any municipality to perform any governmental service, activity or undertaking which each contracting municipality is authorized by law to perform. The contract shall be authorized by the governing body of the municipality and shall state the purpose of the contract and the powers and duties of the parties thereunder."

The statute explicitly states the contract must be authorized by law. A contract that is of open-ended duration that seeks to restrain the policy decisions of future municipal governments is, as we have just observed, not authorized by law. Nothing in the statutory language suggests the Legislature intended to provide a mechanism to undermine the authority of elected municipal governments to select their own policy options.

We find Olathe's reliance on home-rule powers similarly unavailing. K.S.A. 12-101 provides that a city may "[m]ake all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers." Olathe contends this statute authorizes open-ended contracts that may remain in force long after the voters have elected new officials to their city governments.

Such a conclusion would have the effect of fatally undermining the very essence of home-rule. It would take away from elected municipal governments the ability to make decisions and act according to the will of the voters if prior governments had committed them to policy courses.

As a hypothetical example, let us suppose that an anti-growth City Council passed a resolution stating that the city would never expand its borders beyond its then existing city limits. A couple of years later, a new City Council sees a benefit to the city resulting from annexation of adjacent property. Under Olathe's home-rule argument, a member of the earlier council could successfully bring suit to enforce the resolution using a home-rule theory of authority. After all, the resolution would neatly fit the home-rule statutory language allowing municipalities to "do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers." But such an outcome would invite all elected governing bodies to make their policies permanent, and it would defeat the ability of future voters to set their own courses.

As was the case with K.S.A. 2021 Supp. 12-2908, we see nothing in K.S.A. 12-101 abrogating the rule that a City Council cannot bind a future City Council to its policy decisions.

Finally, Olathe argues that *Simmons*, 159 Kan. at 41, supports enforcement of the contract. We consider this to be a misreading of the case. As we noted earlier, *Simmons* is one more case among many holding that contracts are not valid when the terms of the contracts extend beyond the terms of the contracting officials. 159 Kan. 41, Syl. ¶ 6. As with other authorities, *Simmons* states that maintaining and protecting public property and affairs may require longer-term contracts, but only when "reasonably necessary." 159 Kan. 41, Syl. ¶ 6.

Olathe demonstrates no reasonable necessity in enforcing the Agreement. In fact, the Agreement involves property over which Olathe has no authority: the land to be "protected" lies outside its city limits. It is possible that Olathe intended to annex that land someday, but it is also possible that Olathe would never annex that land. Either way, the Agreement does not compel Olathe to do anything in particular to protect the public property, interests, or

affairs of that land. If Olathe were to have annexed the land, it would presumably have to provide services to that land, whether the Agreement existed or not. The Agreement was not necessary for the provision of services to that land. *Simmons* does not support Olathe's position.

Spring Hill also argues by way of a cross-appeal that the Agreement is invalid because the parties did not obtain approval from the Attorney General as set out in K.S.A. 2021 Supp. 12-2904(g). Spring Hill contends that K.S.A. 2021 Supp. 12-2904 is the relevant statute governing interlocal agreements, not K.S.A. 2021 Supp. 12-2908. Because we find the Agreement to be unenforceable as an improper attempt to set out policy decisions for future City Councils, we do not decide at this time whether the Legislature intended to enact statutory provisions overlapping in their scope and inconsistent in their requirements.

The decision of the district court is affirmed. Olathe is not entitled to injunctive relief, and the stay on the district court decision is lifted.

Bar Docket No. 17913

In the Matter of TROY DOUGLAS RENKEMEYER, *Respondent*

(512 P.3d 230)

ORDER OF DISBARMENT

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Disbarment.*

On September 30, 2020, the State of Kansas charged Troy Douglas Renkemeyer, an attorney admitted to practice law in the State of Kansas, with one count of breach of privacy, a severity level 8-person felony in violation of K.S.A. 2020 Supp. 21-6101(a)(6), in the District Court of Johnson County, Kansas. That charge remains pending. The disciplinary complaint filed with the Disciplinary Administrator as a result of that charge also remains pending.

In a letter signed June 14, 2022, Renkemeyer voluntarily surrendered his license to practice law in Kansas pursuant to Supreme Court Rule 230 (2022 Kan. S. Ct. R. at 290).

The court finds that the surrender of Renkemeyer's license should be accepted, orders Renkemeyer disbarred from the practice of law pursuant to Supreme Court Rule 230(b), and revokes Renkemeyer's license and privilege to practice law in Kansas.

The court further orders the Office of Judicial Administration to strike the name of Troy Douglas Renkemeyer from the roll of attorneys licensed to practice law in Kansas effective the date of this order.

The court notes that under Rule 230(b)(1)(C), any pending board proceeding or case terminates effective the date of this order. The Disciplinary Administrator may direct an investigator to complete a pending investigation to preserve evidence.

Finally, the court directs that this order be published in the Kansas Reports, that the costs herein shall be assessed to Renkemeyer, and that Renkemeyer must comply with Supreme Court Rule 231 (2022 Kan. S. Ct. R. at 292).

Dated this 6th day of July 2022.

No. 121,503

STATE OF KANSAS, *Appellant*, v. MICHAEL GLEN MULLENEAUX II, *Appellee*.

(512 P.3d 1147)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*County or District has Broad Discretion in Controlling Prosecutions—Court Intervention Allowed When Appropriate*. A county or district attorney is the representative of the State in criminal prosecutions and has broad discretion in controlling those prosecutions. But a prosecutor's discretion is not limitless, and the doctrine of separation of powers does not prevent court intervention in appropriate circumstances.

2. SAME—*Determination if Dismissal of Criminal Charge with Prejudice Appropriate—Appellate Review*. In determining if dismissal of a criminal charge with prejudice is appropriate, appellate courts apply an abuse of discretion standard. A district court abuses its discretion by (1) adopting a ruling no reasonable person would make, (2) making a legal error or reaching a legal conclusion not supported by factual findings, or (3) reaching a factual finding not supported by substantial competent evidence.

Review of the judgment of the Court of Appeals in an unpublished opinion filed August 13, 2021. Appeal from Geary District Court; COURTNEY D. BOEHM, judge. Opinion filed July 8, 2022. Judgment of the Court of Appeals reversing the district court is reversed. Judgment of the district court dismissing the charges with prejudice is affirmed.

Tony R. Cruz, assistant county attorney, argued the cause, and *Derek Schmidt,* attorney general, was with him on the brief for appellant.

Patrick H. Dunn, of Kansas Appellate Defender Office, argued the cause and was on the brief for appellee.

The opinion of the court was delivered by

LUCKERT, C.J.: In criminal cases, the Kansas Legislature has provided limited and specific paths for the State to appeal. Here, at different points in the proceeding, two alternative paths became available to the State. The first path arose because the district court judge suppressed evidence as a discovery sanction; the State could have taken an interlocutory appeal of that decision. But it made the strategic decision to instead ask the judge to dismiss the case without prejudice. In doing so, the State told the judge that without the suppressed evidence it could not proceed to trial. The judge

then dismissed with prejudice. The State now appeals from the dismissal with prejudice.

On appeal, the Court of Appeals considered the issue to be whether the judge erred by imposing dismissal with prejudice as a sanction for a discovery violation. Finding error, the Court of Appeals reversed and remanded the case. *State v. Mulleneaux*, No. 121,503, 2021 WL 3573777 (Kan. App. 2021) (unpublished opinion).

We hold, however, the district court's sanction for the discovery violation was to suppress evidence and continue with the trial as scheduled. The State chose not to appeal those decisions. Instead, the prosecutor informed the district court that the State could not proceed to trial without the suppressed evidence and asked the court to make a finding of necessity so it could gain a speedy trial advantage upon filing a new case against Michael Glen Mulleneaux II, a case unburdened by a suppression ruling. Under those circumstances, we hold the district court did not abuse its discretion in dismissing the case with prejudice. We thus reverse the Court of Appeals and affirm the district court.

FACTS AND PROCEDURAL BACKGROUND

A law enforcement officer stopped Mulleneaux for a traffic violation. During the stop, the officer learned Mulleneaux was driving on a suspended license and arrested him. The officer performed a search incident to arrest and found a pipe with suspected drug residue. This led to the State charging Mulleneaux with one count of possession of marijuana and one misdemeanor count of possession of drug paraphernalia. See K.S.A. 2017 Supp. 21-5706(b)(3) (possession of marijuana); K.S.A. 2017 Supp. 21-5709(b)(2) (possession of drug paraphernalia). The State alleged Mulleneaux had two prior convictions for possession of marijuana, which made the possession of marijuana a felony. See K.S.A. 2017 Supp. 21-5706(c)(3)(C).

Soon after the State filed charges against Mulleneaux, his attorney requested discovery and inspection under K.S.A. 2021 Supp. 22-3212 and K.S.A. 2021 Supp. 22-3213. She did so by signing a form discovery agreement provided by the Geary

County Attorney's Office. The agreement states the County Attorney's Office will provide discovery within 20 days after arraignment. Fax records reflect the Geary County Attorney's Office received the discovery agreement. Despite Mulleneaux's request, discovery became an issue twice during pretrial proceedings.

The first dispute related to two documents presented by the State at Mulleneaux's preliminary hearing—a journal entry of conviction and a journal entry of motion to revoke probation. This dispute is not at issue on appeal but provides context for Mulleneaux's arguments and the judge's ruling. After the preliminary hearing, Mulleneaux moved to dismiss the felony charge of possession of marijuana, arguing neither journal entry proved the necessary prior convictions. During a hearing on the motion, Mulleneaux's counsel asked the district court judge to "order the State to provide me with copies of those two documents [the journal entries], as I haven't received the discovery." The judge granted Mulleneaux's motion and remanded the case for a second preliminary hearing.

The second discovery dispute leads to this appeal. It relates to a Kansas Bureau of Investigation (KBI) report analyzing whether officers seized marijuana residue during Mulleneaux's arrest. This district magistrate judge admitted the report into evidence in the two preliminary hearings conducted in district court. At both hearings, the arresting officer testified about the traffic stop and subsequent arrest of Mulleneaux. The officer also explained she sent a pipe found during the search incident to Mulleneaux's arrest to the KBI for testing. She received a lab report documenting that a chemist had detected THC. On cross-examination at the second preliminary hearing, the officer confirmed the only evidence of marijuana found on Mulleneaux was the residue in the pipe. The State did not provide a copy of the lab report to the defense at the hearing.

As the time for the trial approached, the State still had not provided a copy of the lab report to Mulleneaux's attorney. This led to Mulleneaux's attorney moving to exclude the KBI lab report and the KBI chemist's testimony from evidence at trial. The district court judge heard arguments on the motion the first morning

of the trial; the judge was the same judge who had heard the motion to dismiss and who was thus aware of the first discovery dispute.

Mulleneaux's attorney first explained why she filed the motion. She detailed the steps she had taken to get the report, including completing and faxing the County Attorney's form discovery agreement. But the State had not provided the report, a fact she realized when preparing for trial. She decided to review the County Attorney's file under its open file policy because of her experience with trying to get a copy of the journal entry the State had relied on at the preliminary hearing. She recounted that when she asked for a copy she was told the County Attorney's Office did not physically have one. But when she inspected the County Attorney's file on Thursday before trial, she found a copy of the journal entry she had been seeking. She did not find the KBI report, however. The next day she filed the motion in limine, asking to suppress the KBI report and the chemist's testimony. While the State sent her a copy over the weekend before trial, she contended the late production did not cure the discovery failure because she had needed the report so she could contact and interview the chemist.

The State argued against excluding the evidence because defense counsel had a chance to review the report at both preliminary hearings and had never moved to compel production of the report. The State had no record of the discovery request Mulleneaux faxed to its office, so it argued K.S.A. 2021 Supp. 22-3212 and its pretrial discovery requirements did not apply. The State argued instead K.S.A. 2021 Supp. 22-3213 applied, which did not require disclosure of any report until after the witness testified. The State also noted defense counsel discovered the report was missing from the State's file on the Thursday before trial but did not notify the State before filing a motion in limine at 5 p.m. on the Friday before the scheduled trial start on Monday. The State said it located and sent a copy of the report to counsel over the weekend. It suggested the more appropriate remedy on these facts would be a continuance.

The district court judge took a brief recess to consider the parties' sanction arguments and review documents. The judge then ruled from the bench and suppressed the evidence:

"There's an obligation for the State to comply with statute[. T]he request for discovery and inspection, which is admitted as Defense Exhibit A, was faxed on June 25th, 2018. The request was made. Statute and the request should have been followed and complied with. They were not. So the sanction is that the State is not allowed to use the KBI lab report or testimony by the KBI lab tech. Court will grant defendant's second motion in limine."

The prosecutor immediately announced: "With that ruling, Judge, the State's going to dismiss without prejudice." The State asked the judge to make "the specific finding that it's being dismissed out of necessity because we can't use the KBI chemist's testimony."

Mulleneaux's counsel responded that if the court were to dismiss the case the dismissal should be with prejudice because the State sought to achieve a tactical advantage through the dismissal by circumventing the judge's suppression order through a new action. The State responded: "[W]e're not dismissing this because of a tactical advantage. We're dismissing this because of their motion. And we cannot proceed to trial because of their motion and their request and sanction. So, out of necessity, we cannot proceed."

The district court dismissed the charges with prejudice.

The State appealed to the Court of Appeals, revealing in its notice of appeal that it was appealing from "the district court's dismissal with prejudice." The State identified K.S.A. 2021 Supp. 22-3602(b)(1) as the statutory authority for its appeal; that statute allows a prosecutor to appeal in a criminal case from an order of dismissal.

The Court of Appeals reversed. It concluded the district court abused its discretion by dismissing with prejudice for a discovery failure. See *Mulleneaux*, 2021 WL 3573777, at *3. Judge Atcheson dissented based on "the exceptionally deferential standard of review we are to apply." 2021 WL 3573777, at *4 (Atcheson, J., dissenting).

Mulleneaux petitioned for review. This court granted review and obtained jurisdiction under K.S.A. 20-3018(b) (petitions for

review of Court of Appeals decisions) and K.S.A. 60-2101(b) (jurisdiction to review Court of Appeals decisions upon petition for review).

ANALYSIS

In the State's brief before the Court of Appeals, it raised two issues in which it argued the district court erred in (1) granting Mulleneaux's motion in limine and (2) dismissing the case with prejudice. Mulleneaux responded to the first issue by arguing the State failed to take the necessary procedural steps to present the suppression order for appellate review. He contended the State did not mention the decision to grant the motion in limine in its notice of appeal. He pointed out that the State cited K.S.A. 2021 Supp. 22-3602 as the only statutory authority for the appeal and that provision did not mention evidentiary or suppression rulings. The Court of Appeals did not directly address this argument, which Mulleneaux raises again in his petition for review. As to the State's second issue about whether the district court judge erred in dismissing the case with prejudice, he argues the Court of Appeals panel mischaracterized the district court judge's ruling as a discovery sanction, which led to it applying the wrong legal analysis.

We consider the two issues in turn.

1. *Merits of the motion in limine are not at issue*.

Mulleneaux cites *State v. Barlow*, 303 Kan. 804, 811, 368 P.3d 331 (2016), and in the Court of Appeals he also cited *State v. Berreth*, 294 Kan. 98, 273 P.3d 752 (2012), as support for his argument that the order granting Mulleneaux's motion in limine and limiting the use of certain evidence is beyond the scope of appellate review as defined in K.S.A. 2021 Supp. 22-3602(b).

Mulleneaux makes a valid point that the right to appeal is defined by statute. See *State v. Young*, 313 Kan. 724, 728, 490 P.3d 1183 (2021). Our Legislature has chosen to restrict the State's right to appeal to specified circumstances. See *State v. Myers*, 314 Kan. 360, 365, 499 P.3d 1111 (2021); *State v. Ramirez*, 175 Kan. 301, 309, 263 P.2d 239 (1953). We must interpret those statutes, which presents a question of law to determine the scope of the right. *Young*, 313 Kan. at 728. Here, the State has cited only one

statute and only one subsection from that statute, K.S.A. 2021 Supp. 22-3602(b)(1), which provides:

> "(b) Appeals to the court of appeals may be taken by the prosecution from cases before a district judge, or a district magistrate judge who is regularly admitted to practice law in Kansas, as a matter of right in the following cases, and no others:
>
> (1) From an order dismissing a complaint, information or indictment."

As Mulleneaux points out, this statutory provision does not mention rulings about discovery disputes or the suppression of evidence, such as the judge's order excluding the KBI report and the KBI chemist's testimony. Mulleneaux suggests the State's right to appeal a decision of that type falls under K.S.A. 2021 Supp. 22-3603, which explicitly authorizes an interlocutory appeal when a district court suppresses evidence.

We need not belabor the finer points of this issue. Compare *Berreth*, 294 Kan. at 112-13 with 294 Kan. at 127-30 (Luckert, J., dissenting); see also *State v. Huff*, 278 Kan. 214, 217-19, 92 P.3d 604 (2004). The State waived any arguments by not briefing them and by conceding at oral argument before us that the merits of the in limine ruling are not before us. See *State v. Bailey*, 313 Kan. 895, 897, 491 P.3d 1256 (2021) (party abandons issue by failing to adequately brief it). As a result, we accept for purposes of this appeal the district court judge's ruling that a discovery violation occurred and that an order suppressing evidence was an appropriate sanction.

2. *Dismissal with prejudice is affirmed.*

The sole issue is thus whether under those circumstances the district court judge erred by dismissing the case with prejudice rather than granting the State's motion to dismiss without prejudice.

The context of that ruling is critical to the analysis. Dismissal arose only after the judge announced her ruling limiting the State's use of the evidence. In making that ruling, the judge implicitly rejected the State's repeated contention that a continuance would cure any prejudice to Mulleneaux.

The prosecutor immediately advised the court "the State's going to dismiss without prejudice." The court asked Mulleneaux's counsel for her position. She argued the State was dismissing for the tactical advantage of avoiding the sanction the court had imposed. She asked that, if the court ordered dismissal, the court either dismiss with prejudice or impose a condition on refiling that the State would use a summons rather than an arrest. The district court judge ordered dismissal with prejudice.

In reviewing the order dismissing with prejudice, "[w]e recognize that a county attorney or district attorney is the representative of the State in criminal prosecutions; and he or she has broad discretion in controlling those prosecutions." *Comprehensive Health of Planned Parenthood v. Kline*, 287 Kan. 372, 408, 197 P.3d 370 (2008). We also acknowledge that a judge's decision to dismiss criminal charges can improperly infringe on a prosecutor's discretion. See *State v. Williamson*, 253 Kan. 163, 165-66, 853 P.2d 56 (1993) (district court erred by dismissing criminal charges against defendant on ground that matter was better handled by civil commitment for care and treatment; dismissal amounted to impermissible judicial intrusion into prosecutor's function). And a court usually cannot interfere with the prosecutor's discretion to dismiss charges. See *Foley v. Ham*, 102 Kan. 66, 70, 169 P. 183 (1917) ("The power effectively to control a prosecution involves the power to determine when and before what tribunal it shall be brought and maintained, and therefore whether it should be discontinued.").

"Nevertheless, a prosecutor's discretion is not limitless; and the doctrine of separation of powers does not prevent court intervention in appropriate circumstances." *Kline*, 287 Kan. at 408. Dismissal with prejudice may thus be appropriate if the interests of justice so demand. *State v. Bolen*, 270 Kan. 337, 342-43, 13 P.3d 1270 (2000). In determining if dismissal of a criminal charge with prejudice is appropriate, appellate courts apply an abuse of discretion standard. 270 Kan. at 343. A district court abuses its discretion by "(1) adopting a ruling no reasonable person would make, (2) making a legal error or reaching a legal con-

clusion not supported by factual findings, or (3) reaching a factual finding not supported by substantial competent evidence." *State v. Alfaro-Valleda*, 314 Kan. 526, 533-34, 502 P.3d 66 (2022).

In part, the Court of Appeals concluded the district court abused its discretion by making the legal error of not applying the factors this court has adopted for situations when a court sanctions a prosecutor. See *Bolen*, 270 Kan. at 343. In *Bolen*, we cautioned that the power to dismiss a criminal complaint "should be exercised with great caution and only in cases where no other remedy would protect against abuse. Dismissal with prejudice should be used only in extreme circumstances. [Citations omitted.]" 270 Kan. at 343. We set out factors a judge should consider, saying: "Where there has been no showing that the defendant suffered actual prejudice as a result of a prosecutor's misconduct, and alternative means of sanctioning the prosecutor exist for the violation, dismissal of pending charges with prejudice may constitute an abuse of discretion by the trial court." 270 Kan. at 343.

Noting that caselaw, the Court of Appeals ruled the district court abused its discretion by not weighing those factors. *Mulleneaux,* 2021 WL 357377, at *3 ("[W]e necessarily conclude the district court stepped outside the governing legal precepts to dismiss the charges against Mulleneaux with prejudice."). They did so through the lens of the dismissal with prejudice being a sanction against the State for failing to provide the KBI report as part of discovery. As Mulleneaux notes, the panel wrote that "[t]he district court *revised* its oral ruling and dismissed the case with prejudice, effectively barring any further prosecution of Mulleneaux on the charges." (Emphasis added.) 2021 WL 3573777, at *2. The panel accordingly began its legal analysis by recognizing a district court's broad discretion to remedy discovery violations. But it noted that discretion had limitations, especially when imposing the "uniquely harsh sanction" of dismissal of a criminal case with prejudice. 2021 WL 3573777, at *2. The panel quoted *Bolen*, 270 Kan. at 342-43, for support and applied the factors *Bolen* set out for situations when a court orders dismissal as a sanction for the State's abuse of process. 2021 WL 3573777, at *2-3.

As Mulleneaux argues, the panel's analysis thus firmly sits in the analytical box of a dismissal as a sanction against the State. He argues that is not the analytical box applicable to these facts, however. We agree.

In sanctioning the discovery violation, the district court granted the motion in limine and restricted the State's use of the KBI lab report and the KBI chemist's testimony. It also implicitly rejected the State's repeated suggestion a continuance would be a better option. Before the State raised the prospect of a dismissal, there is nothing to suggest the judge would have dismissed the case, much less dismissed it with prejudice. And, while Mulleneaux argued any dismissal should be with prejudice, he did not counter the State's motion with a formal motion of his own. Nor does there appear to be any statutory authority that would have supported a defense motion to dismiss at that stage of the proceeding. Cf. K.S.A. 2021 Supp. 22-3208(4) ("The motion to dismiss shall be made at any time prior to arraignment or within 21 days after the plea is entered."). Dismissal arose only because the State announced it was dismissing the case.

After seeking a ruling that dismissal was a necessity, the State denied it was trying to seek a tactical advantage. While the judge did not make specific findings about the prosecutor's intent, the dialogue between the attorneys and the judge reveals that it was everyone's expectation that the State would refile charges against Mulleneaux in a case that would be unburdened by the judge's sanction. The State revealed this intent by asking for a finding of necessity, a ruling important only to the computation of speedy trial dates in a newly filed case. See K.S.A. 2017 Supp. 22-3402; *State v. Smallwood*, 264 Kan. 69, 75, 955 P.2d 1209 (1998) ("[A]bsent a showing of necessity, the State cannot dismiss a criminal action and then refile the identical charges against a defendant to avoid the time limitations mandated by statute."). This was thus not a case of the prosecutor deciding to drop a prosecution, a decision left to the prosecutor's discretion. See *Ham*, 102 Kan. at 67-70.

Rather, the State tried to circumvent a ruling with which it disagreed instead of challenging the order through an interlocutory appeal. That attempt to avoid the judge's ruling created an abuse of process, which the district court had discretion to prevent. See *Kline*, 287 Kan. at 408. The question then becomes if dismissal with prejudice was appropriate.

In many similar cases, dismissing with prejudice would be inappropriate because it is a uniquely harsh sanction a judge should order only after considering other options. See *Bolen*, 270 Kan. at 342-43.

One option would have been to deny the State's request to dismiss without prejudice and to reiterate the previously implied decision to not continue the trial setting. The prosecutor would still have been in control of the case and could have proceeded to trial. As Mulleneaux argues, the State has in other cases proven guilt in a drug possession case on circumstantial evidence. *State v. Northrup*, 16 Kan. App. 2d 443, 455-56, 825 P.2d 174 (1992); see also *State v. Brazzle*, 311 Kan. 754, 769-71, 466 P.3d 1195 (2020) (concluding State presented sufficient evidence defendant possessed oxycodone based on officer's testimony he compared pills found in defendant's car to the appearance of the pill on drugs.com, citing *Northrup*). By not simply denying dismissal without prejudice, the judge infringed on the prosecutor's discretion by not leaving to the prosecutor the decision of whether to proceed with trial.

The error of skipping that procedural step does not automatically lead us to reverse the district court, however, because we hold that error was harmless under the circumstances of this case. The key fact here is the prosecutor's admission to the judge that it could not proceed to trial without the suppressed evidence. In other words, the prosecutor conceded he lacked the evidence necessary to prove the case to the jury. The State acknowledged this again before us, saying it could not prove its case without the KBI report because that report was the sole evidence establishing the pipe in Mulleneaux's possession contained marijuana residue. The State thus could not in good faith have proceeded with the prosecution without the excluded report. See Kansas Rule of Professional Conduct 3.8(a) (2022 Kan. S. Ct. R. at 401) (special responsibilities of a prosecutor). We therefore find harmless any error in not simply denying a dismissal without prejudice. See K.S.A. 60-2105; K.S.A. 2021 Supp. 60-261.

Judgment of the Court of Appeals reversing the district court is reversed. Judgment of the district court dismissing the charges with prejudice is affirmed.

No. 122,582

DELAWARE TOWNSHIP and HIGH PRAIRIE TOWNSHIP, *Appellees*, v. CITY OF LANSING, KANSAS, *Appellant*, LEAVENWORTH COUNTY, KANSAS, and LEAVENWORTH COUNTY BOARD OF COMMISSIONERS, *Appellees*.

(512 P.3d 1154)

SYLLABUS BY THE COURT

CITIES AND MUNICIPALITIES—*Interlocal Agreement Made by Fire District is Enforceable—Not Void for Violating Public Policy.* When an interlocal agreement governing the operation and management of a fire district is terminated by one of the parties under the terms of the agreement, and the district's assets are allocated under those terms, the fire district itself is not altered or dissolved as a legal entity. Provisions in such interlocal agreements permitting termination and asset allocation after sufficient notice are not void for violating public policy.

Review of the judgment of the Court of Appeals in an unpublished opinion filed March 5, 2021. Appeal from Leavenworth District Court; DAVID J. KING, judge. Opinion filed July 8, 2022. Judgment of the Court of Appeals affirming the district court is reversed. Judgment of the district court is reversed.

Adam M. Hall, of Thompson-Hall, P.A., of Lawrence, argued the cause, and *Todd N. Thompson*, of the same firm, was with him on the briefs for appellant.

Timothy P. Orrick, of Orrick & Erskine, L.L.P., of Overland Park, argued the cause, and *Chadler E. Colgan*, of The Colgan Law Firm, of Kansas City, and *David C. VanParys*, Leavenworth County Counselor, were with him on the briefs for appellees.

Johnathan Goodyear, staff attorney, and *Amanda L. Stanley*, general counsel, of League of Kansas Municipalities, were on the briefs for amicus curiae League of Kansas Municipalities.

The opinion of the court was delivered by

STEGALL, J.: This is a dispute between municipalities in Leavenworth County over the future and assets of a fire district. The City of Lansing wants to withdraw from an interlocal agreement governing the fire district. Other parties to the agreement object. After Lansing invoked the termination and asset division provisions of the agreement, this suit was filed. The lower courts ruled against Lansing, holding that the termination and asset division provisions of the agreement were unenforceable because of a

"conflicting" statute governing the creation and termination of fire districts. Lower courts also found public policy reasons to disallow the sought-after termination. Today we reverse those decisions and hold that the agreement is enforceable by its clear terms.

The parties have stipulated to the facts as summarized below. As such, our review is plenary. *Rucker v. DeLay*, 295 Kan. 826, 830, 289 P.3d 1166 (2012); *Weber v. Board of Marshall County Comm'rs*, 289 Kan. 1166, 1175-76, 221 P.3d 1094 (2009).

In 2003, the Leavenworth Board of County Commissioners created Fire District No. 1 under K.S.A. 19-3601 et seq., the Fire Protection Act. The Fire District included the City of Lansing, Delaware Township, and High Prairie Township (all parties to this case). At the same time the County Commission created the Fire District, the municipalities all entered into an Interlocal Agreement under K.S.A. 12-2901 et seq., the Interlocal Cooperation Act. This Agreement set forth the terms and conditions governing the joint operation and management of the Fire District.

The Attorney General approved the Agreement as complying with Kansas' Interlocal Cooperation Act, which included approving several required provisions relevant to this lawsuit. Those required provisions detail the ownership of Fire District assets and—most importantly—how the Agreement may be terminated and the assets divided. The original term of the Agreement was five years, to be automatically renewed in subsequent four-year terms, unless a party properly terminated the Agreement.

Paragraph 8(a) of the Agreement states, "[o]n or after January 1, 2004, any equipment, vehicle, building, personalty or real property acquired by the Fire District, by purchase, contribution or otherwise, except as otherwise provided below, shall be owned solely by the Fire District."

Paragraph 8(b) of the Agreement outlines a few limited, time-based exceptions for "special property." Special property includes the existing township fire stations, which were retained by the respective townships. The Fire District would later purchase the fire stations for $1 after 10 years per the terms of the Agreement. During the initial 10 years, the townships agreed to lease those same buildings, as well as equipment and vehicles, to the Fire District for $1 a year.

Under Paragraph 10(b), termination of the Agreement could be initiated by "any party" but required 18 months advance notice and triggered a specific distribution of assets and liabilities. The termination provisions were divided into two sections. First, "Paragraph 8 of this agreement shall apply and the property referenced shall be disposed of in accordance with the terms of that section." As explained above, Paragraph 8 deals with the title to property purchased by the Fire District as well as property each party brought into the Agreement, such as the townships' fire stations.

For all other assets not covered by Paragraph 8, Paragraph 10(c)(2) provides those assets "shall be apportioned between the parties based upon the assessed valuation of each party as compared to the assessed valuation of the Fire District as a whole." To determine the valuation, the parties must "utilize accepted accounting and depreciation practices." In the event a valuation dispute arose, the parties agreed to submit to binding arbitration.

Additionally, if the Fire District had any liabilities at the time of termination, Paragraph 10(d) of the Agreement provided that the parties "shall jointly be responsible for the discharge of that liability." A party's contribution would be based "upon a comparison of the assessed valuation of each party as each party compared to the assessed valuation of the Fire District as a whole."

All parties operated under the terms of the Agreement for 15 years. Then in 2018, Lansing sent appropriate notice of its intent to terminate the Agreement and begin providing its own fire protection services. As part of Lansing's right of termination, Lansing sought division and disposition of the Fire District's property.

Delaware and High Prairie petitioned for declaratory judgment to stop the dissolution or alteration of the Fire District and the disposition of the Fire District property. The townships argued that under K.S.A. 19-3604, a fire district may only be disorganized after the county commission which created the fire district adopts a resolution to disorganize it. And that this may be done only after a proper petition by county residents. The townships argued the sections in the Agreement that Lansing relied on to terminate the Agreement were illegal and unenforceable.

Lansing responded with a counterclaim seeking a declaratory judgment that the Agreement was enforceable in its entirety. It argued that its notice was sufficient to terminate the Agreement and trigger the division of assets. Crucially, Lansing maintains that ending the Interlocal Agreement does not dissolve the Fire District itself.

After the lower courts disagreed with Lansing, the city petitioned this court for review, and we granted its petition. The district court ruled in favor of Delaware and High Prairie. Lansing appealed. The Court of Appeals affirmed the judgment of the district court holding that Lansing could not unilaterally alter or disorganize the Fire District and could not force a disposition of property as a matter of public policy. *Delaware Township v. City of Lansing, Kansas*, No. 122,582, 2021 WL 833520 (Kan. App. 2021) (unpublished opinion).

DISCUSSION

In this case, the legal arguments arise out of two distinct statutory frameworks. The first, K.S.A. 19-3601 et seq., controls the formation, governance, and termination of fire districts in Kansas. The second, K.S.A. 12-2901 et seq., controls the creation, governance, basic terms, and termination of interlocal agreements in Kansas.

Delaware and High Prairie contend that the "more specific" fire district termination provisions of K.S.A. 19-3604 should override the Agreement's termination provisions authorized by K.S.A. 2021 Supp. 12-2904. Allowing unilateral termination of the Agreement, Delaware and High Prairie contend, is also against public policy because of the public safety importance of fire suppression.

Lansing argues the Agreement may be terminated by its terms—which conform to the requirements of K.S.A. 2021 Supp. 12-2904. From the City's perspective, the two statutory frameworks govern different things entirely, and the termination of an interlocal agreement has no legal impact on the continuing existence of a fire district as a legal entity under K.S.A. 19-3601 et seq. Lansing also insists there is no basis to the claim that this arrangement would create a threat to public safety.

We note as well that an argument concerning constitutional home rule was also bandied about by the parties and the district court in this case. Because we rule exclusively on statutory grounds, we need not reach the home rule questions as they are not relevant to the parties' dispute.

When we interpret statutes and private agreements, such as the parties' Interlocal Agreement, our review is unlimited. *Stewart Title of the Midwest v. Reece & Nichols Realtors*, 294 Kan. 553, 557, 276 P.3d 188 (2012). Likewise, when reviewing the interpretation and legal effect of written instruments, we exercise unlimited review, and are not bound by the lower courts' interpretations of those instruments. *Born v. Born*, 304 Kan. 542, 554, 374 P.3d 624 (2016).

To understand the relationship between the Agreement, the Fire District, and the statutes governing each, we must make every effort to give effect to the plain language of both the Agreement and the statutes. *State v. Smith*, 309 Kan. 929, 932-33, 441 P.3d 472 (2019).

The Agreement states that the Fire District was formed "pursuant to the provisions of K.S.A. 19-3601 et seq." Under K.S.A. 19-3601 et seq.: "The board of county commissioners of any county of the state is hereby authorized and empowered to organize one or more fire districts." The Board's power to organize fire districts is distinct from any formation of an interlocal agreement between municipalities. To illustrate this, K.S.A. 19-3612a(b) incorporates the Interlocal Cooperation Act by reference by explaining how a designated board of county commissioners along with the governing bodies of cities and townships located within the district may enter into an interlocal agreement and delegate authority to appoint a fire district board of trustees.

At no point in K.S.A. 19-3601 et seq. or K.S.A. 12-2901 et seq. is there a reference to a fire district being *created* through the formation of an interlocal agreement—and for good reason. The purpose of an interlocal agreement is to

"permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities, persons, associations and corporations on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to forms of governmental organization that

will accord best with geographic, economic, population and other factors influencing the needs and development of local communities." K.S.A. 12-2901.

But the power to create or dissolve a fire district is not within the scope of an interlocal agreement. In fact, the procedure to disorganize or alter the territory of a fire district is rigid and specifically laid out in K.S.A. 19-3604:

"(a) Any fire district may be disorganized by the board of county commissioners at any time after four years from the date of the publication of the final resolution for the first organization of such district upon a petition to the board and the making of an order *in like manner as in the case of organizing any fire district under K.S.A. 19-3603, and amendments thereto.*

"(b) Subject to the provisions of K.S.A. 19-270, the territory of any organized fire district *may be subsequently altered by the inclusion of new lands or by the exclusion of lands therein upon a petition to the board of county commissioners signed by the owners of at least 10% of the area of the lands sought to be included or excluded, which petition shall conform, as near as may be possible, to the petition required for the organization of a fire district.* If the board of county commissioners finds the petition is sufficient, the board may adopt and publish a resolution attaching or detaching the lands described in the petition to or from the fire district. The resolution shall be published once each week for two consecutive weeks in a newspaper of general circulation in the area where the lands are located. Such publication shall include a map showing the territory of the district and the lands proposed to be attached to or detached therefrom. If within 30 days after the last publication of the resolution and map, a petition protesting the inclusion or detachment of such lands, signed by the owners, whether residents of the county or not, of more than 19% of the area of the lands sought to be included in or excluded from the fire district is filed with the county clerk, the resolution shall have no force or effect. If such a protest petition shall not be filed within such time, the resolution shall become final, and the lands shall thereupon be deemed attached to or detached from the fire district. In any case where lands are included in or excluded from a fire district as provided herein, the board shall declare the new boundary of the district by the adoption and publication of a resolution in like manner as the boundaries were declared at the time of the original organization thereof." (Emphases added.)

K.S.A. 2021 Supp. 12-2904 generally defines the scope and use of interlocal agreements, authorizes the use of interlocal agreements to handle public functions (including fire services), sets forth the basic legal requirements of agreements, and requires attorney general approval of certain types of agreements.

K.S.A. 2021 Supp. 12-2904(d)(5) requires that interlocal agreements contain a termination provision that also details the

disposition of property. The specific terms of this contract provision are left to the parties to negotiate.

"(d) Any such agreement shall specify the following:

(1) Its duration.

(2) The precise organization, composition and nature of any separate legal or administrative entity created thereby together with the powers delegated thereto.

(3) Its purpose or purposes.

(4) The manner of financing the joint or cooperative undertaking and of establishing and maintaining a budget therefor.

(5) *The permissible method or methods to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination.*

(6) Any other necessary and proper matters." (Emphasis added.)

Lastly, K.S.A. 19-3612a outlines the process for the board of county commissioners to delegate all or some governing powers to a board of trustees. And K.S.A. 19-3612a(b) governs the process when the fire district is operating under an interlocal agreement:

"(b) *Pursuant to an interlocal agreement* entered into by the board of county commissioners and the governing bodies of cities and townships located within the fire district, the board of county commissioners may delegate its authority to appoint the members of the fire district board of trustees to a joint board appointed by the governing bodies of cities and townships located within the fire district. The fire district board of trustees appointed by such joint board shall be vested with all of those powers vested in the board of county commissioners under K.S.A. 19-3601 through 19-3606, and amendments thereto.

"*Any interlocal agreement entered into pursuant to this subsection shall be subject to the provisions of K.S.A. 12-2901 et seq., and amendments thereto*." (Emphases added.)

Both sets of statutes concern fire districts—one authorizes and governs the power to create, alter, and dissolve districts, while the other authorizes and governs how municipalities within the district can cooperate to operate and manage the fire suppression services within the fire district. These two schemes and purposes do not conflict. One is not more "specific" than the other. Instead, they are *in pari materia*, and work together harmoniously. See *Miller v. Board of Wabaunsee County Comm'rs*, 305 Kan. 1056, 1066, 390 P.3d 504 (2017).

The takeaway from this analysis is simple—the Interlocal Agreement can operate according to its plain terms (and the parties do not dispute the plain meaning of the Agreement) without impacting the ongoing existence and viability of the Fire District. That district will simply need to arrive at a new arrangement for the provision of fire suppression services within its boundaries. This is the outcome the Court of Appeals deemed "nonsensical." *Delaware Township*, 2021 WL 833520, at *7 ("Lansing's stated intent—seems nonsensical because the Fire District itself continues to exist. The Fire District continues to need and use the property that would be disposed of. If Lansing instead sought to disorganize, or withdraw from, the Fire District, the disposition of Fire District property seems more understandable.").

However difficult it may be to separate the identity of the Fire District as a legal entity from the obligations of the parties under the Agreement, the plain language of the Agreement clearly makes this distinction itself. The Agreement acknowledges there is a functional distinction between terminating the "Fire District" and the "Agreement." Paragraph 10(a) of the Agreement incorporates the procedures of K.S.A. 19-3604 in instances where the Board of Leavenworth County Commissioners wishes to "*disorganize the Fire District.*" (Emphasis added.) Alternatively, Paragraph 10(b) provides a separate procedure (included as required by K.S.A. 2021 Supp. 12-2904[d][5]) in order to terminate "*this agreement.*" (Emphasis added.) Paragraph 10(c) also specifically deals with the distribution of property upon the termination of "*this agreement.*" (Emphasis added.) This language, consistent with the language of the governing statutes, makes clear there is a material distinction between the "Fire District" and the "Agreement."

"It is not the function of courts to make contracts, but to enforce them as made." *Tri-State Hotel Co., Inc. v. Sphinx Investment Co., Inc.*, 212 Kan. 234, 246, 510 P.2d 1223 (1973). ""It is the duty of courts to sustain the legality of contracts in whole or in part when fairly entered into, if reasonably possible to do so, rather than to seek loopholes and technical legal grounds for defeating their intended purpose."" *Wasinger v. Roman Catholic Diocese of Salina*, 55 Kan. App. 2d 77, 80, 407 P.3d 665 (2017). The

power of any party, including Lansing, to terminate the Agreement was clearly bargained for, and Delaware and High Prairie concede as much.

Thus, the Agreement is enforceable on its own terms without placing the Fire District itself in any jeopardy of being unlawfully dissolved. We understand that, as a practical matter, without the Agreement the Fire District may be just a legal "shell"—but that is in fact what a Fire District is. A shell to lawfully acquire, hold, and manage all of the assets and personnel required to provide fire suppression services within its geographical boundaries.

Delaware and High Prairie townships continue to insist that even if the end of the Agreement does not technically dissolve the Fire District, it is a "de facto" disorganization because replacing the "guts" of the district will be difficult or impossible, resulting in a Fire District that does not provide any fire suppression services within its boundaries. The townships insist this outcome violates public policy and that any contractual provision leading to such an outcome must be void as against that public policy. We disagree.

Terminating the Agreement is certainly the beginning of an attempt by Lansing to step away from the Fire District; however, this is no reason to invalidate the termination provisions of the Agreement. If this were the case, the provision allowing for the *actual* dissolution of the Fire District would themselves violate this vague and ill-defined public policy in favor of never altering how fire suppression services are delivered to a particular population. So, if a municipality chooses to stop participating in the management and operation of a Fire District—by invoking the very terms by which it agreed to participate in the first place—we ask rhetorically "so what?" The alternative of forcing the parties to remain locked in an agreement that no party bargained for is, to us, both nonsensical and not in furtherance of any public safety policy.

This is not to say that fire suppression is not a serious matter of public safety and concern. Contracts may indeed be void as against public policy if they are """injurious to the interests of the public . . . or tend[] to interfere with the public welfare or safety."""" *In re Marriage of Traster*, 301 Kan. 88, 105, 339 P.3d 778 (2014).

But we cannot agree with the way the townships and the Court of Appeals connected the public safety dots by disincentivizing municipalities from cooperating to provide this key service in the first place. Rather, """the paramount public policy is that freedom to contract is not to be interfered with lightly."""" *Wasinger*, 55 Kan. App. 2d at 80.

Indeed, Lansing makes several compelling arguments to address public safety concerns. First, Lansing has shown there is no reason to believe any citizen would be left without adequate fire protection. Upon termination of the Agreement, the distribution of assets under Paragraph 10 would be based on a fair appraisal of each parties' percentage makeup of the Fire District. In addition to the fair distribution of assets, the Agreement also provides for a relative allocation of liabilities across all parties. This arrangement would leave no party with disproportionate access to resources or stuck with disproportionate liabilities. In the event that the parties cannot agree on what is "fair," the Agreement requires arbitration by a third party.

There is no reason to believe that individual party ownership of Fire District assets is an inherent threat to public safety. When the parties initially entered into the Agreement, the parties retained title to their own assets—leasing them to the Fire District and eventually selling them to the Fire District per the terms of Paragraph 8.

And lastly, it should be noted that no party is prejudiced by unfair surprise by termination of the Agreement, as 18 months' notice is required. This term was surely bargained for to allow the parties to make these exact kinds of appropriate arrangements.

In conclusion, we hold that Lansing's notice of termination of the Agreement was effective, and the parties must allocate assets and liabilities per the terms of the Agreement.

Judgment of the Court of Appeals affirming the district court is reversed. Judgment of the district court is reversed.

In re Pistotnik

No. 124,868

In the Matter of BRADLEY A. PISTOTNIK, *Respondent*.

(512 P.3d 729)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceedings—One-Year Suspension.*

Original proceeding in discipline. Opinion filed July 8, 2022. One-year suspension.

Matthew J. Vogelsberg, Chief Deputy Disciplinary Administrator, argued the cause, and *Stanton A. Hazlett*, Disciplinary Administrator, was on the formal complaint for the petitioner.

John J. Ambrosio, of Morris, Laing, Evans, Brock & Kennedy, Chtd., of Topeka, argued the cause, *N. Russell Hazlewood*, of Graybill & Hazlewood LLC, of Wichita, was with him on the answer to the formal complaint, and *Bradley A. Pistotnik*, respondent, argued the cause pro se.

PER CURIAM: This is an attorney discipline proceeding against Bradley A. Pistotnik, of Wichita. Pistotnik received his license to practice law in Kansas in April 1982.

On November 30, 2020, the Disciplinary Administrator's office filed a formal complaint against Pistotnik alleging violations of the Kansas Rules of Professional Conduct (KRPC). The complaint was amended on December 17, 2020, and respondent answered the amended formal complaint on February 1, 2021. On April 20, 2021, respondent entered into a joint agreement with the Disciplinary Administrator's office stipulating to violations of KRPC 8.4(b) (criminal act reflecting adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer) (2022 Kan S. Ct. R. at 434), KRPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and KRPC 8.4(g) (conduct that adversely reflects on the lawyer's fitness to practice law).

Respondent personally appeared and was represented by counsel at the complaint hearing before a panel of the Kansas Board for Discipline of Attorneys, which was conducted on April 22, 2021. During the hearing, the panel granted the motion of the Disciplinary Administrator's office to dismiss allegations of violations of KRPC 3.3 (candor towards tribunal) (2022 Kan. S. Ct.

R. at 391) and KRPC 8.4(d) (conduct prejudicial to the administration of justice). After the hearing, the panel determined that respondent had violated KRPC 8.4(b), KRPC 8.4(c), and KRPC 8.4(g). The panel set forth its findings of fact and conclusions of law, along with its recommendation on disposition, in a final hearing report, the relevant portions of which are set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

"*Findings of Fact*

"13. The hearing panel finds the following facts, by clear and convincing evidence:

"14. In June 2014, the respondent left his former firm where he practiced law with his brother, Brian Pistotnik. The respondent formed his own firm, Brad Pistotnik Law, P.A.

"15. Dissolution of the respondent's former firm with his brother was contentious and involved a civil dissolution action filed in district court.

"16. In the dissolution action, the court ordered that the firm's website be converted into a landing page with links to new websites created for each attorney's respective new firm so that consumer traffic would be directed appropriately.

"17. On September 12, 2014, the respondent was contacted by D.D. via e-mail solicitation. D.D. offered the respondent services such as website development and Internet reputation management services.

"18. In a September 14, 2021, [*sic*] e-mail, D.D. volunteered to the respondent what he called his professional opinion that the respondent's brother was improperly directing web traffic at the landing page away from the respondent and was unfairly affecting search engine rankings.

"19. On September 15, 2014, the respondent engaged D.D. to build a website for the respondent's new firm and to prepare an expert report about the landing page for the dissolution action.

"20. The morning of September 19, 2014, an anonymous derogatory posting about the respondent appeared on a website called ripoffreport.com.

"21. Later that morning, the respondent met with D.D. about the expert report D.D. was preparing. During that meeting, D.D. recommended that the respondent regularly search his own name on the Internet for negative posts about himself.

"22. That evening, D.D. sent an e-mail to the respondent advising the respondent that D.D. had arranged for his friend, L.C., of InternetReputation.com

of Denver, Colorado to manage the respondent's internet reputation for free, as a favor to D.D.

"23. On September 20, 2014, the respondent searched his name on the Internet and found the negative post on ripoffreport.com. The respondent believed at the time that his brother had written the post.

"24. That same day, the respondent sent an e-mail to D.D. linking the ripoffreport.com post asking D.D. how to get rid of it. D.D. responded not to worry about it and he would take care of it.

"25. On September 21, 2014, D.D. sent an e-mail to the respondent that stated in part:

'I spoke with [L.C.], he is going to pull all the neg reviews I give him into their queue to have them removed or deindexed . . . . I told him I'd give him a list of the reviews we want to target at that time. So by tomorrow I need you to send me a full list of links to review pages you want addressed.'

"26. At the time, the respondent did not fully understand what deindexing was, nor did he have knowledge prior to September 25, 2014, that D.D. intended to do anything unlawful.

"27. On September 25, 2014, D.D. initiated a flood of e-mails to the servers of leagle.com, ripoffreport.com, and the Jaburg Wilk law firm, which represented a company that owned ripoffreport.com, to influence these three entities to remove negative information about the respondent from the Internet. D.D.'s e-mails stated that the flood of e-mails would cease once the unfavorable information about the respondent was removed. D.D. threatened that if the information was not removed within four hours, he would 'start hitting [their] advertisers.'

"28. That same day the respondent received a phone call from Arizona attorneys Maria Speth and Adam Kunz. The phone call was recorded. During the call the respondent was advised that Speth was a lawyer for ripoffreport.com and said her firm was receiving spam e-mails demanding that the September 19, 2014, post about the respondent be removed from the ripoffreport.com website. Speth described the call as 'urgent' and said she thought the e-mails were 'intended to crash the [firm's computer] system.' Speth stated she had received 47 e-mails as of the time of the call and that the e-mails threatened to go after advertisers if the post about the respondent was not taken down.

"29. The respondent told Speth that he was not sending the e-mails to her firm and had not authorized or directed anyone to send those e-mails on his behalf.

"30. During the call, the following exchange occurred:

'SPETH: So my only question to you is, did you hire someone or ask somebody to help you with this problem? Because whoever you hired is breaking the law.

'RESPONDENT: No, I haven't asked anybody do that. If somebody is doing it, they're doing it on their own.

'SPETH: Well, can you think of anybody that would want to help you in this way? Because, again, we are—this is—this is very serious. I mean, I—this is my law firm's e-mail server that is going to crash if this continues to happen. And—

'RESPONDENT: I really—

'SPETH: —the only way—the only way I can stop it is take it up with my client, which I don't have the authority to do, take down the post about you. So you're my only link to this and I am turning this over to the FBI, so I'm—you're my only link to this and I thought—it seemed to me like maybe you innocently may have hired somebody who said, ["]Hey, I can help you with this problem,["] not knowing that the way that they were going to do it was illegal, because that happens sometimes, so that's why I thought, let me call you and see if you go, ["]Yeah, I hired some guy and he didn't tell me he was going to do this.["]

'RESPONDENT: No, I haven't hired anybody to—to do it, so I'm—whoever is doing it is doing it on their own.'

"31. After this phone call, the respondent called D.D. because he believed D.D. or L.C. had initiated the e-mails to the Jaburg Wilk law firm, ripoffreport.com, and leagle.com. D.D. confirmed that he initiated the e-mails. The respondent was angry with and scolded D.D. and demanded the e-mails stop immediately.

"32. The respondent conceded in the parties' joint stipulation that 'his response to Speth and Kunz that he knew nothing about the e-mail attacks was false, and he should have shared his suspicion that D.D. and/or L.C. may have been responsible for the offending e-mails.'

"33. On September 29, 2014, D.D. sent the respondent an e-mail with an invoice for $2,050.00, listing charges for 'reputation management' relating to leagle.com and ripoffreport.com, expert witness work, and purchase of an android tablet.

"34. The respondent caused his firm to issue and deliver a check payable to D.D. for $2,050.00 the same day the invoice was received.

"35. In the summer of 2015, the respondent discharged D.D. from further work on the website. Afterward, D.D. began to extort and threaten the respondent. By September 8, 2015, D.D. demanded the respondent pay him $450,000.00.

"36. The respondent went to the FBI seeking protection from D.D.'s threats of extortion.

"37. The respondent was subsequently indicted by a grand jury of ten felony counts for his conduct surrounding the e-mails sent to leagle.com, ripoffreport.com, and the Jaburg Wilk law firm in the United States District Court for the District of Kansas case number 18-10099-01-EFM.

"38. On July 20, 2018, the respondent self-reported the federal indictment to the disciplinary administrator's office.

"39. On October 15, 2019, the respondent entered into a plea agreement where he plead[ed] guilty to three (3) violations of 18 U.S.C. § 3, accessory after the fact, in relation to 18 U.S.C. § 875(d), Class A misdemeanors.

"40. The United States District Court for the District of Kansas accepted the respondent's misdemeanor plea, adjudicated him guilty, and ordered the respondent pay $375,000.00 in fines, restitution to ripoffreport.com of $55,200.00, and a special assessment of $300.00. The respondent paid the lump sum of $430,500.00 due in full on the day of his plea and sentencing hearing.

"41. The respondent self-reported these convictions to the Oklahoma Bar Association and the Kansas disciplinary administrator's office.

"42. The respondent was immediately suspended from the practice of law in Oklahoma, on an interim basis, under Oklahoma Rules Governing Disciplinary Proceedings ('ORGDP') 7.3.

"43. Under ORGDP 7, when a lawyer pleads guilty to a crime that 'demonstrates such lawyer's unfitness to practice law,' the disciplinary case proceeds under summary proceedings and certified copies of the judgment and sentence are sent to the Chief Justice of the Oklahoma Supreme Court and constitute conclusive evidence of the conduct and 'suffice as the basis for' attorney discipline in Oklahoma.

"44. The Oklahoma Bar Association initiated disciplinary proceedings against the respondent under ORGDP 7.1[] and 7.2, which provide for the summary process described above.

"45. The Oklahoma Bar Association did not elect to proceed under ORGDP 7.6, which allows for filing a complaint, conducting a disciplinary hearing, and presenting evidence in addition to the documents proving the criminal conviction, instead electing to utilize the summary procedure in ORGDP 7.1 and 7.2.

"46. The respondent requested and was granted a hearing to present mitigating evidence. The Oklahoma Supreme Court granted this hearing 'on the limited scope of mitigation and recommendation of discipline.' The Oklahoma Bar Association was permitted to present aggravating evidence.

"47. The hearing was held on June 5, 2020. The respondent and his counsel learned that the Oklahoma Bar counsel planned to call FBI agent Thomas Ensz. A motion *in limine* was filed to prevent Ensz's testimony, but that motion and a motion for reconsideration were denied.

"48. During the hearing, Agent Ensz was asked whether the respondent was cooperative during the investigation of the respondent's extortion complaint against D.D. Agent Ensz's testimony indicated that during the investigation the respondent withheld e-mails from the FBI that were inculpatory to the respondent.

"49. On November 4, 2020, the Oklahoma Supreme Court published an opinion finding that the respondent's conduct violated Oklahoma Rules of Professional Conduct 8.4(b) and 8.4(c). The Oklahoma Supreme Court suspended the respondent's Oklahoma license for two years and one day. A suspension of this length in Oklahoma automatically requires an application for reinstatement.

"50. Oklahoma Rules of Professional Conduct 8.4(b) and 8.4(c) are identical to Kansas Rules of Professional Conduct 8.4(b) and 8.4(c).

"51. The respondent and the disciplinary administrator's office agreed it would not be appropriate to consider the Oklahoma Supreme Court's finding that the respondent 'misled the FBI by excluding e-mails,' because this 'was not a charge to which Respondent was placed on notice and given an opportunity to respond.' Further, it was not 'addressed in the Oklahoma Panel's report,' and 'it was not an issue Respondent could address before the Oklahoma Supreme Court.'

"52. The respondent and the disciplinary administrator's office stipulated that no client was harmed as a result of the respondent's misconduct.

"53. The joint stipulation contained the respondent's stipulation that his conduct forming the basis of his federal misdemeanor plea violated KRPC 8.4(b), 8.4(c), and 8.4(g).

"*Conclusions of Law*

"54. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 8.4(b) (professional misconduct—criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer), KRPC 8.4(c) (professional misconduct—dishonesty, fraud, deceit or misrepresentation), and KRPC 8.4(g) (professional misconduct—conduct that adversely reflects on the lawyer's fitness to practice law) as detailed below.

"KRPC 8.4(b)

55. 'It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.' KRPC 8.4(b). In this case, the respondent plead[ed] guilty to committing three federal class A misdemeanor violations of 18 U.S.C.

§ 3, accessory after the fact in relation to 18 U.S.C. § 875(d). The respondent's crimes involved dishonest conduct. The respondent concealed information that could have prevented substantial harm to the victims' computer equipment and servers. The respondent's crimes adversely reflect on his honesty, trustworthiness, or fitness as a lawyer. Accordingly, the hearing panel concludes that the respondent violated KRPC 8.4(b).

"KRPC 8.4(c)

56. 'It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.' KRPC 8.4(c). The respondent engaged in conduct that involved dishonesty, deceit and misrepresentation when he told Speth that he had not hired anyone to help him address the ripoffreport.com post about himself. Further, once the respondent learned that D.D. had sent the e-mails that were adversely affecting the victims' computer servers, the respondent chose to cover up D.D.'s conduct instead of informing Speth and paid an invoice D.D. charged for providing Internet reputation services for the respondent. As such, the hearing panel concludes that the respondent violated KRPC 8.4(c).

"KRPC 8.4(g)

57. 'It is professional misconduct for a lawyer to . . . engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.' KRPC 8.4(g). The respondent committed crimes involving dishonesty that resulted in harm to third parties and was dishonest with the victims of D.D.'s crimes, resulting in his conviction of three federal misdemeanor counts of violation of 18 U.S.C. § 3, accessory after the fact in relation to 18 U.S.C. § 875(d) and suspension of his license to practice law in Oklahoma for two years and one day. The hearing panel concludes that the respondent violated KRPC 8.4(g) because his conduct adversely reflects on his fitness to practice law.

"*American Bar Association Standards for Imposing Lawyer Sanctions*

58. In making this recommendation for discipline, the hearing panel considered the factors outlined by the American Bar Association in its Standards for Imposing Lawyer Sanctions (hereinafter 'Standards'). Pursuant to Standard 3, the factors to be considered are the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors.

59. *Duty Violated*. The respondent violated his duty to the public, the legal system, and the profession.

60. *Mental State*. The respondent knowingly violated his duties.

61. *Injury*. As a result of the respondent's misconduct, the respondent caused at least $55,200.00 in damages to ripoffreport.com and also caused injury to the integrity of the legal profession.

"Aggravating and Mitigating Factors

62. Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, found the following aggravating factors present:

63. *Prior Disciplinary Offenses*. The respondent has been previously disciplined on five occasions.

a. On November 8, 1985, the respondent received an informal admonishment for improperly contacting both parties to a domestic matter.

b. On October 23, 1991, the respondent received an informal admonishment after a formal hearing for violation of MRPC 1.15 (safekeeping property) and 1.4 (communication).

c. On December 10, 1993, the respondent received a one-year suspension from the practice of law in *In re Pistotnik*, 254 Kan. 294, 864 P.2d 1166 (1993), for violation of MRPC 1.3 (diligence), 1.4 (communication), 8.4(b), (c), (d) and (g) (misconduct).

d. On April 7, 1994, the respondent received an informal admonition for violation of MRPC 1.15(b) (safekeeping property).

e. On May 11, 1994, the respondent received an informal admonition for violation of MRPC 1.15 (safekeeping property).

64. *Substantial Experience in the Practice of Law*. The Kansas Supreme Court admitted the respondent to practice law in the State of Kansas in 1982. At the time of the misconduct, the respondent had been practicing law for more than 30 years.

65. *Illegal Conduct*. The respondent's misconduct in this case involves conduct that is illegal under 18 U.S.C. § 3, accessory after the fact in relation to 18 U.S.C. § 875(d), which is a class A federal misdemeanor.

66. Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, found the following mitigating circumstances present:

67. *Absence of a Dishonest or Selfish Motive*. The respondent's misconduct does not appear to have been motivated by dishonesty or selfishness. While the respondent engaged in dishonest conduct, his conduct does not appear to have been motivated by dishonesty or selfishness. Instead, the respondent's conduct appears to have been motivated by fear and ignorance of the type and gravity of the problems being expressed by Speth.

68. *Personal or Emotional Problems if Such Misfortunes Have Contributed to Violation of the Kansas Rules of Professional Conduct*. During the period of time the respondent's misconduct occurred, he suffered from a severe back injury that required multiple surgeries in 2014 and 2015. The respondent was prescribed pain medication that affected his thinking, though the respondent testified at some point he stopped taking the medication. One of the respondent's surgeries resulted in an infection and inflammation in his spine, which required more surgery and forced the respondent to spend a substantial amount of time rehabilitating. During this time, the respondent required significant help from his wife to care for himself and needed walking aids to get around.

69. Also, during this time, the respondent was in the process of dissolving his prior law practice with his brother, was involved in a civil dissolution action in court, and was starting up his own law practice, including creating the court-ordered landing page and a new website for his firm. It is clear the respondent's adverse health conditions, family and business struggles with his brother, and personal struggle in starting his own law practice contributed to his misconduct.

70. *Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct*. On the day the respondent plead[ed] guilty in the United States District Court for the District of Kansas for three counts of violation of 18 U.S.C. § 3, the respondent paid $430,500.00 ordered as fines, restitution, and fees assessed against him in full. The hearing panel finds this was a timely and good faith effort on the part of respondent to rectify the consequences of his misconduct and make restitution.

71. *The Present and Past Attitude of the Attorney as Shown by His or Her Cooperation During the Hearing and His or Her Full and Free Acknowledgment of the Transgressions.* The respondent fully cooperated with the disciplinary process. Additionally, the respondent entered into a joint stipulation with the disciplinary administrator's office admitting his violations of KRPC 8.4(b), 8.4(c), and 8.4(g) and the relevant facts.

72. *Previous Good Character and Reputation in the Community Including Any Letters from Clients, Friends and Lawyers in Support of the Character and General Reputation of the Attorney*. The respondent is an active and productive member of the bar of Wichita, Kansas. The respondent also enjoys the respect of his peers and generally possesses a good character and reputation as evidenced by the testimony of Tony Atterbury, William Barr, Daniel Giroux, and Timothy Finnerty and by multiple letters and affidavits received by the hearing panel. The hearing panel also notes the respondent's significant contributions to charity and the community in his area, for which he should be commended.

73. *Delay in Disciplinary Proceedings.* The respondent self-reported his federal indictment on July 20, 2018. The respondent also reported his conviction in the United States District Court for the District of Kansas, which occurred on October 15, 2019. This disciplinary proceeding was delayed initially by circumstances surrounding the COVID-19 pandemic and also by the filing of an

amended formal complaint on December 17, 2020, adding Count II alleging the respondent's November 24, 2020, suspension in Oklahoma.

74. *Imposition of Other Penalties or Sanctions*. The respondent has experienced other sanctions for his conduct. The respondent was convicted of federal misdemeanors, incurred significant fines, restitution, and other fees, was suspended from the practice of law in Oklahoma for two years and one day, and has suffered negative publicity.

75. *Remorse*. At the hearing on this matter, the respondent expressed genuine remorse for having engaged in the misconduct. The hearing panel concludes that the respondent is remorseful. The respondent established his remorse through his statements and demeanor during the formal hearing, his payment of fines, restitution, and fees in the criminal matter, and his cooperation and entry of a joint stipulation to his misconduct in this disciplinary case.

76. *Remoteness of Prior Offenses.* The misconduct which gave rise to the respondent's prior discipline is remote in time and character to the misconduct in this case. The respondent's prior misconduct involved violations of MRPC 1.15 (safekeeping property), which is not at issue here, and violations of similar rules but for a different manner of conduct. The respondent's most recent prior discipline was imposed in 1994, more than 30 years before the misconduct in this case.

77. In addition to the above-cited factors, the hearing panel has thoroughly examined and considered the following Standards:

'5.11 Disbarment is generally appropriate when:

'(a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses;

'(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.'

'5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.'

'7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.'

"*Discussion*

78. The hearing panel observes that the respondent has practiced law for the past 30 years without discipline prior to the misconduct in this case. While the respondent was dishonest with Speth and Kunz and should have informed them of D.D.'s involvement, the respondent's conduct was motivated by fear and ignorance of the technological issues involved. Further, at the time the respondent was experiencing significant family issues with his brother, a business dissolution, starting up his own practice, and near-debilitating recurring medical issues.

79. The respondent's conduct and criminal convictions reflect adversely on the legal profession. However, the hearing panel agrees with the opinion expressed in testimony at the hearing that the respondent's entire career should not be measured by a single lapse of judgment. The hearing panel also notes that no clients were injured by the respondent's conduct. Because of this, the hearing panel is not concerned with the respondent's return to practice after a period of suspension, if that is the discipline ultimately imposed.

"*Recommendation of the Parties*

80. The disciplinary administrator and the respondent jointly recommended that the respondent's license to practice law in Kansas be suspended for one year. The parties further recommended that the respondent undergo a reinstatement hearing pursuant to Rule 232 (2021 Kan. S. Ct. R. 287) prior to reinstatement.

"*Recommendation of the Hearing Panel*

81. Based upon the findings of fact, conclusions of law, and the Standards listed above, the hearing panel unanimously recommends that the respondent be suspended for a period of one year. The hearing panel further recommends that the respondent not be required to undergo a hearing pursuant to Rule 232 (2021 Kan. S. Ct. R. 287) prior to reinstatement.

82. Costs are assessed against the respondent in an amount to be certified by the Office of the Disciplinary Administrator."

DISCUSSION

In a disciplinary proceeding, this court generally considers the evidence, the disciplinary panel's findings, and the parties' arguments to determine whether KRPC violations exist and, if they do, the appropriate discipline to impose. Attorney misconduct must be established by clear and convincing evidence. *In re Foster*, 292 Kan. 940, 945, 258 P.3d 375 (2011); see also Supreme Court Rule

226(a)(1)(A) (2022 Kan. S. Ct. R. at 281) (a misconduct finding must be established by clear and convincing evidence). Clear and convincing evidence is "evidence that causes the factfinder to believe that 'the truth of the facts asserted is highly probable.'" *In re Lober*, 288 Kan. 498, 505, 204 P.3d 610 (2009) (quoting *In re Dennis*, 286 Kan. 708, 725, 188 P.3d 1 [2008]).

Respondent was given adequate notice of the formal complaint and of the amended complaint, to which he filed an answer. Prior to the hearing before the disciplinary panel, respondent entered into a joint agreement stipulating to violations of KRPC 8.4(b), (c), and (g). Based on that stipulation, the Disciplinary Administrator's office moved to dismiss the alleged violations of KRPC 3.3 and 8.4(d), and the panel granted that motion because the evidence did not support the allegations. No exceptions were filed in the case, and the findings of fact and conclusions of law in the hearing panel's final report are deemed admitted. Supreme Court Rule 228(g)(1), (2) (2022 Kan. S. Ct. R. at 287). The evidence before the panel clearly and convincingly established that the charged misconduct violated KRPC 8.4(b) (criminal act reflecting adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and 8.4(g) (conduct that adversely reflects on the lawyer's fitness to practice law).

The only issue left for us to resolve is the appropriate discipline. Respondent and the Disciplinary Administrator's office jointly recommended that we suspend respondent's license to practice law for one year and that respondent be subject to a reinstatement hearing under Supreme Court Rule 232 (2022 Kan. S. Ct. R. at 293). The disciplinary panel recommended that we suspend respondent's license to practice law for one year but that respondent not be required to undergo a hearing prior to reinstatement.

The court agrees with the joint recommendation of the Disciplinary Administrator's office and respondent. There are several mitigating factors present that affect the degree of discipline warranted: respondent's adverse health conditions, family and business struggles with his brother, and personal struggle in starting

his own law office contributed to his misconduct; respondent expressed genuine remorse; respondent faced significant other sanctions for his conduct; respondent has made significant contributions to charity and the community in his area; respondent's prior misconduct was remote in time and character to this misconduct; and respondent made a timely, good-faith effort to make restitution and remedy the consequences of his misconduct.

Even so, we cannot overlook the fact that respondent committed three federal Class A misdemeanor violations, and that those violations involved dishonest conduct. Nor can we overlook the fact that, although respondent did not injure any of his clients, his misconduct caused at least $55,200 in damages to ripoffreport.com. To properly balance these competing interests, we order that respondent's license be suspended for one year and that respondent undergo a reinstatement hearing under Rule 232 before his petition for reinstatement will be considered.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Bradley A. Pistotnik is suspended for one year from the practice of law in the state of Kansas, effective the date of this opinion, in accordance with Supreme Court Rule 225(a)(3) (2022 Kan. S. Ct. R. at 281) for violating KRPC 8.4(b), (c), and (g).

IT IS FURTHER ORDERED that respondent shall comply with Supreme Court Rule 231 (2022 Kan. S. Ct. R. at 292) (notice to clients, opposing counsel, and courts following suspension or disbarment).

IT IS FURTHER ORDERED that if respondent applies for reinstatement, he shall comply with Supreme Court Rule 232 (2022 Kan. S. Ct. R. at 293) and be required to undergo a reinstatement hearing.

IT IS FURTHER ORDERED that the costs of these proceedings be assessed to respondent and that this opinion be published in the official Kansas Reports.

State v. Collier

No. 124,047

STATE OF KANSAS, *Appellee*, v. JEFFREY SCOTT COLLIER, *Appellant.*

(513 P.3d 477)

SYLLABUS BY THE COURT

CRIMINAL LAW—*Sentencing—Court Can Impose Supervision Period Only for Off-grid Crime*. Under K.S.A. 1993 Supp. 21-4720(b), when a defendant is sentenced for both off-grid and on-grid crimes, the sentencing court only has authority to impose the supervision period associated with the off-grid crime.

Appeal from Sedgwick District Court; KEVIN J. O'CONNOR, judge. Opinion filed July 15, 2022. Affirmed.

Kristen B. Patty, of Wichita, was on the brief for appellant.

Julie A. Koon, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

BILES, J.: Jeffrey Scott Collier appeals from a district court's summary denial of his second pro se motion to correct an illegal sentence imposed for offenses committed in 1993. The sentencing court ordered a hard 15 life sentence with lifetime parole for a first-degree murder conviction and a consecutive 97-month prison term for an aggravated robbery conviction. Collier claims the applicable law required 24 months of postrelease supervision because the aggravated robbery should have been designated as the primary crime for sentencing purposes. The State agrees with him. But we hold the district court correctly sentenced Collier and affirm the district court's denial of his motion.

FACTUAL AND PROCEDURAL BACKGROUND

The details of Collier's crimes are not relevant to this postrelease supervision issue but can be found in *State v. Collier*, 259 Kan. 346, 348-49, 913 P.2d 597 (1996) (*Collier I*). Our focus here concerns his resentencing after a string of appeals and remands. See *State v. Collier*, 263 Kan. 629, 637, 952 P.2d 1326 (1998) (*Collier II*). He did not appeal that resentencing at the time.

But several years later, Collier filed what became his first pro se motion to correct an illegal sentence. He claimed the sentencing court should have classified his prior convictions as nonperson offenses when imposing his prison term for the aggravated robbery. The district court summarily denied that motion and this court affirmed. See *State v. Collier*, 306 Kan. 521, 394 P.3d 1164 (2017) (*Collier III*). In 2020, he filed his second pro se motion, which appears to seek correction of the supervision term, which he asserts is required for the aggravated robbery sentence. That is the basis for this appeal.

His second motion gave few specifics. But it did recite nine "Declarations" about his case's procedural history from which an outline for a legal claim emerges. Important here, the fourth and fifth declarations discussed the presumptive guideline sentence for aggravated robbery as "a prison term of 92 to 103 months and postrelease supervision of 24 months" and the fact the district court "did not establish a postrelease supervision duration" for that conviction. His ninth declaration stated: "The initial sentence imposed for . . . Aggravated Robbery . . . is still 97 months prison term with no postrelease supervision imposed."

Admittedly, his statements are challenging to decipher with precision. But when the fourth, fifth, and ninth declarations are read together, it is reasonable to infer Collier attacks the lifetime parole ordered by claiming the statute requires postrelease supervision. See K.S.A. 2021 Supp. 22-3504(a), (c)(1) (permitting correction at any time when a sentence is "ambiguous with respect to the time and manner in which it is to be served"). The district court, however, focused only on the 97-month prison term assigned to the aggravated robbery conviction to summarily deny the motion as successive, so it did not squarely address Collier's likely concern about postrelease supervision.

We view Collier's appeal as arguing the applicable law designates his aggravated robbery conviction as the "primary crime" for sentencing purposes and required the district court to impose 24 months of postrelease supervision. And he suggests the lifetime parole ordered at his 1998 resentencing on the murder conviction is illegal because "the only action the trial court was permitted to

take to comply with the [m]andate" was reducing the mandatory minimum prison time attached to the life sentence.

Jurisdiction is proper. See K.S.A. 60-2101(b) (Supreme Court jurisdiction over direct appeals governed by K.S.A. 2021 Supp. 22-3601); K.S.A. 2021 Supp. 22-3601(b)(3)-(4) (life sentence and off-grid crime cases permitted to be directly taken to Supreme Court).

DISCUSSION

Under K.S.A. 2021 Supp. 22-3504(a), a court may correct an illegal sentence at any time while that sentence is being served. A sentence is illegal when it is "[i]mposed by a court without jurisdiction; . . . does not conform to the applicable statutory provision, either in character or punishment; or . . . is ambiguous with respect to the time and manner in which it is to be served at the time it is pronounced." K.S.A. 2021 Supp. 22-3504(c)(1).

An appellate court reviews a district court's summary denial of a motion to correct an illegal sentence de novo because it has the same access to the motion, records, and files as the district court. A sentence's legality is a question of law subject to unlimited review. *State v. Jackson*, 314 Kan. 178, 179-80, 496 P.3d 533 (2021); see also *State v. Ross*, 295 Kan. 1126, Syl. ¶ 2, 289 P.3d 76 (2012) ("Interpretation of a statute raises a question of law over which an appellate court has unlimited review.").

As mentioned, Collier and the State agree the aggravated robbery sentence is illegal. They believe the applicable law required the district court to impose a postrelease supervision term by designating the aggravated robbery as the primary crime. They rely on K.S.A. 1993 Supp. 21-4720(b), which was in effect at the time of Collier's sentencing and addressed situations when a sentencing judge imposes multiple sentences consecutively. Subsection (b)(1) provided: "[T]he consecutive sentences shall consist of an imprisonment term and a supervision term. The postrelease supervision term will be based on the primary crime." And subsection (b)(2) stated, "*An off-grid crime shall not be used as the primary crime* in determining the base sentence when imposing multiple sentences." (Emphasis added.) And subsection (b)(7) provided: "If the sentence for the consecutive sentences is a prison term, the

postrelease supervision term is a term of postrelease supervision as established for the primary crime." In their view, Collier's off-grid crime of first-degree murder could not be used as the primary crime when deciding the supervision period because of the italicized text quoted above.

But we read the applicable provisions differently. K.S.A. 1993 Supp. 21-4720(b) declares:

"In cases where consecutive sentences may be imposed by the sentencing judge, the following shall apply:

(1) When the sentencing judge imposes multiple sentences consecutively, the consecutive sentences shall consist of an imprisonment term and a supervision term. The postrelease supervision term will be based on the primary crime.

(2) The sentencing judge must establish a base sentence for the primary crime. The primary crime is the crime with the highest crime severity ranking. An off-grid crime shall not be used as the primary crime in determining the base sentence when imposing multiple sentences. If sentences for off-grid and on-grid convictions are ordered to run consecutively, the offender shall not begin to serve the on-grid sentence until paroled from the off-grid sentence. . . .

(3) The base sentence is set using the total criminal history score assigned. . . . .

(7) If the sentence for the consecutive sentences is a prison term, the postrelease supervision term is a term of postrelease supervision as established for the primary crime."

The use of the term "postrelease supervision" in subsections (b)(1) and (b)(7) is not obvious from its plain language, but *Ross* resolved that ambiguity. The *Ross* court held:

"This section is nonsensical if the phrase 'postrelease supervision term' in K.S.A. 21-4720(b)(2) refers to a period of postrelease supervision under K.S.A. 2008 Supp. 22-3717(d) because . . . off-grid crimes are followed by parole under K.S.A. 2008 Supp. 22-3717(b). Accordingly, the phrase, 'postrelease supervision term' in K.S.A. 21-4720(b)(2) must refer more generally to the supervision period that follows the defendant's release from prison, regardless if that is termed 'parole' or 'postrelease.'" 295 Kan. at 1133.

Ross dealt with K.S.A. 21-4720(b)(2), which has slightly different language than K.S.A. 1993 Supp. 21-4720(b)(2), but the use of "postrelease supervision" in Collier's case does not differ from that in *Ross*. And since the statutory meaning of "postrelease supervision" in K.S.A. 1993 Supp. 21-4720(b)(1) and (b)(7) is the same as K.S.A. 21-4720(b)(2), the *Ross* holding makes the remaining statutory language clear. In other words, under subsection

(b)(1), "consecutive sentences shall consist of an imprisonment term and a supervision term. The . . . supervision term will be based on the primary crime." Subsection (b)(2) states "[t]he primary crime is the crime with the highest crime severity ranking," which for the narrow purpose of determining the correct supervision term in Collier's case is the first-degree murder, an off-grid crime. This makes his supervision term lifetime parole. See K.S.A. 1993 Supp. 22-3717(b).

The parties rely on K.S.A. 1993 Supp. 21-4720(b)(2) to press their point in favor of an illegal sentence, but they do not consider the modifier "*in determining the base sentence* when imposing multiple sentences." (Emphasis added.) K.S.A. 1993 Supp. 21-4720(b)(2). And when the relevant portion of the statute is read as a whole, it means a defendant's base sentence has nothing to do with the supervision term in cases involving multiple convictions. See K.S.A. 1993 Supp. 21-4720(b)(3) ("The base sentence is set using the total criminal history score assigned.").

We also note the Legislature replaced the term "primary crime" with "longest supervision term imposed for any of the crimes" in subsection (b)(1) and added the language of "the postrelease supervision term will be based on the off-grid crime" in subsection (b)(2) in 1994. L. 1994, ch. 291, § 59; K.S.A. 2021 Supp. 21-6819 (recodified; same). But the 1994 amendments do not change the statute's substance. Indeed, they reinforce the 1993 legislation's meaning as we describe it.

Here, Collier's primary crime for the purpose of K.S.A. 1993 Supp. 21-4720(b)(1) as we construe it is first-degree murder. And under subsection (b)(2), his off-grid crime can be used when deciding the supervision term—but not the base sentence. The district court correctly sentenced Collier under the applicable law to a hard 15 life imprisonment with lifetime parole for the first-degree murder conviction and a consecutive 97-month imprisonment with no postrelease supervision term for the aggravated robbery conviction. Like in *Ross*, when Collier was sentenced for both off-grid and on-grid crimes, the sentencing court only had authority to impose the supervision period associated with the off-grid crime.

Collier also implies the so-called mandate rule prevented the resentencing court from relying on K.S.A. 1994 Supp. 21-4720(b)(2) ("[T]he postrelease supervision term will be based on the off-grid crime.") and from imposing parole when it modified the mandatory minimum for the life sentence in 1998. He also suggests the parole to be ordered under the amendments to K.S.A. 21-4720 would be a prohibited ex post facto application of the law. We disagree.

Lifetime parole was the appropriate supervision period under the applicable 1993 statute, so the resentencing court was within its statutory authority to correct the supervision term as required. See *State v. Clark*, 313 Kan. 556, 576, 486 P.3d 591 (2021) (holding trial court that imposed illegal sentence by strictly complying with Court of Appeals mandate committed a technical error that required resentencing to correct illegality); *State v. Bailey*, 313 Kan. 895, Syl., 491 P.3d 1256 (2021) ("A litigant waives or abandons an issue by not supporting an argument with pertinent authority or explaining why the argument is sound despite a lack of pertinent authority."). Moreover, even if the district court were required to impose a postrelease supervision period to follow Collier's release from the on-grid crime, as the dissent argues it should, that would not exempt Collier from the lifetime parole requirement. The plain language of K.S.A. 1993 Supp. 22-3717 at the time of Collier's crimes mandated that the end of his prison term for the off-grid conviction, if any, must be followed by lifetime parole. See *State v. Claiborne*, 315 Kan. 399, 400, 508 P.3d 1286 (2022) ("'In Kansas, off-grid crimes are not associated with periods of postrelease supervision but instead are followed by life parole.'").

Turning to that argument, the dissent argues the crime with "the highest crime severity ranking" is not necessarily "the crime we deem most odious or that carries the longest sentence." 316 Kan. at 116 (Rosen, J., dissenting). The dissent relies on *State v. Woodard*, 294 Kan. 717, 280 P.3d 203 (2012), but that reliance is misplaced. In *Woodard*, the defendant appealed from three life sentences with a mandatory minimum term of 25 years following his guilty plea to three counts of aggravated indecent liberties with a child. He claimed these sentences constituted cruel and unusual

punishment and he compared punishment for Jessica's Law violations with the penalties for more serious crimes in Kansas like murder, arguing his crimes were less serious than homicide but was punished more severely. The *Woodard* court rejected his argument and held:

"This argument suffers from several flaws. In the first place, it assumes that murderers necessarily receive more lenient sentences in Kansas than violators of Jessica's Law. This is not the case. In fact, the Kansas Criminal Code sets out a list of transgressions that constitute capital murder, which is an off-grid offense. Capital murder is subject to punishment by death. The penalty for homicide in Kansas may thus be much more severe than the penalties under Jessica's Law. *The fact that the penalty for certain categories of homicide may be less severe than the penalties for other, nonhomicide crimes does not automatically render the penalties for the nonhomicide crimes unconstitutional. There is no strict linear order of criminal activity that ranks all homicides as the most serious crimes and all nonhomicide crimes as less serious, with the corresponding penalties necessarily ranking in diminishing durations of imprisonment*. [Citations omitted.]" (Emphasis added.) 294 Kan. at 723.

Collier's argument focuses only on the statute setting postrelease supervision, not whether a punishment is cruel and unusual and therefore constitutionally invalid. Similarly, the dissent's reference to *State v. Walker*, 283 Kan. 587, 153 P.3d 1257 (2007), misses the point. The primary crime discussed in *Walker* was used for the purposes of calculating the base sentence. See 283 Kan. at 614 ("[H]e contends that the sentencing court erred in ranking the primary crime for purposes of calculating the base sentence."). But postrelease supervision was not an issue in *Walker*.

The dissent's confusion seems to come from a post-1993 understanding of what has constituted "the primary crime," a term which has been used exclusively to calculate a base sentence since 1994. But Collier's case concerns the statute's 1993 version. And K.S.A. 1993 Supp. 21-4720(b) uses the term "primary crime" in two ways. First, the primary crime as used in one sense determines the postrelease supervision term. See K.S.A. 1993 Supp. 21-4720(b)(1) ("When the sentencing judge imposes multiple sentences consecutively, the consecutive sentences shall consist of an imprisonment term and a supervision term. The postrelease supervision term will be based on the primary crime."). Second, the "primary crime" used in the other sense determines the base sentence. K.S.A. 1993 Supp. 21-4720(b)(2) ("An off-grid crime shall

not be used as the primary crime in determining the base sentence when imposing multiple sentences."). In 1994, the Legislature replaced the term "primary crime" as used in the first sense in subsection (b)(1) with the phrase "longest supervision term imposed for any of the crimes." As a result, only the second sense of primary crime has been used since then, in calculating the base sentence. Although the Legislature's use of a single term in two different senses in the 1993 statute is unusual, the parole requirement for off-grid crimes contained in K.S.A. 1993 Supp. 22-3717 demonstrates that the 1994 amendment clarified the law, rather than changed it.

Affirmed.

* * *

ROSEN, J., dissenting: My reading of K.S.A. 1993 Supp. 21-4720(b) and the earlier decisions of this court leads me to disagree with the majority's analysis and conclusion. I would agree with the argument the parties jointly presented to this court and reverse the district court.

The 1993 version of the statute stated that postrelease supervision was to be "based on the primary crime." K.S.A. 1993 Supp. 21-4720(b)(1). The statute went on to state that the primary crime was "the crime with the highest crime severity ranking" and an off-grid crime was "not [to] be used as the primary crime in determining the base sentence when imposing multiple sentences." K.S.A. 1993 Supp. 21-4720(b)(2).

It is seductive to think that the crime with "the highest crime severity ranking" must be the crime we deem most odious or that carries the longest sentence. But this is a subjective assessment that this court has consistently rejected.

In *State v. Woodard*, 294 Kan. 717, 723, 280 P.3d 203 (2012), we held: "There is no strict linear order of criminal activity that ranks all homicides as the most serious crimes and all nonhomicide crimes as less serious, with the corresponding penalties necessarily ranking in diminishing durations of imprisonment." We have consistently followed this holding. See, e.g., *State v. Spear*, 297 Kan. 780, 801-02, 304 P.3d 1246 (2013); *State v. Seward*, 296

Kan. 979, 987, 297 P.3d 272 (2013); *State v. Britt*, 295 Kan. 1018, 1034, 287 P.3d 905 (2012). That this principle was followed in cases relating to cruel and unusual punishment does not diminish the relevance of that principle to this case: we do not give a statutory construction that benefits the prosecution in one situation and a contrary construction so that it will also benefit the prosecution in a different situation.

How was the district court to sentence Collier in 1993? The off-grid crime had no severity ranking; by what rationale could the court have found it to be the "crime with the highest crime severity ranking"? See K.S.A. 1993 Supp. 21-4702(b)(2). There is simply no basis for determining that murder was the crime with the "highest crime severity ranking" as of 1993. It had *no* severity ranking. As recently as two years ago, we explained that the severity level of a crime is determined by determining the "intersection of the crime severity ranking of a current crime of conviction and an offender's criminal history classification." *State v. Fowler*, 311 Kan. 136, 140, 457 P.3d 927 (2020). Where there is no grid, there is no corresponding means of calculating the severity ranking. This is consistent with our statement in *State v. Torres*, No. 99,308, 2009 WL 862166, at *2 (Kan. 2009) (unpublished opinion), that the "primary crime" means "the on-grid crime with the highest severity level."

In *State v. Walker*, 283 Kan. 587, 153 P.3d 1257 (2007), this court expressly agreed with my understanding of the statute and disagreed with the conclusion the court is reaching today. In *Walker*, this court noted that felony murder was an off-grid crime. The court went on to hold that felony murder could not be the "primary crime" under K.S.A. 2006 Supp. 21-4720(b)(2) because it was an off-grid crime. 283 Kan. at 615.

The majority in the present case attempts to distinguish *Walker*, but the asserted distinction simply creates two different rules for interpreting the same language in the same statute. I contend that *Walker* was correctly decided and should remain controlling law.

In 1994, our Legislature amended K.S.A. 21-4720(b) to add language to sections (1) and (2). This new language stated that postrelease supervision would be for the longest supervision term

for "any of the crimes" of conviction, and "the postrelease supervision term will be based on the off-grid crime." This language is now found in K.S.A. 2021 Supp. 21-6819(b)(1) and (2).

The majority contends the 1994 amendment simply "clarified" and "reinforce[d]" the law already in effect. 316 Kan. at 113, 116. The amendment was not "clarifying" or "reinforcing" language; it was language intended to change the peculiar, and probably unintended, results flowing from the earlier language. The Legislature does not clarify and reinforce statutes that already have an uncontested meaning. If the 1994 amendment is to be considered simply a clarification of an ambiguity, then this court should apply the rule of lenity, which requires courts to construe ambiguous statutes in favor of the accused. See, e.g., *State v. Gensler*, 308 Kan. 674, 680, 423 P.3d 488 (2018). If the 1993 version of the statute was ambiguous (which I don't think it was), then Collier should benefit from the reading most favorable to him.

I recognize that the language of K.S.A. 1993 Supp. 21-4720(b) and this court's consequent reading of that plain language in *Walker* can produce results that the Legislature did not contemplate and that appear contrary to our general sense of how criminal behavior should be penalized and supervised. It was the role of the Legislature—not of this court in 2022—to amend that language, and that is precisely what the Legislature did in 1994. Collier was sentenced for crimes committed under the earlier version of the statute, and this court should recognize the sentence was illegal and should remand the case for correction.

STANDRIDGE, J., joins the foregoing dissenting opinion.

No. 124,958

In the Matter of DAVID S. WHINERY, *Respondent*.

(512 P.3d 1162)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—One-year Suspension.*

Original proceeding in discipline. Opinion filed July 15, 2022. One-year suspension, stayed pending successful completion of the agreed 18-month probation plan.

Kathleen Selzler Lippert, Deputy Disciplinary Administrator, argued the cause, and *Gayle B. Larkin*, Disciplinary Administrator, was with her on the formal complaint for the petitioner.

N. Trey Pettlon, of Law Offices of Pettlon & Ginie, of Olathe, argued the cause and was on the answer to the formal complaint, and *David S. Whinery*, respondent, argued the cause pro se.

PER CURIAM: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against the respondent, David S. Whinery, of Liberty, Missouri, an attorney admitted to the practice of law in Kansas in 2000.

On October 4, 2021, the Office of the Disciplinary Administrator filed a formal complaint against Whinery alleging violations of the Kansas Rules of Professional Conduct (KRPC). Respondent filed a timely answer to the formal complaint on October 20, 2021. On February 18, 2022, Whinery and the Disciplinary Administrator entered into a summary submission agreement under Supreme Court Rule 223 (2022 Kan. S. Ct. R. at 277). Under the agreement the parties stipulate and agree that Whinery violated the following Kansas Rules of Professional Conduct:

- KRPC 1.2 (2021 Kan. S. Ct. R. 323) (scope of representation);
- KRPC 1.3 (2021 Kan. S. Ct. R. 325) (diligence);
- KRPC 8.4(d) (2021 Kan. S. Ct. R. 427) (conduct prejudicial to the administration of justice); and
- KRPC 8.4(g) (2021 Kan. S. Ct. R. 427) (conduct that adversely reflects on the lawyer's fitness to practice law).

FACTUAL AND PROCEDURAL BACKGROUND

We quote the relevant portions of the parties' summary submission agreement below.

"4. On February 21, 2020, Disciplinary Administrator's Office received a complaint expressing concern that Respondent had been verbally and possibly physically aggressive with G.O., who was his client and incarcerated at the time. This complaint was docketed and investigated.

"5. On April 3, 2020, Respondent provided a written response and several attachments.

"Background of Client G.O.'s Case

"6. In 2019, Client G.O. was incarcerated on felony charges related to a dispute with his neighbor; Johnson County District Court 19 CR 1810. Client G.O. also had municipal charges pending in Mission, Kansas and Prairie Village, Kansas related to city ordinance violations.

"7. On October 14, 2019, Client G.O. signed a Power of Attorney (POA) to R.W., an acquaintance of Client G.O. Client G.O. hoped his acquaintance would help him take care of his property while he was incarcerated. This POA to acquaintance R.W. included the home address for R.W.

"Respondent's Representation of Client G.O.

"8. In November 2019, Client G.O. retained Respondent to represent him in the felony case and on the municipal charges. Respondent is not able to provide the exact date he was retained because he did not document the date in his file.

"9. On November 12, 2019, Respondent exchanged emails with the prosecutor for Client G.O.'s felony criminal case in Johnston [*sic*] County. Respondent notes that he may be taking on the case for Client G.O. and hopes to get the prosecutor's initial assessment of the situation. The prosecutor notes the community is very concerned that Client G.O. is dangerous.

"10. On November 19, 2019, Respondent filed an entry of appearance in Client G.O.'s felony criminal case; Johnson County District Court 19 CR 1810.

"11. Respondent did not have any written fee agreement with Client G.O. Respondent verbalized his hourly billing rate and estimated his legal fees to Client G.O. Respondent knew Client G.O. did not have funds to pay a retainer but he did have a house, furs, or other assets that could pay Respondent's legal fees. However, Respondent did not keep contemporaneous time records that documented his legal services. During the course of the disciplinary investigation, Respondent did create an estimated time record.

"12. On December 2, 2019, after Client G.O. bonded out of jail, Respondent exchanged text messages with G.O. In these text messages, they discussed whether Client G.O. is getting ripped off by R.W. serving as POA. Client G.O. was concerned that R.W. had taken cars, jewelry, furs, and/or watches from his home while he was incarcerated. Client G.O. wanted Respondent to help protect his assets. Additionally, Respondent told Client G.O. that he was sending a person over to get fur coats to use as collateral for his legal fees.

"13. In December 2019, Respondent advised Client G.O. to (1) revoke the POA previously given to acquaintance R.W. and (2) give POA to Respondent so Respondent could protect Client G.O.'s property. Client G.O. followed Respondent's advice.

"14. Client G.O. asked Respondent to revoke the Power of Attorney previously given to acquaintance R.W. At Respondent's direction, Client G.O. revoked, in writing, the Power of Attorney to R.W. Client G.O. crossed out and marked 'Revoked' on the signed Power of Attorney to R.W. and wrote a letter confirming that, all dated December 14, 2019. Client G.O. directed Respondent to convey that the Power of Attorney had been revoked to both acquaintance R.W. and the Mission Police Department.

"15. Based on Respondent's advice, Client G.O. gave Power of Attorney to Respondent so Respondent could protect his property. On December 14, 2019, Client G.O. wrote a handwritten note stating that he gave Respondent durable power of attorney.

"16. On the same date, December 14, 2019, Respondent sent Client G.O. a text that said, 'There's an Office Max in that shopping center on Johnson Drive . . . and we can execute a Limited Power of Attorney so I can protect your assets.'

"17. Between December 16th and 18th, 2019, Respondent exchanged emails with the prosecutor for the felony criminal case in Johnston [*sic*] County. In his emails, Respondent noted that his client was selling his house to raise funds to comply with court requirements, that his client's business partners robbed him blind, and his client is in need of treatment; Respondent asked that the warrant be stayed.

"18. Respondent's efforts to notify acquaintance R.W. that the POA from Client G.O. had been revoked included the following:

"a. Respondent called a telephone number for R.W. on one or more occasions to tell him the POA had been revoked; however, these efforts were unsuccessful.

"b. Respondent gave City of Mission law enforcement a copy of the revoked POA for R.W. to help protect Client G.O.'s property.

"c. Respondent did not take other steps to notify R.W. that Client G.O. had revoked the previously granted POA, despite the fact R.W.'s physical address was listed on the documents G.O. had given him.

"19. Respondent made no attempt to serve notice of the revoked POA on acquaintance R.W. at his home address which was listed on the POA document.

"20. A subsequent attorney for Client G.O. successfully served R.W. with notice that the POA from Client G.O. had been revoked. This notice was served on R.W. at his home address, which was listed on the POA document that Respondent had in his possession.

"21. Between December 20th and 23rd, 2019, Respondent exchanged emails with the City of Mission Court Clerk and Mission Police Department. Respondent advised City of Mission officials that Client G.O. revoked the Power of Attorney previously given to R.W.

"22. On or about December 30, 2019, R.W., using the purported POA that Client G.O. had asked Respondent to revoke as part of his representation, signed a quick [*sic*] claim deed for Client G.O.'s home over to another person without the knowledge of Client G.O. Client G.O. had to engage in litigation to resolve title and deed issues to his home.

"23. On or about January 9th and 10th, 2020, Respondent helped to facilitate an exclusive real estate listing agreement between Client G.O., who was incarcerated at the time, and a Real Estate Service with E.D. as the 'Listing Agency'. This document has Client G.O.'s signature with a date of January 9, 2020, and the signature of the listing agency dated January 10, 2020.

"24. On January 15, 2020, Client G.O. signed a 'General Durable Power of Attorney' for Respondent. Client G.O. gave Respondent POA to safeguard assets and to help him sell his home so he would have funds to pay his court costs, fines, bond out on his felony case, and pay Respondent's attorney fees.

"25. On February 18, 2020, at 9:36 p.m., Respondent sent an email to the prosecutor and asked if Client G.O. can plead to 'Criminal Threat.' Criminal threat is a lower-level felony charge than the Aggravated Assault that Client G.O. was charged with and is not subject to the special rule of presumptive prison due to the firearm. At the time of this email, Client G.O. did not want to plead to a felony charge. . . .

"26. On February 19, 2020, the next afternoon, the prosecutor emailed a plea offer to Respondent on the felony Johnson County case, 19 CR 1810. The plea offer included Client G.O. entering a plea to two counts of Criminal Threat. Later that day, Respondent clarified the offer.

"27. On February 20, 2020, Respondent and the prosecutor exchanged several emails, including:

"a. February 20, 2020, at 8:05 a.m. an email from the prosecutor clarified the possible sentence.

"b. February 20, 2020, at 8:43 a.m. Respondent stated, 'I spoke with him about the deal last night . . . and will go to JOCO after my Lenexa date at 1030am [*sic*] . . . and will contact him from the phone at the courthouse . . . will let you know ASAP.'

"28. On February 20, 2020, at 8:19 a.m., the court's administrative assistant emailed the parties and asked whether Client G.O.'s case would be a preliminary hearing that afternoon.

"a. Respondent replied at 8:47 a.m., 'I informed (Client G.O.) about the plea offer that has been extended by the State . . . will come to JOCO . . . after my 1030 [*sic*] in Lenexa, and call him from the phones at the courthouse, and get an answer to Judge Cameron and ADA Shannon . . . ASAP . . . .'

"b. Respondent replied at 12:10 p.m., 'Scrap the Prlim (sic) . . . we should be able to advance to Plea. I just need to find him as soon as he is transferred from Gardner . . . to go over the details . . . see everyone at 3 pm.'

"29. On February 20, 2020, Respondent spoke to Client G.O. prior to the designated court hearing time. During this conversation, Client G.O. was in custody, escorted by two law enforcement officers, and seated in the jury box waiting for his hearing. G.O. was in handcuffs and ankle shackles. The deputies each were equipped with a body camera and audio.

"30. On February 20, 2020, Respondent can be seen on the body camera video of an officer entering the court room and approaching Client G.O. who is cuffed and seated in the jury box.

"a. Respondent placed documents on the jury box railing as he talked to Client G.O. about waiving his preliminary hearing and setting a plea date for a plea to criminal threat a felony. Client G.O. did not understand or want to waive his preliminary hearing and did not want to plead to a felony.

"b. After a period of time, Respondent can be heard using expletives in his conversation with Client G.O. and appeared to be frustrated and irritated with Client G.O.

"c. Client G.O. can be heard on the video stating in part to Respondent, '. . . you should tell me, you work for me, I don't know . . . .'

"d. Respondent reached over the jury box railing and touched Client G.O. by grabbing his shoulder/arm to pull him closer to speak in an aggressive fashion.

"e. The interaction between Respondent and his client alarmed officers. One officer immediately intervened physically and moved to stand between Respondent and Client G.O. to provide a physical barrier to protect Client G.O. from Respondent. The officer stated to Respondent, 'No, negative, no, step

away from him, no, leave, I've had enough, you've cussed him out, you're not allowed to touch him, go out to the hallway and cool down.'

"f. This event happened before the judge took the bench.

"31. The officers completed offense reports for the event between Respondent and his client.

"a. Respondent was interviewed by officers on February 26, 2020.

"b. Respondent told the officer during the telephone interview that he was trying to pull his client forward to discuss sensitive information.

"c. Respondent stated during the interview that he was trying to sell his client's house and car.

"d. The officer advised Respondent an offense report charging him with battery would be sent to the District Attorney's office. Respondent said, 'If you think that I battered my client, then I am guilty of battery.' The officer indicated the report would be submitted to the District Attorney's Office for their consideration of whether charges should be filed. As of this date, no criminal charges have been filed against Respondent.

"32. Client G.O. was interviewed by S.I. Terry Morgan. During this interview he told S.I. Terry Morgan that as he talked to Respondent in the jury box, G.O. told Respondent that he worked for him (Client G.O.). Respondent became angry, cursed, and grabbed Client G.O.'s shoulder.

"33. Another inmate was sitting in the jury box and observed the conversation between Respondent and Client G.O. Inmate T.R. was interviewed by S.I. Terry Morgan.

"34. Inmate T.R. said he heard portions of the conversation and observed Respondent's conduct. Inmate T.R. heard Client G.O. say 'You work for me; I don't work for you.'; then he heard Respondent say, 'Fuck this' and reached out and grabbed Client G.O.

"35. The judge called Client G.O.'s criminal case and noted the Court understood that Client G.O. was waiving his preliminary hearing. Respondent told the Court that Client G.O. did not wish to waive; and because the State had called off their witnesses on Respondent's representation that G.O. wanted to waive his right to a preliminary hearing, the matter was continued. The Court noted that an hour had been set aside for a preliminary hearing.

"36. Immediately after the hearing, Deputies who observed Respondent's conduct with Client G.O. advised the judge about the events that happened in the court room. The Court recalled Client G.O.'s case, removed Respondent as counsel and appointed the public defender.

"37. Respondent was interviewed by an investigator for the ODA.

"38. Respondent asserted during his interview that he did explain Constitutional rights, the effects of waiver of preliminary hearing, and consequences of pleas to Client G.O.; however, Respondent does not have any contemporaneous notes in his file reflecting these communications.

"39. Client G.O. had asked Respondent to sell four fur coats to try to raise money to help him post his bond. Respondent was not able to sell the fur coats for Client G.O. and did return to G.O. the four fur coats, a brief case and paperwork that constituted all of the property G.O. placed in his possession.

"Conclusions of Law: Petitioner and Respondent stipulate and agree that Respondent violated the following Supreme Court Rules and Kansas Rules of Professional Conduct. Respondent engaged in misconduct as follows:

"40. KRPC 1.2 (Scope)—Respondent failed to clearly define his scope of representation particularly with what his obligations were with the Power of Attorney G.O. granted him. Respondent contacted the police department to advise them that a previous Power of Attorney G.O. had granted to R.W. had been revoked, but Respondent did not communicate that to R.W. G.O. believed Respondent was retained to convey the Revocation of the POA to R.W. and expected Respondent to do that. There was no written agreement clarifying Respondent's Scope of Representation.

"41. KRPC 1.3 (Diligence)—Respondent failed to make adequate efforts to convey his client G.O.'s revocation of the Power of Attorney to R.W. Respondent did not serve or attempt to serve R.W. with the Revocation despite having his address. After advising Client G.O. to give POA to Respondent, Respondent did not take adequate steps to protect his client's assets. Respondent was aware Client G.O. was unsophisticated and did not document his communication to his client on important rights, or explain issues related to granting POA to Respondent.

"42. KRPC 8.4(d) (Conduct prejudicial to the administration of justice)—By engaging in unprofessional interaction with client in the jury box prior to a hearing including use of profanity and aggressive physical contact, Respondent caused the Court to remove him from the case and appoint another lawyer. Respondent's actions necessitated unduly delaying the proceedings further and delayed the resolution for the client who was in custody at the time.

"43. KRPC 8.4(g) (Conduct that adversely reflects on the lawyer's fitness to practice law)—By engaging in unprofessional interaction with client in the jury box prior to a hearing including use of profanity and aggressive physical contact, Respondent caused law enforcement officers to intercede, and his conduct was observed by another inmate.

"Applicable Aggravating and Mitigating Circumstances:

"44. Aggravating circumstances include:

"a. Prior disciplinary offenses, including:

"i. DA 8,718: 2003 Informal Admonition for violation of Rule 8.4 (Misconduct). Respondent was administratively suspended for failure to pay his registration fee. During that time, he entered pleas on behalf of two (2) clients. Both pleas had to be set aside when the judges realized that Respondent was suspended.

"ii. DA 9,894: 2008 Diversion for violation of Rule 1.1 (Competence). Respondent's client was charged with three (3) counts of aggravated robbery and was convicted on all three (3) counts. Respondent filed a motion for a new trial based on his ineffective assistance of counsel; noting that he failed to object to jury instructions, was not prepared for trial, was deficient in not filing pretrial motions.

"iii. DA 13,272: 2019 Informal Admonition for violation of Rule 1.7(a)(2) (Conflict, current client) and 1.8(b) (Conflict, special rules). Respondent represented a mother in a criminal case where she was charged with one felony and two misdemeanors. Respondent's client struggled with substance abuse issues. Subsequently, Respondent filed a petition for Third Party Custody of his client's child; Respondent was seeking custody of his client's child because Respondent had a long-term relationship with the child. Respondent cited to his client's substance abuse struggles as part of the grounds for intervention.

"b. A pattern of misconduct—Respondent has previously been disciplined for his conduct in criminal cases. In this case, Respondent's lack of diligence created misunderstandings by his client and culminated in Respondent's aggressive physical and verbal conduct in the jury box.

"c. Multiple offenses—Respondent violated KRPC 1.2, 1.3, 8.4(d) and 8.4(g).

"d. Vulnerability of victim: Client G.O. was incarcerated and unsophisticated. Client G.O. trusted Respondent to effectuate revoking the POA for acquaintance R.W. Respondent's limited efforts of attempting to call R.W. and failure to make attempts to serve R.W. or attached a notice his POA had been revoked extended R.W.'s ability to take advantage of Client G.O. Client G.O. followed Respondent's advice and gave Respondent general POA to protect his assets while incarcerated but Respondent did not take steps to protect Client G.O.'s assets while he was incarcerated.

"e. Substantial experience in the practice of law—Respondent was admitted to practice law in Kansas in 2000 and has substantial experience in the practice of law.

"45. Mitigating circumstances include:

"a. Absence of a dishonest or selfish motive—Respondent's actions appear to have been motivated from a genuine desire to help a client who was in custody and unable to help himself at the time Respondent's estimated fees were modest. He performed legal work prior to receiving any payment. Ultimately, when Respondent was removed from the felony case, he did not submit an invoice to Client G.O. for legal services or request payment for any of his time. Respondent did not exhibit any dishonesty during the violations or the subsequent investigation.

"b. Cooperation during the investigation and full and free acknowledgement of the transgressions. Respondent submitted to interviews and provided information in a timely manner whenever requested.

"c. Good character and reputation in the community. Respondent submitted character letters from attorneys and other clients attesting to his character.

"d. Remorse. Respondent exhibited genuine remorse for his conduct before and during the investigation. Respondent wrote a letter of apology to the judge in G.O.'s case and completed that.

. . . .

"Recommendations for Discipline:

"48. Petitioner and Respondent jointly recommend Respondent be suspended from the practice of law in the State of Kansas for one year; that the imposition of this suspension from the practice of law be stayed and Respondent be placed on probation according to the terms in Respondent's Exhibit C for a period of eighteen months (18) months or as directed by the Supreme Court.

"49. Respondent waives his right to a hearing on the formal complaint as provided in Supreme Court Rule 222(c).

"50. Petitioner and Respondent agree that no exceptions to the findings of fact and conclusions of law will be taken.

"51. The complainant in this matter is Judge Cameron. Notice of the Summary Submission will be provided to the complainant and given 21 days to provide the disciplinary administrator with their position regarding the agreement as provided in Supreme Court Rule 223(d).

"52. Respondent understands and agrees that pursuant to Supreme Court Rule 223(f), this Summary Submission Agreement is advisory only and does not prevent the Supreme Court from making its own conclusions regarding rule violations or imposing discipline greater or lesser than the parties' recommendation.

"53. Respondent also understands and agrees that after entering into this Summary Submission Agreement he will be required to appear before the Kansas Supreme Court for oral argument under Supreme Court Rule 228(i)."

DISCUSSION

In a disciplinary proceeding, this court considers the evidence, the disciplinary panel's findings, and the parties' arguments to determine whether KRPC violations exist and, if they do, the appropriate discipline to impose. Attorney misconduct must be established by clear and convincing evidence. *In re Foster*, 292 Kan. 940, 945, 258 P.3d 375 (2011); see also Kansas Supreme Court Rule 226(a)(1)(A) (2022 Kan. S. Ct. R. at 281) (a misconduct finding must be established by

clear and convincing evidence). "Clear and convincing evidence is 'evidence that causes the factfinder to believe that "the truth of the facts asserted is highly probable."'" *In re Lober*, 288 Kan. 498, 505, 204 P.3d 610 (2009).

The Disciplinary Administrator provided Whinery with adequate notice of the formal complaint. The Disciplinary Administrator also provided Whinery with adequate notice of the hearing before the panel. The parties agreed to waive the hearing on the formal complaint, and Whinery made a statement that if the summary submission was approved, the parties will not take exceptions to the findings of fact or conclusions of law. Under Rule 223(b), a summary submission agreement is:

"[a]n agreement between the disciplinary administrator and the respondent to proceed by summary submission must be in writing and contain the following:
"(1) an admission that the respondent engaged in the misconduct;
"(2) a stipulation as to the following:
(A) the contents of the record;
(B) findings of fact;
(C) and conclusions of law, including each violation of the Kansas Rules of Professional Conduct, the Rules Relating to Discipline of Attorneys, or the attorney's oath of office; and
(D) any applicable aggravating and mitigating factors.
"(3) a recommendation for discipline;
"(4) a waiver of the hearing on the formal complaint; and
"(5) a statement by the parties that no exceptions to the findings of fact or conclusions of law will be taken." Rule 223(b) (2022 Kan. S. Ct. R. at 278).

The Kansas Board for Discipline of Attorneys approved the summary submission and canceled a hearing under Rule 223(e)(2). As a result, the factual findings in the summary submission are admitted. See Kansas Supreme Court Rule 228(g)(1) (2022 Kan. S. Ct. R. at 288) ("If the respondent files a statement . . . that the respondent will not file an exception . . . , the findings of fact and conclusions of law in the final hearing report will be deemed admitted by the respondent.").

When signed by the parties, the written summary submission agreement contained all the information required by Rule 223. The summary submission and the parties' stipulations before us establish by clear and convincing evidence the charged conduct violated KRPC 1.2, 1.3, 8.4(d), and 8.4(g). We adopt the findings

and conclusions set forth by the parties in the summary submission and at oral argument. A minority of the court, after reviewing the body camera footage, would find that the undisputed evidence does not establish a violation of KRPC 8.4(d) and 8.4(g).

The remaining issue is deciding the appropriate discipline. The parties jointly recommend that Whinery be suspended from the practice of law in the state of Kansas for one year and that the imposition of this suspension be stayed and Whinery be placed on probation according to the terms of "Respondent's Exhibit C" for a period of 18 months. We adopt and impose the jointly recommended discipline. A minority of the court would impose a lesser discipline.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that David S. Whinery is, effective the date of this opinion, suspended from the practice of law in the state of Kansas for one year; and that this suspension is stayed and Whinery is on probation according to the terms of "Respondent's Exhibit C" for a period of 18 months for violations of KRPC 1.2, 1.3, 8.4(d), and 8.4(g).

IT IS FURTHER ORDERED that the costs of these proceedings be assessed to respondent and that this opinion be published in the official Kansas Reports.

No. 121,014

STATE OF KANSAS, *Appellee*, v. DANIEL EARL GENSON III, *Appellant*.

(513 P.3d 1192)

SYLLABUS BY THE COURT

KANSAS OPEN RECORDS ACT—*Strict Liability of Act—Protection of Public from Sexual and Violent Offenders—Not Unconstitutionally Arbitrary.* The strict liability character of a KORA registration violation offense bears a rational relationship to the legitimate government interest of protecting the public from sexual and other violent offenders and is thus not unconstitutionally arbitrary.

Review of the judgment of the Court of Appeals in 59 Kan. App. 2d 190, 481 P.3d 137 (2020). Appeal from Riley District Court; GRANT D. BANNISTER, judge. Opinion filed July 29, 2022. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Caroline M. Zuschek, of Kansas Appellate Defender Office, argued the cause and was on the brief for appellant.

David Lowden, deputy county attorney, argued the cause, and *Barry R. Wilkerson,* county attorney, *Bethany C. Fields*, deputy county attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

PER CURIAM: Daniel Earl Genson III challenges the Court of Appeals decision affirming his conviction for violating the Kansas Offender Registration Act by failing to register. The issue is whether the Legislature's decision to make the crime of failure to register a strict liability felony violates Genson's substantive due process rights. We conclude it does not.

FACTS AND PROCEDURAL BACKGROUND

After his conviction for attempted voluntary manslaughter, Genson needed to register as a violent offender under KORA. On August 29, 2017, he did so at the Riley County Police Department. There, he met investigations secretary Shannon Ascher, who described his demeanor as "normal." The forms Genson completed informed him he had to register every May, August, November, and February, and again upon certain occasions, such as when his address changed. Ascher told Genson about these requirements. On September 18, Genson came in

to report a change of phone number. He came in again on October 9 to report an address change.

But Genson failed to show up for his registration appointment in November. This does not, itself, establish a failure to register; Genson had until the end of the month to fulfill his registration obligations. To help "make sure he [didn't] miss that month," Ascher tried to call Genson at his own number and his mother's number. Ascher ultimately failed to reach him, and Genson did not register in November. But he registered on December 15 and appeared "normal" at that time.

The State charged Genson with a violation of KORA under K.S.A. 2017 Supp. 22-4903(a) and (c)(1)(A), a severity level six felony, based on his failure to report in person during the month of November 2017. Before trial, the parties stipulated Genson had been convicted of a nonsexual crime requiring registration under KORA. Genson filed a notice of intent to assert a defense of mental disease or defect with no accompanying information, but the State objected because K.S.A 2020 Supp. 21-5203(e) eliminated any mens rea element for a KORA violation, making it a strict liability offense. In reply, Genson argued, among other things, that the State's construction would allow for the conviction of "an individual who falls into a coma during his month of registration and is physically and mentally incapable of complying with K.S.A. 22-4901 et seq." Genson did not clearly articulate an argument that *his* mental illness rendered him physically incapable of complying with his registration obligations. Nor did Genson's reply raise a constitutional claim, although he would later develop the same arguments in challenging the statute's constitutionality. The district court rejected Genson's request for his mental-disease-or-defect defense, agreeing with the State that mens rea is not an element of the crime charged. Accordingly, it held Genson's mental health in November of 2017 was irrelevant.

The case went to jury trial. During trial, the State asked the district court to bar any mention of Genson's mental health because it was not relevant to the crime charged. Genson's attorney noted that Genson had been involuntarily committed at Osawatomie State Hospital for roughly the first half of December 2017, and challenged the constitutionality of strict liability registration violation offenses. Genson's attorney asserted Genson had a constitutional right to present his mental health defense, that he did not "believe that the strict liability statute for

KORA is constitutional, period," and that "there's a constitutional argument as to the statute and as to why mental health issues should be able to be discussed to the jury." While Genson's counsel referenced physical incapacity briefly, he did not argue that Genson was physically *unable* to comply with his registration obligations by virtue of a mental disease or defect or that Genson's conduct was involuntary under K.S.A. 2020 Supp. 21-5201(a).

The district court did not rule on the statute's constitutionality but repeated the substance of its previous written ruling "that generally questions, inquiries, evidence, or for that matter argument related to defense of mental defect are not going to be allowed." As the district court put it, a ruling on the statute's constitutionality "will be the Appellate Court's function." In its eventual Journal Entry of Jury Trial, the district court characterized this as a ruling on the State's motion "in limine."

At the end of the State's case, Genson's counsel made these proffers of "what testimony would have been if this Court had allowed us to go into mental health issues":

- Ascher "is familiar with K.S.A. 22-4904 regarding the duties of parties such as state hospitals, i.e., Osawatomie State Hospital."
- "This court and the State of Kansas had involuntarily committed Mr. Genson to Osawatomie" after Genson "actually took himself to a hospital."
- Genson "would have testified that he had not been on his medications in the month of November, that he became cognizant enough to reach out to his mother to ask for transportation to go to the hospital because he knew he needed help. He was unable to reach his mother and Mr. Genson was able to get himself to the hospital. He would testify he believed that would be the end of November, beginning of December."
- Genson "would have been in the hospital on December 2nd."
- "He spent his time at Osawatomie up through December 14th. When he was out of Osawatomie and medicated on his proper treatment plan, he registered the following day."

Once Genson had been committed in the beginning of December of 2017, his counsel argued, it was the hospital's responsibility to register him, meaning he was only "technically incompliant" for "a day to day and a half." Except for the above-referenced proffer, Genson introduced only one exhibit: his registration form from December 15, 2017. He put forth no other evidence.

Genson was found guilty. Before sentencing, Genson moved to dismiss the case because K.S.A. 2020 Supp. 21-5203(e) was "unconstitutional under the Due Process Clause" as it applied a strict liability standard to a crime of inaction. Genson also filed a Renewal of Motion for Judgment of Acquittal, Motion for Judgment Notwithstanding the Verdict, and Motion for a New Trial, in which he argued, *inter alia*:

> "7. Furthermore, the Court ruled that Mr. Genson was barred from presenting any theory of defense in this case, specifically ruling that evidence concerning Mr. Genson's mental state during the month of November 2017 was inadmissible and irrelevant.
>
> "8. Mr. Genson proffered evidence that would have established that Mr. Genson's mental condition during the month of November 2017 was unstable at best, and that Mr. Genson turned himself into the authorities on December 2, 2017. Law enforcement officers were so concerned with Mr. Genson's mental condition that he was nearly immediately transported to Osawatomie State Mental Hospital while the Riley County Attorney's Office filed a care and treatment case.
>
> "9. The Court's ruling also effectively deprived Mr. Genson of his unquestioned Constitutional right to testify in his own defense in any meaningful way. Without being able to testify about what was taking place in his life during November 2017, the reason he turned himself into the authorities on December 2, 2017, his subsequent admission to Osawatomie State Hospital, or even his initial registration address in December 2017, Mr. Genson's potential trial testimony was essentially limited to stating his name for the record and immediately stepping down to return to the defense table.
>
> "10. The foregoing is a significant and incurable error and was prejudicial to the defendant, effectively robbing him of any ability to defend himself.
>
> "11. In addition, the exclusion of Mr. Genson's mental health evidence deprived the jury of their inherent power to convict only in appropriate circumstances, regardless of the evidence presented by the State."

Again, Genson raised no argument that his mental illness physically incapacitated him in November of 2017. Nor did he claim his failure to register was involuntary for purposes of 2020 Supp. K.S.A. 21-5201(a).

At sentencing, Genson's counsel argued the imposition of strict liability unconstitutionally "violates KORA offenders' due process rights under the Fifth and Fourteenth Amendments, essentially their substantive due process rights." The district court denied this motion. Even so, over the State's objection, the district court granted Genson both a durational and dispositional departure based on his mental health struggles and the de minimis nature of his late registration violation.

Genson appealed to the Court of Appeals, raising four issues related to his inability to present a defense based on his mental health in November 2017. Genson did not raise any new argument on appeal as to the physical voluntariness of his conduct under K.S.A. 2020 Supp. 21-5201(a) and did not claim he was physically unable to register. Instead, Genson argued that K.S.A. 2020 Supp. 21-5203(e) violated his substantive due process rights by making a KORA violation a strict liability crime. The panel disagreed, concluding the strict liability character of the offense was not unconstitutional under a rational basis review. 59 Kan. App. 2d at 200-16. The panel majority refused to address the rest of Genson's claims on a "prudential" basis because they were raised for the first time on appeal. 59 Kan. App. 2d at 200.

In response, Judge Atcheson authored a lengthy dissent criticizing the majority's substantive due process analysis. Judge Atcheson reasoned that statutes criminalizing conduct on a strict liability basis impact a fundamental liberty interest when they provide for "harsh penalties" and argued that such statutes should be subject to strict scrutiny. 59 Kan. App. 2d at 218, 229 (Atcheson, J., dissenting). Within that framework, Judge Atcheson concluded that the statutes at issue here were not narrowly tailored to advance any legitimate government objective and were thus unconstitutional and unenforceable. 59 Kan. App. 2d at 230-32 (Atcheson, J., dissenting).

Genson's petition for review to this court raised only three issues. This court granted review as to Genson's substantive due process claim only, which included a brief challenge to the panel's refusal to address his newly raised claims under section 1 and section 5 of the Kansas Constitution Bill of Rights. The court did not grant review of Genson's challenge to the constitutionality of K.S.A. 2020 Supp. 21-5209 or of

his claims that section 5 of the Kansas Constitution Bill of Rights encompasses a right of jury nullification. We thus express no opinion on the merits of these arguments.

ANALYSIS

Genson challenges the panel's conclusion that K.S.A. 2020 Supp. 21-5203(e)'s imposition of strict liability for a KORA registration violation does not offend substantive due process under the United States Constitution, arguing the statute "infringes on an individual's liberty interest to remain free from incarceration on a felony offense absent proof of scienter." Before turning to the merits of Genson's overall substantive due process claim, we first address the panel's refusal to consider his two other newly raised due process claims under the Kansas Constitution.

The panel did not abuse its discretion in refusing to consider Genson's newly raised claims on appeal.

Before the district court, Genson did not clearly delineate his substantive due process arguments as arising either under the federal or the Kansas Constitutions. Instead, Genson mainly framed his arguments around his constitutional right to present a defense without specifically referencing either the Kansas or federal Constitutions—although, at sentencing, Genson's counsel invoked "due process rights under the Fifth and Fourteenth Amendments, essentially their substantive due process rights."

Appellate courts are obligated to address claims properly raised in district court and later appealed. But if a claim is not effectively raised below, the general rule gives appellate courts the discretion to refuse consideration of that issue. E.g., *State v. Hillard*, 313 Kan. 830, 839-40, 491 P.3d 1223 (2021).

Here, Genson concedes some of his claims were newly raised on appeal. This concession is critical to our assessment of the panel's decision not to consider them: if the issues were *not* being raised for the first time on appeal, the panel would not have had discretion to refuse to consider them. But since these arguments *were* newly raised before the panel, the panel could exercise its discretion to consider whether to apply a prudential exception to the general rule that issues

not raised before the district court cannot be raised for the first time on appeal.

"'A court abuses its discretion when its action is (1) arbitrary, fanciful, or unreasonable, i.e., if no reasonable person would have taken the view adopted by the court; (2) based on an error of law, i.e., if the discretion is guided by an erroneous legal conclusion; or (3) based on an error of fact, i.e., if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based. The party arguing an abuse of discretion bears the burden of establishing that abuse.'" *State v. Aguirre*, 313 Kan. 189, 195, 485 P.3d 576 (2021) (quoting *State v. Corbin*, 311 Kan. 385, 390, 461 P.3d 38 [2020]).

Genson's newly raised claims are that K.S.A. 2020 Supp. 21-5203(e) violated his liberty and jury trial interests under section 1 and section 5 of the Kansas Constitution Bill of Rights. Genson points to no error of fact or law underlying the panel's refusal to consider these arguments for the first time on appeal, and we do not find that no reasonable jurist would have similarly refused. We thus affirm the panel's discretionary refusal to consider these arguments for the first time on appeal.

K.S.A. 2020 Supp. 21-5203(e) does not violate substantive due process.

We turn to Genson's claim that K.S.A. 2020 Supp. 21-5203(e) unconstitutionally impairs his substantive due process rights by making failure to register a strict liability felony. We conclude it does not.

Standard of Review

A statute's constitutionality is reviewed de novo on appeal. *State v. Cook*, 286 Kan. 766, 768, 187 P.3d 1283 (2008). Generally, appellate courts "presume that legislative enactments are constitutional and resolve all doubts in favor of a statute's validity." 286 Kan. at 768.

Preservation

Before we address Genson's claim, we first examine what is *not* before us. Genson has not framed his claim as a voluntariness challenge under K.S.A. 2020 Supp. 21-5201 either to this court, the panel, or the district court. His proffer did not suggest that he was physically incapable of registering in November 2017. Cf. *State v. Dinkel*, 311 Kan. 553, 560, 465 P.3d 166 (2020). Since he did not pursue such a

claim or proffer evidence to support it, we do not consider whether Genson's mental illness might have impacted his theoretical ability to claim that his conduct was involuntary—or whether the district court erred in preventing Genson from presenting mental health evidence in general. Instead, we turn to the sole issue for which we granted review: whether the strict liability criminalization of failure to register under KORA violates substantive due process.

Even here, though, Genson's proffer gives us pause. His proffer does not establish the severity, nature, or genesis of his mental illness, although we can loosely infer that Genson believes the evidence would show he was not "cognizant" during some of November of 2017. Nevertheless, Genson's failure to register at any time during the month of November only became criminal at midnight on December 1, 2017; threadbare though it was, his proffer could support the inference that he was not cognizant on November 30, 2017. Thus we reach his claim that K.S.A. 2020 Supp. 21-5203(e) violates substantive due process by making his failure to register a strict liability felony, despite any lingering uncertainties concerning the facts about Genson's mental illness in general.

Discussion

Genson argues K.S.A. 2020 Supp. 21-5203 violates substantive due process because it impairs his liberty without proof of a culpable mental state (scienter) and because this crime is a felony that carries a serious potential sentence.

The Legislature has broad authority to craft criminal laws. *State v. Thomas*, 313 Kan. 660, 664, 488 P.3d 517 (2021). We recently upheld the Legislature's exercise of this authority in the context of a due process-based challenge to K.S.A. 2020 Supp. 21-5503(e), which, in most cases involving a rape charge, eliminated the defenses "that the offender did not know or have reason to know that the victim did not consent to the sexual intercourse, that the victim was overcome by force or fear, or that the victim was unconscious or physically powerless." *Thomas*, 313 Kan. at 660. After noting the absence of anything "in our law suggesting due process prohibits the Legislature from adopting strict liability criminal offenses," 313 Kan. at 663, we approvingly quoted the *Genson* panel majority's analysis at some length:

"'We begin with the well-established recognition that the Legislature has the authority to create strict liability crimes:

'That it is within the power of the legislature to forbid the doing of an act and make its commission criminal, without regard to the intent or knowledge of the doer, is well established in our jurisprudence. [Citations omitted.]

. . . .

'It is within the power of the legislature to declare an act criminal irrespective of the intent or knowledge of the doer of the act. In accordance with this power, the legislature in many instances has prohibited, under penalty, the performance of specific acts. The doing of the inhibited act constitutes the crime, and the moral turpitude or purity of the motive by which it was prompted and the knowledge or ignorance of its criminal character are immaterial circumstances on the question of guilt. The only fact to be determined in these cases is whether the defendant did the act.' [Citations omitted.]" *Thomas*, 313 Kan. at 664 (quoting *Genson*, 59 Kan. App. 2d at 202).

Broad though the Legislature's authority may be, however, it is not unlimited:

"'While the legislature is vested with a wide discretion to determine for itself what is inimical to the public welfare which is fairly designed to protect the public against the evils which might otherwise occur, it cannot, under the guise of the police power, enact unequal, unreasonable or oppressive legislation or that which violates the Constitution. If the classification provided is arbitrary, . . . and has no reasonable relation to objects sought to be attained, the legislature transcended the limits of its power in interfering with the rights of persons affected by the Act.'" *Henry v. Bauder*, 213 Kan. 751, 753, 518 P.2d 362 (1974) (quoting *Tri-State Hotel Co. v. Londerholm*, 195 Kan. 748, 760, 408 P.2d 877 [1965]).

Indeed, when a statute deprives an individual of liberty, the Due Process Clause of the Fourteenth Amendment to the United States Constitution "imposes procedural and substantive due process requirements." *State v. Hall*, 287 Kan. 139, 143, 195 P.3d 220 (2008). Substantive due process "protects individuals from arbitrary state action," while procedural due process "protects the opportunity to be heard in a meaningful time and manner." *Creecy v. Kansas Dept. of Revenue*, 310 Kan. 454, 462, 447 P.3d 959 (2019). "Although freedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action,' . . . that liberty interest is not absolute." *Kansas v. Hendricks*, 521 U.S. 346, 356, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 [1992]).

The United States Supreme Court has been "'reluctant to expand the concept of substantive due process'" beyond "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed[.]'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). So litigants raising substantive due process claims must set forth "a 'careful description' of the asserted fundamental liberty interest"—largely because "the Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" 521 U.S. at 721. Thus, Genson's claim can only succeed if he shows K.S.A. 2020 Supp. 21-5203(e) impairs a *fundamental* liberty interest or otherwise arbitrarily deprives him of a non-fundamental liberty interest.

Genson's claim that K.S.A. 2020 Supp. 21-5203(e)'s imposition of strict criminal liability violates his substantive due process rights rests on the interpretation and synthesis of various comments set forth in numerous cases decided by the United States Supreme Court and this court across the decades. But the Supreme Court has never declared that the legislative criminalization of conduct on a strict liability basis violates substantive due process. Many cases discussing strict liability crimes focus on questions of statutory interpretation, rather than claimed violations of due process. See, e.g., *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 66, 78, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994); *Staples v. United States*, 511 U.S. 600, 617-18, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978); *Morissette*, 342 U.S. 246, 261-63, 72 S. Ct. 240, 96 L. Ed. 288 (1952). In each case, the Court considered whether the lack of an explicit mens rea element in the definition of a crime conveyed a legislative intent to criminalize conduct on a strict liability basis; in each case, the Court found there was no such legislative intent. None of them directly addressed due process. Moreover, although *Morissette* explored

"public welfare" offenses for which no mens rea element was required, the Supreme Court later clarified it "has never articulated a general constitutional doctrine of mens rea." *Powell v. State of Tex.*, 392 U.S. 514, 535, 88 S. Ct. 2145, 20 L. Ed. 2d 1254 (1968); *Morissette*, 342 U.S. at 254-61.

This case poses no question of statutory interpretation. The statute's plain language is clear that the crime of failure to register does not contain an accompanying mens rea element. We need not resort to legislative history or canons of construction to clarify the Legislature's intent, as the above-noted cases needed to.

Even so, the Supreme Court's caselaw further reflects a particular concern with the criminalization of otherwise innocent conduct on a strict liability basis. E.g., *X-Citement Video, Inc.*, 513 U.S. at 72 ("*Morissette*, reinforced by *Staples*, instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct."). No such concern is present here. An individual cannot commit the crime of failing to register under KORA without a duty *to* register—and without being given notice of that duty, as required by K.S.A. 2020 Supp. 22-4904(a)(1). See *State v. Juarez*, 312 Kan. 22, 25, 470 P.3d 1271 (2020). We therefore find these cases unpersuasive.

Kansas cases discussing the "public welfare" doctrine have also generally turned on questions of statutory interpretation. E.g., *State v. Lewis*, 263 Kan. 843, 857-58, 953 P.2d 1016 (1998) (driving while a "habitual violator" statute construed to include a mens rea element); *State v. Mountjoy*, 257 Kan. 163, 177, 891 P.2d 376 (1995) (statute criminalizing unauthorized practice of the healing arts required no criminal intent under the public welfare doctrine).

Yet the Legislature's authority to craft laws remains subject to constitutional constraints. Cf. *State ex rel. Smith v. Fairmont Foods Co.*, 196 Kan. 73, 81, 410 P.2d 308 (1966) ("The case of *United States v. Balint* [258 U.S. 250, 252, 42 S. Ct. 301, 66 L. Ed. 604 (1922)], acknowledged the public welfare doctrine and found that, *under proper circumstances*, the absence of the scienter requirement in a criminal statute does not constitute a violation of due process." [Emphasis added.]).

Other courts have grappled with whether a crime, even serious crime, must have an element of scienter to be constitutional. Most address the criminality of action rather than the failure to act, but the seriousness of the crime alone does not make the imposition of strict liability unconstitutional. "It is well established that a criminal statute is not necessarily rendered unconstitutional because its definition of a felony lacks the element of scienter." *United States v. Engler*, 806 F.2d 425, 433 (3d Cir. 1986) (citing, for example, *Lambert v. California*, 355 U.S. 225, 228, 78 S. Ct. 240, 242, 2 L. Ed. 2d 228 [1957]). Moreover, "[t]he Supreme Court has indicated that the due process clause may set some limits on the imposition of strict criminal liability, but it has not set forth definite guidelines as to what those limits might be." *Engler*, 806 F.2d at 433.

With this context in mind, much of Genson's argument relies on an extrapolation of *Morissette*'s discussion of "public welfare" offenses. We are not convinced that *Morissette* sets forth a general substantive due process right to a scienter requirement, however. Only once has the Supreme Court found a due process violation in a strict liability ordinance. *Lambert*, 355 U.S. at 229-30. Coincidentally, *Lambert* involved an ordinance criminalizing the failure to comply with a registration requirement, as we have here. Still, the *Lambert* majority found that ordinance unconstitutional *as applied* because the defendant had *no notice* of the statutorily created duty which criminalized his nonperformance—not facially unconstitutional because the ordinance lacked a scienter element. See *Lambert*, 355 U.S. at 227. Assessing Lambert's argument that the ordinance violated her due process rights, the majority wrote:

> "We must assume that appellant had no actual knowledge of the requirement that she register under this ordinance, as she offered proof of this defense which was refused. The question is whether a registration act of this character violates due process *where it is applied to a person who has no actual knowledge of his duty to register*, and where no showing is made of the probability of such knowledge.
>
> "We do not go with Blackstone in saying that 'a vicious will' is necessary to constitute a crime, for conduct alone without regard to the intent of the doer is often sufficient. There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition. But we

deal here with conduct that is wholly passive—mere failure to register. It is unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed. The rule that 'ignorance of the law will not excuse' is deep in our law, as is the principle that of all the powers of local government, the police power is 'one of the least limitable.' On the other hand, due process places some limits on its exercise. Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. . . . These cases involved only property interests in civil litigation. *But the principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case.*

"Registration laws are common and their range is wide. Many such laws are akin to licensing statutes in that they pertain to the regulation of business activities. But the present ordinance is entirely different. Violation of its provisions is unaccompanied by any activity whatever, mere presence in the city being the test. Moreover, circumstances which might move one to inquire as to the necessity of registration are completely lacking. . . . We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand. . . . *Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.* [Citations omitted.]" (Emphases added.) *Lambert* 355 U.S. at 227-30.

Lambert does not answer the question before us. First, notice—the core concern in *Lambert*—is traditionally associated with procedural due process, rather than substantive due process. See, e.g., *State v. Juarez*, 312 Kan. 22, 24, 470 P.3d 1271 (2020); *State v. Robinson*, 281 Kan. 538, 548, 132 P.3d 934 (2006) ("The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner."). That distinction is somewhat muddied since *Lambert* involved notice of *wrongdoing*, rather than notice of a hearing. Still, here the evidence shows Genson *did* know about his KORA registration obligations—at least during September and October 2017, and on December 15 as well. *Genson*, 59 Kan. App. 2d at 205. And even if Genson's stifled theory of defense might have hinged on the notion his mental illness obviated knowledge of his obligations during some part of November 2017—which he did

not clearly argue—we cannot read his proffer to support such a claim. Consequently, Genson cannot rely on *Lambert* to establish a fundamental liberty interest here.

In the end, Genson is left with no persuasive legal authority to indicate the strict liability criminalization of his failure to register violates a fundamental liberty interest simply because such failure is classified as a felony.

We turn then to the question of arbitrariness. Like the Court of Appeals majority, we believe the rational basis test is the appropriate metric by which to evaluate this:

> "When a statute does not implicate fundamental rights, we ask whether it is 'rationally related to legitimate government interests.' 'The rational basis standard is a very lenient standard. All the court must do to uphold a legislative classification under the rational basis standard is perceive any state of facts which rationally justifies the classification.' In such cases, the government has no obligation to produce evidence or empirical data to sustain the rationality of a statutory classification. '[A]ny reasonably conceivable state of facts' will suffice to satisfy rational basis scrutiny. The burden falls on the party attacking the statute as unconstitutional to 'negative every conceivable basis which might support it.'
>
> . . . .
>
> "Genson fails to show that K.S.A. 2019 Supp. 21-5203(e) bears no reasonable relationship to the permissible legislative objective noted above. Rather, KORA meets the rational basis test because it is in the interest of government to protect the public from sexual and other violent offenders. [Citations omitted.]" *Genson*, 59 Kan. App. 2d at 212-13.

The majority's reasoning on this point is sound, and we affirm it in full. We thus conclude Genson has failed to show that K.S.A. 2020 Supp. 21-5203(e)'s strict liability criminalization of KORA registration violations violates his substantive due process rights.

Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

* * *

WILSON, J., concurring: I concur in the result reached by the majority on the narrow question before us. But I write separately to highlight the narrowness of this path.

Specifically, I concur in the majority's reasoning on the sole issue for which we granted review. I find little direct support in either *Morissette* or *Lambert* for the notion that substantive due

process requires, as a matter of *fundamental* right, a legislature to include a scienter element in the definition of a crime—even a felony crime such as this. See *Morissette v. United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952); *Lambert v. California*, 355 U.S. 225, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957). Further, while I note the dissent's position that the Legislature has no "legitimate interest in making a previous violent offender's failure to register a strict liability crime[,]" (Rosen, J., dissenting), 316 Kan. at 152, I cannot see a pathway in the case at bar to severing K.S.A. 2020 Supp. 21-5203(e)'s application to *violent* offenders from its application to sex offenders. For these reasons, I too conclude that Genson has not established a substantive due process violation arising solely out of K.S.A. 2020 Supp. 21-5203(e).

This court also affirmed the Court of Appeals majority's decision not to address two claims based on the Kansas Constitution for the first time on appeal. Because I agree that the majority did not abuse its discretion in refusing to consider these newly raised issues, I also concur in our court's decision not to reach them.

Nevertheless, I am troubled by the panel majority's conclusion that Genson was not prevented from presenting *any* defense because "a defendant who cannot rely on a lack of a mens rea may still have a defense that the voluntary act or omission requirement of the actus reus was not met" under K.S.A. 2020 Supp. 21-5201. *State v. Genson*, 59 Kan. App. 2d 190, Syl. ¶ 4, 481 P.3d 137 (2020). I acknowledge that Genson has not claimed that his failure to register was an involuntary act or omission, which, for purposes of K.S.A. 21-5201, we have interpreted to mean "'[a] willed bodily movement.'" *State v. Dinkel*, 311 Kan. 553, 560, 465 P.3d 166 (2020). We have also expressly drawn a distinction between the voluntary act requirement, or actus reus, and a culpable mental state, or mens rea:

"A voluntary act is an intentional bodily movement, i.e., the intention to lift an arm or move a leg in a certain direction—whatever bodily movement is needed to complete the act requirement. In contrast, intentional mental culpability is the conscious desire to engage in conduct of a certain nature or produce a certain result—i.e., to desire injurious movement or a slap or a kick." *Dinkel*, 311 Kan. at 560.

But this interpretation, when combined with K.S.A. 2020 Supp. 21-5203(e) and K.S.A. 2020 Supp. 21-5209, creates a potential Catch-22 for defendants who suffer a physical incapacity that arises by virtue of a mental disease or defect—for instance, a hypothetical defendant suffering from a condition such as catatonia. Indeed, under K.S.A. 2020 Supp. 21-5209, a "mental disease or defect" defense is available *only* if it could establish that a defendant "lacked the culpable mental state required as an element of the crime charged." *Kahler v. Kansas*, 589 U.S. ___, 140 S. Ct. 1021, 1026, 206 L. Ed. 2d 312 (2020) ("In other words, Kansas does not recognize any additional way that mental illness can produce an acquittal."). Under an earlier statutory analogue of K.S.A. 21-5209, this court recognized that evidence of a mental disease or defect that "did not tend to demonstrate that he was unable to form the requisite intent to commit the crimes charged" could not support a defense of mental disease or defect "and was therefore irrelevant." *State v. Pennington*, 281 Kan. 426, 438, 132 P.3d 902 (2006). And we have held that "culpable mental state" refers *only* to the statutorily defined terms in K.S.A. 2020 Supp. 21-5202(a): "intentionally," "knowingly," or "recklessly"; it does not include premeditation, which is not a statutorily established culpable mental state. *State v. McLinn*, 307 Kan. 307, 320-23, 409 P.3d 1 (2018).

As the majority has recognized, K.S.A. 2020 Supp. 21-5203(e) provides no culpable mental state for Genson's crime. Under *Pennington*, the statutory elimination of a culpable mental state from the elements of a crime would also eliminate the defense of mental disease or defect as *to* that crime and, thus, would render evidence of a defendant's mental illness irrelevant in all strict liability crimes. That a defendant's mental illness might result in physical incapacity may not currently create a statutory corridor permitting the consideration of mental health evidence in strict liability crimes. I find the constitutional implications of such a restriction troubling, although—because they are not before us—they do not impact my agreement with the majority's overall conclusion.

Although Genson briefly hinted at a physical incapacity argument to the district court—without either clearly articulating a voluntariness basis for the claim or proffering evidence to support such a claim—he has long since abandoned it, if indeed it was ever present to begin with. E.g., *Titterington v. Brooke Ins.*, 277 Kan. 888, Syl. ¶ 3, 89 P.3d 643 (2004) ("A point raised only incidentally in a party's brief but not argued in the brief is deemed abandoned."). And because this court declined to grant review of Genson's challenge to the constitutionality of K.S.A. 2020 Supp. 21-5209, the implications of the potential elimination of a voluntariness defense to strict liability crimes—when physical incapacity arises as a byproduct of a mental illness—are beyond our purview.

In sum: Genson did not argue that he was physically *incapable* of registering in November of 2017; his proffer did not support such a claim; and even if he had proffered and argued it at the district court, he has now abandoned it. Consequently, despite my reservations, I find no error in the district court's ruling and concur in the majority's result.

STEGALL and WALL, JJ., join the foregoing concurring opinion.

* * *

ROSEN, J., dissenting: Genson has asked this court to decide whether the Legislature has unconstitutionally trampled a deeply rooted fundamental right. Instead of considering this issue in full, the majority punts the question and justifies the targeted legislation as a valid exercise of police power. I cannot agree. Had our full court accepted its responsibility to uphold the Constitution, I suspect the analysis would show the Legislature violated the substantive due process protections of the Due Process Clause when it made the failure to register a strict liability crime for violent offenders. This is in line with Judge Atcheson's dissent—one that I find compelling. But even if I overlook the majority's failure to appropriately grapple with the substantive due process principles at play, I believe Genson is entitled to relief on other grounds. The majority concludes that the Legislature acted within its permissible realm because the targeted legislation survives rational basis

review. But the majority offered no rational basis analysis. Through proper consideration, it is clear the Legislature acted outside of its police power. Finally, I disagree with this court's decision to deny review on Genson's argument that the Legislature has unconstitutionally abolished the insanity defense. I find the claim troubling and the arguments in support persuasive. For these reasons, I dissent.

Substantive Due Process

The majority accurately captures the framework guiding the Legislature's use of police power and the constraints that substantive due process places on that power. The Legislature may enact laws, and such legislation is generally subject to rational basis review. But if the legislation infringes on certain fundamental rights, it must withstand strict scrutiny. This is because the substantive guarantee of the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). Consequently, when "challenged state action implicate[s] a fundamental right," the Constitution requires "more than a reasonable relation to a legitimate state interest to justify the action." *Glucksberg*, 521 U.S. at 721-22. The legislation is forbidden "'unless the infringement is narrowly tailored to serve a compelling state interest.'" *Glucksberg*, 521 U.S. at 721 (quoting *Collins*, at 302).

To decide whether targeted legislation has crossed the line triggering a higher level of scrutiny, a court decides whether it implicates a fundamental right or liberty that is "'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Glucksberg*, 521 U.S. at 721 (quoting *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 [1977]; *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S. Ct. 149, 152, 82 L. Ed. 288 [1937]). When it undertakes this analysis, the court looks "primarily to eminent common-law authorities (Blackstone, Coke, Hale, and the like), as well as to early English and American judicial decisions." *Kahler v. Kansas*, 589 U.S.__, 140 S. Ct. 1021, 1027, 206 L. Ed.

2d 312 (2020) (citing *Montana v. Egelhoff*, 518 U.S. 37, 44-45, 116 S. Ct. 2013, 135 L. Ed. 2d 361 [1996)] [plurality opinion]; *Patterson v. New York*, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 [1977]). The court must answer "whether a rule of criminal responsibility is so old and venerable—so entrenched in the central values of our legal system—as to prevent a State from ever choosing another." *Kahler*, 140 S. Ct. at 1028. In identifying the right at stake, the description must be "careful." *Glucksberg*, 521 U.S. at 721.

The majority declines to consider whether there is a fundamental interest at stake. Instead, it turns to rational basis because neither the Supreme Court nor any other court has previously declared the interest at stake here to be fundamental. In doing so, the majority abdicates its responsibility to ensure state action has not impermissibly encroached upon a fundamental right. "Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them." *Robb v. Connolly*, 111 U.S. 624, 637, 4 S. Ct. 544, 28 L. Ed. 542 (1884); see also *Arizona v. Evans*, 514 U.S. 1, 8, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) ("State courts, in appropriate cases, are not merely free to—they are bound to—interpret the United States Constitution."); *Trainor v. Hernandez*, 431 U.S. 434, 443, 97 S. Ct. 1911, 52 L. Ed. 2d 486 (1977) ("'state courts have the solemn responsibility equally with the federal courts' to safeguard constitutional rights").

In brushing aside its responsibility, the majority avoids explicitly acknowledging that the Supreme Court has never considered whether the interest Genson advances today—being free from conviction of a serious, high-level felony punishable by lengthy imprisonment based on inaction and without any knowledge of the facts that make one's conduct criminal—is a deeply rooted fundamental interest that deserves substantive due process protection. Without any command from the Supreme Court that it is not, and, in light of our decision to grant review of the constitutional question, we should uphold our duty to interpret and apply Supreme Court precedent and answer the question before us.

Had the majority addressed this question, I believe a correct analysis would likely show that the targeted legislation implicates a deeply rooted fundamental right. The Legislature has made a "violent offender's" failure to register a felonious crime punishable by up to 20 years in prison. See K.S.A. 2020 Supp. 22-4903; K.S.A. 2020 Supp. 21-6804. A longer lapse subjects the failed registrant to additional criminal charges and a longer sentence. See K.S.A. 2020 Supp. 22-4903. I see this as constitutionally problematic. The requirement that mental culpability accompany behavior deemed criminal is a concept embedded deep in our legal history. Blackstone wrote "to constitute a crime against human laws, there must be first, a vicious will; and secondly, an unlawful act consequent upon such vicious will." II Blackstone, Commentaries on the Laws of England, Book 4, chapter II. The United States Supreme Court has acknowledged this profoundly entrenched legal principle. In *Morissette v. United States*, 342 U.S. 246, 250-51, 72 S. Ct. 240, 96 L. Ed. 288 (1952), the Court wrote:

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.'"

It is true the law has loosened its grip on mental culpability requirements in some cases—those regarding "'public welfare' or 'regulatory offenses.'" *Staples v. United States*, 511 U.S. 600, 606, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994). These typically "involve statutes that regulate potentially harmful or injurious items." *Staples*, 511 U.S. at 607. The Court has reasoned that sanctions for noncompliance with these statutes serve as an effective means of regulating potentially dangerous industries and are usually "light . . . , such as fines or short jail sentences." *Staples*, 511 U.S. at 616. The Court has pointed out that public welfare offenses "be-

long to a category of another character, with very different antecedents and origins" than the criminal offenses to which the common law has always attached a mens rea requirement. *Morissette*, 342 U.S. at 252.

The offense at issue in this case is not a public welfare crime. It is not a product of the Legislature's responsibility to regulate dangerous "industries, trades, properties or activities." *Morissette*, 342 U.S. at 254. Like the failure to register offense in *Lambert*, it severely criminalizes conduct that "is wholly passive—mere failure to register." *Lambert v. People of the State of California*, 355 U.S. 225, 228, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957). Moreover, it triggers serious penalties, unlike those in the public welfare realm. The offense is therefore more akin to those of which our legal history has relentlessly demanded a culpable mental state. This suggests to me that K.S.A. 2020 Supp. 21-5203(e) implicates a fundamental right deserving of substantive due process protection. Had the majority of this court correctly considered the issue, I think it would have decided the same.

If K.S.A. 2020 Supp. 21-5203(e) indeed implicates a deeply rooted liberty, it must withstand strict scrutiny to survive. *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993). In Kansas, stringent registration requirements were first adopted to allow law enforcement and the public to track the whereabouts of convicted sex offenders. Thus, the Legislature initially required only sex offenders to register and justified the requirement with a contention specific to sex offenders alone—that they reoffend at a high rate thereby creating a threat to the public at large. Then, several years later, the Legislature added violent offenders to the list of those required to register but left no legislative history offering a similar—or any—justification. Considering the absence of any reason for this expansion, there is no compelling justification for the inclusion of violent offenders. Furthermore, even assuming it serves to protect the public, the means used to enforce it—strict liability and harsh penalties—cannot be characterized as narrowly tailored to realize that result. There is no evidence that the harsh penalties and absent mens rea requirements are the least restrictive means of accomplishing this goal. KORA originally required a culpable mental state to prove failure to register and carried less

severe, misdemeanor penalties. The State has offered nothing to suggest these were ineffective.

To me, this conclusively shows that the targeted legislation would crumble under strict scrutiny. In fact, it convinces me that the majority of this court erred when it concluded the legislation survives even rational basis review.

The rational basis barometer measures whether legislative action is "rationally related to legitimate government interests." *Washington v. Glucksberg*, 521 U.S. 702, 728, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). The majority of this court adopts the Court of Appeals majority's analysis on this point, which reasoned that a court must uphold legislation so long as it can come up with "'any reasonably conceivable state of facts'" to "rationally justif[y] the classification." *Genson*, 59 Kan. App. 2d at 212. The panel majority offered a state of facts it found conceivable, opining that "it is in the interest of government to protect the public from sexual and other violent offenders" and that "[k]nowing where offenders live enables the public to assess the risk and take appropriate protective measures." 59 Kan. App. 2d at 210, 213.

I agree that the government has an interest in protecting the public from predatory sexual and violent offenses and, accordingly, from would-be offenders. But I fail to see how this equates to an interest in protecting the public from only those people who previously committed violent offenses. For a court to accept this position would be to turn mere conjecture—once a violent offender, always a violent offender—into a legal conclusion void of any supporting evidence. I am shocked and stunned by such reckless speculation, especially because our historical system of criminal justice explicitly counsels against it. "[A] presumption of innocence . . . is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481 (1895).

And the Legislature's original justification for KORA—that sex offenders reoffend at a comparatively high rate—fails to bridge the gap between previous violent offender and future violent offender. Not only does heavy suspicion hang over this representation, see Huffman, *Moral Panic and the Politics of Fear:*

The Dubious Logic Underlying Sex Offender Registration Statutes and Proposals for Restoring Measures of Judicial Discretion to Sex Offender Management, 4 Va. J. Crim. L. 241, 260 (2016) (citing studies to show "[r]esearch confirms that sex offenders pose no greater danger to the public than other criminal offenders"), the claim says nothing about recidivism among violent offenders. See also *State v. N.R.*, 314 Kan. 98, 125, 495 P.3d 16 (2021) (Rosen, J., dissenting) (discussing study showing recidivism of sex offenders is "remarkably low"). Without even an unsupported suggestion from the Legislature that violent offenders recidivate at a high rate, I will not presume they do. Nor will I use such a presumption to justify state-sanctioned ostracization and exclusion of those impacted from any sense of a normal existence. See *N.R.*, 314 Kan. at 124 (Rosen, J., dissenting) (discussing severe and onerous effects of registration and its "effective banishment").

Now I turn more to the point. Because I do not believe the Legislature has a reasonable interest in "protecting" people from individuals who previously committed violent offenses when the Legislature has made no suggestion or connection that these individuals are likely to reoffend, I see no legitimate interest in making a previous violent offender's failure to register a strict liability crime. The purpose seems clear—to eliminate most defenses to the crime, thereby reducing the prosecution's burden to secure a conviction for failing to register. But if the registration requirement itself serves no legitimate purpose, a simpler route to conviction is similarly void of any rational basis. Consequently, I would strike down K.S.A. 2020 Supp. 21-5203(e) as it relates to violent offenders.

Finally, I briefly acknowledge the compelling argument that the Legislature has violated substantive due process by eliminating the insanity defense. K.S.A. 2020 Supp. 21-5209 makes evidence of mental disease or defect a defense to only the mental culpability requirements of a crime. K.S.A. 2020 Supp. 21-5203(e) eliminates mental culpability requirements for the offense of failing to register. Thus, together, these statutes abolish the mental disease or defect defense, or, in other words, the insanity defense. Because "[f]ew doctrines are as deeply rooted in our common-law heritage as the insanity defense," *Kahler v. Kansas*, 589 U.S. ___,

140 S. Ct. 1021, 1039, 206 L. Ed. 2d 312 (2020) (Breyer, J., dissenting), this suggests the statutory scheme violates substantive due process.

In *Kahler*, the United States Supreme Court concluded K.S.A. 2020 Supp. 21-5209, on its own, does not violate due process. See 140 S. Ct. at 1037. It reasoned that the deeply entrenched insanity defense was still available in some capacity under the Kansas legislative scheme because the defendant could offer it to show they did not harbor the requisite mental state of a crime. *Kahler*, 140 S. Ct. at 1030-31. It also observed that it could be considered by a judge at sentencing. *Kahler*, 140 S. Ct. at 1031. But when a statute eliminates a mental culpability requirement, mental disease or defect is wholly irrelevant to innocence or guilt. I believe this is constitutionally suspect. Thus, I would have granted review on Genson's claim arguing the same and given it full consideration after opportunity for further briefing and argument.

In sum, I find it highly likely that K.S.A. 2020 Supp. 21-5203(e)'s applicability to violent offenders violates substantive due process because it implicates deeply rooted fundamental rights and fails to withstand strict scrutiny. But I think Genson's claim wins the day on a principle more basic than this. I believe the legislation fails to withstand even rational basis, and is, consequently, outside of the Legislature's police power. I would strike K.S.A. 2020 Supp. 21-5203(e) as it applies to violent offenders. Finally, I would have granted review of Genson's claim that the legislative scheme further violates substantive due process by abolishing the insanity defense and fully considered the claim.

STANDRIDGE, J., joins the foregoing dissenting opinion.

State v. Brown

No. 121,269

STATE OF KANSAS, *Appellee*, v. THOMAS EARL BROWN JR., *Appellant*.

(513 P.3d 1207)

SYLLABUS BY THE COURT

1. *Trial—Trial Error Reversible if Prejudices Defendant's Substantial Rights—Burden on Party Benefitting from Error*. Under K.S.A. 2021 Supp. 60-261 and K.S.A. 60-2105, a trial error is reversible only if it prejudices a defendant's substantial rights. The party benefitting from an error violating a statutory right has the burden to show there is not a reasonable probability that the error will or did affect the outcome of the trial in light of the entire record.

2. SAME—*Claim of Prosecutorial Error—Two-Step Framework*. Appellate courts use a two-step framework to analyze claims of prosecutorial error. First, the appellate court considers whether the prosecutor stepped outside the wide latitude prosecutors are given to conduct the State's case in a manner that does not offend a defendant's constitutional right to a fair trial. Second, if error is found, the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial, using the traditional constitutional harmlessness inquiry demanded by *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Under this test, prosecutorial error is harmless if the State can show beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial given the entire record, that is, where there is no reasonable possibility that the error contributed to the verdict.

3. SAME—*Cumulative Error Test—Whether Errors Substantially Prejudiced Defendant and Denied Defendant Fair Trial—Totality of Circumstances*. The test for cumulative error is whether the errors substantially prejudiced the defendant and denied the defendant a fair trial given the totality of the circumstances. In making the assessment, an appellate court examines the errors in context, considers how the district court judge addressed the errors, reviews the nature and number of errors and whether they are connected, and weighs the strength of the evidence. If any of the errors being aggregated are constitutional, the constitutional harmless error test of *Chapman* applies, and the party benefitting from the errors must establish beyond a reasonable doubt that the cumulative effect of the errors did not affect the outcome.

Appeal from Shawnee District Court; DAVID DEBENHAM, judge. Opinion filed July 29, 2022. Affirmed.

Nicholas David, of The David Law Office LLC, of Lawrence, argued the cause and was on the brief for appellant.

Jodi Litfin, assistant solicitor general, argued the cause, and *Derek Schmidt*, attorney general, was with her on the brief for appellee.

The opinion of the court was delivered by

LUCKERT, C.J.: After a jury convicted Thomas Brown Jr. of first-degree murder and other crimes, he directly appeals, raising three questions:

(1) Did the district court err in admitting a map depicting cell phone tower location data over his hearsay objection?

(2) Did the prosecutor engage in reversible error by making certain statements, including "we know" statements, during closing argument? and

(3) Did cumulative error deprive him of his right to a fair trial?

We presume error on the first issue and find prosecutorial error after analysis of the second issue. We also consider whether those errors individually or cumulatively require us to reverse Brown's conviction and conclude beyond a reasonable doubt the errors would not have affected the jury's verdict. We thus affirm Brown's convictions.

FACTS AND PROCEDURAL BACKGROUND

Hours after her marriage to Melvin Ray, Tiffany Davenport-Ray died from gunshot wounds. The shooting happened in the early morning hours as the couple left a postwedding party that they had hosted at the Topeka Elks Club. Ray drove Davenport-Ray's Dodge Charger. While waiting at a stop light, Ray noticed a white SUV behind them. The SUV followed the Charger and later pulled alongside it. Someone in the SUV fired shots into the Charger. Ray hit the brakes and returned fire. The SUV lost control and crashed. Ray then realized Davenport-Ray had been shot and drove to the hospital. An autopsy revealed Davenport-Ray died of a gunshot wound to the head.

Residents near the shooting and police officers patrolling nearby heard several gunshots. Officers immediately drove toward the sound. En route, they learned of an injury accident in the

direction they were heading. Nearby residents heard the collision and went outside after the shots stopped. They reported observing two vehicles—one that looked like a Charger and another that was a white SUV. One witness told the officers she saw two people exit and flee the SUV, running toward a nearby auto shop. Her husband also saw two people run toward the auto shop and an adjacent fence and a short time later saw the driver exit the vehicle and run. Another resident realized a bullet hit her home where she lived with her mother and sisters.

One officer who arrived on the scene saw a black male running from the scene. One of the residents identified the man as the driver of the SUV. An officer apprehended the SUV driver, later identified as Awnterio Lowery. Officers searched Lowery and took him to the Law Enforcement Center.

Other officers followed the trail of the two SUV passengers who ran toward the auto body shop. Along the way, they found fresh-looking latex gloves matching gloves found in the SUV. But they did not apprehend the two men. Over time, they developed leads that suggested Brown and Jermel Robbins were the two passengers.

Some leads were developed from forensic testing of evidence found at the scene. The police investigation of the scene revealed bullet holes in the passenger side of the SUV. Officers found a gun, latex gloves, and two cell phones in the SUV—an iPhone and a Samsung. Eventually the police tied Brown and Lowery to the phones, in part through DNA testing and through data stored on the phones.

The DNA testing did not exclude Brown as a contributor to DNA found on the Samsung phone. It also revealed he was a contributor to DNA found on other pieces of evidence, including the latex glove fragments found near the auto shop. The testing of the gloves revealed a major contributor whose profile was consistent with Brown's. Testing of DNA found on parts of the car revealed major contributors whose profiles were consistent with Robbins and Lowery. Brown's DNA was consistent with a minor contribution of DNA on the vehicle's airbag. The forensic scientist who performed the DNA testing testified that her laboratory does not provide identity statements. In other words, she would not say

whether the DNA sample is a match but would instead state whether test results excluded a particular individual and then provide a probability for those individuals not excluded. The probability figures associated with evidence tend to reveal a low probability that anyone other than Lowery, Robbins, or Brown could have been the source of DNA found on one or more items of evidence. In other words, each was identified as a major contributor to DNA found on evidence.

The police also obtained the phone records of the iPhone and Samsung found in the SUV. Investigators determined the iPhone belonged to Lowery and Brown had used the Samsung. They learned that Dina Sanchez bought a phone for Brown to use, but it was not a Samsung. But the phone number assigned to the phone Sanchez gave Brown was later assigned to the Samsung found in the SUV. Sanchez testified Brown paid the bills and had exclusive use of the phone. Investigators found two sources of DNA on the Samsung phone: Lowery and Brown. The phone also stored pictures of Brown and his family and friends. Phone company records showed about 2,000 contacts between Brown and people known to Brown in the time Brown used the phone and 762 contacts between Brown and friends or family members in the week before Davenport-Ray's homicide.

At trial, the State presented evidence obtained from the cell phones found in the SUV and from carrier records, including call records, text messages, and location data. Several witnesses presented cell tower location data that the State used to establish where Brown's and Lowery's phones were at various times. Those records include a call from Brown to Lowery in the evening before the shooting. Lowery did not answer the call, and Brown then texted Lowery, "Man cuz, don't spin me, NEED you right now." Lowery replied, "Was good." Brown asked, "Where you at?" Lowery answered, "30 minutes." Evidence of the carrier's records and the location of cell towers revealed communications between the iPhone and Samsung and that the phones were near each other for about an hour before Davenport-Ray's homicide. Both phones were also near the Elks Club and the scene of Davenport-Ray's death.

That same night Brown and his former long-time girlfriend texted. The former girlfriend said, "Good luck tonight, we'll always have some things in common." She rejected the State's contention she was talking about the murder and said she was talking about her stepchildren with Brown. She also texted Brown, "Let me know if I need to do anything," although she did not recall sending the text. Brown replied, "Yeah, I'm on it. I see those MFs don't/didn't give a fuck about my nigga because a lot of MFs knew about the shit. I swear I'll be on some different type of time from now on."

Other evidence also connected Brown, Robbins, and Lowery to the shooting. Weeks after Davenport-Ray's death, Robbins was shot and killed. At the time of his death, Robbins had an old bullet wound on his right outer thigh that would point to a bullet striking him if he had been sitting in the back passenger seat of a vehicle. Robbins had told his sister he incurred the leg wound while sitting in the back of an SUV.

Acting on a tip, officers questioned Tashara Yeargin, who lived near the scene of Davenport-Ray's shooting. Yeargin's statements to officers about events the night Davenport-Ray died varied. At first, she denied any knowledge. She told investigators she had stayed at her aunt's home that night. Later, she said that she was out with friends on a party bus. Eventually, when officers suggested Robbins and Brown had been in her home, she confirmed they arrived at her house out of breath and asked to use her phone. Later analysis revealed calls originated from Yeargin's phone around the time of Davenport-Ray's death to Brown's longtime former girlfriend and to Robbins' wife. Yeargin acknowledged knowing both women, but she denied calling them while Robbins and Brown were at her house. Shortly after making the calls, the two men left by car. Before leaving, Brown told Yeargin, "[D]on't tell anybody that we were here." Robbins gave her $40.

Yeargin's identification of Brown and Robbins at trial was not always clear. She identified one man who arrived the morning of the shooting as "Jermel," last name unknown, who used the nickname BG. She later responded to questions that identified Jermel as Jermel Robbins. She identified a second man who came in with Robbins as TJ and identified him as Brown.

Yeargin stated she did not want to be involved, was afraid of participating, and even moved from her home because she was scared. She specifically sought a new home with cameras to discourage anyone from "mess[ing] with [her]." Defense counsel on cross elicited testimony that Yeargin was mad at the police and believed she was being held on charges as a pretext when the police really wanted her to testify against Brown. Yeargin testified that police introduced Robbins' and Brown's names into their conversations. But she later testified that their use of Robbins' and Brown's names prompted her to tell the truth. Defense counsel tried to introduce doubt about her identification of Brown by noting Yeargin's prior testimony that she knew other members of Brown's family and they all looked alike. Yet Yeargin testified that she recognized Brown as the person at her house. Yeargin acknowledged she testified differently in a prior proceeding and that she was under the influence of drugs when Brown and Robbins came to her house.

Brown's former girlfriend testified she spoke with Brown the weekend of the wedding. She said she had to call Brown on someone else's phone on the Saturday before Davenport-Ray's death because he lost his. She testified she did not recall talking to Brown during the time he allegedly used Yeargin's phone.

Robbins' wife recalled talking by phone with her husband in the early morning hours, but she denied picking him up at Yeargin's house. On cross, she testified she could not recall the specific day she received the middle-of-the-night call from Robbins.

Evidence at trial covered Brown's activities after the shooting. The prosecutor used this evidence to show he fled and to otherwise suggest the circumstances evidenced his guilt. One theme related to him abandoning a job he had held for years. He reported to work hours after the shooting and again the next day. After that, he never returned. Brown's employer eventually terminated him for job abandonment. Law enforcement located and arrested Brown in Missouri. At the time of his arrest, police seized a phone from Brown. That phone showed Brown had forwarded to his former girlfriend a newspaper article reporting on Davenport-Ray's murder. The two discussed Ray's handling of his wife's murder. The

phone also included an exchange with Brown's uncle in which Brown said things looked bad and he needed a good attorney.

The jury found Brown guilty of murder in the first degree, attempted murder in the first degree, conspiracy to commit murder in the first degree, criminal solicitation to commit murder in the first degree, aggravated assault, criminal possession of a weapon, and criminal discharge of a firearm. At sentencing, Brown received a hard 25 life sentence for first-degree murder, another 653-month sentence for the attempted first-degree murder to run consecutive to the life sentence, and concurrent terms for the remaining counts.

Brown appeals, and this court has jurisdiction to consider his arguments. See K.S.A. 60-2101(b) (Supreme Court jurisdiction over direct appeals governed by K.S.A. 2021 Supp. 22-3601); K.S.A. 2021 Supp. 22-3601(b)(3) (direct appeals to Supreme Court allowed for life sentence crimes).

ANALYSIS

1. *No reversible error was committed in admitting the map of cell phone transmissions.*

Brown complains of the admission of State's Exhibits 397 and 398 over his hearsay objection. These exhibits are maps created by a police detective that show cell towers and the locations of the cell phones found in the SUV at certain times the night of the shooting. State's Exhibit 397 reflected data associated with Lowery's iPhone, and Exhibit 398 related to the Samsung phone. Brown's trial attorney conducted a voir dire of the detective regarding these exhibits. The detective explained he made the maps from data he pulled "from the National Domestic Communications Assistance Center [NDCAC] that's run by the United States Department of Justice from their secure website. I download their stored data that's provided to them from the cell phone providers." He also explained the providers were required by law to report the data to the Department of Justice, and the secure website was available to law enforcement to assist in investigations. The detective stated he then imported the data into software to create the maps. The maps show locations of various cell towers in Topeka

and the radius each tower covers. He added pins to the maps to show where phones associated with Brown or Lowery pinged a tower's sector near the Rays' travels.

Following the voir dire, Brown's attorney objected: "These are hearsay, Your Honor. We don't have any foundation for how these were created[,] and they were not created by him." In the ensuing discussion, neither the attorneys nor the judge discussed whether the evidence was hearsay and, if so, whether a hearsay exception applied. Given that record, the State argues Brown thus failed to preserve an objection based on hearsay and that he mainly argued foundation at trial and now attempts to focus on hearsay. See *State v. Bryant*, 272 Kan. 1204, 1208, 38 P.3d 661 (2002) ("[A] defendant may not object to the introduction of evidence on one ground at trial, and then assert a different objection on appeal."). But Brown's counsel did make a hearsay objection during trial, and thus preserved the objection. See K.S.A. 60-404 (prohibiting setting aside a verdict when a party fails to timely object to evidence).

Even so, we do not reach the merits of Brown's arguments for two reasons.

First, only State's Exhibit 398 appears in the record on appeal. Brown's failure to include Exhibit 397 in the record places any error based on its admission beyond this court's review. See Supreme Court Rule 3.01(b) (2022 Kan. S. Ct. R. at 20); see also *State v. Decker*, 275 Kan. 502, 507, 66 P.3d 915 (2003) (concluding this court could not determine whether trial court erred when appellant failed to include photograph complained of in the record on appeal). We therefore limit our consideration to Exhibit 398.

Second, as to State's Exhibit 398, we elect to presume error and consider whether the error demands reversing Brown's convictions. We do so because the trial record related to Brown's objection is less than clear, making it difficult for us or the parties to analyze. The lack of discussion about the hearsay objection provides no clue as to whether the district court judge determined no hearsay was presented or whether the evidence contained hearsay subject to one of the hearsay exceptions provided in K.S.A. 2021 Supp. 60-460. In an apparent attempt to overcome this lack of clarity, Brown's appellate counsel suggests "it appears to Brown the

district court ruled the exhibits fell within the business records exception contained in K.S.A. 60-460(m)." The State argues the evidence was not hearsay, and it contends that Brown is really talking about a lack of foundation.

In addition to little discussion about whether the evidence was hearsay, the parties have only briefly talked about hearsay exceptions. It may be the judge did rely on K.S.A. 2021 Supp. 60-460(m). We decline to engage in that speculation, however, especially because other exceptions might apply, and each would require a different analysis that the parties do not address. E.g., K.S.A. 2021 Supp. 60-460(o) (content of official record) or (bb) (commercial lists and the like).

While the State argues we should not consider the arguments because Brown did not develop the record, we cannot ignore that the State was the proponent of the evidence and had the burden at trial of explaining the basis for admission. The lack of record here falls on everyone—prosecution, defense, and the court. Given the record and the narrow briefing of the issue, we decide not to fully explore the basis for the objection but will instead assume a hearsay error—that is, a statutory violation.

Assuming error does not end our analysis. We also need to consider whether the error is reversible. Under K.S.A. 2021 Supp. 60-261 and K.S.A. 60-2105 a trial error is reversible only if it prejudices a defendant's substantial rights. Here, because Brown contends the court violated his statutory right to the exclusion of certain hearsay evidence, the so-called statutory harmless error test applies. Under that test, the State, as the party benefitting from the assumed error, has the burden to show there is not "a reasonable probability that the error will or did affect the outcome of the trial in light of the entire record." *State v. Ward*, 292 Kan. 541, 569, 256 P.3d 801 (2011). The State easily meets that burden by pointing us to the large volume of cumulative evidence that came into the record of this case without objection.

The cumulative evidence most analogous to the information on State's Exhibit 398 is the Samsung phone's cell provider's records found in State's Exhibit 321. The State introduced Exhibit 321 through the testimony of a Senior Trial Specialist in the Law

Enforcement Relations Group at T-Mobile Metro. Exhibit 321 included records revealing the date, time, and duration of phone calls from the Samsung phone, whether each call was incoming or outgoing, and the cell site location at the beginning and end of each call. The witness explained the information, telling the jury that cell towers are usually divided into three sectors. Location information includes which sector the phone used with the historical information providing a general range from the tower within the sector, but not a specific location for the phone. Typically, a phone looks for the strongest, closest signal. He also explained that the range of a tower varies from 1 to 3 miles in an area like Topeka.

Exhibit 321 includes a video file containing maps showing the location of towers and the times certain phone calls pinged those towers. These maps differ from Exhibit 398 to the extent that they do not include cell tower numbers. But jurors could determine those numbers by comparing the call information on the maps to an Excel file in Exhibit 321, which includes call information and towers pinged. Our review of the maps and Excel files confirms the tower numbers shown on Exhibit 398 track the towers' addresses, latitudes, and longitudes reflected in Exhibit 321.

Several witnesses orally explained the data and drew conclusions about the locations of the cell phones at various times that night. Again, Brown made no objection to this testimony, which duplicates aspects of the map he now objects to on appeal.

In sum, State's Exhibit 398 and related testimony are cumulative of other testimony and exhibits found elsewhere in the record—testimony and exhibits admitted without objection and not challenged in this appeal. We, therefore, conclude there is no reasonable probability the admission of Exhibit 398 affected the outcome of Brown's trial given the entire record. See K.S.A. 2021 Supp 60-261; *Ward*, 292 Kan. at 569. Any error in the admission of Exhibit 398 was thus harmless.

2. Prosecutor's errors during closing argument were harmless.

Brown next points to the prosecutor's statements during closing argument as prosecutorial error. Brown calls out the prosecutor's use of the phrase "we know" as she argued seven points supporting Brown's guilt. Brown also argues the State erred in asserting, "He [Brown] is responsible." We will first discuss the legal framework for

appellate review of prosecutorial error claims, then the caselaw discussing prosecutors' use of "we know" and similar phrases, and finally the specific arguments on which Brown focuses.

2.1. We follow a two-step legal framework for prosecutorial error claims.

We use a two-step framework to analyze claims of prosecutorial error.

First, we consider whether the prosecutor stepped outside the wide latitude prosecutors are given to conduct the State's case in a manner that does not offend a defendant's constitutional right to a fair trial. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016); *State v. King*, 308 Kan. 16, 30, 417 P.3d 1073 (2018). This wide latitude extends to statements made during the prosecutor's opening statement and closing argument. We do not consider any statement in isolation but look to the statement's context to determine whether error occurred. *State v. Timley*, 311 Kan. 944, 949-50, 469 P.3d 54 (2020).

Second, "[i]f error is found, the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial. In evaluating prejudice, we simply adopt the traditional constitutional harmlessness inquiry demanded by *Chapman* [*v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)]." *Sherman*, 305 Kan. at 109. Under this test, "prosecutorial error is harmless if the State can demonstrate 'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, i.e., where there is no reasonable possibility that the error contributed to the verdict.'" 305 Kan. at 109 (quoting *Ward*, 292 Kan. 541, Syl. ¶ 6).

2.2. Use of "*we know" is often outside the prosecutor's wide latitude.*

Turning to the first step, our caselaw often recognizes a prosecutor has the latitude during closing argument to highlight the evidence presented and to draw reasonable inferences from that evidence. *Timley*, 311 Kan. at 950. In doing so, a prosecutor may argue the evidence proves a defendant's guilt. But our caselaw does not give a prosecutor latitude to state the prosecutor's opinion about the ultimate issue of the defendant's guilt. *King*, 308 Kan. at 31.

In keeping with this limitation, we have warned prosecutors to not use words that suggest an argument reflects the prosecutor's view. A review of our recent cases reveals phrases such as "I think," "I believe," and "we know" often reflect the prosecutor's views and thus may constitute error. The use of those phrases is not always error, however. Context matters. See *State v. Charles*, 304 Kan. 158, 173-75, 372 P.3d 1109 (2016). Timing also matters to the extent that we have refrained from labeling an impermissible statement an error if we had never given notice to prosecutors that they should not use a particular phrase. See *King*, 308 Kan. at 33-34. This approach reflects the rule that prosecutors "must be evaluated based on the state of the law at the time of" the trial. *Sherman*, 305 Kan. at 117. Despite these considerations, in *King*, we held the prosecutor committed error by repeatedly using the phrase "we know" during closing arguments. 308 Kan. at 34.

Brown cites *King*, 308 Kan. at 33-36, to support his argument the prosecutor committed error. In *King*, we relied on *State v. Corbett*, 281 Kan. 294, 315-16, 130 P.3d 1179 (2006), in holding the prosecutor erred by repeatedly using the phrase "we know." We acknowledged in *King* that *Corbett* recognized a prosecutor discussing *uncontroverted* evidence could appropriately use "we know." But *Corbett* also gave notice that a prosecutor commits error by using "we know" when discussing *controverted* evidence because doing so improperly expresses the prosecutor's opinion. See *King*, 308 Kan. at 34-35. We recently reaffirmed use of "we know" statements is prosecutorial error when the phrase precedes a discussion of controverted evidence in *State v. Alfaro-Valleda*, 314 Kan. 526, 538-39, 502 P.3d 66 (2022) (discussing *King* and *State v. Douglas*, 313 Kan. 704, 490 P.3d 34 [2021]). In sum, these cases hold that, "[i]f a prosecutor uses the words 'we know' when drawing inferences for the jury rather than recounting uncontroverted evidence, the prosecutor errs even if drawing a reasonable inference." 314 Kan. 526, Syl. ¶ 2.

In *King*, three "we know" statements arose in the context of the prosecutor discussing controverted evidence and asking the jury to draw inferences from that evidence. In the first statement, the prosecutor said, "[W]e know based on what you can see in all the videos and the still photos that have been taken that those Easton batting gloves [referencing gloves found in a car on the

defendant's driveway] are used in every robbery." 308 Kan. at 34. This statement required inferring the gloves found in the car were the same batting gloves described by witnesses or shown in security surveillance videos from various locations where robberies had occurred. In the second statement, the prosecutor said "we know" that the defendant was at a particular robbery scene because a victim's blood was found on the defendant's boot recovered from the defendant's bedroom. This statement drew inferences that the defendant wore the boot while committing a crime and that it was during the commission of that crime that a victim's blood transferred to the defendant's shoe. And in the final "we know" statement, the prosecutor asked the jury to infer the defendant's involvement in the alleged crimes because "[w]e know that they shared in money" based on coin wrappers found in each coconspirator's house and evidence that robbers took coins from various locations. We held each of these "we know" statements constituted error. 308 Kan. at 34. In conclusion, we held that "drawing inferences for the jury, not stating uncontroverted evidence . . . [was] error, even if the inferences being drawn were reasonable." *King*, 308 Kan. at 34.

Comparing the prosecutor's arguments about Brown's guilt to those in *King*, Brown argues the prosecutor committed multiple errors.

2.3. *Here, the prosecutor erred by repeatedly saying, "We know."*

Before we discuss each of the prosecutor's "we know" statements, we address the State's argument about timing and lack of notice. It argues we should not find error because we decided *King* after this case went to trial and the prosecutor thus did not have notice that use of "we know" constituted error. We reject this argument because, while Brown's trial was before our decision in *King*, in *King* we held that *Corbett* had given prosecutor's notice not to use the words "we know." *King*, 308 Kan. at 34. This holding contrasts with our discussion in *King* about the prosecutor's lack of notice not to use the phrase "I think." 308 Kan. at 33-34 (holding "I think" comments "are impermissible conveyances of the prosecutor's opinion to the jury. . . [but] we decline to find the

comments were error in this case because when the prosecutor made these statements at King's trial, we had not yet placed prosecutors on notice that such comments were improper").

Here, the prosecutor had notice. *Corbett* predates Brown's trial by 10 years, and it made clear "we know" was properly used only if it "does not indicate [the prosecutor's] personal opinion[] but demonstrates that the evidence was uncontroverted." *Corbett*, 281 Kan. at 315. And we applied the holding from *Corbett* to find prosecutorial error in *King*, and that trial was before Brown's. 308 Kan. at 34. The State does not provide any reason for a different result here. And we see none. We reaffirm our holding in *Corbett* and the holding in *King*, that prosecutors had notice not to use the phrase "we know" to discuss contested evidence. We now apply that rule.

Here, each of the "we know" statements about which Brown complains related to controverted matters and required the jury draw one or more inferences from the evidence. These statements included:

(1) "The first reason we know that the defendant is guilty is the phone evidence in this case" and "we know that the Samsung was in the area of the Elks Club, just like the iPhone was in the area of the Elks Club."

(2) "[R]eason No. 2 that we know the defendant is guilty is the DNA evidence."

(3) "What we know is common sense. The defendant is in the front passenger seat beginning his firing and keeping his firing as the SUV passes the Dodge Charger. Reason No. 4 that the defendant is guilty is simply common sense."

(4) "[T]he defendant, as you know is charged with a murder," and "[t]he reason we know that those guys acted together is because Awnterio Lowery, Jermal Robbins, both of their DNA was in the SUV," and the "defendant's [DNA] is close by."

(5) "Reason No. 6 . . . to show that the defendant is guilty, is simply that we know the defendant left. He ran."

(6) "[W]e know the defendant acted intentionally because he reeled off enough rounds."

We agree with Brown's contention that the prosecutor erred in each instance. Each statement related to a contested point, and each required the jury to draw inferences. For example, the first point about the phone evidence required inferring: (1) the Samsung phone was Brown's despite being linked to another person's

account, (2) Brown physically possessed the phone the night of Davenport-Ray's death, (3) the Samsung's location within the cell tower's sector was near the Elks Club rather that somewhere else within the sector, and (4) the iPhone associated with Lowery was also located near the Elks Club rather than somewhere else within the sector covered by the tower.

Similarly, when considering the other statements, the jury had to rely on controverted evidence to make inferences from the evidence to conclude Brown fired shots from the front passenger seat, he repeatedly fired shots and that action demonstrated his intent, he conspired with Lowery and Robbins, and he left his job and relocated out of guilt.

Given the controverted nature of each reason listed by the prosecutor and the inferences the jury needed to make to reach the conclusions the prosecutor promoted, her repeated use of "we know" was prosecutorial error. See *Alfaro-Valleda*, 314 Kan. at 539 (reiterating the general rule that an inference, even a reasonable one, captures the prosecutor's thought process or opinion and is not an uncontroverted fact).

2.4. *The prosecutor erred in another argument.*

Brown also argues the prosecutor erred in the final sentences of her closing argument and in making similar statements throughout the argument. At the end of her argument, she said: "[T]hese crimes took place because the defendant fired into a vehicle that contained three people. He is responsible. Those seven reasons show that he is responsible for every single charge pending against him." Brown makes two arguments.

He first contends the evidence does not support the contention that Brown fired into the Charger because DNA testing excluded him as a contributor to the DNA mixture found on the gun. While it is true no DNA tied Brown to the gun, the evidence left room for the jury to draw a reasonable inference he shot the gun. Circumstantial evidence suggested Brown was in the car, and injuries suffered by Lowery and Robbins suggest Lowery drove and Robbins sat in the rear seat. Ray's testimony and other evidence suggested shots were fired from the front passenger seat. And evidence supports an inference Brown wore gloves the night of the

shooting, which could explain why he did not transfer DNA to the gun. Considering the entire record, the prosecutor's comments were a fair inference drawn from the evidence presented at trial.

In his second argument, Brown contends the prosecutor's "[h]e is responsible" statement violates this court's holding in *State v. Peppers*, 294 Kan. 377, 399-400, 276 P.3d 148 (2012). There, while acknowledging a prosecutor may argue evidence shows an accused's guilt, we held the prosecutor should avoid saying things like the defendant is guilty "[b]ecause he did it" without directing the jury back to the evidence. Otherwise, the failure to include directional language, such as "the evidence shows the defendant's guilt," renders the statements an impermissible expression of the prosecutor's opinion. 294 Kan. at 400. The prosecutor's statements at the end of closing argument that "he is responsible" did not use directional language to point the jury back to the evidence. As Brown argues, the prosecutor thus offered improper expressions of her opinion that constitute error under *Peppers*.

2.5. *Prosecutorial error was individually and cumulatively harmless.*

Brown argues the prosecutor's errors are individually prejudicial to the point they require a new trial and cumulatively they do even more harm to his right to a fair trial. We agree that the prosecutor's repeated use of the prohibited "we know" phrase is troubling. But the repetition is just one aspect of our consideration. When determining if prosecutorial error causes prejudice, "[a]ppellate courts must simply consider any and all alleged indicators of prejudice, as argued by the parties, and then determine whether the State has met its burden—*i.e.*, shown that there is no reasonable possibility that the error contributed to the verdict." *Sherman*, 305 Kan. at 111. The strength of the evidence may inform this inquiry, but it is not our primary focus, for prejudice may be found even in strong cases. 305 Kan. at 111 (citing *United State v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 240, 60 S. Ct. 811, 84 L. Ed. 129 [1940]).

Here, the State relies on the jury instructions; the context of the statements and, more specifically, that the prosecutor sur-

rounded the statements with a discussion of the evidence; the reasonableness of the inferences the prosecutor asked the jury to draw; and the overall strength of the evidence. Before we discuss the evidence and the record, we will address the argument about the district court's instructions to the jury before closing argument.

Appellate courts often weigh these instructions when considering whether any prosecutorial error is harmless. In doing so, we presume the jurors follow the instructions. See, e.g., *Alfaro-Valleda*, 314 Kan. at 545-46. District courts commonly instruct the jury that "[s]tatements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they should be disregarded." Through these words, jurors know prosecutors are advocates, and appellate courts can weigh that in determining whether a prosecutor's error is harmless. See *Timley*, 311 Kan. at 951. Here, the district court gave that instruction. It also reminded the jury that it was for the jurors "to determine the weight and credit to be given the testimony of each witness." We weigh these instructions in considering whether the prosecutor's errors affected the verdict.

We next turn to the State's argument about context. We agree that each time the prosecutor used the words "we know" she did so in the context of discussing evidence that supported the conclusion. For example, after commenting that one reason "we know that the defendant is guilty is the phone evidence in this case" and "we know that the Samsung was in the area of the Elks Club, just like the iPhone was in the area of the Elks Club," the prosecutor thoroughly reviewed the cell phone evidence. In doing so, she first detailed the evidence supporting the inferences that Brown used the Samsung phone found in the SUV in the weeks and hours before Davenport-Ray's death. This was mostly evidence of the many texts, calls, and pictures found on the Samsung to and about Brown's friends and family. The prosecutor also highlighted evidence supporting the second inference that the Samsung had been near the Elks Club and the location of the shooting. In doing so, she acknowledged differences in testimony of the State's witnesses. For example, she referred to the testimony of the Senior

Trial Specialist from T-Mobile Metro describing the sector covered by each tower as ranging from 1 to 3 miles, not just the 1-mile radius the police detective had drawn on his maps. She explained reasons the jury could still infer that both the Samsung and the iPhone had been near where the newlyweds celebrated and the scene of Davenport-Ray's shooting.

Likewise, the prosecutor followed the "we know" statement relating to DNA evidence by explaining the places investigators found the evidence and reviewing the scientific evidence supporting the inference that Brown contributed to the DNA samples. And, again, the prosecutor was candid, commenting, "There was some question as to why we didn't have any of the defendant's DNA in the car. The defendant could not be excluded from the front driver's air bag. The numbers are not big, the numbers are small." This context informed the jury it had to weigh the evidence.

In each other instance of a "we know" argument, the prosecutor discussed the evidence that supported the inference, which often built on the inferences related to the phone and DNA evidence. In general, the inferences were reasonable, and most were compelling. And each time, the prosecutor discussed evidence that weighed against the State's case, such as the lack of DNA evidence definitively putting Brown in the SUV. The context of this discussion underscored for the jury that it needed to consider how, and if, the evidence supported each of the seven reasons the prosecutor listed.

As to the reasonableness of the inferences and the strength of the evidence factors argued by the State, the inferences were reasonable and the evidence was sufficient to show beyond a reasonable doubt that Brown was in contact with Lowery before the homicide in this case (both through text messages and phone calls made before the homicide as well as cell phone location data showing that their phones were near each other just before and at the time of the shooting). Lowery's on-scene apprehension, the eyewitness' identification of him as the SUV's driver, and the discovery of Brown's phone in the SUV made the cell phone evidence connecting him and Brown that evening compelling. And Robbins' DNA taken from the interior of the SUV strongly supports a

conclusion that Robbins was present. Yeargin's testimony and phone calls made from her phone to Brown's former girlfriend and Robbins' wife on Yeargin's phone provide evidence connecting Brown to Robbins at the time of the shooting. And Brown's DNA on the latex gloves found on the path of the two occupants who fled from the car also provides convincing evidence of Brown's presence. Circumstantial evidence establishes that Robbins sat in the backseat of the SUV, allowing for reasonable inferences that Brown was in the passenger seat of the car when the multiple shots were fired. Finally, as to the last inference, the prosecutor reviewed the evidence establishing that Brown abandoned a job he held for years within days of the shooting without notifying his employer. From the totality of the evidence a jury could reasonably infer he had fled out of guilt.

Nothing suggests to us that the jurors would have reached a different verdict had the prosecutor more appropriately couched the seven reasons for finding Brown guilty in terms of statements like "the evidence shows." In summary, we have considered the strength of the evidence against Brown, the context of each "we know" statement as part of the discussion of the evidence the jury should weigh, and the court's instruction charging the jurors with the duty to weigh the evidence and consider counsel's arguments as just that, not as evidence. Those factors considered in context of the entire record convince us the State met its burden of establishing beyond a reasonable doubt there is no reasonable possibility the errors individually or cumulatively contributed to the verdict.

3. *Cumulative error does not require reversal of Brown's convictions.*

Finally, Brown argues cumulative error requires us to reverse his convictions. We have assumed error in the admission of Exhibit 398 and identified error in the prosecutor's closing argument. Our standard when considering cumulative error arguments is well settled:

"The test for cumulative error is whether the errors substantially prejudiced the defendant and denied the defendant a fair trial given the totality of the circumstances. In making the assessment, an appellate court examines the errors in

context, considers how the district court judge addressed the errors, reviews the nature and number of errors and whether they are connected, and weighs the strength of the evidence. . . . If any of the errors being aggregated are constitutional, the constitutional harmless error test of *Chapman* applies, and the party benefitting from the errors must establish beyond a reasonable doubt that the cumulative effect of the errors did not affect the outcome. . . . Where, as here, the State benefitted from the errors, it has the burden of establishing the errors were harmless." *State v. Thomas*, 311 Kan. 905, 914, 468 P.3d 323 (2020).

In applying this standard, we note that State's Exhibit 398 and the first asserted "we know" error during closing argument both relate to evidence from phone records. There is thus some interrelationship among the errors. But the errors occurred on separate days of the trial, with enough time between them that the jury was unlikely to associate one with the other. We also discount for the cumulative error analysis any error in the admission of exhibit 398 because the data underlying the exhibit was also found in other exhibits not challenged in this appeal. While the prosecutor erred in saying "we know," the evidence allowed a reasonable and convincing inference that Brown possessed the phone at certain locations significant to this case. And, given the jury instructions, the jurors knew it was their role to consider that evidence to see if it supported the inferences and if the inferences supported convicting Brown. So, while there is an interrelation among these two errors, they do not accumulate to cause substantial prejudice or an unfair trial.

As we have discussed, we do not find the prosecutor's errors to be cumulatively prejudicial. We see no other basis for concluding cumulative error supports reversal here. We thus hold that cumulative error doctrine does not require reversing Brown's convictions.

CONCLUSION

While we find error, we have concluded the State met its burden of establishing beyond a reasonable doubt the errors did not affect the jury's verdict. We therefore affirm Brown's convictions and his sentences.

Affirmed.

WILSON, J., not participating.

State v. Bates

No. 122,128

STATE OF KANSAS, *Appellee*, v. CARLOS R. BATES, *Appellant*.

(513 P.3d 483)

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Fourth Amendment Right Protects against Unreasonable Searches and Seizures—Same Protections under Section 15 of Kansas Constitutional Bill of Rights*. The Fourth Amendment to the United States Constitution protects the right of an individual to be secure and not subject to unreasonable searches and seizures by the government. Section 15 of the Kansas Constitution Bill of Rights offers the same protections. Under the Fourth Amendment and section 15, any warrantless search or seizure is presumptively unreasonable unless it falls within one of the few established and well-delineated exceptions to the warrant requirement.

2. SEARCH AND SEIZURE—*Exception to Warrant Requirement of Fourth Amendment—Investigatory Detention under* Terry v. Ohio—*Requirements* One exception to the warrant requirement of the Fourth Amendment to the United States Constitution is an investigatory detention under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). This exception applies to brief investigatory stops of persons or vehicles that fall short of traditional arrest. For this exception to apply, an investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.

3. SAME—*Reasonable Suspicion Standard Requires Considering Totality of Circumstances—Particularized and Objective Basis Required for Suspecting Person Stopped for Crim*e. The reasonable suspicion standard requires consideration of the totality of the circumstances—the whole picture. Based on that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. A mere hunch is not enough to be a reasonable suspicion. But the particularized basis need not rise to the level of probable cause, which is the reasonable belief that a specific crime has been committed and that the defendant committed the crime.

4. SAME—*District Court Ruling on Motion to Suppress—Bifurcated Standard of Review Applied by Appellate Courts*. Appellate courts apply a well-settled, bifurcated standard of review when reviewing a district court ruling on a motion to suppress. Under the first part of the standard, an appellate court reviews a district court's factual findings to determine whether they are supported by substantial competent evidence. Substantial competent evidence is defined as such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion. Appellate courts do not reweigh the evidence or assess credibility of witnesses when assessing the district court's findings. Under the second part of the bifurcated standard of

review, appellate courts review de novo the district court's conclusion of law about whether a reasonable suspicion justifies the investigatory detention.

Review of the judgment of the Court of Appeals in an unpublished opinion filed January 29, 2021. Appeal from Sedgwick District Court; SETH L. RUNDLE, judge. Opinion filed July 29, 2022. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Rick Kittel, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Julie A. Koon, assistant district attorney, argued the cause, and *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, were with her on the brief for appellee.

The opinion of the court was delivered by

LUCKERT, C.J.: This appeal arises after police detained Carlos R. Bates while he sat in a minivan in an alleyway. The detention followed a series of events that began with a late-night 911 call reporting an unwelcomed knocking on the door of a home. An officer quickly arrived, and an occupied minivan parked near the home drove away. Another officer then spotted the minivan in a nearby alleyway and turned on emergency lights and blocked the minivan from leaving. When both officers reached the alleyway, they approached the vehicle. Smelling marijuana, the officers conducted a search that led to the State charging Bates with possession of drugs and drug paraphernalia with the intent to distribute. Bates sought to suppress evidence obtained during the search because he argued the seizure of the minivan violated his right to be free from unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution and section 15 of the Kansas Constitution Bill of Rights.

The district court judge denied Bates' motion to suppress, concluding the detention was reasonable and justified under the public safety exception to the warrant requirement. Bates appealed, and the Court of Appeals affirmed the denial of the motion to suppress after holding the district court judge correctly denied the motion but used the wrong rationale for doing so. The Court of Appeals rejected the judge's reliance on the public safety exception and instead held the officers held a reasonable suspicion of crimi-

nal activity and legitimately conducted a valid investigatory detention under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). See *State v. Bates*, No. 122,128, 2021 WL 301896, at *3-4 (Kan. App. 2021) (unpublished opinion).

Upon review, we affirm the Court of Appeals and the district court's denial of Bates' motion to suppress. We hold, as did the Court of Appeals, that the officers had a reasonable suspicion of criminal activity that justified an investigatory detention.

FACTUAL AND PROCEDURAL BACKGROUND

A brief discussion of the procedural background helps frame the issue before us, which is narrower than the issue presented to either the district court or the Court of Appeals. We begin by explaining the procedure that leads us to a limited review of the district court and Court of Appeals decisions.

We first note that we do not have before us the question of whether a police officer seized the minivan parked in the alleyway when he pulled behind it and activated his emergency lights. The parties litigated that question in the district court, and the district court determined a seizure occurred. On appeal, the parties do not dispute that ruling. Likewise, no party raises issues about the legality of the search of the minivan if we determine its seizure was valid. As a result, the single overarching issue is whether the officers' seizure of the minivan violated the Fourth Amendment and section 15.

The trial and appellate process have further narrowed the scope of that single issue. To explain, it helps to keep in mind that the Fourth Amendment protects the right of an individual to be secure and not subject to unreasonable searches and seizures by the government. *State v. Ryce*, 303 Kan. 899, 909, 368 P.3d 342 (2016). Section 15 of the Kansas Constitution Bill of Rights offers the same protections. *Ryce*, 303 Kan. at 909; *State v. Williams*, 297 Kan. 370, 376, 300 P.3d 1072 (2013). Under the Fourth Amendment and section 15, any warrantless search or seizure is presumptively unreasonable unless it falls within one of the few established and well-delineated encounters recognized as a warrant exception. *Ryce*, 303 Kan. at 909.

Of the possible exceptions, the district court judge considered two: whether the stop was (1) a valid investigatory detention, also known as a *Terry* stop (and concluded it was not) or (2) a valid public safety stop (and concluded it was). See *State v. Cleverly*, 305 Kan. 598, 605, 385 P.3d 512 (2016) (listing some warrant exceptions, including investigative detentions and public safety stops). On appeal, the Court of Appeals considered the same two exceptions but reached the opposite conclusions, holding the detention was not a valid safety stop but was a valid investigatory detention. *Bates*, 2021 WL 301896, at *3-4.

Bates petitioned for review and asks us to reverse the Court of Appeals' holding that the stop was a valid investigatory detention. He does not seek review of the ruling on which he prevailed before the Court of Appeals—that is, that the detention was not a valid public safety stop. It was the State that was adversely affected by that ruling. The State thus had the option of filing a cross-petition or conditional cross-petition for review to ask us to review that portion of the Court of Appeals decision. See Supreme Court Rule 8.03(c)(3) (2022 Kan. S. Ct. R. at 57) ("The purpose of a cross-petition is to seek review of specific holdings the Court of Appeals decided adversely to the cross-petitioner."). But it did not, and the Court of Appeals' holding that the detention was not a valid public safety stop is thus settled in Bates' favor. See *State v. Taylor*, 314 Kan. 166, 168, 496 P.3d 526 (2021).

This narrowing of the issues means we must determine only whether the officers conducted a valid investigatory detention. The district court judge held they did not, and Bates now argues we should defer to both the judge's findings of fact and his conclusion of law on that point. He also argues the Court of Appeals failed to analyze whether the judge's determination of no reasonable suspicion was based on substantial competent evidence (he contends it was). He also argues the Court of Appeals panel made factual findings to support its conclusion.

Given Bates' contention that the panel engaged in fact-finding, we set out in full the district court judge's findings of fact, omitting his citations to the record:

"1. On September 1, 2017, Officer Gilmer was dispatched to a 'suspicious character' call at 1906 N. Hood, Wichita, Sedgwick County, Kansas.

"2. The suspicious character was reported to be knocking on the front door of the residence at that address.

"3. The report was made by a 9-1-1 call.

"4. Officer Gilmer had no information about the description of the person or people knocking on the door or any involved vehicles.

"5. Officer Gilmer arrived in the area of 1906 N. Hood shortly after the 1:27 a.m. 9-1-1 call.

"6. Officer Gilmer observed a red mini-van parked on the street in front of or near the house at 1906 Hood.

"7. The red mini-van appeared to be running and the lights were on.

"8. Officer Gilmer saw no one outside the vehicle.

"9. It was dark outside.

"10. Officer Gilmer did not have his emergency overhead lights or sirens on when he arrived in the area of 1906 N. Hood.

"11. Officer Gilmer approached the vehicle on foot and shined his flashlight onto the vehicle. He did not recall having used his police car's overhead flashing lights up to this point.

"12. Officer Gilmer was wearing a green polo shirt and tan pants, and a badged vest.

"13. The vehicle drove off when Officer Gilmer walked up to the vehicle and shined his flashlight on it.

"14. Officer Gilmer did not announce himself as 'police' or say 'stop' when he approached the vehicle.

"15. Officer Gilmer communicated to another police officer to stop the vehicle.

"16. Officer Gilmer knew the neighborhood to have 'a lot' of larceny to autos, car break-ins, and residential burglaries.

"17. Officer Oliphant knew the area to have 'a lot of vandalisms . . . lot of burglaries . . . lot of gang activity.'

"18. Officer Gilmer did not make contact with the 9-1-1 caller or the home prior to approaching the vehicle of interest at either 1906 N. Hood or in the alley.

"19. Officer Gilmer 'heard' Officer Oliphant stop the vehicle nearby and drove to that location.

"20. Upon Officer Gilmer's arrival about a minute later he found that the same vehicle which had driven away was now parked in an alleyway with its lights off, about one and a half blocks away from where he first saw it.

"21. When Officer Gilmer arrived at the alley, Officer Oliphant's police car emergency overhead lights were on.

"22. Officer Gilmer walked up to the passenger side of the vehicle, made contact with the passenger, and noted an odor of marijuana coming from the vehicle.

"23. The passenger identified himself as Brown.

"24. Officer Gilmer has experienced cases of people knocking on a front door and then breaking into the rear of the home if no one answers the door.

"25. Officer Oliphant did not see people walking outside when he arrived in the area of 1906 N. Hood, prior to the vehicle driving away from Officer Gilmer.

"26. Officer Oliphant's emergency equipment was not activated when he was approaching 1906 N. Hood and he was not trying to stop the vehicle at that time.

"27. Officer Oliphant had a suspicion that the vehicle was involved in the door knocking.

"28. Officer Oliphant found the vehicle parked in an overgrown alleyway with its lights off.

"29. Officer Oliphant first drove by the parked car, realized he had missed something, then backed up, and activated his emergency equipment. The vehicle of interest had already stopped, parked, and had its headlights turned off when Officer Oliphant turned on his emergency equipment and parked in the street near the alley entrance.

"30. After Officer Gilmer arrived, both officers walked up to the vehicle.

"31. Officer Oliphant found it suspicious to be parked in an alley right off the street completely blacked out.

"32. Other than the occupants of the vehicle, from the time of the arrival of Officers Oliphant and Gilmer in response to the 9-1-1 dispatch and the vehicle 'stop,' they did not observe any other people in the area near 1906 N. Hood.

"33. Because of the location of the vehicle near 1906 N. Hood, the occupants of the vehicle could have been involved in the door knocking, or they could have been witnesses to it.

"34. At the beginning of the encounter between the officers and the vehicle in the alleyway, both officers smelled the odor of marijuana coming out of the car.

"35. The officers did not think that knocking on the door of the residence was a crime."

After making those findings, the district court judge concluded: "Officers Oliphant and Gilmer could not have conducted a *Terry* stop because, according to their testimony, they did not believe a crime had been committed, was being committed, or was about to be committed." But the judge also concluded: "They did, however, conduct a reasonable and acceptable community caretaking public safety inquiry, even if they do not refer to it as such." The judge thus denied Bates' motion to suppress.

The case proceeded to a bench trial on stipulated facts. The judge convicted Bates of possession of cocaine with intent to distribute and possession of drug paraphernalia with intent to distribute. Bates appealed.

Before the Court of Appeals, Bates argued the district court relied on facts not in the record to support the public safety justification for the stop because the officers did not testify about concern for the welfare of the minivan's occupants or anyone else. The State disagreed but also suggested an alternative rationale to the Court of Appeals by renewing the argument it had made in district court that the stop was a valid investigatory detention.

The Court of Appeals panel agreed with Bates' arguments about the district court's conclusion the officers conducted a valid public safety stop. It held the stop did not fall within the public safety exception because the officers testified concern for the

well-being of the minivan's occupants did not motivate their actions. *Bates*, 2021 WL 301896, at *3. But the panel affirmed the district court as right for the wrong reason because the facts in the record supported a finding that the officers had reasonable suspicion to detain the occupants of the minivan. 2021 WL 301896, at *4. The panel concluded that reasonable inferences derived from the facts gave "rise to a reasonable suspicion that criminal activity was afoot." 2021 WL 301896, at *4. The panel listed seven facts supporting a conclusion that officers could reasonably suspect criminal activity:

"Officers Gilmer and Oliphant relied on seven facts when stopping the van: (1) They responded to a report of someone knocking on the front door of a caller's residence; (2) they received the report early in the morning; (3) burglaries were common in the neighborhood; (4) Officer Gilmer stated burglars will sometimes knock on the front door to determine whether someone is home; (5) upon arriving, the officers saw a van parked outside the residence with its lights on; (6) the van drove away as Officer Gilmer approached it; and (7) Officer Oliphant found the van parked with its lights off in an alley 1 1/2 blocks away." *Bates*, 2021 WL 301896, at *4.

The panel included two other statements about facts that Bates contends were fact-finding by the appellate court. First, it discussed the reliability of the information about the 911 call:

"While the officers did not observe the knock, this information was reliable because the caller, by providing the house's address, could be identified and held to account. See *State v. Chapman*, 305 Kan. 365, 373, 381 P.3d 458 (2016) (discussing reliability of tip based on whether identity of provider is disclosed, could be ascertained, or could not be discovered). The caller indicated he did not expect a visitor. Based on the van's location and its lights being on, the officers could reasonably conclude one of the van's occupants was the door-knocker." 2021 WL 301896, at *4.

Second, he argues the following inference drawn by the Court of Appeals conflicts with substantial competent evidence:

"Officer Gilmer's statement describing how some burglars operate tied the knocking to potential criminal activity. The time of the call and the prior illegal activity in the neighborhood strengthened that connection. And after Officer Gilmer attempted to approach the van, it drove away and parked with its lights off in a nearby alley, suggesting its occupants did not want to interact with police." 2021 WL 301896, at *4.

After drawing that inference, the Court of Appeals concluded:

"Individually, these circumstances may simply appear odd. See *Chapman*, 305 Kan. at 372 (report of suspicious but not criminal activity cannot form reasonable suspicion). But in light of Officer Gilmer's description of burglaries, these circumstances become sufficiently suspicious to suggest a crime was going to be committed, warranting an investigatory detention. See *State v. Kirby*, 12 Kan. App. 2d 346, 353, 744 P.2d 146 (1987) (noting 'location, time of day, previous reports of crime in the area, and furtive actions of suspects' may support reasonable suspicion but time of day and crime in the area cannot justify a stop by themselves), *disapproved of on other grounds by State v. Jefferson*, 297 Kan. 1151, 310 P.3d 331 (2013).

"We conclude that, under the totality of the circumstances, the officers' investigatory detention of the van was supported by reasonable suspicion that the occupants intended to commit a burglary." 2021 WL 301896, at *4.

Noting that Bates did not challenge the officers' subsequent search of the minivan, the Court of Appeals affirmed the district court decision to deny the motion to suppress. 2021 WL 301896, at *4.

Bates timely petitioned for review, which this court granted. This court's jurisdiction is proper under K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions), and K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

ANALYSIS

As we have discussed, the only exception to the warrant requirement that the parties have preserved for our consideration is the one allowing an investigatory detention, also known as a *Terry* stop. This exception applies to "brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002). Recognizing that the "'balance between the public interest and the individual's right to personal security,' . . . tilts in favor of a standard less than probable cause" in a brief investigative stop, "the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity '"may be afoot."'" 534 U.S. at 273 (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 [1989]); see *Terry*, 392 U.S. at 30. For this exception to apply, "[a]n investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal

activity." *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).

The Kansas Legislature has codified this exception in K.S.A. 22-2402: "Without making an arrest, a law enforcement officer may stop any person in a public place whom such officer reasonably suspects is committing, has committed or is about to commit a crime and may demand of the name, address of such suspect and an explanation of such suspect's actions." See *State v. Doelz*, 309 Kan. 133, 139, 432 P.3d 669 (2019) ("'Investigatory detentions are generally permitted under the Fourth Amendment to the United States Constitution and K.S.A. 22-2402 if "an objective officer would have a reasonable and articulable suspicion that the detainee committed, is about to commit, or is committing a crime."'").

The reasonable suspicion standard requires consideration of "the totality of the circumstances—the whole picture . . . . Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Cortez*, 449 U.S. at 417-18. A mere "hunch" is not enough to be a reasonable suspicion. *Terry*, 392 U.S. at 27. But the particularized basis need not rise to the level of probable cause, *Navarette v. California*, 572 U.S. 393, 397, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014), which "'"is the reasonable belief that a specific crime has been committed and that the defendant committed the crime."'" *State v. Fewell*, 286 Kan. 370, 377, 184 P.3d 903 (2008).

It is these legal principles that define our analysis of the district court's denial of Bates' motion to suppress. A well-settled, bifurcated standard of review applies to that analysis. Under the first part of the standard, an appellate court reviews a district court's factual findings to determine whether they are supported by substantial competent evidence. *State v. Scheuerman*, 314 Kan. 583, 593, 502 P.3d 502 (2022). Substantial competent evidence is defined as such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion. *State v. Queen*, 313 Kan. 12, 20, 482 P.3d 1117 (2021). Appellate courts do not reweigh the evidence or assess credibility of witnesses when assessing the district court's findings. *Scheuerman*, 314 Kan. at 593.

Under the second part of the bifurcated standard of review, appellate courts review de novo the district court's conclusion of law about whether a reasonable suspicion justifies the investigatory detention. 314 Kan. at 593.

Application of this bifurcated standard is at the heart of the parties' arguments. Bates asserts we must defer to the district court findings and to any conclusion of law supported by that substantial competent evidence. We agree only in part. As Bates suggests, if substantial competent evidence supports the findings, we grant deference to the district court to the extent that we do not reweigh evidence or judge the credibility. Rather, we accept the judge's factual findings when substantial evidence supports them. See 314 Kan. at 593. But we disagree with his suggestion that our de novo review requires us to defer to the district court's legal conclusion drawn from those facts. De novo review means we exercise unlimited review without deference to the legal conclusions of the district court. *State v. Sanchez-Loredo*, 294 Kan. 50, 54, 272 P.3d 34 (2012). In other words, "[t]he ultimate determination of the suppression of evidence is a legal question requiring independent appellate review." *State v. Moore*, 283 Kan. 344, 349, 154 P.3d 1 (2007). Our role is to review the judge's findings of fact for substantial competent evidence and then independently apply those facts to determine whether the officers had a reasonable suspicion.

Neither Bates nor the State suggests any one of the district court judge's factual findings lacked the support of substantial competent evidence. Bates' quarrel thus is not that the Court of Appeals panel failed to fact check the district court findings. Instead, Bates faults the panel for failing to recognize that substantial competent evidence supports the judge's legal conclusion that the officers lacked reasonable suspicion. He also contends the panel should have deferred to the judge's conclusion because it had that factual support. But, again, that ignores de novo review.

Ironically, if we applied the standard Bates' proposes, our analysis would not lead to the outcome he seeks. The district court judge concluded: "Officers Oliphant and Gilmer could not have conducted a *Terry* stop because, according to their testimony, they did not believe a crime had been committed, was being commit-

ted, or was about to be committed." Our review of the record confirms they testified it was not a crime to ring a doorbell, even at 1:27 a.m., and that it was not a crime to park in an alleyway with your lights off. But we do not find support for a conclusion they did not believe the minivan occupants were not about to commit a crime. In fact, the officers often described Bates' conduct as suspicious, and they tied that suspicious behavior to patterns of criminal conduct.

Bates counters the officers' testimony about their suspicions by repeating the judge's conclusion that the officers admitted they saw no crimes committed, by examining each factor identified in the testimony individually, by suggesting each relates to a lawful activity, and by contending the actions are subject to innocent explanations. These arguments attempt to persuade us to apply a probable cause standard by requiring an officer to articulate a belief a crime was committed. They also ignore the totality of the circumstances, especially those circumstances that can be innocently explained. *Terry* itself instructs that these arguments are incorrect.

In *Terry*, an officer watched men repeatedly walk back and forth, looking in a store window and talking to each other. The United States Supreme Court recognized that each of the acts was "perhaps innocent in itself," but the totality of the circumstances "warranted further investigation." 392 U.S. at 22. Those suspicious circumstances justified the officer's action of approaching the men and asking questions, even though he had not seen a crime committed.

Likewise, in *Sokolow*, 490 U.S. 1, the Court observed that individually the facts forming the proffered suspicion did not reveal a crime and were innocent when considered individually. The defendant had traveled under an alias, followed an evasive path through an airport, paid cash for plane tickets, and traveled from Honolulu to Miami where he stayed for about 48 hours. Despite the innocent nature of each act, the Court held that "taken together they amount to reasonable suspicion." 490 U.S. at 9. The Court observed that "'the relevant inquiry is not whether particular conduct is "innocent" or "guilty," but the degree of suspicion that attaches to particular types of noncriminal acts.'" 490 U.S. at 10

(quoting *Illinois v. Gates*, 462 U.S. 213, 243 n.13, 103 S. Ct. 2317, 76 L. Ed. 2d 527 [1983]).

In yet another illustrative case, *Arvizu*, 534 U.S. 266, the Court reversed a Court of Appeals conclusion that reasonable suspicion did not justify a border patrol agent from stopping a minivan because most of the 10 factors identified by the district court as part of the totality of circumstances were "readily susceptible to an innocent explanation [and thus] entitled to 'no weight.'" 534 U.S. at 274 (quoting *United States v. Arvizu*, 232 F.3d 1241, 1249-51 [9th Cir. 2000], *rev'd and remanded* 534 U.S. 266 [2002]). The Court rejected "this sort of divide-and-conquer analysis," noting: "The court's evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the 'totality of the circumstances,' as our cases have understood that phrase." 534 U.S. at 274.

Our caselaw mirrors these holdings. See *State v. Martinez*, 296 Kan. 482, 487, 293 P.3d 718 (2013) ("'Our task . . . is not to pigeonhole each purported fact as either consistent with innocent travel or manifestly suspicious,' [citation omitted], but to determine whether the totality of the circumstances justify the detention."); *Moore*, 283 Kan. at 354 (same); *State v. DeMarco*, 263 Kan. 727, 734, 952 P.2d 1276 (1998) (same).

Here, contrary to the instruction of these cases, the district court judge focused on the fact the officers testified they observed no crime being committed. And while neither Officer Ryan Oliphant nor Officer Joshua Gilmer clearly stated that he formed a reasonable suspicion a crime had been or was about to be committed, they noted the behaviors they found suspicious and identified other factors that contribute to a reasonable suspicion. Their testimony conveys their belief they had a reasonable suspicion to investigate the actions of those in the minivan. But the judge did not discuss the totality of the circumstances that include:

- Both officers repeatedly referred to "suspicious" conduct by labeling the initial call as a "suspicious character call" because, in Officer Gilmer's words, having someone

knock on a door at 1:27 in the morning made it suspicious. The district court judge agreed:

"Based on the information available to the officers, they knew that a dwelling occupant had an unknown and unwanted person at his door. The door knocking was at such a time that it would be reasonable to conclude that something was wrong—regardless of whether it involved crime—and that a citizen of the community wanted the police to deal with it. . . . Under the circumstances of this case, it was reasonable for both the 9-1-1 caller and the officers to conclude that something was amiss that should be looked into."

- The judge also found in his findings of fact 16 and 17 that both officers were aware of there being "a lot" of residential burglaries, larceny to autos, car break-ins, vandalism, and gang activity in the area. And on cross Officer Gilmer explained this pattern was occurring in the subject neighborhood around the time of this incident.

- As the judge found in finding 24, "Officer Gilmer has experienced cases of people knocking on a front door and then breaking into the rear of the home if no one answers the door." They had been involved with burglaries where the burglars had knocked to see if anyone was home.

- The judge found in finding 5 that Officer Gilmer arrived "shortly" after the 911 call. And in the text of his decision, the judge noted: "The responding officers saw only one possible source of the door knocking: the occupants of the vehicle." Then, in finding 27, the judge referred to Officer Oliphant having a "suspicion" the minivan was tied to the door knocking.

- When the minivan drove away, the officers searched for it and found it nearby, parked without its lights on

> in an overgrown alleyway that Officer Oliphant described as one "that's not traveled very much . . . and is mostly grass." According to finding 31, "Officer Oliphant found it suspicious to be parked in an alley right off the street completely blacked out."

The Court of Appeals panel also discussed the reliability of the information relayed in the 911 call. It also noted: "And after Officer Gilmer attempted to approach the van, it drove away and parked with its lights off in a nearby alley, suggesting its occupants did not want to interact with police." 2021 WL 301896, at *4.

Bates argues both these conclusions required fact-finding by the panel. While it is true the district court judge did not explicitly discuss the reliability of the 911 call, he implicitly did so when he concluded that the officers "knew that a dwelling occupant had an unknown and unwanted person at his door." But we agree the panel engaged in fact-finding when it inferred the minivan occupants did not want to interact with police. The district court never found that the occupants knew police approached the minivan. And such a conclusion is not obvious from the record. Officer Gilmer explained that he parked his patrol car around the corner, it was dark when he walked toward the minivan with only his flashlight on, and he was wearing "soft clothes" that did not readily identify him as an officer. Under those circumstances, we agree with Bates that driving away was not on its own suspicious. But the circumstance of driving away and traveling only about a block and a half to park in an alleyway and turning off the minivan's lights helps explain Officer Oliphant's conclusion the behavior was suspicious.

We hold the totality of these circumstances provided "a 'particularized and objective basis' for suspecting legal wrongdoing"—in other words, a reasonable suspicion sufficient to justify an investigative detention. *Arvizu*, 534 U.S. at 273.

In doing so, we distinguish the totality of the circumstances from two somewhat analogous cases: *State v. Andrade-Reyes*, 309 Kan. 1048, 442 P.3d 111 (2019), and *Schreiner v. Hodge*, 315 Kan. 25, 504 P.3d 410 (2022).

In *Andrade-Reyes*, police approached two people sitting in a vehicle legally parked in an apartment complex parking lot late at night. The passenger seemed nervous and moved his hands. After holding that the initial encounter was a seizure and not a voluntary encounter, this court held the officers lacked reasonable suspicion of any criminal activity as required by *Terry*. 309 Kan. at 1058. As here, police did not observe any illegal activity. What is more, as here, the State said the fact that it was late at night in a high crime area was one of the factors supporting reasonable suspicion. 309 Kan. at 1058-59.

In *Schreiner v. Hodge*, the plaintiff sought monetary damages under various tort theories for an alleged wrongful detention. The detention happened after the plaintiff legally parked his vehicle on a residential street and walked into a wooded, public area, in the middle of the day. Someone called police and reported the unoccupied vehicle as suspicious. When the plaintiff returned to his vehicle, an officer detained him and prevented him from leaving. The officer observed nothing that suggested the vehicle had been involved in a crime, nor did he observe the plaintiff committing any crimes. He did consider hypotheticals involving potential criminal activity and knew other crimes had taken place in the area. Under the totality of the circumstances, we concluded the officer had no reasonable suspicion of criminal activity. 315 Kan. at 35.

A side-by-side comparison of this case with *Andrade-Reyes* and *Schreiner v. Hodge* highlights the fact-specific nature of determining reasonable suspicion. Just slight variations in circumstances can create reasonable suspicion even though somewhat analogous situations fail to rise to that standard. See *Arvizu*, 534 U.S. at 274-75 (noting Court has "deliberately avoided reducing [the reasonable suspicion standard] to '"a neat set of legal rules"'" but observing that "[e]ven if in many instances the factual 'mosaic' analyzed for a reasonable-suspicion determination would preclude one case from squarely controlling another, 'two decisions when viewed together may usefully add to the body of law on the subject'").

Unlike the circumstances in *Andrade-Reyes* and *Schreiner v. Hodge*, the police suspected Bates or the other occupant of the

minivan of ringing a stranger's doorbell at 1:27 a.m. As the district court judge stated: "Under the circumstances of this case, it was reasonable for both the 9-1-1 caller and the officers to conclude that something was amiss that should be looked into." And this specific—and unusual—practice followed a pattern seen in burglaries. The officers also felt it suspicious the minivan had driven to a nearby spot and parked with its lights off in a seldom-used alleyway. Granted, none of these circumstances—or all of them taken together—rule out innocent behavior. "A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct." *Arvizu*, 534 U.S. at 277 (citing *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 [2000]).

In summary, each of the factors we have identified is no doubt alone susceptible of innocent explanation, none provide probable cause to believe a crime occurred, and some factors are more probative than others. Taken together and "remembering that reasonable suspicion represents a 'minimum level of objective justification,'" *DeMarco*, 263 Kan. at 735, they suffice to form a particularized and objective basis for a reasonable suspicion that Bates was about to commit a crime. The seizure of the minivan was thus reasonable under the Fourth Amendment and section 15.

Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

No. 122,268

STATE OF KANSAS, *Appellant*, v. DEXTER BETTS, *Appellee.*

(514 P.3d 341)

SYLLABUS BY THE COURT

CRIMINAL LAW—*Statute Permits Claim of Self-defense Immunity if Use of Deadly Force Justified—Exception*. K.S.A. 2021 Supp. 21-5231(a) permits a criminal defendant in certain cases to claim self-defense immunity from prosecution for the justified use of deadly force. This statutory immunity is confined to circumstances when the use of such force is against a person or thing reasonably believed to be an aggressor. The statute does not extend immunity for reckless acts resulting in unintended injury to innocent bystanders while the defendant engaged in self-defense with a perceived aggressor.

Review of the judgment of the Court of Appeals in 60 Kan. App. 2d 269, 489 P.3d 866 (2021). Appeal from Sedgwick District Court; KEVIN J. O'CONNOR, judge. Opinion filed July 29, 2022. Judgment of the Court of Appeals affirming the district court is reversed. Judgment of the district court is reversed, and the case is remanded with directions.

Matt J. Maloney, assistant district attorney, argued the cause, and *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, were with him on the brief for appellant.

Jess W. Hoeme, of Joseph, Hollander & Craft LLC, of Wichita, argued the cause, and *Carrie E. Parker*, of the same firm, of Topeka, was with him on the briefs for appellee.

The opinion of the court was delivered by

BILES, J.: While securing the interior of a family home during a domestic violence investigation, Wichita Police Officer Dexter Betts fired two gunshots in quick succession at a fast-approaching dog he thought was attacking him. He missed, and bullet fragments struck a young girl sitting nearby. The State charged the officer with reckless aggravated battery for injuring her. Betts moved to dismiss the charge before trial. He argued state law immunizes his use of deadly force in self-defense—even if he acted recklessly and regardless of who got hurt. The district court agreed and dismissed the case. When the State appealed, a Court of Appeals panel affirmed. *State v. Betts*, 60 Kan. App. 2d 269, 489 P.3d

866 (2021). On review, we reverse the grant of statutory immunity and remand the case to the district court for further proceedings.

This appeal presents facts we have not considered before. In the typical self-defense immunity case, the State charges a defendant with an intentional crime committed against a person claimed to be the aggressor. And when the defendant invokes statutory immunity from prosecution in a case involving the use of deadly force against the alleged aggressor, we determine whether the defendant had a reasonable belief such force was necessary to prevent imminent death or great bodily harm to the defendant or a third person. See, e.g., *State v. Collins*, 311 Kan. 418, 461 P.3d 828 (2020) (two-prong test applies).

But what about a circumstance like this when the crime charged involves an innocent bystander who was unintentionally injured during the defendant's allegedly reckless conduct while engaging in self-defense? To answer that, we begin with the statute. *State v. Hardy*, 305 Kan. 1001, 1008, 390 P.3d 30 (2017) ("As with any problem of statutory interpretation, we turn first to the plain language of the statute itself."). K.S.A. 2021 Supp. 21-5231(a)'s text explicitly ties its privilege to yet another statute, K.S.A. 2021 Supp. 21-5222, which provides only that a person is "justified in the use of force *against another . . . to defend . . . against such other's imminent use of unlawful force*." (Emphasis added.) So on its face, the statutory grant of immunity is confined to the use of force against a person or thing reasonably believed to be an aggressor.

We hold K.S.A. 2021 Supp. 21-5231(a) does not extend its immunity to a defendant's reckless acts while engaged in self-defense that result in unintended injury to an innocent bystander as alleged here.

FACTUAL AND PROCEDURAL BACKGROUND

The parties do not dispute the district court's factual findings, so we quote from its written order:

"On December 30, 2017, defendant Betts, Officer [Andrew] Corliss & other Wichita Police Department (WPD) officers were dispatched to a residence on a report of domestic violence. . . . Information provided to law enforcement included that the man had a gun; the man had threatened suicide; the man had put

the gun in his mouth; the man had choked a dog. The officers were notified that the actions of the man were committed in front of children. Officers were informed that the children were in the house screaming. WPD officers were responding to a volatile and potentially dangerous situation.

"Officers Betts and Corliss contacted a male outside the home upon arrival. The man was unarmed. The officers saw children standing inside the front door of the residence. WPD Sgt. Crouch arrived and instructed officers Betts and Corliss to enter the residence to check the safety of the occupants. As officers Betts and Corliss approached the door or shortly after their entry into the residence, Sgt. Crouch informed the officers that the gun was inside the residence under a pillow in a bedroom.

"When the officers entered the residence, two . . . boys were in front of the television in the living room of the small home. A girl was on the floor in front of a sectional couch. . . . Officer Corliss entered the home and went to his left into the master bedroom and located a gun under a pillow. *Officer Betts acknowledged the children and entered a hallway. Officer Betts, consistent with WPD department policy and/or procedures, had his weapon drawn.* A flashlight was affixed to Officer Betts's firearm and provided illumination. *Officer Betts noticed what he believed to be a pit bull in one of the rooms off of the hallway.*

"Officer Corliss yelled out that he found a gun. *Officer Betts acknowledged Corliss and said 'we have a dog in here.' Officer Betts returned to the living room. The dog that Officer Betts had noticed had advanced down the hallway and was approaching Officer Betts. Officer Betts said 'whoa, whoa' and fired twice at the advancing dog. The girl mentioned earlier can be seen on the floor in front of the couch near the advancing dog. The dog was barking as it approached the officer and appears to be lunging toward Officer Betts when the shots are fired. The shots missed the dog and struck the floor. Bullet fragments struck the girl above the eye and on a toe.*

"Officer Betts's AXON camera recorded the incident. According to the AXON video, all of the above transpired within approximately thirty . . . seconds of the officers' entry into the home." (Emphases added.)

The State charged Betts with reckless aggravated battery under K.S.A. 2017 Supp. 21-5413(b)(2)(B) ("Aggravated battery is . . . recklessly causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted."). K.S.A. 2021 Supp. 21-5202(j) explains that "[a] person acts 'recklessly' or is 'reckless,' when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation."

The State's case alleges Betts consciously disregarded a substantial and unjustifiable risk of injury by firing his handgun twice

at the dog while the girl sat nearby on the living room floor. At the preliminary hearing, the district court found probable cause to believe the charged crime had occurred and probable cause to believe Betts committed it. In its ruling, the court noted, "the child that was ultimately injured . . . is right next to the dog." See *State v. Washington*, 293 Kan. 732, 733-34, 268 P.3d 475 (2012) (noting probable cause to bind a defendant over for trial "'signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt'").

Betts filed a pretrial motion to dismiss seeking self-defense immunity under K.S.A. 2021 Supp. 21-5231(a). It provides:

> "A person who uses force which . . . is justified pursuant to K.S.A. 21-5222 . . . is immune from criminal prosecution and civil action for the use of such force . . . . As used in this subsection, 'criminal prosecution' includes arrest, detention in custody and charging or prosecution of the defendant."

K.S.A. 2021 Supp. 21-5222, which K.S.A. 2021 Supp. 21-5231 references, adds detail:

> "(a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such use of force is necessary to defend such person or a third person against such other's imminent use of unlawful force.
>
> "(b) A person is justified in the use of deadly force under circumstances described in subsection (a) if such person reasonably believes that such use of deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person."

In his motion, Betts argued that so long as his use of deadly force against the dog was justified under this statutory scheme, any unintended harm to an innocent bystander should not change his entitlement to immunity. The State responded with three arguments: (1) self-defense immunity is never available to those who act recklessly; (2) a reasonable person in Betts' circumstances would not believe firing a handgun in the living room was justified because he saw the children and knew a dog was on the premises before he arrived; and (3) self-defense immunity is reserved for deadly force applied against a person, but not an animal.

Three witnesses testified for the State at an evidentiary hearing on the motion to dismiss. Officer Corliss described the incident, while Officer Hannah Holley, a crime scene investigator, explained how the bullets fragmented when they struck the floor and hit the girl. Wichita Police Lieutenant Christopher Halloran, a former range master in charge of the department's firearms training, described the policy on use of deadly force in self-defense against animals. He explained the policy allows WPD officers to use firearms to defend themselves against a charging or dangerous animal. He said: "[T]he fact that Officer Betts used his weapon to defend himself against a dog is not uncommon." He added: WPD "does shoot dogs pretty regularly." He presented a video simulator used to train recruits that includes scenarios with dog attacks. The defense introduced evidence summarizing 21 incidents of officers shooting at dogs between 2014 and 2018.

In ruling, the district court limited itself to the State's arguments, rejecting each. First, the court decided a defendant can assert self-defense immunity when charged with a recklessness crime. It relied on *Hardy*, 305 Kan. at 1010, which characterized the statutory scheme as a "true immunity." The district court concluded self-defense immunity should be available regardless of the charged offense's mens rea element. Otherwise, the court continued, "it . . . put[s] the cart before the horse." The court reasoned, "The immunity statute would be meaningless if the State could avoid the statute by claiming that justifiable use of force to defend one's self is nonetheless criminally reckless based upon the circumstances of such use of force or the environment in which the force was exercised." It held the statute grants immunity from criminal prosecution whether the State charges intentional, knowing, or reckless behavior.

Second, the court addressed the State's argument that a reasonable person in Betts' circumstances would not believe firing a handgun in the living room with children nearby was justified self-defense, by ruling:

"[T]here is no conflict in the evidence in this case. *Neither party disputes that Officer Betts was, in fact, defending himself. The 'dispute' in this case is whether Officer Betts should have fired his weapon in defense of himself under the cir-*

cumstances not whether he was or was not justified in defending himself. Arguably, if the shots had met their mark, Officer Betts would not have been charged with a crime.

. . . .

"[T]he court first concludes that Officer Betts was lawfully present in the home and had no duty to retreat under the law. Officer Betts was not the aggressor as contemplated by K.S.A. 21-5226.

. . . .

"The evidence establishes and neither party disputes that Betts reasonably believed that the use of force was necessary to defend himself from the dog's attack. *The court finds that a reasonable person and/or a reasonable law enforcement officer would have believed that the use of force in self-defense was necessary under the circumstances.*

. . . .

". . . The decision in this case is based solely upon the facts and circumstances of the case and applies only to this case. The decision does not preclude prosecution of a law enforcement officer for a reckless aggravated battery under different circumstances. The court can contemplate factual situations where the State could meet its burden to demonstrate probable cause that use of force by an officer was not justified. This is simply not one of those cases because the dispute in this case is not whether Betts was defending himself. *The State is alleging that Betts should not have done so under the circumstances. An argument can be made that Officer Betts could have and/or should have allowed the dog to attack him and suffer possible injury to his person. The argument regarding whether Betts should have used force to defend himself under the circumstances is a philosophical argument subject to varied opinions. The analysis the court conducts is confined to the parameters of the statute and neither party disputes and the evidence establishes that Betts was justified in the use of force in defending himself.* The statute grants immunity from criminal prosecution. No exception exists for the criminal prosecution of alleged reckless behavior.

"The injuries to the little girl as a result of the actions of Officer Betts were certainly unfortunate and regrettable. However, *the court finds that the State has failed to meet its burden to demonstrate that the defendant's use of force was not justified.*" (Emphases added.)

Finally, the court repeated its earlier rejection of the State's human-vs.-animal distinction, by noting in its written order:

"[A]lthough [K.S.A.] 21-5222 would certainly suggest that a claim of self-defense can only be asserted against another person's unlawful force and an animal cannot act unlawfully. [K.S.A.] 21-5221(a)(1), however, defines 'use of force' as the application of physical force, including by a weapon directed at or upon another person or *thing*. The legislature included the word *thing* i[n] the statute and the court concluded that an animal, in this case a dog, was a thing as contemplated by the statute.

"A person's use of force to defend against an animal attack is normally not controversial and rarely, if ever, is alleged to rise to the level of criminal behavior. The unique circumstances of this case required the court to consider the question of whether a claim of self-defense can be asserted against an animal and the court answered in the affirmative based upon the definition of use of force."

Neither party appealed this third ruling, so we treat it here as settled. See *State v. Dale*, 312 Kan. 174, 182, 474 P.3d 291 (2020) ("A party generally abandons or waives an issue by not briefing or arguing it to the court."). For the other rulings, the State appealed. See K.S.A. 2021 Supp. 22-3602(b)(1) (State may appeal dismissal of complaint, information, or indictment).

A Court of Appeals panel affirmed. It held the district court correctly allowed Betts to assert immunity because the statute "permits a district court to consider a defendant's claims of self-defense regardless of whether the State has charged conduct that is intentional, knowing, or reckless." *Betts*, 60 Kan. App. 2d at 282. It then held the court correctly found a reasonable person in Betts' position would have perceived deadly force to be necessary to protect against the approaching dog. 60 Kan. App. 2d at 282.

We granted the State's petition for review. Parenthetically, we note Betts did not cross-petition for review of the panel's decision on a preservation claim he raised on appeal, so that is resolved in the State's favor. See *State v. McBride*, 307 Kan. 60, 62, 405 P.3d 1196 (2017) (effect of failing to cross-petition for review). Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decision); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

APPLYING SELF-DEFENSE IMMUNITY TO RECKLESS CONDUCT

We have consistently viewed the pretrial grant of statutory immunity under K.S.A. 2021 Supp. 21-5231(a) as a discrete analytical exercise from that required when a defendant asserts self-defense as an affirmative defense at trial. *Hardy*, 305 Kan. at 1009-10 ("Self-defense and immunity are clearly distinct concepts."). Here, the State argues statutory immunity is unavailable because it charged Betts with a reckless conduct crime. This presents an issue of statutory interpretation over which a court exercises unlimited review. 305 Kan. at 1008.

"'To the extent we are called upon to interpret the statute, we first attempt to give effect to the intent of the legislature as expressed through the language of the statutory scheme it enacted. When a statute is plain and unambiguous, the court must give effect to express language, rather than determine what the law should or should not be. Stated another way, when a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a statute so as to add something not readily found in the statute. Stated yet another way, a clear and unambiguous statute must be given effect as written. If a statute is clear and unambiguous, then there is no need to resort to statutory construction or employ any of the canons that support such construction.'" *State v. Ayers*, 309 Kan. 162, 163-64, 432 P.3d 663 (2019).

To argue its point, the State focuses on the mens rea for the charged offense. But in our view, it is more meaningful that the crime charged here alleges unintended injury to an innocent bystander. To explain this, we start with the State's argument that self-defense immunity cannot prevent prosecution for reckless crimes because self-defense is available only in cases alleging intentional crimes.

The State relies on *State v. Bradford*, 27 Kan. App. 2d 597, 3 P.3d 104 (2000), *superseded by statute on other grounds as stated in State v. Cordray*, 277 Kan. 43, 82 P.3d 503 (2004). In that case, the defendant struck a hammer-wielding woman with his car during an argument and was convicted of reckless aggravated battery. The panel reversed the conviction because of a failure to instruct on lesser included offenses. But the panel went on to consider another claimed error concerning the district court's rejection of a requested self-defense jury instruction for that same reckless aggravated battery charge in the context of self-defense claimed as an affirmative defense. The panel said the district court was correct not to instruct on self-defense because "[s]elf-defense is the intentional use of reasonable force to fend off an attacker. The concept of recklessness does not fit within the definition of self-defense." 27 Kan. App. 2d at 601; see also *State v. Edwards*, No. 118,626, 2019 WL 1575717 (Kan. App. 2019) (unpublished opinion) (holding a self-defense instruction factually inappropriate because there was insufficient evidence to support self-defense, and legally inappropriate because self-defense does not apply to reckless aggravated battery, relying on *Bradford*).

But the State's embrace of *Bradford* to argue a distinction based on mens rea alone is misplaced. K.S.A. 2021 Supp. 21-5231(a)'s text tells us that a person who uses justifiable force under K.S.A. 2021 Supp. 21-5222 "is immune from criminal prosecution," which "includes arrest, detention in custody and *charging* or prosecution." (Emphasis added.) This extension of immunity for even "charging" a defendant suggests the mens rea element of any potential crime would not impact an immunity analysis. And while K.S.A. 2021 Supp. 21-5222 deems the use of force justified when the defender "reasonably believes" it is "necessary," neither the statute nor our traditional two-part test for applying it includes the charged offense's mens rea in its analysis. See *Collins*, 311 Kan. at 427-28. Based on this, we conclude the charged offense's mens rea does not resolve the statutory immunity question presented here.

We turn next to the circumstances underlying the crime charged, which in this instance involves unintended injury to an innocent bystander who the defendant did not perceive to be an attacker. Placing our focus on the facts alleged sharpens the analysis and allows contrast with the prior caselaw.

As mentioned, in the usual deadly-force self-defense immunity case, the alleged victim and aggressor are the same person. In such a case, a "district court must consider the totality of the circumstances, weigh the evidence before it without deference to the State, and decide whether the State has carried its burden to show probable cause that defendant's use of force was not statutorily justified." *State v. Phillips*, 312 Kan. 643, Syl. ¶ 1, 479 P.3d 176 (2021). The State meets its burden by showing defendant's use of deadly force was not justified because either (1) the defendant did not honestly believe the use of deadly force was necessary against the aggressor to prevent imminent death or great bodily harm to the defendant or a third person, or (2) a reasonable person in the same circumstances would not have perceived the use of lethal force against the aggressor necessary to protect the defendant or a third person. 312 Kan. at 662-63. This test derives from K.S.A. 2021 Supp. 21-5222. The first prong is a subjective inquiry, while the second is an objective one. *Collins*, 311 Kan. at 427. This two-part test has not previously required a person acting in self-defense

to consider their surroundings before unleashing lethal force against their attacker.

But if the alleged victim and alleged aggressor are different people, this test falls short because it would resolve the immunity question by considering only whether the defendant's otherwise criminal act was justified against the attacker without regard to the alleged reckless injury inflicted on the victim. Our statutory scheme requires a different analytical path to address the crime charged.

Looking first at K.S.A. 2021 Supp. 21-5221(a), we see "[u]se of deadly force" is broadly defined. It includes "any or all of the following directed at or upon another person or thing: . . . the application of physical force, including by a weapon or through the actions of another" "which is likely to cause death or great bodily harm to a person." But K.S.A. 2021 Supp. 21-5231(a), which references K.S.A. 2021 Supp. 21-5222, has more narrowly defined the conditions for when a defendant is immunized for the use of justified force. The latter statute provides only that a person is "justified in the use of force *against another* . . . to defend . . . *against such other's* imminent use of unlawful force." In other words, the justification is for the force directed at an attacker. The statutes do not speak to force that results in accidental injuries to third parties. And this means different circumstances may bring about dissimilar outcomes for a defendant whose self-defense injures an innocent person.

Consider some possibilities for illustration. For instance, the defendant might intentionally shoot a bystander under the mistaken belief the bystander is an aggressor. E.g., *Carbo, Inc. v. Lowe*, 521 N.E.2d 977 (Ind. Ct. App. 1988) (holding liquor store clerk entitled to believe he was being attacked during a robbery attempt when unmasked innocent bystander, who entered store with masked armed robbers, vaulted over the store counter after robbers began firing; the clerk's fatal shooting of bystander was justifiable self-defense). This scenario seemingly could fall within our standard test for immunity because it requires only that the defendant "reasonably believe[]" the person against whom force is used is about to use unlawful force against the defendant or a

third person. K.S.A. 2021 Supp. 21-5222. We are not deciding this today, however, because those facts are not presented.

Another possibility would be if the defendant accidentally injures the bystander during an otherwise justified act of self-defense. If the State charges an intentional crime for this, the defendant would presumably argue he harbored no criminal intent toward the bystander. See *People v. Morris*, 109 A.D.2d 413, 416, 491 N.Y.S.2d 860 (1985) (if defendant would have been justified in shooting the intended victim, defendant is no less justified in accidentally shooting an innocent bystander when charged with intentional crime, but under certain circumstances, defendant may be convicted of lesser included offense if jury concludes injury to bystander caused by defendant's reckless or negligent conduct). Again, we are not deciding this scenario here because the State did not charge Betts with an intentional crime.

So what if the State alleges a reckless crime involving injury to a bystander, i.e., the State asserts the defendant consciously disregarded a substantial and unjustifiable risk of injury to the bystander while exercising the self-defense privilege against a perceived attacker? Only two Court of Appeals decisions have minimally touched on a similar fact-pattern, but neither help. *In re C.J.*, No. 72,845, 1995 WL 18253426, at *1 (Kan. App. 1995) (unpublished opinion), rejected a claim defendant was not guilty of battery when defendant unintentionally hit a teacher who was trying to break up a school brawl when evidence showed self-defense no longer necessary against the initial aggressor. The panel did not reach the innocent bystander question because it held the facts failed to justify self-defense regardless. The only other discussion came more generally in *State v. Bellinger*, 47 Kan. App. 2d 776, 278 P.3d 975 (2012), in which the dissent listed some out-of-state cases and superficially concluded: "If a defendant legitimately acts in self-defense, he or she is commonly not criminally responsible for harm to third parties." 47 Kan. App. 2d at 800 (Atcheson, J., dissenting).

In our view, the crime charged can shift the focus. And the State here claims a reckless crime occurred when Betts fired his handgun twice at the dog while the girl sat nearby. See K.S.A.

2021 Supp. 21-5413(b)(2)(B) ("Aggravated battery is . . . recklessly causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted."); K.S.A. 2021 Supp. 21-5202(j) ("A person acts 'recklessly' or is 'reckless,' when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.").

As noted, K.S.A. 2021 Supp. 21-5222 provides only that a person is "justified in the use of force *against another . . . to defend . . . against such other's imminent use of unlawful force*." (Emphasis added.) This means statutory immunity attaches to the use of force against the person or thing reasonably believed to be an aggressor—not an innocent bystander such as the young girl here. So when a defendant asserts self-defense immunity in a case involving reckless injury to an innocent bystander, who the defendant did not perceive to be an attacker, immunity does not apply. Said more plainly, the reckless use of force against innocent bystanders lies outside the immunity statute's stated scope, so the prosecution can proceed if the State can demonstrate probable cause exists that the defendant recklessly harmed the bystander as defined by the criminal statutes. See K.S.A. 2021 Supp. 22-2902(3) (probable cause finding at preliminary examination).

This result is in line with most states that have addressed the innocent bystander issue by either statute or caselaw. In states with statutes providing a self-defense privilege extending to unintended harm to an innocent bystander, they do so expressly and do not allow it unconditionally. And while the specific text differs, all declare a self-defense claim available when the defendant acted with usual and ordinary caution and without an unlawful intention or is unavailable when the defendant acted either recklessly or negligently. See, e.g., Ala. Code § 13A-3-21(b) ("If a person is justified or excused in using force against a person, but he recklessly or negligently injures or creates a substantial injury to another person, the justifications afforded by this article are unavailable in a prosecution for such recklessness or negligence."); Ariz.

Rev. Stat. Ann. § 13-401(A) (self-defense justification "unavailable in a prosecution for the reckless injury or killing of the innocent third person"); Ark. Code Ann. § 5-2-614(b) (self-defense justification "unavailable in a prosecution for the recklessness or negligence toward the third party"); Del. Code Ann. tit. 11 § 470(b) (self-defense justification "unavailable in a prosecution for an offense involving recklessness or negligence towards innocent persons"); Haw. Rev. Stat. Ann. § 703-310(2) (self-defense justification unavailable "for such recklessness or negligence toward innocent persons"); Idaho Code Ann. § 18-4012 ("Homicide is excusable . . . [w]hen committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent."); Ky. Rev. Stat. Ann. § 503.120(2) (self-defense justification "unavailable in a prosecution for an offense involving wantonness or recklessness toward innocent persons"); Me. Rev. Stat. tit. 17-A § 101(3) (self-defense justification "is unavailable in a prosecution for such recklessness"); Miss. Code. Ann. § 97-3-17(a) ("The killing of any human . . . shall be excusable . . . [w]hen committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent."); *Rogers v. State*, 994 So. 2d 792, 802 (Miss. Ct. App. 2008) (applying Miss. Code. Ann. § 97-3-17 in innocent bystander case); Mo. Ann. Stat. § 563.070 ("Conduct which would otherwise constitute an offense . . . is excusable and not criminal when it is the result of accident in any lawful act by lawful means without knowingly causing or attempting to cause physical injury and without acting with criminal negligence."); Neb. Rev. Stat. Ann. § 28-1414(3) (self-defense justification "unavailable in a prosecution for such recklessness or negligence towards innocent persons"); N.J. Stat. Ann. § 2C:3-9 (self-defense justification "unavailable in a prosecution for such recklessness or negligence towards innocent persons"); N.M. Stat. Ann. § 30-2-5(A) ("Homicide is excusable . . . when committed by accident or misfortune in doing any lawful act, by lawful means, with usual and ordinary caution and without any unlawful intent."); N.D. Cent. Code Ann. § 12.1-05-01 (self-defense justification "unavailable in a prosecution for such recklessness or

negligence"); Okla. Stat. Ann. tit. 21, § 731 ("Homicide is excusable . . . [w]hen committed by accident and misfortune in doing any lawful act, by lawful means, with usual and ordinary caution, and without any unlawful intent."); S.D. Codified Laws § 22-16-30 ("Homicide is excusable if committed by accident and misfortune in doing any lawful act, with usual and ordinary caution."); Tenn. Code Ann. § 39-11-604 (self-defense justification "unavailable in a prosecution for harm to an innocent third person who is recklessly injured or recklessly killed by the use of such force"); Tex. Penal Code Ann. § 9.05 (self-defense justification "unavailable in a prosecution for the reckless injury or killing of the innocent third person"); Wash. Rev. Code Ann. § 9A.16.030 ("Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent."); Wis. Stat. Ann. § 939.48(3) ("The privilege of self-defense extends not only to the intentional infliction of harm upon a real or apparent wrongdoer, but also to the unintended infliction of harm upon a 3rd person, except that if the unintended infliction of harm amounts to the crime of first-degree or 2nd-degree reckless homicide, homicide by negligent handling of dangerous weapon, explosives or fire, first-degree or 2nd-degree reckless injury or injury by negligent handling of dangerous weapon, explosives or fire, the actor is liable for whichever one of those crimes is committed.").

In 15 states and the District of Columbia, there are no explicit statutes on the subject and no caselaw. But in those states where there is caselaw, 13 allow a self-defense privilege to extend to unintended harm to a bystander but have held or at least suggested reckless crimes are excluded—California, Colorado, Florida, Georgia, Illinois, Maryland, Michigan, Minnesota, New York, North Carolina, Ohio, Utah, and Wyoming. See, e.g., *People v. Mathews*, 91 Cal. App. 3d 1018, 1024, 154 Cal. Rptr. 628 (Ct. App. 1979) (privilege extended to voluntary manslaughter, an intentional crime but without malice); *Henwood v. People*, 54 Colo. 188, 192, 194, 129 P. 1010 (1913) (defendant challenged the second-degree murder conviction; noting "[i]f the facts justified him in so doing, his action in this respect would be lawful, but, if he

did so without due caution or circumspection, taking into consideration the presence of others in the barroom, he was not guiltless, but might be adjudged guilty of involuntary manslaughter in causing the death of Copeland"); *Nelson v. State*, 853 So. 2d 563, 565 (Fla. Dist. Ct. App. 2003) ("[A]ppellant should have been entitled to transfer his theory of self-defense to defend against the transferred intent crime."); *Howard v. State*, 307 Ga. 12, 23, 834 S.E.2d 11 (2019) (noting the principle of transferred justification does not apply when the accused shot carelessly and in reckless and wanton disregard of the danger resulting to bystander); *People v. Getter*, 26 N.E.3d 391 (Ill. App. Ct. 2015) (extending privilege to aggravated discharge of a firearm against the innocent bystander, which required a defendant acted knowingly); *Ruffin v. State*, 10 Md. App. 102, 268 A.2d 494 (1970) (self-defense justification available to intentional crimes; holding it was inapplicable to a reckless crime); *People v. Jackson*, 390 Mich. 621, 624, 212 N.W.2d 918 (1973) ("The unintended killing of an innocent bystander is not murder if justifiably committed in proper self-defense. It may, however, be manslaughter."); *People v. Morris*, 109 A.D.2d 413, 415-17, 491 N.Y.S.2d 860 (1985) (holding where defendant would have been justified in shooting intended victim, defendant is no less justified in shooting innocent bystander accidentally; however, under certain circumstances, defendant may be convicted of lesser included offense if jury concludes that injury to bystander was caused by defendant's reckless or negligent conduct); *State v. Mitchell*, 251 N.C. App. 370, 794 S.E.2d 922 (2016) (holding the privilege could have been available to an assault-with-a-deadly-weapon-inflicting serious-injury crime, unclear from the opinion, but this crime is either intentionally or knowingly done; holding no evidence supported self-defense, so that privilege had no bearing on the instant case); *State v. Clifton*, 32 Ohio App. 2d 284, 286, 290 N.E.2d 921 (Ohio Ct. App. 1972) (extending privilege to the crime of knowingly causing the death of third party); *State v. Castillo*, 23 Utah 2d 70, 72, 457 P.2d 618 (1969) (recognizing "the general principle that if a person acting in necessary self-defense unintentionally injures a third person, he is not guilty of assault and battery"); *Holloman v. State*, 51 P.3d 214, 221 (Wyo. 2002) ("The general rule is that if a person acting

in necessary self-defense unintentionally injures or kills a third person, he is not guilty of homicide or assault and battery. . . . The rule is not absolute and may not apply if the defendant acted recklessly or negligently."); *State v. Griffis*, No. A14-1921, 2015 WL 4994451, at *4 (Minn. Ct. App. 2015) (unpublished opinion) (extending privilege to intentional crime but unavailable when defendant is "criminally liable for reckless or negligent conduct that injures a third party").

Pennsylvania is an outlier but instructive for illustrating the public policy issues that would have to be decided to judicially extend self-defense immunity here beyond our statute's explicit terms. See *Com. v. Fowlin*, 551 Pa. 414, 710 A.2d 1130 (1998) (extending privilege to reckless acts even when innocent bystander harmed). Sobering too are the facts. In *Fowlin*, the defendant drew his gun in a crowded nightclub in self-defense. He randomly fired 7-11 shots into the crowd after being blinded by pepper spray in the initial attack. He killed an assailant and wounded another attacker, but he also shot an innocent bystander. A court majority held the defendant could not be criminally liable for reckless endangerment or aggravated assault for shooting the bystander. 551 Pa. at 421-22. In disagreeing, the dissenters commented:

> "The holding of the majority effectively allows an actor to respond *in any manner and with whatever amount of force he chooses no matter who he injures*, so long as he is justified in acting in self-defense. This is a dangerous precedent. . . . [S]uch blanket authority for the use of self-defense defies logic, especially in contemporary society where possession of lethal weapons and confrontations involving them have become all too commonplace. *Under the majority's reasoning, one would be justified and could not be found criminally liable for detonating a hand-grenade in a crowded shopping mall in order to defend himself against an attacker*." (Emphases added.) 551 Pa. at 426 (Castille, J., concurring and dissenting).

The *Fowlin* dissent underscores the policy questions in play when deciding whether, or to what extent, immunity should shield defenders from criminal and civil liability for reckless harm to innocent bystanders. And since Kansas statutes have not addressed those choices, our duty without such direction or statutory ambiguity is not to make public policy. See, e.g., *State v. Rozell*, 315 Kan. 295, 304, 508 P.3d 358 (2022) (courts do not add words to

statutes when interpreting them "except in limited situations after finding a statutory ambiguity"). We observe no ambiguity in the statute as drafted, and the parties have not identified any. If the Legislature wishes to extend self-defense immunity when an innocent bystander is hurt, it can do so.

In the meantime, we find nothing in the statutes providing a blanket shield for reckless conduct injuring an innocent bystander who was not reasonably perceived as an attacker. So once the State meets its burden to come forward with probable cause to show the use of deadly force was done recklessly as alleged here, the case should proceed. See K.S.A. 2021 Supp. 22-2902(3) (upon preliminary examination, "[i]f from the evidence it appears that a felony has been committed and there is probable cause to believe that a felony has been committed by the defendant, the magistrate shall order the defendant bound over to the district judge having jurisdiction to try the case"); see also K.S.A. 2021 Supp. 21-5413(g)(2)(D) (reckless aggravated battery is a severity level 8, person felony).

The judgment of the Court of Appeals affirming the district court is reversed. The judgment of the district court is reversed, and the case is remanded to the district court for further proceedings.

State v. White

No. 122,039

STATE OF KANSAS, *Appellee,* v. JOHNNY C. WHITE, *Appellant.*

(514 P.3d 368)

SYLLABUS BY THE COURT

1. TRIAL—*Exclusion of Evidence at Trial –Preservation of Issue for Appeal Requires Substantive Proffer—Two-Fold Purpose.* When a district court excludes evidence at trial, the party seeking to admit that evidence must make a sufficient substantive proffer to preserve the issue for appeal. A formal proffer is not required, and we may review the claim as long as an adequate record is made in a manner that discloses the evidence sought to be introduced. The purpose of such a proffer is two-fold—first, to procedurally preserve the issue for review, and second, to substantively demonstrate lower court error.

2. INDICTMENT AND INFORMATION—*Statute Permits Amendment of Information Before Verdict if No Additional or Different Crime Charged and Rights Not Prejudiced*. K.S.A. 2021 Supp. 22-3201(e) permits the State to amend an information at any time before a verdict if it charges no additional or different crime and if the defendant's substantial rights are not prejudiced. The State has considerable latitude in charging and amending the time periods during which a defendant is accused of sexually abusing children—even if the changes in the time frames are substantial—so long as the change would not prejudice the defendant. A district court does not abuse its discretion by allowing the State to amend an information in situations where the defendant has only minimally developed an alibi defense.

Review of the judgment of the Court of Appeals in 60 Kan. App. 2d 458, 494 P.3d 248 (2021). Appeal from Sedgwick District Court; JEFFREY SYRIOS, judge. Opinion filed August 5, 2022. Judgment of the Court of Appeals affirming the district court on the issues subject to review is affirmed. Judgment of the district court is affirmed on the issues subject to review.

Kasper Schirer, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Julie A. Koon, assistant district attorney, argued the cause, and *Lesley A. Isherwood*, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: In 2014, Johnny C. White pled guilty to aggravated indecent liberties with a child after admitting to raping his

teenage granddaughter. In 2017, C.U., a friend of White's granddaughter, disclosed that White had sexually abused her several years prior during a sleepover. The State then charged White with two counts of aggravated indecent liberties with a child, and a jury convicted White of the first count only. A Court of Appeals panel affirmed White's conviction, and we granted his petition for review. Today we affirm the Court of Appeals and affirm White's conviction.

FACTS

In May 2017, C.U. disclosed to her aunt that she had been sexually violated several years earlier by her friend's grandfather. During a sleepover at the friend's house, C.U. said that she woke to find her panties pulled down by a man who was touching her vagina. The man then took her hand and forced her to touch his penis. This happened in the early morning hours while C.U. was on the couch in the living room and the rest of the girls were asleep on the floor.

C.U. recalled that she was approximately eight years old when the touching occurred. The home was owned by White's daughter and her husband, the parents of C.U.'s friend. White was living in the basement of the home. During that time frame C.U. spent the night at that house nearly every weekend.

At the time of C.U.'s disclosure in 2017, White was serving a sentence at the Hutchinson Correctional Facility as the result of his 2014 guilty plea and conviction. After interviewing C.U., Wichita Detective Daniel Ribble interviewed White at the prison. White consistently denied any touching of C.U. throughout the hour-long interview. White also agreed to take a polygraph examination.

A few weeks later Detective Ribble returned to the prison with a KBI agent trained in the administration of polygraph examinations. After the examination, the agent concluded that the polygraph results showed that White "was not truthful in his responses to the relevant questions" regarding C.U.'s accusations. Ribble returned to the room, and he and the agent continued interviewing White. They told White he was not being truthful and that he had failed the polygraph. They suggested that C.U. had no reason to

make up her story, that she was telling the truth, and that the only way to give C.U. closure and healing would be to confess. Eventually, when asked "how many times" the touching happened, White finally responded: "Once." He then admitted that "she's not lying to you."

White said that he came upstairs in the early morning hours, before it was light, to use the bathroom. He admitted he saw C.U. sleeping on the couch, sitting down on the couch, and touching her vagina. White continued to deny that C.U. had touched his penis, reiterating that "she never touched any part of my body." The State charged White with two off-grid counts of aggravated indecent liberties with a child. Count one concerned C.U.'s allegation that White touched C.U.'s vagina, and count two concerned her allegation that White forced C.U. to touch his penis.

Before trial, the State moved to exclude from evidence any mention of the use of the polygraph during the interrogation, seeking to only admit the portion of the interview that contained the confession. White filed a motion to suppress the confession, arguing that it was coerced and involuntary. The State also sought to admit White's 2014 videotaped confession as propensity evidence under K.S.A. 2021 Supp. 60-455(d) over defense objection.

After a hearing on the motions, at which White testified, the district court ordered that neither party elicit any testimony related to the polygraph examination. The court found White's 2017 confession admissible because it was freely, voluntarily, and intelligently made. It also ruled that the State could present the 2014 video confession as propensity evidence under K.S.A. 2021 Supp. 60-455(d). In addition to the video, the district court admitted the journal entry of conviction and the 2014 interrogating officer Detective Richard Gerdsen's foundation testimony.

Just before the jury was sworn in, White stipulated in writing to having been convicted of aggravated indecent liberties with a child in 2014. In addition to the stipulation, the State played the 2014 confession video for the jury. In that video, White repeatedly described the very graphic details of the sexual encounters with his granddaughter in response to Detective Gerdsen's questions. White reiterated many times that he "tried to resist the temptations, she's my granddaughter and its wrong." White discussed how he had attempted suicide and

talked about his desire to kill himself because he could not live with the shame and the guilt.

On the fourth day of trial, the State moved to amend the date range in the information to match C.U.'s trial testimony. Previously, C.U. had said the touching occurred when she was around eight years old; but at trial, in response to questions by defense counsel, she said it occurred when she was "seven [or] eight." Because the original information's date range was from January 1, 2009 to December 31, 2009, the State sought to amend the information to include the dates between January 25, 2008 and December 31, 2009 to match C.U.'s testimony. The district court permitted the amendment over defense objection.

The jury asked two questions during deliberations: (1) "Was the interview on Aug[ust] 17th or 2nd interview with the two officers a sworn testimony by the defendant?" and (2) "May we have the transcripts for the interviews?" Before the district court could respond to these questions, however, the jury returned its verdict. The jury convicted White on count one (that he touched C.U.) and acquitted him on count two (that he forced C.U. to touch him). The district court sentenced White to a hard 25 life sentence.

The Court of Appeals assumed without deciding that it was error for the district court to admit the 2014 confession, because even if it was error, it was harmless. *State v. White*, 60 Kan. App. 2d 458, 486, 494 P.3d 248 (Kan. App. 2021). The panel identified no other trial errors and affirmed White's conviction. 60 Kan. App. 2d at 487. We granted White's petition for review.

DISCUSSION

White argues four issues on appeal: (1) his right to present a defense was violated by exclusion of the polygraph; (2) the district court abused its discretion when it permitted the State to amend the information; (3) the admission of his 2014 videotaped confession was reversible error; and (4) cumulative error denied him a fair trial. We consider each issue in turn.

The district court's exclusion of polygraph evidence did not violate White's right to present a defense.

White first argues that exclusion of the fact that he took a polygraph rendered him unable to argue to the jury that his confession was

unreliable. He relies on *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986), to argue the constitutional right to present a complete defense "would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence."

We exercise unlimited review when the defendant claims the district court interfered with his constitutional right to present a defense. *State v. Seacat*, 303 Kan. 622, 638, 366 P.3d 208 (2016).

When a district court excludes evidence at trial, the party seeking to admit that evidence must make a sufficient substantive proffer to preserve the issue for appeal. *State v. Swint*, 302 Kan. 326, 332, 352 P.3d 1014 (2015). A formal proffer is not required, and we may review the claim as long as "an adequate record is made in a manner that discloses the evidence sought to be introduced." 302 Kan. at 332. The purpose of such a proffer is two-fold—first, to procedurally preserve the issue for review, and second, to substantively demonstrate lower court error. Here, while we find that White's proffered testimony at the pretrial motions hearing preserved the issue for our review, we conclude that the substance of that proffer is insufficient to support his claims made on appeal.

The substance of White's proffered testimony at the district court is as follows:

"[Counsel] Can you tell the Court, you know, *all the various reasons why you changed* from maintaining that you did not do this to saying that you did.

"[White] Well, I've suffered from blackouts for most of my life. When the detective asked me, well, maybe I did this and I just don't remember doing it, then the best answer I could give was, well, it could be possible I did this and just don't remember doing it. But after going over the police reports with you and reading all these statements and stuff like this, I don't—I don't believe I did anything to that girl." (Emphasis added.)

Now, on appeal, White argues that the jury could not make "a fully informed decision about the veracity of the confession" without having the evidence that White took "an inherently unreliable" polygraph examination. In his appellate brief, White cites to *Crane v. Kentucky* where the Court held that a defendant must be able to answer "the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" 476 U.S. at 689. The Court found that excluding the circumstances that

prompted the confession "strip[s]" a defendant and prohibits him from casting doubt on the credibility of his confession. 476 U.S. at 689. *Crane* thus applies in situations where a defendant's right to present a defense is inhibited by a specific circumstance that the defendant is unable to describe for the jury.

Here though, the proffer does not line up with the rule from *Crane*. White tries to argue on appeal that the polygraph was the specific circumstance that induced him to change his testimony, but the substance of his proffered testimony says otherwise. As we have said, "[t]he proponent of excluded evidence has the duty of making known the 'substance' of the expected evidence in a proffer." *State v. Evans*, 275 Kan. 95, 99, 62 P.3d 220 (2003). The substance that White made known in his proffer centered on his history of alcoholism and blackouts—not taking the polygraph examination. His proffer did not say that the polygraph examination or its results caused him to confess. The district court did not bar White from testifying about his history with blackouts, and therefore did not bar White from describing the reason why he confessed.

Under the proffered facts here, White cannot show that his right to present a defense was inhibited by the polygraph. We conclude that the district court did not err in excluding evidence of the polygraph examination.

The district court did not abuse its discretion when it allowed the State to amend the information.

We review a district court's decision to grant a motion to amend an information for abuse of discretion. *State v. Bischoff*, 281 Kan. 195, 205, 131 P.3d 531 (2006). An abuse of discretion occurs if the decision is arbitrary, fanciful, or unreasonable, or if it is based on an error of law or fact. *State v. Ingham*, 308 Kan. 1466, 1469, 430 P.3d 931 (2018).

The State may amend an information at any time before a verdict if it charges no additional or different crimes and if the defendant's substantial rights are not prejudiced. K.S.A. 2021 Supp. 22-3201(e). In assessing prejudice, we consider whether (1) the date was a critical issue; (2) the change implicates the statute of limitations; (3) the amendment affects an alibi defense; (4) time

was an element of the offense; or (5) there is any surprise to the accused. *State v. Holman*, 295 Kan. 116, 146, 284 P.3d 251 (2012), *overruled on other grounds by State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016).

As the Court of Appeals recognized, the State is given "considerable latitude in charging the time periods during which child victims have been sexually abused." *White*, 60 Kan. App. 2d at 477. For example, in *State v. Nunn*, 244 Kan. 207, 225, 768 P.2d 268 (1989), the defendant was charged with several sex crimes. On the second day of a three-day trial, the State amended the one-month long time frame in the original information to cover a year-long period, and another two-week period was expanded to cover a one-year period. We recognized that those changes in the time frames were substantial; however, because the defendant's defense was simply a denial of the allegations, we found that there was no prejudice by the amendment. We said that "[i]t was for the jury to determine what weight and credibility should be given to the testimony of [the victim] in light of the changed dates and inconsistencies in the evidence." 244 Kan. at 227.

White contends the amendment "robbed him of a potentially viable alibi defense," arguing that the evidence showed that he was no longer living in the home during the January 1, 2009 to December 31, 2009 time frame in the original information. But while some testimony was elicited about when White moved out of the house, the record was murky on that point. The trial testimony did not develop any cognizable time frame for when White would have moved out, and several witnesses contradicted his claims. For example, when the State asked White's daughter: "In the year 2009, would Mr. White have been living with you at the 2230 address?" she replied "[y]es." And Detective Ribble testified that White did not remember exactly when he moved out but agreed it would have been sometime between 2008 and 2010 after White lost his job due to the recession. But Ribble did say that he "talk[ed] to family members who *confirmed that* [*White*] *would have been there through 2010*." (Emphasis added.)

As the Court of Appeals stated, White did "not give any specific reason he did not procure more evidence before trial to sup-

port his alibi defense. And the record fails to show that the amendment had any impact on his minimally developed alibi defense." *White*, 60 Kan. App. 2d at 479. We conclude that the district court did not abuse its discretion in permitting the amendment.

Admission of White's 2014 confession was harmless.

We review a district court's determination that the probative value of evidence outweighs its potential for undue prejudice for abuse of discretion. *State v. Boysaw*, 309 Kan. 526, 539, 439 P.3d 909 (2019).

While K.S.A. 2021 Supp. 60-455(a) generally prohibits the use of propensity evidence, K.S.A. 2021 Supp. 60-455(d) permits evidence of a defendant's prior sexual misconduct "in a criminal action in which the defendant is accused of a sex offense," and this evidence "may be considered for its bearing on any matter to which it is relevant and probative." We require the district court to weigh the probative value against the prejudicial effect before admitting this kind of evidence. *State v. Prine*, 297 Kan. 460, Syl. ¶ 3, 303 P.3d 662 (2013).

In evaluating the probative value of evidence of other crimes, the district court should consider "how clearly the prior act was proved; how probative the evidence is of the material fact sought to be proved; how seriously disputed the material fact is; and *whether the government can obtain any less prejudicial evidence*." (Emphasis added.) *Boysaw*, 309 Kan. at 541. The factors to be considered in evaluating the possible prejudicial effect include "the likelihood that such evidence will contribute to an improperly based jury verdict; the extent to which such evidence may distract the jury from the central issues of the trial; and how time consuming it will be to prove the prior conduct." 309 Kan. at 541.

White does not argue that his prior crime was not probative, but rather that it was highly prejudicial and unnecessary because of his stipulation. And while the Court of Appeals panel found that the district court properly and thoroughly considered *Boysaw*'s factors regarding the probative effect, it found the district court's "assessment of the prejudicial effect was more cursory, perhaps skirting *Boysaw*'s guidance" in the factors to be considered. *White*,

60 Kan. App. 2d at 482. Specifically, the panel criticized the district court's seemingly off-base conclusion that no less prejudicial evidence was available, noting that the district court "failed to state why Gerdsen's testimony, coupled with White's stipulation, was not a less prejudicial way to admit the relevant facts about White's prior sexual abuse of his granddaughter." 60 Kan. App. 2d at 483. The panel also found that the video could "easily inflame the passions or prejudices of the jury." 60 Kan. App. 2d at 484.

The panel ultimately assumed without deciding that the district court erred in admitting the 2014 video, because the panel concluded that even if it was error, it was harmless. 60 Kan. App. 2d at 484. Because the State did not cross-petition for review of the panel's decision to assume error, the only issue now before us is harmlessness.

We determine if an error is harmless by examining whether there is a reasonable probability the error affected the trial's outcome in light of the entire record. *State v. Longstaff*, 296 Kan. 884, 895, 299 P.3d 268 (2013). "Under this analysis, we are concerned only with undue or unfair prejudice," and the State, as the party benefitting from the error, has the burden of demonstrating harmlessness. 296 Kan. at 895.

The panel cited and analyzed each of the three types of prejudice we have recognized may result from the admission of prior crimes evidence:

"'. . . First a jury might well exaggerate the value of other crimes as evidence proving that, because the defendant has committed a similar crime before, it might properly be inferred that he committed this one. Secondly, the jury might conclude that the defendant deserves punishment because he is a general wrongdoer even if the prosecution has not established guilt beyond a reasonable doubt in the prosecution at hand. Thirdly, the jury might conclude that because the defendant is a criminal, the evidence put in on his behalf should not be believed.'" *State v. Davis*, 213 Kan. 54, 58, 515 P.2d 802 (1973)." *State v. Gunby*, 282 Kan. 39, 48-49, 144 P.3d 647 (2006).

White argues that the 2014 "video contributed to the possibility of an improperly based jury verdict." The inflammatory nature of the video, argues White, is such that there is a reasonable probability that the error affected the outcome of the trial in light of the entire record.

The panel disagreed, finding that the jury likely still would have convicted White based on the stipulation, Detective Gerdsen's testimony, and White's 2017 confession. "To have found White not guilty of either crime, the jury would have had to disbelieve White's uncontradicted admission, as well as the victim's testimony." *White*, 60 Kan. App. 2d at 486.

Though the video may have been inflammatory, we do not find that there is a reasonable probability that it affected the verdict given C.U.'s testimony and White's uncontradicted confession.

Cumulative error did not deny White a fair trial.

Lastly, White alleges that cumulative error deprived him of a fair trial. To determine whether cumulative error was so great as to require reversal of a defendant's conviction, we examine whether the totality of the circumstances substantially prejudiced the defendant. *State v. Rhoiney*, 314 Kan. 497, 505, 501 P.3d 368 (2021). The cumulative error doctrine does not apply in cases where only one potential error has been identified. *State v. Dixon*, 289 Kan. 46, 71, 209 P.3d 675 (2009). We thus find that there was no cumulative error.

Judgment of the Court of Appeals affirming the district court on the issues subject to review is affirmed. Judgment of the district court is affirmed on the issues subject to review.

Bruce v. Kelly

No. 124,415

MARK A. BRUCE, *Plaintiff*, v. LAURA KELLY, in Her Official Capacity as Governor of the State of Kansas, WILL LAWRENCE, in His Individual Capacity as Chief of Staff to Governor Laura Kelly, and HERMAN T. JONES, in His Official and Individual Capacities as Superintendent of the Kansas Highway Patrol, *Defendants.*

(514 P.3d 1007)

SYLLABUS BY THE COURT

1. APPELLATE PROCEDURE—*Certified Questions Must Be Questions of Law of this State*. Questions certified to the Kansas Supreme Court under K.S.A. 60-3201 must be questions of law of this state. In answering certified questions, this court will not decide questions of law outside the scope of the certified question, nor will this court decide any question of fact.

2. CIVIL SERVICE—*Kansas Civil Service Act—Two Groups of Employees in Kansas –Classified and Unclassified Service.* The Kansas Civil Service Act, K.S.A. 75-2925 et seq., divides state civil service employees into two groups: those in the unclassified service and those in the classified service. The unclassified service includes those positions specifically designated as in the unclassified service. The classified service includes those positions in state service not included in the unclassified service. Thus, positions in the state service are presumptively within the classified service unless otherwise specified.

3. SAME—*Kansas Civil Service Act—Rights of Classified Employees and Unclassified Employees*. Through its many procedural and substantive protections, the Kansas Civil Service Act, K.S.A. 75-2925 et seq., grants permanent classified employees the right of continued employment absent any valid cause for termination, and that right is a property right that may not be impaired without due process of law. In contrast, unclassified employees are at-will employees and thus have no property interest in continued employment.

4. SAME—*Kansas Highway Patrol Rank of Major—Classified Service under Statute*. K.S.A.74-2113's plain language defines the rank of major in the Kansas Highway Patrol as within the classified service.

5. SAME—*Kansas Highway Patrol—Statutory Requirement for Permanent Status in Classified Service*. If Kansas Highway Patrol members attain permanent status in the classified service before being appointed superintendent or assistant superintendent within the unclassified service, then K.S.A. 74-2113 requires that they be "returned" to their former classified rank with permanent status after their term in the unclassified service ends.

6. SAME—*Kansas Highway Patrol—Six Month Probationary Period Not Required if Return to Former Rank*. K.A.R. 1-7-4 (2021 Supp.) does not require Kansas Highway Patrol superintendents or assistant superintendents to serve another six-month probationary period upon returning to their former rank in the classified service, as contemplated in K.S.A. 74-2113(a).

On certification of two questions of law from the United States District Court for the District of Kansas, DANIEL D. CRABTREE, judge. Opinion filed August 5, 2022. The answers to the certified questions are determined.

Alan V. Johnson, of Sloan, Eisenbarth, Glassman, McEntire & Jarboe, L.L.C., of Topeka, argued the cause and was on the briefs for plaintiff.

David R. Cooper, of Fisher, Patterson, Sayler & Smith, LLP, of Topeka, argued the cause and was on the brief for defendants.

The opinion of the court was delivered by

WALL, J.: This opinion addresses two questions of law certified to our court by the United States District Court for the District of Kansas. Certified question proceedings are unique because the lawsuit is not pending before any Kansas state court. Even so, the Legislature has granted the Kansas Supreme Court jurisdiction to answer questions of state law raised by a federal court (or other foreign jurisdiction) when our responses may control the outcome of the matter pending before the certifying court and no Kansas precedent addresses the questions certified.

Here, the certified questions arise from a federal civil lawsuit Mark A. Bruce filed against Governor Laura Kelly, Chief of Staff to the Governor, Will Lawrence, and Kansas Highway Patrol Superintendent Herman T. Jones (Defendants). Bruce worked for the Kansas Highway Patrol (KHP) for 30 years. He was promoted to the rank of major in March 2008 and successfully completed a six-month probationary period in that role. In April 2015, Governor Sam Brownback appointed Bruce to serve as superintendent of the KHP. He continued in this role until March 2019, when Bruce alleges Defendants forced him to resign his employment.

Bruce argues K.S.A. 74-2113 required Defendants to return him to the rank he held before his appointment to Superintendent—a return to the rank of major with permanent status in the classified service—rather than terminate his employment with

the KHP. Bruce claims Defendants' refusal to continue his employment, as required by statute, gives rise to constitutional due process claims under 42 U.S.C. § 1983 (2018) and a state law claim for tortious interference with a business relationship. Defendants, however, contend Bruce had no right to continued employment. First, Defendants argue K.S.A. 74-2113 places the rank of major within the unclassified service. And employees in the unclassified service have no right to continued employment. Second, even if K.S.A. 74-2113 defines the rank of major within the classified service, Defendants argue K.A.R. 1-7-4 (2021 Supp.) would have required Bruce to serve another probationary period upon his return to the rank of major, during which his employment could be terminated at will. This means Defendants could end the employment relationship for any or no reason.

Given the parties' conflicting interpretations of the statutes and administrative regulations, coupled with the lack of controlling Kansas precedent interpreting these provisions, the United States District Court certified two questions:

"1. Does Kan. Stat. Ann. § 74-2113 define the rank of Major in the KHP as a member of the unclassified or classified service of the Kansas civil service?

"2. If Kan. Stat. Ann. § 74-2113 defines the rank of Major in the KHP as a member of the classified service, does Kan. Admin. Regs. § 1-7-4 require a former member of the classified service—who already has completed a required probationary period for the classified service—to serve another six month probationary period in the classified service after serving as a member of the unclassified service?" *Bruce v. Kelly*, No. 20-4077-DDC-GEB, 2021 WL 4284534, at *32 (D. Kan. 2021) (unpublished opinion).

As to the first question, we hold that K.S.A. 74-2113 defines the rank of major within the classified service under the Kansas Civil Service Act (KCSA), K.S.A. 75-2925 et seq. As to the second question, we hold that K.A.R. 1-7-4 (2021 Supp.) does not require a former KHP superintendent or assistant superintendent to serve another probationary period when returning to their former rank as contemplated in K.S.A. 74-2113(a).

FACTS AND PROCEDURAL BACKGROUND

In its certification order, the United States District Court set forth these facts pertinent to the certified questions:

"The KHP is an agency of the State of Kansas that enforces traffic, criminal, and other laws of Kansas throughout the state. In June 1989, the KHP hired plaintiff as a trooper. On March 14, 2008, the KHP promoted plaintiff to the position of Major. After his promotion, plaintiff served a probationary period of six months, as Kan. Stat. Ann. § 75-2946 requires. After this probationary period, plaintiff attained permanent status as a Major in the classified service.

"On April 2, 2015, then-Governor of Kansas, Sam Brownback, appointed plaintiff to serve as the Superintendent of the KHP, at the pleasure of the Governor. In November 2018, Laura Kelly was elected as the Governor of Kansas. As Governor-elect, Ms. Kelly announced that plaintiff would remain as KHP Superintendent.

"On March 28, 2019, Governor Kelly's Chief of Staff, Will Lawrence, summoned plaintiff to Mr. Lawrence's office for a meeting. In the meeting, Mr. Lawrence told plaintiff that Governor Kelly was not going to retain him as KHP Superintendent. And[] Mr. Lawrence told plaintiff 'that "we need you to resign."' After further discussion, plaintiff told Mr. Lawrence that he would resign. Mr. Lawrence then handed plaintiff a pre-prepared resignation letter. . . . Plaintiff signed the resignation letter, and he handed it back to Mr. Lawrence.

"Mr. Lawrence then handed plaintiff a pre-prepared letter dated March 18, 2019[,] and signed by Mr. Lawrence. The letter stated in relevant part:

'This letter is to confirm receipt and acceptance of your resignation from your position as the Superintendent of the Kansas Highway Patrol (KHP), effective April 6, 2019. Effective immediately, you are relieved of all duties and authority and are being placed on administrative leave until the effective date of your resignation.

. . . .

'Thank you for your service to the State of Kansas. I wish you success in your future endeavors.'

"During the March 28, 2019 meeting, Mr. Lawrence never discussed with plaintiff the option of returning to plaintiff's former rank of Major. Based on plaintiff's March 28 conversation with Mr. Lawrence and the language of Mr. Lawrence's letter, plaintiff understood and believed that Governor Kelly was dismissing him from all employment with the KHP. As a consequence, on March 29, 2019, plaintiff initiated email communications with Mr. Lawrence about retiring from the KHP. Plaintiff initiated these communications because 'he understood and believed that he had no other choice but to retire from the KHP.'

"On April 2, 2019, plaintiff sent a letter to Governor Kelly, with a copy to Mr. Lawrence. The letter provided, in relevant part:

'This letter serves as notice that I will retire from the Kansas Highway Patrol effective May 1, 2019. My last day on the payroll will be April 8, 2019.

. . . .

'I am proud to have had the honor to serve and lead the Kansas Highway [Patrol] for the past 30 years. I wish the Agency and its employees nothing but the best in the future.'" 2021 WL 4284534, at *3-4.

Bruce later sued Defendants in the United States District Court for the District of Kansas. He alleged Defendants constructively discharged him from the KHP despite the requirement in K.S.A. 74-2113 to return him to the rank of major after his term as superintendent ended. He asserted claims under 42 U.S.C. § 1983 against Governor Kelly, in her official capacity, and Lawrence, in his personal capacity, alleging they deprived him of his property interest in continued employment with the KHP without due process of law. He also brought a claim under the Kansas Tort Claims Act against Lawrence, alleging Lawrence tortiously interfered with Bruce's prospective business relations with the KHP. Bruce brought a fourth claim against his successor as KHP superintendent, Herman T. Jones, but that claim is not relevant to this opinion.

Defendants moved to dismiss Bruce's complaint. They argued, in part, that Bruce had failed to state a § 1983 claim for due process violations or a state law tortious interference claim because Bruce had neither a protected property interest nor a prospective business advantage in continued employment with the KHP. Defendants maintained that the KHP had declassified the rank of major in 2016, and the Legislature amended K.S.A. 74-2113 in 2018 to reflect this change. According to Defendants, the rank of major was no longer within the classified service, so Bruce did not have a property interest in being returned to the rank of major with permanent status in the classified service. In the alternative, if majors were still within the classified service, Defendants argued that K.A.R. 1-7-4 (2021 Supp.) would have required Bruce to serve a six-month probationary period upon returning to the classified service, and during this period, Defendants could terminate his employment at will.

In response, Bruce argued that K.S.A. 74-2113 continues to define majors as within the classified service. Bruce also claimed that K.A.R. 1-7-4 (2021 Supp.) would not require him to serve a probationary period upon his return to the rank of major because he completed his mandatory probationary period after KHP appointed him to this rank in 2008. Finally, Bruce noted that K.S.A. 74-2113 required that he be "returned" to the rank he held when

appointed as superintendent. He construed this provision to require KHP to place him in the same rank, classification, and status he had attained before his appointment to superintendent in 2015—the rank of major with permanent status in the classified service.

In its order, the United States District Court observed that K.S.A. 74-2113 "wasn't drafted in a clear and consistent fashion[, and e]ach side of the caption presents a compelling argument why the plain language of the statute favors the competing constructions that each side proposes." 2021 WL 4284534, at *19. The court was also unsure whether K.A.R. 1-7-4 (2021 Supp.), when applied to the facts, would require Bruce to serve another probationary period if he were returned to the rank of major within the classified service. 2021 WL 4284534, at *24. Thus, the court certified the two questions of state law now before us. 2021 WL 4284534, at *23-24, 32.

ANALYSIS

I. Standard of Review and Relevant Legal Framework

We have jurisdiction to answer questions of state law certified to us by a United States District Court under K.S.A. 60-3201. *Burnett v. Southwestern Bell Telephone*, 283 Kan. 134, 136, 151 P.3d 837 (2007). The statute permits the Kansas Supreme Court to answer certified "questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court and the court of appeals of this state." K.S.A. 60-3201.

"By statutory definition, certified questions present questions of law, and we exercise unlimited review over such questions." *Craig v. FedEx Ground Package System, Inc.*, 300 Kan. 788, 792, 335 P.3d 66 (2014). But the scope of our review is limited by the certification order issued by the United States District Court. Thus, any questions of law that are not within the scope of the certification order and all questions of fact fall outside the jurisdictional reach of K.S.A. 60-3201. See *Hays v. Ruther*, 298 Kan. 402, 404, 313 P.3d 782 (2013) (court will not decide questions of

fact when answering certified question and parties' request for factual findings not properly before the court); *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 72, 150 P.3d 892 (2007) (declining to consider legal argument based on federal law because "it is neither included in the certified question nor could it properly have been included in the certified question").

The two certified questions also require us to interpret Kansas statutes and administrative regulations, which again present questions of law subject to unlimited review. *Woessner v. Labor Max Staffing*, 312 Kan. 36, 45, 471 P.3d 1 (2020). The rules governing such an interpretation are well-established:

> "The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. In ascertaining this intent, we begin with the plain language of the statute, giving common words their ordinary meaning. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. But if a statute's language is ambiguous, we will consult our canons of construction to resolve the ambiguity. [Citations omitted.]" *Johnson v. U.S. Food Service*, 312 Kan. 597, 600-01, 478 P.3d 776 (2021).

But even when the language of the statute is clear, we must still consider various provisions of an act *in pari materia* to reconcile and bring those provisions into workable harmony, if possible. *Neighbor v. Westar Energy, Inc*., 301 Kan. 916, 919, 349 P.3d 469 (2015); *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 918, 296 P.3d 1106 (2013). Thus, the doctrine of *in pari materia* has utility beyond those instances where statutory ambiguity exists. It can be used as a tool to assess whether the statutory language is plain and unambiguous in the first instance, and it can provide substance and meaning to a court's plain language interpretation of a statute. See *Othi v. Holder*, 734 F.3d 259, 265 (4th Cir. 2013) ("'To determine a statute's plain meaning, we not only look to the language itself, but also the specific context in which that language is used, and the broader context of the statute as a whole.'"); see also Cross, Statutory Interpretation 128 (1976) ("[I]t seems that the present position is that, when an earlier statute is *in pari materia* with a later one, it is simply part of its context to be considered by the judge in deciding whether the meaning of a provision in the later statute

is plain."); Dickerson, The Interpretation and Application of Statutes 233 (1975) (noting doctrine of *in pari materia* used to "reflect or buttress a sincere attempt by the courts to ascertain the [plain] meaning of the statute as read in its proper context").

We employ the doctrine of *in pari materia* here to lend support to our plain language interpretation of the statutory and regulatory provisions relevant to the certified questions. See *State v. Batson*, 99 Haw. 118, 122, 53 P.3d 257 (2002) (employing *in pari materia* analysis to support validity of plain meaning interpretation of statute); *Hornbeck Offshore Transp., LLC v. U.S. Coast Guard*, 424 F. Supp. 2d 37, 52 (D.D.C. 2006) (same).

II. *Certified Question 1: Does K.S.A. 74-2113 Define the Rank of Major in the KHP as Within the Unclassified or Classified Service?*

To answer the first certified question, we begin by discussing the nature and character of classified and unclassified service under the KCSA. Then, we interpret the relevant statutory provision, K.S.A. 74-2113, to determine whether KHP majors are placed within the classified or unclassified service. Ultimately, we hold that the plain language of the statute places KHP majors in the classified service, and this plain-language interpretation is bolstered by traditional rules of statutory interpretation.

A. Classified and Unclassified Service Under the KCSA

The KCSA divides state civil service employees into two groups: those in the unclassified service and those in the classified service. K.S.A. 75-2935. The unclassified service includes those positions specifically designated by law as being in the unclassified service, or those positions designated as or converted to the unclassified service by an appointing authority under limited circumstances. See K.S.A. 75-2935(1); K.A.R. 1-2-97 (defining unclassified service as "those positions specifically designated by law as unclassified"). The classified service includes those positions in state service not included in the unclassified service. See K.S.A. 75-2935(2); K.A.R. 1-2-19 (defining classified service as "all positions in the state service, except those which are specifically placed in the unclassified service by K.S.A. 75-2935, as amended, or

other sections of the statutes"). Thus, positions in the state service are presumptively within the classified service unless otherwise specified.

An extensive network of statutes and administrative regulations governs employment in the classified service. See K.S.A. 75-2935(2) ("No person shall be appointed, promoted, reduced or discharged as an officer, clerk, employee or laborer in the classified service in any manner or by any means other than those prescribed in the Kansas civil service act and the rules adopted in accordance therewith."). Appointments in the classified service are made "according to merit and fitness from eligible pools which so far as practicable shall be competitive." K.S.A. 75-2935(2); see also K.S.A. 75-2939 through K.S.A. 75-2945 (setting forth rules on the selection and appointment of employees in classified service). Those persons appointed to the classified service must first serve a probationary period, during which their employment may be terminated at will. K.S.A. 75-2946; K.A.R. 1-7-3 (2021 Supp.); see also K.A.R. 1-7-4 (2021 Supp.) (providing for probationary period in some cases other than for new hires). Once an employee successfully completes the probationary period, that employee earns permanent status in the classified service. K.S.A. 75-2946; see also K.A.R. 1-2-57 (defining "permanent status" as "the status of an employee who has successfully completed a probationary period, in accordance with K.A.R. 1-7-3, 1-7-4, and 1-7-6").

A hallmark of the classified service is the employment protections afforded to those who have achieved permanent status. Indeed, "[o]ne of the purposes of civil service laws is to take from the appointing officer the right of arbitrary removal of an employee." *Goertzen v. State Department of Social & Rehabilitation Services*, 218 Kan. 313, 320, 543 P.2d 996 (1975). An appointing authority may dismiss, demote, or suspend a permanent classified employee only for valid cause as specified in the KCSA. See K.S.A. 75-2949; *Wright v. Kansas Water Office*, 255 Kan. 990, 996-97, 881 P.2d 567 (1994). And permanent classified employees are entitled to many other procedural and substantive protections when an appointing authority takes adverse employment action against them:

> "Under the Kansas Civil Service Act, a permanent classified civil service employee is entitled to various procedural and substantive safeguards in the event of a dismissal, demotion, or suspension, including: (1) prior notice; (2) a written statement setting forth the reasons for the intended action; (3) an opportunity to respond in writing,

in person, or both, to a representative of the appointing authority; (4) a responsive written decision by the appointing authority; and (5) the right to appeal from any adverse decision to the Civil Service Board for a full evidentiary hearing; and, thereafter, the right to an administrative appeal from any adverse decision to a state district court." *Darling v. Kansas Water Office*, 245 Kan. 45, 48, 774 P.2d 941 (1989).

See also K.S.A. 75-2949 (describing procedure pertaining to dismissal, demotion, or suspension of employees in classified service).

Through these provisions, the KCSA grants classified employees "the right of continued employment in the absence of a valid cause for termination." *Wright*, 255 Kan. 990, Syl. ¶ 1. And that right is a property interest that may not be impaired without due process of law. *McMillen v. U.S.D. No. 380*, 253 Kan. 259, Syl. ¶ 4, 855 P.2d 896 (1993).

In contrast, employees in the unclassified service serve at the pleasure of their appointing authority and may be terminated at will. See *Stoldt v. City of Toronto*, 234 Kan. 957, 964, 678 P.2d 153 (1984) ("[T]he tenure of any office not provided for in the constitution may be declared by statute, and when not so declared such office shall be held at the pleasure of the appointing authority."); see also Kan. Const. art. 15, § 2 ("The tenure of any office not herein provided for may be declared by law; when not so declared, such office shall be held during the pleasure of the authority making appointment."). Because unclassified employees may be terminated at will, they have no property interest in continued employment. See *Moorhouse v. City of Wichita*, 259 Kan. 570, 580, 913 P.2d 172 (1996) ("An employee-at-will has no property interest in continued employment.").

B. The Plain Language of K.S.A. 74-2113 Places the Rank of Major Within the Classified Service

Having identified the legally significant distinction between classified and unclassified service, we now turn to the substance of the first certified question, which asks whether K.S.A. 74-2113 defines the rank of major within the classified or unclassified service. To answer that question, we begin with the language of K.S.A. 74-2113(a), which identifies three distinct personnel categories within the agency and the classification of each category under the KCSA:

"There is hereby created a Kansas highway patrol. The patrol shall consist of: (1) A superintendent, who shall have the rank of colonel and who shall have special training and qualifications for the position; (2) an assistant superintendent, who shall have the rank of lieutenant colonel; and (3) officers and troopers who are appointed in accordance with appropriation acts and as provided in this section. The superintendent and assistant superintendent shall be within the unclassified service under the Kansas civil service act. The assistant superintendent shall be appointed by the superintendent from among the members of the patrol, and shall serve at the pleasure of the superintendent. If a person appointed as superintendent, assistant superintendent or major is a member of the patrol when appointed, the person in each case, upon termination of the term as superintendent, assistant superintendent or major, respectively, shall be returned to a rank not lower than the rank the person held when appointed as superintendent, assistant superintendent or major. If the rank is filled at that time, a temporary additional position shall be created in the rank until a vacancy occurs in such rank. All other officers, troopers and employees shall be within the classified service under the Kansas civil service act."

The parties posit two contrasting interpretations of this statute. Bruce focuses on the statute's declaration that "[t]he superintendent and assistant superintendent shall be within the unclassified service . . . All other officers, troopers and employees shall be within the classified service under the Kansas civil service act." K.S.A. 74-2113(a). Because the statutory language expressly identifies only the superintendent and assistant superintendent as unclassified positions, Bruce concludes majors are among the "other officers, troopers and employees" in the classified service.

Defendants draw the opposite conclusion from the statutory language. Their interpretation relies on the intermediary sentences Bruce overlooks. Those sentences provide that if a person appointed to the position of superintendent, assistant superintendent, or major was a member of the KHP when appointed, then upon termination that person "shall be returned to a rank not lower than the rank the person held when appointed." K.S.A. 74-2113(a). Defendants argue these intermediary sentences acknowledge that majors, along with the superintendent and assistant superintendent, are within the unclassified service. Thus, Defendants claim the last sentence of subsection (a) means all officers, troopers, and employees other than the superintendent, assistant superintendent, and majors are within the classified service.

Following the proper course for statutory interpretation, we hold the plain language of K.S.A. 74-2113 places the rank of major within the classified service. This conclusion is evident when analyzing the plain language of the provisions within subsection (a) and considering how they operate together in harmony with other provisions within the statute.

The first two sentences of K.S.A. 74-2113(a) create the KHP and define the three categories of personnel comprising the agency:

"There is hereby created a Kansas highway patrol. *The patrol shall consist of: (1) A superintendent*, who shall have the rank of colonel and who shall have special training and qualifications for the position; *(2) an assistant superintendent*, who shall have the rank of lieutenant colonel; *and (3) officers and troopers* who are appointed in accordance with appropriation acts and as provided in this section." (Emphases added.)

The third sentence of subsection (a) expressly places the first two personnel categories within the unclassified service: "The superintendent and assistant superintendent shall be within the unclassified service under the Kansas civil service act." K.S.A. 74-2113(a). And the seventh sentence of subsection (a) places the remaining personnel category within the classified service: "All other officers, troopers and employees shall be within the classified service under the Kansas civil service act." K.S.A. 74-2113(a).

Interpreting K.S.A. 74-2113(a) to place KHP majors within the classified service adheres to the plain language throughout this subsection. See *United States v. Brown*, 974 F.3d 1137, 1143 (10th Cir. 2020) (courts obligated to interpret statutes as symmetrical and coherent regulatory schemes and fit all parts into a harmonious whole, if possible). Under this interpretation, the first two sentences in subsection (a) establish the KHP and identify the three groups of personnel within the agency: (1) superintendent; (2) assistant superintendent; and (3) all other officers and troopers. The statute then provides the classifications for these same three personnel groups—superintendent and assistant superintendent are expressly placed in the unclassified service (in the third sentence) while all other officers and troopers are expressly placed in the

classified service (in the seventh sentence). Majors are not included among the personnel groups expressly designated within the unclassified service (in the third sentence). Thus, majors fall within the category of "all other officers [and] troopers" who are placed in the classified service (in the seventh sentence). This interpretation aligns with the three-part division of KHP personnel (in the second sentence), providing a coherent and harmonious reading of the plain language of subsection (a). See *Northern Natural Gas Co.,* 296 Kan. at 918 (courts must consider provisions *in pari materia* and bring them into workable harmony, if possible).

Interpreting K.S.A. 74-2113 to define majors within the classified service is not only consistent with the plain language throughout subsection (a) but also with the plain language of other subsections of the statute. Much like subsection (a), the Legislature continued to distinguish the superintendent and assistant superintendent from "[a]ll other members of the patrol" in subsections (b) and (c):

"(b) *The superintendent* of the patrol shall be appointed by the governor, subject to confirmation by the senate as provided in K.S.A. 75-4315b, and amendments thereto, and shall receive an annual salary fixed by the governor. Except as provided by K.S.A. 46-2601, and amendments thereto, no person appointed as superintendent shall exercise any power, duty or function as superintendent until confirmed by the senate. *The assistant superintendent* shall receive an annual salary fixed by the superintendent and approved by the governor.

"(c) *All other members of the patrol* shall be appointed by the superintendent in accordance with appropriation acts and with the Kansas civil service act. " (Emphases added.) K.S.A. 74-2113(b), (c).

Thus, interpreting K.S.A. 74-2113(a) to define the rank of major within the classified service aligns with the Legislature's division of the KHP into three distinct personnel groups and its pattern throughout the statute of distinguishing the superintendent and assistant superintendent from all other KHP members.

Of course, the third and seventh sentences are not the only provisions within subsection (a). And when interpreting a statute, we do not consider isolated parts alone, but all relevant parts together. *Northern Natural Gas Co.*, 296 Kan. at 918. The fifth and sixth sentences of subsection (a) state:

"If a person appointed as superintendent, assistant superintendent or major is a member of the patrol when appointed, the person in each case, upon termination

of the term as superintendent, assistant superintendent or major, respectively, shall be returned to a rank not lower than the rank the person held when appointed as superintendent, assistant superintendent or major. If the rank is filled at that time, a temporary additional position shall be created in the rank until a vacancy occurs in such rank." K.S.A. 74-2113.

Defendants rely on these two sentences to argue K.S.A. 74-2113 places majors within the unclassified service. They point out the fifth and sixth sentences immediately precede the seventh sentence of subsection (a), which states "[*a*]*ll other* officers, troopers and employees shall be within the classified service." (Emphasis added.) K.S.A. 74-2113(a). Based on this sequencing, Defendants assert the fifth and sixth sentences modify, or must be read along with, the seventh sentence. When doing so, Defendants argue the phrase "all other" (in the seventh sentence) means "all KHP personnel other than the superintendent, assistant superintendent, and majors." Thus, while K.S.A. 74-2113(a) fails to expressly include majors within the unclassified service, Defendants contend the statute does so implicitly through its grammatical structure. See *Barten v. Turkey Creek Watershed Joint District No. 32*, 200 Kan. 489, 504, 438 P.2d 732 (1968) (Under the last antecedent rule, qualifying words are "ordinarily confined to the last antecedent, or to the words and phrases immediately preceding.").

But Defendants' construction disregards the subject matter addressed in the plain language of these provisions. While the fifth sentence of subsection (a) does explicitly mention majors, that sentence, along with the sixth sentence, addresses specific employment protections the Legislature created for KHP superintendents, assistant superintendents, and majors—the right to return to their former positions. But neither the fifth nor sixth sentence addresses the classification of their positions under the KCSA. In fact, only two sentences within subsection (a) specifically address the classification of KHP personnel groups: (1) the third sentence, placing the superintendent and assistant superintendent within the unclassified service; and (2) the seventh sentence, placing all other officers, troopers, and employees within the classified service.

By focusing on the subject matter addressed in the plain language of subsection (a), it is apparent the phrase "all other" in the seventh sentence must be read along with the third sentence because both provisions address the same subject matter—the proper

classification of KHP personnel under the KCSA. Defendants would have us construe the phrase "all other" to modify the fifth and sixth sentences even though they do not address the same subject matter. Such a construction is not supported by a harmonious, plain language reading of subsection (a). See *McMillen,* 253 Kan. at 268-69 (when statutory provisions affect the same issue and subject matter, such provisions should be read together to make them consistent, harmonious, and sensible). And this plain language disposes of Defendants' construction and their reliance on the last antecedent rule. See *State v. Kleypas*, 272 Kan. 894, 950, 40 P.3d 139, 194 (2001) (Last antecedent rule "may not be employed to reach a certain result where the language of the statute is plain and unambiguous."); *Link, Inc. v. City of Hays*, 266 Kan. 648, 654, 972 P.2d 753 (1999) (noting that the last antecedent rule is "flexible" and should not be applied in a formulaic manner where the subject matter, sense, or meaning require a different construction).

We conclude that K.S.A. 74-2113(a) places the rank of major within the classified service. This interpretation adheres to the plain language and brings the subsections of the statute into harmony.

C. The Plain Language Interpretation Is Corroborated by Traditional Methods of Statutory Construction

Because we can answer the first certified question based on the statute's plain language, our statutory interpretation analysis could end here. That said, even if we were to conclude that K.S.A. 74-2113's plain language was ambiguous, traditional canons of statutory construction and the legislative history favor the same interpretation. See *Jarvis v. Kansas Dept. of Revenue*, 312 Kan. 156, 159, 473 P.3d 869 (2020) (if Legislature's intent unclear from statutory language, court may look to legislative history, background considerations, and canons of construction to determine legislative intent).

1. Interpreting K.S.A. 74-2113 to Place Majors Within the Classified Service Is Consistent with Traditional Canons of Statutory Construction

Construing K.S.A. 74-2113 to place majors within the classified service finds support in the canon of *expressio unius est exclusio alterius*. Under this canon, courts may presume the Legislature intended to

exclude an item from a specific statutory list if the Legislature did not include that item in the list. *Cole v. Mayans*, 276 Kan. 866, 878, 80 P.3d 384 (2003). K.S.A. 74-2113(a) expressly includes the superintendent and assistant superintendent in the list of KHP personnel within the unclassified service. But the Legislature did not include majors in this list of unclassified personnel. Under the canon of *expressio unius est exclusio alterius*, we may presume the omission is purposeful, and the Legislature intended to exclude majors from the unclassified service. See *Patterson v. Cowley County, Kansas*, 307 Kan. 616, 626, 413 P.3d 432 (2018) (court can presume the Legislature intended to exclude items not expressly identified among the list of items specified by statute).

Our reliance on this canon of statutory construction is particularly befitting here when reading K.S.A. 74-2113 together with the KCSA. We must read these statutory provisions in harmony because K.S.A. 74-2113(c) provides that all members of the KHP, other than the superintendent and assistant superintendent, are to be appointed in accordance with the KCSA. As discussed above, the KCSA effectively presumes state civil service positions are within the classified service unless otherwise specified. See K.S.A. 75-2935(1) (identifying specific positions within unclassified service); K.S.A. 75-2935(2) (classified service includes all positions not designated unclassified); K.A.R. 1-2-19 (defining "classified service" as all positions in state service except positions specifically placed in unclassified service). In this regard, the KCSA's approach to determining the classification of state personnel aligns with the canon of *expressio unius est exclusio alterius*—all unclassified positions must be expressly identified, and if not, the position is presumptively classified. Thus, KHP majors are within the classified service because they must be appointed in accordance with the KCSA and no statute expressly places them in the unclassified service.

2. Construing K.S.A. 74-2113 to Place Majors Within the Classified Service Is Supported by the Legislative History

Construing K.S.A. 74-2113(a) to define the rank of major within the classified service is also the most logical statutory interpretation given the legislative amendments and related history supporting those amendments over time.

a. 1963 and 1982 Amendments

K.S.A. 74-2113 (previously codified at K.S.A. 74-20a01) did not address the classification of KHP members until 1963. Before then, a statute in the KCSA, K.S.A. 75-2935, placed all members of the KHP within the unclassified service. L. 1941, ch. 358, § 11. In 1963, the Legislature amended K.S.A. 75-2935 to delete the provision placing all KHP personnel in the unclassified service. L. 1963, ch. 400, § 3.

That same year, the Legislature also amended K.S.A. 74-2113 to address the classification of KHP personnel. We quote the statutory amendments below, using bold text to signify any language added by the amendments and strikethrough text to signify any language deleted by the amendments, as we will do throughout this opinion:

"There is hereby created a Kansas highway patrol. The patrol shall consist of one (1) superintendent, who shall have the rank of colonel, and who shall have special training and qualifications for such position, and if he was a member of the patrol at the time of his selection as superintendent, he shall, upon termination of his term as superintendent, be returned to a rank not lower than the rank he held at the time of his appointment as superintendent, and if said rank be filled at that time, a temporary additional position shall be created in such rank until such time as a vacancy exists in such rank; one (1) assistant superintendent, who shall have the rank of lieutenant colonel; and not more than two hundred (200) officers and troopers: ***Provided*, The superintendent shall be within the unclassified service while the assistant superintendent and all other officers, troopers, and employees shall be within the classified service of the Kansas state civil service**." L. 1963, ch. 400, § 1.

Thus, when the Legislature originally amended K.S.A. 74-2113 to address the classification of KHP personnel, it established the classification of all three personnel groups in a single sentence.

In 1982, the Legislature reorganized K.S.A. 74-2113. In this reorganization, the Legislature split the sentence addressing the classification of KHP personnel groups into two, separate sentences—one addressing the classification of the superintendent and the other addressing the classification of the assistant superintendent and all other KHP officers, troopers, and employees. Then, the Legislature moved the language addressing a superintendent's right to return to a former rank, placing this text between the two sentences addressing the classification of KHP personnel:

"(a) There is hereby created a Kansas highway patrol. The patrol shall consist of: (1) A superintendent, who shall have the rank of colonel~~,~~ and who shall have special training and qualifications for such position~~, and if the person appointed~~

~~as superintendent was a member of the patrol at the time of appointment as superintendent, such person shall, upon termination of the term as superintendent, be returned to a rank not lower than the rank such person held at the time of appointment as superintendent, and if said rank be filled at that time, a temporary additional position shall be created in such rank until such time as a vacancy exists in such rank~~; (2) an assistant superintendent, who shall have the rank of lieutenant colonel; and (3) officers and troopers who are appointed in accordance with appropriation acts and as provided in this section. The superintendent shall be within the unclassified service under the Kansas civil service act ~~and~~. **If a person appointed as superintendent is a member of the patrol when appointed, such person, upon termination of the term as superintendent, shall be returned to a rank not lower than the rank such person held when appointed as superintendent. If such rank is filled at that time, a temporary additional position shall be created in such rank until a vacancy occurs in such rank.** The assistant superintendent and all other officers, troopers and employees shall be within the classified service under the Kansas state civil service." L. 1982, ch. 347, § 32.

The 1982 amendment reorganized the statute but did not change the substantive meaning of its provisions. And the reorganization was logical. As amended, the statute first identified the three categories of KHP personnel comprising the agency before then describing the classification of each personnel category and any other employment protections offered to certain KHP positions.

In short, the legislative history from 1963 to 1982 confirms the statute originally addressed the classification of all three KHP personnel categories in a single sentence. But as part of the 1982 reorganization, the Legislature created a textual gap between the language addressing the classification of the KHP superintendent and the language classifying the remaining KHP personnel categories. But because the 1982 amendment made no substantive changes, we presume the Legislature intended the two classification sentences continue to be read together. See *Board of Education of U.S.D. 512 v. Vic Regnier Builders, Inc.*, 231 Kan. 731, 736, 648 P.2d 1143 (1982) (Ordinarily courts presume statutory amendments change the intended effect of the statute, but this presumption has "little force in the case of amendments adopted in a general revision or codification of the law."). This bolsters our conclusion that the phrase "[a]ll other officers, troopers and employees" in the seventh sentence of K.S.A. 74-2113(a) is intended to be read along with the third sentence ("[t]he superintendent and

assistant superintendent shall be within the unclassified service"). So construed, K.S.A. 74-2113 places KHP majors within the group of "[a]ll other officers, troopers and employees" within the classified service.

b. 1991 Amendment to K.S.A. 74-2113

More support for our statutory construction can be found in the 1991 amendments to K.S.A. 74-2113. Those amendments moved the assistant superintendent—a position that had been in the classified service since 1963—into the unclassified service. In doing so, the Legislature made several changes to the statutory language addressing the assistant superintendent position:

"(a) There is hereby created a Kansas highway patrol. The patrol shall consist of: (1) A superintendent, who shall have the rank of colonel and who shall have special training and qualifications for such position; (2) an assistant superintendent, who shall have the rank of lieutenant colonel; and (3) officers and troopers who are appointed in accordance with appropriation acts and as provided in this section. The superintendent **and assistant superintendent** shall be within the unclassified service under the Kansas civil service act. **The assistant superintendent serving on the effective date of this act shall be appointed to such position by the superintendent. Thereafter, the assistant superintendent shall be appointed by the superintendent from among the members of the patrol, and shall serve at the pleasure of the superintendent.** If a person appointed as superintendent **or assistant superintendent** is a member of the patrol when appointed, such person **in each case**, upon termination of the term as superintendent **or assistant superintendent, respectively**, shall be returned to a rank not lower than the rank such person held when appointed as superintendent **or assistant superintendent**. If such rank is filled at that time, a temporary additional position shall be created in such rank until a vacancy occurs in such rank. ~~The assistant superintendent and~~ All other officers, troopers and employees shall be within the classified service under the Kansas ~~state~~ civil service **act**.

"(b) The superintendent of the patrol shall be appointed by the governor, subject to confirmation by the senate as provided in K.S.A. 75-4315b, and amendments thereto, and shall receive an annual salary fixed by the governor. **The assistant superintendent shall receive an annual salary fixed by the superintendent and approved by the governor**.

"(c) All other members of the patrol shall be appointed by the superintendent in accordance with appropriation acts and with the Kansas civil service act." L. 1991, ch. 234, § 1.

The 1991 amendments confirm the Legislature knows what statutory changes it needs to make to expressly place a KHP posi-

tion within the unclassified service rather than the classified service. Yet K.S.A. 74-2113(a) contains no such language placing the rank of major within the unclassified service. We assume the Legislature's omission was purposeful and reflects its intent to define the rank of major as within the classified service. See *City of Shawnee v. Adem*, 314 Kan. 12, 18, 494 P.3d 134 (2021) (where Legislature has shown it knows how to express its intent when new provisions are to be considered part of Kansas Code of Criminal Procedure, the omission of such language in subsequent legislative enactments assumed to be deliberate and to reflect the intent of the Legislature); *Zimmerman v. Board of Wabaunsee County Comm'rs,* 289 Kan. 926, 974, 218 P.3d 400 (2009) (where Legislature showed through statutory language it knows how to preempt the Kansas Corporation Commission, its failure to include similar language in another statute strongly suggests preemption was not intended).

c. 2018 Amendments

To support their respective positions, both parties refer to the 2018 amendments to K.S.A. 74-2113, which modified the statute as follows:

"(a) There is hereby created a Kansas highway patrol. The patrol shall consist of: (1) A superintendent, who shall have the rank of colonel and who shall have special training and qualifications for ~~such~~ **the** position; (2) an assistant superintendent, who shall have the rank of lieutenant colonel; and (3) officers and troopers who are appointed in accordance with appropriation acts and as provided in this section. The superintendent and assistant superintendent shall be within the unclassified service under the Kansas civil service act. ~~The assistant superintendent serving on the effective date of this act shall be appointed to such position by the superintendent. Thereafter,~~ The assistant superintendent shall be appointed by the superintendent from among the members of the patrol, and shall serve at the pleasure of the superintendent. If a person appointed as superintendent ~~or~~ **,** assistant superintendent **or major** is a member of the patrol when appointed, ~~such~~ **the** person in each case, upon termination of the term as superintendent ~~or~~ **,** assistant superintendent **or major**, respectively, shall be returned to a rank not lower than the rank ~~such~~ **the** person held when appointed as superintendent ~~or~~ **,** assistant superintendent **or major**. If ~~such~~ **the** rank is filled at that time, a temporary additional position shall be created in ~~such~~ **the** rank until a vacancy occurs in such rank. All other officers, troopers and employees shall be within the classified service under the Kansas civil service act." L. 2018, ch. 18, § 1.

The 2018 amendments made no change to the statutory provisions placing KHP personnel categories within the unclassified or classified services. But the amendments added majors to the list of personnel who "shall be returned to a rank not lower than the rank the person held when appointed." The only other KHP positions entitled to the same employment protection are the superintendent and the assistant superintendent positions, both of which are within the unclassified service.

While the parties agree the impetus behind the 2018 amendments was the KHP's implementation of a new career progression plan in 2016, they disagree about the ultimate purpose and effect of the amendments. Defendants claim Bruce, who was the KHP superintendent in 2016, used his authority under K.S.A. 75-2935(1)(x) and (1)(cc) to declassify the rank of major through the new career progression plan. See K.S.A. 75-2935(1)(x) (appointing authority may designate persons in newly hired positions as within the unclassified service); K.S.A. 75-2935(1)(cc) (subject to several exceptions, appointing authority may convert any vacant position within the classified service into an unclassified position). According to Defendants, the Legislature merely acknowledged the KHP's declassification of the rank of major by enacting the 2018 amendments and extending to majors the right to return to a former rank.

In contrast, Bruce claims KHP's new career progression plan merely allowed majors to voluntarily move to unclassified positions to obtain pay increases, and the Legislature intended the 2018 amendments to provide protections to majors who exercised that option. He also asserts neither he, as the appointing authority, nor the Legislature could have declassified the rank of major without violating the due process rights of the KHP personnel currently in those positions. See *Darling*, 245 Kan. at 49 ("'While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.'").

Both parties spend considerable time and effort debating the changes wrought by the KHP's 2016 career progression plan and Bruce's authority to make those changes. But these arguments are,

for the most part, beyond the scope of the certified question. Whether Bruce declassified the rank of major while he was KHP superintendent is a mixed question of fact and law outside the scope of this court's jurisdiction in answering the certified question. See *Hays*, 298 Kan. at 404. Whether Bruce could declassify the rank of major under K.S.A. 75-2935 and whether he could exercise such authority without violating constitutional due process protections are questions of law that likewise fall beyond the scope of the certified question. See *Kansas Judicial Review v. Stout*, 287 Kan. 450, 454, 196 P.3d 1162 (2008) (scope of jurisdictional review limited to the contours of the certified questions themselves). And as much as the latter question implicates federal due process rights of KHP personnel, rather than questions of state law, it is not appropriate for us to address such an inquiry under K.S.A. 60-3201. See *Winnebago*, 283 Kan. at 72-73 (certification statute designed to allow Kansas Supreme Court to answer question of state law; purpose of act not served by addressing federal constitutional question).

Even so, the legislative history behind the 2018 amendments is informative. This history bolsters the conclusion that the Legislature intended to extend to KHP majors the right to return to a former rank, rather than to declassify the rank of major altogether. The 2018 amendments were originally introduced as S.B. 84 in January 2017. Sen. Journal, p. 73 (January 25, 2017); S.B. 84 (2017). Then-Superintendent Bruce testified in support of S.B. 84 before the Senate Committee on Federal and State Affairs:

"*This bill allows for Officers and Troopers, that have been appointed to the rank of Major, be afforded the same deference that is currently allowed for Superintendent and Assistant Superintendent* within the Kansas Highway Patrol.

"As it states in current law, if a person is appointed as Superintendent or Assistant Superintendent, the person in each case, upon termination of that appointment, shall be returned to a rank of not lower than the rank the person held prior to the appointment. In 2015, the Legislature approved a Competitive Comprehensive Pay Plan specifically for the uniformed members of the Kansas Highway Patrol, which has significantly improved the Agency's hiring and retention concerns. During plan implementation, an unintended consequence was discovered that forced the rank of Major into unclassified service. Furthermore, *the rank of Major no longer met any of the provisions set forth in statute nor any of the protections provided in classified service. Consequently, the individual holding this rank could be relegated back to the position of Trooper or even ter-*

mination from the Agency upon the appointment of a new Superintendent. This revelation was not anticipated nor intended to create such a scenario for those eligible to attain the rank of Major.

"The implementation of the Comprehensive Pay Plan has had a tremendous positive impact on the Patrol in a variety of ways and will no doubt sustain our efforts into the future. This change to the statute will provide clarity for the rank of Major, maintaining the Patrol's ability to attract and make qualified appointments, as well as bring in line the provisions already in place for the unclassified positions for Superintendent and Assistant Superintendent." (Emphases added.) Hearing on S.B. 84 Before the Kansas Senate Committee on Federal and State Affairs (January 31, 2017) (testimony of Mark Bruce).

S.B. 84 was eventually struck from the Senate calendar, but the same bill was introduced as S.B. 369. Sen. Journal, p. 1483 (January 11, 2018); Sen. Journal, p. 1537 (February 5, 2018); Supplemental Note on Senate Bill No. 369 (2018), p. 1; S.B. 369 (2018). Then-Superintendent Bruce provided the following testimony in support of S.B. 369 before both the Senate and House Committees for Federal and State Affairs:

"*The purpose of this bill is to restore civil service protection to the 4 majors within the KHP that lost it as an unintended consequence of our Career Progression Plan that was implemented in 2016*. This plan accomplished two things for the Patrol. First, it increased pay for the purposes of increasing the number of applicants applying to become new troopers. Second, it corrected a compaction issue regarding the pay of our supervisors.

"Development of the Career Progression Plan (CPP) unintentionally required the highest ranking classified members of the Patrol, our majors, to become unclassified employees, in order to be placed at the appropriate spot on the CPP.

"*Moving the majors to the unclassified service made them the only at-will uniformed members in the trooper ranks. They can be transferred, demoted or fired without cause.* These individuals are career members of the Patrol who were hired on as troopers and earned promotions through the ranks and to their current position.

"Leaving the majors in the unclassified service will have a negative impact on the Patrol's ability to attract the most qualified people to apply for this position. Eligibility for promotion to major, by KHP policy is limited to captains. We generally have 18-20 members serving at that level. They are several years into their career and many won't apply for a major's vacancy because they don't want to move. The remaining number of potential candidates will be reduced by the requirement to leave classified service in order to be promoted.

"*The assistant superintendent and myself are in the unclassified service. However, at the end of our appointments, state law requires that we go back no further in rank than the last permanent position we held. In fairness to our majors and in the best interests*

of the Patrol, I am requesting that their position be afforded the same, earned protection." (Emphases added.) Hearing on S.B. 369 Before the Kansas Senate Committee on Federal and State Affairs (February 12, 2018) (testimony of Mark Bruce); Hearing on S.B. 369 Before the Kansas House Committee on Federal and State Affairs (March 14, 2018) (testimony of Mark Bruce).

Bruce's testimony reveals the purpose of the 2018 amendments was not to change the statutory classification of majors under the KCSA. In fact, Bruce's testimony presumes that before S.B. 369 was even introduced, some KHP majors had been moved from the classified service to the unclassified service because of their participation in the career progression plan. Whether Bruce's assumption (that KHP majors lost their classified status by voluntarily participating in the career progression plan) is factually accurate is beyond the scope of our review. But his testimony helps explain the purpose of the legislation. Rather than addressing classification of personnel under the KCSA, the 2018 amendment simply extended to all KHP majors the employment protection already granted to the superintendent and assistant superintendent—the right to return to their former position. This conclusion is bolstered by the fact the 2018 amendments to K.S.A. 74-2113 made no change to the provisions in subsection (a) that address the classification of personnel groups under the KCSA (the third and seventh sentence).

Likewise, the Revisor's memorandum to the chair and members of the House Committee on Federal and State Affairs on S.B. 369 states the purpose of the bill was to grant majors the same right to return to a former rank already granted to the superintendent and assistant superintendent:

"Senate Bill No. 369 (SB 369) amends K.S.A. 74-2113 regarding officers of the Kansas Highway Patrol (KHP). Members of the KHP are appointed to certain officer ranks and lose such rank when the term of the appointment ends. Under current law, at the end of the appointment term any person who is appointed to the rank of superintendent or assistant superintendent cannot be reduced in rank below such person's rank prior to appointment as superintendent or assistant superintendent.

"*SB 369 would add the rank of major to the list of appointed officers that cannot be reduced in rank below such officer's rank prior to appointment.*" (Emphasis added.) Hearing on S.B. 369 Before the Kansas House Committee on Federal and State Affairs (March 14, 2018) (memorandum of Jason Long).

S.B. 369 passed both the Senate and House unanimously. Sen. Journal, p. 1616 (February 21, 2018); House Journal, p. 2540 (March 19, 2018).

Again, whether the KHP's career progression plan declassified the rank of major is a mixed question of fact and law beyond the scope of this court's review. Consistent with the certification order, we are concerned only with determining whether K.S.A. 74-2113 places majors within the classified service. And the history shows the Legislature did not enact the 2018 amendments to define the rank of major within the unclassified service.

Rather, the purpose of the 2018 amendments was to "add the rank of major to the list of appointed officers that cannot be reduced in rank below such officer's rank prior to appointment."

3. Construing K.S.A. 74-2113(a) to Place Majors Within the Classified Service Does Not Render the 2018 Amendments Superfluous

According to Defendants, if K.S.A. 74-2113 defines majors within the classified service, then the employment protections granted to KHP majors under the 2018 amendments "would be superfluous and meaningless . . . because classified employees already have [these] protections under the civil service act." Thus, even though K.S.A. 74-2113 does not expressly place majors within the unclassified service, Defendants contend the statute must be read that way to give meaning to the 2018 amendments. See *Stanley v. Sullivan*, 300 Kan. 1015, 1021, 336 P.3d 870 (2014) (courts presume Legislature does not intend to enact superfluous or redundant legislation).

But the 2018 amendments to K.S.A. 74-2113 would be superfluous only if they granted KHP majors redundant employment protections—protections permanent classified employees already possessed under the KCSA. Our review of the KCSA and its implementing regulations confirm this is not the case.

Under the KCSA's statutory framework, an appointing authority may not dismiss, demote, or suspend a permanent classified employee without legitimate cause. See *Prager v. Kansas Dept. of Revenue*, 271 Kan. 1, 40, 20 P.3d 39 (2001); see also K.S.A. 75-2949d(a) (deficiencies in work performance or conduct grounds for dismissal, demotion, or suspension); K.S.A. 75-2949(a) (no permanent classified employee may be dismissed, demoted, or suspended for political, religious, racial, or other nonmerit reasons). But the KCSA does not compel or limit the type of discipline the appointing authority may impose when

it has good cause to take adverse employment action. More specifically, the KCSA does not compel the agency to return KHP majors to their former positions rather than terminate their employment.

The KCSA offers some protection to certain permanent classified employees who are promoted to a higher position, but this protection is limited temporally and inapplicable to Bruce. When an employee with permanent status in the classified service is promoted with probationary status to a higher position and then dismissed without cause during or at the end of the probationary period, K.S.A. 75-2944(b) requires that the employee be "demoted with permanent status to a position in the class from which the employee was promoted, or to a position in another class in the same salary range." The statute essentially grants eligible employees the right to demotion instead of discharge. But it protects only those employees promoted within the classified service, and the right to demotion expires after the probationary period ends. Thus, this statutory protection would not apply to Bruce, who was appointed to a position in the unclassified service without a probationary period. Nor would it apply more generally to employees appointed to the rank of major after they complete a probationary period in that rank.

And K.S.A. 75-2947(c) gives appointing authorities discretion to grant a leave of absence "to an officer or employee holding a regular position in the classified service to enable such person to take an appointive position in the state unclassified service." The administrative regulation implementing this statutory provision provides:

"Any employee with permanent status may be granted leave of absence without pay from the employee's classified position to enable the employee to take a position in the unclassified service, if the granting of this leave is considered by the appointing authority to be in the best interest of the service. Leave for this purpose shall not exceed one year, but the appointing authority may grant one or more extensions of up to one year, and the appointing authority may determine the number of extensions." K.A.R. 1-9-6(e).

The statute does not specifically address what happens to these employees once their term in the unclassified service ends. But one could infer from these provisions that the employee's leave would end, and the employee would return to their former

position in the classified service. Even if this were the proper statutory construction, the employee must first request a leave of absence to take a position in the unclassified service. And the appointing authority is granted discretion whether to approve such a request. Further, the leave of absence cannot exceed one year. While the employee may request an extension, the appointing authority is again granted discretion whether to approve an extension.

Quite simply, when an employee's term in the unclassified service is terminated, the KCSA does not *compel* an appointing authority to return that employee to his or her former position in the classified service. But in the 2018 amendments to K.S.A. 74-2113, the Legislature granted this very employment protection to KHP majors. But for the 2018 amendments, permanent employees within the classified service possessed no such right under the KCSA. Thus, construing K.S.A. 74-2113(a) to define the rank of major within the classified service does not render the 2018 amendments superfluous.

In sum, the plain language of K.S.A. 74-2113(a) places KHP majors within the classified service. But even if the statute's plain language did not compel this conclusion, traditional canons of statutory construction and the legislative history would. Thus, in answering the first certified question, we hold K.S.A. 74-2113 defines the rank of major within the classified service.

III. Certified Question 2: If K.S.A. 74-2113 Defines the Rank of Major in the KHP as a Member of the Classified Service, Does K.A.R. 1-7-4 (2021 Supp.) Require a Former Member of the Classified Service—Who Already Has Completed a Required Probationary Period for the Classified Service—to Serve Another Six-month Probationary Period in the Classified Service After Serving as a Member of the Unclassified Service?

Because we hold K.S.A. 74-2113 places KHP majors within the classified service, we must address the second certified question. That question contemplates a scenario in which an employee earns permanent status in the classified service by successfully completing a probationary period, then serves for a period as a

member of the unclassified service, and afterwards returns to the classified service. The United States District Court asks whether K.A.R. 1-7-4 (2021 Supp.) requires that employee to serve another six-month probationary period.

To respond to this inquiry, we first determine the intended scope of the second question. Then, we analyze the probationary period requirements in the KCSA. Finally, we respond to the merits of the certified question and hold that K.A.R. 1-7-4 (2021 Supp.) does not require a former KHP superintendent or assistant superintendent to serve another probationary period upon returning to their former rank in the classified service, as contemplated in K.S.A. 74-2113(a).

A. The Scope of Our Review Is Limited to K.A.R. 1-7-4's Application to KHP Personnel

The second certified question asks whether employees returning to the classified service from the unclassified service must serve another period of probation. But the question's wording does not expressly limit its scope to KHP employees. One could interpret the question broadly as an invitation to address the application of K.A.R. 1-7-4 (2021 Supp.) to any employee in the state service, regardless of the employing agency.

That said, the language within the certification order and the surrounding context of the litigation suggest the United States District Court intended the second certified question to address the application of K.A.R. 1-7-4 (2021 Supp.) to KHP personnel. First, the federal district court made clear we need only respond to the second question if we conclude, in response to the first certified question, that K.S.A. 74-2113 places KHP majors within the classified service. Second, this lawsuit involves a dispute over employment in the KHP. Third, in the certification order, the United States District Court questioned only how K.A.R. 1-7-4 (2021 Supp.) would apply to Bruce's situation—that is, an employee returning to the rank of major after serving as KHP superintendent. See *Resolution Trust Corp. v. Scaletty*, 257 Kan. 348, 350, 891 P.2d 1110 (1995) (finding issue was outside the scope of certified question based on federal court's discussion of the question in certification order). Fourth, as noted, K.S.A. 74-2113 addresses the

employment of KHP personnel in the state service and must be read together with the KCSA. Finally, the parties agreed at oral argument the scope of our review should be limited to KHP employees. Thus, our response addresses the application of K.A.R. 1-7-4 (2021 Supp.) to KHP employees similarly situated to Bruce.

B. The KCSA's Probationary Period Requirement

The KCSA provides "all appointments within the classified service shall be for a probationary period" unless "otherwise provided in the Kansas civil service act or by rules and regulations adopted thereunder." K.S.A. 75-2946. The probationary period serves "as a working test of the employee's ability to perform adequately in the position to which the employee was hired." K.A.R. 1-7-3(a) (2021 Supp.). Probationary employees are generally at-will employees and "may be dismissed . . . at any time during the probationary period." K.A.R. 1-7-3(d) (2021 Supp.). But see K.S.A. 75-2944(b) (providing right to demotion to prior job class in some cases for employees with permanent status serving probationary period because of promotion). It is only after the successful completion of a probationary period that an employee earns permanent status and the concomitant employment protections granted to classified personnel under the KCSA.

K.A.R. 1-7-4 (2021 Supp.) sets out the probationary period requirements for employees in various circumstances. The regulation exempts several types of employees from serving a probationary period at all. See K.A.R. 1-7-4(c) (2021 Supp.) (person rehired on basis of reemployment has permanent status from date of rehire); K.A.R. 1-7-4(f) (2021 Supp.) (employee with permanent status who is transferred retains permanent status); K.A.R. 1-7-4(i) (2021 Supp.) (temporary employees not subject to probationary period). But generally, most employees appointed to a classified position are required to serve a probationary period ranging from three to six months. See, e.g., K.A.R. 1-7-4(a) (2021 Supp.) (new hires and rehires on basis other than reemployment or reinstatement subject to six-month probationary period); K.A.R. 1-7-4(b) (2021 Supp.) (employee who is promoted subject to probationary period of three to six months); K.A.R. 1-7-4(d) (2021 Supp.) (person rehired on basis of reinstatement subject to

probationary period of three to six months). More specifically, "employee[s] who [are] transferred, demoted, or promoted from any position in the unclassified service to a regular position in the classified service shall serve a probationary period of six months." K.A.R. 1-7-4(h) (2021 Supp.).

C. K.A.R. 1-7-4 (2021 Supp.) Does Not Require KHP Superintendents or Assistant Superintendents Returning to Their Former Rank Under K.S.A. 74-2113(a) to Serve a New Probationary Period

Not surprisingly, the parties not only disagree on whether K.A.R. 1-7-4 (2021 Supp.) applies to someone in Bruce's situation, but they also disagree on which subsection of the regulation is most applicable. Bruce argues K.S.A. 74-2113's directive that he be "returned" to his former rank means he would go back to the rank of major with permanent status in the classified service. And he contends an administrative regulation cannot validly require him to serve another six-month probationary period when a statute requires a return to his former position with permanent status. See *In re Tax Appeal of City of Wichita*, 277 Kan. 487, 495, 86 P.3d 513 (2004) ("To be valid, rules or regulations of an administrative agency . . . must be appropriate, reasonable, and not inconsistent with the law."). Finally, Bruce asserts that if he were returned to his former rank of major, he would have been "rehired on the basis of reemployment" and would have been exempt from serving a probationary period under K.A.R. 1-7-4(c) (2021 Supp.) anyway.

Defendants argue K.S.A. 75-2946 and K.A.R. 1-7-4(h) (2021 Supp.) generally require *any* person appointed to the classified service, after serving in the unclassified service, to complete a six-month probationary period. But see K.A.R. 1-9-6(e) (employee with permanent status may be granted leave of absence without pay from classified position to take position in unclassified service). They also contend K.S.A. 74-2113(a) requires certain KHP personnel be returned to their former rank, but the statute does not guarantee a return to a specific position with permanent status. Thus, someone in Bruce's situation would still need to serve a six-month probationary period under K.A.R. 1-7-4(h) (2021 Supp.).

Finally, Defendants argue K.A.R. 1-7-4(c) (2021 Supp.) is inapplicable to Bruce's situation.

Defendants are correct in suggesting K.A.R. 1-7-4(c) (2021 Supp.) would not apply to Bruce. That provision exempts employees who have been "rehired on the basis of reemployment" from serving a probationary period. K.A.R. 1-7-4(c) (2021 Supp.). An employee "rehired on the basis of reemployment" refers to a process in which employees who have been laid off from the classified service are automatically placed in a pool of like persons eligible to apply for any vacancy. See K.S.A. 75-2948 (describing layoff procedures); K.A.R. 1-6-23 (2021 Supp.) (describing reemployment procedures). Since Bruce was never laid off from the classified service, K.A.R. 1-7-4(c) (2021 Supp.) is simply inapplicable.

That leaves K.A.R. 1-7-4(h) (2021 Supp.) as the only provision potentially applicable to Bruce's situation. This regulatory provision requires employees who are transferred, demoted, or promoted from the unclassified service to a regular position in the classified service to serve a six-month probationary period. But Bruce notes K.S.A. 74-2113(a) also makes clear that certain eligible KHP personnel "shall be returned to a rank not lower than the rank the person held when appointed as superintendent, assistant superintendent or major." The pivotal inquiry is whether the exercise of this statutory right triggers the probationary period contemplated in K.A.R. 1-7-4(h) (2021 Supp.).

To answer the second certified question, we first interpret the meaning and scope of the right to be "returned" to former rank under K.S.A. 74-2113(a). Once properly construed, we then analyze the statute along with K.A.R. 1-7-4(h) (2021 Supp.). Ultimately, we hold that K.A.R. 1-7-4(h) does not require a KHP superintendent or assistant superintendent returning to their former rank under K.S.A. 74-2113(a) (2021 Supp.) to serve a new (or second) probationary period.

1. *K.S.A. 74-2113 Requires KHP Superintendents and Assistant Superintendents Be Returned to the Same Position, Status, and Condition of Employment Held at the Time of Appointment*

We begin by interpreting the statute to determine the meaning of the "return to former rank" provision. The relevant statutory language provides:

"If a person appointed as superintendent, assistant superintendent or major is a member of the patrol when appointed, the person in each case, upon termination of the term as superintendent, assistant superintendent or major, respectively, shall be *returned* to a *rank* not lower than the rank the person held when appointed as superintendent, assistant superintendent or major." (Emphases added.) K.S.A. 74-2113(a).

Neither the word "returned" nor "rank" is defined by any statute or administrative regulation. Without those definitions, we construe these words according to their context, giving words in common use their ordinary meaning. *State v. Sandoval*, 308 Kan. 960, 963, 425 P.3d 365 (2018); *O'Donoghue v. Farm Bureau Mut. Ins. Co.*, 275 Kan. 430, 433, 66 P.3d 822 (2003).

As Bruce points out, the ordinary meaning of "return" is "to go back to where one was." See, e.g., Webster's New World College Dictionary 1242 (5th ed. 2016) (defining "return" as "to go or come back, as to a former place, condition, practice, opinion, etc."); Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/return (defining "return" as "to go back or come back again" or "to go back in thought, practice, or condition"); see also *Midwest Crane & Rigging, LLC v. Kansas Corporation Comm'n*, 306 Kan. 845, 851, 397 P.3d 1205 (2017) (recognizing dictionary definitions are a good source for the ordinary meaning of words). The ordinary meaning of "return" suggests eligible KHP members must revert to the very position and classification status they held before being appointed to superintendent, assistant superintendent, or major.

As for the word "rank," its ordinary meaning is "official position or standing." See Black's Law Dictionary 1511 (11th ed. 2019) (defining "rank" as "[a] social or official position or standing, as in the armed forces"). But as used in K.S.A. 74-2113(a), "rank" also corresponds to a "position" in state service. See K.A.R. 1-2-59 ("position" is "a group of duties and responsibilities, assigned or delegated by an appointing authority, requiring the services of an employee on a full-time basis or, in some cases, on a less than full-time basis"). This construction is supported within

K.S.A. 74-2113(a) itself. The sixth sentence of subsection (a) states, "If the *rank* [to which a KHP member is to be returned] is filled at that time, a temporary additional *position* shall be created." (Emphases added.) K.S.A. 74-2113(a). This language conveys an equivalency between "rank" and "position," at least within the KHP.

Based on the ordinary meaning of these terms, K.S.A. 74-2113(a) requires KHP superintendents, assistant superintendents, and majors be "returned" to the position and classification status the employee had attained before being appointed as superintendent, assistant superintendent, or major. For someone who had achieved permanent status at a rank in the classified service before being appointed to superintendent, assistant superintendent, or major that would mean a return to his or her previous rank with permanent status.

But this conclusion does not end our inquiry. Defendants aptly observe that this statutory provision must be construed together with the KCSA and its implementing regulations—specifically K.A.R. 1-7-4(h) (2021 Supp.)'s requirement that any employee transferred, demoted, or promoted from the unclassified service to a regular position in the classified service serve a six-month probationary period. See K.S.A. 74-2113(c) ("All other members of the patrol shall be appointed by the superintendent in accordance with . . . the Kansas civil service act."). Thus, we move to the second part of our analysis and compare the statute together with the administrative regulation.

2. The Plain Language of K.S.A. 74-2113(a) Controls Over K.A.R.1-7-4(h) (2021 Supp.)

As noted in the prior section, the plain language of K.S.A. 74-2113(a) requires that, upon the termination of an employee's term as superintendent, assistant superintendent, or major, the person in each case must be "returned" to the same position and classification status he or she had before the appointment. In reading this statute together with K.A.R. 1-7-4(h) (2021 Supp.), the plain language and defined terms within these provisions render K.A.R. 1-7-4(h) (2021 Supp.) inapplicable. And, alternatively, even if we were to conclude that ambiguity arises when reading the statute

and regulation together, the plain language of K.S.A. 74-2113 would control.

First, the plain language of K.S.A. 74-2113, coupled with the defined terms within K.A.R. 1-7-4(h) (2021 Supp.), reveal that the administrative regulation is inapplicable. K.S.A. 74-2113(a) provides that at the end of an employee's term as superintendent, assistant superintendent, or major, that employee "shall be *returned* to a rank not lower than the rank the person held when appointed." (Emphasis added.) In contrast, the regulation requires "[e]ach employee who is *transferred*, *demoted*, or *promoted*" from "unclassified service to a regular position in the classified service" serve a six-month probationary period. (Emphasis added.) K.A.R. 1-7-4(h) (2021 Supp.).

Within the statutory provision, the Legislature did not require that eligible employees be "promoted," "demoted," "transferred," "reemployed," "rehired," or "reinstated" to their former rank—terms that are expressly defined in the KCSA's implementing regulations. Instead, the Legislature chose the word "returned." And, as we established above, the ordinary meaning of "return" signifies that K.S.A. 74-2113 requires eligible KHP members revert to the position and classification status they had attained when appointed as superintendent, assistant superintendent, or major. So if the eligible employee had attained permanent status in the classified service before appointment, then the employee would be "returned" to permanent classified status after the appointment.

This plain meaning construction distinguishes a *return* to former rank from other employment actions contemplated within the KCSA, including promotions, transfers, and demotions triggering the probationary requirements in K.A.R. 1-7-4(h) (2021 Supp.). Under the KCSA, "'[p]romotion' means a change of an employee from a position in one class to a position in another class having a higher pay grade, by an employee who meets the required selection criteria for promotion." K.A.R. 1-2-67. The term "promotion" does not properly describe the employment protection in K.S.A. 74-2113(a) because the right to be "returned" to a former rank does not require the superintendent or assistant superintendent, upon termination of their term, be moved to another position with

a higher pay grade. Thus, a "return" to former rank has meaning distinct from the KCSA's definition of a "promotion."

Under the KCSA, "'[t]ransfer' means a change by an employee from one position to another position with a close similarity of duties, essentially the same basic qualifications, and the same pay grade." K.A.R. 1-2-88. The term "transfer" also fails to properly describe the statutory employment protection in K.S.A. 74-2113(a) because the right to be "returned" to a former rank does not require the former superintendent or assistant superintendent be changed to another position with close similarity of duties, qualifications, and pay. Thus, a "return" to former rank has meaning distinct from the KCSA's definition of a "transfer."

Finally, under the KCSA, "'[d]emotion' means the movement of an employee from a position in one class to a position in another class having a lower pay grade, either on an involuntary basis for disciplinary purposes or on a voluntary basis." K.A.R. 1-2-31. The term "demotion" comes the closest of all the defined terms in K.A.R. 1-7-4(h) (2021 Supp.) to describing the employment protection provided under the statute. But because the superintendent and assistant superintendent are within the unclassified service, they serve at the pleasure of the appointing authority who can terminate the employment relationship with or without cause. Thus, an appointing authority is free to involuntarily terminate the term of a superintendent or assistant superintendent (triggering that employee's statutory right to be returned to former rank) for reasons other than "disciplinary purposes." And if a superintendent or assistant superintendent is "returned" to their former rank under those circumstances (involuntary termination without cause), that employment action would not be a "demotion" as defined in the KCSA. Thus, a "return" to former rank has meaning distinct from the KCSA definition of "demotion."

This analysis confirms the word "return" in K.S.A. 74-2113(a) has unique meaning distinct from other employment actions contemplated within the KCSA. The probationary period contemplated in K.A.R. 1-7-4(h) (2021 Supp.) applies when an employee is "transferred, demoted, or promoted" from a position in the unclassified service to a regular position in the classified service. But the plain language reading of the statute confirms that a "return"

to former position contemplates an employment action distinct from a promotion, transfer, or demotion. Thus, K.A.R. 1-7-4(h) (2021 Supp.) is inapplicable. And this regulation does not require KHP superintendents or assistant superintendents to serve a six-month probationary period upon their return to a former position as contemplated in K.S.A. 74-2113(a).

Second, even if one could reasonably conclude that reading K.S.A. 74-2113(a) together with K.A.R. 1-7-4(h) (2021 Supp.) creates ambiguity, traditional rules of statutory construction bolster our plain language interpretation. "Statutory provisions that are clear when read separately may become ambiguous when read together." *Hays*, 298 Kan. at 406. In that case, we may resort to canons of construction, legislative history, or other background considerations to determine legislative intent. *Martin v. Naik*, 297 Kan. 241, 258, 300 P.3d 625 (2013). When addressing potential ambiguity between statutory provisions, the court must continue to read the provisions *in pari materia* and seek to bring them into harmony, if possible. *State ex rel. Secretary of DCF v. Smith*, 306 Kan. 40, 57, 392 P.3d 68 (2017).

The legislative history of the 2018 amendments to K.S.A. 74-2113(a) favors our plain language construction that the statutory right to be "returned" to a former rank does not require a new probationary period for former superintendents and assistant superintendents. As noted in our response to the first certified question, the history confirms that the purpose of the 2018 amendments was to protect the continued employment of KHP majors and prevent them from being discharged from the agency
when their term in that rank ends. It accomplished this aim by extending to majors the same employment protection already granted to superintendents and assistant superintendents.

Defendants' construction would thwart the employment protections granted by the statute and the 2018 amendments specifically. See *Milano's Inc. v. Kansas Dept. of Labor*, 296 Kan. 497, 501, 293 P.3d 707 (2013) (if statute's language subject to multiple interpretations, courts may consider statute's purpose and statute's effect under suggested constructions). If KHP superintendents or assistant superintendents had to serve a probationary period upon

their return to classified service, K.S.A. 74-2113(a) would ostensibly require that these employees be placed in their former ranks with probationary status. Once returned to their former positions with probationary status, the appointing authority would be free to discharge them for any reason or no reason. K.S.A. 75-2946. Rather than providing any genuine employment protection, K.S.A. 74-2113(a) would simply require the appointing authority perform a perfunctory step (a return to probationary status) before dismissal. And if *that* perfunctory requirement were not met, former KHP superintendents, assistant superintendents, and majors would have no viable recourse at law because they would have no property interest in continued employment as at-will, probationary employees. See *Moorhouse*, 259 Kan. at 580 (at-will employees have no property interest in continued employment).

Defendants' construction would also fail to give meaning to other provisions within K.S.A. 74-2113(a). The fifth sentence of subsection (a) establishes the right to be "returned" to former rank. The sixth sentence provides: "If the rank is filled at that time, a temporary additional position shall be created in the rank until a vacancy occurs in such rank." K.S.A. 74-2113(a). This provision compels the agency to create a new, temporary position for a superintendent, assistant superintendent, or major returning to their former position, if no current vacancy exists. The plain language contemplates a continuing employment relationship between the eligible KHP employee and the agency. But because the appointing authority may fire employees without cause during this probationary period, KHP could discharge eligible employees simply because there are no vacancies in their former positions. Thus, Defendants' interpretation fails to give the sixth sentence its intended meaning and effect.

Further, as much as K.A.R. 1-7-4(h) (2021 Supp.) could be said to conflict with our construction of K.S.A. 74-2113(a), the statutory provision would control for at least two reasons. First, K.A.R. 1-7-4(h) (2021 Supp.) is an administrative regulation. Administrative regulations must follow the law to be valid, and they cannot contravene a controlling statute. *Pemco, Inc. v. Kansas Dept. of Revenue*, 258 Kan. 717, 720, 907 P.2d 863 (1995); *Tew v. Topeka Police & Fire Civ. Serv. Comm'n*, 237 Kan. 96, 100, 697 P.2d 1279 (1985). Thus, if K.A.R. 1-

7-4(h) (2021 Supp.) conflicts with K.S.A. 74-2113, the regulation must yield to the statute.

Second, when statutory provisions are in conflict, the more specific provision generally prevails. *State ex rel. Schmidt, v. Governor Kelly*, 309 Kan. 887, 898, 441 P.3d 67 (2019). K.A.R. 1-7-4 (2021 Supp.) is a general regulatory provision governing probationary periods for employees of any state agency. In contrast, K.S.A. 74-2113(a) governs employment in the KHP and specifically provides employment protection to the superintendent, assistant superintendent, and majors. So even if we viewed the regulation on the same footing as the statute, K.S.A. 74-2113 would supersede K.A.R. 1-7-4(h) (2021 Supp.) as the more specific provision to the situation at hand.

Thus, in response to the second certified question, we hold that K.A.R. 1-7-4 (2021 Supp.) does not require eligible KHP employees to serve a six-month probationary period when returned to their former rank as contemplated in K.S.A. 74-2113(a).

CONCLUSION

We, therefore, answer the questions certified to us by the United States District Court for the District of Kansas in the following manner: We hold K.S.A. 74-2113 defines the rank of KHP major as within the classified service. And if KHP employees attain permanent status in the classified service before being appointed as superintendent or assistant superintendent in the unclassified service, then K.A.R. 1-7-4 (2021 Supp.) does not require them to serve another probationary period when "returned" to their former rank and classification status under K.S.A. 74-2113(a).

* * *

LUCKERT, C.J., concurring: I concur with the holdings reached by the majority. Unlike the majority, however, I would label K.S.A. 74-2113 ambiguous. As the United States District Court determined, K.S.A. 74-2113 "wasn't drafted in a clear and consistent fashion[, and e]ach side of the caption presents a compelling argument why the plain language of the statute favors the competing constructions that each side proposes." *Bruce v. Kelly*, No. 20-4077-DDC-GEB, 2021 WL 4284534, at *19 (D. Kan. 2021) (unpublished opinion). While I ultimately agree the majority's interpretation of K.S.A. 74-2113 reflects

legislative intent, the words of the statute alone do not, in my view, reveal that intent. But digging deeper, and applying what the majority calls the traditional methods of statutory construction, reveals the Legislature intended the statutory meaning set out in the majority opinion

No. 124,867

In the Matter of JOSEPH R. BORICH III, *Respondent*.

(514 P.3d 352)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—One-year Suspension, Subject to Conditions*.

Original proceeding in discipline. Opinion filed August 5, 2022. One-year suspension subject to conditions.

W. Thomas Stratton Jr., Deputy Disciplinary Administrator, argued the cause, and *Stanton A. Hazlett*, Disciplinary Administrator, was with him on the formal complaint for the petitioner.

John J. Ambrosio, of Morris, Laing, Evans, Brock & Kennedy, Chtd., of Topeka, argued the cause, and *Joseph R. Borich III*, respondent, argued the cause pro se.

PER CURIAM: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against the respondent, Joseph R. Borich III, of Leawood, an attorney admitted to the practice of law in Kansas in 1995. This matter involves the filing of a formal complaint, a hearing and findings of a hearing panel, and one subsequent proceeding before this court. The following summarizes the history of this case before the court:

On June 3, 2021, the Office of the Disciplinary Administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). On June 23, 2021, the respondent, through counsel, filed an answer to the complaint.

On August 18, 2021, the hearing panel conducted the hearing on the formal complaint by Zoom, where the respondent appeared along with counsel. The hearing panel determined the respondent violated KRPC 1.1 (2022 Kan. S. Ct. R. at 327) (competence); KRPC 1.2 (2022 Kan. S. Ct. R. at 329) (scope of representation); KRPC 1.5 (2022 Kan. S. Ct. R. at 333) (fees); KRPC 1.15 (2022 Kan. S. Ct. R. at 372) (safekeeping property); KRPC 1.16 (2022 Kan. S. Ct. R. at 378) (terminating representation); and KRPC 8.4 (2022 Kan. S. Ct. R. at 434) (professional misconduct).

Upon conclusion of the hearing, the panel made the following findings of fact and conclusions of law, together with its recommendation to this court:

"*Findings of Fact*

"9. The hearing panel finds the following facts, by clear and convincing evidence:

"10. J.D. and C.D., complainants, retained the respondent to represent them in claims against their home builder for defects in their new home construction. On December 19, 2007, the respondent and J.D. and C.D. entered into a fee agreement. According to the one-page fee agreement J.D. and C.D. were to pay the respondent 'on a contingency basis of 33 1/3% above any monies recoverable, for the purposes of attempting to negotiate a settlement, representation at jury trial and appeals court in the claim for damages to their home' against the home builder. The fee agreement also provided that '[t]he client will be responsible for costs and expenses of the lawsuit, payable as due. Expenses shall be limited to filing fees, court fees, expert appraisal fees, deposition court reporter fees, and appeal brief printing and filing fees.' The contract provided for no other payments by J.D. and C.D.

"11. Over the course of more than ten years that their case was pending, J.D. and C.D., particularly C.D., provided a substantial amount of time and work preparing legal filings and other documents in the case that the respondent ultimately reviewed, utilized, signed, and filed. The respondent acknowledged that C.D. provided a significant amount of legal research and drafted many of the legal documents in the case. However, the respondent stated that he did not request this of C.D., that she did this on her own initiative, and the respondent maintained ultimate control over the litigation

"12. In late 2008, after several unsuccessful attempts to mediate and settle the case with the home builder but before any lawsuit was filed, the respondent suggested an amendment to the original representation agreement to J.D. and C.D. In a letter dated December 19, 2008, to J.D., C.D., and a third client, the respondent wrote, in material part:

'I also thank you for committing to the attorney's fee contract whereby I still will remain on a 33 1/3% contingent fee on both your claims. However, each of you is to pay $1,000.00 in December in attorney's fees and $500.00 per month in attorney's fees starting in January. The attorney's fees will be deducted as a credit from the final contingency attorney fee award. Mr. Chapman will receive $250.00 a piece per month as the paralegal/expert consultant. Finally, the client will be responsible for all expert fees, court fees, mediation fees, and arbitration fees. Per our discussions, I will not return any attorney's fees if we are not successful, or alternatively, our legal relief turns out to be repairs by [the home builder]. I will not seek any additional fees other than what is outlined in this letter.'

The December 19, 2008, letter was signed by both J.D. and C.D.

"13. J.D. and C.D. believed that the $500 monthly payments were a prepayment of the respondent's 33 1/3% contingent fee to which the parties previously agreed.

"14. The respondent did not place the $500 monthly payments into his attorney trust account and instead kept the payments for himself because he believed the funds were already earned before he received them. However, the respondent acknowledged that he did not keep any record of his time to support his belief that the funds had been earned.

"15. The December 19, 2008, letter did not state at what point or under what circumstances the fees would be considered 'earned' by the respondent.

"16. After the new agreement was entered regarding attorney fees, J.D. and C.D. over time paid the respondent $46,910. The respondent gave no billing statements or accounting to J.D. and C.D. for the payments they made to him.

"17. At one point during one of the mediation sessions with the home builder, the home builder offered to pay $75,000 to J.D. and C.D. to settle the case. The respondent advised J.D. and C.D. to accept the $75,000 offer, but J.D. and C.D. rejected the offer.

"18. On August 28, 2009, the respondent filed a petition for damages against the home builder on behalf of J.D. and C.D. in Johnson County District Court, case number 09CV7881. On October 7, 2009, the case was removed to federal court based on a federal claim in the petition and the state district court case was terminated.

"19. On December 1, 2010, the United States District Court for the District of Kansas entered summary judgment against J.D. and C.D. on their federal claim. The federal district court dismissed the claim for breach of the purchase agreement, sustaining the home builder's motion to compel arbitration on that claim, and declined to exercise supplemental jurisdiction over the state law claims for breach of limited warranty.

"20. On or about February 23, 2011, the respondent demanded and accepted from J.D. and C.D. a $5,000 payment that was in addition to the amounts agreed to in the prior 2007 contingent fee agreement and 2008 amendment to the contingent fee agreement.

"21. The respondent stated in an email message to C.D. that he requested the additional $5,000 because he 'reviewed [his] timesheets and the amount of time spent in this matter is almost incalculable. The bill would be significantly more in spite [*sic*] of $500/month for attorney fees and paralegal fees.' However, in a July 24, 2019, letter to the disciplinary administrator's office, the respondent's attorney at the time stated that no contemporaneously created time

records of the time the respondent spent on this case exist. Thus, the statement to J.D. and C.D. that the need for the $5,000 payment was false.

"22. On April 27, 2011, the respondent filed a new petition for damages against the home builder on behalf of J.D. and C.D. in district court, case number 11CV3679.

"23. On July 18, 2011, the district court entered a memorandum decision dismissing Count IV of the petition. The district court stayed Counts I and II, which involved claims for breach of express limited warranty, until Count III, a claim for breach of the purchase agreement, was determined during arbitration.

"24. The respondent felt 'overwhelmed' and believed that the case against the home builder was 'monster litigation for a solo practitioner' like himself. The respondent testified, 'there's no way a sole practitioner could represent or go through that on his own. No way.' Prior to the 2013 arbitration, the respondent recommended that J.D. and C.D. hire attorney Jim Jackson to help the respondent with the case. They hired Mr. Jackson to work as co-counsel with the respondent. At the time Mr. Jackson was also retained it was to assist the respondent in filing a pleading when the respondent was unavailable to do so.

"25. J.D. and C.D. paid Mr. Jackson directly for his work on an hourly basis. Over time, J.D. and C.D. paid Mr. Jackson a total of $48,803 for his representation in their case.

"26. On May 3, 2013, the respondent demanded and accepted from J.D. and C.D. a $500 payment that was in addition to the amounts agreed to in the prior 2007 contingent fee agreement and 2008 amendment to the contingent fee agreement. The respondent stated that this additional $500 requested was '[d]ue to the extraordinary amount of time spent in April.'

"27. In July 2013, J.D. and C.D. lost the arbitration. The arbitrator found in favor of the home builder on Count III of J.D. and C.D.'s petition.

"28. On January 10, 2014, the district court entered an order granting the home builder's motion to confirm the arbitration award in 11CV3679.

"29. Pursuant to K.S.A. 5-418(a)(3), '[a]n appeal may be taken from . . . [a]n order confirming or denying confirmation of an award' entered during arbitration. 'The appeal shall be taken in the manner and to the extent as from orders or judgments in a civil action.'

"30. On January 22 and 24, 2014, J.D. and C.D. emailed the respondent about their desire to appeal the district court's order affirming the arbitration decision.

"31. The respondent did not file a timely notice of appeal of the district court's order affirming the arbitration decision.

"32. On September 30, 2015, the district court ruled that J.D. and C.D.'s fraud and negligent misrepresentation claims were barred from being brought outside the statute of limitations and their remaining limited warranty claims were precluded by law under the doctrines of *res judicata* and collateral estoppel based on the district court's confirmation of the arbitration determination.

"33. The district court entered a final order adjudicating all outstanding claims on February 19, 2016.

"34. Six notices of appeal were filed on behalf of J.D. and C.D. between October 26, 2015 and September 1, 2016. Two of these notices were prematurely filed. Three of the notices were never docketed with the Kansas Court of Appeals. One prematurely-filed appeal and one timely-filed appeal were docketed as appeal numbers 114,775 and 115,427 respectively.

"35. On April 11, 2016, the Court of Appeals issued a show cause order why appeal numbers 114,775 and 115,427 should not be consolidated. Instead of responding to the show cause order, on April 26, 2016, the respondent filed identical and voluminous motions titled 'Motion to Dismiss for Lack of Appellate Jurisdiction,' which the court construed as voluntary dismissals of the two docketed appeals.

"36. The Court of Appeals held that the brief filed on behalf of J.D. and C.D. 'attempt[ed] to make several rather convoluted arguments. In addition, it [was] nearly impossible to square [J.D. and C.D.'s] brief with the record on appeal.'

"37. The Court of Appeals further held that J.D. and C.D. completely ignored in their initial brief the court's order that the parties brief the issue of whether the Court of Appeals had jurisdiction to consider their appeal. The reply brief only briefly addressed the appellate jurisdiction issue. The home builder fully briefed the jurisdiction issue.

"38. In its August 18, 2017, opinion, the Court of Appeals held that the court 'lack[ed] jurisdiction to consider any of the issues' and dismissed J.D. and C.D.'s appeal.

"39. The Kansas Supreme Court denied J.D. and C.D.'s petition for review of the Court of Appeals decision.

"40. On May 4, 2018, J.D. and C.D. sent a letter to the respondent stating their desire to file a *writ of certiorari* to the United States Supreme Court. J.D. and C.D. also asked that the respondent provide them a full accounting of the money they had paid to him and others, including Mr. Jackson, stating their understanding that all funds they paid would be returned to them in the event no recovery was obtained from the home builder.

"41. On May 13, 2018, the respondent told J.D. and C.D. that his representation of them was terminated. On May 15, 2018, the respondent's attorney, Douglas Patterson wrote to J.D. and C.D. confirming that the

respondent terminated his representation. No funds were returned by the respondent to J.D. and C.D.

"42. On June 21, 2018, after terminating his representation of J.D. and C.D., the respondent issued a $3,500 check to J.D. and C.D. from his UMB Bank trust account. A letter from the respondent's attorney, Mr. Patterson, indicated that the $3,500 was payment to J.D. and C.D. of an arbitration award that the respondent held in trust for J.D. and C.D.

"43. During the disciplinary investigation in this matter, the respondent was asked to provide a copy of proof of the arbitration award, a copy of the check from the home builder, and proof of deposit of the check into the respondent's trust account. Through Mr. Patterson, the respondent stated that he had been mistaken and that there was no arbitration award. The $3,500 check was funded by a June 13, 2018, deposit of $4,000 to the respondent's trust account using his own personal funds.

"*Conclusions of Law*

"44. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 1.1 (competence), KRPC 1.2 (scope of representation), KRPC 1.5 (fees), KRPC 1.15 (safekeeping property), KRPC 1.16 (declining or terminating representation), and KRPC 8.4 (professional misconduct) as detailed below.

"KRPC 1.1 and KRPC 1.2

"45. Lawyers must provide competent representation to their clients. 'Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.' KRPC 1.1. KRPC 1.2 provides in material part:

'(a) A lawyer shall abide by a client's decisions concerning the lawful objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means which the lawyer shall choose to pursue. A lawyer shall abide by a client's decision whether to settle a matter.

. . . .

'(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing.'

"46. The comments to KRPC 1.1 provide additional clarity on an attorney's responsibilities. Competent representation 'includes inquiry into and analysis of the factual and legal elements of the problem' and 'adequate preparation.' KRPC 1.1, Cmt. 5. 'The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.' KRPC 1.1, Cmt. 5. Before contracting with other lawyers on a client's case, a lawyer 'should ordinarily obtain informed consent from the client and must reasonably believe

that the other lawyer's services will contribute to the competent and ethical representation of the client.' KRPC 1.1, Cmt. 6.

"47. Likewise, the comments to KRPC 1.2 are also helpful to consider in this case. 'A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking.' KRPC 1.2, Cmt. 1. Also, '[i]n questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred . . . .' KRPC 1.2, Cmt. 1. Further, '[a]n agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1.' KRPC 1.2, Cmt. 5. Finally, '[w]hen lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2.' KRPC 1.1, Cmt. 7.

"48. The respondent failed to provide J.D. and C.D. with competent representation. The respondent recognized his lack of competence in J.D. and C.D.'s case, to some extent, stating that he felt 'overwhelmed' and believed that the arbitration and litigation with the home builder was 'monster litigation for a solo practitioner' like himself. The respondent testified, 'there's no way a sole practitioner could represent or go through that on his own. No way.' The respondent failed to timely and properly file appeals on behalf of J.D. and C.D. In addition, the respondent accepted assistance from J.D. and C.D. in the case that would ordinarily be expected to be provided by a lawyer or the lawyer's staff. Both the United States District Court for the District of Kansas and the Court of Appeals noted significant deficiencies in the respondent's filings. Six notices of appeal were filed on behalf of J.D. and C.D. between October 26, 2015 and September 1, 2016, in the Court of Appeals. Two of these notices were prematurely filed. Three of the notices were never docketed with the Court of Appeals. The respondent failed to appropriately respond to the Court of Appeals' show cause order regarding consolidation, filed a brief on behalf of J.D. and C.D. that contained 'convoluted arguments' and that was 'nearly impossible to square . . . with the record on appeal,' and ignored the Court of Appeals' order to address jurisdiction in the appellate brief and only briefly addressed jurisdiction in the reply brief.

"49. The hearing panel concludes that the respondent failed to represent J.D. and C.D. with the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation in their case. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.1.

"50. The respondent did not properly limit the scope of his representation. After accepting representation of J.D. and C.D., the respondent recommended they also hire Mr. Jackson to assist the respondent. J.D. and C.D. were not properly consulted prior to Mr. Jackson being brought in to work on the case. In

fact, C.D. was under the impression that the respondent had negotiated Mr. Jackson's employment and that fees J.D. and C.D. paid to Mr. Jackson would be credited against the 33 1/3% contingency fee. Recommending that J.D. and C.D. hire Mr. Jackson to help with the litigation at their own additional cost after the respondent had already committed to representing J.D. and C.D. supports a finding that the respondent was not competent to handle the clients' case and unreasonably limited the scope of his representation.

"51. The hearing panel concludes that the respondent improperly limited the scope of his representation of J.D. and C.D. when he recommended that they hire another attorney to assist the respondent at the clients' own expense and accepted and utilized assistance from J.D. and C.D. beyond that reasonably expected from a client under Rule 1.2. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.2(c).

"KRPC 1.5(d)

"52. An attorney's fee must be reasonable. KRPC 1.5(a). Contingent fee agreements must be in writing. KRPC 1.5(d) provides the requirement in this regard:

'A fee may be contingent on the outcome of the matter for which the service is rendered . . . . A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, and the litigation and other expenses to be deducted from the recovery.'

"53. The respondent entered into a contingency fee agreement with J.D. and C.D. The initial December 19, 2007, contingency fee agreement, and December 19, 2008, amendment to that contingency fee agreement were both reduced to writing.

"54. However, the December 19, 2008, amendment to the contingency fee agreement did not specify in what event the funds paid by J.D. and C.D. would be regarded as earned by the respondent. This understandably resulted in J.D. and C.D.'s confusion about the way the respondent treated their monthly payments—i.e., not depositing those payments into a trust account, not providing J.D. and C.D. with billing statements or an accounting to show that the respondent treated those payments as earned upon receipt, and refusing to refund the payments when there was no recovery from the home builder.

"55. 'A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal . . . .' KRPC 1.5(d). The December 19, 2008, amendment to the contingent fee agreement did not state the method by which the respondent's fee was to be determined, the amount that would accrue to the respondent, or at what point those amounts would accrue to the respondent. Accordingly, the hearing panel

concludes that the amendment to the contingent fee agreement violated KRPC 1.5(d).

"56. On or about February 23, 2011, the respondent demanded and accepted from J.D. and C.D. a $5,000 payment that was in addition to the amounts agreed to in the prior 2007 contingent fee agreement and 2008 amendment to the contingent fee agreement. Also, on or about May 3, 2013, the respondent demanded and accepted from J.D. and C.D. a $500 payment that was in addition to the amounts agreed to in the prior 2007 contingent fee agreement and 2008 amendment to the contingent fee agreement. Finally, the respondent did not keep contemporaneously time records to show whether or how these additional amounts were earned.

"57. The hearing panel concludes that the respondent amended the parties' existing contingent fee agreement to an agreement that was unreasonable and did not comply with the requirements of KRPC 1.5(d). Thus, the hearing panel concludes that the respondent violated KRPC 1.5(a) and KRPC 1.5(d).

"KRPC 1.15(a)

"58. Lawyers must properly safeguard the property of their clients and third persons. Properly safeguarding the property of others necessarily requires lawyers to deposit unearned fees into an attorney trust account. KRPC 1.15(a). 'A lawyer may charge a flat fee to a client for a specific task to be undertaken. When the flat fee is paid to the lawyer, it must be deposited into the lawyer's trust account and the fee cannot be withdrawn until it is earned.' *In re Thurston*, 304 Kan. 146, 149, 371 P.3d 879 (2016). A flat fee is not earned until the agreed task is completed. A lawyer and client may agree to partial withdrawals based on completion of agreed subtasks. *Id*.

"59. The respondent's December 19, 2008, amendment to the contingency fee agreement via a letter to J.D. and C.D. does not provide for when or in what event the $500 monthly payments would be earned.

"60. J.D. and C.D. understood that the $500 monthly payments were a prepayment of the respondent's contingent fee to which the parties previously agreed.

"61. During the hearing, the respondent testified that he did not place the $500 monthly payments into his attorney trust account because he considered the funds to have already been earned before he received the payments. However, the respondent acknowledged that he did not keep any record of his time that might support this belief. The respondent's explanation for his failure to place these payments into his trust account—that he had already earned the fees before they were paid—is not supported by the evidence.

"62. The parties' December 19, 2008, revised fee agreement does not provide for when attorney fees would be earned other than at the conclusion of the case, and the respondent kept no contemporaneous time records to show his

time spent in the case prior to paying himself. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.15(a) by failing to deposit unearned fees, thus, the property of others, into his attorney trust account.

"KRPC 1.15(b)

"63. Lawyers must provide an accounting of fees paid upon request. KRPC 1.15(b) provides:

'Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.'

"64. On May 4, 2018, J.D. and C.D. requested an accounting of the money they had paid up to that date. In the letter, J.D. and C.D. provided their own accounting of their payments in the case. J.D. and C.D. also asked the respondent to confirm he had an attorney trust account and that he had safeguarded their payments separate from his own personal or business accounts. The respondent replied through his attorney:

'As to the remainder of your letter concerning your request for information on an account, such account does not exist and never has. You know that. Pursuant to your agreement with Mr. Borich, you paid Mr. Borich the sums described in your letter. You also paid the additional monies to Mr. Jackson, [R.C.], for the arbitration and other costs. There was no conversation on May 2, 2018 in this regard. *Accordingly, any suggestion that any refund will be made to you for any purposes is specifically denied.*'

The respondent never provided an accounting to J.D. and C.D.

"65. The hearing panel concludes that the respondent violated KRPC 1.15(b) when he failed to promptly provide J.D. and C.D. an accounting of the funds they had paid to him.

"KRPC 1.15(d)

"66. KRPC 1.15(d) requires a lawyer to preserve the identity of funds or other property belonging to a client. Specifically, KRPC 1.15(d) requires:

'All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable accounts maintained in the State of Kansas with a federal or state chartered or licensed financial institution and insured by an agency of the federal or state government, and no funds belonging to the lawyer or law firm shall be deposited therein (with certain exceptions inapplicable here).'

"67. The respondent commingled his personal funds with his clients' and third persons' funds. The respondent deposited unearned fees into his operating account. Additionally, the respondent deposited $4,000 of his personal funds into his attorney

trust account to cover a $3,500 check he paid to J.D. and C.D. As a result, the hearing panel concludes that the respondent violated KRPC 1.15(d).

"KRPC 1.16(a)

"68. In certain circumstances, attorneys must withdraw from representing a client. KRPC 1.16 provides:

'(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: . . . the representation will result in violation of the rules of professional conduct or other law . . . .'

The respondent should have withdrawn from representing J.D. and C.D. when it became clear that he was not competent to handle the representation. The hearing panel concludes that the respondent's failure to withdraw amounts to a violation of KRPC 1.16(a).

"KRPC 1.16(d)

"69. KRPC 1.16(d) requires lawyers to take certain steps to protect clients after the representation has been terminated. Specifically, KRPC 1.16(d) provides:

'Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.'

'Upon termination, a lawyer needs to be in a position to accurately determine the fees earned to date. That requires lawyers to keep time records reflecting actual time spent in the representation.' *In re Thurston*, 304 Kan. 146, 149, 371 P.3d 879 (2016).

"70. In a July 24, 2019, letter to the disciplinary administrator's office, the respondent's attorney stated that no contemporaneously created time records of the time the respondent spent on this case exist. Further, on August 17, 2021, the parties entered into a written stipulation that the respondent violated KRPC 1.16 by failing to keep time records reflecting actual time spent in the representation [of] J.D. and C.D.

"71. The hearing panel concludes that the respondent violated KRPC 1.16(d) when he failed to keep accurate time records reflecting the time he spent in the representation. See *In re Thurston*, 304 Kan. 146, 371 P.3d 879 (2016).

"KRPC 8.4(c)

"72. 'It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.' KRPC 8.4(c). After the termination of his representation of J.D. and C.D., the respondent issued a $3,500 check to J.D. and C.D. from his trust account, indicating that it was an arbitration award paid by the home builder. There was never an arbitration award and never any payment from the home

builder. The $3,500 check was funded by a June 13, 2018, deposit of $4,000 to the respondent's trust account using his own personal funds.

"73. The respondent knew his statement to his clients was false because just days before, the respondent deposited $4,000 of his own funds into his trust account to cover the check. Accordingly, the hearing panel concludes that the respondent violated KRPC 8.4(c).

"KRPC 8.4(d)

"74. 'It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.' KRPC 8.4(d).

"75. Both the United States District Court for the District of Kansas and the Court of Appeals noted significant deficiencies in the respondent's filings. Six notices of appeal were filed in the Court of Appeals on behalf of J.D. and C.D. between October 26, 2015 and September 1, 2016. Two of these notices were prematurely filed. Three of the notices were never docketed with the Court of Appeals. The respondent failed to appropriately respond to the Court of Appeals' show cause order regarding consolidation, filed a brief on behalf of J.D. and C.D. that contained 'convoluted arguments' and that was 'nearly impossible to square . . . with the record on appeal,' and ignored the Court of Appeals' order to address jurisdiction in the appellate brief and only briefly addressed jurisdiction in the reply brief.

"76. The hearing panel concludes that the respondent engaged in conduct that was prejudicial to the administration of justice when he filed pleadings in the United States District Court for the District of Kansas and the Kansas Court of Appeals that ignored court orders and were notably deficient. Accordingly, the hearing panel concludes that the respondent violated KRPC 8.4(d).

"*American Bar Association Standards for Imposing Lawyer Sanctions*

"77. In making this recommendation for discipline, the hearing panel considered the factors outlined by the American Bar Association in its Standards for Imposing Lawyer Sanctions (hereinafter 'Standards'). Pursuant to Standard 3, the factors to be considered are the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors.

"78. *Duty Violated*. The respondent violated his duties to his clients, the public, and the legal system. The respondent violated his duties to his clients to charge a reasonable fee and to properly safeguard client property. The respondent violated his duty to the public to maintain his personal integrity. Finally, the respondent violated his duty to the legal system to refrain from conduct that is prejudicial to the administration of justice.

"79. *Mental State*. The respondent negligently violated some of his duties and knowingly violated other duties.

"80. *Injury*. As a result of the respondent's misconduct, the respondent caused actual and potential injury to his clients, the legal system, and the legal profession. The respondent's misconduct caused actual injury to his clients in the form of unreasonably increased attorney and other legal fees, reduced chance of successful resolution of their claims, and increased negative emotional toll related to their case. The respondent's misconduct caused actual injury to the legal system by wasting the courts' time with addressing pleadings and other filings that did not conform to the rules and orders of the jurisdiction. Finally, the respondent's dishonest conduct injured the legal profession.

"Aggravating and Mitigating Factors

"81. Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, found the following aggravating factors present:

"82. *Dishonest or Selfish Motive*. The respondent exhibited a selfish motive in requesting additional flat fee payments after initially accepting J.D. and C.D.'s case on a contingency basis. Requiring the additional payments reduced his risk and increased his clients' risk in the litigation beyond what was initially agreed. Accordingly, the hearing panel concludes that the respondent's misconduct was motivated by selfishness. However, as discussed below, this is mitigated significantly by evidence that the respondent put a substantial amount of time and work into J.D. and C.D.'s case.

"83. *A Pattern of Misconduct*. The respondent engaged in a pattern of misconduct by repeatedly failing to deposit unearned fees into his attorney trust account. The respondent engaged in his pattern of misconduct for a period of years. Accordingly, the hearing panel concludes the respondent's pattern of misconduct is an aggravating factor in this case.

"84. *Multiple Offenses*. The respondent committed multiple rule violations. The respondent violated KRPC 1.1 (competence), KRPC 1.2 (scope of representation), KRPC 1.5 (fees), KRPC 1.15 (safekeeping property), KRPC 1.16 (terminating representation), and KRPC 8.4 (professional misconduct). Accordingly, the hearing panel concludes that the respondent committed multiple offenses.

"85. *Vulnerability of Victim*. The evidence showed that J.D. and C.D. were vulnerable to the respondent's misconduct. They were put into a position where they could not terminate the respondent's representation without serious repercussions to their case, which is evidenced by their agreement to pay additional fees to the respondent and Mr. Jackson beyond what was initially agreed at the outset of their case. The hearing panel concludes that vulnerability of J.D. and C.D. is an aggravating factor.

"86. *Substantial Experience in the Practice of Law*. The Missouri Supreme Court admitted the respondent to the practice of law in 1973 and the Kansas Supreme Court admitted the respondent to practice law in 1995. As such, at the time of the misconduct in this case, the respondent had been licensed to practice law for more than 30 years. The hearing panel concludes that the respondent has substantial experience in the practice of law.

"87. *Indifference to Making Restitution*. The respondent failed to refund any portion of the attorney fees J.D. and C.D. paid to him. The hearing panel concludes that this is an aggravating factor.

"88. Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, found the following mitigating circumstances present:

"89. *Absence of a Prior Disciplinary Record*. The respondent has not previously been disciplined. The hearing panel concludes the lack of any prior discipline in combination with the respondent's long legal career is a significant mitigating factor.

"90. *Personal or Emotional Problems if Such Misfortunes Have Contributed to Violation of the Kansas Rules of Professional Conduct*. During the pendency of J.D. and C.D.'s case, the respondent's marriage ended in divorce. In that same time, the respondent experienced serious health conditions that resulted in major surgery, a stroke, and a heart irregularity requiring hospitalization after the conclusion of the case. The severity of the health conditions and personal issues may have contributed to the misconduct in this case. The hearing panel concludes this is a mitigating factor.

"91. *The Present and Past Attitude of the Attorney as Shown by His or Her Cooperation During the Hearing and His or Her Full and Free Acknowledgment of the Transgressions.* The respondent cooperated with the disciplinary process. Additionally, the respondent admitted that he violated KRPC 1.16. However, the respondent denied other violations of the Kansas Rules of Professional Conduct and refused any refund of attorney fees paid to J.D. and C.D. On balance, the hearing panel finds the respondent's cooperation and admission to be a mitigating factor.

"92. *Previous Good Character and Reputation in the Community Including Any Letters from Clients, Friends and Lawyers in Support of the Character and General Reputation of the Attorney*. The respondent enjoys the respect of his peers and generally possesses a good character and reputation as evidenced by nine letters of support and the testimony of two fellow attorneys. The hearing panel concludes this is an important mitigating factor.

"93. *Remorse*. At the hearing on this matter, the respondent expressed some remorse for the result of J.D. and C.D.'s case. The respondent acknowledged he made mistakes in J.D. and C.D.'s case, took some responsibility for the case

result, and exhibited remorse for the negative impact that his actions had on J.D. and C.D. The hearing panel concludes this is a mitigating factor in this case.

"94. *The respondent's overall intentions shown through his actions*. It is clear based on the evidence that J.D. and C.D. paid a substantial amount of money to the respondent and Mr. Jackson and contributed significant hours to working on their own case. It is also clear that the respondent spent a substantial amount of time and effort on his clients' case. This case was complex. It involved three mediation sessions, an arbitration session, state court litigation, and federal litigation. The case also involved an appeal to the Court of Appeals and petition for review to the Kansas Supreme Court. Overall, the case lasted more than 10 years. The respondent represented J.D. and C.D. throughout the entire case at every level. The hearing panel has no doubt that the respondent expended a substantial amount of time to handle J.D. and C.D.'s case. The hearing panel concluded that this is an important mitigating factor.

"95. In addition to the above-cited factors, the hearing panel has thoroughly examined and considered the following Standards:

"4.12 'Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.'

"4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.'

"4.42 'Suspension is generally appropriate when:

'(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or

'(b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.'

"4.43 'Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.'

"4.52 'Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client.'

"4.53 'Reprimand is generally appropriate when a lawyer:

'(a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or

'(b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.'

"4.62 'Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.'

"4.63 'Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.'

"7.2 'Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.'

"7.3 'Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.'

"*Discussion*

"96. The hearing panel has the duty to find facts by clear and convincing evidence. The hearing panel also has the duty to determine whether those facts establish violations of the Kansas Rules of Professional Conduct or the Rules Relating to Discipline of Attorneys. If the hearing panel concludes that a respondent violated the rules, the hearing panel must then consider factors in mitigation and aggravation and make a recommendation for discipline.

"97. The hearing panel is not authorized to resolve fee disputes between clients and attorneys. Determining a fee dispute requires a different presentation of evidence and type of analysis than that involved in an attorney discipline proceeding.

"98. The respondent's misconduct in this case contributed to a misunderstanding with his clients regarding how their payments would be treated. First, the 2008 amendment to the attorney fee contract failed to describe the method by which the respondent's fee was to be determined, the amount that would accrue to the respondent, or at what point or under what circumstances those amounts would accrue to the respondent. Second, the respondent treated J.D. and C.D.'s payments as earned fees without providing J.D. and C.D. with an accounting for how those fees were handled or reaching an agreed understanding of the point when those fees were earned by the respondent. Finally, the respondent did not hold the payments in his trust account until he could establish that the payments were earned.

"99. The disciplinary administrator requested the hearing panel recommend that the respondent be required to refund J.D. and C.D. for the attorney fees they paid in their case against the home builder. At one point during the litigation with the home builder, the home builder offered $75,000 to resolve the case with J.D. and C.D. The respondent recommended that J.D. and C.D. accept $75,000 to settle the case. Had the respondent fully complied with the Rules of Professional Conduct, he might have been able to establish that he was entitled to keep the full $46,910 J.D. and C.D. paid to him. However, the evidence shows that this was not the case, and the hearing panel concludes that the respondent should not keep the full $46,910 that J.D. and C.D. paid.

"100. The hearing panel also recognizes that the respondent provided valuable services to J.D. and C.D. over the course of ten years in their case against the home builder.

"101. Under the original Attorney Fee Contract entered on December 19, 2007 with J.D. and C.D., the respondent would have received '33 1/3% above any monies recoverable.' Had J.D. and C.D. accepted the $75,000 offer by the home builder, the respondent would have been entitled to an attorney fee of

$25,000. The hearing panel concludes that the respondent should be permitted to retain the $25,000 that he would have been entitled to under the original December 19, 2007, attorney fee contract had the case settled as he recommended and be required to refund J.D. and C.D. the remaining $21,910 of their payments to him. The disciplinary administrator requested that the respondent also be required to reimburse J.D. and C.D. for $1,876.93 they paid to other individuals working with the respondent. The amounts paid to individuals other than the respondent are not before the hearing panel and the hearing panel makes no recommendation regarding these amounts.

"*Recommendation of the Parties*

"102. The disciplinary administrator recommended that the respondent be suspended for one year and be required to undergo a reinstatement hearing pursuant to Rule 232 (2021 Kan. S. Ct. R. 287) prior to reinstatement.

"103. The respondent recommended that the hearing panel recommend something less than suspension as discipline.

"*Recommendation of the Hearing Panel*

"104. Accordingly, based upon the findings of fact, conclusions of law, and the Standards listed above, the hearing panel unanimously recommends that the respondent be suspended for a period of 90 days. The hearing panel further recommends that the respondent be ordered to refund J.D. and C.D. $21,900 of the attorney fees that were paid to the respondent by J.D. and C.D.

"105. Costs are assessed against the respondent in an amount to be certified by the Office of the Disciplinary Administrator."

DISCUSSION

In a disciplinary proceeding, this court considers the evidence, the findings of the hearing panel, and the arguments of the parties and determines whether violations of KRPC exist and, if they do, what discipline should be imposed. Attorney misconduct must be established by clear and convincing evidence. *In re Foster*, 292 Kan. 940, 945, 258 P.3d 375 (2011); see Supreme Court Rule 226(a)(1)(A) (2022 Kan. S. Ct. R. at 281). "Clear and convincing evidence is 'evidence that causes the factfinder to believe that "the truth of the facts asserted is highly probable."'" *In re Lober*, 288 Kan. 498, 505, 204 P.3d 610 (2009) (quoting *In re Dennis*, 286 Kan. 708, 725, 188 P.3d 1 [2008]).

The respondent was given adequate notice of the formal complaint to which he filed an answer. The respondent was also given adequate notice of the hearing before the panel and the hearing

before this court. He did not file exceptions to the hearing panel's final hearing report.

With no exceptions before us, the panel's factual findings and conclusions of law are deemed admitted. Supreme Court Rule 228(g)(1), (2) (2022 Kan. S. Ct. R. at 287). Furthermore, the facts before the hearing panel establish by clear and convincing evidence the charged misconduct in violation of KRPC 1.1 (2022 Kan. S. Ct. R. at 327) (competence); KRPC 1.2 (2022 Kan. S. Ct. R. at 329) (scope of representation); KRPC 1.5 (2022 Kan. S. Ct. R. at 333) (fees); KRPC 1.15 (2022 Kan. S. Ct. R. at 372) (safekeeping property); KRPC 1.16 (2022 Kan. S. Ct. R. at 378) (terminating representation); and KRPC 8.4 (2022 Kan. S. Ct. R. at 434) (professional misconduct). The evidence also supports the panel's conclusions of law. We, therefore, adopt the panel's findings and conclusions.

The only remaining issue is to decide the appropriate discipline for these violations. This court is not bound by the recommendations made by the Disciplinary Administrator or the hearing panel. See *In re Biscanin*, 305 Kan. 1212, 1229, 390 P.3d 886 (2017).

After carefully considering the evidence presented, as well as the ABA Standards for Imposing Lawyer Sanctions, we think the disciplinary recommendations offered by the hearing panel fail to reflect the significance of the misconduct that occurred in this case. We conclude that the respondent must repay the full $46,910 to the claimants and be suspended from the practice of law for one year subject to conditions set forth below.

As it pertains to the amount owed to the complainants, the Disciplinary Administrator requested that the respondent be required to refund J.D. and C.D. for the full $46,910 they paid respondent in attorney fees in their case against the home builder.

The hearing panel maintained that the $46,910 refund amount should be offset by $25,000 because the home builder offered $75,000 to resolve the case very early on in the litigation. The panel observed that under the original Attorney Fee Contract entered on December 19, 2007, with J.D. and C.D., the respondent would have received "33 1/3% above any monies recoverable." Therefore, had J.D. and C.D. accepted the $75,000 offer by the

home builder, the respondent would have been entitled to an attorney fee of $25,000. The hearing panel reasoned that the respondent should be permitted to retain the $25,000 that he would have been entitled to had J.D. and C.D. accepted the settlement offer as he recommended. Thus, the panel concluded that the respondent should be required to refund J.D. and C.D. only the remaining $21,910 of their payments as restitution.

We reject the panel's reasoning and agree with the Disciplinary Administrator's recommendation regarding the amount respondent is required to refund J.D. and C.D. The refusal of a settlement offer, especially early in the litigation when the offer is substantially lower than the plaintiffs and counsel have valued their damages, should not be considered a triggering event that entitles consideration of an attorney fee owed to counsel. This is especially true in this instance when nearly all the litigation expenses were incurred following the failed settlement negotiations. The hearing panel found that J.D. and C.D. paid $46,910 to the respondent and contributed significant hours working on their own case. The case was complex. It involved three mediation sessions, an arbitration session, state court litigation, and federal litigation. The case also involved an appeal to the Court of Appeals and petition for review to the Kansas Supreme Court. Overall, the case lasted more than 10 years. The respondent represented J.D. and C.D. throughout the entire case at every level. Regarding this representation, the hearing panel found—and the respondent did not contest—that multiple serious rule violations occurred at nearly every phase of the litigation and caused most of the expenses incurred by J.D. and C.D. While the hearing panel recognized that the respondent expended a substantial amount of time to handle the case, this does not equate to money that the respondent is entitled to via the initial fee agreement. We conclude the amount owed to J.D. and C.D. is $46,910.

Also worthy of mention is the troubling decision of both the respondent and counsel in this disciplinary action to cast blame on the complainants. Characterizations of the complainants as difficult and impossible permeated the hearings in this matter. Counsel also opined that the respondent should have "kicked them [complainants] to the side" during oral presentation to this court. Both

respondent and counsel paradoxically took the position that the complainants should have filed a malpractice action or some sort of fee claim in a separate action to recoup their losses as a result of respondent's inept legal representation.

As the hearing panel found, it was the respondent's misconduct that caused actual injury to his clients in the form of unreasonably increased attorney and other legal fees. It was the respondent's actions that reduced the chance of successful resolution of the complainants' claims and increased the emotional stress related to their case. It was the respondent's misconduct that caused injury to the legal system by wasting the courts' time with pleadings and other filings that did not conform to the rules and orders of the jurisdiction. And it was the respondent's dishonest conduct that injured the legal profession. Counsel and respondent's deflection of responsibility to anyone other than the respondent is not supported by facts or findings in the record before us. Blaming the complainants serves only to exacerbate the minimization and denial of the gross misconduct that occurred in this matter and to highlight the respondent's failure to accept responsibility for his conduct.

We hold that the appropriate sanction in this matter is a one-year suspension and that the respondent is required to refund the complainants $46,910 paid in attorney fees. If, after a period of 90 days of suspension, the respondent has made full repayment, the remaining nine months of suspension will be stayed. If the repayment occurs between 90 days and one year of suspension, the remaining time on the one-year suspension will be stayed upon full repayment. If, after the one-year suspension, the respondent has not made full repayment, a reinstatement hearing will be required before the respondent may return to the practice of law. Supreme Court Rule 232 (2022 Kan. S. Ct. R. at 293).

Costs are assessed against the respondent in an amount to be certified by the Office of the Disciplinary Administrator.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Joseph R. Borich III is suspended for one year from the practice of law in the state of Kansas with the conditions as set forth above, effective the date of this

opinion, in accordance with Supreme Court Rule 225(a)(3) (2022 Kan. S. Ct. R. at 281) for violations of KRPC 1.1, 1.2, 1.5, 1.15, 1.16, and 8.4.

IT IS FURTHER ORDERED that respondent shall comply with Supreme Court Rule 231 (2022 Kan. S. Ct. R. at 292).

IT IS FURTHER ORDERED that if after one year Borich has not made full repayment of $46,910 paid in attorney fees to complainants, he must apply for reinstatement, and shall comply with Supreme Court Rule 232 (2022 Kan. S. Ct. R. at 293) and be required to undergo a reinstatement hearing.

IT IS FURTHER ORDERED that the costs of these proceedings be assessed to respondent and that this opinion be published in the official Kansas Reports.

Roll v. Howard

No. 121,447

CATHERINE ROLL, a Disabled Person,by and Through Her Co-guardians TERESA ROLL KERWICK and MARY ANN BURNS, *Appellant*, v. LAURA HOWARD, Secretary of the Kansas Department for Aging and Disability Services, and MIKE DIXON, Superintendent of the Parsons State Hospital and Training Center, *Appellees*.

(514 P.3d 1030)

SYLLABUS BY THE COURT

1. CIVIL PROCEDURE—*Mootness Doctrine—Determination if Case Is Moot*. A case is moot when it is clearly and convincingly shown the actual controversy has ended, the only judgment that could be entered would be ineffectual for any purpose, and it would not impact any of the parties' rights.

2. SAME—*Prevailing Party Entitled to Award of Costs and Fees under Federal Statut*e. In order to be entitled to an award of costs and fees under 42 U.S.C. § 1988(b) (2018), a party must demonstrate they are the prevailing party.

3. SAME—*Prevailing Party Is Awarded Relief by Court on Merits of Claims—No Award of Fees if Case Dismissed as Moot*. A "prevailing party" is the party that has been awarded some relief by the court on the merits of at least some of the claims. Generally, when a case is dismissed as moot without a judgment by the court on the merits of any of the claims or a court-ordered consent decree, there is no prevailing party entitled to an award of attorney fees even though a party may have achieved the desired result of the litigation.

Review of the judgment of the Court of Appeals in 59 Kan. App. 2d 161, 480 P.3d 192 (2020). Appeal from Sedgwick District Court; FAITH A.J. MAUGHAN, judge. Opinion filed August 12, 2022. Appeal dismissed.

David P. Calvert, of David P. Calvert, P.A., of Wichita, and *Stephen M. Kerwick,* of Wichita, argued the cause and were on the briefs for appellant.

Arthur S. Chalmers, assistant attorney general, argued the cause, and *Derek Schmidt*, attorney general, was with him on the briefs for appellee.

PER CURIAM: The defendants sought to relocate Catherine Roll, an individual with significant mental and physical disabilities, from the Parsons State Hospital and Training Center (Hospital), where she has been a long-term resident, to a community-based treatment center. Roll, through her guardians, resisted such a transfer and contended that the Americans with Disabilities Act

(ADA) and the Social Security Act (SSA) prohibited the defendants from changing her placement without her approval. The district court held that she did not have a statutory right to remain at the Hospital. The Court of Appeals affirmed that order, and we granted review.

We dismiss the appeal as moot. But in order to explain this determination, we find it necessary to recount the long and convoluted course the litigation in this case has taken.

Catherine Roll was born in 1955. She has had developmental delays since infancy and developed schizophrenia as a teenager. She was in mainstream public schooling into second grade, when she was transferred to parochial schooling specializing in children with intellectual and developmental disabilities. She was eventually placed in the Larned State Hospital for a short time and then, in 1970, transferred to Parsons State Hospital. She has been on a long-term regimen of psychotropic medication to treat her schizophrenia.

Roll had a generally successful experience at the Hospital, recently achieving 96 percent of her treatment objectives. She also appeared to be happy and comfortable at the Hospital. She would go out into the community with escorts approximately eight times a month, including trips to Walmart, manicures, and baseball games. Roll had some work duties at the Hospital, including tasks such as folding and shredding papers and delivering things to staff members. She received physical therapy for an ankle injury and other conditions.

Roll's parents died in the late 1990s. Teresa Kerwick and Mary Ann Burns are Roll's sisters, and they became her co-guardians in 2002.

In the spring of 2016, Hospital staff contacted Teresa and told her the Hospital had to cut approximately 1.3 million dollars from its operating budget, and Roll was a good candidate for transfer from the facility. On June 8, 2016, Teresa received a letter informing her that she needed to find a community care institution or Roll would be discharged to the guardians' homes. Believing that community-based residential centers would provide less desirable services for Roll and that she benefited from the long-term relationship she had with the Hospital staff and her familiarity with

the campus, the guardians ultimately rejected voluntary transfer to another facility.

On August 19, 2016, Kerwick and Burns filed a petition seeking injunctive relief and an application for a temporary restraining order seeking to prevent the defendants from discharging Roll to community services or the petitioners' homes. The original petition included only a claim that the defendants' conduct violated the ADA with an accompanying claim of a civil rights violation under 42 U.S.C. § 1983 (2018). On the same day, the district court granted an ex-parte order temporarily restraining the defendants from discharging Roll from Parsons State Hospital and Training Center. The record does not reflect that the temporary restraining order was ever converted to a separate preliminary injunction, but the order remained in effect while the case was pending in district court.

The court granted a motion by the defendants for the appointment of a guardian ad litem to represent Roll's interests. The guardian examined a multitude of documents, including social worker assessments, psychological evaluations, and case notes, and submitted a letter to the district court. The letter noted Roll's numerous special needs, the manner in which the Hospital was meeting those needs, and the difficulty in finding an adequate substitute for the care she was receiving. It recommended retaining Roll at the Hospital. At the defendants' request, the guardian ad litem then carried out in-person interviews with Roll, the Hospital staff, and representatives of community treatment facilities, and issued a follow-up letter modifying his recommendation to include the possibility of relocation to a community-based center and noting advantages to both the Hospital and the community facilities.

Roll filed a motion for summary judgment. Following multiple responses and replies, the district court denied the motion, determining that genuine issues of material fact precluded summary judgment, and the case went to a bench trial.

Many of the witnesses were current or former Hospital staff who generally testified that Roll was in active treatment, was highly successful in responding to her treatment, did not exhibit aggressive or psychotic behavior, and was pleasant and compliant.

The staff members also testified that, in their opinion, Roll would do well in a community-based program. The guardians testified about their personal experiences with Roll and explained why they did not consider any of the community-based centers suitable for placement.

After the trial, the district court granted the guardians permission to add a claim under the SSA that the proposed transfer from the Hospital violated Roll's right to choose which facility would provide her treatment. The parties submitted proposed findings of fact and conclusions of law, as well as trial briefs on the ADA and SSA claims.

On May 23, 2019, the district court entered judgment in favor of the defendants with a 69-page journal entry including extensive findings of fact and conclusions of law. Based on the evidence presented at trial, the district court found that treatment available at a community-based program was appropriate to meet Roll's needs and that the Hospital provided a level of care and restrictions beyond what was medically necessary for Roll. In rejecting the ADA and SSA claims, the district court explained:

> "There is no discrimination in the agency action initiated by Parsons State Hospital. Ms. Roll's treatment team has assessed her needs and abilities. A determination has been made that Ms. Roll is capable of living independently in a community based environment with the assistance of community service providers. This does not constitute an act of discrimination entitling Plaintiffs to injunctive relief.
>
> . . . .
>
> " . . . Ms. Roll's Social Work Assessment Annual Reviews, Psychological Annual Reviews, and Individual Program Plans from 2010 through 2017 supports good cause for her discharge. This documentation collectively speaks to the very issue of the adaptive living skills Ms. Roll has developed over time which make her appropriate for placement in a less restrictive living environment. This documentation, in conjunction with testimony offered by staff of Parsons State Hospital, provides evidence to the Court of her desire to partake in community based activities, her ability to work and earn wages, her ability to take care of her own hygiene needs, her ability to dress herself, her ability to exercise choices about daily living, her ability to perform various tasks to include setting a table, maintaining her bedroom, assisting with sweeping and mopping, doing art projects, working on puzzles, shopping, going out to eat, attending church, partaking in religious studies, reading her bible, reading magazines or the newspaper and communicating her wants, needs and desires."

Roll took a timely appeal to the Kansas Court of Appeals, and the district court granted Roll a stay of the effect of the judgment pending appellate resolution, effectively keeping the temporary restraining order in place. The Court of Appeals affirmed in *Roll v. Howard*, 59 Kan. App. 2d 161, 480 P.3d 192 (2020). The intermediate appellate court summarized its ruling in the opinion's introduction:

"Catherine Roll is a patient at Parsons State Hospital, where she has lived and been treated for an intellectual disability and schizophrenia for several decades. In 2016, the Department for Aging and Disability Services, in conjunction with Parsons, indicated an intent to transfer Roll to a more integrated community-based treatment program (though the specific program where she would be transferred was not yet determined). Roll's guardians sought a permanent injunction to prevent the transfer, alleging the Americans with Disabilities Act (ADA) and the Social Security Act (SSA) prevented the Department from transferring her without her consent.

"After a trial, the district court found that the Department had shown that the treatment available at a community-based program was appropriate to meet Roll's needs. The court also found that, because Parsons provided a level of care and restriction beyond what was medically necessary, neither the ADA nor the SSA prevented the State from transferring her to a different program. After carefully reviewing the record and the parties' arguments, we find the district court's crucial finding—that Roll does not need to be treated in a facility as restrictive as Parsons—is supported by the record. And we agree that there is no right under the ADA and SSA for patients to remain at a more restrictive facility if the level of care provided is medically unnecessary. Thus, we affirm the district court's denial of the permanent injunction." 59 Kan. App. 2d at 163-64.

On March 25, 2021, this court granted Roll's petition for review. She filed a supplemental brief on April 28, 2021, and this court heard oral argument on September 15.

Then, about a week after oral argument, on September 24, the defendants filed a Notice of Change of Circumstances and Motion for Dismissal in which they asserted that Roll's physical and mental health had suffered a significant decline and the defendants no longer considered community-based treatment an option. The notice stated, in part:

"8. However, Ms. Roll's medical and mental health conditions and her associated treatment needs have changed. The PSH [Parsons State Hospital] professionals, familiar with Ms. Roll's needs and capabilities, have now determined that community placement is not appropriate. They believe that she should receive her care and treatment at PSH.

"9. In later January 2021, Ms. Roll was diagnosed with an intracranial atherosclerosis, commonly referred to as hardening of the arteries in the brain. As late as March 2021, PSH's professionals did not believe this condition required her continued residence and treatment at PSH.

"10. Yet, the condition has worsened. Ms. Roll's behaviors, needs and abilities are now such that Ms. Roll cannot be cared for and treated in community placement. She needs the care and treatment provided by PSH.

"11. Ms. Roll's deteriorating condition is progressive and, at best, it will not improve for community placement to ever be an appropriate option for her.

"12. Whether this Court were to reverse or affirm the decisions of the Court of Appeals and trial court, the defendants will not transfer Ms. Roll to a community-based treatment program or away from PSH."

In light of these alleged changed circumstances, the defendants moved to dismiss the appeal as moot. They further asked the court to vacate both the district court and Court of Appeals judgments.

On September 29, contending she had prevailed in the litigation, Roll filed a motion for attorney fees totaling $143,290 and for costs totaling $8,345.80. The defendants filed a response opposing the motion for monetary award, arguing that neither party prevailed because the entire case had become moot. On October 20, Roll filed a response to the motion to dismiss and a separate motion requesting an additional $17,640 in fees generated preparing the response. In the response, the guardians alleged that the Hospital knew about Roll's deteriorating medical condition for many months. The guardians asserted that on December 16, 2020, they received "the first of many emails" from a social worker at the Hospital documenting the decline of Roll's condition. They claimed the case was not moot and that exceptions to the mootness doctrine applied.

On December 3, this court ordered the parties to engage in mediation. The court directed the parties to address issues including the extent and permanency of Roll's changed circumstances, when the defendants knew or should have known about the changes in her condition, and what effect those changes had on the parties' respective positions in the appeal.

A mediation session took place on March 4, 2022 and lasted about 3 1/2 hours. On April 4, the parties filed a joint statement informing the court they had reached no settlement and were unable to agree on disputed facts.

Discussion

In September 2021, before this court reached a decision on the merits, the defendants informed this court they no longer were seeking to transfer Roll and they intended to maintain her residence at the Hospital. Based on substantial changes in Roll's medical condition after the district court's factual findings and legal conclusions, the defendants voluntarily provided the plaintiff with the relief she has been seeking through litigation for the past six years. This court can offer the plaintiff no further relief than what she has already received.

A case is moot when a court determines that "'it is clearly and convincingly shown the actual controversy has ended, the only judgment that could be entered would be ineffectual for any purpose, and it would not impact any of the parties' rights.'" *State v. Roat*, 311 Kan. 581, 584, 466 P.3d 439 (2020) (quoting *State v. Montgomery*, 295 Kan. 837, 840-41, 286 P.3d 866 [2012]).

Here, due to Roll's declining condition, the defendants no longer oppose Roll's request to remain at the Hospital. The parties are therefore in agreement, and this court can enter no ruling that would affect the contested issue. "When, by reason of changed circumstances between commencement of an action and judgment on that action, a judgment would be unavailing as to the issue presented, the case is moot. [Citation omitted.]" *Roat*, 311 Kan. at 596.

Courts have a duty to decide actual controversies by judgments that can be given an effect and not to give opinions on abstract propositions. Mere "rightness" does not suffice to justify the continued exercise of authority over an appeal. *Roat*, 311 Kan. at 599. Were this court to rule either in favor of the defendants or in favor of Roll, the judgment would have no effect on her long-term placement. The defendants have represented in a written notice filed with this court that Roll's deteriorating condition is progressive and "it will not improve for community placement to *ever* be an appropriate option for her." (Emphasis added.) She will continue to reside at the Hospital either way that this court might rule, which is precisely what she sought in her petition.

The entire premise of the district court's ruling was its factual findings that treatment available at a community-based program was appropriate to meet Roll's needs and that the Hospital provided a level of care and restrictions beyond what was medically necessary for Roll. The facts and evidence that supported these findings has now completely changed—in fact, the opposite is true. Although a factual dispute may exist between the parties as to *when* Roll's medical condition began to decline, there appears to be no dispute that her condition substantially worsened after the district court made its factual findings and denied the plaintiff's request for an injunction. The injunctive relief being sought by the plaintiff is no longer necessary or required, and we decline to review the case simply to determine whether the lower courts, at their discretion, could have awarded attorney fees to the plaintiff based on her statutory claims.

Roll urges application of an exception to the mootness doctrine that allows a court to decide cases "capable of repetition, yet evading review." See, e.g., *Roat*, 311 Kan. at 590. We are not persuaded that the circumstances of this case and the issues it presents are of such a nature that they are likely to be repeated in future litigation. Furthermore, although review was ultimately precluded under the peculiar facts of this case, we consider it likely that similar issues, should they arise, will be susceptible to appellate review. After all, this case was reviewed by the Court of Appeals, and it was only Roll's changed circumstances that led us to dismiss the appeal after we granted review.

We therefore apply Supreme Court Rule 8.03(j)(6) (2022 Kan. S. Ct. R. at 54) and dismiss the appeal as moot. In dismissing the appeal at this stage, we take no position on the correctness of the opinions of the courts below and we caution against relying on the decision of the Court of Appeals for precedential value. See Rule 8.03(h) and (k)(2).

Roll has requested a substantial award of costs and attorney fees from this court based on her statutory claims. See 42 U.S.C. § 12205 (2018); 42 U.S.C. § 1988(b) (2018) (both statutes provide that the court, in its discretion, may allow the "prevailing party" reasonable attorney fees and costs). Is Roll the prevailing party in this case?

The United States Supreme Court set out the general standard governing the prevailing-party determination in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989): "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." 489 U.S. at 792-93. The Court explained that a material alteration in the parties' legal relationship occurs when "the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit.'" 489 U.S. at 791-92. This standard requires that "'a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail.'" 489 U.S. at 792 (quoting *Hewitt v. Helms*, 482 U.S. 755, 760, 107 S. Ct. 2672, 96 L. Ed. 2d 654 [1987]).

In *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dept. of Health & Human Res.*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001), the petitioners operated assisted living residences that were ordered closed after the state fire marshal found the residents were incapable of "self-preservation." The petitioners sued for a declaratory judgment that the "self-preservation" requirement violated provisions of the Fair Housing Amendments Act (FHAA) and of the ADA. After the state legislature acted to eliminate this requirement and the case was dismissed as moot, the petitioners moved to recover attorney fees as the prevailing party under the "catalyst theory," which posits that a plaintiff is a prevailing party if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. 532 U.S. at 601. The lower courts ruled against the petitioners, and the United States Supreme Court affirmed. The opening paragraph of the Court's opinion succinctly stated:

> "Numerous federal statutes allow courts to award attorney's fees and costs to the 'prevailing party.' The question presented here is whether this term includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. We hold that it does not." 532 U.S. at 600.

The United States Supreme Court rejected the "catalyst theory" that had been recognized by some lower federal courts to determine the prevailing party and held the fee provisions of the FHAA and of the ADA require a party to secure either a judgment on the merits or a court-ordered consent decree to qualify as the prevailing party. 532 U.S. at 602-05. In so ruling, the Court reasoned that a "defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." 532 U.S. at 605.

Federal courts do not follow the Supreme Court's holding in *Buckhannon* when it is superseded by statute. See, e.g., *Poulsen v. Department of Defense*, 994 F.3d 1046 (9th Cir. 2021) (finding that 2007 amendment defining "prevailing party" under Freedom of Information Act abrogated the rule of *Buckhannon* in claims for attorney fees under that Act). But otherwise, federal courts still follow the holding in *Buckhannon* in rejecting claims for attorney fees in cases dismissed as moot. See, e.g., *Suarez-Torres v. Panaderia y Resposteria Espana, Inc.*, 988 F.3d 542 (1st Cir. 2021) (district court properly denied plaintiffs attorney fees under ADA because defendant voluntarily agreed to make substantial changes in response to plaintiffs' complaint, and plaintiffs failed to demonstrate requisite judicial imprimatur on that outcome to make them prevailing parties); *Doe v. Dixon*, 716 F.3d 1041 (8th Cir. 2013) (dismissal on mootness ground did not result from plaintiffs prevailing on the merits of any of their claims, and plaintiffs were not entitled to prevailing party status simply because a voluntary change in conduct was recognized in the order of dismissal); *Walker v. Calumet City*, 565 F.3d 1031 (7th Cir. 2009) (award of attorney fees to property owner under 42 U.S.C. § 1988[b] as prevailing party in action against city was reversed because dismissal of case for mootness did not impose judicial imprimatur that would permit awarding attorney fees under *Buckhannon*). The statutes under which Roll seeks to recover attorney fees—42 U.S.C. § 12205 and 42 U.S.C. § 1988(b)—have not been amended to define "prevailing party" since the Supreme Court decided *Buckhannon*.

A review of the procedural history of this case shows that Roll did not prevail at any point in the litigation except for receiving an ex-parte temporary restraining order. But she lost on the merits of her claims in the district court, and she lost in the Court of Appeals. Although we cannot say she would have lost in our court, we also cannot say she prevailed in our court. Her own changed circumstances, not a judicial determination, resulted in her obtaining the relief she sought for six years. She did not obtain an alteration of the legal relationship of the parties, and she did not succeed on any significant issue in litigation which achieved some of the benefit she sought in bringing the suit. She failed to secure a judgment on the merits or a court-ordered consent decree, although she received the desired result of her litigation. Simply put, Roll was not awarded any relief by any court on the factual and legal issues that were addressed by the court. We therefore conclude Roll is not entitled to attorney fees in a case that we dismiss as moot.

Appeal dismissed.

STANDRIDGE, J., not participating.
THOMAS E. MALONE, J., assigned.[1]

* * *

ROSEN, J., dissenting: I take issue with the majority opinion for what I consider two fundamental errors of reasoning. I will explain first that the lower courts reached incorrect decisions in denying Roll the relief she sought. I will next argue that, under the curious circumstances of this case, the appeal is not moot and Roll was the prevailing party.

The Lower Court Decisions Were Fundamentally Flawed

In my view, both the district court and the Court of Appeals got their decisions wrong. If they had ruled correctly, Roll would have prevailed before this appeal reached us and we would not be concerned

[1]**REPORTER'S NOTE:** Judge Malone, of the Kansas Court of Appeals, was appointed to hear case No. 121,447 vice Justice Standridge under the authority vested in the Supreme Court by K.S.A. 2021 Supp. 20-3002(c).

about whether mootness barred the request for attorney fees. I contend the strong likelihood of success on their appeal should enter into the calculus of whether Roll should be awarded fees and costs.

I initially note that I agree with the lower courts' analysis and conclusions regarding the Americans with Disabilities Act. Roll argued that the Act protected her from being forced to relocate to a community treatment setting, relying on statutory language that, standing in isolation, supports her position: "Nothing in this chapter shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept." 42 U.S.C. § 12201(d) (2018). The lower courts rejected her argument.

In a nutshell, nothing in that statute calls for placement in a more restrictive environment simply because that is what the disabled person desires. A state may offer to provide adequate services in a least-restrictive environment, and a disabled person may reject those services. The state is then free of its responsibility to provide residential services to that person. In other words, if a disabled person is living at home or in a private care facility, a state may not require that person to relocate to either a state hospital or a community-based residential program. But a state is not required to admit—or continue to locate—the person at whichever particular program the person prefers. See Chambers, *Integration as Discrimination Against People with Disabilities? Olmstead's Test Shouldn't Work Both Ways*, 46 Cal. W. L. Rev. 177, 195-96 (2009); *D.T. v. Armstrong*, No. 1:17-CV-00248-EJL, 2017 WL 2590137, at *8 (D. Idaho 2017) (unpublished opinion); *Sciarrillo ex rel. St. Amand v. Christie*, CIV.A. No. 13-03478 SRC, 2013 WL 6586569 (D.N.J. 2013) (unpublished opinion); *Richard S. v. Dept. of Developmental Servs. of California*, No. SA CV 97-219-GLT ANX, 2000 WL 35944246 (C.D. Cal. 2000) (unpublished opinion); *Richard C. ex rel. Kathy B. v. Houstoun*, 196 F.R.D. 288, 289 (W.D. Pa. 1999); *Illinois League of Advocs. for Developmentally, Disabled v. Quinn*, No. 13 C 1300, 2013 WL 3168758, at *5 (N.D. Ill. 2013) (unpublished opinion). In short, I do not think Roll would have or should have prevailed on the ADA issue.

But I vigorously disagree with the courts below on two other critical points.

The first of these is the application of Medicaid statutes and regulations.

Medicaid is an optional, federal-state program through which the federal government provides financial assistance to states for the medical care of individuals in financial hardship. *Wilder v. Va. Hosp. Association*, 496 U.S. 498, 502, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990). Once a state elects to participate in the program, it must comply with all federal Medicaid laws and regulations. 496 U.S. at 502.

Under the Medicaid waiver program created by 42 U.S.C. § 1396n(c) (2000), states may waive the requirement that persons with "mental retardation" or a related disability live in an institution in order to receive certain Medicaid services. *Doe v. Kidd*, 501 F.3d 348, 351 (4th Cir. 2007). The program allows states to experiment with methods of care, or to provide care on a targeted basis, without adhering to the strict mandates of the Medicaid system. *Bryson v. Shumway*, 308 F.3d 79, 82 (1st Cir. 2002).

The "free choice" provision under the Medicaid Act waiver program, located at 42 U.S.C. § 1396n(c)(2)(B) and (C) (2018), requires states to provide assurances that they will offer to qualified individuals an evaluation for the need for inpatient hospital services, nursing facility services, or services in an intermediate care facility for the "mentally retarded." Furthermore, individuals who are "likely to require the level of care provided in a hospital, nursing facility, or intermediate care facility" must be "informed of the feasible alternatives, if available under the waiver, *at the choice of such individuals*, to the provision of inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded." (Emphasis added.)

Moreover, 42 U.S.C. § 1396a(a)(23) (2018) expressly states that any individual eligible for assistance may obtain that assistance from "any institution" qualified to perform the required services and the individual's choice of who provides that assistance shall not be restricted. The Medicaid Act thus clearly states a free-choice intention.

The implementing regulation for the free-choice provision provides:

"(d) Alternatives—Assurance that when a beneficiary is determined to be likely to require the level of care provided in a hospital, NF, or ICF/IID [nursing facility, or intermediate care facility/individuals with intellectual disabilities], the beneficiary or his or her legal representative will be—

(1) Informed of any feasible alternatives available under the waiver; and

(2) *Given the choice of either institutional or home and community-based services*." (Emphasis added.) 42 C.F.R. § 441.302(d) (2021).

In short, the free choice provision "gives recipients the right to choose among a range of qualified providers, without government interference." *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785, 100 S. Ct. 2467, 65 L. Ed. 2d 506 (1980).

Roll argues that 42 C.F.R. § 441.302(d) gives her the right to choose where she will reside, so long as her chosen facility provides the level of care that she is likely to require. She contends that, because the Hospital has demonstrated the ability to provide that level of care and because she has active treatment needs that the Hospital can satisfy, the Medicaid provisions of the Social Security Act and the implementing regulation give her the right to choose to remain at that facility. I agree. The record and the law, in my view, unquestionably demonstrate she has that right.

Witnesses and the trial court devoted considerable time and attention to two factors: (1) the reasons why the Hospital was seeking to move Roll into other care facilities, and (2) the ability of those alternative facilities to provide Roll with the care she requires. The general sense of that evidence and the related findings was that budgetary constraints compelled the Hospital to reduce its patient load and export those patients who are able to receive adequate care in other settings; the changing environment at the Hospital increased safety concerns for all its patients; and there are many care facilities around the state that, at least in theory, will provide Roll with good care.

To a large extent, this evidence and the trial court's related findings are a red herring. The question under this issue is not whether the Hospital's proposed relocation of Roll was reasonable, which it may have been. The question is whether Roll had a legally protected right to remain in her current setting, where it is uncontroverted that she was receiving excellent care and where she has felt comfortable and secure.

The Court of Appeals provided a perfunctory, two-paragraph analysis of the merits of Roll's claim, in essence holding that, if it is decided that a disabled person is likely to require only the level of care offered in a community-based service, then the statute does not require a state to offer the choice between institutional or community-based services. See *Roll v. Howard*, 59 Kan. App. 2d 161, 187, 480 P.3d 192 (2020). By this reasoning, a state may elect to offer the lowest common denominator of adequate care. The Court of Appeals cited to no authority for this limitation.

With this holding, the Court of Appeals implicitly added a proviso to the statutory language: If an individual is determined to be likely to require the level of care provided in an intermediate care facility (such as a community-based treatment center), then the only feasible choice that a state must give is an intermediate care facility or opting out to home care. The state is not required to offer the choice of a more intensive care facility.

But this is not what the statute or the regulation says. Repeating the statutory language quoted above, a state must provide that "individuals who are determined to be likely to require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded are informed of the feasible alternatives, if available under the waiver, *at the choice of such individuals*, to the provision of *inpatient hospital services*, nursing facility services, or services in an intermediate care facility for the mentally retarded[.]" (Emphasis added.) 42 U.S.C. § 1396n(2)(c).

The Court of Appeals interpretation would make more sense if the Medicaid Act were an anti-discrimination statute, as the Americans with Disabilities Act is. Then it would be reasonable to assume that the less discriminatory—or more integrated—option would always be the statutorily preferred option. But the waiver is designed to give disabled individuals the *option* of accepting some treatment program other than institutionalization. See *Doe*, 501 F.3d at 359. It may be that most individuals would choose in-home or community-based services when those are available, but the Medicaid Act *does not require* that they choose those services.

The United States Supreme Court has explicitly held that the Medicaid Act

"gives recipients the right to choose among a range of qualified providers, without government interference. By implication, *it also confers an absolute right to be free from government interference with the choice to remain in a home that continues to be qualified*. But it clearly does not confer a right on a recipient to enter an unqualified home and demand a hearing to certify it, nor does it confer a right on a recipient to continue to receive benefits for care in a home that has been decertified." (Emphasis added.) *O'Bannon*, 447 U.S. at 785.

I cannot see how the courts in the present case can get around this unambiguous language. The Hospital continues to be qualified. Roll has a right to choose among a range of qualified providers without government interference. She enjoys an "absolute right" to remain in a home that continues to be qualified. She had the right to remain at the Hospital, even if she would not be admitted to the Hospital under today's admission criteria.

The right under the freedom of choice provision "is not so vague and amorphous that it cannot be judicially enforced; the statute and its corresponding regulations clearly illustrate that the freedom of choice provision establishes a two-fold right to both information about feasible alternatives and a choice of such alternatives, if available." *Guggenberger v. Minnesota*, 198 F. Supp. 3d 973, 1015 (D. Minn. 2016).

The statutory and regulatory language and the holdings of *O'Bannon* and lower courts line up precisely with Roll's position. Plaintiffs have lost when they have sought to force states to keep facilities open so that they may remain in those facilities or when they have sought to force states to establish new facilities so that they may have a greater range of choices. That is not the situation here. Roll wants to exercise her choice to stay where she is, in a treatment facility that is open and that clearly suffices to meet her needs.

Our Court of Appeals added a component to the Medicaid statute not contained in the statutory language. The court held that the choice provision only arises "*when a court has determined* someone is 'likely to require the level of care provided in' one of the facilities listed in the statute." (Emphasis added.) *Roll*, 59 Kan. App. 2d at 187. The statute makes no mention of courts stepping in to make the medical determination of which level of care a patient requires. Taking the Court of Appeals language on its face,

every time a facility offers a patient a choice, it will have to obtain judicial approval of the choices available.

But more to the point, the statute makes no mention of offering only the services that meet a patient's minimum needs. Instead, the statute, as well as the Supreme Court in *O'Bannon*, states that the choice in treatment level lies with the patient, so long as the treatment option meets the patient's needs. The statute does not exclude options that exceed the minimum care requirements. Otherwise, the freedom of choice provision becomes basically meaningless: a patient will only have the "option" to "choose" the kind of facility that provides the most basic services for the patient's needs.

So far, this analysis has not addressed a critical point that the defendants urged was dispositive in their favor. They contended Roll was not entitled to apply the freedom of choice provision to promote her cause because the statutory and regulatory language applies the choice option *only* to individuals who are "likely to require the level of care provided in a hospital, nursing facility, or intermediate care facility," and not to those who will need less advanced care. 42 U.S.C. § 1396n(c)(2)(B) and (C). The Court of Appeals apparently agreed, judicially adding a component not contained in the Medicaid scheme.

The defendants' argument and the Court of Appeals conclusion stand in sharp contrast to the Supreme Court's ruling in *O'Bannon*: "[The Medicaid statutory scheme] confers *an absolute right* to be free from government interference with *the choice to remain in a home that continues to be qualified*." (Emphasis added.) 447 U.S. at 785. If an individual has active treatment needs, such as Roll had and continues to have, then the individual enjoys the right to remain in a facility that is qualified to provide for those needs. The Hospital is such a facility.

To be sure, the district court held as a matter of law that Roll has no active treatment needs, meaning, at the very least, she would not qualify for Medicaid services. This ruling will be discussed in detail below, but I suggest that an elderly patient who requires medication to control schizophrenic psychosis, who has an IQ of 51, who needs prompting before she uses the bathroom

and requires assistance cleaning up afterwards, who has spinal deformities, who is barely able to speak in complete sentences, who requires assistance in making dietary choices, and who has been the subject of detailed annual active treatment plans for decades has active treatment needs. This is sufficiently the case such that the staff of one community facility that the guardians visited, who was familiar with Roll from the Hospital, informed the guardians that she probably required more treatment than the facility would be able to provide. Put another way, she obviously had active treatment needs because, if she did not have such needs, then it wouldn't have mattered whether she was in a dedicated care facility, and she might not even have qualified under Medicaid regulations for placement in a community-based residential center.

The Medicaid Act does not state, as the defendants claim, that individuals who are determined to be likely to require the level of care provided *only* in a hospital must be informed of feasible alternatives. Such a limitation is not in the statute; it has been added by the defendants and the lower courts. That limitation eviscerates the free choice language of the Medicaid Act and the regulations, which allow an individual to choose among hospitals, intermediate care facilities, and home services, so long as any of those options provide the individual with the care he or she needs. Assuming, based on the uncontroverted evidence presented to the district court, that Roll had special needs, the freedom-of-choice provision applied to her.

Neither the statute nor the regulation limits the choice provision to a situation in which an individual requires the highest levels of care available. Instead, under the Medicaid Act, its implementing regulations, and Supreme Court precedent, the treatment facility, wherever the individual is choosing to remain, must be able to provide the level of care that the beneficiary is likely to require. This assures that the beneficiary will actually receive the needed care; it is not an escape valve for facilities to eject people with disabilities.

The regulations speak of "any feasible alternatives," not just the alternatives that are most convenient for hospitals seeking to download their less-intensive needs patients. This would explain why qualifying beneficiaries must be "[g]iven the choice of either

institutional or home and community-based services." (Emphasis added.) 42 C.F.R. § 441.302(d)(2).

It should be remembered that the Hospital was not trying to relocate Roll because it is an inappropriate setting for her in treatment terms; it was seeking to relocate her because of budgetary and space concerns. If the court is to believe the defendants and their witnesses, the Hospital has been very careful to comply with Medicaid requirements, meaning that Roll has had active-treatment needs and the Hospital has been meeting those needs for decades. But the defendants did a 180-degree turn when they tried to compel her to leave the Hospital, maintaining that she was not likely to require the kind of care the Hospital provided.

For all the apparent complexity this analysis entails, it boils down to a simple conclusion: the Medicaid statute and regulations required that Roll have the choice to remain at the Hospital, a legal reality that both the district court and the Court of Appeals refused to acknowledge.

I now turn to the factual conclusions that the district court reached and that the Court of Appeals affirmed. Rarely will this court dispute a district court's factual findings, but, in this case, those findings were completely at odds with the uncontroverted evidence before it.

The district court concluded Roll was not in "active treatment" at the Hospital. The Court of Appeals determined that the district court conclusion was supported by competent evidence and it would not reweigh the evidence on appeal. *Roll*, 59 Kan. App. 2d at 173-74.

The question of whether Roll was receiving active treatment has more profound implications than either of the courts below gave it. If it is legally correct that Roll was not in active treatment, then she had no protection under the Medicaid Act and she was not entitled to exercise the choice provision discussed above. More importantly, however, it is likely she was not entitled to placement in any Medicaid-supported care facility. If she was not in active treatment, then the detailed treatment plans that were developed and submitted for her over many years at the Hospital were basically nullities and nothing more than a scheme to defraud the federal and state governments.

I take the position that both the trial court and the Court of Appeals erred in determining that Roll was not in active treatment. The uncontroverted evidence before the trial court was that she was in active treatment, both in a common-usage sense and in a legal sense. "Active treatment" is a term of art under the Medicaid Act, and both courts below failed to analyze the active treatment condition in the context of Medicaid requirements.

Because the term "active treatment" is a legal term of art, whether the factual findings support the legal conclusion that Roll required such treatment is a mixed question of fact and law. This court generally reviews the factual findings under the substantial competent evidence standard but exercises unlimited review of the conclusions of law based on those facts. See *Gannon v. State*, 305 Kan. 850, 881, 390 P.3d 461 (2017).

Federal regulations require that recipients of Medicaid benefits, such as Roll, participate in an "active treatment program," and the regulations define active treatment:

"(1) Each client must receive a continuous active treatment program, which includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services described in this subpart, that is directed toward—

(i) The acquisition of the behaviors necessary for the client to function with as much self determination and independence as possible; and

(ii) The prevention or deceleration of regression or loss of current optimal functional status.

"(2) Active treatment does not include services to maintain generally independent clients who are able to function with little supervision or in the absence of a continuous active treatment program." 42 C.F.R. § 483.440(a) (2021).

Without mentioning that regulatory definition, the district court explicitly found that Roll was not receiving active treatment, but the court's journal entry is internally inconsistent. In one section, it states:

"31. [These] *treatment professionals* come from several disciplines, including psychologists, social workers, medical doctors, nursing staff, direct support staff, vocational client training supervisors and activity specialists. These *treatment professionals actively provided care and support* to Ms. Roll throughout her stay at Parsons State Hospital.

"32. The services offered by these professionals included *psychological services, medical services, teaching, facilitating and assisting in daily life skills, leisure skills, vocational training skills and communication skills.*" (Emphases added.)

In another section, however—the section that is the subject of Roll's appeal—the district court held:

> "Ms. Roll does not display behavioral issues which would indicate she has active treatment needs. *Given that Ms. Roll has no active treatment needs*, members of Ms. Roll's treatment team at Parsons State Hospital have simply been providing supervision to Ms. Roll, which can be accomplished in a community based setting.
>
> "Examples of behaviors which would demonstrate active treatment needs includes an inability to employ self-help skills, an inability to work, an inability to communicate, an inability to control one's temper, an inability to respond to supervision, problems with elopement and an inability to address safety, health or hygiene needs." (Emphasis added.)

Then, later, the district court explained that certain community-based facilities will be able "to meet her treatment needs." It is unclear why the district court thought that Roll would be able to find placement that could comport with her treatment needs when it also held that she had no treatment needs.

Administering medication, adjusting prescriptions, providing physical therapy, teaching life skills, preventing or slowing regressive behavior and ideation—these are all "treatments." For example, Eric Schoenecker, a psychologist and defense witness, testified that psychotropic medication, such as the Loxitane that Roll was taking, can have "a dramatic effect on the behavior aspects of an individual's daily living," and for this reason it was important to monitor both medication and behavioral and nonmedicinal therapies. He also testified that Roll has scoliosis and is developing cataracts. These are examples of health and behavior issues requiring active treatment.

The online Merriam-Webster dictionary defines "treatment" as "the action or way of treating a patient or a condition medically or surgically: management and care to prevent, cure, ameliorate, or slow progression of a medical condition." https://www.merriam-webster.com/dictionary/treatment?src=search-dict-box. The same dictionary defines "active" as "characterized by action rather than by contemplation or speculation . . . having practical operation or results." https://www.merriam-webster.com/dictionary/active?src=search-dict-box. By these definitions, Roll was receiving active treatment and had active treatment needs.

But, more importantly, a parade of defense witnesses testified that Roll was receiving active treatment; she had active treatment needs; and, in response to those needs, they developed active treatment plans that they provide to staff, guardians and family members, and the government agencies that administer Medicaid programs. Furthermore, their testimony was uncontroverted; it was, after all, the defendants' position that they were in compliance with statutory and regulatory requirements, and it was Roll's position that she required active treatment. Either the district court simply ignored the explicit, emphatic testimony of those witnesses, or it deemed the defendants' witnesses to be completely untrustworthy. If the court considered the defendants' witnesses to be unreliable, it gave no explanation for such a conclusion. It even adopted their other testimony wholesale into its factual findings. It was not the plaintiff who was second-guessing the healthcare professionals; it was the district court.

The following witnesses testified that Roll was in active treatment:

Dr. Jerry Rea, formerly the Hospital director, testified that Roll met the federal requirements for implementing an active treatment program and that she was in "active treatment." Eric Schoenecker, a staff psychologist, testified that Roll was currently "under active treatment" and she "meets the standards for being at Parsons." Robyn Thomas, a clinical psychologist on the Hospital staff, testified that she worked with Roll on achieving "active treatment training objectives." Karen VanLeeuwen, the director of Hospital social services, testified that Roll was in active treatment at the time of the hearing and the active treatment was in most of the areas available for treatment and in "all the self-care areas." These were all witnesses called by the defendants. The transcript contains no testimony or other evidence that Roll did not have active treatment needs or was not receiving active treatment.

Without explanation, the district court limited its understanding of "active treatment needs" to "behavioral issues." There is no statutory or common-usage basis for such a limitation. Furthermore, the uncontroverted evidence established that, in the absence of psychotropic medication and behavioral treatment, Roll's schizophrenia led to paranoid, delusional, and violent behavior. When

she was temporarily taken off a psychotropic medication, her behavior became much more aggressive, including putting her fist through a window and aggression toward other residents, and she began to hallucinate. The fact that active treatment had that condition under control does not mean that she had no behavioral issues and no active treatment needs.

Defense witness VanLeeuwen testified that Roll's active-treatment needs included determining and teaching needed adaptive behaviors, improving independent leisure skills, improving independent functioning skills, and improving personal safety skills. These are not "behavioral issues" in the sense that Roll was exhibiting violent or uncooperative behavior, but they were issues in improving, maintaining, or slowing the regression of Roll's quality of life and ability to function among other human beings. Even if one pretends that such services are not "active treatment," it is close to impossible to understand how monitoring, adjusting, and administering medicine for the control of schizophrenic illness does not fall within the purview of "active treatment." The district court even listed medication stabilization as an "active treatment need."

The district court relied on the testimony of defense witnesses to conclude that Roll was highly successful in meeting her "treatment objectives." Based on this success, the court seems to have inferred that she was not in active treatment. Apparently, a patient who is responding well to active treatment is not in need of active treatment and is not currently in active treatment.

The Court of Appeals deferred to the district court's evaluation of the evidence, holding there was simply a difference of opinion between Roll's guardians and the Hospital's medical professionals. That court concluded the district court's findings were supported by substantial competent evidence in the record. *Roll*, 59 Kan. App. 2d at 173-74.

There are at least two problems with this appellate analysis. Although both the district court and the Court of Appeals treat this as a purely factual question, subject to a court's common-sense understanding of what constitutes "active treatment," it is more in the nature of a legal conclusion. As set out above, 42 C.F.R. § 483.440(a) defines "active treatment" and makes it a requirement

for receipt of general Medicaid assistance. The regulation refers to "a program of specialized and generic training, treatment, health services and related services." Neither the district court nor the Court of Appeals applied the evidence before them to the regulatory definition.

The second problem with the Court of Appeals analysis is its determination that the question was simply "a difference of opinion between what Roll's guardians believe to be active treatment and the descriptions of the Parsons medical staff." 59 Kan. App. 2d at 173-74. But the Parsons medical staff unanimously agreed with Roll's guardians that Roll has active treatment needs and was receiving active treatment at the Hospital—there was no difference of opinion about whether Roll is receiving active treatment. The difference of opinion lay in whether Roll would continue to receive active treatment meeting her particular requirements if she were transferred to a community-based program.

Why does this matter? Finding otherwise could potentially put Hospital staff at risk for charges of Medicaid fraud for submitting plans for treatment needs when no such needs existed. And further, Roll might lose her eligibility for future Medicaid benefits, possibly even having to repay past benefits.

The matter is relevant for deciding whether Roll had a right to make a free choice of providers of active treatment services under the Medicaid Act, as discussed above. If she was not in active treatment and did not have active treatment needs, then neither the Hospital nor intermediate care facilities would be providing services that she needed because she did not actually need active treatment services. This would undermine her argument that Medicaid law entitled her to a choice of whether to stay in her current placement or transfer to some other facility.

This may have been the point of the district court's finding: if Roll was not receiving active treatment, then she did not have a legal right to remain at the Hospital, and the courts should not be involved in evaluating whether this or that community-based center was able to meet her needs. The shortcut for getting the courts out of that decision-making process was to hold she had no active treatment needs. The defendants considered the shortcut to their advantage because it lightened the burden on them to transition

Roll into some other facility, which could be any other facility at all if she had no active treatment needs.

But this shortcut is at odds with the uncontroverted evidence in the record and the requirements of the Medicaid program. The evidence was clear and overwhelming that Roll was in active treatment and had active treatment needs that were being met at the Hospital. She was therefore entitled to exercise her statutory choice and continue to reside at the Hospital.

In summary, both the district court and the Court of Appeals made clearly reversible errors in both their legal and factual conclusions.

The Appeal Is Not Moot and Roll Is Entitled to Attorney Fees and Costs

If Roll had been doing nothing through her appeal but prolonging litigation to needlessly eke out a few more years of residence at the Hospital, I would be inclined to join the majority and dismiss the appeal as moot. But, as I have argued above, her case has been meritorious from the time it was before the district court. It is the defendants who unnecessarily consumed the time of the appellate courts by failing to notify these courts that Roll's conditions were changing dramatically and her needs were increasing, even further undermining the district court's factual findings and forcing the defendants to change their position with respect to her residency at the Hospital.

Taking their pleadings on their face—and the defendants have not challenged the amount claimed—Roll has incurred attorney fees amounting to over $160,000 in prosecuting this litigation. If she had not prosecuted this litigation, the defendants would have transferred her, in violation of her rights under the Medicaid Act, back in 2016. The majority opinion gives similarly situated plaintiffs a harsh choice: fight for their rights, but, if the defendants jump out of the litigation at the last possible minute, they are left hammered with the costs of litigation; or surrender their rights because they cannot afford to risk a last-minute acquiescence by the defendants. I am firmly convinced this is not the choice that Congress intended plaintiffs in civil-rights based actions to face when it enacted 42 U.S.C. § 1988(b).

Fee shifting plays a significant role in civil rights litigation. It is intended to encourage compliance with civil rights statutes. See, e.g., Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 Vand. L. Rev. 1069, 1070 (1993). The decision of the majority today has the opposite consequence: it discourages parties from successfully litigating to protect their rights by incurring the costs of the litigation when they obtain the sought after relief.

I conclude the mootness doctrine does not deprive Roll of an award of fees to which she is statutorily entitled.

First, she stated a demand for attorney fees as a separate count in her original petition. That demand constitutes a distinct, justiciable interest. A case is moot when "'the only judgment that could be entered would be ineffectual *for any purpose*, and it would not impact *any of the parties' rights*.'" (Emphases added.) *State v. Roat*, 311 Kan. 581, 584, 466 P.3d 439 (2020). Here, the award of attorney fees is a substantial right, and it is a right to which Roll is entitled as the party who, as a consequence of this litigation, obtained the relief she sought.

If an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatsoever to the prevailing party, the appeal must be dismissed. But the possibility of the award of costs means an appeal is not moot in its entirety. See, e.g., *Landrith v. Hazlett*, 170 Fed. Appx. 29, 31 (10th Cir. 2006) (unpublished opinion) (citing *Church of Scientology v. United States,* 506 U.S. 9, 12-13, 113 S. Ct. 447, 121 L. Ed. 2d 313 [1992]).

Second, Roll sought injunctive relief in the district court. Injunctive relief means not only that a defendant is barred from taking some action today; injunctive relief is also prospective in effect. In general, "an injunction is not an appropriate action to obtain relief for past or completed acts but operates only *in futuro* to prevent later acts." *Andeel v. Woods*, 174 Kan. 556, 557, 258 P.2d 285 (1953). In addition to a temporary restraining order, Roll sought a permanent injunction. I do not see how a permanent injunction can become moot simply because a defendant backs away from an intended course of action.

If I follow the majority's reasoning, whenever a plaintiff seeks injunctive relief, defendants can moot the action and avoid paying

attorney fees by declaring that they have changed their minds. But prospective relief in a situation such as this does not become moot simply because a party avers it has changed its mind. In *United States v. Washington*, 596 U.S. ___, 142 S. Ct. 1976, 213 L. Ed. 2d 336 (2022), after the Supreme Court granted certiorari, the defendant averred that a putatively discriminatory statute had been amended to remove the offending terms and that the amendment would be effective retroactively. The Supreme Court declined to dismiss the case as moot, holding that promises of retroactive effectiveness would not undo the legal merits of challenges to the statute before it was amended. 142 S. Ct. at 1983.

In the present case, we have no factual findings and no court determinations that Roll's condition has declined so as to create different active treatment needs. We also have no binding agreement that the defendants will not once again reverse their course of action. Apparently, the court majority deems it sufficient for a defendant to simply declare there won't be any future harm in order to avoid a court order and the consequent payment of fees. And it is also sufficient for a defendant to declare that it has decided to give the plaintiff the relief she has fought for in order to avoid the plaintiff becoming the prevailing party.

No fact-finding has taken place and no judicial determination has been made confirming the allegations by the defendants that they were motivated by recent changes to Roll's condition and that they will never again seek her transfer. We also have the guardians' allegations, supported by documented communications between them and the Hospital staff, showing that Roll's condition had deteriorated far below the level of care possible in less-intensive care facilities long before review was even sought in this court. The majority simply accepts the defendants' bald allegations regarding the circumstances and consequences of the change.

This court has acknowledged an attorney fee claim can serve as the basis for appellate review in cases where a party has both requested attorney fees and prospective relief in the form of declaratory judgment or injunction. See, e.g., *Baker v. Hayden*, 313 Kan. 667, 675-76, 490 P.3d 1164 (2021); *Willis v. Kansas Highway Patrol*, 273 Kan. 123, 41 P.3d 824 (2002). This court may

still review the lower court rulings and award Roll a permanent injunction. This is more than a minimal or trivial interest; it is relief that she requested and that extends to govern future action, not to redress some past harm. See *City of Mesquite v. Aladdin's Castle, Inc*., 455 U.S. 283, 289, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982) (well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine legality of the practice; prospective nature of injunctive relief empowers courts to prevent future abuse).

I further contend that Roll prevailed in this litigation. To be sure, the defendants jumped ship before this court issued an opinion, but that does not change the reality that Roll remained in the Hospital because she litigated this action. Remaining in the Hospital was the essence of her action, and she succeeded in obtaining and preserving a restraining order up through the time that the defendants backed away from their decision.

A "prevailing party" is the party that "has been awarded some relief by the court." *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dept. of Health & Hum. Res.*, 532 U.S. 598, 603, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001). Obtaining preliminary relief can suffice to award a party prevailing party status:

"A preliminary injunction is a form of court-ordered relief. Thus, '[a] preliminary injunction issued by a judge carries all the "judicial imprimatur" necessary to satisfy *Buckhannon*.' *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002); see also *People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226, 233 n. 5 (3d Cir. 2008) ('We need not determine in this case the outer limits of the requisite "judicial imprimatur." Whatever those may be, preliminary injunctions are certainly within them.' (citation omitted))." *Kansas Jud. Watch v. Stout*, 653 F.3d 1230, 1237 (10th Cir. 2011).

As the Tenth Circuit has held: "[I]f a preliminary injunction satisfies the relief-on-the-merits requirement, the plaintiff qualifies as a 'prevailing party' even if events outside the control of the plaintiff moot the case." *Kansas Jud. Watch*, 653 F.3d at 1238. A defendant's acquiescence in the relief sought by a plaintiff does not necessarily protect the defendant from paying fees. "[A] party may be considered to have prevailed even when the legal action stops short of final appellate, or even initial, judgment due to a settlement or intervening mootness." *Grano v. Barry*, 783 F.2d 1104, 1108 (D.C. Cir. 1986).

Roll preserved the status quo, which had the effect of staving off action by the defendants until they decided they no longer deemed Roll's transfer medically or legally defensible. This demonstrates there was a change in the legal relationship of the parties that endured until the defendants requested dismissal

The United States Supreme Court has recognized that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. . . . The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement." *United States v. W. T. Grant Co*., 345 U.S. 629, 632, 73 S. Ct. 894, 97 L. Ed. 1303 (1953). In an earlier decision, the Court stated: "Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power." *Walling v. Helmerich & Payne*, 323 U.S. 37, 43, 65 S. Ct. 11, 89 L. Ed. 29 (1944); see also *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 309, 17 S. Ct. 540, 41 L. Ed. 1007 (1897) (dissolution of illegally constituted assembly after judgment is entered does not deprive court of appellate jurisdiction).

Again, the court majority disagrees with our Supreme Court and holds today that ongoing unlawful conduct may be condoned if the wrongdoer bails out of the litigation right before final judgment is handed down. But this is a wrong way of looking at prevailing-party status.

In ordinary litigation, we don't concern ourselves with who is technically the "prevailing party." It's enough to observe that plaintiffs have achieved what they set out to achieve, whether by court order or by agreement of the defendants. But this case challenges us to determine who prevailed, and, in my view, Roll definitely prevailed. When the defendants announced they were giving her the relief she sought after years of litigation, she prevailed. Simply tossing in one's cards and walking away from the table doesn't mean that no one won; the party that stayed the course and ultimately received what it set out to get is the party that won.

The defendants and the court majority want this determination to focus on Roll's changed condition. Her changed condition may be what prompted the defendants to change their direction (albeit long after her condition changed), or the threat of paying attorney

fees may be what prompted their change of direction, but it really doesn't matter. Roll won. She is getting what she fought for, and the defendants cannot avoid her winning by announcing they're not playing the game anymore.

The majority correctly notes that the United States Supreme Court rejected the so-called "catalyst theory" for determining whether a party has prevailed. See *Buckhannon*, 532 U.S. at 610. The present case, however, does not present a catalyst situation, and, given the procedural history of this case, the majority's discussion is not relevant to the attorney fees analysis.

In order to constitute a "catalyst," a threat of suit or initiation of a legal action is the motivating force that leads a defendant to voluntarily grant the relief that a plaintiff seeks. The granted relief is a voluntary action by the defendant, not the result of a changed legal relationship between the parties. See *Buckhannon*, 532 U.S. at 603-04.

In the present case, the defendants would have discharged Roll into some form of local care in 2016 if the courts had not stayed the change of her treatment facility. If we are to take the defendants' motion for dismissal at face value, as the majority does, the defendants would have continued their fight to discharge her until this court rendered a decision. While it is true that the restraining order and subsequent stays merely preserved the status quo, the defendants elected to request dismissal before this court had the opportunity to weigh in on the merits. The defendants did not "voluntarily" abandon this case; they were no longer able to carry out the discharge because it became impossible to place Roll somewhere else. The plaintiff's lawsuit was not the catalyst for the defendants to abandon their plan to transfer Roll. The restraining order and Roll's eventual decline prevented the defendants from taking the action they sought to carry out for some six years. See, e.g., *Select Milk Producers, Inc. v. Veneman*, 304 F. Supp. 2d 45, 52 (D.D.C. 2004) (plaintiffs were prevailing parties for two reasons despite only obtaining a preliminary injunction before litigation became moot: first, injunction created material alteration in parties' legal relationship; and second, change in relationship resulting from injunction was the exact relief plaintiffs sought), *aff'd in relevant part sub nom. Select Milk Producers, Inc. v. Johanns*,

400 F.3d 939, 942 (D.C. Cir. 2005); *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002) (preliminary injunction carried judicial imprimatur necessary to satisfy *Buckhannon* where plaintiff obtained injunction preventing county from using report at his termination hearing; when case subsequently became moot, attorney fees were appropriate although claim for permanent injunctive relief was not decided on the merits, it was important to decision that "preliminary injunction was not dissolved for lack of entitlement" but rather "was rendered moot" after the employment termination hearing was over, "after the preliminary injunction had done its job"); *Young v. City of Chicago*, 202 F.3d 1000, 1000-01 (7th Cir. 2000) (upholding award of attorney fees to plaintiff who obtained preliminary injunction against city's establishment of security perimeter excluding protesters from areas around site of 1996 Democratic National Convention, but whose claims became moot after convention ended and no final judgment on the merits was ever entered).

Perhaps one might be more sympathetic to the defendants if they had filed their notice of changed circumstances before the Court of Appeals entered its judgment. The record shows the Hospital was aware of Roll's cognitive decline and significant behavioral problems for several months before the Court of Appeals' ruling, and Roll's CT scan and further indicators of behavioral and mental decline were well known to the staff before this court granted Roll's petition for review. Even after her condition declined dramatically, the defendants sought a district court order to terminate the stay and allow them to place her in a community-based facility.

In other words, the "changed circumstances" changed well before Roll's guardians incurred the expense and stress of arguing this case before this court. But instead of conceding that Roll would receive her requested relief, the defendants put both Roll's guardians and this court through a time-consuming and costly appellate review. If this case were truly moot, as the defendants and the majority contend, then it was the defendants who elected to beat a moot horse for at least another eight months.

I would hold that the case is not moot and would decide it on its merits. Even if the defendants promise they will not seek future

removal of Roll from the Hospital, I would deem Roll the prevailing party for having protected and preserved her residency at the Hospital during the entire time the defendants sought to remove her.

Conclusion

The district court ignored the uncontroverted evidence—which the defendants' own witnesses provided—that she had active treatment needs and was receiving active treatment for those needs at the Hospital. It relied on unsupported and counterfactual conclusions that it drew from that evidence to reach an incorrect legal conclusion about Roll's rights under the Medicaid Act. The Court of Appeals engaged in an erroneous review of those factual determinations and the legal conclusion, inviting reversal by this court.

Roll was able to obtain a judicial stay on her transfer, a stay that remained in effect until the defendants proclaimed they no longer intended to transfer her. It was only shortly after oral argument before this court that the defendants, perhaps feeling the heat of a looming large attorney-fee award, announced they would no longer seek to remove Roll from the Hospital. Through her persistent litigation, Roll finally prevailed in this case, entitling her to attorney fees. This appeal was not moot, which this court demonstrated by continuing to exercise jurisdiction until now.

I would retain jurisdiction and correct the wrong lower-court results which now flap loosely in the caselaw breeze, and I would award fees and costs to Roll as the prevailing party.

BILES, J., joins the foregoing dissenting opinion.

City of Wichita v. Trotter

No. 122,007

CITY OF WICHITA, *Appellant*, v. ARLANDO TROTTER, *Appellee*.

(514 P.3d 1050)

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Challenge to First Amendment as Overbroad—Personal Injury not Required by Challenging Party*. A party challenging a law as overbroad under the First Amendment need not establish a personal injury arising from that law.

2. SAME—*Fourth Amendment Rights are Personal*. Fourth Amendment rights are personal, and defendants may not vicariously assert them.

3. SAME—*First Amendment Overbreadth Doctrine.* The First Amendment overbreadth doctrine may be implicated when a criminal statute makes conduct punishable, which under some circumstances is constitutionally protected from criminal sanctions.

4. SAME—*Challenge to Potentially Overbroad Statute—Burden on Challenging Part— Requirements*. Where a potentially overbroad statute regulates conduct, and not merely speech, the overbreadth must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. The party challenging the law bears the burden of showing (1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory method of severing the law's constitutional from its unconstitutional applications.

5. STATUTES—*Severance of Unconstitutional Provision by Court—Intent of Governing Body—Requirements to Sever Portion of Ordinance.* Whether a court may sever an unconstitutional provision from a statute or ordinance and leave the remainder in force and effect depends on the intent of the governing body that drafted it. A court may only sever an unconstitutional portion of an ordinance if, from examination of the ordinance, the court finds that (1) the act would have been passed without the objectionable portion, and (2) the ordinance would operate effectively to carry out the intention of the governing body that passed it with such portion stricken.

6. APPEAL AND ERROR—*New Issue Raised Sua Sponte by Appellate Court—Opportunity to Brief Issue before Determination of Issue.* When an appellate court raises a new issue sua sponte, counsel for all parties should be afforded a fair opportunity to brief the new issue and present their positions to the appellate court before the issue is finally determined.

7. SAME—*Challenge to Court's Error of Law—Appellate Review Unlimited*. When a party challenges a court's error of law, an appellate court's review of that error is unlimited.

Review of the judgment of the Court of Appeals in 60 Kan. App. 2d 339, 494 P.3d 178 (2021), from Sedgwick District Court; SETH L. RUNDLE, judge. Opinion filed August 12, 2022. Judgment of the Court of Appeals reversing the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed.

Jan M. Jarman, assistant city attorney, argued the cause and was on the briefs for appellant.

Kevin J. Zolotor, of O'Hara & O'Hara LLC, of Wichita, argued the cause and was on the briefs for appellee.

The opinion of the court was delivered by

WILSON, J.: Arlando Trotter appeals the decision of the Court of Appeals panel reversing the district court's dismissal of his two charges, which arose under Wichita Municipal Ordinances 3.06.030.A. and 3.30.030.A. Because we agree with the district court that W.M.O. 3.06.030.A. is overbroad and conclude that the panel erred by sua sponte reversing the district court's dismissal of Trotter's other charge, we affirm the district court and affirm in part and reverse in part the panel.

FACTS AND PROCEDURAL BACKGROUND

The procedural history of this case presents us with a limited factual record. In two separate municipal court cases, the City of Wichita charged Trotter with one violation each of W.M.O. 3.06.030.A. ("fail to file license application for after-hours") and W.M.O. 3.30.030.A. ("teen club/entertainment"). We know nearly nothing about the charges or proceedings that occurred before the Wichita Municipal Court. At any rate, after the municipal court found Trotter guilty in both cases, Trotter appealed to the district court, characterizing his convictions as arising under city ordinances "0306030A" and "0330030A." As a practical matter, Trotter's appeal had the effect of conditionally vacating his municipal convictions. *City of Salina v. Amador*, 279 Kan. 266, 274, 106 P.3d 1139 (2005).

On appeal before the district court, Trotter moved to consolidate both cases into one. He also moved to dismiss his charges, challenging the constitutionality of W.M.O. 3.06.030.A. The district court agreed, finding W.M.O. 3.06.030.A. unconstitutionally overbroad because it

intrudes upon several "examples of Constitutionally protected behaviors." The district court then dismissed both charges, thus fully vacating Trotter's municipal convictions. *Amador*, 279 Kan. at 274.

The City appealed. After rejecting Trotter's other constitutional claims, a panel of the Court of Appeals reversed the district court's conclusion that W.M.O. 3.06.030.A. was unconstitutionally overbroad. The panel also sua sponte reversed the district court's dismissal of the charge arising under W.M.O. 3.30.030.A., commenting that its "consideration of this issue is necessary to serve the ends of justice." *City of Wichita v. Trotter*, 60 Kan. App. 2d 339, 357, 494 P.3d 178 (2021).

Trotter moved for rehearing or modification, which the Court of Appeals denied. He then petitioned this court for review, which we granted.

ANALYSIS

Trotter challenges several aspects of the panel's decision. We find merit in his constitutional overbreadth argument and in his claim that the panel erred in reversing the district court's dismissal of his charge under W.M.O. 3.30.030.A., albeit not for the reasons he suggests. We deny Trotter's remaining claims as moot.

W.M.O. 3.06.030.A. is unconstitutionally overbroad.

Trotter disputes the panel's conclusions that W.M.O. 3.06.030.A. is not unconstitutionally overbroad and that it lacked jurisdiction to consider his arguments about the ordinance's alleged Fourth Amendment implications for overbreadth purposes. He has abandoned all other constitutional arguments.

The existence of appellate jurisdiction presents a question of law subject to unlimited review. *State v. Clark*, 313 Kan. 556, 560, 486 P.3d 591 (2021). The same is true of a challenge to the constitutionality of a statute or ordinance. *State v. Boettger*, 310 Kan. 800, 803, 450 P.3d 805 (2019); *City of Wichita v. Edwards*, 23 Kan. App. 2d 962, 964, 939 P.2d 942 (1997).

Standing

When First Amendment rights are affected, a party challenging a law as overbroad need not establish a personal injury arising from that law. *Williams*, 299 Kan. at 919 ("The general rule [requiring standing]

does not apply . . . when a litigant brings an overbreadth challenge that seeks to protect First Amendment rights, even those of third parties."). Cf. *Wenzel v. Bankhead*, 351 F. Supp. 2d 1316, 1323 (N.D. Fla. 2004) (distinguishing overbreadth claims from Fourth Amendment claims). Thus, the panel correctly determined that Trotter has standing to raise an overbreadth claim under the First Amendment.

The panel also correctly concluded that Trotter lacks standing to levy a Fourth Amendment challenge against W.M.O. 3.06.030.A. True, the panel approached this consideration from the perspective of a *direct* Fourth Amendment challenge rather than Trotter's true argument, which contends that W.M.O. 3.06.030.A. "is unconstitutionally overbroad because it infringes on the First Amendment when it requires one to waive her Fourth Amendment Rights in order to receive a license (permission) to exercise her First Amendment Rights." But we consider this a distinction without a difference as to standing. Trotter cites no authority extending the third-party standing approach beyond the domain of the First Amendment, and we have consistently held that Fourth Amendment rights "'are personal, and defendants may not vicariously assert them.'" *State v. Scheuerman*, 314 Kan. 583, 593, 502 P.3d 502 (2022). Thus we affirm the panel's rejection of Trotter's claim as to the Fourth Amendment implications of the ordinance.

Constitutional principles

We turn now to the merits of Trotter's First Amendment overbreadth claim. Under the First Amendment to the United States Constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. Trotter's claim of overbreadth focuses on W.M.O. 3.06.030.A.'s impact on the First Amendment right of assembly. See *De Jonge v. State of Oregon*, 299 U.S. 353, 364, 57 S. Ct. 255, 81 L. Ed. 278 (1937) (incorporating the First Amendment right to assemble to the states under the Fourteenth Amendment to the United States Constitution).

All parties agree the ordinance is content neutral. But content neutrality does not immunize an ordinance from overbreadth scrutiny. Cf. *Harmon v. City of Norman, Oklahoma*, 981 F.3d 1141,

1148-54 (10th Cir. 2020) (addressing content neutrality of an ordinance as a component of an as-applied challenge and overbreadth separately as a component of a facial challenge).

A criminal statute may be unconstitutionally overbroad when it "makes conduct punishable which under some circumstances is constitutionally protected from criminal sanctions." *Dissmeyer v. State*, 292 Kan. 37, 43, 249 P.3d 444 (2011). "Where conduct and not merely speech is involved, the United States Supreme Court requires that 'the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" *Williams*, 299 Kan. at 920. Thus, because "'[a]lmost every law is potentially applicable to constitutionally protected acts,'" a court will not find a law unconstitutionally overbroad unless the party challenging the law can show "'(1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory method of severing that law's constitutional from its unconstitutional applications.'" *Martens*, 279 Kan. at 253 (quoting *State v. Whitesell*, 270 Kan. 259, Syl. ¶ 6, 13 P.3d 887 [2000]); see also *Boettger*, 310 Kan. at 803 (party challenging the statute bears the burden of establishing constitutional infirmity). Moreover, "[c]riminal statutes must be scrutinized with particular care . . . those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *City of Houston, Tex. v. Hill*, 482 U.S. 451, 459, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987). Still, "[t]he overbreadth doctrine should be employed sparingly and only as a last resort." *Martens*, 279 Kan. at 253.

The Wichita after-hours establishment licensing scheme

The challenged ordinance, W.M.O. 3.06.030., provides:

"A. Except as provided in 3.06.030 subsection B, it is unlawful for any person to either as the owner, principal, officer, agent, servant, responsible person or employee, to own, lease, manage, maintain or operate an after-hours establishment without first obtaining a license and paying all fees as required by this chapter, and complying with all other applicable provisions of this code.

"B. No separate license shall be required under this chapter for a business licensed by the State of Kansas or City of Wichita, including but not limited to:

entertainment establishment, drinking establishment, drinking establishment restaurant, licensed community event, licensed temporary entertainment district, or sexually oriented businesses.

"C. A license under this section is not transferable to another person or location. A change in ownership shall require the new owner to pay a new application fee and secure a new license."

Several definitions in W.M.O. 3.06.020. establish the ordinance's scope:

"'After-hours establishment' means any venue for a series of events or ongoing activity or business, occurring alone or as part of another business, to which the public is invited or allowed which is open anytime between midnight and 6:00 a.m., where individuals gather and is not otherwise licensed for the sale of alcoholic beverages or cereal malt beverages or otherwise licensed by the City of Wichita or state of Kansas for a business at that location. This term shall not include hospitals, hotels, motels or other boarding houses nor is it intended to apply to private homes where specifically invited guests gather. A combination of two or more of the following factors is prima facie evidence that an establishment is an 'after-hours establishment':

"(1) Playing of music either recorded or live;
"(2) Entertainment such as trivia or games;
"(3) Sporting events in person or broadcasted on screens;
"(4) Crowds in excess of 20 people;
"(5) Alcoholic beverages present;
"(6) Food by an unlicensed vendor offered for purchase or as a benefit of paid entry;
"(7) Entry allowed only upon payment of a fee or membership;
"(8) Establishment monitored by security guards;
"(9) Advertisements or notifications on social media or by other means that invite the public to attend or participate in functions or activities located on the premises of such establishment.

. . . .

"'Games' mean an activity engaged in for diversion or amusement.

. . . .

"'Music' as used in this Chapter shall apply to live musicians, disc jockeys, and all music amplified through speakers or loud enough to be heard outside of the establishment.

. . . .

"'Premises' means any place where an after-hours establishment is operated or maintained and includes all hallways, bathrooms, parking areas, and other adjacent portions of the premises, which are under the control of the licensee or which are utilized by the licensee and are accessible to the public during operating hours.

"'Private home' means a building or structure used solely as a private residence where no other commercial or entertainment activities occur or may occur.

The term is meant to encompass private citizens gathering with invited guests in their own residentially zoned home.

"'Public' means non-employees and includes invited guests and members of an organization even if that organization is selective in its membership.

"'Trivia' means a quizzing game.

"'Venue' means any interior or exterior area, building, room, lot, or space used as a location for people to gather."

Finally, W.M.O. 3.06.010. sets forth the ordinance's overall purpose:

"The City of Wichita finds that some after-hours establishments within the city contribute to public intoxication, noise, disorderly conduct, assaults, violent crime and other similar problems connected primarily with the routine congregation of persons around such after-hours establishments, especially those which are managed without adequate security and attention to preventing these problems.

"The City of Wichita finds that a significant amount of police resources are being expended to address safety issues at after-hours establishments and safety risks are abundant when City personnel are not allowed to enter the facility for safety checks on locked doors and fire suppression devices. The purpose of this Chapter is to regulate the operation of all after-hours establishments so as to minimize the negative effects and to preserve the public safety, health and welfare."

As the City argues, many of the ordinance's aspects suggest that it was intended to regulate mainly late-night *commercial* activity. Had the ordinance's plain language limited its applicability to commerce alone, this matter might be settled easily because, "it is irrelevant whether the ordinance has an overbroad scope encompassing protected commercial speech of other persons, because the overbreadth doctrine does not apply to commercial speech." *Village of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 497, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).

The problem is that nothing in the ordinance's plain language *does* limit it to commercial activity. As it is defined, W.M.O. 3.06.030. requires a license for every "venue" (essentially everywhere but a few places specifically excluded by the ordinance) where the "public" (essentially everyone *except* employees and "specifically invited guests" gathering in "private homes") "is invited or allowed" for a "series of events or ongoing activity or business" that extends to any point between midnight and 6 a.m. The ordinance excludes only (1) other places already licensed by the state or the city, (2) hospitals, (3) hotels, (4) motels, (5) boarding houses, and (6) "private homes where specifically invited guests gather."

The broad reach of the "public" is further shown by the failure to limit the term "organization." While an individual's specifically invited guests fall outside the ordinance's ambit (but only if they gather solely inside the individual's home and that home is not otherwise disqualified), the same is not true for an invited "organization." With no definition of "organization," the attendees of a monthly book club meeting or a weekly gathering of the Future Farmers of America, for example, would qualify as "the public" under the ordinance's plain language. But we need not resort to such hypothetical applications to divine the ordinance's scope—any regular gatherings involving an "organization" would require licensing under the ordinance if they extend after midnight or begin before 6 a.m. In the context of other city and state licensing laws, W.M.O. 3.06.030. acts as a catchall "everything but the kitchen sink" regulatory scheme that purports to control most activity between midnight and 6 a.m.

While much of the ordinance's scope may be sound, its reach into private homes exceeds its constitutionally tolerable grasp. As defined by W.M.O. 3.06.020., a "private home" is "a building or structure used solely as a private residence where no other commercial or entertainment activities occur or may occur" and applies to "private citizens gathering with invited guests in their own residentially zoned home." Stated another way, the ordinance only excludes gatherings in the *interior* of buildings used *solely* as residences ("where no other commercial or entertainment activities occur or may occur") that sit in *solely* residentially zoned areas. Back yard gatherings, gatherings inside residences used partially for commercial purposes—such as those with home offices—and gatherings inside residences that are not solely in residential zones fall within the ordinance's scope.

Indeed, the City's initial response to Trotter's district court motion to dismiss even admitted that "[i]f a person has a home and a nice metal building out back and they host parties every weekend with music and food, they must have a license." We agree: under the ordinance's plain language, such a gathering would require a license if it lasted past midnight. But we cannot agree that the Constitution permits such an intrusion.

It was here that the panel stumbled. The panel focused on the ordinance's purported limitation to gatherings "to which the public was invited," claiming that "the district court's hypothetical applications of W.M.O. 3.06.030.A. fall short of the mark because the district court's hypotheticals would apply only if such persons started hosting recurrent early-morning gatherings that the public could attend." *Trotter*, 60 Kan. App. 2d at 372-73. But the panel ignored the ordinance's wide definition of "public," as well as other problems with the ordinance's definitions previously referenced. These problems convince us that any limitation on the ordinance's scope created by its "public" requirement is illusory, at best. The few exceptions the ordinance carves out illustrate its default rule: that nearly all gatherings fall within its reach unless specifically exempted.

Of course, we "'must construe statutes to avoid unreasonable or absurd results.'" *State ex rel. Schmidt v. Kelly*, 309 Kan. 887, 904, 441 P.3d 67 (2019) (quoting *N. Natural Gas Co. v. ONEOK Field Services Co.,* 296 Kan. 906, 918, 296 P.3d 1106 [2013]). But that principle—like other rules of construction—only applies in the presence of ambiguous language. E.g., *Schmidt v. Trademark, Inc.*, 315 Kan. 196, Syl. ¶ 1, 506 P.3d 267 (2022). While the meaning of "organization" may be ambiguous, the City's definition of "private homes" is not. We cannot construe around an ordinance's plain language, much as the City invites us to by, for example, reading a "curtilage" limitation into the ordinance's definitions. As written, W.M.O. 3.06.030. unambiguously regulates a wide range of otherwise lawful activity both inside certain private homes (i.e., those either used partially for "commercial or entertainment activities" or those not situated within residentially zoned areas) and around all private homes (i.e., anywhere outside the building or structure that comprises the home). The only exception to this broad regulatory swath goes to "specifically invited guests" *inside* a residentially zoned private home (used solely as a private home) between the hours of midnight and 6 a.m.

The panel expressed some concern with the zoning aspect of the ordinance, declaring that "[t]he very name 'nonresidential' implies persons would not ordinarily have private homes in such dis-

tricts" and "[i]t thus follows that neither the district court nor Trotter have shown that there is a realistic danger that W.M.O. 3.06.030.A. would significantly compromise persons living in a nonresidentially zoned area from gathering in accordance with their First Amendment right to assemble." *Trotter,* 60 Kan. App. 2d at 373. But we take judicial notice under K.S.A. 60-409(b) of the Wichita-Sedgwick County Unified Zoning Code, which is incorporated by reference in W.M.O. 28.04.010. Article III.B.14, III.B.16, and III.B.19 of that Code, provide for "Limited Commercial District," "General Commercial District," and "Central Business District" zoning. Those sections of the Code permit several residential uses in such zones. While we cannot say how many residences fall under such zones, their very existence dispels the panel's assumption that there is no realistic danger of their regulation here.

While clearly the City has a legitimate governmental interest in the regulation of late-night commercial activity, that interest does not justify regulatory intrusion into non-commercial activity vis-à-vis the right of assembly in or around private homes. Cf. *Konen v. Spice*, 318 F. Supp. 630, 632 (E.D. Wis. 1970) (ordinance prohibiting "all assemblies in any place (except the public ball park) without an advance permit granted by the chief of police" found unconstitutionally overbroad). This is also true of the City's stated purpose in regulating "the operation of all after-hours establishments so as to minimize the negative effects and to preserve the public safety, health and welfare." W.M.O. 3.06.010. Cf. *Occupy Sacramento v. City of Sacramento*, 878 F. Supp. 2d 1110, 1119 (E.D. Cal. 2012) (ordinance restricting gatherings in public parks without a permit between 11 p.m. and 5 a.m. not unconstitutionally overbroad); *Gordon v. Schiro*, 310 F. Supp. 884, 887 (E.D. La. 1970) ("It is beyond the reach of a penal ordinance to prohibit people from merely being on the streets 'habitually' or even at late 'or unusual' hours."). See also *Territory of Hawaii v. Anduha*, 48 F.2d 171, 171-73 (9th Cir. 1931) (statute prohibiting loafing or loitering "upon any public street or highway or in any public place" found unconstitutional: "[T]he right of the territory, or one of its municipalities, to legislate against the obstruction of public streets and highways, whether caused by idlers or others, is

not open to question. But a regulation as broad as this is wholly unnecessary for that purpose."). As one case put it:

"Although [the Town of] Dedham likely would have created overbreadth concerns had it attempted to ban *all First Amendment activity between 1:00 a.m. and 6:00 a.m.*, it did not take so bold a step. Rather, Dedham chose a safer path by focusing on those activities—*commercial* entertainment—most likely to result in late-night disruptions. [Citation omitted.]" (Emphasis added.) *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 748 (1st Cir. 1995).

As we have noted, nothing in the plain language of the ordinance limits its application solely to commercial endeavors. And while the City here has not attempted to ban *all* gatherings between midnight and 6 a.m., the broad sweep of its regulation captures the lion's share of such activity—including much activity within private homes, residentially zoned or not.

"An ordinance or statute is overbroad when it regulates or prohibits constitutionally protected conduct which should be left to the private domain, that is, conduct which the national, state or local government simply does not have the right to control." *Schiro*, 310 F. Supp. at 886. We have little trouble concluding that this ordinance creates a real and substantial intrusion into the private lives of Wichitans that goes far beyond the scope necessary to further the City's legitimate interests. We do not find W.M.O. 3.06.030.A. overbroad based on unlikely or extreme hypotheticals, but instead based on the ordinance's plain language.

Nor can we sever the ordinance's unconstitutional applications from its constitutional ones. First, we observe that the parties have largely left this prong of the analysis alone. Even the district court "never considered if there was a satisfactory means to sever the unconstitutional application of W.M.O. 3.06.030.A. from its constitutional form as required under the second part of the unconstitutionally overbroad test." *Trotter*, 60 Kan. App. 2d at 362. The City now urges us to sever the ordinance in any number of ways, but our authority to do so is limited. We have considered "severing a provision from [an ordinance] if to do so would make the [ordinance] constitutional and the remaining provisions could fulfill the purpose of the [ordinance]." *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 913, 179 P.3d 366 (2008). As we have held:

"'Whether the court may sever an unconstitutional provision from a statute and leave the remainder in force and effect depends on the intent of the legislature. If from examination of a statute it can be said that (1) the act would have been passed without the objectionable portion and (2) if the statute would operate effectively to carry out the intention of the legislature with such portion stricken, the remainder of the valid law will stand. Whether the legislature had provided for a severability clause is of no importance. This court will assume severability if the unconstitutional part can be severed without doing violence to legislative intent.'" *Gannon v. State*, 304 Kan. 490, 519, 372 P.3d 1181 (2016) (quoting *Felten Truck Line v. State Board of Tax Appeals*, 183 Kan. 287, 300, 327 P.2d 836 [1958]).

Granted, the focus of the ordinance is clearly commercial. But the ordinance also casts a wide net over practically all late-night activity by design, as emphasized by the multiple definitional layers that clarify its meaning. As the City's Supplemental Brief claims, "A group gathering overnight on a regular basis may call themselves a church, a political organization, or a private club, but the law applies equally to any group." Consequently, we cannot predict whether the Wichita City Council would have passed the ordinance without the troubling definitions of "private homes" or "public." Instead, we conclude that they cannot be severed without doing violence to the intent of the ordinance.

The district court expressed its opinion in terms of hypotheticals. It need not have done so: under W.M.O. 3.06.030., the regulation of late-night gatherings in Wichita is the rule proven by its few exceptions. We thus affirm the district court's decision to dismiss Trotter's charge under W.M.O. 3.06.030.A. and strike down the ordinance as unconstitutionally overbroad.

The panel abused its discretion by sua sponte reversing the district court's dismissal of Trotter's remaining charge.

Before the appeal, the district court perhaps inadvertently dismissed Trotter's second charge (and vacated his municipal conviction on that charge) for violating W.M.O. 3.30.030.A., even though "Trotter never argued that his charge [and consequent municipal conviction] for violating W.M.O. 3.30.030.A. should be dismissed because it was unconstitutional." *Trotter*, 60 Kan. App. 2d at 356. On appeal, the *panel* sua sponte reversed the district court's dismissal based on its consideration of the district court's authority to dismiss this second municipal conviction. The panel

held that such consideration was "necessary to serve the ends of justice." 60 Kan. App. 2d at 357. In our view, this was error.

> "As we have previously cautioned, when 'an appellate court raises a new issue sua sponte, counsel for all parties should be afforded a fair opportunity to brief the new issue and present their positions to the appellate court before the issue is finally determined.'" *Lumry v. State*, 305 Kan. 545, 566, 385 P.3d 479 (2016) (quoting *State v. Puckett*, 230 Kan. 596, 640 P.2d 1198 [1982]).

The panel "provided the parties with a fair opportunity to address this apparent problem" at oral arguments. *Trotter*, 60 Kan. App. 2d at 357. Indeed, the panel even permitted the parties to file supplemental briefing—but only as to "the issue of standing addressing overbreadth, right of assembly, the Fourth Amendment, and procedural due process." The panel's order for additional briefing did not permit the parties to present their views on the district court's dismissal of the second charge. By raising this dismissal and then denying the parties the opportunity to brief the issue—or, indeed, to respond in any way other than through spur of the moment answers in oral arguments—the panel overstepped its role.

We acknowledge the initial apparent inconsistency in our disapproval of the panel's dismissal of the second charge without briefing while we, as well, do not invite the parties to brief it. But this inconsistency evaporates upon closer inspection because we are not raising this issue sua sponte. Trotter's petition for review to this court challenged the panel's failure to address his claim that the City never briefed the district court's dismissal of his charges; as Trotter's brief before the panel argued, "The City did not brief or argue that the trial court improperly dismissed the cases with prejudice." We find merit in this general contention, although not on the precise grounds Trotter suggests. Once a party raises an issue of a court's error of law, our review of the error itself is unlimited. E.g., *State v. Morley*, 312 Kan. 702, 711, 479 P.3d 928 (2021).

Ultimately, it was the City's burden as appellant to establish that the district court erred, not Trotter's. E.g., *Hartman v. Stumbo*, 195 Kan. 634, 637, 408 P.2d 693 (1965) ("The burden remains always upon an appellant to show error in the ruling he seeks to

overturn."). And while the City's Notice of Appeal conferred appellate jurisdiction over the district court's dismissal of both charges, the City's briefing included no argument as to the dismissal of the charge arising under W.M.O. 3.30.030.A. The City thus waived this argument. E.g., *State v. Tracy*, 311 Kan. 605, 610, 466 P.3d 434 (2020).

It is not the role of the appellate court to second-guess the matters which the prosecutor chooses to appeal—or to waive through absence of briefing—based on the appellate court's own instincts about the ends of justice. By doing so here, the panel erred. We thus reverse the panel's reversal of the district court's dismissal of the municipal violation of W.M.O. 3.30.030.A.

In light of our decision, we deny as moot Trotter's remaining claims.

CONCLUSION

We affirm the panel's rejection of Trotter's Fourth Amendment claim as to the Fourth Amendment implications of W.M.O. 3.06.030.A. We hold W.M.O. 3.06.030.A. to be unconstitutionally overbroad. We also hold that the panel erred by sua sponte reversing the district court's dismissal of a second municipal charge (and the district court's vacating of the underlying municipal conviction) when the City failed to brief that dismissal. We therefore affirm in part and reverse in part the panel's judgment and affirm the district court's dismissal of Trotter's charges.

State v. Buchhorn

No. 122,252

STATE OF KANSAS, Appellee, v. CARRODY M. BUCHHORN, *Appellant*.

(515 P.3d 282)

SYLLABUS BY THE COURT

APPEAL AND ERROR—*Six Justices Equally Divided on Issues on Appeal—Judgment Must Stand.* When one of the justices is disqualified to participate in a decision of the issues raised in an appeal or petition for review, and the remaining six justices are equally divided as to the proper disposition of the issues on appeal or review, the judgment of the court from which the appeal or petition for review is made must stand.

Review of the judgment of the Court of Appeals in an unpublished opinion filed August 13, 2021. Appeal from Douglas District Court; SALLY D. POKORNY, judge. Opinion filed August 19, 2022. Judgment of the Court of Appeals reversing the district court stands. Judgment of the district court is reversed, and the case is remanded with directions.

William J. Skepnek, of The Skepnek Law Firm, P.A., of Lawrence, argued the cause, and *Keynen J. (K.J.) Wall*, *Russell J. Keller*, and *Quentin M. Templeton*, of Forbes Law Group, LLC, of Overland Park, and *Stephan L. Skepnek*, of The Sader Law Firm, of Kansas City, Missouri, and *Kevin Babbit*, of Fagan & Emert, LLC, of Lawrence, were with him on the briefs for appellant.

Kris Ailslieger, deputy solicitor general, argued the cause, and *Emma C. Halling*, assistant district attorney, *Kate Duncan Butler*, assistant district attorney, *Joshua David Seiden*, deputy district attorney, *Charles E. Branson*, former district attorney, *Suzanne Valdez*, district attorney, and *Derek Schmidt*, attorney general, were on the briefs for appellee.

PER CURIAM: This matter involves a child who died unexpectedly at the home daycare where Carrody M. Buchhorn worked. After the Douglas County coroner ruled the child's death was instantaneous and caused by a blow to the head, a jury convicted Buchhorn of second-degree murder. A Court of Appeals panel reversed Buchhorn's conviction and remanded for a new trial because her trial counsel's constitutionally deficient performance prejudiced her right to a fair trial. This court granted review.

Justice Wall took no part in this review because of his prior connection with the case while in private practice before joining the Supreme Court. The remaining six members of the court are

equally divided on how the issues on review should be decided. We stated the applicable rule in *Paulsen v. U.S.D. No.* 368, 239 Kan. 180, 182, 717 P.2d 1051 (1986):

> "The general rule in this jurisdiction, and elsewhere, is that when one of the justices is disqualified to participate in a decision of issues raised in an appeal and the remaining six justices are equally divided in their conclusions, the judgment of the trial court must stand. [Citations omitted.] See also Kansas Constitution, Art. 3, § 2, which provides that the concurrence of four justices shall be necessary to a decision."

The court being equally divided, the judgment of the Court of Appeals, the court from which review is sought, reversing the district court and remanding with directions stands. Buchhorn's cross-petition for review is dismissed as moot.

WALL, J., not participating.

State v. Hilyard

No. 123,323

STATE OF KANSAS, *Appellee*, v. RACHAEL C. HILYARD, *Appellant*.

(515 P.3d 267)

SYLLABUS BY THE COURT

1 CRIMINAL LAW—*Premeditation May Be Shown by Circumstantial Evidence—Reasonable Inferences.* Premeditation may be shown by circumstantial evidence, provided inferences from that evidence are reasonable.

2. SAME—*Sufficiency of Evidence—Circumstantial Evidence*. Sufficient evidence, even circumstantial, need not rise to such a degree of certainty that it excludes any and every other reasonable conclusion.

3. SAME—*Consent by Defendant Required to Use of Guilt-Based Defense*. A defendant must consent to the use of a guilt-based defense, but that consent need not be on the record.

4. APPEAL AND ERROR—*Ineffective Assistance Claim Raised First Time on Direct Appeal—Evidentiary Hearing Not Required if Defendant Did Not Request*. Absent a request from the defendant, this court need not remand a case for an evidentiary hearing to resolve an ineffective assistance claim raised for the first time on direct appeal.

5. TRIAL—*Closing Arguments—When Burden of Proof Not Shifted by Prosecutor*. During closing arguments, a prosecutor does not shift the burden of proof to the defendant by pointing out a lack of evidence either to support a defense or to corroborate a defendant's argument about deficiencies in the State's case. Nor does a prosecutor shift the burden of proof by mentioning the lack of evidence to rebut testimony and other evidence presented by the State.

6. SAME—*Jury Determination of Weight and Credit Given to Testimony of Witness—Assessing Witness Credibility by Prosecutor.* A jury determines the weight and credit to be given the testimony of each witness. While prosecutors are not allowed to offer personal opinions on credibility, a prosecutor may suggest legitimate factors for the jury to consider when assessing witness credibility.

7. CRIMINAL LAW—*No Affirmative Duty by Statute to Order Mental Examination—Discretionary Decision of Court.* K.S.A. 2021 Supp. 22-3429 imposes no affirmative duty for courts to raise the issue of whether to order a mental examination. If the issue is raised, the decision of whether to order such mental examination is discretionary.

Appeal from Sedgwick District Court; BRUCE C. BROWN, judge. Opinion filed August 19, 2022. Affirmed.

Randall L. Hodgkinson, of the Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Matt J. Maloney, assistant district attorney, argued the cause, and *Marc Bennett,* district attorney, and *Derek Schmidt*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

WILSON, J.: This is Rachael Hilyard's direct appeal after the district court imposed a hard 50 prison sentence for her first-degree premeditated murder conviction. Hilyard appeals on several theories, including insufficient evidence to support premeditation, erroneous jury instruction, ineffective assistance of counsel, prosecutorial error, and the district court's abuse of discretion. For the reasons discussed below, we affirm Hilyard's conviction and sentence.

FACTS AND PROCEDURAL HISTORY

In April 2017, then 9-year-old J.G. accompanied his grandmother, Micki Davis, to the home of Rachael Hilyard, his dad's ex-girlfriend. Davis had received a phone call from Hilyard to pick up J.G.'s dad's things or Hilyard would leave them at the curb. While gathering those things at Hilyard's home, Hilyard and Davis got into a fight. According to J.G., Hilyard suddenly pushed Davis from behind and began attacking her.

As soon as J.G. saw the attack, he ran to Davis' pickup parked in the driveway, locked himself inside, and called 911. While J.G. was in the truck, Hilyard approached the truck and talked to J.G., asking him to let her in. She eventually left to go back into the house.

J.G. left the truck and began running. He eventually stopped at the home of Brandon Martinez, who was out in his garage. Martinez took over the 911 phone call for J.G., and law enforcement soon arrived. With J.G. safely in the patrol vehicle, Officers Crouch and Spicuglia tried to make contact at Hilyard's house by knocking on the front door, looking through windows, and trying the back door—all with no response. Finally, Officer Spicuglia lifted the single-stall garage door. Inside, he saw a female body near a large pool of blood. The body's head was missing.

Officer Crouch moved to cover the perimeter of the house to contain whatever evidence and suspects might be in the residence until more officers could arrive. When more officers arrived on the scene, they entered the house and found Hilyard on the floor of the bathroom. Hilyard immediately complied with all the officers' verbal commands. She did not have any weapons and did not resist officers as they took her into custody. The officers then found Davis' head in the kitchen sink. CSI collected two bloody kitchen knives from near Davis' body.

While being transported, Hilyard overheard some radio traffic where the dispatch gave the incorrect address for her home; without prompting, Hilyard coherently gave the officers her correct address. After being placed in an interrogation room, Hilyard made an unprompted statement to an officer to the effect of "this is my fault."

During an autopsy, the coroner found bruises on Davis' head, face, breast, and lower back, as well as eight fractured ribs: all evidence of blunt force trauma. The coroner testified there was no way to know whether someone had lost consciousness based only on this type of bruising; but it was possible. The coroner then detailed the sharp force injuries to Davis' neck; he could not tell exactly how many stab wounds there were but was confident it was not just one uninterrupted cut through the neck. The coroner explained that to sever the head from a torso, one must use significant effort. The coroner also said he found blood in Davis' lungs, leading him to believe she was still breathing while her throat was cut. Ultimately, the coroner ruled the cause of death was sharp force injuries through the neck.

The physical evidence found in Hilyard's garage also suggested Davis was likely alive while being decapitated. Crime scene investigators found blood spatters at the scene which they believed had been caused by arterial spray—which generally requires an amount of blood pressure or a pumping heart.

Hilyard was charged with first-degree premeditated murder. Initially, she was found incompetent to stand trial and was ordered to undergo treatment at Larned State Security Hospital. After treatment and a competency evaluation from Larned, the district court found Hilyard competent to stand trial.

During the defense's opening statement, counsel acknowledged this was not a "whodunit" case; there was no issue about who killed Davis. Rather, defense counsel told the jury "when you have all of the evidence, I expect you will render a guilty verdict to my client on the appropriate charge."

Hilyard testified as part of her defense. She acknowledged she was expecting Davis and J.G. to pick up some of her ex-boyfriend's things and said she'd known Davis for probably 20 years. While discussing a painting Hilyard wanted to give to Davis, Hilyard thought Davis flinched at her. She "reacted," and they wrestled from the adjoining laundry room into the garage, where Hilyard believed J.G. to be. Hilyard admitted Davis did not touch her before the scuffle. Hilyard did not perceive Davis as a threat but was "on edge" because she thought someone was coming to kill her. Hilyard did not remember the details of the fight, but she knew she and Davis wrestled to the garage. Contrary to the blunt force injuries found during the autopsy, Hilyard denied remembering punching Davis at all. She did remember both herself and Davis "resisting."

Hilyard remembered J.G. running out of the garage during the fight. Hilyard testified that when the fight ended, Davis was lying on the garage floor. She avoided looking at Davis because she feared someone was watching her—Hilyard—through her own eyes. She closed the garage door.

Hilyard testified that she then went into the house looking for J.G. Upon realizing he was not in the house, she walked outside and found him in the truck. She approached the truck and was confused as to why he was so scared; Hilyard told J.G. he did not need to be scared. J.G. told Hilyard he was calling 911, at which point Hilyard returned to the house.

Hilyard explained that once she was back in the house, she got one knife and went back out into the garage. She testified she did not know Davis was still alive, nor did she know Davis was breathing. But Hilyard also testified she went to the garage "to go make sure [Davis] was okay still" . . . "'cuz [Hilyard] thought [Davis] was gonna get back up."

Hilyard then began severing Davis' head because "things" told Hilyard she had little time and she needed to get Davis' head away

from her body so her soul could get free and go to heaven. As Hilyard was cutting through Davis' neck, the first knife broke. She had to stop and go get another knife from the kitchen. After severing Davis' head, Hilyard walked into the kitchen and placed Davis' head in the sink. Then she went into the bathroom, where she believed she stayed until the police arrived.

During closing, defense counsel again summed up its position as, "[m]y client killed Ms. Davis, but there's no premeditation." Counsel supported this by highlighting Hilyard's belief that Davis was already dead. Other than Hilyard's own testimony, defense counsel presented no evidence.

The court instructed the jury on three lesser included offenses, but the jury ultimately convicted Hilyard of premeditated first-degree murder. The district court sentenced Hilyard to life in prison with no chance of parole for 50 years. Hilyard filed a timely notice of appeal.

ANALYSIS

SUFFICIENCY OF THE EVIDENCE

Hilyard's first issue on appeal is whether there was sufficient evidence to support the jury's finding of premeditation. She argues there was not. We find sufficient evidence in the record to support a finding of premeditation and no error below.

Preservation

Generally, there is no requirement for a criminal defendant to challenge the sufficiency of the evidence before the trial court to preserve it for appeal. *State v. Farmer*, 285 Kan. 541, 545, 175 P.3d 221 (2008). We find no exception in this case to that general rule.

Standard of Review

There must be evidence supporting each element of a crime to meet the sufficiency of the evidence standard. An appellate court reviews sufficiency by looking at all the evidence in a light most favorable to the prosecution to determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable

doubt. In making that determination, the appellate court will not reweigh evidence, evaluate witness credibility, or resolve conflicts in the evidence. *State v. Gonzalez*, 307 Kan. 575, 586, 412 P.3d 968 (2018).

Discussion

"Premeditation is the process of thinking about a proposed killing before engaging in the homicidal conduct." *State v. Scott*, 271 Kan. 103, 108, 21 P.3d 516 (2001). Thus, Hilyard argues she could not have formed premeditation unless she knew, or reasonably should have known, that Davis was still alive before Hilyard dealt the fatal cut.

Premeditation need not be proved by direct evidence. Premeditation may be shown by circumstantial evidence, provided inferences are reasonable. Our caselaw identifies five factors to consider when deciding whether circumstantial evidence gives rise to an inference of premeditation: "'(1) the nature of the weapon used; (2) lack of provocation; (3) the defendant's conduct before and after the killing; (4) threats and declarations of the defendant before and during the occurrence; and (5) the dealing of lethal blows after the deceased was felled and rendered helpless.'" *State v. Kettler*, 299 Kan. 448, 467, 325 P.3d 1075 (2014) (quoting *State v. Scaife,* 286 Kan. 614, 617-18, 186 P.3d 755 [2008]). Inferences reasonably drawn are not driven by the number of factors present in a particular case, because in some cases one factor alone may be compelling evidence of premeditation. See *State v. Cook*, 286 Kan. 1098, 1102, 191 P.3d 294 (2008).

It is not improper for a conviction to be sustained by circumstantial evidence, and if there is substantial evidence this court will not disturb a guilty verdict. Sufficient evidence, even circumstantial, need not rise to such a degree of certainty that it excludes any and every other reasonable conclusion. *State v. Logsdon*, 304 Kan. 3, 25, 371 P.3d 836 (2016).

Hilyard focuses simply on her contention that the State did not prove, even circumstantially, she knew Davis was alive when she delivered the fatal cut. While Davis may have been alive but unconscious, Hilyard claims no evidence showed she knew or reasonably could have known Davis was alive. This argument focuses on the fifth factor above: the dealing of lethal blows after the deceased was felled and rendered helpless.

But there is evidence from which the jury could infer Hilyard knew Davis was alive before she began to sever Davis' head and before Hilyard committed the final act that ended Davis' life. For example, the coroner testified about forensic evidence which indicates Davis was likely alive when Hilyard began that process. There was blood in Davis' airways, which in this case illustrates she was still breathing when at least one of the cuts was made to her neck. In addition, a crime scene investigator testified that the arterial spray blood spatter patterns demonstrate Davis had blood pressure and a pumping heart when at least some of the cuts were made.

Hilyard argues the coroner never testified that evidence of life would have been apparent to a layperson; the State counters that even a layperson would understand these to be signs of a living victim. Hilyard herself testified she went back to the garage "to go make sure [Davis] was okay still" because "[she] thought [Davis] was gonna get back up." By her own admission, a reasonable juror could have inferred that before decapitating Davis, Hilyard thought Davis was "okay" and could have gotten back up.

Touching on the other *Kettler* factors, J.G. reported the attack was unprovoked. By Hilyard's account, the attack began when Davis gave her a sideways glance and flinched, which a reasonable juror could infer was no provocation at all.

There is sufficient evidence to support the jury's finding of premeditation, based on reasonable inferences from physical evidence and the testimony of witnesses, including Hilyard. We find no error below.

JURY INSTRUCTIONS

Next, Hilyard asserts the omission of additional language in a jury instruction was error. This additional language clarifies the distinction between intent and premeditation. Because Hilyard has not shown how the jury instruction, as given, was erroneous, we find no error.

Preservation

Hilyard did not request at trial the jury instruction she now claims to be proper. While that means the issue was not preserved for appeal, such preservation is not a prerequisite to our consideration of the merits. However, failure to preserve the issue does affect our standard of review. See K.S.A. 2021 Supp. 22-3414(3).

Standard of Review

"When a party challenges a district court's failure to give a particular instruction, we review the challenge in three steps. First, we decide whether a failure to preserve the issue or a lack of appellate jurisdiction precludes us from reviewing the challenge at all. Parties generally cannot raise issues for the first time on appeal. . . . But a party may raise a jury-instruction challenge for the first time on appeal under K.S.A. 2020 Supp. 22-3414(3) if the 'failure to give an instruction is clearly erroneous.' . . .

"At step two of our analysis, we evaluate the merits of the claim to determine whether the district court erred by failing to give the instruction. In this step, we examine whether the proposed instruction was both legally and factually appropriate. But we are also mindful that a party is not entitled to any proposed instruction merely because it is legally and factually appropriate. Thus, if the requested instruction is legally and factually appropriate, we must also determine whether the instructions given by the district court, considered together as a whole, properly and fairly stated the applicable law and were not reasonably likely to mislead the jury. If so, the district court's failure to give the requested instruction does not constitute error. Our review at this step is unlimited, meaning we need not defer to any conclusions that the district court made about the propriety of the instruction. If we conclude that the district court did err, then we move to step three.

"At step three, we determine whether the district court's error warrants reversal. If the party failed to request an otherwise appropriate instruction at trial, . . . the Legislature has instructed us to review only for clear error. See K.S.A. 2020 Supp. 22-3414(3) (providing that '[n]o party may assign as error the giving or failure to give an instruction . . . unless the party objects thereto before the jury retires' or 'unless . . . the failure to give an instruction is clearly erroneous'). Under that standard, we will reverse a conviction only if the party firmly convinces us that the jury would have reached a different verdict had the district court given the instruction. [Citations omitted.]" *State v. Shields*, 315 Kan. 814, 819-21, 511 P.3d 931 (2022).

"The first element of this analysis ultimately affects the last one 'in that whether a party has preserved an issue for review will have an impact on the standard by which we determine whether an error is reversible.'" *State v. Ross*, 310 Kan. 216, 223, 445 P.3d 726 (2019) (quoting *State v. Barber*, 302 Kan. 367, 377, 353 P.3d 1108 [2015]).

Hilyard argues that the failure to give her requested instruction was clearly erroneous, and the State has not disputed her ability to raise that claim for the first time on appeal. Thus, our review is not foreclosed under the first step of the analysis, and we will reach the merits of the instructional challenge.

Discussion

The district court gave Hilyard's jury the standard instruction on premeditation found at PIK Crim. 4th 54.150 (2020 Supp.). It states: "Premeditation means to have thought the matter over beforehand, in other words, to have formed the design or intent to kill before the act. Although there is no specific time period required for premeditation, the concept of premeditation requires more than the instantaneous, intentional act of taking another's life." This instruction was requested by Hilyard. She proposed no additional language.

Hilyard now argues the district court should have modified the PIK instruction by adding the following language as part of the instruction on premeditation: "Premeditation requires more than mere impulse, aim, purpose, or objective. It requires a period, however brief, of thoughtful, conscious reflection and pondering—done before the final act of killing—that is sufficient to allow the actor to change his or her mind and abandon his or her previous impulsive intentions." Hilyard's argument on this issue is based on this court's recent decision in *State v. Stanley*, 312 Kan. 557, 569, 574, 478 P.3d 324 (2020), where this court advised it was best practice to use such language when the district court *also* modifies the PIK instructions to include: "'Premeditation does not have to be present before a fight, quarrel, or struggle begins. Premeditation is the time of reflection or deliberation. Premeditation does not necessarily mean that an act is planned, contrived or schemed beforehand. . . . Premeditation can occur during the middle of a violent episode, struggle or fight.'" Notably, Hilyard does not argue the district court should have included the full modifications outlined in *Stanley* in the instructions given to her jury.

The instructions as given, without the additional requested language, must constitute error for Hilyard to succeed. If the instructions given were sufficient, meaning that they properly and fairly stated the law and were not reasonably likely to mislead the jury, there is no error for an appellate court to correct. *Shields*, 315 Kan. at 821. In such a situation, *Shields* shows that it is immaterial if another instruction, upon retrospect, was also legally and factually appropriate, even if such instruction might have been *more* clear or *more* thorough than the one given. 315 Kan. at 820.

"'The use of PIK instructions is not mandatory but is strongly recommended. The pattern instructions have been developed by a knowledgeable committee to bring accuracy, clarity, and uniformity to jury instructions. They should be the starting point in the preparation of any set of jury instructions. If the particular facts in a given case require modification of the applicable pattern instruction or the addition of some instruction not included in PIK, the district court should not hesitate to make such modification or addition. However, absent such need, PIK instructions and recommendations should be followed.'" *State v. Bernhardt*, 304 Kan. 460, 470, 372 P.3d 1161 (2016) (quoting *State v. Dixon*, 289 Kan. 46, Syl. ¶ 1, 209 P.3d 675 [2009]).

Thus, a district court has discretion to modify the PIK language where such modification is legally and factually appropriate. The district courts in both *Bernhardt* and *Stanley* found a particular need to include additional language based on the facts before them. Upon our review of the facts in those cases, we ruled the additions to the PIK language—and thus the jury instructions as given—remained legally and factually appropriate.

But Hilyard advances a different line of argument: that the instruction as given, without parts of the supplemental language, was erroneous. Hilyard asserts that the additional language would have been "helpful to prevent the 'blurring of the distinction between intent and premeditation,'" because of the "brawl" she asserts took place between herself and the victim. In other words, Hilyard's claim relies on the assumption that the PIK, as written, represents an insufficient statement of the law.

We disagree. While the additional language clarifies the law of premeditation in some circumstances, it does not change the core substance accurately set forth in the PIK. In *Stanley*, as in *Bernhardt,* we deemed the additional language "both a correct statement of the law and factually appropriate given the potential for juror confusion over the temporal intricacies embedded in the legal concept of premeditation." *State v. Stanley*, 312 Kan. at 565. But although the added language may enhance a jury's understanding of the law, we cannot agree that the PIK, standing alone, is an incorrect, insufficient, or unnecessarily confusing statement of the law. *State v. McDaniel*, 306 Kan. 595, 615, 395 P.3d 429 (2017) ("To be legally appropriate, 'an instruction must always fairly and accurately state the applicable law . . . .'"); *State v. Uk*, 311 Kan. 393, 401-02, 461 P.3d 32 (2020) (finding identical language "fairly and clearly sets forth the law").

A close inspection of Hilyard's rationale shows only that the jury may have found her additional instruction language "helpful" because there had been a "brawl." Even if true, it is beside the point. The existence of a brawl, fight, or disagreement at some time before the act of killing does not *require* additional assistance to the jury in every case on the issue of premeditation; the standard PIK language is legally sufficient and generally not likely to mislead the jury. In both *Bernhardt* and *Stanley*, there was a temporal element that prompted the district court—in its discretion—to believe the jury may have confused the issues of intent and premeditation. Neither a temporal element, nor any other expressed reason for jury confusion has been shown here. And we must keep in mind that Hilyard does not now request the full modified instructions approved of in *Stanley* and *Bernhardt*, only a snippet. Assuming, without deciding, her proposed modified instructions remain legally appropriate, Hilyard still simply fails to show any necessity for the additional language such that the absence of that language was erroneous. The instruction given was legally appropriate and not reasonably likely to confuse the jury under the circumstances of this case.

Next, for all the reasons above that we found there was sufficient evidence to support the jury's finding of premeditation, we *also* find it was factually appropriate to give the standard instruction. *State v. Bodine*, 313 Kan. 378, 386, 486 P.3d 551 (2021) (For an instruction to be factually appropriate, there must be sufficient evidence—viewed in a light most favorable to the requesting party—to support the jury instruction.). While Hilyard's proposed instruction would also have been factually appropriate, the additional language she proposes was not necessary under the facts of this case. We find no error in the instruction given.

Given our holding that the instructions as given were sufficient—being both legally and factually appropriate—that is where our analysis ends. There was no error below, so a prejudice analysis is unnecessary.

INEFFECTIVE ASSISTANCE OF COUNSEL

In her third issue, Hilyard argues there must be an adequate showing on the record that her trial counsel received her informed consent to pursue a guilt-based defense. Otherwise, both her Sixth Amendment

right to counsel and her right to a jury trial are violated and this court must reverse her conviction and remand for a new trial.

During trial, Hilyard's counsel conceded there was no question that Hilyard killed Davis. This is called a guilt-based defense. Although some form of homicide is admitted by this defense, thereby functionally relieving the State of its burden to prove to the jury beyond a reasonable doubt that Hilyard killed Davis, there may have been a good strategic reason for using such a defense. As there are different classifications of criminal homicide, some more serious than others, the admission of one element—the killing—may make a jury more amenable to a defendant's arguments about other elements of relevant charges. The guilt-based defense is sometimes used to emphasize the credibility of another defense, especially if the defendant's counsel knows the cause and manner of a victim's death seem obvious or could be proved easily.

Hilyard does not argue in her brief that she did not consent to her trial counsel's guilt-based defense. Rather, she suggests there must be a showing on the record; the record must disclose Hilyard agreed to the guilt-based defense. Without such, she argues there was ineffective assistance of counsel so much that we must reverse and remand her case for a new trial.

We find that Hilyard failed to preserve the issue and we decline to review it.

Preservation

Defense counsel has no right to conduct a defense premised on guilt over a client's objection. *State v. Carter*, 270 Kan. 426, 440, 14 P.3d 1138, 1148 (2000) (defense counsel's imposing a guilt-based defense against defendant's wishes violated his Sixth Amendment right to counsel and denied him a fair trial). Hilyard does not claim she objected to—or even complained of—a guilt-based defense. In fact, she may have consented to such a defense. Hilyard does not say, and we do not know. She argues simply that by judicial fiat we should create a rule which presumes there is no consent to a guilt-based defense unless that consent is made on the record. Further, she argues that without such a record, trial counsel was necessarily ineffective, and the proper remedy is a new trial.

The merits of an ineffective assistance of counsel claim are not ordinarily addressed for the first time on appeal. The usual course is a request by appellate counsel for remand to the district court for an evidentiary hearing on the ineffective assistance claim, commonly called a "*Van Cleave* hearing." See *State v. Van Cleave*, 239 Kan. 117, 120, 716 P.2d 580 (1986).

But Hilyard's counsel does not request remand for a *Van Cleave* hearing on her claim of ineffective assistance of counsel. When appellate counsel does not request a hearing, this court need not order a *Van Cleave* remand sua sponte. See *State v. Dull*, 298 Kan. 832, 839, 317 P.3d 104 (2014) (declining to remand because of appellate counsel's apparently deliberate decision not to seek a *Van Cleave* hearing, even though at least one of the defendant's arguments may require an evidentiary hearing to resolve it).

Hilyard's assertion that a remand is unnecessary for an appellate court to resolve the issue has rarely been successful.

> "Although 'there are circumstances when no evidentiary record need be established, when the merit or lack of merit of an ineffectiveness claim about trial counsel is obvious,' and an ineffectiveness claim can therefore be resolved when raised for the first time on appeal, these circumstances are 'extremely rare.' *Rowland*, 289 Kan. at 1084-85; see also *State v. Levy*, 292 Kan. 379, 253 P.3d 341 (2011) (declining to consider ineffective assistance claims for first time on direct appeal; declining to remand for *Van Cleave* hearing based on defendant's failure to meet minimal requirements); *Laymon v. State*, 280 Kan. 430, 444, 122 P.3d 326 (2005) (direct appeal counsel's performance objectively unreasonable; performance prejudiced defendant); *Carter*, 270 Kan. at 433-34, 440-41 (trial counsel's pursuit of guilt-based defense despite client's contrary wishes ineffective, prejudicial per se)." *Dull*, 298 Kan. at 839.

The record in *Carter* established one of the "extremely rare" times the ineffectiveness claim could be resolved when raised first on appeal. But the circumstances of *Carter* are strikingly different than those present in Hilyard's case.

In *Carter*, the defendant made repeated and vigorous objections to his trial counsel's use of a guilt-based defense. Just like Hilyard's case, trial counsel admitted involvement in a homicide, but argued there was no premeditation. Unlike Hilyard, the defendant in *Carter* maintained his total innocence and complained vociferously—on the record—more than once when his defense counsel attempted to use a guilt-based defense.

This court accepted Carter's claim—raised for the first time on appeal—because the record was sufficient to decide the issue on direct appeal. The acts of counsel that Carter relied on were not in dispute and there was no purpose to a remand. *Carter*, 270 Kan. at 432-33. Hilyard's case is not the same. Hilyard never objected on the record to her trial counsel's use of a guilt-based strategy. Notably, she actively participated in it. Hilyard took the stand and admitted to killing Davis. The purpose of her testimony reflected her defense strategy: convincing the jury that there was no premeditation.

Simply put, Hilyard's case is not one of the "extremely rare" times an ineffectiveness claim can be resolved on direct appeal. Her complained of error is that her trial attorney did not memorialize her explicit consent to a guilt-based defense on the record. But we find no rule that says it must be so and no compelling reason to impose such a rule now. We will not create the presumption Hilyard seeks.

Conversely, there is also no rule that requires a defendant to object to a guilt-based defense on the record. Neither is there a rule creating a presumption that she has not objected to such a defense if the objection is not made on the record.

The only dispute Hilyard offers is whether she consented to the guilt-based defense; if she told her attorney she did not want to use a guilt-based defense and they used one anyway, it would certainly be ineffective assistance of counsel. Without a rule requiring either on-the-record consent or on-the-record objection, an evidentiary hearing would be the proper avenue to determine whether Hilyard opposed her trial counsel's defense strategy. Quite simply, a claim of ineffective assistance of counsel for failure to obtain consent for a guilt-based defense must be proved below. It has not been.

Hilyard did not ask for a remand for an evidentiary hearing in her appeal, which she states was an intentional choice. Both her brief and her reply brief argue that "[t]he only proper remedy is to reverse and remand for a new trial." As this court demonstrated in *Dull*, absent a request from the defendant, it need not remand a case for an evidentiary hearing to resolve an ineffective assistance

claim raised for the first time on direct appeal. *Dull*, 298 Kan. at 839-40.

No remand for a *Van Cleave* hearing was requested and one will not be ordered sua sponte by this court.

In sum, this issue is not preserved and we decline review.

PROSECUTORIAL ERROR

In her fourth issue for review, Hilyard argues that the prosecutor misstated the law during closing arguments, which effectively shifted the burden and constituted prosecutorial error. We disagree and find no error.

Preservation

Hilyard did not object to the State's closing argument at trial. While this court can consider the presence—or absence—of a contemporaneous objection when analyzing an instance of alleged prosecutorial error, no objection is needed to preserve it for review. *State v. Blevins*, 313 Kan. 413, 428, 485 P.3d 1175 (2021).

Standard of Review

There are two steps to the prosecutorial error analysis:

> "[T]he appellate court must decide whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial. If error is found, the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial. In evaluating prejudice . . . prosecutorial error is harmless if the State can demonstrate 'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, i.e., where there is no reasonable possibility that the error contributed to the verdict.'" *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016) (quoting *Ward*, 292 Kan. 541, Syl. ¶ 6).

Prosecutors fall outside their wide latitude—and thus commit error—if they misstate the law. *State v. Ross*, 310 Kan. 216, 221, 445 P.3d 726 (2019). Likewise, it is improper for the prosecutor to attempt to shift the burden of proof to the defendant.

A prosecutor does not shift the burden of proof to the defendant by pointing out a lack of evidence either to support a defense or to corroborate a defendant's argument about deficiencies in the

State's case. Nor does a prosecutor shift the burden of proof by posing a general question about the lack of evidence offered to rebut testimony and other evidence presented by the State. The prosecutor's comment must be evaluated in context and can be mitigated by jury instructions on the burden of proof. *State v. Watson*, 313 Kan. 170, 176-77, 484 P.3d 877 (2021).

Discussion

In Hilyard's case, the district court instructed the jury on three lesser included offenses, including second-degree intentional murder, second-degree reckless murder, and involuntary manslaughter. It also properly instructed the jury on the law, explaining that if the jury had a reasonable doubt between a greater and lesser offense, it could only convict of the lesser.

During the State's closing argument, the prosecutor discussed the jury's options between the charge of premeditated first-degree murder and the three lesser included offenses. He also properly explained, "it is for you to determine the weight and credit to be given the testimony of each witness."

Later, the prosecutor specifically addressed with the jury the lesser included offenses of second-degree reckless murder and involuntary manslaughter:

> "These other two statutes—excuse me, other two options are reckless murder, which says you do something recklessly, and here's the definition, and then there's a definition of involuntary manslaughter, which gives a lesser—a lesser degree of recklessness. This applies *if you believe that Ms. Hilyard truly didn't know* [*Davis*] *was still alive* and just recklessly disregarded the fact that she was a living, breathing human being when she slit her throat." (Emphasis added.)

And he continues, circling back to the jury's role:

> "Again, instruction two, you judge the credibility of all witnesses. On this day this woman attacks from behind, without provocation, this is according to [J.G.]. And you can judge [J.G.]'s credibility and how many other things he got right. Without any provocation this woman attacks his grandmother, beats her to the ground, and when she's unable to defend herself she takes—she goes back in the house, makes a decision, goes back in the house, gets a knife, makes sure that the garage door is down and then she is determined to do what she did until she has completed the task. I'm asking you to find this woman guilty of first degree premeditated murder."

Hilyard only complains about the emphasized language above, "if *you believe* that Ms. Hilyard truly didn't know [Davis] was still alive."

She contends that this both misstates the law and shifts the burden from the State to herself because "the jury didn't have to believe anything in order to convict Ms. Hilyard of the lesser included offense—it only had to form a reasonable doubt that the state proved intent and premeditation." Hilyard argues that this statement shifted the burden in a way that the jury could only convict of the lesser offense if it believed that the defense proved something, i.e., whether Hilyard knew Davis was still alive.

But the State did not say the jury had to believe the *defense* proved anything. Rather, the prosecutor was explaining which lesser offense might apply depending on the determinations the jury made about the evidence. As the State points out, it is like the prosecutor saying "if you find" rather than "if you believe." In other words, if the *State* failed to prove to the jury that Hilyard *did know* Davis was still alive (i.e., if the jury believed/found Hilyard *did not know* Davis was still alive), a lesser included offense might apply.

To any extent the prosecutor *was* referring to believing Hilyard specifically, it would not have been burden shifting; it would have been in the context of the jury's role of determining the weight and credit to be given to the testimony of each witness. While prosecutors are not allowed to offer personal opinions on credibility, this court has held that a prosecutor may explain the legitimate factors which a jury may consider in assessing witness credibility and may argue why the factors present in the case should lead to a compelling inference of truthfulness. *State v. Williams*, 299 Kan. 911, 935-37, 329 P.3d 400 (2014).

Just after the "believe" language, the prosecutor highlighted the factors which could compel the jury to believe J.G.'s truthfulness and which simultaneously undercut Hilyard's own testimony. Just like in *Williams*, the prosecutor's statements here, when placed in context, permissibly directed the jury to the evidence that boosted or degraded the credibility of the witnesses. We find no error.

MENTAL EVALUATION

Finally, Hilyard argues the district court's failure to order a mental evaluation under K.S.A. 2016 Supp. 22-3429 constitutes an abuse of discretion which requires this court to reverse her sentence and remand with directions for the district court to order an evaluation according to the statute. K.S.A. 2016 Supp. 22-3429 states in full:

"After conviction and prior to sentence and as part of the presentence investigation authorized by K.S.A. 21-6703, and amendments thereto or for crimes committed on or after July 1, 1993, a presentence investigation report as provided in K.S.A. 21-6813, and amendments thereto, the trial judge may order the defendant committed for mental examination, evaluation and report. If the defendant is convicted of a felony, the commitment shall be to the state security hospital or any suitable local mental health facility. If the defendant is convicted of a misdemeanor, the commitment shall be to a state hospital or any suitable local mental health facility. If adequate private facilities are available and if the defendant is willing to assume the expense thereof, commitment may be to a private hospital. A report of the examination and evaluation shall be furnished to the judge and shall be made available to the prosecuting attorney and counsel for the defendant. A defendant may not be detained for more than 120 days under a commitment made under this section."

Preservation

Hilyard did not raise this issue below. She neither requested a mental evaluation under K.S.A. 2016 Supp. 22-3429 nor did she object to the lack of such an evaluation. Generally, this court will not consider legal theories not raised in the court below. *State v. Perkins*, 310 Kan. 764, 768, 449 P.3d 756 (2019). But Hilyard now argues this court can reach the issue for the first time on appeal because the failure to do so would lead to the denial of a fundamental right. In so arguing, she effectively claims our court should apply a discretionary exception to the preservation rule. This court will sometimes review unpreserved claims when: (1) "The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case"; (2) consideration of the question is "necessary to serve the ends of justice or to prevent the denial of fundamental rights"; or (3) the judgment of a trial court should be upheld on appeal as "right for the wrong reason." *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015).

Here, the second factor applies, as we agree a fundamental right is implicated. We choose to exercise our discretion to consider Hilyard's issue. Therefore, it is under the second exception we now review her claim.

Standard of Review

A district court's decision on whether to order an evaluation under K.S.A. 2021 Supp. 22-3429 is reviewable for abuse of discretion. *State v. Evans*, 313 Kan. 972, 992, 492 P.3d 418 (2021).

Discussion

K.S.A. 2021 Supp. 22-3429 provides, in part, "[a]fter conviction and prior to sentence and as part of the presentence investigation authorized by K.S.A. 2021 Supp. 21-6703 . . . the trial judge may order the defendant committed for mental examination, evaluation and report. If the defendant is convicted of a felony, the commitment shall be to the state security hospital or any suitable local mental health facility."

Then, if the report of the examination authorized by K.S.A. 2021 Supp. 22-3429 shows

"the defendant is in need of psychiatric care and treatment, that such treatment may materially aid in the defendant's rehabilitation and that the defendant and society are not likely to be endangered by permitting the defendant to receive such psychiatric care and treatment, in lieu of confinement or imprisonment, the trial judge shall have power to commit such defendant to: (1) The state security hospital or any county institution provided for the reception, care, treatment and maintenance of mentally ill persons, if the defendant is convicted of a felony." K.S.A. 2021 Supp. 22-3430.

In *Evans*, the defendant went a step further than Hilyard by filing a request for a mental evaluation under K.S.A. 22-3429. The district court considered the motion but denied it. Evans argued the trial court needed to explain its reason for denying the request and its failure to do so constituted an abuse of discretion.

Our holding in *Evans* was clear:

"Under Evans' reasoning, mental evaluations would be the rule, and not ordering them would be an exception subject to close appellate scrutiny. In practical effect, Evans asks this court to establish a rule that all requests for presentencing mental evaluations must be granted unless the trial court can state some compelling reason not to grant the request. We decline to impose such a burden on sentencing courts. No such rule is contained in the statutory language, and such a rule would be contrary to the plain language of the statute, which says that "the trial judge *may* order the defendant committed for mental examination, evaluation and report." K.S.A. 2020 Supp. 22-3429.

"The statutory evaluation scheme is clearly permissive, and *it is the defendant's burden* to persuade a sentencing court that a mental examination serves the interests of justice. When a party presents no facts and makes no argument to support its request for relief, an issue may be deemed abandoned. Furthermore, . . . surely Evans had some burden to establish a record of her argument and the findings that led to its rejection. . . .

"Simply asserting that the trial court denied a request does not elevate an issue to the status of preserved for appeal. . . .

"Here, Evans never stated any grounds to the trial court why it should grant her request for a mental health evaluation. She created no record in support of her motion, and she essentially abandoned the argument below. For these reasons, this issue fails to present reversible error." (Emphasis added.) *Evans*, 313 Kan. at 992-93.

Hilyard did not request a mental examination, let alone meet her burden to persuade the sentencing court to order a mental examination. The statute imposes no affirmative duty for courts to raise this issue sua sponte and whether to do so is clearly discretionary. There is no indication the sentencing judge was unaware of this discretion. There is no error.

CONCLUSION

Hilyard is not due the relief she now seeks. There was sufficient evidence to support the jury's finding of premeditation, no jury instruction error, and no prosecutorial error. Her claim of ineffective assistance of counsel is not properly preserved. The trial court did not abuse its discretion in denying her request for a mental health evaluation.

The conviction and sentence are affirmed.

State v. Zeiner

No. 122,682

STATE OF KANSAS, *Appellee,* v. TY R. ZEINER, *Appellant.*

(515 P.3d 736)

SYLLABUS BY THE COURT

1. TRIAL—*Jury Instructions—Court May Modify or Add Clarification to PIK Instructions if Facts Warrant Change.* A district court may modify or add clarifications to PIK instructions, even those which track statutory language, if the particular facts in a given case warrant such a change.

2. MOTOR VEHICLES—*DUI Statutory Meaning of "Attempt to Operate" Means Attempt to Move Vehicle*. Under K.S.A. 2021 Supp. 8-1567, the term "operate" is synonymous with "drive," which requires some movement of the vehicle. Consequently, an "attempt to operate" under the DUI statute means an attempt to move the vehicle.

Review of the judgment of the Court of Appeals in an unpublished opinion filed June 11, 2021. Appeal from Marion District Court; MARGARET F. WHITE, magistrate judge. Opinion filed August 26, 2022. Judgment of the Court of Appeals affirming the district court on the issue on review is reversed. Judgment of the district court is reversed, and the case is remanded with directions.

Kelly J. Trussell, of Sloan, Eisenbarth, Glassman, McEntire & Jarboe L.L.C., of Topeka, argued the cause and was on the briefs for appellant.

Natalie Chalmers, assistant solicitor general, argued the cause, and *Derek Schmidt*, attorney general, was with her on the briefs for appellee.

The opinion of the court was delivered by

STEGALL, J.: Ty Zeiner was convicted of driving while under the influence (DUI) after he was found by Deputy Starkey asleep in the driver's seat of his SUV and parked alongside a gravel road. Because the district court committed a reversible error in the jury instructions by failing to properly define the word "operate" as used in K.S.A. 2021 Supp. 8-1567(a), we reverse his DUI conviction and remand the case for a new trial with proper jury instructions.

Around 3:15 a.m. on November 18, 2018, a person driving home in rural Marion County noticed a white SUV parked, with its headlights on and motor running, alongside the gravel road several miles east of the city of Marion. On this morning, the temperature was in the 20s, the wind was blowing about 15 mph, and it

was spitting snow. Acting out of a general concern for safety, the person pulled alongside the SUV and observed the driver, Zeiner, asleep in the driver's seat. The person then called his father for advice, and the father called the local sheriff's office. Deputy Larry Starkey responded to the call and arrived at the scene at 3:33 a.m.

When Deputy Starkey arrived, the SUV's motor had been turned off, though the radio and headlights were still on. Deputy Starkey immediately recognized the sleeping driver as Zeiner. Deputy Starkey tapped on the SUV's window and woke Zeiner up. Zeiner was in the driver's seat. He was wearing no seatbelt, made no attempt to move, stop, or shift the vehicle, or take any other action that indicated he was attempting to control the movement or future movement of the SUV.

Zeiner fumbled with the door handle and opened it to talk to Deputy Starkey. Deputy Starkey immediately noticed a smell of alcohol on Zeiner's breath. Zeiner initially denied drinking any alcohol, then quickly amended his story to say that he had consumed a couple of drinks with dinner earlier that evening. Zeiner explained that around 6:30 the previous evening he had drank two beers at Radius Brewing in Emporia, then drove to Strong City to meet his friend, John Maddox, at Ad Astra Food and Drink. Maddox later testified that he could not remember if Zeiner drank alcohol at Ad Astra but said Zeiner did not appear intoxicated during the roughly hour-long time they were there together. We do not know what time Zeiner left Ad Astra or how much, if any, alcohol Zeiner consumed while with Maddox.

Zeiner explained that he had been driving home from Ad Astra when he began to feel very tired and he decided to pull over. Zeiner was only 3 miles from his house. Zeiner asked Deputy Starkey a few times if he could simply drive home and let Deputy Starkey follow him there to ensure he made it safely. Deputy Starkey said no. Zeiner then asked if he could start his SUV to run the heater because it was cold outside. Deputy Starkey obliged, provided Zeiner promised not to try to drive away.

Based on his past interactions with Zeiner, Deputy Starkey suspected Zeiner was intoxicated because he appeared unusually "slow" and had "glassy eyes." Deputy Starkey subsequently asked

Zeiner to perform two field sobriety tests: the "walk and turn" test and the "one-leg stand" test. Because of the cold weather, Deputy Starkey asked Zeiner to perform the tests using his patrol truck as a shield from the wind. Zeiner was wearing only a dress jacket for warmth and hard-soled dress shoes during the tests, and he repeatedly complained about how cold he felt. Zeiner attempted the one-leg stand test four times and failed. During this test, Zeiner missed a number while counting, put his foot down, and generally had trouble maintaining balance. During the walk and turn test he was docked on the pivot-turn and did not walk heel-to-toe or in a true straight line.

After finishing the tests, Deputy Starkey arrested Zeiner and the pair moved into the cab of his patrol truck to talk. Zeiner agreed to allow Deputy Starkey to search his vehicle. Upon this search, Deputy Starkey found an unopened beer bottle in the console, an empty bottle of the same brand of beer on the passenger floorboard, and several matching bottlecaps on the floor of the SUV. Zeiner denied knowing that the empty bottle was in the truck, though he admitted he knew about the sealed bottle. Deputy Starkey did not search the area around the truck for additional bottles to match the caps found on the floorboard or ask Zeiner if he had been drinking the beer in the car.

Deputy Starkey then took Zeiner to the sheriff's office and administered three breath tests. The first test at 4:51 a.m. rendered no readable sample because Zeiner failed to blow into the machine properly. The second test at 5:24 a.m. rendered a deficient sample, still reading .134. The third test at 5:39 a.m. rendered another deficient sample which read .145.

In his official drug and alcohol incident report, Deputy Starkey did not check any of the boxes that state he had witnessed any unsafe operation or signs of impairment, including fumbling, repeating words, false information, bloodshot eyes, watery eyes, glazed eyes, droopy eyes, slowness to respond, slurred speech, hiccupping, excitability, indifference, use of profanity, insults, carefree attitude, acting cocky, combative, sleepy, abusive, or antagonistic. Rather, Deputy Starkey just stated that Zeiner was acting unusually slow based on Deputy Starkey's past interactions with Zeiner.

Upon this evidence, the State charged Zeiner with a second time DUI offense under K.S.A. 2021 Supp. 8-1567(a)(1) (breath-alcohol concentration of at least 0.08) and, in the alternative, K.S.A. 2021 Supp. 8-1567(a)(3) (incapable of safely driving due to intoxication). The State also charged him with transporting liquor in an open container.

K.S.A. 2021 Supp. 8-1567(a)(3) states that "[d]riving under the influence is operating or attempting to operate any vehicle within this state while: . . . under the influence of alcohol to a degree that renders the person incapable of safely driving a vehicle." The parties below have disputed the meaning of the term "operate" in the statute throughout this case.

At trial, Zeiner properly objected to the jury instructions, arguing for an instruction that clearly defined "operate" as used in the statute to mean "drive." The trial judge denied this request and opted for the broader language as used in the PIK, although the trial judge specifically recognized during sentencing that this case raised a difficult and substantial instructional issue.

The jury found Zeiner guilty of both DUI charges and not guilty of transporting liquor in an open container. Zeiner appealed the DUI convictions, and the Court of Appeals reversed his conviction under K.S.A. 2021 Supp. 8-1567(a)(1) because the district court improperly admitted the partial breath test samples as evidence. *State v. Zeiner*, No. 122,682, 2021 WL 2386047, at *3 (Kan. App. 2021) (unpublished opinion). The State did not appeal that reversal to this court.

The Court of Appeals affirmed Zeiner's DUI conviction under K.S.A. 2021 Supp. 8-1567(a)(3). 2021 WL 2386047, at *5, 7. In upholding this conviction, the Court of Appeals held the jury instruction was erroneous but that the error was harmless:

> "[R]esolution of this case does not turn on whether Zeiner attempted to operate or drive his vehicle after he pulled over to the side of the road. Zeiner freely admitted that he drove his vehicle from Strong City to the place where Starkey found him. Because this evidence was undisputed, there is no reasonable probability that the district court's failure to define 'operate' as 'drive' affected the jury's verdict." 2021 WL 2386047, at *7.

The Court of Appeals also held that the evidence was sufficient to support the jury's guilty verdict on this count. We agree

that the evidence was sufficient, but we find the instructional error is not harmless beyond a reasonable doubt.

DISCUSSION

Zeiner challenges both the sufficiency of the evidence and the lower court's ruling on harmless error. We examine each of these issues in turn.

There was sufficient evidence presented at trial to convict Zeiner of a DUI under K.S.A. 2021 Supp. 8-1567(a)(3).

"When a criminal defendant challenges the sufficiency of the evidence used to support a conviction, an appellate court looks at all the evidence 'in a light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt.' A reviewing court 'generally will "not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations."' [Citations omitted.]" *State v. Harris*, 310 Kan. 1026, 1030, 453 P.3d 1172 (2019).

A reviewing court need only look to the evidence in favor of the verdict to determine whether the essential elements of a charge are sustained. *State v. Ric*e, 261 Kan. 567, 585-86, 932 P.2d 981 (1997). It is only in rare cases where the testimony is so incredible that no reasonable fact-finder could find guilt beyond a reasonable doubt that a guilty verdict will be reversed. *State v. Torres*, 308 Kan. 476, 488, 421 P.3d 733 (2018); *State v. Matlock*, 233 Kan. 1, 5-6, 660 P.2d 945 (1983).

When evaluating the type of evidence before the court, we often state that even the gravest offense can be based entirely on circumstantial evidence. *State v. Banks*, 306 Kan. 854, 858-59, 397 P.3d 1195 (2017). Sufficient circumstantial evidence does not need to exclude every other reasonable conclusion to support a conviction. *State v. Logsdon*, 304 Kan. 3, 25, 371 P.3d 836 (2016).

On the other hand, convictions based entirely upon circumstantial evidence """can present a special challenge to the appellate court"' because """the circumstances in question must themselves be proved and cannot be inferred or presumed from other circumstances."""" *State v. Williams*, 229 Kan. 646, 648-49, 630 P.2d 694 (1981) (quoting 1 Wharton's Criminal Evidence § 91, pp. 150-51 [13th ed. 1972])." *Banks*, 306 Kan. at 859.

In analyzing the events of the night of November 17 and early morning of November 18, 2018, we must consider two time frames. The first occurs when Zeiner admittedly drove from Ad Astra in Strong City to the location where he parked his SUV. The second occurs from the time he parked until Deputy Starkey arrived on the scene at 3:33 a.m. At least for purposes of this appeal, the parties do not really dispute two critical facts: (1) that Zeiner did drive his vehicle to where it was parked sometime during the night; and (2) the evidence was sufficient to show Zeiner was intoxicated when he was observed sleeping in his running and parked car and when Deputy Starkey arrived a few minutes later and found Zeiner asleep in the car, now not running, but with its lights and radio on. Absent from the record is any direct evidence of Zeiner being intoxicated when he left Ad Astra or when he was driving or how long Zeiner had been parked on the side of the road before being observed.

The State claims the evidence shows Zeiner was drunk before he parked his car, either from consuming alcohol in Strong City or in his vehicle while driving (or both). Zeiner, on the other hand, claims the evidence is just as consistent with the possibility that he was not drunk when driving, he was merely tired, so he parked the vehicle and then consumed alcohol, intending to drive home the next morning.

Even though there is no direct evidence to support the conclusion that Zeiner drove while intoxicated, there are several pieces of circumstantial evidence that, when viewed in the light most favorable to the prosecution, create a reasonable basis to conclude that Zeiner was drunk when he left Strong City. Those facts include that Zeiner admitted to drinking earlier in the evening, the last place he admitted to being was an establishment that served alcohol, he was found only 3 miles from his house, he was asleep in the driver's seat, he smelled like alcohol, there was evidence of alcohol being consumed in the vehicle, Zeiner failed two field sobriety tests, and Zeiner provided three deficient breath test samples—two hours after being arrested—which indicated that he was intoxicated. "Proof of driving does not require an eyewitness to the driving. It may be shown by circumstantial evidence." *State v. Fish*, 228 Kan. 204, 210, 612 P.2d 180 (1980). In our view, there

was sufficient evidence for a jury to reasonably conclude Zeiner drove *while* intoxicated.

The trial court committed reversible error by denying Zeiner's request to modify the PIK instruction to define or replace "operate" as "drive."

Our standard of review is clear and well known:

"(1) First, the appellate court should consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; (2) next, the court should use an unlimited review to determine whether the instruction was legally appropriate; (3) then, the court should determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and (4) finally, if the district court erred, the appellate court must determine whether the error was harmless, utilizing the test and degree of certainty set forth in [*State v.*] *Ward*[, 292 Kan. 541, 565, 256 P.3d 801 (2011)]." *State v. Murrin*, 309 Kan. 385, 391, 435 P.3d 1126 (2019).

Zeiner properly objected to the jury instruction used at trial. The trial judge noted this objection in the record, and the State does not dispute the reviewability of this issue. When a defendant properly objects to an instruction at trial, this court examines whether the instruction properly and fairly stated the law as applied to the facts and could not have reasonably misled the jury. In making this determination, appellate courts consider the instructions as a whole. *State v. Butler*, 307 Kan. 831, 843, 416 P.3d 116 (2018).

The jury instruction at issue here tracked both the statutory language of K.S.A. 2021 Supp. 8-1567(a)(3) and the language of the PIK instruction. This language required the jury to find that Zeiner operated or attempted to operate his vehicle while he was too intoxicated to safely drive.

During trial the State made several arguments that Zeiner was "operating" his vehicle by running the heater, radio, and lights of his SUV while parked. Furthermore, the testimony of Deputy Starkey added to the confusion:

"[DEFENSE COUNSEL] From the point that you first saw the vehicle, what facts or information do you have in terms of what you saw, heard, felt, touch, that would lead you to believe that Mr. Zeiner, at that point, was attempting to operate the vehicle or to drive the vehicle?

"[STARKEY] The lights were on, and the radio was playing.

"[DEFENSE COUNSEL] Okay. *So you think the fact that the lights are on and the radio is playing suggests that Mr. Zeiner was attempting to drive the vehicle?*

"[STARKEY] *No. But he was attempting to operate the vehicle.*
"[DEFENSE COUNSEL] Okay. We'll get to that in jury instructions. Okay?
"[STARKEY] Okay." (Emphases added.)

Expanding the scope of the relevant timeframe for intoxication to include the time *after* Zeiner parked his vehicle would obviously strengthen the State's case immensely. But it would not be a correct statement of the law. *State v. Darrow*, 304 Kan. 710, Syl. ¶ 1, 374 P.3d 673 (2016) ("[T]he term 'operate' is synonymous with 'drive,' which requires some movement of the vehicle. Consequently, an 'attempt to operate' under the DUI statute means an attempt to move the vehicle.").

For this precise reason, the Court of Appeals correctly held that by failing to clearly define the term "operate" in the jury instructions to mean "drive" the district court committed instructional error—that is, the instruction requested by Zeiner was both legally and factually appropriate and should have been given.

We recognize that in most circumstances, this court "'strongly recommend[s] the use of PIK instructions, which knowledgeable committees develop to bring accuracy, clarity, and uniformity to instructions.'" *Butler*, 307 Kan. at 847. PIK instructions should generally be the starting point in the preparation of any set of jury instructions. However, a district court may modify or add clarifications to PIK instructions if the particular facts in a given case warrant such a change. *State v. Dixon*, 289 Kan. 46, Syl. ¶ 10, 209 P.3d 675 (2009).

The State's petition for review only glancingly challenges the Court of Appeals' error finding. The State focuses on the fact that Zeiner's requested instruction did not include language about attempt. And while we certainly agree with the State that instructional language defining "attempting to operate" as an "attempt to drive" would be appropriate, it does not follow that the district court was free to not give the necessary instruction at all. We agree with the Court of Appeals. This was error.

The only remaining issue is whether that error was harmless.

"'[B]efore a Kansas court can declare an error harmless it must determine the error did not affect a party's substantial rights, meaning it will not or did not affect the trial's outcome. The degree of certainty by which the court must be persuaded that the error did not affect the outcome of the trial will vary depending on whether the error implicates a right guaranteed by the United States Constitution. If it does, a Kansas court must be persuaded beyond a *reasonable doubt* that there was no impact on the trial's outcome, *i.e.*, there is no reasonable possibility that the error contributed to the verdict. If a right

guaranteed by the United States Constitution is not implicated, a Kansas court must be persuaded that there is no *reasonable probability* that the error will or did affect the outcome of the trial.'" (Emphases added.) *State v. Plummer*, 295 Kan. 156, 162-63, 283 P.3d 202 (2012).

Given the unique facts of this case and the potential confusion created by both the prosecutor's statements and the trial court's failure to provide the jury with the legally appropriate and precise definition of "operate," we are not convinced beyond a reasonable doubt that the jury convicted Zeiner based on a belief that he actually drove his vehicle while intoxicated after leaving Strong City, or whether it believed he was illegally "operating" his vehicle while parked on the side of the road. Given this, we do not have the necessary confidence the jury would have reached the same result had it been properly instructed. Zeiner's conviction must be reversed.

We reverse Zeiner's conviction under K.S.A. 2021 Supp. 8-1567(a)(3) and remand the case for a new trial on that charge with proper jury instructions.

Judgment of the Court of Appeals affirming the district court on the issue on review is reversed. Judgment of the district court is reversed, and the case is remanded with directions.

State v. Eubanks

No. 122,758

STATE OF KANSAS, *Appellee*, v. COREY A. EUBANKS, *Appellant*.

(516 P.3d 116)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Sentencing—Illegal Sentence—Correct at Any Time.* A sentence is illegal if it does not conform to the applicable statutory provisions, either in character or punishment. An illegal sentence can be corrected at any time.

2. SAME—*Sentencing—Restitution is Part of Criminal Sentence—Due Immediately—Exceptions.* Kansas law allows district courts to order restitution as part of a criminal defendant's sentence. Restitution includes, but is not limited to, damage or loss caused by the defendant's crime. Restitution is due immediately unless (1) the court orders the defendant be given a specified time to pay or be allowed to pay in specified installments or (2) the court finds compelling circumstances that would render restitution unworkable, either in whole or in part.

3. SAME—*Sentencing—Restitution Statutes Create Presumption of Validity*. When read together, K.S.A. 2020 Supp. 21-6604(e) and K.S.A. 2020 Supp. 22-3717(n) permit the district court to specify in its sentencing order the amount of restitution to be paid and the person to whom it shall be paid as a condition of postrelease supervision in the event the Prisoner Review Board declines to find compelling circumstances that would render a plan of restitution unworkable. These two statutes create a presumption of validity to the court's journal entry setting the amount and manner of restitution.

4. SAME—*Sentencing—Restitution—No Statutory Requirement Restitution Paid as Condition of Postrelease Supervision.* K.S.A. 2020 Supp. 22-3717(n) does not require the journal entry to specify that restitution be paid as a condition of postrelease supervision.

5. SAME—*Plea Agreements Similar to Civil Contracts—Appellate Review.* Plea agreements are akin to civil contracts. The primary rule for interpreting a contract is to ascertain the parties' intent. We exercise unlimited review over the interpretation of contracts and are not bound by the lower court's interpretations or rulings.

6. SAME—*Restitution—Order of Restitution for Crimes of Conviction or by Agreement under Plea Agreements.* A district court may only order restitution for losses or damages caused by the crime or crimes for which the defendant was convicted unless, under a plea agreement, the defendant has agreed to pay for losses not caused directly or indirectly by the defendant's crime.

Review of the judgment of the Court of Appeals in an unpublished opinion filed September 10, 2021. Appeal from Douglas District Court; AMY J. HANLEY, judge. Opinion filed August 26, 2022. Judgment of the Court of Appeals affirming the district court and remanding the case with directions is affirmed in part and reversed in part. Judgment of the district court is affirmed.

Kasper Schirer, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Brian Deiter, assistant district attorney, argued the cause, and *Kate Duncan Butler*, assistant district attorney, *Charles E. Branson*, district attorney, and *Derek Schmidt*, attorney general, were on the briefs for appellee.

The opinion of the court was delivered by

STANDRIDGE, J.: The State charged Corey A. Eubanks with burglary of a nondwelling, two counts of felony theft, and criminal damage to property. As part of a plea deal, he pled no contest to an amended charge of attempted theft in exchange for the State dismissing the original charges. The district court sentenced Eubanks to 10 months in prison and ordered him to pay restitution to the two victims of the burglary and theft "as a condition of [Eubanks'] postrelease."

On direct appeal, Eubanks challenged the district court's award of restitution. He argued he did not agree to pay restitution to one of the victims because that loss resulted from the dismissed charges and was unrelated to his sole conviction for attempted theft. Eubanks also claimed his sentence was illegal because the district court lacked authority to order restitution as a condition of his postrelease supervision. A Court of Appeals panel affirmed the district court's restitution order, finding Eubanks affirmatively confirmed at the plea hearing and at sentencing that the plea agreement contemplated restitution to both victims. The panel also held the district court had authority to order restitution as a condition of Eubanks' postrelease supervision but remanded for the district court to issue a new journal entry clarifying the payment of restitution was a condition of postrelease supervision.

On review, Eubanks argues the panel erred in affirming the district court's restitution order. He contends, as he did below, the district court lacked authority to order restitution as a condition of postrelease supervision and he did not agree to pay restitution to a

victim whose loss was unrelated to his conviction for attempted theft.

FACTUAL AND PROCEDURAL BACKGROUND

On March 11, 2018, a thief cut a section of the fence on the border of the Globe Quarry in Douglas County, broke into a locked trailer owned by Ditch Diggers, Inc., and stole a generator and chainsaws from the trailer. The thief also stole 300 to 400 feet of copper wire and three CAT batteries from the quarry property. Alan Platt owned the copper wire and the batteries.

Law enforcement's investigation pointed to Eubanks as the perpetrator. The State charged Eubanks with burglary of a nondwelling, two counts of felony theft, and criminal damage to property.

The parties appeared before the district court on October 30, 2019, where defense counsel advised the court that Eubanks had entered into a plea agreement with the State. The written plea agreement is not included in the record on appeal, but the prosecutor recited the terms of the agreement as follows:

> "The defendant is going to plead either guilty or no contest to the amended charge of attempted theft, which is a subsection of receiving stolen property, a level 10 nonperson felony.
>
> "The State will agree to dismiss the remaining charges. Sentencing will be open. Defendant can argue whether—for the sentence of prison, probation, or whether it's consecutive or concurrent to what he's in KDOC for. And obviously the State will argue its position.
>
> "Pay restitution to the *victims*, and that amount is not available yet. 18-TR-2017, the State will dismiss at the defendant's costs, which he's free to ask the court to waive." (Emphasis added.)

Defense counsel agreed the prosecutor's recitation of the plea agreement was accurate and "essentially states what it is." Eubanks waived his right to a preliminary hearing on the amended charge of attempted theft, and the district court proceeded with the plea hearing. Eubanks confirmed he understood the charge against him, was aware of the maximum penalties he faced, understood he would relinquish certain rights by entering the plea agreement, was competent to enter the plea, and was not threatened or coerced to plead no contest. During the plea colloquy, the following exchange occurred:

"THE COURT: Okay. Now, the plea agreement was stated for the record. You heard [the prosecutor] state the plea agreement, correct?
"THE DEFENDANT: Yes, ma'am.
"THE COURT: Is that the plea agreement as you understand it?
"THE DEFENDANT: Yes, ma'am.
"THE COURT: Are you satisfied with that plea agreement?
"THE DEFENDANT: Yes, ma'am."

Eubanks entered a plea of no contest to the attempted theft charge, which related to the property stolen from Platt. The district court found a factual basis for the plea based on evidence at the preliminary hearing on Eubanks' original charges. The court accepted Eubanks' plea and found him guilty of attempted theft. After the court scheduled the sentencing hearing, defense counsel stated, "[A]s soon as we hear something about restitution, we may well want a hearing with respect to the restitution."

At Eubanks' sentencing hearing, the district court asked if anyone wanted to speak before sentencing. Neither Platt nor anyone from Ditch Diggers was present, but the prosecutor stated,

"I do have a statement. . . . And this is from [Alan] Platt, P-L-A-T-T, one of the two victims. He said . . . we were finishing a phase of a [job] for Douglas County road when all of the copper wire and ground rods, along with the fiberoptic wire off the scales on the conveyer were taken off. Also, three large 4D batteries were removed. . . .
"The extra overtime and running to get the replacement parts was almost a full day long with the downtime of the plant. That was a lot of unneeded work. I can also say the owner of Ditch Diggers has also conveyed that this theft of the chainsaws and other property cost them significant downtime, so there was a direct impact on the parties because of the defendant's crimes."

The prosecutor continued,

"Judge, first of all, I will relate back to how this crime did impact the victims. There was almost $10,000 worth of property taken. And as part of the plea agreement the defendant has agreed to pay restitution. [Alan Platt] is $4,425.71. . . . And to Ditch Diggers, Inc., $4,601.04. And I will note that that does not include any labor, any time lost. This is simply for the value of the stolen equipment that was not recovered."

In response, defense counsel advised that "with respect to restitution we'd like to have a hearing on the subject of the amount of restitution." The district court acknowledged Eubanks was entitled to a hearing but noted a restitution hearing would require the

court to continue the sentencing hearing to a later date. After consulting with Eubanks, defense counsel said, "Well, I think under the circumstances since it's a very large amount of money and my client is entitled to justification by the *parties* involved as to *their losses*, I think we really need to have a hearing." (Emphases added.) When asked how many witnesses the State would call at a restitution hearing, the prosecutor said she would call two. The prosecutor also said,

"But I would like to put on the record that I provided a restitution order with the actual receipts for the—I mean, the value of the stolen property has been provided, so they're just going to take the stand and say exactly the same thing that's written here, and the defendant has agreed to pay restitution. So I've got two witnesses, Judge."

At this point, defense counsel advised the district court that Eubanks had changed his mind about the restitution hearing and "under the circumstances he would just as soon go ahead and be sentenced." The court then personally addressed Eubanks, who confirmed he wanted to proceed with sentencing without contesting the amount of restitution requested by the State.

The district court sentenced Eubanks to 10 months in prison and 12 months of postrelease supervision. The court also ordered Eubanks to pay restitution. The judge expressly stated,

"I am going to order as a condition of your postrelease that you pay restitution to [Alan Platt] in the amount of $4,425.79, and to Ditch Diggers in the amount of $4,601.04. I should also note that that restitution can be worked on while you're in custody paying towards it as well."

The sentencing journal entry of judgment reflected the district court's award of restitution to Platt and to Ditch Diggers.

On direct appeal, Eubanks challenged the district court's restitution order. Eubanks argued he did not agree to pay restitution to Ditch Diggers, a victim of the dismissed charges. Eubanks also claimed the restitution award resulted in an illegal sentence because the district court lacked authority to order restitution as a condition of postrelease supervision. See *State v. Eubanks*, No. 122,758, 2021 WL 4127725, at *3-4 (Kan. App. 2021) (unpublished opinion).

A Court of Appeals panel affirmed the district court's restitution order. First, the panel held the award of restitution to Ditch

Diggers was valid because Eubanks had agreed to pay Ditch Diggers under the terms of the plea agreement. 2021 WL 4127725, at *3-4. Second, the panel found the district court had authority under K.S.A. 2020 Supp. 21-6604(e) and K.S.A. 2020 Supp. 22-3717(n) to order restitution as a condition of postrelease supervision. But because the sentencing journal entry of judgment failed to state restitution was a condition of Eubanks' postrelease supervision, the panel remanded to the district court to issue a new journal entry expressly stating so. 2021 WL 4127725, at *4-5.

We granted Eubanks' petition for review on both issues. Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

ANALYSIS

Eubanks challenges the panel's decision affirming the district court's restitution order. First, he contends the panel erroneously found the district court had statutory authority to order restitution as a condition of postrelease supervision. Next, he contends the panel's remand to the district court for a new journal entry expressly stating restitution is a condition of Eubanks' postrelease supervision deprives the Prisoner Review Board (Board) of authority to consider workability of the restitution order. Finally, he contends the panel erred in determining that he agreed to pay restitution to Ditch Diggers. We address each contention in turn.

1. *Restitution as a condition of postrelease supervision*

Eubanks argues the district court lacked statutory authority to order restitution as a condition of his postrelease supervision, thus rendering his sentence illegal. He asks this court to vacate that portion of the district court's restitution order. Eubanks did not raise this issue before the district court. But K.S.A. 2021 Supp. 22-3504 provides the legal authority to correct an illegal sentence at any time, so the panel appropriately considered Eubanks' argument for the first time on appeal. See *State v. Hambright*, 310 Kan. 408, 411, 447 P.3d 972 (2019) (considering illegal sentence challenge for first time on direct appeal).

Restitution is part of a criminal defendant's sentence. *State v. Johnson*, 309 Kan. 992, 996, 441 P.3d 1036 (2019). A sentence is illegal if it does not conform to the applicable statutory provisions, either in character or punishment. K.S.A. 2021 Supp. 22-3504(c)(1). Whether a sentence is illegal within the meaning of K.S.A. 22-3504 is a question of law over which appellate courts have unlimited review. *State v. Sartin*, 310 Kan. 367, 369, 446 P.3d 1068 (2019). And whether the district court exceeded its statutory authority in ordering restitution as a condition of postrelease supervision requires interpretation of the applicable statutes, which also involves legal questions that we review de novo. See *State v. Samuels*, 313 Kan. 876, 880, 492 P.3d 404 (2021).

We begin our analysis by reviewing the relevant statutory provisions. Kansas law allows district courts to order restitution as part of a criminal defendant's sentence. Restitution "shall include, but not be limited to, damage or loss caused by the defendant's crime." K.S.A. 2020 Supp. 21-6604(b)(1). Restitution is due immediately unless (1) "[t]he court orders that the defendant be given a specified time to pay or be allowed to pay in specified installments" or (2) "the court finds compelling circumstances that would render restitution unworkable, either in whole or in part." K.S.A. 2020 Supp. 21-6604(b)(1)(A) and (B).

When a district court sentences a defendant to prison or jail, "the court may specify in its order the amount of restitution to be paid and the person to whom it shall be paid if restitution is later ordered as a condition of parole, conditional release or postrelease supervision." K.S.A. 2020 Supp. 21-6604(e). The postrelease supervision statute, K.S.A. 2020 Supp. 22-3717, addresses restitution as follows:

> "If the court that sentenced an inmate specified at the time of sentencing the amount and the recipient of any restitution ordered as a condition of parole or postrelease supervision, the prisoner review board shall order as a condition of parole or postrelease supervision that the inmate pay restitution in the amount and manner provided in the journal entry unless the board finds compelling circumstances that would render a plan of restitution unworkable." K.S.A. 2020 Supp. 22-3717(n).

At sentencing here, the district court orally stated the amount and the recipients of restitution to be paid, ordering it "as a condition of [Eubanks'] postrelease" and noting Eubanks also could

work towards paying restitution while in custody. Citing K.S.A. 2020 Supp. 21-6604(e) and K.S.A. 2020 Supp. 22-3717(n), the panel found the district court had authority to order restitution as a condition of Eubanks' postrelease supervision. *Eubanks*, 2021 WL 4127725, at *4-5.

Eubanks argues the panel's ruling contradicts a plain reading of the relevant statutes. He contends only the Board can set conditions of postrelease supervision, while a court's authority is limited to specifying the amount and manner of the restitution. To the extent Eubanks is arguing the panel found the district court has unconditional authority to order restitution as a condition of postrelease supervision, Eubanks makes a valid point. But what Eubanks fails to acknowledge is that the statutes in play here provide overlapping roles for the district court and the Board when it comes to restitution and postrelease supervision. K.S.A. 2020 Supp. 21-6604(e) and 22-3717(n) must be read together. The former statute gives the district court authority to order the amount and recipient of restitution, "if restitution is later ordered [by the Board] as a condition of . . . postrelease supervision." K.S.A. 2020 Supp. 21-6604(e). The latter statute provides that the court's order setting the amount and recipient of restitution is a conditional one subject to reduction or elimination if the Board ultimately finds the restitution plan unworkable. See K.S.A. 2020 Supp. 22-3717(n). When read together, these two statutes create a presumption of validity to the court's journal entry setting the amount and manner of restitution.

And that is exactly what happened here. In ordering Eubanks to pay restitution, the district court stated from the bench,

> "I am going to order as a condition of your postrelease that you pay restitution to [Alan Platt] in the amount of $4,425.79, and to Ditch Diggers in the amount of $4,601.04. I should also note that that restitution can be worked on while you're in custody paying towards it as well."

The court's restitution order as pronounced from the bench does not limit or interfere with the Board's inherent authority to reduce or eliminate restitution at the time of release if the Board finds the restitution plan unworkable. For this reason, we conclude the court's restitution order at sentencing conforms to K.S.A. 2020 Supp. 22-3717(n) and is not illegal.

Notably, our conclusion today is consistent with the holding in *State v. Alderson*, 299 Kan. 148, 322 P.3d 364 (2014). A jury convicted Alderson of first-degree murder. At sentencing, the district court ordered restitution in the amount of $119,899.86. The court's journal entry stated: "'The Court finds that restitution is owed in this case, as set out below, and advises the Secretary of Corrections' Board of Pardon and Parole that defendant's release from incarceration should be made contingent upon defendant making restitution.'" 299 Kan. at 150. Well over 10 years after sentencing, and while Alderson was still in prison, a private collection corporation retained by the State made written demand on Alderson to pay his restitution. Alderson filed a motion requesting release from the restitution order based on its dormancy under K.S.A. 2013 Supp. 60-2403(d). We concluded the language in the journal entry was too ambiguous to subject the defendant to restitution collection during imprisonment and the district court did not have authority to impose parole conditions. Therefore, we held that "the district court did not enter an enforceable restitution judgment when it sentenced Alderson. It instead provided an advisory calculation of damages for the benefit of the Kansas Prisoner Review Board. There being no judgment of restitution, the judgment could not become dormant." 299 Kan. at 151. Likewise, here, the sentencing court entered an order specifying the amount and recipient of restitution as a condition of postrelease supervision, an order which is advisory in nature because it is subject to reduction or elimination as a postrelease supervision condition if the Board ultimately finds the restitution plan unworkable.

On direct appeal, the panel found "no merit in Eubanks' assertion that the district court lacked the authority to order him to pay restitution as a condition of postrelease supervision." *Eubanks*, 2021 WL 4127725, at *5. Based on this finding, the panel remanded "for the district court to issue a new journal entry by way of an order nunc pro tunc clarifying that the payment of restitution is to be a condition of Eubanks' postrelease supervision." *Eubanks*, 2021 WL 4127725, at *5. The panel's finding and direction on remand appears to suggest it found the district court had unconditional authority to order restitution as a condition of Eubanks' postrelease supervision. To the extent the panel did so, we disapprove and specifically hold the court's authority to order restitution as a condition of postrelease supervision is conditional

in nature because it is subject to reduction or elimination by the Board at the time it sets the conditions of postrelease supervision. Notwithstanding the panel's finding and remand order, we affirm its ultimate decision finding that the district court's oral restitution order at sentencing did not result in an illegal sentence. See *State v. Overman*, 301 Kan. 704, 712, 348 P.3d 516 (2015) (if court reaches correct result, its decision will be upheld even though it relied on the wrong ground or assigned erroneous reasons for its decision).

2. *Restitution as stated in the journal entry of judgment*

At the sentencing hearing, the district court pronounced from the bench the amount and the recipients of restitution to be paid as a condition of Eubanks' postrelease supervision specifically, $4,425.79 to Platt and $4,601.04 to Ditch Diggers. Although the journal entry of judgment set forth the restitution amount to be paid to each victim, it did not expressly state the restitution was ordered as a condition of his postrelease supervision. Based on this omission, the panel found the journal entry imposed a sentence at variance with that pronounced from the bench and remanded for the district court to issue a nunc pro tunc journal entry clarifying the restitution ordered is to be a condition of Eubanks' postrelease supervision. *Eubanks*, 2021 WL 4127725, at *5 (citing *State v. Mason*, 294 Kan. 675, 677, 279 P.3d 707 [2012]) ("'A criminal sentence is effective upon pronouncement from the bench; it does not derive its effectiveness from the journal entry. A journal entry that imposes a sentence at variance with that pronounced from the bench is erroneous and must be corrected to reflect the actual sentence imposed.'").

On review, Eubanks argues the panel's remand for a new journal entry stating restitution is a condition of postrelease supervision necessarily will deprive the Board of authority to consider restitution workability.

We find it unnecessary to consider Eubanks' argument because, based on the plain language of the applicable statutes, the panel erred in deciding to remand for a nunc pro tunc order.

Again, K.S.A. 2020 Supp. 22-3717(n) provides:

"If the court that sentenced an inmate specified at the time of sentencing the amount and the recipient of any restitution ordered as a condition of parole or postrelease supervi-

sion, the prisoner review board shall order as a condition of parole or postrelease supervision that the inmate pay restitution in the amount and manner provided in the journal entry unless the board finds compelling circumstances that would render a plan of restitution unworkable."

Here, the district court "specified *at the time of sentencing* the amount and the recipient of any restitution ordered as a condition of parole or postrelease supervision." (Emphasis added.) See K.S.A. 2020 Supp. 22-3717(n). Thus, the Board is required to "order as a condition of . . . postrelease supervision that the inmate pay restitution in the amount and manner provided in the journal entry unless the [B]oard finds compelling circumstances that would render a plan of restitution unworkable." K.S.A. 2020 Supp. 22-3717(n). The statute does not require the journal entry to specify that restitution be paid as a condition of postrelease supervision; it only requires the journal entry to state the restitution amount and manner in which the restitution is to be paid. In this case, the journal entry stated the restitution amount as $9,026.75 and the manner in which the restitution to be paid as:

"$ 4425.71 Alan J Platt, 2016 Clark Road, Richmond KS 66080

"$ 4601.04 Ditch Diggers Inc, PO Box 258, Salina KS 67402-0258."

Based on the analysis above, we reverse the panel's remand order directing the district court to issue a new journal entry providing that the payment of restitution was to be a condition of Eubanks' postrelease supervision.

3. *Restitution to Ditch Diggers*

Eubanks argues the panel erred in concluding he agreed to pay restitution to Ditch Diggers as part of his plea agreement. He claims the terms of the plea agreement recited at the plea hearing did not provide for restitution payments on dismissed charges. Because Ditch Diggers' loss was unrelated to his only conviction (attempted theft of Platt's copper wire and CAT batteries), Eubanks asks this court to vacate the portion of the district court's order awarding restitution to Ditch Diggers.

Eubanks did not raise this issue before the district court. Generally, a party may not raise a claim for the first time on appeal. *State v. Kelly*, 298 Kan. 965, 971, 318 P.3d 987 (2014). But the Court of Appeals exercised its prudential authority to consider the issue because it involved a question of law arising on proved or admitted facts and was

determinative of the case. See *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 (2020) (appellate courts not obligated to review a new claim even if an exception would support decision to do so); *Johnson*, 309 Kan. at 995 (listing exceptions to general rule that new legal theory may not be asserted for the first time on appeal).

Plea agreements are akin to civil contracts and thus may be analyzed similarly. *State v. Frazier*, 311 Kan. 378, 382, 461 P.3d 43 (2020). The primary rule for interpreting a contract is to ascertain the parties' intent. *Peterson v. Ferrell*, 302 Kan. 99, 104, 349 P.3d 1269 (2015). We exercise unlimited review over the interpretation of contracts and are not bound by the lower court's interpretations or rulings. *Trear v. Chamberlain*, 308 Kan. 932, 936, 425 P.3d 297 (2018).

As discussed, a sentencing court has authority to order a criminal defendant to pay restitution, "which shall include, *but not be limited to*, damage or loss caused by the defendant's crime." (Emphasis added.) K.S.A. 2020 Supp. 21-6604(b)(1). A district court "may only order restitution for losses or damages caused by the crime or crimes for which the defendant was convicted unless, pursuant to a plea bargain, the defendant has agreed to pay for losses not caused directly or indirectly by the defendant's crime." *State v. Dexter*, 276 Kan. 909, 919, 80 P.3d 1125 (2003); see *State v. Ball*, 255 Kan. 694, 701, 877 P.2d 955 (1994) (sentencing court has authority to enter agreed-upon restitution amount where defendant agrees to pay restitution for each charged offense in exchange for State's agreement to dismiss some of the charges).

Eubanks contends the panel wrongly framed his issue as one claiming the terms of his plea agreement were ambiguous. He asserts his real argument was that the terms stated orally on the record at the plea hearing did not include an agreement to pay restitution for Ditch Diggers' loss. Eubanks alleges the panel improperly read into the plea agreement a promise to pay restitution to Ditch Diggers when he only agreed to pay for the loss resulting from the attempted theft of Platt's copper wire and batteries. Eubanks also argues restitution to Ditch Diggers is unwarranted because his attempted theft of Platt's copper wire and batteries was not the proximate cause of Ditch Diggers' loss.

Eubanks' argument is unpersuasive. Whether Ditch Diggers' loss related to Eubanks' conviction for attempted theft is irrelevant because he agreed—under the terms of the plea agreement as recited and

acknowledged by both parties at the plea hearing and later confirmed at sentencing—to pay restitution to Ditch Diggers.

The State initially charged Eubanks with burglary of a nondwelling, two counts of felony theft, and criminal damage to property. Under the plea agreement, Eubanks agreed to plead no contest to a single charge of attempted theft in exchange for the dismissal of the four original charges. The amended attempted theft charge related to the property stolen from Platt.

The written plea agreement is not included in the record on appeal. But at the plea hearing, the prosecutor recited the terms of the plea agreement to include payment of "restitution to the *victims*." (Emphasis added.) Defense counsel agreed the prosecutor's recitation of the plea agreement was accurate. Eubanks also personally confirmed the plea agreement was as described by the prosecutor and he was satisfied with the plea agreement.

At sentencing, the prosecutor read a statement from Platt about the losses he incurred as a result of the theft. The prosecutor advised the court the owner of Ditch Diggers "also conveyed that this theft of the chainsaws and other property cost them significant downtime, so there was a direct impact on the parties because of the defendant's crimes." The prosecutor reiterated "how this crime did impact the *victims*," and specifically stated Eubanks had agreed to pay restitution under the plea agreement, separately identifying the value of Platt's and Ditch Diggers' unrecovered stolen property. (Emphasis added.)

In response, defense counsel advised the district court Eubanks wanted a hearing on the amount of restitution. Notably, counsel did not specifically challenge the amount of restitution owed to Ditch Diggers or otherwise allege that Eubanks should not pay restitution to Ditch Diggers. Rather, counsel stated that "it's a very large amount of money and my client is entitled to justification by the *parties* involved as to *their* losses." (Emphases added.) The prosecutor said that if a restitution hearing were held, she would call two witnesses to testify about the value of the stolen property. Although the prosecutor did not identify the witnesses by name, it is clear from the context of the prosecutor's statement she was referring to Platt and a representative of Ditch Diggers. When Eubanks later decided to forgo a restitution hearing and proceed with sentencing, he agreed the amount of restitution requested by the State was not in question because he was not contesting it.

Without a written document detailing the plea bargain, the best evidence of what the parties intended is their words—and in Eubanks' case, silence—at the district court. The State recited the plea bargain using the word victims in the plural. Eubanks affirmed this recitation, saying it matched the written copy he had. He never objected, expressed confusion, or asked questions about the prosecutor's word choice. At sentencing, when the State revisited restitution, Eubanks again remained silent. He never indicated, either personally or through his attorney, that he did not believe he needed to pay Ditch Diggers as part of the plea agreement. No one in the courtroom expressed any ambiguity on this point. Based on the record, the parties understood the plea agreement included restitution to Ditch Diggers and acted in accordance with that understanding. And Eubanks' remarks about possibly wanting a restitution hearing concerned the *value* of the property rather than the *identity* of the person owed. Eubanks' continued silence at these hearings establishes he understood that despite only pleading to a single charge, he agreed to pay restitution to all of his victims.

CONCLUSION

Based on the analysis above, we

- affirm the panel's decision concluding the district court's restitution order did not result in an illegal sentence,
- affirm the panel's decision concluding the terms stated orally on the record at the plea hearing included an agreement to pay restitution for Ditch Diggers' loss, and
- reverse the panel's remand order directing the district court to issue a new journal entry providing that the payment of restitution was to be a condition of Eubanks' postrelease supervision.

Judgment of the Court of Appeals affirming the district court and remanding the case with directions is affirmed in part and reversed in part. Judgment of the district court is affirmed.