REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF KANSAS

REPORTER:

SARA R. STRATTON

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Court's Exercise of Discretionary Jurisdiction—Determination if Action Lies in Mandamus or Quo Warranto—Question of Law. Once a court decides to exercise its discretionary jurisdiction, it next must determine whether the particular action (or each particular claim within the particular action) lies in mandamus or lies in quo warranto (or both or neither). This is a question of law. When deciding whether a particular action lies in mandamus or quo warranto, a court must consider the limited scope and nature of mandamus or quo warranto actions in conjunction with the relief sought by the petitioner. If the action does not lie, the petition for mandamus or quo warranto relief must be denied. *Schwab v. Klapper* 150

— Following Determination of Type of Action Court Rules on Merits of Claim. After a court has decided to exercise its discretionary jurisdiction and has determined that the particular action lies in either mandamus or quo warranto, then the court will consider and rule on the merits of the claim. *Schwab v. Klapper* 150

Existence of Jurisdiction—Appellate Review. Whether jurisdiction exists is a question of law over which this court's review is unlimited. *State v. Gleason* 222

Kansas Supreme Court has Concurrent Discretionary Jurisdiction over Original Actions Filed in Mandamus or Quo Warranto—Factors for Consideration. This court has concurrent discretionary jurisdiction over original actions filed in either mandamus or quo warranto. Factors we will consider when deciding whether to exercise discretionary jurisdiction include: whether the case presents issues of significant public concern or matters of statewide importance; whether the petition presents purely legal questions or requires extensive fact-finding; or whether there is a need for an expeditious ruling. *Schwab v. Klapper* 150

Subject Matter Jurisdiction of District Courts Derived from Kansas Constitution and Kansas Statutes. A district court's subject matter jurisdiction derives from the Kansas Constitution and Kansas statutes. Article 3 of the Kansas Constitution provides that the district courts shall have such jurisdiction in their respective districts as may be provided by law. In turn, K.S.A. 20-301 vests district courts with general original jurisdiction of all matters, both civil and criminal, unless otherwise provided by law. And

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K.S.A. 22-2601 gives district courts exclusive jurisdiction to try all cases of felony and other criminal cases arising under the statutes of the state of Kansas. *State v. Gleason* 222

KANSAS TORT CLAIMS ACT:

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Determination Whether Governmental Action Is Discretionary Function under Tort Claims Act—Consideration of Judgment of Governmental Employee. In determining whether a governmental action is a discretionary function for the purposes of immunity under K.S.A. 75-6104(e), courts consider whether the judgment of the governmental employee is of the nature and quality which the Legislature intended to put beyond judicial review. The more a judgment involves the making of policy, the more it is of a nature and quality to be recognized as inappropriate for judicial review. However, Kansas Tort Claims Act immunity does not depend on the status of the individual exercising discretion and thus may apply to discretionary decisions made at the operational level as well as at the planning level. *Schreiner v. Hodge* 25

Governmental Entity Immune from Liability under Exception of Act—Question of Law—De Novo Review. Whether a governmental entity is immune from liability under an immunity exception of the Kansas Tort Claims Act, K.S.A. 75-6101 et seq., is a question of law subject to de novo review. A governmental entity bears the burden to establish immunity under an immunity exception to the Act. *Schreiner v. Hodge* 25

Statutory Language Shows Legislative Intent for Immunity Even if Discretion May Be Erroneous or Mistaken under Facts. The plain language of K.S.A. 75-6104(e) shows that the Legislature intended for immunity to apply to discretionary functions even when the exercise of discretion could be characterized as erroneous or mistaken under the facts.
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MOTOR VEHICLES:

Conviction under Oklahoma DUI Statute Constitutes Prior Conviction under Kansas DUI Statute. The Oklahoma DUI statute, Okla. Stat. tit. 47, § 11-902, is comparable to K.S.A. 2020 Supp. 8-1567, and a conviction under Oklahoma's DUI statute constitutes a prior conviction under K.S.A. 2020 Supp. 8-1567(i)(3)(B). *State v. Patton* 1

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Elements of Missouri DWI Statute Broader than Kansas DUI Statute—Missouri Conviction Not a Prior Conviction under Kansas DUI Statute. The elements of the Missouri driving while intoxicated (DWI) statute, Mo. Rev. Stat. § 577.010, are broader than the elements of K.S.A. 2015 Supp. 8-1567, and a conviction under Missouri's DWI statute does not constitute a prior conviction under K.S.A. 2015 Supp. 8-1567(i)(3).
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Elements of Oklahoma DUI Statute Broader than Kansas DUI Statute—Oklahoma Conviction Not a Prior Conviction under Kansas DUI Statute. The elements of the Oklahoma DUI statute, Okla. Stat. tit. 47, § 11-902, are broader than the elements of K.S.A. 2015 Supp. 8-1567, and a conviction under Oklahoma's DUI statute does not constitute a prior conviction under K.S.A. 2015 Supp. 8-1567(i)(3). *State v. Patton* 1

Missouri DWI Statute Conviction Constitutes Prior Conviction under Kansas DUI Statute. The Missouri DWI statute, Mo. Rev. Stat. § 577.010, is comparable to K.S.A. 2020 Supp. 8-1567, and a conviction under Missouri's DWI statute constitutes a prior conviction under K.S.A. 2020 Supp. 8-1567(i)(3)(B). *State v. Patton* 1

Sentencing Repeat Offenders under DUI Statutes—Legislative Intent to Include Out-of-State Offenses as Prior Convictions. When sentencing defendants as repeat offenders under K.S.A. 2015 Supp. 8-1567, the plain language of the statute establishes that the Legislature intended courts to count as prior convictions those out-of-state offenses with elements identical to, or narrower than, the Kansas DUI statute. *State v. Patton* 1

Sentencing Repeat Offenders under Kansas DUI Statute—Legislative Intent. When sentencing defendants as repeat offenders under K.S.A. 2020 Supp. 8-1567, the Legislature intended courts to count as prior convictions those out-of-state offenses comparable to Kansas' DUI statute in title, elements, and prohibited conduct, even if the elements of the out-of-state crime are broader. *State v. Patton* 1

Sentencing under Kansas DUI Statute—Application after Effective Amendment Date—Violation of Ex Post Facto Clause if Increase in Punishment. The application of K.S.A. 8-1567's sentencing provisions to a defendant who committed the offense before, but was sentenced after, new amendments went into effect, relying on *State v. Reese*, 300 Kan. 650, 333 P.3d 149 (2014), violates the Ex Post Facto Clause of article I, section 10 of the United States Constitution if the intervening change in the law increases the defendant's punishment. *State v. Patton* 1

— Application of Version in Effect at Sentencing Date—Exception. A sentencing court should apply the version of K.S.A. 8-1567 in effect at the time of sentencing *unless* the Legislature amended the statutory provisions after the offense was committed *and* that amendment increases the defendant's penalty or otherwise disadvantages the defendant as contemplated in

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Beazell v. Ohio, 269 U.S. 167, 169-70, 46 S. Ct. 68, 70 L. Ed. 216 (1925). *State v. Patton* 1

POLICE AND SHERIFFS:

Determination Whether Reasonable Suspicion Exists to Detain Person—Discretionary Act by Officers—Totality of Circumstances. The determination of whether reasonable suspicion exists is an inherently discretionary act because it requires officers to evaluate the totality of the circumstances and make a judgment in light of their experience and training. And, generally, the types of decisions officers make over the course of an investigation, including whether reasonable suspicion exists to detain a person, are sufficiently grounded in policy to fall within the discretionary function immunity provision of K.S.A. 75-6104(e). *Schreiner v. Hodge* 25

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Reasonable Brief Seizure under Fourth Amendment—Requires Reasonable Suspicion Based in Fact. A brief seizure is reasonable for purposes of the Fourth Amendment to the United States Constitution when the officer has an articulable and reasonable suspicion, based in fact, that the detained person is committing, has committed, or is about to commit a crime. *Schreiner v. Hodge* 25

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No. 120,434

STATE OF KANSAS, *Appellee*, v. DWAYNE LYNN PATTON, *Appellant.*

(503 P.3d 1022)

SYLLABUS BY THE COURT

1. MOTOR VEHICLES—*Sentencing Repeat Offenders under DUI Statutes—Legislative Intent to Include Out-of-State Offenses as Prior Convictions.* When sentencing defendants as repeat offenders under K.S.A. 2015 Supp. 8-1567, the plain language of the statute establishes that the Legislature intended courts to count as prior convictions those out-of-state offenses with elements identical to, or narrower than, the Kansas DUI statute.

2. SAME—*Elements of Missouri DWI Statute Broader than Kansas DUI Statute—Missouri Conviction Not a Prior Conviction under Kansas DUI Statute.* The elements of the Missouri driving while intoxicated (DWI) statute, Mo. Rev. Stat. § 577.010, are broader than the elements of K.S.A. 2015 Supp. 8-1567, and a conviction under Missouri's DWI statute does not constitute a prior conviction under K.S.A. 2015 Supp. 8-1567(i)(3).

3. SAME—*Elements of Oklahoma DUI Statute Broader than Kansas DUI Statute—Oklahoma Conviction Not a Prior Conviction under Kansas DUI Statute.* The elements of the Oklahoma DUI statute, Okla. Stat. tit. 47, § 11-902, are broader than the elements of K.S.A. 2015 Supp. 8-1567, and a conviction under Oklahoma's DUI statute does not constitute a prior conviction under K.S.A. 2015 Supp. 8-1567(i)(3).

4. SAME—*Sentencing Repeat Offenders under Kansas DUI Statute—Legislative Intent.* When sentencing defendants as repeat offenders under K.S.A. 2020 Supp. 8-1567, the Legislature intended courts to count as prior convictions those out-of-state offenses comparable to Kansas' DUI statute in title, elements, and prohibited conduct, even if the elements of the out-of-state crime are broader.

5. SAME—*Missouri DWI Statute Conviction Constitutes Prior Conviction under Kansas DUI Statute.* The Missouri DWI statute, Mo. Rev. Stat. § 577.010, is comparable to K.S.A. 2020 Supp. 8-1567, and a conviction under Missouri's DWI statute constitutes a prior conviction under K.S.A. 2020 Supp. 8-1567(i)(3)(B).

6. SAME—*Conviction under Oklahoma DUI Statute Constitutes Prior Conviction under Kansas DUI Statute.* The Oklahoma DUI statute, Okla. Stat. tit. 47, § 11-902, is comparable to K.S.A. 2020 Supp. 8-1567, and a conviction under Oklahoma's DUI statute constitutes a prior conviction under K.S.A. 2020 Supp. 8-1567(i)(3)(B).

7. SAME—*Sentencing under Kansas DUI Statute—Application after Effective Amendment Date—Violation of Ex Post Facto Clause if Increase in Punishmen*t. The application of K.S.A. 8-1567's sentencing provisions to a defendant who committed the offense before, but was sentenced after, new amendments went into effect, relying on *State v. Reese*, 300 Kan. 650, 333 P.3d 149 (2014), violates the Ex Post Facto Clause of article I, section 10 of the United States Constitution if the intervening change in the law increases the defendant's punishment.

8. SAME—*Sentencing under Kansas DUI Statute—Application of Version in Effect at Sentencing Date—Exception*. A sentencing court should apply the version of K.S.A. 8-1567 in effect at the time of sentencing *unless* the Legislature amended the statutory provisions after the offense was committed *and* that amendment increases the defendant's penalty or otherwise disadvantages the defendant as contemplated in *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S. Ct. 68, 70 L. Ed. 216 (1925).

Review of the judgment of the Court of Appeals in 58 Kan. App. 2d 669, 475 P.3d 14 (2020). Appeal from Reno District Court; TIMOTHY J. CHAMBERS, judge. Opinion filed February 11, 2022. Judgment of the Court of Appeals affirming the district court is reversed. Judgment of the district court is vacated, and the case is remanded with directions.

Shannon S. Crane, of Hutchinson, argued the cause and was on the briefs for appellant.

Thomas R. Stanton, district attorney, argued the cause, and *Natasha Esau*, assistant district attorney, *Keith E. Schroeder*, former district attorney, and *Derek Schmidt*, attorney general, were with him on the briefs for appellee.

The opinion of the court was delivered by

WALL, J.: In this appeal we address the sentencing of repeat offenders under K.S.A. 8-1567, the driving under the influence (DUI) statute in Kansas. Recently in *State v. Myers*, 314 Kan. 360, 499 P.3d 1111 (2021), we held that under the 2018 amendments to that statute, the Legislature intended courts to count as prior convictions those out-of-state offenses comparable to the Kansas DUI statute, even if the elements of the out-of-state crime are broader. We must now decide whether those amendments apply to a person, like Dwayne Patton, who committed a DUI before, but was sentenced after, the amendments came into effect.

In *State v. Reese*, 300 Kan. 650, 333 P.3d 149 (2014), we held that courts should apply the DUI sentencing provisions in effect at the time of sentencing, even if the law has changed since the

offense occurred. But the facts here require us to clarify this general rule established in *Reese*. We hold that a sentencing court should apply the version of K.S.A. 8-1567 in effect at the time of sentencing *unless* the Legislature amended the statutory provisions after the offense was committed *and* that amendment increases the defendant's penalty. In those circumstances, applying the intervening change in the law, relying on *Reese*, would violate the Ex Post Facto Clause of article I, section 10 of the United States Constitution. To avoid this constitutional quandary, sentencing courts should instead apply the version of K.S.A. 8-1567 in effect when the defendant committed the DUI offense.

Here, that means that the version of K.S.A. 8-1567 in effect when Patton committed his DUI in January 2016 applies in determining his sentence, not the 2018 amendments. Under the plain language of the statute in effect in 2016, two of Patton's out-of-state DUI convictions—one from Missouri and one from Oklahoma—would not count as prior convictions because the elements of those statutes are not identical to, or narrower than, the elements of the Kansas statute. But under the 2018 amendments, those out-of-state convictions *would* constitute prior convictions because the DUI statutes of those states are "comparable" to the Kansas DUI statute. See *Myers*, 314 Kan. at 377. Because the Kansas DUI statute provides progressively enhanced penalties for repeat offenders, applying the 2018 amendments to Patton at sentencing would increase his punishment in violation of the Ex Post Facto Clause. We therefore reverse the panel of the Court of Appeals that applied those amendments and remand the matter to the district court for resentencing under the sentencing provisions in effect when Patton committed the DUI in January 2016.

FACTUAL AND PROCEDURAL BACKGROUND

The Kansas DUI statute provides progressively enhanced penalties for repeat offenders. See K.S.A. 2020 Supp. 8-1567(b)(1)(A)-(E). A first conviction is classified as a misdemeanor offense. K.S.A. 2020 Supp. 8-1567(b)(1)(A). A second conviction is a misdemeanor with increased jail time and fines. K.S.A. 2020 Supp. 8-1567(b)(1)(B). A third conviction is a misdemeanor with even more severe penalties unless the person has a

prior DUI within the last 10 years, in which case it is a felony. K.S.A. 2020 Supp. 8-1567(b)(1)(C) and (D). And a fourth or subsequent conviction is always a felony. K.S.A. 2020 Supp. 8-1567(b)(1)(E).

Various statutory provisions inform the sentencing court which convictions to count when determining whether to sentence a defendant as a first-time, second-time, third-time, or fourth-or-subsequent-time offender. See K.S.A. 2020 Supp. 81567(i)(1)-(6). Relevant to this appeal are the provisions informing the courts which out-of-state DUI convictions qualify as prior offenses under Kansas' DUI statute. The 2018 legislative amendments to K.S.A. 8-1567 materially changed these provisions.

When Patton committed his DUI in January 2016, the version of the statute in effect directed courts to count out-of-state DUI convictions that "would constitute a crime" under the Kansas DUI statute. K.S.A. 2015 Supp. 8-1567(i)(3). But because Patton failed to appear several times, his jury trial did not occur until September 2018, and he was not sentenced until November 2018. In the meantime, the Legislature had amended K.S.A. 8-1567. Those amendments, which went into effect on July 1, 2018, directed courts to count out-of-state DUI convictions that "would constitute an offense that is comparable" to a DUI under the Kansas statute. K.S.A. 2018 Supp. 8-1567(i)(3)(B); L. 2018, ch. 106, § 13. We recounted the legislative process that produced the amendments in *Myers*. 314 Kan. at 368-76.

At sentencing, the parties never discussed which version of K.S.A. 8-1567 applied because Patton had not disputed that he had at least three prior DUI convictions. His presentence investigation report showed four DUI convictions after July 1, 2001. See K.S.A. 2020 Supp. 8-1567(i)(1) (directing courts to count only those prior convictions that occurred on or after that date). The first was a 2003 Kansas conviction. The second was a 2003 Oklahoma conviction. The third was a 2007 Missouri conviction. And the fourth was a 2010 Kansas conviction. Based on these convictions, the district court sentenced Patton to 12 months in jail for having committed a fourth or subsequent DUI under K.S.A. 2018 Supp. 8-1567(b)(1)(E).

On appeal to a panel of the Court of Appeals, Patton argued for the first time that the district court had erred by counting his Oklahoma and Missouri DUI convictions as prior offenses, rendering his sentence illegal. Patton claimed that K.S.A. 2015 Supp. 8-1567, the version of the

statute in effect when he had committed the offense, allowed courts to count out-of-state convictions only if the elements of the other state's DUI law were identical to, or narrower than, the elements of the Kansas law. And he insisted that the elements of Oklahoma's DUI and Missouri's driving while intoxicated (DWI) statutes were broader. The State agreed that Patton's sentence should be determined under the version of the law in effect when he committed the offense in January 2016. The State also agreed that the Missouri DWI statute was broader than the Kansas statute. But the State maintained that the elements of the Oklahoma statute were identical to Kansas' DUI statute.

The panel disagreed with the parties' analytical framework. Instead, the panel relied on our decision in *Reese*, which held that the DUI sentencing provisions in effect at the time of sentencing apply, even if those provisions were not yet in effect when the defendant had committed the offense. See 300 Kan. at 657. Under the *Reese* framework, the panel applied K.S.A. 2018 Supp. 8-1567, the version in effect after the 2018 amendments, and held that the district court properly counted Patton's Oklahoma and Missouri convictions as prior offenses because they were "comparable" to a Kansas DUI offense. *State v. Patton*, 58 Kan. App. 2d 669, 681-82, 475 P.3d 14 (2020).

We granted Patton's petition for review of this issue. The panel also rejected Patton's prosecutorial-error claim, but Patton did not petition for review of that issue. Following oral argument, we ordered supplemental briefing to address whether the panel's decision to apply the 2018 amendments to K.S.A. 8-1567, relying on *Reese*, violated the Ex Post Facto Clause. In their supplemental briefs, Patton and the State agreed that the panel's application of the amendments violated the Ex Post Facto Clause and that this court should instead apply the DUI sentencing provisions in effect when Patton committed his offense.

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

To resolve this appeal, we must determine which version of K.S.A. 8-1567 applies to Patton. Is it, as the panel held, the version in effect when Patton was sentenced? Or, as the parties contend, do ex

post facto concerns require us to apply the version in effect when Patton committed his offense?

I. Standard of Review and Legal Framework

To answer those questions, we must interpret K.S.A. 8-1567 as well as statutes from Oklahoma and Missouri. As we have often said, the most fundamental rule of statutory construction is that we follow the Legislature's intent when we can establish it. *State v. Gracey*, 288 Kan. 252, 257, 200 P.3d 1275 (2009). We begin that search by looking at the statutory language. If that language is clear and unambiguous, we stop there. 288 Kan. at 257. District courts and the Court of Appeals use the same approach. But statutory interpretation presents a question of law, so our review of the lower courts' conclusions is unlimited, and we need not defer to their interpretation of K.S.A. 8-1567. *State v. Alvarez*, 309 Kan. 203, 205, 432 P.3d 1015 (2019).

We must also determine whether the application of K.S.A. 2018 Supp. 8-1567 to Patton flouts the Ex Post Facto Clause, which generally prohibits the retroactive criminalization of an act or the retroactive increase in the severity of punishment for an offense. *State v. Todd*, 299 Kan. 263, 277-78, 323 P.3d 829 (2014). Like statutory interpretation, a statute's constitutionality raises a question of law subject to unlimited review. *State v. Gonzalez*, 307 Kan. 575, 579, 412 P.3d 968 (2018).

II. This Case Is Distinguishable from Reese *Because the Intervening Change in Law Disadvantages Patton*

The facts in *Reese* are similar, but not identical, to those here. Reese committed a DUI in July 2009 and was convicted in June 2011. When he committed that offense, K.S.A. 2009 Supp. 8-1567(o)(3) directed courts to count all prior DUI convictions during a defendant's lifetime when sentencing the defendant as a repeat offender. But before Reese was sentenced, an amendment to K.S.A. 8-1567 went into effect on July 1, 2011. Under that amendment, courts could consider prior convictions only if the conviction occurred on or after July 1, 2001. Reese argued at sentencing that this intervening change in the law should apply to him. The district court disagreed and sentenced Reese for a fourth or subsequent DUI, a felony offense. Because Reese had only one DUI conviction on or after July 1, 2001, applying the amendment

would have greatly benefitted him—he would have been sentenced for a second DUI, a misdemeanor offense, rather than the felony sentence that the court imposed.

We reversed a panel of the Court of Appeals that affirmed the district court's ruling. *Reese*, 300 Kan. at 658-59. After reviewing the historical development of the DUI statutory scheme and considering how prior DUI offenses have historically been handled, we announced a general rule: when sentencing a defendant as a repeat DUI offender, the Legislature intended courts to apply the sentencing provisions of K.S.A. 8-1567 in effect at the time of sentencing. 300 Kan. at 654-59. Based on that general rule, we vacated Reese's sentence and remanded with directions to resentence him under the 2011 amendments. 300 Kan. at 659.

Yet there is a material fact that distinguishes Patton's circumstances from those in *Reese*. There, applying the intervening change in the sentencing provisions benefitted the defendant—he was sentenced for a second DUI instead of a fourth or subsequent DUI. In contrast, Patton was *disadvantaged* by applying the intervening change in the sentencing provisions. Under the version of the statute in effect when Patton committed the offense, his Oklahoma and Missouri convictions would not have counted as prior convictions. But under the 2018 amendments that went into effect before Patton was sentenced, those same out-of-state convictions *would* count as prior convictions for purposes of sentencing Patton as a repeat DUI offender.

To confirm that Patton would be disadvantaged by applying the 2018 amendments, we first analyze how Patton's Oklahoma and Missouri convictions would have been treated under each version of the DUI sentencing provisions. Once this conclusion is substantiated, we then determine whether applying the law in effect at the time of Patton's sentencing violates the Ex Post Facto Clause and warrants further clarification of the general rule established in *Reese*.

A. Under K.S.A. 2015 Supp. 8-1567(i)(3), Convictions Under Oklahoma's and Missouri's Statutes Do Not Count as Prior Convictions for Purposes of Sentencing Patton as a Repeat DUI Offender

The version of the statute in effect when Patton committed the DUI was K.S.A. 2015 Supp. 8-1567. Under that statute, a prior "'conviction' includes . . . a violation of . . . any law of another state which would constitute a crime described in subsection (i)(1)." K.S.A. 2015 Supp. 8-1567(i)(3). Subsection (i)(1) includes "[c]onvictions for a violation of [the Kansas DUI statute]." K.S.A. 2015 Supp. 8-1567(i)(1). Under this statutory scheme, an out-of-state conviction may be counted as a prior conviction—and in turn, increase the penalty for a current DUI offense—only if that out-of-state crime would also violate the Kansas statute.

We have not previously interpreted this statutory provision. But a panel of the Court of Appeals did in *State v. Stanley*, 53 Kan. App. 2d 698, 390 P.3d 40 (2016). It construed that statute narrowly to include as a prior conviction only those out-of-state offenses with elements identical to, or narrower than, the elements of K.S.A. 8-1567. 53 Kan. App. 2d at 700-01. The panel relied on the plain statutory language to reach that conclusion, not constitutional principles or canons of construction.

We agree with *Stanley*'s conclusion that the plain language of K.S.A. 2015 Supp. 8-1567(i)(3) requires sentencing courts to count out-of-state DUIs as prior convictions only if they pass the "identical-to-or-narrower-than" elements test. This conclusion logically flows from the language in subsection (i)(3) that directs sentencing courts to include as prior offenses those out-of-state convictions that "constitute a crime" under the Kansas DUI statute. Thus, if the elements of an out-of-state statute are identical to the elements of the Kansas DUI statute, then an out-of-state conviction under that jurisdiction's statute would necessarily "constitute a crime" under the Kansas DUI statute. The same is true of an out-of-state statute with elements narrower than the Kansas DUI statute. But if the elements of the out-of-state offense are broader than the elements of the Kansas statute, then a person could violate the out-of-state statute without violating the Kansas statute. In

that case, a violation of the out-of-state offense would not necessarily "constitute a crime described in [the Kansas DUI statute]." K.S.A. 2015 Supp. 8-1567(i)(3).

As a result, to determine whether Patton's out-of-state DUIs may be counted as prior convictions under K.S.A. 2015 Supp. 8-1567(i)(3), we must compare the elements of the Missouri and Oklahoma statutes to the elements of the Kansas DUI statute. Unless the elements of those statutes are identical to, or narrower than, those of K.S.A. 2015 Supp. 8-1567, Patton's out-of-state convictions cannot be considered when sentencing him as a repeat DUI offender.

As it still does, the Kansas DUI statute in effect at the time of Patton's offense prohibited operating or attempting to operate a vehicle while the person's blood-alcohol concentration was .08 or more or while the person was incapable of safely driving because of the influence of drugs or alcohol:

"(a) Driving under the influence is operating or attempting to operate any vehicle within this state while:

(1) The alcohol concentration in the person's blood or breath as shown by any competent evidence . . . is .08 or more;

(2) the alcohol concentration in the person's blood or breath, as measured within three hours of the time of operating or attempting to operate a vehicle, is .08 or more;

(3) under the influence of alcohol to a degree that renders the person incapable of safely driving a vehicle;

(4) under the influence of any drug or combination of drugs to a degree that renders the person incapable of safely driving a vehicle; or

(5) under the influence of a combination of alcohol and any drug or drugs to a degree that renders the person incapable of safely driving a vehicle." K.S.A. 2015 Supp. 8-1567(a).

Patton's 2007 Missouri DWI conviction was based on Mo. Rev. Stat. § 577.010 (1982). Under that statute, "[a] person commits the crime of 'driving while intoxicated' if he [or she] operates a motor vehicle while in an intoxicated or drugged condition." Mo. Rev. Stat. § 577.010(1) (1982). A person is in an "intoxicated condition" when he or she is "under the influence of alcohol, a controlled substance, or drug, or any combination thereof." Mo. Rev. Stat. § 577.001(13); see also *State v. Schroeder*, 330 S.W.3d 468, 475 (Mo. 2011) (holding that attempts to define what is meant by

an "'intoxicated condition'" would "'tend to confuse rather than clarify the issues'").

The Missouri statute is broader than K.S.A. 2015 Supp. 8-1567 in at least one respect. Operating a vehicle "under the influence of alcohol" covers a wider range of conduct than operating a vehicle under the influence of alcohol or drugs "to a degree that renders the person incapable of safely driving a vehicle" or driving when a person's blood alcohol concentration (BAC) "is .08 or more." K.S.A. 2015 Supp. 8-1567(a)(1). A person can be under the influence of alcohol without having a BAC of .08 or more and without being under the influence to a degree that the person is incapable of safely driving. This element of Mo. Rev. Stat. § 577.010 is broader than the elements of K.S.A. 2015 Supp. 8-1567. As a result, a Missouri DWI conviction would not constitute a prior conviction under K.S.A. 2015 Supp. 8-1567(i)(3).

Patton's other out-of-state conviction, the 2003 Oklahoma DUI, was based on Okla. Stat. tit. 47, § 11-902 (2002). That statute provided that a person commits an Oklahoma DUI by driving, operating, or being in actual physical control of a vehicle when (1) the person's blood-alcohol concentration is .10 or more, (2) the person is under the influence of alcohol, or (3) the person is incapable of safely driving because of the influence of drugs and alcohol:

> "A. It is unlawful and punishable as provided in this section for any person to drive, operate, or be in actual physical control of a motor vehicle within this state who:
>
> 1. Has a blood or breath alcohol concentration . . . of ten-hundredths (0.10) or more at the time of a test of such person's blood or breath administered within two (2) hours after the arrest of such person;
> 2. Is under the influence of alcohol;
> 3. Is under the influence of any intoxicating substance other than alcohol which may render such person incapable of safely driving or operating a motor vehicle; or
> 4. Is under the combined influence of alcohol and any other intoxicating substance which may render such person incapable of safely driving or operating a motor vehicle." Okla. Stat. tit. 47, § 11-902(A) (2002).

Much of the Oklahoma DUI statute criminalizes the same conduct as Kansas' DUI statute. But the elements of an Oklahoma DUI differ from Kansas in at least one material respect. Under the

Oklahoma statute, a person may not "be in actual physical control" of a vehicle while the person has a blood-alcohol concentration of .10 or more or is incapable of safely driving because of the influence of drugs or alcohol. Okla. Stat. tit. 47, § 11-902(A). Under the actual-physical-control standard, "[a] person may thus be convicted . . . if he was intoxicated and behind the wheel of an operable motor vehicle." *State v. Salathiel*, 313 P.3d 263, 264 n.2 (Okla. Crim. App. 2013); see also *Hughes v. State*, 535 P.2d 1023, 1024 (Okla. Crim. App. 1975) (holding that "'actual physical control'" can mean "'directing influence, domination[,] or regulation,'" and that it is sufficient that defendant "could have at any time started the automobile and driven away").

A person who violates that portion of the Oklahoma statute would not have committed a crime under the Kansas DUI statute because the actual-physical-control standard cannot establish a crime under K.S.A. 8-1567. See *State v. Darrow*, 304 Kan. 710, 714, 374 P.3d 673 (2016). The Kansas statute criminalizes "operating or attempting to operate any vehicle" under the influence. K.S.A. 2015. Supp. 8-1567(a). Under the statute, the term "'operating' requires movement of the vehicle, and an 'attempt to operate' means to attempt to move the vehicle." 304 Kan. at 714. As a result, "[t]aking actual physical control of the vehicle is insufficient to attempt to operate that vehicle without an attempt to make it move." 304 Kan. at 714. The Oklahoma statute thus criminalizes a broader range of conduct than the Kansas DUI statute—the elements of the Oklahoma offense are not identical-to-or-narrower-than the crime of DUI in Kansas. Like a conviction under the Missouri statute, a conviction under the Oklahoma statute would not constitute a prior conviction under K.S.A. 2015 Supp. 8-1567(i)(3).

We note that subsection (A)(2) of the Oklahoma DUI statute, on its face, seemingly provides another independent basis for concluding that the elements of the Oklahoma statute are broader than those of the Kansas statute. Under that subsection, a person commits a DUI by operating a vehicle while merely "under the influence of alcohol." Okla. Stat. tit. 47, § 11-902(A)(2). One could argue—and Patton has on appeal—that a person could be "under

the influence of alcohol" under the Oklahoma statute without being under the influence to a degree that the person is incapable of safely driving, which the Kansas statute requires. See K.S.A. 2015 Supp. 8-1567(a)(3)-(5). If that were the case, then the Oklahoma DUI statute (much like the Missouri DWI statute) would have elements broader than the Kansas DUI statute.

But unlike the appellate courts in Missouri, Oklahoma's appellate courts have consistently interpreted the phrase "under the influence" to mean that an "intoxicating substance" has "so far affected [a person] as to hinder, to an appreciable degree, his ability to operate a motor vehicle in a manner that an ordinary prudent and cautious person, in full possession of his faculties, using reasonable care, would operate or drive under like conditions." *Stewart v. State*, 372 P.3d 508, 513 (Okla. Crim. App. 2016) (citing *Stanfield v. State*, 576 P.2d 772, 774 [Okla. Crim. App. 1978]); see *Luellen v. State*, 81 P.2d 323, 329 (Okla. Crim. App. 1938).

Based on this authority, we are not convinced that subsection (A)(2) of the Oklahoma DUI Statute is broader than the standard under K.S.A. 2015 Supp. 8-1567(a)(3)-(5), which prohibits "driving under the influence" of alcohol, drugs, or a combination of alcohol and drugs "to a degree that renders the person incapable of safely driving a vehicle." Arguably, being under the influence of a substance to a degree that prevents a person from operating a vehicle as an "ordinary prudent and cautious" person "using reasonable care"—the Oklahoma standard—would also mean that a person was incapable of safely driving a vehicle—the Kansas standard. In other words, an ordinary prudent and cautious person, using reasonable care, drives safely.

As such, subsection (A)(2) of the Oklahoma DUI statute, as construed by Oklahoma appellate courts, appears to be substantively identical to, not broader than, K.S.A. 2015 Supp. 8-1567(a)(3)-(5). Even so, because we have already found that the Oklahoma DUI statute is broader than the Kansas DUI statute in another material respect, we decline to define the exact contours of subsection (A)(2) of the Oklahoma statute.

We now turn to the version of the Kansas statute in place at the time of sentencing to determine whether application of the 2018 amendments increase the punishment for Patton's offense.

B. Under K.S.A. 2018 Supp. 8-1567(i)(3) and (j), Convictions Under Oklahoma's and Missouri's DUI Statutes Count as Prior Convictions for Purposes of Sentencing Patton as a Repeat DUI Offender

The version of the statute in effect at the time of Patton's sentencing was K.S.A. 2018 Supp. 8-1567, which incorporates the Legislature's 2018 amendments. Under that version of the statute, when courts are sentencing a defendant as a repeat DUI offender, they should count convictions "of a violation of . . . any law of another jurisdiction that would constitute an offense that is *comparable to*" the offenses described in the Kansas DUI statute. (Emphasis added.) K.S.A. 2018 Supp. 8-1567(i)(3). And when considering whether an out-of-state offense is "comparable" to a Kansas DUI, sentencing courts consider the name and elements of the out-of-state offense and whether that offense prohibits similar conduct:

"(j) For the purposes of determining whether an offense is comparable, the following shall be considered:

(1) The name of the out-of-jurisdiction offense;
(2) the elements of the out-of-jurisdiction offense; and
(3) whether the out-of-jurisdiction offense prohibits similar conduct to the conduct prohibited by the closest approximate Kansas offense." K.S.A. 2018 Supp. 8-1567(j)(1)-(3).

We recently interpreted these provisions in *Myers*. We determined that the word "comparable" was ambiguous in the statute and examined the legislative history that led to the 2018 amendments. 314 Kan. at 368-76. Based on this history, we held that when sentencing defendants as repeat offenders under the Kansas DUI statute, the Legislature intended courts to count as prior convictions those out-of-state offenses comparable to Kansas' DUI statute in title, elements, and prohibited conduct, even if the elements of the out-of-state crime are broader. 314 Kan. at 376. And we determined that the Missouri DWI statute was similar to the Kansas DUI statute in title, elements, and prohibited conduct and thus was "comparable" for purposes of K.S.A. 2018 Supp. 8-1567(i)(3). 314 Kan. at 377.

As part of our legislative history analysis, we also looked to the preamble to the bill enacting the 2018 amendments, which explains that the Legislature intended convictions from a nonexclusive list of jurisdictions, including Missouri, to be comparable offenses that qualify as a prior DUI offense under K.S.A. 8-1567:

"WHEREAS, The Legislature intends to promote the inclusion of convictions for such offenses in a person's criminal history, including, but not limited to, any violation of: Wichita municipal ordinance section 11.38.150; Missouri, V.A.M.S. § 577.010 or V.A.M.S. § 577.012; Oklahoma, 47 Okl. St. Ann. § 11-902; Colorado, C.R.S.A. § 42-4-1301(1); and Nebraska, Neb. Rev. St. § 60-6,196." House Journal, p. 3078 (May 2, 2018).

We recognized that this type of legislative preamble is not part of the enacted statute, but in the face of statutory ambiguity, "'[a] preamble, purpose clause, or recital is a permissible indicator of meaning.'" 314 Kan. at 374 (quoting Scalia & Garner, Reading Law: The Interpretation of Legal Texts 217 [2012]). We relied, in part, on that preamble to clarify the statutory ambiguity and to bolster our conclusion that the Legislature intended convictions under Missouri's DWI statute to count as prior convictions for the sentencing of repeat DUI offenders. 314 Kan. at 374.

Using the same reasoning employed in *Myers*, we can reach the same conclusion about Oklahoma's DUI statute. The statute's title, elements, and prohibited conduct are similar to the Kansas DUI statute. And the list of jurisdictions set forth in the preamble to the bill enacting the 2018 amendments also includes Oklahoma convictions. Thus, we hold that a conviction under Oklahoma's DUI statute is "comparable" to Kansas' DUI statute and thus constitutes a prior conviction under K.S.A. 2018 Supp. 8-1567.

The analysis above confirms that under the version of the statute in effect when Patton committed his offense, neither his prior Missouri DWI conviction nor his Oklahoma DUI conviction constituted prior offenses for purposes of sentencing under K.S.A. 2015 Supp. 8-1567. But under the version of the statute in effect at the time of Patton's sentencing, both out-of-state convictions are "comparable" to a Kansas DUI conviction. Thus, both Patton's Missouri DWI conviction and Oklahoma DUI conviction constitute prior offenses for purposes of sentencing under K.S.A. 2018 Supp. 8-1567.

In this respect, whether Patton's out-of-state convictions constitute prior offenses for purposes of sentencing depends on which version of the statute applies—under K.S.A. 2015 Supp. 8-1567 the out-of-state convictions are not prior offenses, but under K.S.A. 2018 Supp. 8-1567, both out-of-state convictions constitute prior offenses. We now consider the legal consequences arising from this conclusion.

III. Applying the 2018 Amendments Under These Circumstances Violates the Ex Post Facto Clause and Requires Clarification of the Rule in Reese.

As noted above, an ex post facto violation occurs when a statute applies to acts committed before the statute went into effect and applying the statute disadvantages the defendant. *Todd*, 299 Kan. at 277-78. Here, the Court of Appeals panel applied statutory amendments to an act (Patton's January 2016 DUI) that occurred before those amendments came into effect. We must now determine whether that application disadvantaged Patton in violation of the Ex Post Facto Clause.

Not all allegations of disadvantage can establish an ex post facto violation. Instead, to be unconstitutional under the Clause, the statute must disadvantage the defendant in one of the three ways recognized in *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S. Ct. 68, 70 L. Ed. 216 (1925). *Todd,* 299 Kan. at 277. There, the United States Supreme Court described three categories of statutes that would violate the Clause: (1) statutes that punish as a crime conduct that was innocent when a person committed it; (2) statutes that increase the punishment for a crime after its commission; and (3) statutes that deprive a person of a defense to a crime available when it was committed. 299 Kan. at 277.

Based on our comparison of the DUI sentencing provisions in effect when Patton committed the offense with those provisions in effect after the 2018 amendments, we conclude that the second *Beazell* category applies. The panel's application of the 2018 amendments required it to count Patton's prior out-of-state convictions in determining his repeat offender status. And because the DUI statute provides progressively enhanced penalties for repeat offenders, the effect of including those out-of-state convictions

was to increase Patton's punishment. As a result, applying the 2018 amendments to Patton would increase the penalty for his offense after he committed it. Which is to say, application of those amendments to Patton would violate the Ex Post Facto Clause.

This constitutional predicament requires us to clarify the general rule established in *Reese*: that a sentencing court should apply the law in effect at the time of sentencing to determine whether a defendant has committed a first, second, third, or fourth or subsequent DUI offense. 300 Kan. at 656, 658-59. That general rule stands. But in *Reese*, the defendant benefited from the intervening change in the law. Here, the intervening change in the law disadvantages Patton by retroactively increasing the punishment for his offense, in violation of the Ex Post Facto Clause. Thus, we clarify the general rule in *Reese* and hold that a sentencing court should apply the version of K.S.A. 8-1567 in effect at the time of sentencing *unless* the Legislature amended the statutory provisions after the offense was committed *and* that amendment increases the defendant's penalty (or otherwise disadvantages the defendant as contemplated in *Beazell*). In those circumstances, the sentencing court must apply the law in effect when the offense was committed.

With that clarification, we conclude that the DUI sentencing provisions in effect when Patton committed his DUI in January 2016 apply to his sentencing. Even so, we do not fault the approach taken by the Court of Appeals panel. Courts are duty bound to follow this court's precedent absent an indication that we are departing from that precedent, and we had given no indication that we were departing or modifying the rule established in *Reese*. See *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017). But the facts of this appeal require clarification of that general rule. As a result, we reverse the panel of the Court of Appeals and remand the matter to the district court for resentencing under the DUI sentencing provisions in effect when Patton committed his crime, i.e., K.S.A. 2015 Supp. 8-1567.

Lastly, we briefly note some lingering uncertainty about one of Patton's prior DUI convictions. Along with Patton's 2003 Kansas DUI conviction and the out-of-state convictions discussed

above, Patton's presentence investigation report (PSI) also included a 2010 Kansas DUI conviction as part of his criminal history. Unlike the first three convictions, the PSI scored the 2010 Kansas DUI as an adult nonperson felony, not as a sentence enhancement. During oral arguments, Patton claimed that the PSI classification controls and that the 2010 conviction cannot count as a prior conviction at sentencing. Contrary to the statement of the Court of Appeals, the State has consistently maintained on appeal that the 2010 Kansas conviction should count as a prior conviction for sentencing purposes. And in supplemental briefing, the State contended that the PSI complied with K.S.A. 2015 Supp. 21-6810(d)(9), which directs courts to count all prior convictions for criminal-history purposes except those that are used to enhance a sentence. Here, only three prior DUI convictions were needed to enhance Patton's sentence to a fourth-or-subsequent DUI, the highest severity. So the State argues that there would have been no reason for the PSI to list the 2010 DUI as a sentence-enhancing conviction. The record before us is not sufficient for meaningful review and resolution of this issue. That said, this opinion does not foreclose further litigation of that issue on remand for resentencing.

The judgment of the Court of Appeals affirming the district court is reversed, the judgment of the district court is vacated, and the case is remanded to the district court with directions.

STANDRIDGE, J., not participating.
HENRY W. GREEN JR., J., assigned.[1]

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[1]**REPORTER'S NOTE:** Judge Green, of the Kansas Court of Appeals, was appointed to hear case No. 120,434 vice Justice Standridge under the authority vested in the Supreme Court by K.S.A. 2020 Supp. 20-3002(c).

No. 123,515

STATE OF KANSAS, *Appellee*, v. MARCUS BUTLER, *Appellant.*

(503 P.3d 239)

SYLLABUS BY THE COURT

1. COURTS—*Abuse of Discretion by District Court if Factual or Legal Error*. A district court abuses its discretion if no reasonable person could agree with its decision or if its exercise of discretion is founded on a factual or legal error.

2. SAME—*Legal Error if Erroneous Legal Conclusion Guides District Court*. A legal error occurs when the district court's discretion is guided by an erroneous legal conclusion.

3. APPEAL AND ERROR—*Burden on Party Alleging Abuse of Discretion*. The party alleging an abuse of discretion bears the burden of establishing error.

Appeal from Wyandotte District Court; JENNIFER L. MYERS, judge. Opinion filed February 11, 2022. Affirmed.

Joseph A. Desch, of Law Office of Joseph A. Desch, of Topeka, was on the brief for appellant, and *Marcus Butler*, appellant pro se, was on the supplemental brief.

Daniel G. Obermeier, assistant district attorney, *Mark A. Dupree Sr.*, district attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

WALL, J.: A jury convicted Marcus Butler of first-degree felony murder and other crimes following a January 2013 home invasion in Wyandotte County. Six years later, Butler filed a motion for postconviction discovery under *State v. Mundo-Parra*, 58 Kan. App. 2d 17, 462 P.3d 1211, *rev. denied* 312 Kan. 899 (2020), where a panel of the Court of Appeals held that "postconviction discovery should be allowed when the defendant shows that it is necessary to protect substantial rights." 58 Kan. App. 2d at 24. The district court denied Butler's motion. On appeal from that decision, Butler claims the district court abused its discretion in denying his motion for postconviction discovery.

The State argues that there is no statutory basis for postconviction discovery, and it urges us to overrule *Mundo-Parra*. But we need not decide the validity of *Mundo-Parra* to resolve the issues in this appeal. Even if we assume, without deciding, that the rule announced in *Mundo-Parra* is sound, Butler has failed to demonstrate that the district court's ruling constitutes an abuse of discretion. We therefore affirm the district court's order denying Butler's motion for postconviction discovery.

FACTS AND PROCEDURAL BACKGROUND

Butler was convicted of first-degree felony murder, attempted aggravated robbery, and conspiracy to commit aggravated robbery after a three-day trial in September 2014. The State's case largely relied on the testimony of three men who worked with Butler at a Ford dealership in Leavenworth. They testified that Butler had broken into an apartment where he had previously bought marijuana, fired his gun after entering the apartment, then fled after the planned robbery went awry. One of the coworkers was a coconspirator who testified against Butler as a part of a plea agreement with the State. The other two witnesses were coworkers who testified that Butler first attempted to recruit them to the conspiracy and later threatened to harm them if they cooperated with investigators. The facts underlying Butler's convictions are more fully set out in *State v. Butler*, 307 Kan. 831, 832-40, 416 P.3d 116 (2018), but those facts are not pertinent to the disposition of this appeal.

The district court sentenced Butler to life imprisonment with no chance of parole for 20 years for first-degree murder, plus another 64 months' imprisonment for the attempted aggravated robbery and conspiracy to commit aggravated robbery convictions. It also imposed lifetime postrelease supervision. We affirmed those convictions on appeal, but we vacated the lifetime postrelease portion of Butler's sentence and remanded the matter for the district court to impose lifetime parole instead. 307 Kan. at 869.

In August 2020, about six years after his conviction, Butler filed a motion for postconviction discovery based on *Mundo-Parra*, a Court of Appeals decision from 2020. In that case, the defendant requested discovery of the State's investigatory file 12

years after pleading no contest to kidnapping and rape. The Court of Appeals panel reviewed appellate decisions in Kansas and other jurisdictions and held that a defendant is entitled to postconviction discovery upon a showing that it is necessary to protect substantial rights, even though there is no Kansas statute authorizing such discovery. *Mundo-Parra*, 58 Kan. App. 2d at 21-24.

As explained below, Butler's discovery request included phone records and witness statements that he claimed were necessary to protect his fundamental right to confront witnesses under the Sixth Amendment to the United States Constitution. The district court denied Butler's motion, finding that Butler had not met the standard set out in *Mundo-Parra* because he had not shown that the requested discovery might change the result of his trial or cast doubt on his conviction.

Butler appealed the district court's ruling directly to our court. Jurisdiction is proper under K.S.A. 2020 Supp. 22-3601(b)(3) (appeal must be taken directly to Supreme Court when the maximum sentence of life imprisonment has been imposed).

ANALYSIS

We begin by stating what this opinion does not do. It does not endorse the rule established in *Mundo-Parra*, as Butler requests on appeal. Nor does it abrogate that holding, as the State requests. This appeal is not ideally postured to address this larger question. Instead, the issues before us may be resolved without embarking upon a comprehensive analysis of a defendant's postconviction discovery rights, if any, under Kansas law.

Butler has alleged the district court erred by not granting his motion for postconviction discovery. But even if we assume, without deciding, that defendants *do* have the right to postconviction discovery as set forth in *Mundo-Parra*, Butler has not established that the district court abused its discretion by denying his motion. We therefore affirm the district court's order.

I. *Standard of Review and Legal Framework*

Butler argues on appeal that the district court abused its discretion by denying his postconviction discovery motion. See *Mundo-Parra*, 58 Kan. App. 2d at 25 (reviewing a district court's

decision to grant or deny postconviction discovery only for abuse of discretion); *State v. Riis*, 39 Kan. App. 2d 273, Syl. ¶ 3, 178 P.3d 684 (2008) (same). Our standard of review is well-established: a district court abuses its discretion if no reasonable person could agree with its decision or if its exercise of discretion is founded on a factual or legal error. *State v. Thomas*, 307 Kan. 733, 739, 415 P.3d 430 (2018).

Butler specifically contends that the district court committed a legal error by misapplying the rule set forth in *Mundo-Parra*. A legal error occurs when the court's "'discretion is guided by an erroneous legal conclusion.'" *State v. McLinn*, 307 Kan. 307, 332, 347-48, 409 P.3d 1 (2018). As the party alleging an abuse of discretion, Butler bears the burden of proving error. 307 Kan. at 348.

In *Mundo-Parra*, the panel identified a two-part test for analyzing postconviction discovery requests. Under this test, a defendant must make a good cause showing for the requested discovery by: (1) identifying the specific subject matter for discovery and (2) demonstrating why discovery about those matters is necessary to protect substantial rights. *Mundo-Parra*, 58 Kan. App. 2d at 24. The panel further defined a "'substantial right'" as "'[a]n essential right that potentially affects the outcome . . . and is capable of legal enforcement.'" 58 Kan. App. 2d at 23 (quoting Black's Law Dictionary 1584 [11th ed. 2019]).

II. *Butler Fails to Establish That the District Court Misapplied the Rule Set Forth in* Mundo-Parra

Butler's motion clearly identified the subject matter for discovery, satisfying the first prong of *Mundo-Parra*'s two-part test. First, Butler requested the cellphone number and service-provider information of his coconspirator and one of the coworkers who testified against him. Second, he requested the statements made to law enforcement by the apartment's residents who witnessed the home invasion. Butler's request was not the sort of fishing expedition that *Mundo-Parra* disallowed.

Butler asserted that discovery of those matters was necessary to protect his right to impeach the State's witnesses, "a fundamental right, protected by the Confrontation Clause of the Sixth Amendment." *State v. Brooks*, 297 Kan. 945, 952, 305 P.3d 634

(2013). Butler explained that he wanted the cellphone information so that he could subpoena his coconspirator's and coworker's phone records. He claimed those records would show that the coworker was an accomplice in the crime, which could have been used to impeach the coworker's credibility at trial when he testified that he was not involved in the criminal activity. Butler also wanted the witness statements because he claimed they would show that Butler had never bought marijuana at the apartment prior to the home invasion. He argued this information could have been used to impeach Butler's coworkers and coconspirator, who all testified that Butler's motivation for robbing the apartment stemmed from his previous drug purchases at that location.

But the district court did not find these explanations convincing, and it determined that "[t]here is no suggestion in the record or in [Butler's] request for discovery that there is any substantive reason that his conviction should be questioned." Specifically, the district court rejected the cellphone-records request because Butler possessed and utilized similar information at trial. Butler's coconspirator testified that the coworker had helped set up the robbery, and Butler's trial counsel argued to the jury that the coworker had taken part in the robbery. As a result, the district court found the coworker's credibility was impeached at trial and the jury made a credibility determination.

The district court also rejected the witness-statement request because none of the apartment's residents testified at trial. Because these witnesses did not testify, the impeachment evidence Butler sought through postconviction discovery would not have been admissible at trial and served no useful purpose in challenging the verdict. Therefore, Butler had not established that "there was a likelihood that the evidence would change the result of the trial."

Butler argues the district court misapplied *Mundo-Parra* in its decision. He contends that a defendant need only describe the materials for discovery and merely articulate how the materials could implicate his substantial rights. Butler contends the *Mundo-Parra* test does not require a defendant to make a showing that the requested discovery could affect the outcome of the proceedings. Butler therefore claims the district court went further than *Mundo-*

Parra requires or allows and denied Butler's request based on an erroneous legal conclusion.

We disagree with Butler's rendition of *Mundo-Parra*. There, the panel's analysis confirms that a defendant must do more than just articulate or assert that a substantial right is implicated. Instead, *Mundo-Parra* found that postconviction discovery is allowed only when a defendant *shows* that it is necessary to protect substantial rights. In turn, the panel defined substantial rights as those "'potentially affect[ing] the outcome'" of his trial. *Mundo-Parra*, 58 Kan. App. 2d at 23. In fact, in applying its legal test, the panel in *Mundo-Parra* rejected the defendant's discovery request because there was "simply no suggestion in our record or in Mundo-Parra's request for discovery that there is any substantive reason that either his pleas or his convictions should be questioned in any way." 58 Kan. App. 2d at 25. This analysis confirms that the *Mundo-Parra* panel believed that a defendant's right to postconviction discovery is contingent on a showing that the requested discovery relates to a factual matter that could affect an essential right that potentially affects the outcome of the proceedings.

We therefore conclude that the district court's analysis of whether the requested materials would have affected the outcome of Butler's trial falls well within the framework established in *Mundo-Parra*. And we agree with the district court that Butler's request has not called his convictions into question or otherwise shown that the discovery is necessary to protect his substantial rights. As to Butler's request for cellphone records to establish his coworker's involvement in the crime, similar information (coconspirator testimony implicating the coworker in the crimes) was already used to impeach Butler's coworker at trial. As to Butler's request for witness statements to law enforcement for purposes of impeaching these witnesses, the apartment residents' statements to police could not have been introduced at trial because neither Butler nor the State called them as witnesses. See *State v. Davis*, 255 Kan. 357, 365, 874 P.2d 1156 (1994) (evidence of defendant's prior conviction could not be admitted for impeachment purposes where defendant did not testify at trial); *State v. Hilsman*, 333 N.W.2d 411, 413 (N.D. 1983) (trial court properly excluded de-

fendant's impeachment evidence challenging credibility of potential witness who did not testify at trial); Cf. K.S.A. 60-420 ("for the purpose of impairing or supporting the credibility of a *witness*, any party . . . may examine the *witness* and introduce extrinsic evidence" relevant to the witness' credibility) (emphases added).

Assuming (without deciding) that *Mundo-Parra* defines a defendant's legal right to postconviction discovery under Kansas law, we hold that the district court did not base its decision on an erroneous legal conclusion. Butler has not established that the district court abused its discretion. We therefore affirm the district court order denying Butler's motion for postconviction discovery.

The judgment of the district court is affirmed.

No. 117,034

MARK T. SCHREINER, *Appellant*, v. CHAD S. HODGE and DANNY SMITH, *Appellees*.

(504 P.3d 410)

SYLLABUS BY THE COURT

1. SUMMARY JUDGMENT—*No Disputed Material Facts—De Novo Review*. When the material facts are not in dispute, an order granting summary judgment presents only a question of law subject to de novo review.

2. SEARCH AND SEIZURE—*Fourth Amendment Prohibits Unreasonable Searches or Seizures.* The Fourth Amendment to the United States Constitution prohibits state actors from performing unreasonable searches or seizures. An officer effects a seizure when the officer, through physical force or show of authority, has in some way restrained the liberty of a citizen.

3. SAME—*Reasonable Brief Seizure under Fourth Amendment—Requires Reasonable Suspicion Based in Fact.* A brief seizure is reasonable for purposes of the Fourth Amendment to the United States Constitution when the officer has an articulable and reasonable suspicion, based in fact, that the detained person is committing, has committed, or is about to commit a crime.

4. KANSAS TORT CLAIMS ACT—*Governmental Entity Immune from Liability under Exception of Act—Question of Law—De Novo Review*. Whether a governmental entity is immune from liability under an immunity exception of the Kansas Tort Claims Act, K.S.A. 75-6101 et seq., is a question of law subject to de novo review. A governmental entity bears the burden to establish immunity under an immunity exception to the Act.

5. SAME—*Determination Whether Governmental Action Is Discretionary Function under Tort Claims Act—Consideration of Judgment of Governmental Employee.* In determining whether a governmental action is a discretionary function for the purposes of immunity under K.S.A. 75-6104(e), courts consider whether the judgment of the governmental employee is of the nature and quality which the Legislature intended to put beyond judicial review. The more a judgment involves the making of policy, the more it is of a nature and quality to be recognized as inappropriate for judicial review. However, Kansas Tort Claims Act immunity does not depend on the status of the individual exercising discretion and thus may apply to discretionary decisions made at the operational level as well as at the planning level.

6. POLICE AND SHERIFFS—*Determination Whether Reasonable Suspicion Exists to Detain Person—Discretionary Act by Officers—Totality of Circumstances*. The determination of whether reasonable suspicion exists is an

inherently discretionary act because it requires officers to evaluate the totality of the circumstances and make a judgment in light of their experience and training. And, generally, the types of decisions officers make over the course of an investigation, including whether reasonable suspicion exists to detain a person, are sufficiently grounded in policy to fall within the discretionary function immunity provision of K.S.A. 75-6104(e).

7. KANSAS TORT CLAIMS ACT—*Statutory Language Shows Legislative Intent for Immunity Even if Discretion May Be Erroneous or Mistaken under Fact*s. The plain language of K.S.A. 75-6104(e) shows that the Legislature intended for immunity to apply to discretionary functions even when the exercise of discretion could be characterized as erroneous or mistaken under the facts.

8. SAME—*Breach of Legal Duty—Discretionary Function Immunity Against Tort Claim May Still Be Applicable.* The breach of a legal duty does not necessarily foreclose discretionary function immunity as a defense against a tort claim.

9. SAME—*Wanton or Malicious Act by Officer or Breach of Duty to Individual—Discretionary Function Immunity Not Applicable*. If an officer acts wantonly or maliciously, or if the officer breaches a specific duty owed to an individual rather than the public at large, then discretionary function immunity under K.S.A. 75-6104(e) does not apply.

Review of the judgment of the Court of Appeals in 55 Kan. App. 2d 50, 407 P.3d 264 (2017). Appeal from Johnson District Court; JAMES F. VANO, judge. Opinion filed February 18, 2022. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Mark T. Schreiner, appellant pro se, argued the cause, and was on the briefs.

Christopher L. Heigele, of Coronado Katz LLC, of Kansas City, Missouri, argued the cause, and was on the brief for appellees.

The opinion of the court was delivered by

WALL, J.: On an afternoon in June 2014, a police officer responded to a report of suspicious activity in a residential area of Johnson County. During the investigation, the officer encountered Mark T. Schreiner and detained him. Several other officers arrived at the scene before Schreiner was eventually released. Schreiner later filed suit against two of the responding officers to recover money damages under various state law tort theories, which allegedly arose from this encounter.

The district court granted the defendants' motion for summary judgment. The district court found the officers' conduct was privileged under common law because they had reasonable suspicion to detain Schreiner. The district court also found the officers were entitled to discretionary function immunity under the Kansas Tort Claims Act (KTCA), K.S.A. 75-6101 et seq. The Court of Appeals affirmed the district court's order in a split decision, and we granted Schreiner's petition for review.

After thorough review of the summary judgment record and analysis of the legal arguments, we conclude the officers lacked reasonable suspicion to detain Schreiner as part of their investigation. Thus, the officers' conduct was not privileged. Given this holding, the controlling question on appeal is whether the KTCA grants the officers immunity from Schreiner's state law tort claims. To resolve this question, we must interpret K.S.A. 75-6104(e) to determine whether the Legislature intended discretionary function immunity to apply, even though the officers' investigation did not satisfy Fourth Amendment scrutiny.

Ultimately, we conclude the officers' reasonable suspicion determination inherently required them to exercise judgment and discretion based largely on experience and training. While the Fourth Amendment to the United States Constitution and Kansas statute require officers to have reasonable suspicion before they may lawfully detain a person without a warrant, that requirement does not alter the discretionary nature of the officers' reasonable suspicion determination in the field. The plain language of the KTCA extends immunity to government employees performing discretionary functions "whether or not the discretion is abused." K.S.A. 75-6104(e).

Of course, the KTCA does not protect malicious or wanton misconduct or other conduct in breach of a specific legal duty. But without evidence of such misconduct, we conclude the officers are entitled to discretionary function immunity, even though their reasonable suspicion determination ultimately proved to be mistaken when subjected to after-the-fact scrutiny.

Therefore, we affirm the district court order granting summary judgment to the defendants.

FACTUAL AND PROCEDURAL BACKGROUND

On June 5, 2014, at approximately 12 p.m., Schreiner legally parked his truck, which had Missouri license plates, on a residential street in Mission, Kansas. Schreiner then exited his truck and walked south through a nearby wooded area.

Sometime later, someone called the police and reported Schreiner's truck as "suspicious." Officer Chad Hodge was dispatched to investigate the truck. While en route, Hodge learned that someone had previously reported the same vehicle parked in the area and the same individual leaving that vehicle and entering the wooded area. In his deposition, Hodge testified that he was also aware there had been peeping Toms, break-ins, and car burglaries in the area. When Hodge arrived, Schreiner was not present. Hodge collected the vehicle information and called it into dispatch.

At approximately 3 p.m., Schreiner returned to his truck through the wooded area. Hodge had just finished calling Schreiner's information into dispatch and approached Schreiner as he walked to his truck. Hodge asked Schreiner if the truck belonged to him. Schreiner told Hodge he refused to answer any questions and asked if he was free to go. Hodge told him yes, he was free to leave. Schreiner got into his truck, but Hodge took control of his left arm and ordered him back out.

Hodge asked Schreiner his name and Schreiner provided his driver's license. Hodge did not return the license when Schreiner asked for it back. After being denied his license, Schreiner began walking away. He did not get far before Hodge "took control of his right arm" and told Schreiner he was not under arrest, but not free to leave until the investigation was complete. Schreiner yelled, "If I'm not free to leave then I'm under arrest." Then, Schreiner spontaneously lay down on the ground in a "defensive position." Undeterred, Hodge told Schreiner to get up and sit on the curb. Schreiner asked Hodge to call his supervisor.

Eventually, Hodge's supervisor, Sergeant Danny Smith, arrived at the scene along with two other officers. One of the officers was instructed to stand in front of Schreiner and prevent him from leaving. Schreiner first told the officers that he would not answer questions, but he ultimately relented. In his complaint, Schreiner

alleged that he was detained for over an hour. However, in his deposition, Schreiner did not dispute the accuracy of dispatch records, which reflected that the encounter lasted less than an hour.

Hodge completed the investigation and determined that Schreiner had committed no crime. In his deposition, Hodge estimated that the entire encounter lasted 20 to 25 minutes.

Acting pro se, Schreiner sued the officers for various state law tort claims allegedly arising from his interaction with the officers. In his amended complaint, Schreiner asserted claims for assault, battery, unlawful seizure, false arrest, and false imprisonment against Hodge. Schreiner asserted claims for false arrest and false imprisonment against Smith. Hodge and Smith moved for summary judgment. They argued that Schreiner could not establish the elements of his claims because reasonable suspicion of criminal activity rendered their actions privileged under common law. They also asserted they were entitled to discretionary function immunity under the KTCA.

After a hearing, the district court granted summary judgment for the defendants. From the bench, the district court ruled that the officers' actions were "justified" because they were supported by reasonable suspicion of criminal activity and that the officers were entitled to immunity under the KTCA because they were performing a discretionary function. The district court's findings of fact and conclusions of law in support of the summary judgment ruling were memorialized in its December 2, 2016, Journal Entry and Judgment.

Schreiner appealed. A majority of the Court of Appeals panel affirmed the district court's order granting summary judgment for the defendants. It held that reasonable suspicion of criminal activity supported Schreiner's detention and thus the officers were entitled to discretionary function immunity under K.S.A. 75-6104(e). *Schreiner v. Hodge*, 55 Kan. App. 2d 50, 60-61, 407 P.3d 264 (2017). We granted Schreiner's petition for review.

ANALYSIS

Schreiner challenges the Court of Appeals' decision affirming the district court's order granting summary judgment for Officer Hodge and Sergeant Smith.

I. Standard of Review and Legal Framework

The legal standard governing summary judgment is well established:

> """Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and when we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied.""" *Patterson v. Cowley County, Kansas*, 307 Kan. 616, 621, 413 P.3d 432 (2018).

When, as here, the material facts are not in dispute, an order granting summary judgment presents only a question of law subject to de novo review. *Jason Oil Company v. Littler*, 310 Kan. 376, 380-81, 446 P.3d 1058 (2019).

Based on the uncontroverted facts, the district court concluded the defendants were entitled to judgment as a matter of law for two reasons: (1) the officers' actions were supported by reasonable suspicion of criminal activity and thus Schreiner could not establish that the officers' privileged conduct satisfied the elements of Schreiner's tort claims; and (2) the officers were immune from liability under K.S.A. 75-6104(e)—the KTCA's discretionary function exception to liability.

A majority of the Court of Appeals agreed that the officers had reasonable suspicion of criminal activity. Even so, it did not focus its analysis on the common-law privilege issue. Instead, the majority held the officers were performing a discretionary function when they stopped and investigated Schreiner, and consequently they were immune from liability under K.S.A. 75-6104(e). See *Schreiner*, 55 Kan. App. 2d at 61-63.

We begin our analysis by reviewing the reasonable suspicion issue. Then, we turn our attention to the question of discretionary function immunity under the KTCA.

II. Schreiner's Detention Was Not Supported by Reasonable Suspicion

The Fourth Amendment to the United States Constitution prohibits state actors from performing unreasonable searches or seizures. *State v. Chavez-Majors*, 310 Kan. 1048, 1053, 454 P.3d 600 (2019) (citing *Mapp v. Ohio*, 367 U.S. 643, 647, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 [1961]). An officer effects a seizure when """the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.""" *State v. Reiss*, 299 Kan. 291, 298, 326 P.3d 367 (2014).

A brief seizure is reasonable for Fourth Amendment purposes when "the officer has an articulable and reasonable suspicion, based in fact, that the detained person is committing, has committed, or is about to commit a crime." *State v. Glover*, 308 Kan. 590, 593, 422 P.3d 64 (2018) (citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 [1968]; *State v. Epperson*, 237 Kan. 707, 712, 703 P.2d 761 [1985]), *rev'd on other grounds*, 589 U.S.__, 140 S. Ct. 1183, 206 L. Ed. 2d 412 (2020). We refer to this type of constitutionally permissible seizure as an *investigatory detention*. *Glover*, 308 Kan. at 593. The Kansas Legislature has also codified law enforcement's authority to conduct an investigatory detention based on reasonable suspicion. See K.S.A. 22-2402(1) (granting officers discretion to stop any person the officer reasonably suspects of committing a crime).

"To have reasonable suspicion to detain an individual, '[a] police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *Glover*, 308 Kan. at 593 (quoting *Terry*, 392 U.S. at 21). We have recognized that "the suspicion must have '"a particularized and objective basis"' and be something more than 'an unparticularized suspicion or hunch.'" *Glover*, 308 Kan. at 593 (quoting *State v. DeMarco*, 263 Kan. 727, 735, 952 P.2d 1276 [1998]). "'What is reasonable depends on the totality of circumstances in the view of a trained law enforcement officer.'" *State v. Lowery*, 308 Kan. 359, 366, 420 P.3d 456 (2018) (quoting *State v. Martinez*, 296 Kan. 482, 487, 293 P.3d 718 [2013]).

As the Court of Appeals observed, the seminal case on investigatory detention and reasonable suspicion is *Terry v. Ohio*. In *Terry*, the United States Supreme Court held that an officer did not violate the Fourth Amendment when he seized an individual because the facts reasonably supported the officer's belief that the defendant was preparing to participate in a robbery. 392 U.S. at 28. The Court noted that the defendant's individual acts may have been innocent if considered in isolation, but

"the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away." 392 U.S. at 23.

The Court also noted that the officer had "30 years' experience in the detection of thievery from stores in this same neighborhood," which bolstered the reasonableness of his suspicions. 392 U.S. at 23.

A. Application of Fourth Amendment Principles to the Detention of Schreiner

The Court of Appeals majority saw parallels between the facts in this case and the facts in *Terry*, but we disagree. In *Terry*, the officer observed the defendant for several minutes before the stop. From this period of observation, the officer was able to point to specific behaviors that, based on his extensive experience in detecting theft, led him to suspect the defendant was preparing to commit robbery.

In contrast, Officer Hodge never articulated anything about Schreiner or Schreiner's vehicle that led him to believe Schreiner was committing any crimes. During his deposition, Hodge explained that upon arriving at Schreiner's truck, he considered all the hypothetical crimes the absent driver could possibly be committing in the area:

"Okay. Initial thoughts upon arrival were why do I have a vehicle parked in a residential area and the driver did not enter a residence. He entered the woods

instead of a residence. To me in my mind, what's running through my mind is where [is] this person at, is he over in the apartment complex committing vehicle burglaries, is he walking around in the neighborhood looking in windows, is he up at the businesses just to the south trying to steal a car, trying to commit burglaries. Same things go with the apartment complex just to the west. That's what was running through my head."

Nevertheless, Hodge stated that nothing about Schreiner's vehicle made him believe it had been involved in a crime. Hodge also said he had not witnessed Schreiner commit any crimes, and that Schreiner did not fit the description of any suspects from any known crimes. And while Hodge found Schreiner's behavior to be "evasive" and "erratic," and perceived Schreiner as "nervous," he never connected this to criminal activity.

The Court of Appeals majority also aligned this case with *State v. Reason*, 263 Kan. 405, 951 P.2d 538 (1997), but again we find the comparison inapt. In *Reason*, an officer approached a luxury car with temporary out-of-state tags parked in a public parking lot on a hot afternoon. He did not see anyone in or around the car, so he suspected it might have been abandoned or was being stripped. When he approached, he noticed Reason and another person inside the car who was asleep or unconscious. The officer asked Reason if he was okay and whether he owned the vehicle. Reason provided his name and said he owned the vehicle, but he also said his wallet had been stolen and that he had no identification on him. The officer then began running warrant and vehicle identification number (VIN) checks.

This court characterized the initial encounter—the officer's approach and initial questions—as a voluntary encounter that did not trigger Fourth Amendment protections. But as soon as the officer requested identification and registration and began running warrant and VIN checks, the voluntary encounter began to resemble an investigatory detention, at which point the officers would need to establish reasonable suspicion of illegal activity to justify the detention. But even viewing the interaction as an investigatory detention, this court concluded that the officers had reasonable suspicion based on "Reason's claim of vehicle ownership without presenting any vehicle registration or personal identification." 263 Kan. at 412.

The Court of Appeals majority here turned to *Reason* to hold that "Schreiner's refusal to answer when Hodge asked if the truck was his certainly provided the officer with justification to investigate."

Schreiner, 55 Kan. App. 2d at 60. But Schreiner's case is distinguishable from *Reason* because it did not begin with a voluntary encounter. Schreiner refused to reply when Hodge asked if he owned the truck. Schreiner did not voluntarily choose to engage with an officer, tell the officer that he owned the vehicle, and then fail to produce evidence of vehicle registration or identification, as in *Reason*.

As Judge Atcheson pointed out in his dissent in this case, Schreiner's refusal to answer questions cannot serve as a basis for reasonable suspicion. If the officers did not have reasonable suspicion of criminal activity before Schreiner refused to answer questions, as the majority implied, then the encounter with Hodge was only permissible under the Constitution if it was a voluntary encounter. And we have acknowledged that a person's "lack of response" during a voluntary encounter "cannot be weighed against him [or her]." *State v. Andrade-Reyes*, 309 Kan. 1048, 1057, 442 P.3d 111 (2019).

> "In a voluntary encounter, '[t]he person approached . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.' And if the person declines, '[h]e may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.' [Citations omitted.]" 309 Kan. at 1057.

The facts here are more akin to those in *Andrade-Reyes*, where this court held that officers did not have reasonable suspicion to perform an investigatory detention. 309 Kan. at 1067. In *Andrade-Reyes*, just after midnight, two officers noticed a legally parked car in a dark parking lot with two individuals inside. The officers approached the car and directed flashlights inside. Andrade-Reyes, who was in the car, reached down toward the floorboard and then sat upright with his hands clenched and held in front of him. The officer asked Andrade-Reyes what was in his hands. Andrade-Reyes did not answer or open his hands. He eventually moved one hand, dropped something on the ground, and opened the hand to show the officer it was empty. The officer asked what was in his other hand and then ordered him to open it. When Andrade-Reyes complied, he dropped a bag of cocaine.

We concluded that the officers did not have reasonable suspicion of criminal activity to support their investigatory detention—which consisted of one officer's repeated requests and eventual order for Andrade-Reyes to open his hands. Before Andrade-Reyes dropped the bag of cocaine,

"the officers knew only that, after midnight, Andrade-Reyes sat in a car legally parked in a high-crime area, he was extremely nervous, he had reached toward the floor, his hands were clenched, and he did not respond to Officer Larson's questions. These facts did not cause either officer to articulate a subjective belief that a particular crime had occurred, was occurring, or was about to occur or even that they reasonably suspected any criminal activity." 309 Kan. at 1058.

Here, there are even fewer indicators of criminal activity than in *Andrade-Reyes*. Schreiner left his truck legally parked in an area where officers were aware other crimes had taken place. The officer had knowledge that Schreiner or someone driving Schreiner's truck had done the same thing a few weeks earlier. Upon returning, Schreiner refused to answer any of the officers' questions and attempted to leave. Neither officer testified that he reasonably believed Schreiner had committed, was committing, or was about to commit a crime. We conclude these circumstances do not support the lower courts' conclusions that the officers had reasonable suspicion of criminal activity.

B. The Officers' Actions Were Not Privileged

The district court granted summary judgment for the defendants, in part, because it concluded the defendants' actions were "justified" by their reasonable suspicion of criminal activity and, consequently, Schreiner could not establish the elements of his tort claims. Because we conclude the officers here lacked reasonable suspicion of criminal activity, their conduct was not privileged. The district court erred when it granted summary judgment on these grounds, and the Court of Appeals erred in affirming this legal conclusion.

We must now determine whether the defendants were, nonetheless, entitled to summary judgment based on discretionary function immunity under the KTCA.

III. The Officers Are Entitled to Discretionary Function Immunity Under the KTCA

The district court and the Court of Appeals concluded the defendants were entitled to summary judgment under the KTCA because they were performing a discretionary function when they committed the allegedly tortious conduct. Consistent with Judge Atcheson's dissenting

opinion, Schreiner argues the officers were not performing a discretionary function because they stopped and investigated him without reasonable suspicion of criminal activity.

A. Standard of Review and Legal Framework

As with the previous issue, our review of an order granting summary judgment based on undisputed facts is unlimited. *Jason Oil Company*, 310 Kan. at 380-81. Furthermore, this issue requires us to construe the immunity provisions of the KTCA. "Whether 'a governmental entity is immune from liability under an immunity exception of the [KTCA] is a matter of law. Accordingly, appellate review is de novo.'" *Williams v. C-U-Out Bail Bonds*, 310 Kan. 775, 794, 450 P.3d 330 (2019) (quoting *Soto v. City of Bonner Springs*, 291 Kan. 73, Syl. ¶ 4, 238 P.3d 278 [2010]).

To the extent this issue requires us to interpret the KTCA, the rules of statutory construction also apply. The most fundamental rule of statutory construction is the intent of the Legislature governs if that intent can be ascertained. *State v. Spencer Gifts*, 304 Kan. 755, 761, 374 P.3d 680 (2016). "Reliance on the plain and unambiguous language of a statute is 'the best and only safe rule for determining the intent of the creators of a written law.'" 304 Kan. at 761 (quoting *Merryfield v. Sullivan*, 301 Kan. 397, 399, 343 P.3d 515 [2015]). If there is ambiguity in the statute's language, we resort to legislative history and canons of construction to glean the Legislature's intent. *In re Paternity of S.M.J. v. Ogle*, 310 Kan. 211, 212-13, 444 P.3d 997 (2019).

B. The KTCA

Enacted in 1979, the KTCA transformed the law regarding governmental tort liability in Kansas. Prior to its enactment, Kansas had adhered to the common law doctrine of governmental immunity, which generally shielded cities, counties, and the state from liability when their employees acted negligently or wrongfully. As this court has explained,

"'The doctrine of governmental immunity was held to exempt governmental entities from privately instituted civil suits without the expressed consent of the sovereign. The doctrine was founded upon the belief the courts, which derived their power from the sovereign, could not have been empowered to enforce such authority against the sovereign; that the king could do no wrong, nor could he

authorize such conduct while acting in his sovereign capacity, for no man can do by his agents and officers that which he cannot do by himself. Under the doctrine of immunity for governmental officers, the common law recognized the necessity of permitting public officials to perform their official duties free from the threat of personal liability.'" *Collins v. Heavener Properties, Inc.*, 245 Kan. 623, 628, 783 P.2d 883 (1989) (quoting *Siple v. City of Topeka*, 235 Kan. 267, 169-70, 679 P.2d 190 [1984]).

The KTCA modified this common-law doctrine and essentially subjected governmental entities to vicarious liability under the doctrine of respondeat superior, making such entities liable for the tortious conduct of their employees in the same way that a private employer would be. Westerbeke, *The Immunity Provisions in the Kansas Tort Claims Act: The First Twenty-Five Years*, 52 U. Kan. L. Rev. 939, 944 (2004).

The general rule of liability is set forth in K.S.A. 75-6103(a), which provides:

"Subject to the limitations of this act, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state."

Consistent with K.S.A. 75-6103(a), we have frequently observed that "liability is the rule and immunity is the exception" under the KTCA. *Soto*, 291 Kan. at 78. Yet, the exceptions to the general rule of liability are numerous and confirm "there has been no wholesale rejection of immunity by the Kansas Legislature." *Robertson v. City of Topeka*, 231 Kan. 358, 360, 644 P.2d 458 (1982); see also *Mendoza v. Reno County*, 235 Kan. 692, 693, 681 P.2d 676 (1984) ("There are, however, numerous exceptions to this general rule of liability which 'indicates there has been no wholesale rejection of immunity by the Kansas Legislature.'"); McAllister and Robinson, *The Potential Civil Liability of Law Enforcement Officers and Agencies*, 67 J.K.B.A. 14, 16 (September 1998) (noting KTCA "is far from a complete relinquishment of sovereign immunity from suit").

The KTCA enumerates 24 specific exceptions from liability. Among those exceptions, the one most relevant to our analysis is the discretionary function immunity provided under K.S.A. 75-6104(e), which states:

"A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:

. . . .

"(e) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved."

K.S.A. 75-6104 further clarifies that "[t]he enumeration of exceptions to liability in this section shall not be construed to be exclusive nor as legislative intent to waive immunity from liability in the performance or failure to perform any other act or function of a discretionary nature."

C. Meaning and Scope of the KTCA's Discretionary Function Immunity Provision

To determine whether K.S.A. 75-6104(e) bars Schreiner's tort claims, "the Court must determine whether [defendants'] alleged tortious conduct occurred during the performance of a discretionary function." *Stead v. U.S.D. No. 259,* 92 F. Supp. 3d 1088, 1113 (D. Kan. 2015). A governmental entity bears the burden to establish immunity under this exception. *Williams*, 310 Kan. at 795 (citing *Soto*, 291 Kan. 73, Syl. ¶ 5). But this framework begs the question: "What constitutes a discretionary function?"

The KTCA does not define the term "discretionary function," and the legislative history offers no insight into the intended meaning. However, K.S.A. 75-6104(e) is patterned after a provision in the Federal Tort Claims Act (FTCA) that likewise carves out immunity for discretionary functions. *Carpenter v. Johnson*, 231 Kan. 783, 785, 649 P.2d 400 (1982); *Robertson*, 231 Kan. at 360. And we have previously looked to the interpretation of the FTCA's discretionary function exception in construing the meaning of K.S.A. 75-6104(e). See *Robertson*, 231 Kan. at 360-62.

K.S.A. 75-6104(e)'s federal counterpart provides that the FTCA's liability provisions do not apply to:

"Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation b.3e valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part

of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C.
§ 2680(a) (2018).

The FTCA's discretionary function exception applies only to those acts that "'involv[e] an element of judgment or choice.'" *United States v. Gaubert*, 499 U.S. 315, 322, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991) (quoting *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S. Ct. 1954, 100 L. Ed. 2d 531 [1988]). But not every act involving an element of judgment will qualify for immunity. Rather, "[b]ecause the purpose of the exception is to 'prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort,' . . . the exception 'protects only governmental actions and decisions based on considerations of public policy.' [Citations omitted.]" *Gaubert*, 499 U.S. at 323.

Even so, courts have not narrowly construed the immunity provision to apply only to those decisions made by personnel at the planning or policy-making level of government (to the exclusion of decisions made by personnel at the operational or management level of government). 499 U.S. at 325. Indeed, government employees at the operational and management level frequently exercise discretion based on, or in furtherance of, established policy considerations. Thus, whether the FTCA's discretionary function exception applies depends not on "'the status of the actor'" but rather "'the nature of the conduct.'" 499 U.S. at 325.

We have interpreted K.S.A. 75-6104(e) in a similar fashion, recognizing it is the nature and quality of the discretion exercised, rather than the status of the employee, that determines whether certain acts or omissions are entitled to immunity. See *Soto*, 291 Kan. 73, Syl. ¶ 6 ("In deciding whether the discretionary function exception of the Kansas Tort Claims Act applies, it is the nature and quality of the discretion exercised which should be the focus rather than the status of the employee exercising the discretion."). This construction is bolstered by the Legislature's 1987 amendment to K.S.A. 75-6104(e), which clarified that discretionary function immunity would apply "regardless of the level of discretion exercised." L. 1987, ch. 353, sec. 3.

Thus, to determine whether a government employee's function or duty is discretionary for the purposes of the KTCA, courts must ask "whether the judgment of the governmental employee is of the nature and quality which the legislature intended to put beyond judicial review." *Bolyard v. Kansas Dept. of SRS*, 259 Kan. 447, 452, 912 P.2d 729 (1996). "'The more a judgment involves the making of policy[,] the more it is of a "nature and quality" to be recognized as inappropriate for judicial review.'" *Thomas v. Board of Shawnee County Comm'rs*, 293 Kan. 208, 234, 262 P.3d 336 (2011) (quoting *Kansas State Bank & Tr. Co. v. Specialized Transportation Services, Inc.*, 249 Kan. 348, 365, 819 P.2d 587 [1991]). However, "'[KTCA] immunity does not depend upon the status of the individual exercising discretion and thus may apply to discretionary decisions made at the operational level as well as at the planning level.'" *Thomas*, 293 Kan. at 235 (quoting Westerbeke, 52 U. Kan. L. Rev. at 960).

D. Police Investigations and Reasonable Suspicion Determinations Fall Within the Scope of K.S.A. 75-6104(e)

With this analysis in mind, we turn to the conduct in question. Schreiner's tort claims arose from the officers' investigation of a citizen's report of suspicious activity and, more specifically, their determination that the totality of the circumstances created reasonable suspicion to detain Schreiner during the investigatory process.

We have consistently found the investigatory methods and procedures employed by governmental employees to be matters requiring the exercise of judgment and discretion. *Soto*, 291 Kan. at 85 (noting by way of example that "the precise steps to be taken . . . to verify personally identifying information," the "manner of conducting an investigation," and the "people to whom social workers converse in supervising child placements" are discretionary functions); see also *Awad v. United States*, 807 Fed. Appx. 876, 880 (10th Cir. 2020) (unpublished opinion) (manner in which law enforcement agents conduct their investigation and identify suspects involves elements of judgment or choice).

Likewise, an officer's determination whether reasonable suspicion exists is an inherently discretionary process. Before officers decide to detain or stop a person, they must evaluate the totality of the circumstances and determine whether reasonable suspicion exists—a judgment officers make based largely on their experience and training. See *Lowery*, 308 Kan. at 366. As such, law enforcement's reasonable suspicion determination necessarily entails the exercise of judgment and discretion. See *Thomas*, 293 Kan. at 234-35 (whether a particular judgment requires a government employee to use his or her expertise is a factor relevant to determining whether a particular act is discretionary); see also *Odom v. Wayne Co.*, 482 Mich. 459, 476, 760 N.W.2d 217 (2008) (characterizing officers' exercise of judgment "to determine whether there is reasonable suspicion to investigate" as a discretionary, rather than ministerial, act); *Beattie v. Smith*, 543 Fed. Appx. 850, 860 (10th Cir. 2013) (unpublished opinion) (applying Kansas law and finding officers' determination that probable cause existed based on their investigation of a report of potential criminal activity is a discretionary function); *Magnan v. Doe*, Civil No. 11-753 (JNE/SER), 2012 WL 5247325, at *14 (D. Minn. 2012) (unpublished opinion) ("The determination of whether sufficient reasonable suspicion is present to detain a person or seize property is a discretionary decision made by police officers.").

Moreover, an officer's exercise of this discretion in the field implicates matters of policy sufficient to invoke K.S.A. 75-6104(e). For one, officers investigating potential crimes, like Hodge and Smith, are acting within the scope of their employment to provide police protection, a traditional governmental function. See *Woods v. Homes & Structures of Pittsburg, Kansas*, 489 F. Supp. 1270, 1296 (D. Kan. 1980). Where the conduct in question relates to the performance of traditional governmental functions, we have typically found the conduct to be sufficiently policy-oriented to remove it from judicial second-guessing and place it within the scope of K.S.A. 75-6104(e). See, e.g., *Bolyard*, 259 Kan. at 455 (SRS's placement decision to protect child's welfare); *Mills v. City of Overland Park*, 251 Kan. 434, 446-48, 837 P.2d 370 (1992) (law enforcement officers' decision not to detain in-

toxicated patron); *Robertson*, 231 Kan. at 362-63 (law enforcement officers' decision to remove homeowner from premises rather than trespasser).

Furthermore, law enforcement's authority to detain third parties has been established as a matter of policy through K.S.A. 22-2402(1). That statute provides that, "[w]ithout 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." (Emphasis added.) K.S.A. 22-2402(1). As the Court of Appeals observed, the statute's use of the term "may" is significant because it reflects the discretionary nature of an investigatory stop—law enforcement officers have the choice to stop someone when reasonable suspicion exists, but they are not required to do so. See *Schreiner*, 55 Kan. App. 2d at 54. And, as previously noted, an officer's determination whether reasonable suspicion exists inherently requires an exercise of discretion based on the officer's experience and training. Because the Legislature defined this authority (and related conditions and limitations) in statute, we presume the exercise of such powers to be sufficiently grounded in governmental policy to fall within the scope of K.S.A. 75-6104(e). See *Gaubert*, 499 U.S. at 324 ("When established governmental policy, as expressed or implied by statute . . . allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion.").

Finally, the investigation of a report of criminal activity requires officers to make informed judgments on a variety of other policy-related matters. These decisions include, for example, whether the potential threat to public safety and the totality of the circumstances justify detention of a suspect, what investigative techniques are most appropriate, and what resources to allocate to a particular investigation. In turn, these discretionary decisions are grounded in economic, political, and social policy considerations. See *Awad*, 807 Fed. Appx. at 881 (describing how federal agents' "decision whether to investigate, as well as decisions concerning the nature and extent of an investigation, are subject to economic, political, and social policy considerations").

For these reasons, we conclude that an officer's decision whether and how to investigate a crime, along with their reasonable suspicion determination, require the type of policy-based judgments the Legislature intended to insulate from tort liability under the discretionary function exception in K.S.A. 75-6104(e).

E. The Lack of Reasonable Suspicion Does Not Preclude Discretionary Function Immunity

Schreiner and the dissent contend that our holding on the issue of privilege, i.e., that defendants lacked objectively reasonable suspicion to detain Schreiner under Fourth Amendment standards, forecloses discretionary function immunity as a matter of law. They reason that law enforcement officers lack discretion to violate the Fourth Amendment, or K.S.A. 22-2402(1) for that matter, and thus those provisions stripped defendants' conduct of its discretionary nature.

But whether defendants, in fact, correctly determined that reasonable suspicion existed under Fourth Amendment standards is a red herring. Here, our task is to properly construe the KTCA. And the plain language of K.S.A. 75-6104(e) simply does not support a rule that precludes discretionary function immunity any time a court determines, in hindsight, that the government employee's judgment was erroneous, mistaken, or otherwise constituted an abuse of discretion.

The plain language of K.S.A. 75-6104(e) extends discretionary function immunity to government employees exercising or failing to exercise a discretionary function, "whether or not the discretion is abused." The plain meaning of this phrase signifies that the Legislature intended immunity to apply to discretionary functions even when the exercise of discretion could be characterized as erroneous, mistaken, or even unconstitutional. See *Shivers v. United States*, 1 F.4th 924, 930 (11th Cir. 2021) (construing similar language under FTCA and concluding that "there is nothing in the statutory language that limits application of this exception based on the 'degree' of the abuse of discretion or the egregiousness of the employee's performance"; "Congress could have adopted language that carved out certain behavior from this exception—for example . . . a constitutional violation," but did not

do so); *Linder v. United States*, 937 F.3d 1087, 1091 (7th Cir. 2019) (rejecting plaintiff's argument that no one has discretion to violate the Constitution; nothing in the language of the FTCA "suggests that some discretionary but tortious acts are outside the FTCA while others aren't"); *Kiiskila v. United States*, 466 F.2d 626, 627-28 (7th Cir. 1972) (plaintiff's "exclusion from Fort Sheridan was based upon Colonel Nichols' exercise of discretion, albeit constitutionally repugnant, and therefore excepted her claim from the reach of the [FTCA] under 28 U.S.C. § 2680[a]"). In other words, the key inquiry under K.S.A. 75-6104(e) is "not about how poorly, abusively, or unconstitutionally the employee exercised his or her discretion but whether the underlying function or duty itself was a discretionary one." *Shivers*, 1 F.4th at 931 (interpreting discretionary function immunity under FTCA).

Consistent with this interpretation, we have held that the breach of a legal duty does not necessarily foreclose discretionary function immunity under the KTCA. See *Soto*, 291 Kan. at 80 ("[I]f there is a duty owed [and breached], the discretionary function exception to liability is not necessarily barred as a defense."); *Schmidt v. HTG, Inc.*, 265 Kan. 372, 392, 961 P.2d 677 (1998) ("Although governmental entities do not have discretion to violate a legal duty, we have not held that the existence of any duty deprives the State of immunity under the discretionary function exception."). After all, a tort, by definition, involves the breach of a legal duty. See *Mills*, 251 Kan. at 445 ("A tort is a violation of a duty imposed by law."). If all alleged breaches of a legal duty foreclosed immunity under K.S.A. 75-6104(e), that provision would never apply in common-law tort actions and K.S.A. 75-6104(e) would be rendered meaningless. See *Soto*, 291 Kan. at 80. Such an interpretation cannot withstand scrutiny under our traditional canons of construction. See *In re Marriage of Traster*, 301 Kan. 88, 98, 339 P.3d 778 (2014) (court favors statutory constructions that give effect to every part of a legislative act and do not render any portion thereof useless).

Therefore, even if Hodge and Smith were mistaken, their reasonable suspicion determination was still a discretionary function immune from tort liability. The Tenth Circuit's analysis in *Awad*

is instructive on this point. There, Awad sued the federal government for negligence, false arrest, and false imprisonment after United States Drug Enforcement Administration (DEA) agents mistakenly identified him as the perpetrator of a crime and arrested him. The government invoked discretionary function immunity under the FTCA, and the district court granted summary judgment in favor of the government.

On appeal, Awad argued the DEA agents lacked probable cause to arrest him and thus discretionary function immunity did not apply because the constitutional violation deprived the agents of discretion. The Tenth Circuit was unconvinced that the immunity question turned on the correctness of the agents' probable cause determination:

"[P]robable probable cause is a constitutional requirement of any arrest, but Awad cites nothing that requires DEA agents to follow a 'prescribe[d] course of action' in gathering probable cause and identifying a suspect. Indeed, deciding whether probable cause has been established involves discretion and judgment; the requirement for probable cause to exist does not make the ultimate, evaluative decision non-discretionary. Even if they were mistaken, the DEA agents made a discretionary determination that probable cause to arrest Awad existed. Awad's insistence that their initial evaluation was wrong does not inform this debate; it is irrelevant to our analysis. [Citations omitted.]" *Awad*, 807 Fed. Appx. at 880-81.

Awad makes clear, the focus of our inquiry under K.S.A. 75-6104(e) is not on whether the officers *correctly* determined that the reasonable suspicion requirement had been met. Rather, the relevant inquiry is whether the underlying act was discretionary in nature. See *Shivers*, 1 F.4th at 931; *Linder*, 937 F.3d at 1091.

Consistent with *Awad*, we held in *Robertson* that K.S.A. 75-6104(e) applies even where a court's post-hoc analysis reveals that law enforcement made mistakes or errors in judgment while exercising discretionary authority. There, defendant summoned police officers to his house to remove a trespasser, but rather than remove the trespasser, the officers ordered Robertson to leave. Soon after, the trespasser set fire to Robertson's house. Robertson sued the officers for negligence, but we held that the officers' on-the-scene decisions, made in the absence of mandatory guidelines, were entitled to discretionary function immunity, even if those decisions

appeared erroneous in hindsight. *Robertson*, 231 Kan. at 362-63. We explained:

"It would be virtually impossible for police departments to establish specific guidelines designed to anticipate every situation an officer might encounter in the course of his work. Absent such guidelines, police officers should be vested with the necessary discretionary authority to act in a manner which they deem appropriate without the threat of potentially large tort judgments against the city, if not against the officers personally.

. . . .

"Failure to distinguish between the time frame in which police officers are required to take action and the factual situation presented to the court by a claimant in his petition, as here, could lead to disastrous results. The court is in the position of a Monday-morning quarterback. The *facts* with which the court must deal are *established*. The critical time material to the exercise of judgment by the police officers was at the scene of the incident . . . . In our opinion the legislature did not intend to impose on police officers the obligation to ascertain the true state of the facts within such limited time frame at their peril. The police officers were not required to exercise judgment at their peril. This interpretation of the discretionary function exception in the Kansas Tort Claims Act gives it substance." 231 Kan. at 362-63.

Granted, we have held that discretionary function immunity does not apply when a clearly defined mandatory duty exists. Schreiner and the dissent suggest the Fourth Amendment and K.S.A. 22-2402 create such a mandatory duty. Contrary to their assertions, the reasonable suspicion requirement cannot be characterized as a clearly defined mandatory duty. Such a mandatory duty may arise from agency directive, caselaw, or statute. *Montgomery v. Saleh*, 311 Kan. 649, 664-65, 466 P.3d 902 (2020) (citing *Soto*, 291 Kan. at 80). And it must "leave[] little to no room for individual decision making, exercise of judgment, or use of skill, and qualify[] a defendant's actions as ministerial rather than discretionary." *Thomas*, 293 Kan. at 235. In other words, a "clearly defined mandatory duty" is one that completely governs or prescribes the required course of conduct under the circumstances, leaving no room for governmental employees to exercise independent discretion or judgment.

Undoubtedly, both the Fourth Amendment and K.S.A. 22-2402 require officers to have reasonable suspicion of criminal activity before detaining a person. But neither provision sets forth a

mandatory process or protocol that officers must follow in determining whether reasonable suspicion exists under the totality of the circumstances. Nor has the Legislature or police department undertaken the almost certainly impossible task of delineating every possible set of facts which may give rise to reasonable suspicion and committing them to policy. Thus, the officers' reasonable suspicion determination remains an inherently discretionary process that is not subject to or controlled by any clearly defined mandatory duty. In fact, here, both the district court and the Court of Appeals majority concluded that Hodge and Smith did have reasonable suspicion to detain Schreiner. While anecdotal, the lower courts' decisions illustrate why the reasonable suspicion requirement is not properly characterized as a *clearly defined* mandatory duty. Cf. *Shivers*, 1 F.4th at 931 (Eighth Amendment contains no specific directive as to inmate classifications or housing placements and plaintiff's allegations of an Eighth Amendment violation cannot demonstrate a breach of a mandatory duty sufficient to overcome discretionary function immunity under the FTCA).

In accord with *Shivers*, *Linder*, *Awad*, and *Robertson*, we read the plain language of K.S.A. 75-6104(e) to leave no room for a statutory construction exposing officers to tort liability if their in-the-moment judgment fails to satisfy after-the-fact constitutional scrutiny. To effectively perform their core governmental functions, K.S.A. 75-6104(e) requires law enforcement officers be afforded discretion to determine the existence of reasonable suspicion based on their experience and training, free from the deterring influence of potential tort liability. The Legislature left no room for the extra-textual constitutional-claims exclusion for which Schreiner and the dissent advocate. See *Shivers*, 1 F.4th at 930. Accordingly, we hold that Hodge's and Smith's conduct falls within the scope of K.S.A. 75-6104(e), even though our post-hoc analysis reveals that the officers were mistaken in their judgment regarding the existence of reasonable suspicion.

However, this does not mean that officers may engage in any type of investigatory conduct with impunity. K.S.A. 75-6104(e) grants immunity from liability for damages arising from the of-

ficer's exercise of discretion. "The term 'discretion' imparts the exercise of judgment, wisdom and skill, as distinguished from unthinking folly, heady violence and rash injustice." *Hopkins v. State*, 237 Kan. 601, 612, 702 P.2d 311 (1985). Thus, the phrase "whether or not the discretion is abused" in K.S.A. 75-6104(e) does not insulate malicious or wanton conduct because such conduct reflects the absence of discretion, not its abuse. *Hopkins*, 237 Kan. at 612 ("If the officers acted needlessly, maliciously or wantonly, resulting in injury to the plaintiff's property, the officers acted outside the protection of the act."); see *Barrett v. U.S.D. No. 259*, 272 Kan. 250, 264, 32 P.3d 1156 (2001); *Moran v. State*, 267 Kan. 583, 596, 985 P.2d 127 (1999); *Taylor v. Reno County*, 242 Kan. 307, 309, 747 P.2d 100 (1987); *Beck v. Kansas Adult Authority*, 241 Kan. 13, 33, 735 P.2d 222 (1987).

Liability for wanton or malicious conduct is consistent with the rule of liability at common law. "Under the common law, personal liability was imposed on officers who maliciously or wantonly injured a person or his property even though the officers were engaged in a governmental function." *Hopkins*, 237 Kan. at 611; see *Beck*, 241 Kan. at 27. We have recognized that the Legislature did not intend the KTCA to extinguish liability for a breach of these common-law duties. 237 Kan. at 611. For these reasons, the KTCA's discretionary function immunity does not insulate officers from liability for damages arising from wanton or malicious conduct.

Additionally, the KTCA does not insulate officers from potential liability arising from the breach of a *specific* duty owed to an individual. Under the common-law "public duty doctrine," a law enforcement officer's general duty to preserve the peace was considered a duty owed to the public at large, rather than to any specific person, and officers were immune from claims arising out of the performance or nonperformance of their general duties. *Conner v. Janes*, 267 Kan. 427, 429, 981 P.2d 1169 (1999); Westerbeke, 52 U. Kan. L. Rev. at 969. However, if an officer had a special relationship with the plaintiff or owed a specific duty to that individual, the officer could be liable for breaching that specific duty. 267 Kan. at 429; see also *Williams*, 310 Kan. at 788 ("To warrant an exception to the public duty doctrine, a plaintiff

suing a governmental entity must establish either a special relationship or a specific duty owed to the plaintiff individually."). Because the common law did not insulate officers from liability for damages arising from negligent performance of a specific duty, the Legislature did not intend K.S.A. 75-6104(e) to apply to such conduct. See *Hopkins*, 237 Kan. at 611 ("Neither the courts nor our legislature, in passing the [KTCA], extended the mantle of immunity beyond the boundaries of protection previously recognized under the common law.").

Here, however, the summary judgment record confirms that neither of these exceptions to discretionary function immunity applies. As for the breach of a specific duty, Schreiner never alleged the existence of a special relationship with defendants. See *Williams*, 310 Kan. at 788-89 (discussing types of relationships which may give rise to government entity's specific duty). Nor did he allege any undertaking or conduct giving rise to a specific duty. See *Dauffenbach v. City of Wichita*, 233 Kan. 1028, 1033, 667 P.2d 380 (1983) (specific duty may arise if government agent performs affirmative act that causes injury or makes specific promise or representation that creates justifiable reliance). And the summary judgment evidence does not establish any of the circumstances that customarily create a special relationship or give rise to a specific duty on the part of law enforcement. See, e.g., *Carl v. City of Overland Park, Kan.*, 65 F.3d 866, 869 (10th Cir. 1995) (mandatory police policy governing vehicle pursuits gave rise to specific duty); *Hendrix v. City of Topeka*, 231 Kan. 113, 137, 643 P.2d 129 (1982) (police officers may be liable for failure to provide promised protection to informant or for excessive use of force during arrest). Rather, the record confirms the officers were responding to a citizen's call regarding suspicious activity and investigating the same in furtherance of their general duty to preserve the peace and prevent crime. Law enforcement officers are immune from tort claims arising from the performance/nonperformance of such general duties. *Conner*, 267 Kan. at 429.

Likewise, the record reveals no evidence of wanton, let alone malicious, conduct. Wanton behavior requires:

"'something more than ordinary negligence, and yet . . . something less than willful injury; to constitute wantonness, the act must indicate a realization of the

imminence of danger and a reckless disregard and complete indifference and unconcern for the probable consequences of the wrongful act. It is sufficient if it indicates a reckless disregard for the rights of others with a total indifference to the consequences, although a catastrophe might be the natural result.'" *Soto*, 291 Kan. at 82 (quoting *Saunders v. Shaver*, 190 Kan. 699, 701, 378 P.2d 70 [1963]).

Neither the district court findings nor the summary judgment record suggests Hodge or Smith acted wantonly or maliciously. As the Court of Appeals observed:

"[W]e note that Schreiner was never arrested, or handcuffed, nor was he frisked by Officer Hodge. From this record, it is clear that no voices were raised toward Schreiner and no foul language or epithets of any kind were directed toward him by any officer. While wanton conduct of a government employee is not covered by discretionary function immunity, there is simply no evidence that Officer Hodge (or Sergeant Smith) acted wantonly in this case. See *Soto*, 291 Kan. at 81-82. To the contrary, this record shows that both officers acted with professional restraint." *Schreiner*, 55 Kan. App. 2d at 60.

Schreiner does not controvert this evidence or challenge the relevant district court findings.

In conclusion, we hold that Officer Hodge and Sergeant Smith lacked reasonable suspicion to detain Schreiner. Nevertheless, the officers' detention and investigation of Schreiner, along with their reasonable suspicion determination, were discretionary functions implicating matters of policy. Therefore, the officers are entitled to discretionary function immunity under the KTCA. The plain language of K.S.A. 75-6104(e) makes clear that this immunity applies even though the officers' reasonable suspicion determination was incorrect under the facts. In the absence of any evidence establishing wanton or malicious conduct or a breach of a special duty owed to Schreiner, the district court and Court of Appeals properly concluded that the officers are entitled to judgment as a matter of law.

This holding does not deprive Schreiner of a remedy for constitutional violations. Under federal law, 42 U.S.C. § 1983 (2018) creates a cause of action for money damages based on a violation of any constitutional right under color of state law, including unconstitutional searches and seizures. *Slayton v. Willingham*, 726 F.2d 631, 635 (10th Cir. 1984). Schreiner asserts no such claim in this action. Further, the Legislature did not create the KTCA to address such constitutional violations—the KTCA only addresses

liability for state tort law claims against government officials where a *private person or entity* would be liable in the same circumstances. See K.S.A. 75-6103(a) (limiting liability to damages caused by negligent or wrongful acts or omissions of government officials acting within the scope of their employment "under circumstances where the governmental entity, *if a private person*, would be liable under the laws of this state"); *Linder*, 937 F.3d at 1090 ("What's more, the theme that 'no one has discretion to violate the Constitution' has nothing to do with the Federal Tort Claims Act, which does not apply to constitutional violations. It applies to torts, as defined by state law—that is to say, 'circumstances where the United States, *if a private person*, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.' The Constitution governs the conduct of public officials, not private ones. [Citation omitted.]"). And private persons are not generally liable for violations of constitutional rights, removing such claims from the reach of the KTCA. *Morse v. North Coast Opportunities, Inc.*, 118 F.3d 1338, 1340 (9th Cir. 1997) (private individuals not generally liable for violations of constitutional rights unless action attributable to the government). This leaves Schreiner with the traditional state law tort theories he pled under the KTCA. Under the circumstances, K.S.A. 75-6104(e) grants the officers immunity from those claims.

The judgment of the Court of Appeals is affirmed; the judgment of the district court is affirmed.

BEIER, J., not participating.
MICHAEL E. WARD, Senior Judge, assigned.[1]

* * *

ROSEN, J., dissenting: Today, a majority of this court decides the Kansas Legislature meant to deprive individuals of the right to a civil cause of action against the state when a law enforcement

[1]**REPORTER'S NOTE:** Senior Judge Ward was appointed to hear case No. 117,034 vice Justice Beier under the authority vested in the Supreme Court by K.S.A. 20-2616.

officer violates K.S.A. 22-2402(1) and disregards an individual's Fourth Amendment right to be free from an unreasonable stop or seizure. Because this conflicts with the statutory provisions in question and the right to a constitutional freedom that this court is tasked with protecting, I dissent.

I agree with the majority that the officers in this case did not have reasonable suspicion to detain Schreiner. Nothing in the record indicates that Schreiner's entry or exit from the "wooded area" was an act of trespass or otherwise unlawful. Although Officer Hodge testified in his deposition that he was aware of peeping Toms, break-ins, and car burglaries in the area, there is no suggestion that Schreiner was involved in any such activity. Schreiner's truck was properly tagged in the adjoining state of Missouri. It was properly parked on a residential street in Mission, Kansas. Schreiner's driver's license was valid. Schreiner committed no traffic offenses. No fruits or instrumentalities of a crime were observed in or near his truck.

All Officer Hodge knew when responding to the area was that someone had been observed walking into a wooded area in broad daylight after exiting a vehicle legally parked on a city street, and that a similar incident had occurred in the same area several weeks prior. And upon his arrival Officer Hodge learned very little that would bolster an objective belief of reasonable suspicion. Schreiner's lack of cooperation and lack of response to Hodge's questions cannot factor into the reasonable suspicion analysis. *State v. Andrade-Reyes*, 309 Kan. 1048, 1057, 442 P.3d 111 (2019).

This means that, regardless of whether the officers believed the circumstances to be suspicious, the facts that were known to them would not have made a reasonable officer with the same knowledge and training suspicious that criminal activity was afoot. See *State v. Jones*, 300 Kan. 630, 644, 333 P.3d 886 (2014). The majority and I disagree about what this means for the defendants' assertion of discretionary function immunity. I believe it conclusively defeats it. Consequently, I would reverse the Court of Appeals decision and the district court's grant of summary judgment.

Under the KTCA, subject to statutory limitations, "each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state." K.S.A. 75-6103(a). This legislation makes the government liable for the injurious acts of its employees and, consequently, gives injured parties a greater chance at recovery than if they sued only the employee. It ensures this result by requiring that the government pay for the employee's legal defense and indemnify the employee against damages even when an injured party names only the employee in a lawsuit. K.S.A. 75-6108; K.S.A. 75-6109.

Both the Legislature and this court have made clear that "[u]nder the KTCA, liability is the rule and immunity from liability is the exception." *Thomas v. Board of Shawnee County Comm'rs*, 293 Kan. 208, 233, 262 P.3d 336 (2011). But two categories of exceptions exist.

The first category of exceptions shields the government from liability while leaving the employee subject to suit. The KTCA relieves the government employer from defending and indemnifying an employee if the employee was not acting in the scope of their employment, if the employee "fail[ed] to cooperate in good faith in the defense of the claim," or if the conduct was a result of "actual fraud or actual malice." K.S.A. 75-6103; K.S.A. 75-6108; K.S.A. 75-6109. If any of these are true, the injured party may file suit against the employee, but the government will not be liable for the defense or any resulting judgment.

The second category of exceptions shields both the government and the employee from liability. K.S.A. 75-6104 enumerates 24 different kinds of conduct that fall within this category of exception. The defendants here asserted immunity under the discretionary function exception in K.S.A. 75-6104, which provides:

"A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:

. . . .

"(e) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved." K.S.A. 75-6104(e).

This provision immunizes the government and its employees against liability for damages that occur when an employee is exercising a "discretionary function." Thus, the defendants' claims of immunity turn on whether their actions were discretionary in nature.

As the majority notes, the Kansas Legislature modeled the discretionary function immunity off a nearly identical provision in the Federal Tort Claims Act (FTCA). *Carpenter v. Johnson*, 231 Kan. 783, 785, 649 P.2d 400 (1982); Hagerman and Johnson, *Governmental Liability: The Kansas Tort Claims Act [or The King Can Do Wrong],* 19 Wash. L. J. 260, 272 (1980). Federal courts have been interpreting this provision since 1953. *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953) (first interpreting discretionary function provision in FTCA). In one of its more recent cases, the United States Supreme Court has explained "the basis for the discretionary function exception was Congress' desire to 'prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.'" *Berkovitz v. United States*, 486 U.S. 531, 536-37, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988). The Court has also outlined a two-step model for evaluating discretionary function questions: (1) did the government employee or agency have discretion to make any choice at all? If the employee had no discretion, the exception did not apply; and (2) if the employee had discretion or choice, did Congress intend to immunize that type of discretion from liability? 486 U.S. at 536-37.

This court has considered this federal caselaw in interpreting Kansas' own discretionary function provision. It first did so 1982 in *Robertson v. City of Topeka*, 231 Kan. 358, 362, 644 P.2d 458 (1982). There, the plaintiff alleged officers were negligent in responding to his call to have a third party removed from his property. The officers, unsure of who the property belonged to, ordered the plaintiff off the property. The third party remained and burned

down the house. The court held the officers had been performing a discretionary function because, based on the facts known to the officers, there was no clear-cut remedy and the officers lacked clear guidelines to follow under the circumstances. *Robertson*, 231 Kan. at 362.

A few months later, this court offered some nuance to the discretionary function analysis in *Carpenter v. Johnson*, 231 Kan. 783, 649 P.2d 400 (1982). It considered whether the government and its employees were immune from liability when the plaintiff alleged that employees were negligent in failing to place a warning sign at a curve in the road in contravention to guidelines in an agency manual. The court announced that "[t]he test is whether the judgments of the government employee are of the nature and quality which the legislature intended to put beyond judicial review." 231 Kan. at 788. It observed that the employees were statutorily required to follow the guidelines in the manual and reasoned that, whether the decision to leave the curve without a sign was discretionary depended on whether the manual's guidelines required the sign. Because this was a factual decision that could not be determined as a matter of law based on the summary judgment record, the defendants were not entitled to immunity. 231 Kan. at 790.

This court cited *Carpenter* a few years later in *Cansler v. State*, 234 Kan. 554, 675 P.2d 57 (1984), in holding that the State was not immune when prison staff failed to confine dangerous inmates and to warn when those inmates escaped. This court held that "the State, as the custodian of dangerous persons" had a "duty to confine and [a] duty to warn." 234 Kan. at 570. These were "non-discretionary" requirements "imposed by law" and, consequently, employees' alleged failure to follow the requirements was not protected by discretionary function immunity. 234 Kan. at 570. *Carpenter* and *Cansler* stand for the notion that government actors are not engaged in a discretionary function that is outside of the court's review if they have allegedly violated a mandatory rule.

We expanded upon the mandatory guideline rule in *Jackson v. City of Kansas City*, 235 Kan. 278, 290, 680 P.2d 877 (1984), *overruled on other grounds by Simmons v. Porter*, 298 Kan. 299,

312 P.3d 345 (2013). There, we concluded firefighters were not performing a discretionary function when their fire engines collided because they had violated the department's policy of driving under 35 miles per hour. With *Jackson*, we embraced the notion that the mandatory guidelines that make an employee's conduct non-discretionary can come from statutes, caselaw, or department policy. We explicitly confirmed this in *Soto v. City of Bonner Springs*, 291 Kan. 73, 80, 238 P.3d 278 (2010) ("A mandatory guideline can arise from agency directives, case law, or statutes.").

Shortly after *Jackson*, this court offered a more robust definition of discretionary function. It observed that "'[d]iscretion' has been defined as the power and the privilege to act unhampered by legal rule" and "as the capacity to distinguish between what is right and wrong, lawful and unlawful, wise or foolish, sufficiently to render one amenable and responsible for his acts." *Hopkins v. State*, 237 Kan. 601, 610, 702 P.2d 311 (1985). It reasoned that "[d]iscretion implies the exercise of discriminating judgment within the bounds of reason." 237 Kan. at 610 (citing *Sandford v. Smith*, 11 Cal. App. 3d 991, 1000, 90 Cal. Rptr. 256 [1970]).

We summarized much of this caselaw in *Thomas v. Board of Shawnee County Comm'rs,* 293 Kan. 208, 262 P.3d 336 (2011). There, we observed that "'[t]he mere application of any judgment is not the hallmark of the exception.'" 293 Kan. at 234 (quoting *Soto,* 291 Kan. at 79). Instead, we explained, "'the more a judgment involves the making of policy, the more it is of a "nature and quality" to be recognized as inappropriate for judicial review.'" 293 Kan. at 234 (quoting *Kansas State Bank & Tr. Co.,* 249 Kan. 348, 365, 819 P.2d 587 [1991]). And we noted three principles that guide the application of the discretionary function exception:

"(1) '[T]he discretionary function primarily involves policy-oriented decisions and decisions of such a nature that the legislature intended them to be beyond judicial review,' (2) 'the immunity does not depend upon the status of the individual exercising discretion and thus may apply to discretionary decisions made at the operational level as well as at the planning level,' and (3) 'the discretionary function does not encompass conduct that is deemed "ministerial," *i.e.,* conduct that involves no discretion.'" *Thomas*, 293 Kan. at 235 (quoting Westerbeke, *The Immunity Provisions in the Kansas Tort Claims Act: The First Twenty-Five Years*, 52 U. Kan. L. Rev. 939, 960 [2004]).

More recently, we emphasized that "[g]enerally, the discretionary function exception is inapplicable when there is a '"clearly defined mandatory duty or guideline,"' which can arise from statutes, caselaw, or agency directives." *Hill*, 310 Kan. at 510 (quoting *Soto*, 291 Kan. at 80); see also *State ex rel. Franklin v. City of Topeka*, 266 Kan. 385, 391, 969 P.2d 852 (1998) (no immunity against employment discrimination claim because State was subject to "legislatively created duty to refrain from discriminatory employment practices" under K.S.A. 44-1009).

In this case, Schreiner has alleged that the officers violated a mandatory statutory rule and a constitutional provision. Because the summary judgment record conclusively shows this to be true, the defendants were not entitled to discretionary function immunity.

An officer's authority to detain a suspect during an investigation is expressly limited by the United States Constitution and a Kansas statute. The Fourth Amendment prohibits officers from conducting "unreasonable searches and seizures." U.S. Const. amend. IV. And K.S.A. 22-2402(1) provides that "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." (Emphasis added.) Following our own caselaw regarding the non-discretionary nature of a state actor's alleged failure to follow mandatory guidelines, these rules take an unreasonable stop outside the realm of discretionary functions. Many federal courts have similarly held there is no discretionary function immunity under the FTCA's discretionary function immunity clause for alleged violations of constitutional rights. *Loumiet v. United States*, 828 F.3d 935, 943-44 (D.C. Cir. 2016) ("At least seven circuits, including the First, Second, Third, Fourth, Fifth, Eighth, and Ninth, have either held or stated in dictum that the discretionary-function exception does not shield government officials from FTCA liability when they exceed the scope of their constitutional authority" and "[t]o this court's knowledge, only the Seventh Circuit has held otherwise."); see, e.g., *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) (no discretionary function immunity when plaintiff

alleged unconstitutional policies because "governmental conduct cannot be discretionary if it violates a legal mandate"); *Muhammad v. United States*, 884 F. Supp. 2d 306, 313 (E.D. Pa. 2012) ("it is well established that the discretionary function exception does not apply to constitutional violations").

This conclusion comports with our general understanding that a discretionary function is one that is largely policy-based. The central question the officer faces—whether reasonable suspicion exists—is neither policy-centered nor one I think the Legislature intended to put beyond a court's review. This is a constitutional query, and, as such, has been firmly within the judiciary's realm since the United States Supreme Court held that it is the final arbiter of the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803). Courts have been explicitly examining whether an officer had reasonable suspicion of criminal activity since the standard appeared in 1968. See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (announcing for first time that officers can briefly stop and investigate person based on reasonable suspicion of criminal activity without offending the Fourth Amendment).

It is true that officers must, often in a split second, decide whether reasonable suspicion exists, and their employers give them the authority to make this decision and act on it. In this sense, an officer who chooses to pursue an investigatory detention is clearly exercising judgment. But, as the Sixth Circuit has concluded, this "exercise of 'discretion' by the officer in the sense of choosing among alternative courses of action does not automatically trigger official immunity." *Downs v. United States*, 522 F.2d 990, 998 (6th Cir. 1975) (citing *Carter v. Carlson*, 447 F.2d 358 [D.C. Cir. 1971], *rev'd on other grounds* 409 U.S. 418, 93 S. Ct. 602, 34 L. Ed. 2d 613 [1972]). This is because officers who suspect criminal activity have no legal authority to stop and investigate a person unless that suspicion is *objectively* reasonable. Courts maintain this rule "because protection of personal liberties is thought to outweigh the danger of less effective law enforcement out of fear of personal tort liability." *Downs*, 522 F.2d at 998.

The distinction between an officer's decision to investigate and an officer's decision to detain someone while investigating

cannot be understated. The judgment of whether to investigate the complaint of an identified citizen, or an anonymous tip, or even an offense observed by the officer, is generally within an officer's discretion. It is not guided or compelled by statute or caselaw or policy. Law enforcement officer's use that discretion regularly for instance in deciding whether to initiate a traffic stop. It can be a matter of the time available, the distance to be traveled, the perceived credibility of the reporting party, or the need to investigate more serious matters. In that sense then, the decision of whether to investigate is a discretionary act as that term is used in the KTCA.

This aspect of policing often involves the sometimes-competing policy concerns of suppressing crime and protecting the public, because pursuing a suspect can endanger the lives of bystanders. See generally *Montgomery v. Saleh*, 311 Kan. 649, 466 P.3d 902 (2020) (plaintiffs alleged officer's pursuit of suspect caused third-party injuries). And officers are not generally compelled by a mandatory statute, regulation, or specific duty to investigate crime. While owing a duty to the public at large to preserve the peace, absent a special relationship, officers do not always have a duty to take affirmative action. *Robertson*, 231 Kan. at 363.

But Schreiner has not alleged an issue with the officers' decision to investigate or not investigate a suspected crime. He challenges the officers' decision to detain him *without* reasonable suspicion during their investigation. This is an obvious violation of a mandatory statutory directive. K.S.A. 22-2402(1) is clear. The detention is conditioned on the presence of reasonable suspicion, which we unanimously agree was not present in this case. As such, it was not a "discretionary function" as envisioned by the Kansas Legislature.

Quoting *Soto*, 91 Kan. at 85, the majority posits that we regularly consider "investigatory methods and procedures employed by governmental employees to be matters requiring the exercise of judgment and discretion." *Schreiner v. Hodge*, 315 Kan. 25, 40, 504 P.3d 410 (2022). While that may be true, we face a more specific situation. As I have explained, Schreiner alleged—and established—a violation of a specific statutory and constitutional directive. He has not offered a broad claim of negligence.

The majority relies heavily on *Soto*, but the facts and the analysis fail to support its position. In *Soto*, officers lawfully stopped the plaintiff for a traffic violation and were informed by dispatch that there was a warrant for the plaintiff's arrest. After the plaintiff had been arrested, jailed, and transferred to the county that issued the warrant, officials learned the plaintiff was not the subject of the warrant. The Court of Appeals concluded county officials were performing a discretionary function when they confirmed the plaintiff's identifiers with the issuing county and declined to continue investigating the plaintiff's claims of mistaken identity. 38 Kan. App. 2d at 386. The panel quoted an out-of-state case for the notion that officers are "'engaged in a discretionary function in determining how to investigate, and to what extent to investigate before seeking a warrant.'" *Soto*, 32 Kan. App. 2d at 385 (quoting *Davis v. Klevenhagen*, 971 S.W.2d 111 [Tex. App. 1998]). This court affirmed, but it further limited the legal contours of the discretionary function immunity that can be gleaned from *Soto* by stating "the decision whether to do anything about a claim of mistaken identity may or may not be discretionary . . . , but the precise steps to be taken by detention personnel to consider such a claim, e.g., to verify personally identifying information, is discretionary." *Soto*, 291 Kan. at 85.

Contrary to the majority's position, *Soto* does not stand for the notion that law enforcement officers are always performing a discretionary function when they are making decisions related to investigation. Rather, it offers the very specific holding that policy decisions about how to investigate claims of mistaken identity can generally be described as discretionary and, more generally, that the KTCA does not blanket officers with unfettered immunity whenever they are making investigatory decisions.

But the majority uses its reading of *Soto*—that investigatory decisions are always discretionary—to support its conclusion that investigatory *detentions*, regardless of whether they are prohibited by statute or the Constitution, are discretionary acts for which neither the employee nor government are liable. It reasons that, like investigatory decisions, "an officer's determination whether reasonable suspicion exists is an inherently discretionary process" because the officer must make a decision based on the facts and the officer's experiences. *Schreiner*, 315 Kan. at 42. The majority opines that this "necessarily entails the exercise of judgment and discretion." 315 Kan. at 41.

By this standard, every decision would fall within the realm of a discretionary function. This court has acknowledged that "'judgment is exercised in almost every human endeavor, so that factor alone cannot be determinative of immunity.'" *Carpenter*, 231 Kan. at 789 (quoting *Robertson*, 231 Kan. at 361). Moreover, as I have emphasized, an officer does *not* have discretion to detain an individual when the facts known to that officer would not make a reasonable officer suspicious of criminal activity.

The majority also concludes that deciding whether reasonable suspicion of criminal activity is present "implicates matters of policy sufficient" to make an officer's detention of someone a discretionary act. The majority rests this characterization on a number of flawed assertions.

First, the majority paints this as a policy decision because officers who are investigating crimes are acting within the scope of their employment to perform a traditional government function. But the KTCA applies only when an employee is acting within the scope of their employment. K.S.A. 75-6103(a). The majority cannot use the very circumstance that subjects the government to liability to immunize the government from liability. And, even if the performance of a "traditional government function" is generally discretionary, the complained of conduct in this case—detaining an individual without reasonable suspicion—is not a traditional government function.

Next, the majority asserts that an officer's decision to detain a person is one of policy that the Legislature intended to shield from judicial review because an officer's authority to detain people was established as a matter of policy through K.S.A. 22-2402(1) by the Kansas Legislature. The majority points out that the statute provides that an officer "*may*" stop a person when they have reasonable suspicion, thus making their decision to do so discretionary. I agree that officers generally have discretion to detain an individual or not detain an individual *when reasonable suspicion exists*. Consequently, as I explain above, allegations that officers were negligent when they did not pursue a suspect will usually be defeated by a claim of discretionary immunity. But, again, that is not what we face here. Schreiner has alleged, and we have agreed, that the officers detained him *without* reasonable suspicion of criminal activity. The Legislature has not authorized officers to do this and our Constitution explicitly forbids it.

The majority concludes by opining that an officer deciding how to investigate a report of criminal activity must make many policy-related decisions. I agree that in determining whether and how to pursue an investigation an officer must decide what will be most effective and serve public safety. But in doing so, an officer must not traverse the bounds of what is statutorily or constitutionally appropriate. Clearly, there are means of investigating reports of criminal activity without detaining a person when reasonable suspicion does not exist. In making decisions about how to do so, discretionary function immunity will generally apply. But when a plaintiff has alleged that an officer overstepped statutory and constitutional limits, and the summary judgment record cannot conclusively establish this to be untrue, discretionary function immunity does not apply.

Finally, the majority declares that its ruling does not deprive Schreiner of a remedy because he can bring a § 1983 action against the officers as individuals. This is less persuasive than the majority implies. Unless the complained-of actions constituted execution of local governmental "custom," the plaintiff has a suit against only the individual employee, not the local government employer who is responsible for the employee's training and supervision and, practically speaking, has better ability to absorb the financial impact of a judgment against its favor. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). In addition, the § 1983 plaintiff faces the towering barrier of qualified immunity. Judge Reinhardt of the Ninth Circuit has explained, "[T]he Court has through qualified immunity created such powerful shields for law enforcement that people whose rights are violated, even in egregious ways, often lack any means of enforcing those rights." Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 Mich. L. Rev. 1219, 1245 (2015). As a consequence, the existence of a possible § 1983 action does little to relieve any distress over eliminating the KTCA action.

In the same line of analysis, the majority also posits that the KTCA is not even applicable to this constitutional violation because the legislation subjects government entities to suit only when a private individual would be liable, and the Constitution does not regulate private conduct. But Schreiner has alleged assault, battery, false imprisonment, and false arrest. Private individuals are certainly liable for these torts even if their actions do not also amount to constitutional violation.

I can support neither the result nor the supporting analysis from the majority. Four members of this court have overlooked years of caselaw and statutory and constitutional provisions to totally immunize the government and its employees from an unconstitutional detention. Although the Kansas Legislature meant to chisel a path of meaningful relief for those who would be harmed by the torts of government employees, this court dismantles that path for those attempting to recover for a Fourth Amendment violation. Put another way, I cannot agree with an interpretation of the KTCA that immunizes the violation of one's Fourth Amendment rights.

I would conclude that the district court erred when it granted summary judgment based on discretionary function immunity, and the Court of Appeals majority erred when it affirmed that ruling.

MICHAEL E. WARD, Senior Judge, joins the foregoing dissenting opinion.

* * *

BILES, J., dissenting: Contrary to the majority's holding, both the Fourth Amendment to the United States Constitution and Kansas law prevent law enforcement from simply detaining someone in a public place without their consent while investigating whether that person just might happen to be involved in criminal activity. Without more, this is not an optional investigative tool. The Legislature has declared this tactic out of bounds. See K.S.A. 22-2402(1). Our law requires an investigating officer to have an articulable and reasonable suspicion—based in fact—that the person being detained is committing, has committed, or is about to

commit a crime. See *State v. Sanders*, 310 Kan. 279, Syl. ¶ 5, 445 P.3d 1144 (2019) ("The suspicion must have a particularized and objective basis and be something more than a suspicion or hunch."). Today, for purposes of civil liability, the majority scraps this objective standard and sets the new bar somewhere below even a gut feeling. For that reason, I dissent.

The majority's premise is that an officer who detains someone is immune from civil liability under the Kansas Tort Claims Act because of the discretion the officer exercises in deciding *whether* to investigate crime and *how to* do to it, even if the "how to" part includes breaking the law. This makes little sense. See *Hopkins v. State*, 237 Kan. 601, 610, 702 P.2d 311 (1985) (noting "'discretion'" as used in K.S.A. 75-6104[e] can be understood as "the privilege to act unhampered by legal rule"). If the Legislature wanted law enforcement to be immune from civil liability even when violating the law, it could have said so by broadening the statutory definition of "discretion" in K.S.A. 75-6104(e) from its established legal meaning. But the Legislature has not done that, so the majority engages in judicial policy making to get there.

By enacting K.S.A. 22-2402(1), the Legislature fixed an officer's duty when deciding whether to detain someone without making an arrest. That statute provides:

> "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." (Emphasis added.)

The key here is the Legislature's use of the term "reasonably suspects." And this requirement to have reasonable suspicion before detaining someone without arresting them resides not only in K.S.A. 22-2402(1) but also the Fourth Amendment to the United States Constitution. Yet to get to its desired policy result, the majority twists this case into a rhetorical pretzel by muddling two key distinct questions: whether an officer can investigate a person who happens to be in a public place; and whether that officer can forcibly stop the person while doing that investigation. And by clouding over things in this way, the majority misses the real question: whether Kansas law enforcement officers have a privilege to simply detain anyone in public unhampered by legal rule. And as to that, our statute, the Fourth Amendment, and

the caselaw collectively set a clearly defined, mandatory standard for an officer's decision to detain. See *State v. Cash*, 313 Kan. 121, 130, 483 P.3d 1047 (2021) ("The reasonable suspicion analysis requires use of an objective standard based on the totality of the circumstances, not a subjective standard based on the detaining officer's personal belief.").

An even stranger reality here is that every member of this court agrees these officers did not meet our well-established, reasonable suspicion standard when forcibly detaining Schreiner during this encounter. *Schreiner v. Hodge*, 315 Kan. at 27. The majority correctly notes Officer Hodge "never articulated anything about Schreiner or Schreiner's vehicle *that led him to believe Schreiner was committing any crimes*." (Emphasis added.) 315 Kan. at 32. And as far as I'm concerned, that's the ballgame. The officer admits nothing about this encounter led him to believe Schreiner was committing *any* crime. Making this point even clearer, the majority continues:

> "Hodge stated that nothing about Schreiner's vehicle made him believe it had been involved in a crime. Hodge also said he had not witnessed Schreiner commit any crimes, and that Schreiner did not fit the description of any suspects from any known crimes. And while Hodge found Schreiner's behavior to be 'evasive' and 'erratic,' and perceived Schreiner as 'nervous,' *he never connected this to criminal activity*." (Emphasis added.) 315 Kan. at 33.

So if the officer had nothing articulable connecting Schreiner to criminal activity, can we not also agree the best he had was maybe a hunch? And if that is so, surely we can agree that based on the officer's training and experience he would know, or reasonably should have known, he had no business preventing Schreiner from moving on without something more to go on. Yet, the officer stopped him anyway, assisted by other officers who the majority holds also lacked any objective, articulable basis to reasonably believe Schreiner committed, was committing, or was about to commit a crime. 315 Kan. at 34. How is this anything other than an unlawful detention?

Our full court also understands the statutory exception to civil liability does not apply when a clearly defined mandatory duty or guideline exists, which it does in this case because that mandatory duty exists under statute, caselaw, and the Constitution. 315 Kan. at 46. So if the standard is so clear that every member of this court sees it, and we also know these officers were trained and experienced in appropriate police procedures, how can it be said there is no recognizable, clearly defined

mandatory duty when deciding entitlement to discretionary function immunity under K.S.A. 75-6104(e)? It is not enough to simply say the investigating officer might in good faith get it wrong sometimes because an officer who acts in good faith is typically shielded from individual liability already through the KTCA's indemnity provisions. See K.S.A. 75-6109. And one would think a governmental entity's potential civil liability would operate as a beneficial deterrent for public agencies to ensure officers receive appropriate training on something as fundamental as detaining citizens on public streets.

Even so, the majority holds "an officer's decision whether and how to investigate a crime, along with his or her reasonable suspicion determination, require the type of policy-based judgments the Legislature intended to insulate from tort liability." 315 Kan. at 43. I disagree. To the contrary, it is an assessment whether the facts confronting an officer are objectively sufficient to raise suspicion of criminal conduct. And this assessment is one that courts routinely review, including as we have done in this very case. The point is simply this: the Legislature has already decided law enforcement does not have discretionary power to detain an individual in a public place based on some subjective notion of suspicion. And this is not open to debate. Our law is as plain as it can be—officers who have a hunch about possible criminal activity have no legal authority or discretion to just stop someone out in public. Their suspicion must be *objectively* reasonable.

The simple conclusion should be that the "exercise of 'discretion' by the officer in the sense of choosing among alternative courses of action does not automatically trigger official immunity." *Downs v. United States*, 522 F.2d 990, 998 (6th Cir. 1975). And given the certainty attached to the officer's duty in these circumstances, the majority's concerns about courts second-guessing an officer's in-the-field decision making are blind to reality. Courts have been doing this since the reasonable suspicion standard appeared in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). And the consequences when the officer is wrong are often far more serious than potential civil liability exposure because criminal convictions get reversed and crucial evidence gets suppressed based on this judicial review. See, e.g., *State v. Jimenez*, 308 Kan. 315, 420 P.3d 464 (2018) (upholding suppression of drug-trafficking evidence discovered during a traffic stop that was improperly prolonged without reasonable suspicion).

Indeed, even in the civil liability context, many federal courts have held there is no liability shield under the Federal Tort Claims Act's discretionary function immunity clause for alleged violations of constitutional rights. *Loumiet v. United States*, 828 F.3d 935, 943-44 (D.C. Cir. 2016) ("At least seven circuits, including the First, Second, Third, Fourth, Fifth, Eighth, and Ninth, have either held or stated in dictum that the discretionary-function exception does not shield government officials from FTCA liability when they exceed the scope of their constitutional authority," and "[t]o this court's knowledge, only the Seventh Circuit has held otherwise."); e.g., *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) (no discretionary function immunity when plaintiff alleged unconstitutional policies because "governmental conduct cannot be discretionary if it violates a legal mandate"); *Muhammad v. United States*, 884 F. Supp. 2d 306, 313 (E.D. Pa. 2012) ("[I]t is well established that the discretionary function exception does not apply to constitutional violations.").

We all agree Officer Hodge did not have a particularized and objective basis to suspect Schreiner was committing, had committed, or was about to commit a specific crime. Hodge even told Schreiner he was free to leave, but then stopped him by grabbing his arm when Schreiner did what Hodge said he could do. These officers were not performing a discretionary function as envisioned by the Legislature because their conduct violated a clearly defined, mandatory duty requiring reasonable suspicion to detain a person. And without any recognizable standard for accountability, those inclined to do so will do as they please. I would reverse the Court of Appeals decision and the district court's grant of summary judgment.

No. 122,680

STATE OF KANSAS, *Appellee*, v. ROBERT GLENN TERRELL, *Appellant*.

(504 P.3d 405)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Classification of Prior Offenses for Criminal History—Statutory Interpretation—Appellate Review.* The classification of prior offenses for criminal history purposes involves statutory interpretation, which presents a question of law subject to unlimited appellate review.

2. SAME—*Prior Convictions under KSGA—Classification as Person or Nonperson at Time New Crime Committed.* Under the Kansas Sentencing Guidelines Act, K.S.A. 2020 Supp. 21-6801 et seq., all prior convictions, whether out-of-state, pre-guidelines, or amended post-guidelines, are to be classified as person or nonperson as of the time the new crime is committed.

Review of the judgment of the Court of Appeals in 60 Kan. App. 2d 39, 488 P.3d 520 (2021). Appeal from Cowley District Court; NICHOLAS ST. PETER, judge. Opinion filed February 18, 2022. Judgment of the Court of Appeals vacating the judgment of the district court is reversed. Judgment of the district court is affirmed.

Kristen B. Patty, of Wichita, argued the cause and was on the briefs for appellant, and *Robert G. Terrell*, appellant pro se, was on a supplemental brief.

Natalie Chalmers, assistant solicitor general, argued the cause, and *Ian T. Otte,* deputy county attorney, and *Derek L. Schmidt*, attorney general, were with her on the briefs for appellee.

The opinion of the court was delivered by

ROSEN, J.: Robert Glenn Terrell disputes how his criminal history was calculated for sentencing purposes following his plea of guilty to aggravated escape from custody. The Court of Appeals vacated the sentence, and this court granted review.

Factual Background

On November 19, 2018, Terrell entered a plea of guilty to one count of aggravated escape from custody under K.S.A. 2020 Supp. 21-5911(b)(1)(G), a severity level 5 nonperson felony. Terrell's presentence investigation report included an offender registration

violation conviction from February 25, 2005, for a crime committed in 2004; the report counted it as a level 10 person felony. Although the registration violation was classified as a nonperson felony at the time of Terrell's guilty plea in 2005, the presentence report reclassified it as a person felony under *State v. Keel*, 302 Kan. 560, 357 P.3d 251 (2015).

At his sentencing hearing, Terrell, who was representing himself but had standby counsel, objected to the presentence investigation report's reclassification of the 2005 conviction from nonperson to person felony status. He argued that *Keel* controlled the issue in his favor. The court rejected his argument, stating from the bench:

> "Regarding the issue of whether or not his prior conviction for offender registration should be scored as a person or nonperson felony, the court would find that at the time that Mr. Terrell was convicted, this crime was scored as a nonperson felony, as is indicated in the PSI. *State v. Keel* provided that an offense should be scored as a felony, based upon how it would be determined at the time of the current crime of conviction was committed. In this particular instance, the violation of the Offender Registration Act would be viewed as a person felony as of the day that Mr. Terrell left the Department of Corrections without authorization. And, therefore, the Court would follow the *Keel* case in this matter and find that it should be scored as a person felony at this time."

The court then imposed a sentence that was a substantial downward durational departure: instead of the standard guidelines sentence of 120 months, the court sentenced Terrell to a prison term of 40 months, with 24 months' postrelease supervision.

Terrell's standby counsel filed a timely notice of appeal to the Court of Appeals. On February 5, 2019, Terrell filed a motion pro se to withdraw his notice of appeal. On the same day, he filed a motion to correct an illegal sentence, asserting, among other claims, that the sentencing court illegally reclassified his 2005 conviction and sentence from nonperson to person. After the trial court denied this motion, Terrell filed further motions seeking reconsideration and additional requests to correct an illegal sentence. He eventually took an appeal from an order denying one of his repeated motions to correct.

In a published opinion, the Court of Appeals vacated the reclassification of Terrell's criminal history. *State v. Terrell*, 60 Kan.

App. 2d 39, 488 P.3d 520 (2021). This court granted the State's petition for review. On September 17, 2021, Terrell was released on post-release supervision, but the appeal remains subject to review by this court.

Classification of the 2005 Conviction

The classification of prior offenses for criminal history purposes involves statutory interpretation, which presents a question of law subject to unlimited appellate review. *State v. Wetrich*, 307 Kan. 552, 555, 412 P.3d 984 (2018).

Terrell argues that his 2005 conviction for a crime he committed in 2004 should be scored as a nonperson felony, which is how it was designated at the time he committed that crime. The State argues that the 2005 conviction should be scored as a person felony because that is how that crime is now designated. The Kansas Sentencing Guidelines Act, K.S.A. 2020 Supp. 21-6801 et seq., does not explicitly inform the courts whether the score at the time of the original sentence or the score at the time of the new sentence should govern.

The district court, the Court of Appeals, and the parties disagree about whether and how to apply this court's decision in *State v. Keel*, 302 Kan. 560, to Terrell's situation.

The failure-to-register statute originally designated the crime as a nonperson felony, but the statute was later amended to make the crime a person felony. K.S.A. 2004 Supp. 22-4903 provided: "Any person who is required to register as provided in this act who violates any of the provisions of this act . . . is guilty of a severity level 10, nonperson felony." The statute was amended in 2016 to read that a registration violation "shall be designated as a person or nonperson crime in accordance with the designation assigned to the underlying crime for which the offender is required to be registered under the Kansas offender registration act." K.S.A. 2016 Supp. 22-4903(c)(1). Because the underlying crime was rape—a person felony—Terrell's failure to register would also become a person felony.

A timeline may help clarify the issue:

2002: Terrell pleads guilty and is convicted of rape.

2004: Terrell commits an offender registration violation related to the rape conviction.

2005: Terrell pleads guilty and is convicted of the offender registration violation. The violation was designated a nonperson felony.

2015: The Kansas Supreme Court issues *State v. Keel* addressing how to score pre-sentencing guidelines convictions.

2016: The offender registration statute is amended to designate a registration violation involving rape as a person felony.

2018: Terrell is charged with and pleads guilty to aggravated escape from custody.

2019: Terrell is sentenced based on a determination that his 2004 violation is now scored as a person felony.

2021: The Court of Appeals determines that the district court improperly transformed the offender registration conviction from a nonperson into a person felony.

In *Keel*, this court addressed the problem of how to score convictions that preceded the sentencing guidelines act and therefore lacked person or nonperson designations. The resolution reached in *Keel* was to carry the undesignated pre-KSGA conviction forward in time to when the current crime of conviction was committed and apply the statutory designation in place at that time: "Thus, the classification of a prior conviction or juvenile adjudication as a person or nonperson offense for criminal history purposes under the KSGA is determined based on the classification in effect for the comparable Kansas offense at the time the current crime of conviction was committed." 302 Kan. at 590. This plain language supports the district court's decision to consider the 2004 violation to be a person felony.

Although the district court understood *Keel* to reclassify a prior conviction according to whatever its classification was at the time of the commission of the new crime, the Court of Appeals held that *Keel* described a different set of circumstances and did not apply to Terrell's situation. In a broad sense, the Court of Ap-

peals panel was quite correct in distinguishing *Keel*; *Keel* addressed the kind of problem with which this court has wrestled over the past two decades—how sentencing courts are to classify crimes that were committed without an explicit person/nonperson designation, such as crimes committed in other states or crimes committed before 1993.

In *Keel*, the issue was how to classify crimes committed before the sentencing guidelines were enacted in 1993 in the absence of express statutory direction. *Keel* was decided to address a specific problem—pre-guidelines felonies that did not fit the new sentencing procedures. See *Keel*, 302 Kan. at 592 (Johnson, J., concurring in part and dissenting in part) (opinion "eliminates the troublesome circumstance of Kansas having no person felonies prior to the enactment of the Kansas Sentencing Guidelines Act").

But the issue in the present case is different. A common-law remedy for a missing classification is not needed here. The *Keel* court explained the special circumstances of that decision, circumstances that do not apply to Terrell's situation:

> "We start out by acknowledging that there is no explicit language in the KSGA telling courts precisely how to classify in-state or out-of-state pre-KSGA convictions or juvenile adjudications as person or nonperson offenses for criminal history purposes. This means we cannot merely interpret text whose meaning and effect are plain." *Keel*, 302 Kan. at 572.

The Court of Appeals panel relied on several principles to conclude that Terrell's 2004 conviction should not be reclassified as a person felony:

- The doctrine of *expressio unius est exclusio alterius*—when something is expressly included in one place, the failure to include it elsewhere implies that the thing is not intended to be included elsewhere. The court looked to four statutory provisions that expressly make the classification of a prior conviction count as of "the date the current crime of conviction was committed." These are: pre-KSGA Kansas adult felony convictions under K.S.A. 2020 Supp. 21-6810(d)(2); pre-KSGA juvenile felony adjudications under K.S.A. 2020 Supp. 21-6810(d)(3)(B); pre-KSGA Kansas adult misdemeanor convictions under K.S.A. 2020 Supp. 21-6810(d)(6); and

prior out-of-state convictions and juvenile adjudications under K.S.A. 2020 Supp. 21-6811(e)(3). Those specific statutory directives are lacking in the current case, implying that the Legislature did not intend to require or allow reclassification of post-KSGA convictions. *Terrell*, 60 Kan. App. 2d at 44-45.

- K.S.A. 2020 Supp. 21-6810(d)(8). This statute addresses convictions for crimes under statutes that have been repealed: "Prior convictions of a crime defined by a statute that has since been repealed shall be scored using the classification assigned at the time of such conviction." The Court of Appeals concluded that the same directive should apply to post-KSGA statutes that are subsequently amended to change the person category designation. 60 Kan. App. 2d at 46.

- The rule of lenity. When a criminal statute is silent or ambiguous on a matter, the rule of lenity applies to mandate that the statute be construed in favor of the accused. *State v. Reese*, 300 Kan. 650, 653, 333 P.3d 149 (2014). Any uncertainty about what the Legislature intended by its directives for classifying pre-KSGA convictions, repealed post-KSGA convictions, and amended post-KSGA convictions should operate in a defendant's favor. 60 Kan. App. 2d at 46.

The court concluded:

> "A reasonable interpretation of K.S.A. 2020 Supp. 21-6810(d)(8) reflects a legislative intent to classify in-state convictions under subsequently repealed statutes as person or nonperson offenses based on the classification in effect at the time of the prior conviction. But we find nothing in the KSGA reflecting a legislative intent to *reclassify* prior post-KSGA convictions based on subsequent amendments to existing statutes." 60 Kan. App. 2d at 47.

Although we recognize that the Court of Appeals supported its decision with well-reasoned analysis, we are ultimately persuaded that the State's position is more tenable. We will discuss each of the Court of Appeals points in turn.

The doctrine of *expressio unius est exclusio alterius*: The statutory scheme was silent with respect to scoring pre-guidelines convictions when this court decided *Keel* and *State v. Murdock*, 299 Kan. 312, 323 P.3d 846 (2014), *overruled by Keel*, 302 Kan.

at 581. The *Keel* court did not decide that the guidelines act simply did not apply to pre-guidelines sentences under the doctrine of *expressio unius est exclusio alterius*; instead, the court extended the statutory scheme, filling in the missing directives on how to score pre-guidelines crimes. This common-law extension was codified in the statutes on which the Court of Appeals based its *expressio unius* analysis.

Legislative intentions: The sentencing guidelines were enacted "'to standardize sentences so that similarly situated offenders would be treated the same, thus limiting the effects of racial and geographic bias.'" *Keel*, 302 Kan. at 574 (quoting *State v. Paul*, 285 Kan. 658, 667, 175 P.3d 840 [2008]). "[U]sing the date of the current crime removes the permanent effect of how prior crimes are treated for purposes of calculating criminal history, thereby providing a mechanism for sentences to reflect ever-evolving sentencing philosophies and correction goals." 302 Kan. at 588. Updating the criminal history scores as the Legislature chooses to amend them is consistent with a legislative intention to score crimes in an evolving scheme, and it "removes the permanent effect of how prior crimes are treated," consistent with the philosophy of *Keel* and of revised legislative intentions. See 302 Kan. at 588.

Inconsistent results: The Court of Appeals decision produces inconsistent or illogical results. A defendant convicted of a comparable out-of-state crime that Kansas has changed from a nonperson to a person crime will be scored as a person crime. Another defendant convicted of an in-state crime that is subsequently changed from a nonperson to a person crime will be scored as a nonperson crime. The result is that an individual committing essentially the same criminal conduct may receive different criminal history scores, depending on whether the crime was committed in Kansas or in a different state.

K.S.A. 2020 Supp. 21-6810(d)(8): Repeal is not the same as reclassification. The wholesale repeal and recodification of much of the criminal code in 2011 would have the effect of freezing many older convictions in their pre-guideline status, no matter how they were classified under guidelines statutes.

The rule of lenity. Although this rule would operate to protect Terrell, it could operate against a defendant whose crime has been reclassified from person to nonperson, such as identity theft. See *Keel*, 302 Kan. at 588. Registration offenses have been classified as nonperson in all situations (K.S.A. 2004 Supp. 22-4903), then as person in all situations (K.S.A. 2006 Supp. 22-4903), and now as person or nonperson, depending on the underlying offense (K.S.A. 2020 Supp. 22-4903[c]). The Court of Appeals opinion would help some defendants and harm other defendants; therefore, it is not a rule of lenity.

While recognizing that *Keel* is simply dicta with respect to post-guidelines crimes, it nevertheless provides guidance for how to calculate criminal histories when the post-guideline classifications have changed over time. *Keel* noted that an advantage of scoring based on the date the *current* crime of conviction was committed provides a means to reflect "ever-evolving sentencing philosophies and correction goals." 302 Kan. at 588.

To adopt Terrell's position would mean applying a judicial construction to a narrow topic on which the Legislature was silent, and that construction would be at odds with the reasoning in *Keel*. We conclude that the better understanding of the statutory sentencing scheme requires that all prior convictions, whether out-of-state, pre-guidelines, or amended post-guidelines, be classified as person or nonperson as of the time the new infraction is committed.

The judgment of the Court of Appeals vacating the judgment of the district court is reversed. The sentence imposed by the district court is affirmed.

No. 123,831

STATE OF KANSAS, *Appellee*, v. RAMON JUILIANO, *Appellant*.

(504 P.3d 399)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Definition of Illegal Sentence*. An illegal sentence is defined as a sentence imposed by a court without jurisdiction, a sentence that does not conform to the applicable statutory provision, or a sentence ambiguous about the time and manner to be served.

2. SAME—*Statutory Authority for Courts to Correct Illegal Sentence at Any Time*. Courts have statutory authority to correct an illegal sentence at any time, so an illegal sentence issue may be considered for the first time on appeal.

3. SAME—*Sentence Meaning Derived from Entire Sentencing Hearing*. The meaning of a sentence is derived from the context of the entire sentencing hearing.

4. SAME—*Orally Pronounced Sentence Controls if Differs from Sentence in Journal Entry.* Where the sentence announced from the bench differs from the sentence described in the journal entry, the orally pronounced sentence controls.

Appeal from Wyandotte District Court; J. DEXTER BURDETTE, judge. Opinion filed February 18, 2022. Affirmed.

Joseph A. Desch, of Law Office of Joseph A. Desch, of Topeka, was on the brief for appellant.

Daniel G. Obermeier, assistant district attorney, and *Mark A. Dupree Sr.*, district attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

STANDRIDGE, J.: Ramon Anthony Juiliano appeals the district court's denial of his motion to correct an illegal sentence. A jury convicted Juiliano of criminal solicitation to commit first-degree murder and first-degree murder in 1998. The court sentenced Juiliano to life in prison without the possibility of parole for 40 years (hard 40). In 2014, Juiliano moved to correct an illegal sentence under K.S.A. 22-3504. The district court summarily denied his motion. Juiliano appeals,

claiming his hard 40 sentence is illegal because (1) the court orally imposed a sentence at the sentencing hearing that did not conform to the appropriate statutory language; (2) the court erred by finding that he committed the murder in an especially heinous, atrocious, or cruel manner; and (3) the court erred by failing to reduce to writing the statutory criteria it relied on to impose the hard 40 sentence, as required by the relevant sentencing statutes. On Juiliano's first claim, we find the sentence orally imposed by the court at the sentencing hearing conformed to the appropriate statutory language and that Juiliano is serving a legal sentence. On Juiliano's second and third claims, we find K.S.A. 22-3504 is an improper vehicle to challenge the procedural errors alleged. For these reasons, we affirm.

FACTS

In November 1997, a jury convicted Juiliano of criminal solicitation to commit first-degree murder and premeditated first-degree murder in the shooting death of Jack West. The State moved for a hard 40 sentence under K.S.A. 1996 Supp. 21-4635, alleging Juiliano caused West "serious mental anguish" in the days before the murder. The State relied on the following evidence: Juiliano had been stalking West before the murder; a masked gunman assaulted West in his driveway three weeks before the murder and, on the night of the murder, Juiliano killed West under similar circumstances; and Juiliano plotted the murder in advance and even tried to hire another person to do it about two months before the homicide.

Juiliano opposed the motion. He relied on *State v. Cook*, 259 Kan. 370, 913 P.2d 97 (1996), *superseded by statute as stated in State v. McLinn*, 307 Kan. 307, 409 P.3d 1 (2018), to claim shooting deaths seldom warrant a finding that the crime was committed in a heinous, atrocious, or cruel manner. He also asserted none of the recognized exceptions from *State v. Brady*, 261 Kan. 109, 929 P.2d 132 (1996), *abrogation recognized by State v. Jones*, 283 Kan. 186, 151 P.3d 22 (2007), or *State v. Alford*, 257 Kan. 830, 896 P.2d 1059 (1995), applied. Juiliano claimed he did not prolong the shooting or inflict any sort of extreme mental anguish before death. He argued that the case was not unusual as compared to other shooting deaths and, for that reason, the court could only impose a hard 25 sentence.

The district court held a sentencing hearing in February 1998. The court ultimately granted the State's motion to impose a hard 40 sentence based on its finding that Juiliano committed the murder in an especially heinous, atrocious, and cruel manner. Along with the hard 40 sentence, the court imposed a consecutive 49-month sentence for the criminal solicitation charge.

Relevant to this appeal, the sentencing journal entry filed after the sentencing hearing failed to specify the specific statute under which the court imposed the hard 40 sentence. The journal entry also failed to identify which aggravating factors the court relied on to justify the hard 40 sentence. But the journal entry clarified multiple times that the court was imposing a hard 40 sentence and that it was granting the State's motion to impose a hard 40 sentence.

Juiliano appealed his convictions and sentence to this court. On direct appeal, he asserted that the district court committed reversible error in answering a jury question and challenged the sufficiency of the evidence supporting his convictions. We affirmed Juiliano's convictions and sentence. *State v. Juiliano*, 268 Kan. 89, 94-98, 991 P.2d 408 (1999).

Juiliano filed a pro se motion to correct an illegal sentence. In it, he alleged his hard 40 sentence was illegal because the district court imposed it under a statutory procedure found to be unconstitutional under *State v. Soto*, 299 Kan. 102, 322 P.3d 334 (2014), and *Alleyne v. United States,* 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). He claimed his hard 40 sentence was unconstitutional because it allowed the sentencing judge, instead of a jury, to find additional facts that increased his sentence. Although *Soto* and *Alleyne* were decided after he was sentenced, Juiliano asked the district court to retroactively apply their holdings. The district court denied Juiliano's motion, finding *Soto* and *Alleyne* could not be retroactively applied to cases finally decided before those decisions were rendered. Juiliano appeals.

ANALYSIS

Whether a sentence is illegal is a question of law subject to de novo review. *State v. Redding*, 310 Kan. 15, 23, 444 P.3d 989 (2019). An illegal sentence is defined as: (1) a sentence imposed by a court without jurisdiction; (2) a sentence that does not conform to the applicable statutory provision, either in character or

the term of authorized punishment; or (3) a sentence that is ambiguous with respect to the time and manner in which it is to be served. K.S.A. 2020 Supp. 22-3504(c)(1); *State v. Gilbert*, 299 Kan. 797, 801, 326 P.3d 1060 (2014).

When a district court summarily denies a motion to correct an illegal sentence under K.S.A. 22-3504, this court exercises de novo review of that decision because it has the same access to the motions, records, and files as the district court. 299 Kan. at 801. A K.S.A. 22-3504 motion may be summarily denied without the appointment of counsel when the motion, files, and records of the case conclusively show the defendant has no right to relief. But a district court is statutorily required to appoint an attorney to represent an indigent defendant when the K.S.A. 22-3504 motion presents a substantial question of law or triable issue of fact. *State v. Laughlin*, 310 Kan. 119, 121, 444 P.3d 910 (2019).

To the extent that these issues involve statutory interpretation, this court also exercises unlimited review over such questions. *State v. Jamerson*, 309 Kan. 211, 214, 433 P.3d 698 (2019).

Juiliano argues that the district court erred in summarily denying his motion to correct an illegal sentence. He concedes his claim that *Soto* and *Alleyne* should be retroactively applied is now foreclosed by our decision in *State v. Brown*, 306 Kan. 330, Syl. ¶¶ 1, 2, 393 P.3d 1049 (2017) (holding that motions to correct illegal sentence were not appropriate vehicle to challenge sentence imposed in violation of *Alleyne* and recognizing *Alleyne* only applies prospectively). Instead, Juiliano raises three new arguments to support his illegal sentence claim: (1) the court orally imposed a sentence at the sentencing hearing that did not conform to the appropriate statutory language; (2) the court erred by finding that he committed the murder in an especially heinous, atrocious, or cruel manner; and (3) the court erred by failing to reduce to writing the statutory criteria it relied on to impose the hard 40 sentence.

The State argues Juiliano abandoned these arguments because he did not properly explain why we should consider them for the first time on appeal. Even so, courts have a statutory duty to correct an illegal sentence at any time. Although Juiliano failed to argue one of the recognized exceptions to the preservation rule in his brief, this court can address the illegal sentence issues for the first time on appeal. See *State*

v. Sartin, 310 Kan. 367, 375, 446 P.3d 1068 (2019); *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019).

1. *The district court's oral pronouncement of sentence*

Juiliano first argues that his sentence, as pronounced from the bench, is illegal because it does not conform to the appropriate statutory language. He challenges the following wording in the district court's oral pronouncement at sentencing:

> "Based upon these reasons, I am granting the State's motion for the hard 40 sentence on the first degree premeditated murder case. *The defendant will be sentenced* over into the custody of the Department of Corrections on the one count of murder, K.S.A. 21-3401, a person felony off grid, *to the hard 40 sentence of life without parole.*" (Emphases added.)

Juiliano argues the italicized language establishes the judge sentenced him to a "life without parole" sentence instead of a true hard 40 sentence. Because a life without parole sentence does not conform to the statutory authorized provisions in K.S.A. 1996 Supp. 21-4635 and 21-4638, he argues his sentence is illegal.

The court sentences a person convicted of a crime in accordance with the sentencing provisions in effect when the person committed the crime. *State v. Overton*, 279 Kan. 547, 561, 112 P.3d 244 (2005). The applicable statutes for sentencing in effect when Juiliano committed his crimes were K.S.A. 1996 Supp. 21-4635 and 21-4638.

K.S.A. 1996 Supp. 21-4635(a) provides that if a defendant is convicted of premeditated first-degree murder, the court must determine whether the defendant is required to serve a hard 40 sentence, or another sentence as provided by law. Subsection (b) outlines the method for the sentencing court to determine if any aggravating or mitigating factors exist. Subsection (c) explains that if the sentencing court finds one or more aggravating factors exist and those factors are not outweighed by any existing mitigating circumstances, the court must impose the hard 40 sentence described in K.S.A. 1996 Supp. 21-4638.

K.S.A. 1996 Supp. 21-4638 states:

> "When it is provided by law that a person shall be sentenced pursuant to this section, *such person shall be sentenced to imprisonment for life* and shall not be eligible for probation or suspension, modification or reduction of sentence. In addition, *a person sentenced pursuant to this section shall not be eligible for*

parole prior to serving 40 years' imprisonment, and such 40 years' imprisonment shall not be reduced by the application of good time credits." (Emphases added.)

Juiliano's nonconforming "life without parole" argument is virtually identical to the one made in *State v. Hill*, 313 Kan. 1010, 1012, 492 P.3d 1190 (2021). In that case, the sentencing judge ordered Hill to serve a hard 50 sentence after he was convicted of capital murder. At the sentencing hearing, the judge kept referring to the sentence for capital murder as a term of "life imprisonment without possibility of parole" even though both parties continued clarifying that the State was seeking a hard 50 sentence for the capital murder conviction. In pronouncing the hard 50 sentence, the judge specifically ordered Hill to serve a "'sentence of life imprisonment without possibility of parole.'" 313 Kan. at 1012. The parties understood the pronouncement to mean that Hill was to serve a hard 50 sentence, and the sentencing journal entry later reflected that he was to serve a hard 50 sentence. On appeal, Hill asserted for the first time that his sentence was illegal because the district court improperly pronounced a life without parole sentence, a sentence that was not statutorily authorized at the time of the pronouncement.

This court was not persuaded by Hill's argument. We pointed out that in looking narrowly at the words Hill focused on, we would agree that the sentencing judge failed to mention the mandatory minimum 50-year term. But when looking to the entire context of the sentencing hearing, it was "sufficiently clear to everyone present that Hill was to receive the mandatory hard 50 sentence and they acted accordingly." 313 Kan. at 1015. After explaining the context in greater detail, we determined, "[T]he meaning of the sentence pronounced from the bench is the sentence reflected in Hill's journal entry. There is ultimately no ambiguity and Hill is serving a legal sentence." 313 Kan. at 1016.

Applying the principle from *Hill* to this case—i.e., evaluating the meaning of a sentence based on the context of the entire sentencing hearing—we find the district court imposed a hard 40 sentence. While the court could have used better wording, the context makes it clear the court ordered Juiliano to serve a hard 40 sentence. The State filed a motion specifically requesting a hard 40

sentence under K.S.A. 1996 Supp. 21-4638. Defense counsel responded, arguing that the hard 40 sentence should not apply in this case. At the sentencing hearing, before the parties' arguments, the court noted on the record that it had read through the State's hard 40 sentence motion and Juiliano's response. This readily establishes the court understood the State was seeking the hard 40 sentence as outlined in K.S.A. 1996 Supp. 21-4638. Throughout the hearing, the prosecutor and defense counsel repeatedly referred to the proposed sentence as the hard 40 sentence. The prosecutor also consistently asked the court to "impose the hard 40" sentence. In making its finding, the court made clear it was granting the State's motion for the "hard 40 sentence on the first degree premeditated murder case." All of this came before the judge finally declared, "The defendant will be sentenced . . . to the hard 40 sentence of life without parole." We find no ambiguity in the sentence pronounced, which conformed to K.S.A. 1996 Supp. 21-4638.

2. *The aggravating circumstance*

Juiliano next argues that the district court erred by imposing a hard 40 sentence because it improperly determined he committed the murder in an especially heinous, atrocious, or cruel manner. See K.S.A. 1996 Supp. 21-4635(b); K.S.A. 1996 Supp. 21-4636(f). He asserts the district court inappropriately combined the facts of the crime of conviction with a finding that Juiliano was the masked gunman who threatened West with a gun outside his home three weeks before the murder, an incident never charged. Juiliano argues the statutory language of K.S.A. 1996 Supp. 21-4636(f) prohibited the court from considering the prior uncharged incident—specifically, the provision limits consideration of the aggravating factor *only* to the crime of conviction and not any other unrelated and uncharged circumstances.

Juiliano's argument fails based on our court's holding in *State v. Peirano*, 289 Kan. 805, 217 P.3d 23 (2009). *Peirano* presented almost identical circumstances to the case here. Peirano was convicted in 1994 of two counts of first-degree murder and sentenced to serve two concurrent hard 40 life sentences. In imposing the hard 40 sentences, the sentencing court found an aggravating fac-

tor existed: Peirano committed the murders in an especially heinous, atrocious, or cruel manner. Thirteen years later, he moved to correct an illegal sentence arguing that the district court erred in finding that the especially heinous, atrocious, or cruel aggravating factor applied.

Before addressing the issue, we determined that a motion to correct an illegal sentence under K.S.A. 22-3504(1) was the improper vehicle for challenging these kinds of alleged procedural errors. The court explained:

> "When, for example, a trial court failed to permit a defendant to offer argument in mitigation of sentence, the sentence was not illegal, because the sentencing court had jurisdiction and the sentences imposed were within the applicable statutory limits. *State v. Heath,* 285 Kan. 1018, 1019-20, 179 P.3d 403 (2008) (citing *State v. Mebane,* 278 Kan. 131, 134-35, 91 P.3d 1175 [2004]); see also *Trotter v. State,* 288 Kan. 112, 126-27, 200 P.3d 1236 (2009) (claim that multiple sentences arose from single wrongful act and violated Double Jeopardy Clause does not establish that sentence is illegal); *State v. Mitchell,* 284 Kan. 374, 377, 162 P.3d 18 (2007) (definition of illegal sentence does not encompass violations of constitutional provisions); *State v. Harp,* 283 Kan. 740, 744, 156 P.3d 1268 (2007) (sentence violating identical offense doctrine is not an illegal sentence within meaning of K.S.A. 22-3504); *State v. Johnson,* 269 Kan. 594, 601, 7 P.3d 294 (2000) (claim that State's comments at sentencing were inconsistent with plea agreement does not render resulting sentence illegal).
>
> "In the present case, Peirano challenges the procedures that the district court followed in applying K.S.A. [1994 Supp.] 21-4635 to his sentence. The sentence itself was authorized by a valid statute, both as to its character and its term, and the sentence was not ambiguous with respect to the time and manner in which it was to be served. The sentence was therefore not illegal under the limited terms of K.S.A. 22-3504, and no reversible error has occurred." *Peirano*, 289 Kan. at 807.

In other words, Peirano did not argue that the sentencing court lacked jurisdiction. He did not argue that the court imposed a sentence that failed to conform to the authorized term in the applicable sentencing statute. He also did not argue that his sentence was not ambiguous as to the time or manner it was to be served. Rather, he challenged the procedure the court followed in imposing the statutorily authorized term—i.e., whether the sentencing court erred in finding the aggravating factor to exist. Because this was a procedural challenge, we ruled that it was inappropriate to address with a motion to correct an illegal sentence. 289 Kan. at 807.

Juiliano, like the defendant in *Peirano*, ultimately challenges the procedure the district court followed in finding that the especially heinous, atrocious, or cruel aggravating factor applied. He does not argue that the sentencing court lacked jurisdiction to impose his sentence. He does not claim that his sentence is ambiguous as to the time or manner it was to be served. Juiliano's sentence was authorized by a valid statute, both as to its character and its term, and the sentence was not ambiguous with respect to the time and manner in which it was to be served. The limited definition of an illegal sentence set forth in K.S.A. 2020 Supp. 22-3504 necessarily forecloses Juiliano's illegal sentence claim based on the district court's aggravated factor finding.

3. *Statutory "in writing" requirements*

Juiliano finally argues that his sentence is illegal because the district court failed to follow the written requirements of K.S.A. 1996 Supp. 21-4635(c) and 21-4638 when it issued the final sentencing journal entry. Juiliano asserts K.S.A. 1996 Supp. 21-4635(c) required the court to specify in the journal entry the aggravating factor it relied on. He also claims that K.S.A. 1996 Supp. 21-4638 required the court to specify he was sentenced under K.S.A. 1996 Supp. 21-4638.

The State correctly counters this argument has no merit. Juiliano does not argue the district court lacked jurisdiction to impose the hard 40 sentence. He does not argue the sentence itself was not statutorily authorized. And he does not challenge his sentence as ambiguous. He simply argues the court failed to reduce certain findings to writing as the statutes required. As we note in the preceding section, the statutory definition of an illegal sentence is a limited one and does not apply to journal entry discrepancies. A sentence in a criminal case is effective at the moment the court pronounces it from the bench. A sentencing judgment does not derive its effectiveness from the sentencing journal entry. The journal entry merely records the sentence imposed. *State v. Phillips,* 289 Kan. 28, 33, 210 P.3d 93 (2009). So if there is a discrepancy between the pronounced sentence and the written journal entry, our court has held that the pronounced sentence controls. *Abasolo v. State,* 284 Kan. 299, 304, 160 P.3d 471 (2007).

Applying that logic here, the sentencing hearing transcript clearly establishes the district court pronounced a hard 40 sentence. The analysis from the first section regarding the context of the entire sentencing hearing is incorporated and applied here. Any discrepancies in the journal entry do not trump that oral pronouncement, and the appropriate remedy for such errors is to file a motion for a nunc pro tunc order. See *State v. Moncla,* 262 Kan. 58, 79, 936 P.2d 727 (1997).

Affirmed.

No. 122,271

STATE OF KANSAS, *Appellee*, v. EMOND S. GULLEY, *Appellant*.

(505 P.3d 354)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Voluntary Manslaughter Instruction—Words Not Legally Sufficient Provocation.* Words alone are not legally sufficient provocation to support a voluntary manslaughter instruction.

2. SAME—*Claim of Prosecutorial Error—Reasonable Inference by Prosecutor.* A prosecutor does not commit prosecutorial error by suggesting a defendant could not have been pressured into falsely inculpating himself or herself during interrogation because he or she did not succumb to the pressures on the witness stand.

3. SAME—*Prohibition of Mandatory Sentences of Life Without Parole for Juvenile Offenders—*Miller v. Alabama *Inapplicable to this Case. Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), prohibits mandatory sentences of life without parole for juvenile offenders. *Miller* does not apply to the aggregate sentence in this case of life with an opportunity for parole after 618 months plus 61 months' imprisonment.

Appeal from Sedgwick District Court; BRUCE C. BROWN, judge. Opinion filed March 4, 2022. Affirmed.

Jacob Nowak, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Lance J. Gillett, assistant district attorney, argued the cause, and *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, were with him on the briefs for appellee.

The opinion of the court was delivered by

PER CURIAM: A jury found Emond S. Gulley guilty of committing first-degree premeditated murder and aggravated robbery in 2018 when he was 15 years old. The court sentenced Gulley to life in prison without possibility of parole for 618 months for the murder conviction and a consecutive 61 months' imprisonment for the robbery conviction. Gulley appeals his convictions and his sentences. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 25, 2018, around 12:30 in the morning, someone shot and killed T.C. Security camera footage from a residence and various businesses shows the shooting and the moments leading

up to the shooting but does not clearly show the identity of the shooter. In this footage, two people walk together through Wichita before eventually arriving at a residence where the shooting occurs. When confronted with still images of the two people walking through Wichita, Gulley initially identified them as himself and T.C. Gulley eventually recanted and told officers he was not the person in the video. Nonetheless, the jury found Gulley guilty based on the following facts.

On March 24, 2018, Gulley was 15 years old. Around 10 or 11 in the morning, he arrived at Paige Selichnow's home in Wichita, Kansas. Sometime that afternoon or evening, three more people arrived at Selichnow's home: T.C.; Tyrek Murrell, a.k.a. Clutch; and A.S.

Around 9 p.m., T.C. and Murrell went outside Selichnow's house to meet Andrew Horton. Horton believed he was there to sell someone a "Ruger nine millimeter E9." Rather than giving Horton money for the gun, Murrell held a firearm to Horton's head and took the 9mm firearm from him. He gave the 9mm to T.C. and the pair went back inside Selichnow's house. Selichnow would later testify that she saw T.C. with a gun inside her house showing it and "clinking" it around.

Sometime after 9 or 10 p.m., A.S. sent a message to some girls asking them to come over. When the girls arrived, T.C., Murrell, and A.S. came out to meet them. Gulley eventually told the girls Selichnow did not want any more people in her house, so the girls left.

Sometime after the girls' visit, T.C. and one of the others left Selichnow's house together and walked through Wichita to a residence at 805 S. Pershing Street. Video surveillance from various businesses and a home security camera show the two walking together. The person with T.C. is wearing a jacket with the words "NIKE SPORTSWEAR" across the back. The pair seem to walk harmoniously until they reach the house on Pershing Street. Then T.C. walks towards the house while the other person walks a few feet in a different direction. The shooter then turns around, walks up briskly behind T.C., pulls something from T.C.'s person, shoots T.C. a number of times, and runs away. T.C. manages to get up and stumble away before the video footage stops.

Jennifer Ruiz lived at 805 S. Pershing. On the night T.C. was killed, she was home with her friend Raneesha Boyd, a.k.a. Nina Washington, and her sister Ariana Flores. Boyd informed Ruiz that T.C. was coming over. Boyd then got in the shower and Ruiz went to sleep. Ruiz awoke to either arguing outside of her window or gunshots. After hearing the gunshots, Ruiz called the police and went outside to find T.C.'s body lying in the grass.

Officers arrived at the scene around 12:45 a.m. on March 25. They attempted CPR but were unable to revive T.C. From the scene, investigators recovered six 9mm bullet casings and several bullet fragments and found impact marks from projectiles.

Following various evidentiary leads, detectives went to Selichnow's house on March 26, 2018, looking for witnesses. Selichnow said there was no one else home and agreed to let them look inside. Detectives found Gulley hiding shirtless in a closet. As Gulley left the house, Selichnow put a jacket around him. Officers later identified it as the Nike jacket the shooter was wearing on the security footage.

On March 28, 2018, officers arrested Gulley and a man named Douglas Florence outside near Selichnow's house. Gulley had the 9mm Ruger in his pocket. Forensic scientists would later determine that the six cartridge cases recovered from the scene of T.C.'s murder were fired from this weapon. Florence was wearing a backpack that had the Nike jacket inside. Florence would later testify that Gulley put the windbreaker in the backpack before the two left Selichnow's house.

When detectives first interviewed Gulley, he told them he had been with T.C., Murrell, and A.S. on the night T.C. was murdered, but that the other three left Selichnow's house and T.C. called him at 12:07 to tell him he was at A.S.'s house. When detectives confronted Gulley with cell phone records and other evidence that put the four of them at Selichnow's house at 12:07 a.m., Gulley changed his story. Gulley told detectives that T.C. had called him while he was in the bathroom and told him he was going to his cousin's house and Gulley decided to walk with him. Gulley told detectives he and T.C. separated at the "C Store," which is two blocks from where the shooting occurred. Detectives showed Gulley a series of photographs from the videos that had captured his

walk with T.C. Gulley identified the two people in the video as himself and T.C. He told detectives that the last image was captured immediately before he and T.C. separated. When a detective told Gulley that the image was taken right before T.C. was shot, Gulley changed his story once more. He told the detective that the people from whom the 9mm was stolen drove up to him and T.C. when they were standing outside of the residence, the two of them ran, Gulley heard gunshots, and T.C. was killed.

The State charged Gulley as a juvenile with first-degree premeditated murder and aggravated robbery. The court ordered Gulley be detained in a juvenile facility.

While Gulley was in detention awaiting further proceedings, the State initiated a second prosecution against him for acts that allegedly occurred while Gulley was detained. The State averred that on June 24, 2018, Gulley lured a corrections officer to his cell and, when she opened his door, Gulley beat her, demanded her keys, and removed her belt and radio. When the officer broke free, Gulley allegedly took her keys and unlocked the door to another juvenile's cell. For these alleged acts, the State charged Gulley as a juvenile with aggravated robbery and battery of a law enforcement officer.

The State eventually moved to prosecute Gulley as an adult in this case and the case stemming from the alleged acts in the detention center. After a hearing during which the court considered evidence from both cases, the court granted the State's motion. Gulley pleaded guilty to the charges against him for the incident at the detention facility and went to trial over the charges stemming from T.C.'s murder.

Gulley testified in his own defense at trial. This testimony differed from what he had previously told detectives. He confirmed that he, T.C., Murrell, and A.S. had been together smoking marijuana at Selichnow's house on the night T.C. was killed. He confirmed that some girls drove over to the house and left after visiting outside. Gulley testified that T.C. had a 9mm that night that T.C. and Murrell had stolen from Horton and that T.C. was keeping it in his pants when he was not waving it around. Gulley said that sometime around 11 p.m. or 12 a.m. T.C. told him he was going to leave and that when Gulley returned from the restroom,

both T.C. and Murrell were gone. He testified that sometime after 12 a.m., Murrell returned to the house alone and told him that T.C. was gone. Gulley said they smoked more marijuana and fell asleep until the next morning. Gulley testified he was not the person with T.C. in the video footage. He said that he lied to detectives when he told them he was the person in the video because his mind had not been "functioning as it should" and he did not want to "snitch" on Murrell.

The jury found Gulley guilty of both charges. The district court held a joint sentencing hearing for the convictions in this case and those stemming from the incident at the detention center. The court concluded Gulley had a criminal history score of "B" based on the convictions from the incident at the jail. Gulley did not object to this score. The court then sentenced Gulley to life without possibility of parole for 618 months for the murder conviction and a consecutive 61 months' in prison for the aggravated robbery. Gulley appealed.

DISCUSSION

Instructional error

Gulley argues the district court should have offered an instruction on voluntary manslaughter-heat of passion.

This court reviews claims of jury instruction errors in a number of steps. First, it considers whether it "'can or should review the issue, i.e., whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal.'" *State v. Holley*, 313 Kan. 249, 253, 485 P.3d 614 (2021). If review is appropriate, this court may decide whether there was error below. To do so, it determines whether the instruction would have been legally and factually appropriate. *Holley*, 313 Kan. at 253-54. This decision is subject to unlimited review. If this court finds error, it decides whether the error was harmless. If the issue was not preserved, reversal is appropriate only if the defendant shows clear error by "'firmly convinc[ing] [this court] the jury would have reached a different verdict had the instruction error not occurred.'" *State v. Buck-Schrag*, 312 Kan. 540, 550, 477 P.3d 1013 (2020) (quoting *State v. Williams*, 308 Kan. 1439, 1451, 430 P.3d 448 [2018]).

Reviewability

Gulley concedes that this claim of error was not properly preserved. He initially requested an instruction on voluntary manslaughter-heat of passion. But, at the instruction conference, the court said it did not see any evidence to support such an instruction and defense counsel replied: "Candidly, Judge, I think the Court has to give any lesser that it believes is applicable. Initially, we requested manslaughter, but based on the facts, I can't in good faith, ask the Court to give the instruction, as it doesn't apply." Based on this withdrawal of the instruction request, Gulley concedes this court's review should be for clear error.

The State takes this one step further. It argues that the court should not consider this issue because Gulley invited any error.

"Under the invited error doctrine, a litigant may not invite error and then complain of that same error on appeal." *State v. Willis*, 312 Kan. 127, 131, 475 P.3d 324 (2020). This court has refused to consider claims of instructional errors under this doctrine when the trial court gave instructions that the defendant requested or agreed to at trial. See *Willis*, 312 Kan. at 131; *State v. Pattillo*, 311 Kan. 995, 1014-15, 469 P.3d 1250 (2020); *State v. Fleming*, 308 Kan. 689, 707, 423 P.3d 506 (2018); *State v. Peppers*, 294 Kan. 377, 393, 276 P.3d 148 (2012).

Gulley argues this case is more like that in *State v. Soto*, 301 Kan. 969, 983-84, 349 P.3d 1256 (2015), where this court concluded the defendant had not invited instructional error. In *Soto*, the State proposed jury instructions for first-degree murder, second-degree intentional murder, and voluntary manslaughter. At the instructions conference, the district court told the parties there was no evidence to support the lesser included offense instructions for second-degree murder or voluntary manslaughter. The parties agreed. On appeal, the defendant argued it was clear error when the court did not instruct on intentional second-degree murder. This court ruled the defendant had not invited any error because "[d]efense counsel made no affirmative request to omit a second-degree murder instruction nor did defense counsel decline an offer by the court to give the instruction." *Soto*, 301 Kan. at 984. The court explained that "[d]efense counsel acquiesced to the trial

judge's ruling rather than requested the instruction not be given." *Soto*, 301 Kan. at 984.

We agree with Gulley. Here, Gulley requested an instruction, and when the court stated that there was no evidence to support the instruction, defense counsel conceded that he could not in good faith ask for the instruction. His acquiescence does not bar him from raising this instructional error on appeal.

Error

Because voluntary manslaughter is a lesser included offense of first-degree murder, it would have been legally appropriate for the court to instruct on voluntary manslaughter in this case. *State v. Gallegos*, 313 Kan. 262, 267, 485 P.3d 622 (2021). We move on to consider whether it would have been factually appropriate.

Voluntary manslaughter-heat of passion is "knowingly killing a human being committed: (1) Upon a sudden quarrel or in the heat of passion." K.S.A. 2020 Supp. 21-5404(a). "The core elements of voluntary manslaughter are an intentional killing and a legally sufficient provocation." *Gallegos*, 313 Kan. at 267. Legally sufficient provocation is provocation that "deprive[s] a reasonable person of self-control and cause[s] that person to act out of passion rather than reason." *Gallegos*, 313 Kan. at 267. This is an objective standard. *Gallegos*, 313 Kan. at 267.

Gulley argues there were facts that suggested whoever killed T.C. did so after a sudden quarrel. He insists there is evidence that T.C. argued with the shooter seconds before T.C. was killed. He points to Jennifer Ruiz' testimony that, prior to hearing gunshots, she thought she heard people arguing. He also avers that the security footage shows T.C. say something to the shooter right before the killing.

Gulley contends this sudden quarrel was legally sufficient provocation because there was no evidence of an ongoing quarrel and the murder happened quickly. He relies on *State v. Uk*, 311 Kan. 393, 400, 461 P.3d 32 (2020), where this court rejected an argument that voluntary manslaughter was factually appropriate because there had been an ongoing quarrel between the victim and defendant and the killing took place over a significant length of time.

The State argues that Gulley misconstrues the evidence. It asserts that Ruiz clarified the argument she thought she heard was a dream. The State also avers that, because the security video has no audio, Gulley is merely speculating when he contends that T.C. said something to the shooter. The State also contends that even if the facts would support a finding that T.C. and Gulley argued before the shooting, words alone do constitute legally sufficient provocation to support a voluntary manslaughter instruction.

We conclude the instruction was not factually appropriate. The parties disagree about whether the evidence shows a sudden quarrel, and for good reason. Neither Ruiz' testimony nor the video clearly indicates whether there was an argument before the shooting. At trial, Ruiz testified:

"I heard arguing outside of my bedroom window. But at the time I was in— I was trying to fall asleep, I was in a deep sleep, so I thought I was dreaming. And then I heard a gunshot, and I think it was more than one, and then I just heard a scream."

When the prosecutor asked her if gunshots were all she heard, she replied, "No, sir . . . I heard arguing, a lot of people arguing, it sounded like a group of people. And that's literally it." But when the prosecutor asked, "You felt like maybe parts of what you were hearing were maybe dreams?" she replied, "Yes, sir." The prosecutor questioned whether the gunshots were what "woke you up or were you already awake when you heard the gunshots?" She answered, "No, that's what woke me up." And the video is grainy and without sound, so it is difficult to tell whether T.C. and the shooter exchange words immediately before the killing.

This evidence does not definitively indicate there was or was not an argument. But, even assuming there was a "sudden quarrel" before the killing, Gulley fails to explain how this quarrel constituted legally sufficient provocation. As the State points out, this court has said that words alone are not legally sufficient provocation. *State v. Stafford*, 312 Kan. 577, Syl. ¶ 2, 477 P.3d 1027 (2020).

Gulley argues that words were not the only provocation. He points to "the suddenness of the quarrel, the brevity of the offense, the lack of ongoing dispute, and the lack of any alternative expla-

nation for the offense." But he has not cited any additional provocation; he has cited evidence that he thinks supports his notion that the quarrel led the shooter to kill T.C. Consequently, Gulley has not overcome this court's holding that words alone are insufficient to constitute legally sufficient provocation.

In the alternative, Gulley asks this court to overrule its holding that words alone are insufficient provocation to support a voluntary manslaughter instruction. He argues that this holding makes heat of passion voluntary manslaughter "superfluous" to imperfect self-defense voluntary manslaughter because "it is difficult to envision an action, sufficiently inflammatory as to cause a witness to that action to lose control of their actions and reason, which is not already encompassed by the imperfect defense of self, another, or property theory."

This argument is unpersuasive. Gulley ignores a significant difference between voluntary manslaughter and imperfect self-defense: the latter requires a showing that the defendant had an unreasonable but honest belief that deadly force was necessary. K.S.A. 2020 Supp. 21-5404(a)(2). Heat of passion voluntary manslaughter has no such requirement. K.S.A. 2020 Supp. 21-5404(a)(1). Considering this difference, Gulley's argument fails. The court did not err when it found the evidence did not support an instruction on voluntary manslaughter.

Prosecutorial error

In his next issue, Gulley argues the prosecutor commented on his credibility during closing argument and that this constituted prosecutorial error. He points to the following comment:

> "He wants you to believe that Detective Relph somehow pressured him into making all of these admissions. But you saw him in court, he was able to hold his own with Mr. Edwards, he was certainly able to hold his position and be firm with what he thought—with what his testimony was. That doesn't make any sense."

The State responds that this was a permissible comment based on the evidence.

This court analyzes a defendant's claim of prosecutorial error in two steps. First, it determines whether error has occurred by analyzing whether "'the act complained of falls outside the wide

latitude afforded to prosecutors to conduct the State's case in a way that does not offend the defendant's constitutional right to a fair trial.'" *State v. Anderson*, 308 Kan. 1251, 1260, 427 P.3d 847 (2018) (quoting *State v. Sherman*, 305 Kan. 88, 378 P.3d 1060 [2016]). If error occurred, this court "'determines if that error prejudiced the defendant's right to a fair trial.'" 308 Kan. at 1260. The State can show there was no such prejudice if it establishes, "in light of the entire record," "'there is no reasonable possibility the error contributed to the verdict.'" 308 Kan. at 1260.

We have routinely explained the general rule governing prosecutorial error:

"'A prosecutor has wide latitude in crafting arguments and drawing "reasonable inferences from the evidence but may not comment on facts outside the evidence." Any argument "must accurately reflect the evidence, accurately state the law, and cannot be 'intended to inflame the passions or prejudices of the jury or to divert the jury from its duty to decide the case based on the evidence and the controlling law.'" [Citations omitted.]' *State v. Longoria*, 301 Kan. 489, 524, 343 P.3d 1128 (2015)." *Anderson*, 308 Kan. at 1261.

A prosecutor steps outside this wide latitude when the prosecutor states "'his or her personal belief as to the reliability or credibility of testimony given at a criminal trial.'" *State v. Sprague*, 303 Kan. 418, 428, 362 P.3d 828 (2015). This is "because such comments are 'unsworn, unchecked testimony, not commentary on the evidence of the case.'" *State v. Duong*, 292 Kan. 824, 830, 257 P.3d 309 (2011) (quoting *State v. Pabst*, 268 Kan. 501, 510, 996 P.2d 321 [2000]).

In *State v. Sean*, 306 Kan. 963, 399 P.3d 168 (2017), this court identified cases in which prosecutors erred when they explicitly stated that witnesses lied or were not credible. 306 Kan. at 979 (citing *State v. Elnicki*, 279 Kan. 47, 64, 105 P.3d 1222 [2005] [improper to call defendant a liar and comment "'the truth shows you beyond a reasonable doubt the defendant is guilty'"]; *State v. Pabst*, 268 Kan. 501, 507, 996 P.2d 321 [2000] [improper to repeatedly tell jury defendant and defendant's counsel had lied without connecting it to evidence]; *State v. Akins*, 298 Kan. 592, 607, 315 P.3d 868 [2014] [improper to say witnesses or their statements were not credible]).

Sean distinguished improper comments on credibility from those in which a prosecutor "observes that some reasonable inference about witness credibility may be drawn from evidence introduced at trial." 306 Kan. at 980. As examples, this court cited *Duong*, 292 Kan. at 831-32, and *State v. Davis*, 275 Kan. 107, 122-23, 61 P.3d 701 (2003). In *Duong*, the defendant was accused of touching a child's penis in a public restroom. The child reported the incident immediately upon leaving the restroom. Duong initially told police no one else had been in the restroom when he entered. He eventually amended this statement, telling police there were two or three people in the restroom when he entered and when he left. He denied touching the child. In closing, the prosecutor argued A.C. and the State's theory were "so credible" because "[A.C.] told right away . . . . He came right out of that bathroom and he said mom, that guy in there tried to touch me. It's so credible because of that.'" *Duong*, 292 Kan. at 827. The State contrasted that with the defendant's credibility, arguing he was not credible because his story changed under pressure. This court was satisfied that "the prosecutor's remarks fit within the context of an overarching evidence-based argument that A.C.'s story was more believable than Duong's." *Duong*, 292 Kan. at 832.

Similarly, in *Davis*, the victim of a kidnapping and sexual assault, S.K.F., reported her account of the criminal acts immediately after they took place. The defendant denied the allegations when he testified at trial 10 months later. This court held the prosecutor was within permissible bounds when he said "I would suggest . . . if you use your common sense, you'll know that when a person is in an emotional state . . . that what comes out of their mouth is more likely the truth than something that comes ten months later with plenty of time for reflection and creation." *Davis*, 275 Kan. at 122. It was also acceptable for the prosecutor to tell the jury, "I would suggest to you that the evidence has shown that [S.K.F.] should be believed by you and that you should return verdicts on all of those counts." *Davis*, 275 Kan. at 122. And this court found no error in the prosecutor's statement that "'[t]he defense would have you believe that [S.K.F.] set this whole thing up . . . . And I would suggest to you that that would require someone who had very, very high intelligence, very, very cold, cold blood.

And from [S.K.F.]'s testimony, I would suggest to you that simply is not the case.'" *Davis*, 275 Kan. at 123.

First, Gulley argues the prosecutor's statements were improper comments on his credibility. He insists that the prosecutor's evaluation of his trial performance—that Gulley "was able to hold his own" and "be firm with what he thought"—was improper. He also argues that even if the prosecutor's comments can be characterized as inferences based on evidence, they were improper because they were *unreasonable* inferences. Gulley contends it is unreasonable to assume he was not pressured into giving a false statement to the officers during interrogation based on his performance while testifying at trial. He avers that giving testimony at trial is entirely different from answering questions during a police interrogation. He points out that his interrogation occurred less than an hour after his arrest, that officers outnumbered him during the interrogation, and that he had no idea what the evidence was during the interrogation. In contrast, he asserts, his cross-examination occurred well after the arrest, it was one-on-one, and he was aware of the evidence against him.

The State argues the prosecutor's statement "[t]hat doesn't make any sense" was appropriate because it was not an opinion, but a conclusion based on the evidence—Gulley's testimony that "he was able to withstand questioning by detectives and deny their accusations," and his ability to withstand "the crucible of cross-examination and tell a consistent story." To the State's point, there is caselaw that supports the notion that a witness' performance during testimony can, in itself, offer evidence of credibility. *State v. Todd*, 299 Kan. 263, 285, 323 P.3d 829 (2014) (A jury is permitted to consider the demeanor of a witness, as well as his or her words.); *State v. Scaife*, 286 Kan. 614, 624, 186 P.3d 755 (2008); *State v. Franco*, 49 Kan. App. 2d 924, 936, 319 P.3d 551 (2014).

We agree with the State's position. First, the statements describing Gulley's demeanor during trial cannot run afoul of rules prohibiting commentary on witness credibility because they were not comments on Gulley's credibility; they were an evaluation of Gulley's trial performance.

Second, the prosecutor did not paint Gulley's story that he was pressured into making false statements as unbelievable based on

his own opinion; he rested it on Gulley's demeanor and consistency as he was testifying. Because a prosecutor may make reasonable inferences about credibility based on the evidence, the prosecutor's statement that it did not "make sense" that Gulley would have succumbed to pressure and given a false story was permissible.

And, finally, we reject Gulley's assertion that this was an unreasonable inference. While there are undeniable differences between interrogation and cross-examination, the latter is not a pressure-free encounter. "The object of cross-examination is to test the truth of statements of a witness made on direct examination." 98 C.J.S. Witnesses § 509. This often takes the form of rigorous questioning regarding gaps or weak points in a witness's account. See *State v. Marshall*, 294 Kan. 850, 869, 281 P.3d 1112 (2012) ("counsel rigorously cross-examined [the witness] about inconsistencies in his descriptions and identifications"); *State v. Shadden*, 290 Kan. 803, 834, 235 P.3d 436 (2010) (officers subject to "rigorous cross-examination regarding" their reliance on field sobriety tests to make an arrest). Consequently, the inference that Gulley could not have been pressured into falsely inculpating himself during interrogation because he did not succumb to the pressures on the witness stand is reasonable enough.

We conclude Gulley has failed to show the prosecutor erred.

Cumulative error

Gulley argues that, even if the instructional or prosecutorial error alone do not require reversal, the cumulative effect of the errors prejudiced his right to a fair trial and entitle him to a new trial.

This court "may reverse when the totality of the circumstances demonstrate that the defendant was substantially prejudiced by cumulative errors and was denied a fair trial." *State v. George*, 311 Kan. 693, 709, 466 P.3d 469 (2020). There must be two or more errors to support a reversal based on cumulative error.

Because we conclude there was no error, the cumulative error doctrine is inapplicable.

Eighth Amendment challenge

Finally, Gulley argues his sentence violates the Eighth Amendment's prohibition of cruel and unusual punishment under the principles announced in *Miller v. Alabama*, 567 U.S. 460, 132

S. Ct. 2455, 183 L. Ed. 2d 407 (2012). In *Miller*, the Supreme Court held that mandatory life without parole for juvenile offenders violates the Eighth Amendment because it prevents the court from considering youth before imposing the sentence. 567 U.S. at 479-80. In this case, the district court sentenced Gulley to life without possibility of parole for 618 months for the murder conviction and a consecutive 61 months' imprisonment for the aggravated robbery conviction. Gulley urges us to hold that *Miller* prohibited this sentence because it is the functional equivalent of life without parole. We reject Gulley's claim.

Gulley failed to present this argument in the district court. The State argues that, consequently, we cannot consider the claim now. But Gulley asks us to reach the issue under one of the exceptions to the preservation rule, averring his claim "'involves only a question of law arising on proved or admitted facts and is finally determinative of the case.'" *State v. Harris*, 311 Kan. 371, 375, 461 P.3d 48 (2020) (quoting *State v. Hirsh*, 310 Kan. 321, 338, 446 P.3d 472 [2019]).

Because this is a question of law that requires no new fact-finding for its resolution, we will reach the issue.

Our standard of review is de novo. This issue calls on us to consider a categorical Eighth Amendment challenge and to interpret precedential caselaw. Both present legal questions subject to unlimited review. *Wimbley v. State*, 292 Kan. 796, 802, 275 P.3d 35 (2011); *State v. Patterson*, 311 Kan. 59, 72, 455 P.3d 792, *cert. denied* 141 S. Ct. 292 (2020).

The Eighth Amendment to the United States Constitution bars cruel and unusual punishments. U.S. Const. amend. VIII. This encompasses a ban on punishments that are disproportionate to the offense or to the offender. *Roper v. Simmons*, 543 U.S. 551, 560-61, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

The United States Supreme Court has held that the death penalty is a categorically disproportionate sentence for juvenile offenders and that life-without-parole sentences are categorically disproportionate for juvenile offenders who commit non-homicide crimes. *Roper*, 543 U.S. at 570-71; *Graham v. Florida*, 560 U.S. 48, 82, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). This is because

juveniles "have a less developed character, are immature and irresponsible, are vulnerable to peer pressure and negative influence, have a high capacity for reform, and are unlikely to be 'irretrievably depraved.'" *State v. Williams*, 314 Kan. 466, 469, 500 P.3d 1182 (2021) (quoting *Roper*, 543 U.S. at 570); *Graham*, 560 U.S. at 68. In *Miller*, the Court ruled that *mandatory* life without parole for any juvenile offender—even one who commits homicide—violates the Eighth Amendment because it will be a rare circumstance in which life without parole is a proportionate sentence for a juvenile. 567 U.S. at 479. Before sentencing a juvenile to life without parole, the *Miller* Court ruled, a sentencer should consider "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 567 U.S. at 480.

Recently, in *Jones v. Mississippi*, 593 U.S. __, 141 S. Ct. 1307, 1311, 209 L. Ed. 2d 390 (2021), the Court affirmed *Miller*'s ban on mandatory life sentences without parole for juvenile offenders. But it ruled that a court need not make "a separate factual finding of permanent incorrigibility" or create an "on-the-record-sentencing explanation" before it may sentence a juvenile to life without parole. *Jones*, 141 S. Ct. at 1319.

In this case, the district court imposed a sentence for Gulley's murder conviction pursuant to K.S.A. 2018 Supp. 21-6620 and K.S.A. 2018 Supp. 21-6623. These statutes generally require the district court to sentence a defendant convicted of premeditated first-degree murder to life imprisonment without parole for 50 years unless there are substantial and compelling reasons to depart to the hard 25. K.S.A. 2020 Supp. 21-6620(c)(1)(A). But, if the defendant's criminal history would place the offender in a sentencing grid block in which "the sentencing range would exceed 600 months if the sentence established for a severity level 1 crime was imposed," then the defendant must serve life with a mandatory minimum equal to "the sentence established for a severity level 1 crime pursuant to the sentencing range." K.S.A. 2020 Supp. 21-6620(c)(1)(B).

When Gulley was sentenced, his criminal history was a B. This score would have required Gulley to be sentenced from a grid box with 554 months as the lower sentence, 586 as the mid-range

sentence, and 618 months as the upper sentence for a severity level 1 crime. K.S.A. 2018 Supp. 21-6804. The court agreed with the parties' contention that the court had no option but to impose the upper sentence in the grid box as the mandatory minimum. Consequently, the district court sentenced Gulley to life without possibility of parole for 618 months.

For his aggravated robbery conviction, the district court imposed a consecutive, non-mandatory sentence of 61 months' imprisonment.

Gulley argues this sentence violates *Miller* because it is the functional equivalent of life without parole. To support his argument, Gulley turns to the Court of Appeals opinion in *Williams v. State*, 58 Kan. App. 2d 947, 985, 476 P.3d 805 (2020). There, a panel of the court concluded a hard 50 sentence is the functional equivalent of life without parole and thus unconstitutional under *Miller* unless the sentencing court first considers youth and its attendant characteristics. See *Williams*, 58 Kan. App. 2d 947, Syl. ¶¶ 5, 6. We recently overruled the panel's conclusion that *Miller* applies to non-mandatory sentencing schemes. Because Ronell Williams' sentence was not mandatory, we had no reason to consider the panel's remaining conclusions. *Williams*, 314 Kan. at 473.With our holding here, we overrule the *Williams* panel's conclusion that *Miller* always applies to hard 50 sentences for juvenile offenders.

The *Miller* Court explicitly held "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. at 479. The Court's clear language dooms Gulley's claim. Nowhere in the opinion does the Court indicate that a sentence that offers parole within an offender's lifetime falls within *Miller*'s protective sphere. As the Supreme Court of Colorado has pointed out, both *Graham* and *Miller* "refer repeatedly and unambiguously to the sentence of life without parole." *Lucero v. People*, 394 P.3d 1128, 1133 (2017). The Court does the same in its most recent opinion regarding this issue. See *Jones*, 141 S. Ct. 1307 (referring only to life without parole sentences).

More than the clear language convinces us *Miller* is inapplicable to sentences that offer parole within an offender's lifetime.

The Court's reasoning shows that central to its decision was its observation that life without parole is analogous to a death sentence, which the Court had already forbidden as a punishment for juvenile offenders in *Roper*. *Miller* relied on the *Graham* reasoning to come to its decision. And the *Graham* Court pointed out that "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." 560 U.S. at 69. While "the State does not execute the offender sentenced to life without parole," the Court reasoned, "the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence." *Graham*, 560 U.S. at 69-70.

In adopting the principles announced in *Graham*, *Miller* endorsed *Graham*'s reasoning and its characterization of a life-without-parole sentence. The opinion noted that *Graham* likened life without parole to a death sentence—the "ultimate penalty"—and thus treated it "similarly to that most severe punishment." *Miller*, 567 U.S. at 474-75. It reasoned that "*Graham* indicates that a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison." *Miller*, 567 U.S. at 477. Life *with* parole does not share these key characteristics.

Unlike life without parole and the death penalty, life with parole offers "hope of restoration" because it provides an opportunity for release within an offender's lifetime. See *Graham*, 560 U.S. at 70. Consequently, *Miller* is inapplicable. With our decision, we join courts across the country that have concluded the same. See *United States v. Sparks*, 941 F.3d 748, 754 (5th Cir. 2019), *cert. denied* 140 S. Ct. 1281 (2020) ("[S]entences of life *with* the possibility of parole or early release do not implicate *Miller*. . . . Nor do sentences to a term of years.") (citing *Bowling v. Dir., Va. Dep't of Corr.*, 920 F.3d 192, 197 [4th Cir. 2019]; *Goins v. Smith*, 556 Fed. Appx. 434, 440 [6th Cir. 2014] [unpublished opinion]; *Lucero v. People*, 394 P.3d 1128, 1132-33 [Colo. 2017]; *Lewis v. State*, 428 S.W.3d 860, 863-64 [Tex. Crim. App. 2014]; *United States v. Walton*, 537 Fed. Appx. 430, 437 [5th Cir. 2013] [unpublished opinion]; *United States v. Morgan*, 727 Fed.

Appx. 994, 997 [11th Cir. 2018] [unpublished opinion]; *United States v. Lopez*, 860 F.3d 201, 211 [4th Cir. 2017]); *State v. Ali*, 895 N.W.2d 237, 246 (Minn. 2017) (rejecting claim that *Miller* applies to aggregate sentences especially because "the Court has not held that the *Miller/Montgomery* rule applies to sentences other than life imprisonment without the possibility of parole"); *State v. Gutierrez*, No. 33,354, 2013 WL 6230078, at *1 (N.M. 2013) (unpublished opinion) ("sentence is not life without the possibility of parole, but life with the possibility for parole" so *Miller* inapplicable); *Grooms v. State*, No. E2014-01228-CCA-R3-HC, 2015 WL 1396474, at *4 (Tenn. Crim. App. 2015) (unpublished opinion) (sentences that provide for the possibility of parole, even if the possibility will not arise before many years of incarceration, do not violate *Miller*).

Gulley's life with parole sentence makes him eligible for parole at 66 years old. Even if we add the sentence for the aggravated robbery, Gulley will be eligible for release at 71. Neither of these ensures that Gulley will be executed by the State or live his entire life in prison. Consequently, *Miller* is inapplicable to his case and his claim fails.

We affirm Gulley's convictions and sentences.

* * *

ROSEN, J., concurring in part and dissenting in part: I agree with the majority's resolution to Gulley's claims of trial error. However, I believe the majority overlooked a sentencing error that, if corrected, could alter the duration of Gulley's sentence. I would remand this case to the district court for a resentencing hearing on that issue before deciding whether Gulley's sentence is constitutional. While I appreciate Justice Standridge's position and find her dissent compelling, I decline to pass legal judgment on Gulley's sentence absent assurance I am considering the correct sentence and arguments specific to that sentence.

"An illegal sentence may be corrected at any time, K.S.A. 2018 Supp. 22-3504(1); and we have the authority to correct an illegal sentence sua sponte." *State v. Johnson*, 309 Kan. 992, 997,

441 P.3d 1036 (2019) (citing *State v. Rogers*, 297 Kan. 83, 93, 298 P.3d 325 [2013]).

The statute governing Gulley's sentence for the murder conviction is as follows:

"(1)(A) . . . [A] defendant convicted of murder in the first degree based upon the finding of premeditated murder shall be sentenced pursuant to K.S.A. 21-6623, and amendments thereto, unless the sentencing judge finds substantial and compelling reasons, following a review of mitigating circumstances, to impose the sentence specified in subsection (c)(2) [(c)(2) describes the hard 25].

"(B) The provisions of subsection (c)(1)(A) requiring the court to impose the mandatory minimum term of imprisonment required by K.S.A. 21-6623, and amendments thereto, shall not apply if the court finds the defendant, because of the defendant's criminal history classification, would be subject to presumptive imprisonment pursuant to the sentencing guidelines grid for nondrug crimes and the sentencing range would exceed 600 months if the sentence established for a severity level 1 crime was imposed. In such case, the defendant is required to serve a mandatory minimum term equal to the sentence established for a severity level 1 crime pursuant to the sentencing range. The defendant shall not be eligible for parole prior to serving such mandatory minimum term of imprisonment, and such mandatory minimum term of imprisonment shall not be reduced by the application of good time credits. No other sentence shall be permitted." K.S.A. 2020 Supp. 21-6620(c).

As the majority observes, Gulley had a criminal history score of "B," which would have put Gulley in a grid box with a sentencing range from 554 months to 618 months for a severity level 1 crime. This meant subsection (c)(1)(B) applied at sentencing and required the court to impose "a mandatory minimum term equal to the sentence established for a severity level 1 crime pursuant to the sentencing range." K.S.A. 2018 Supp. 21-6620(c)(1)(B). The court and the parties assumed this required a sentence of life without parole for the highest grid option—618 months. In other words, they all determined the court had no discretion to choose the lower grid options as the mandatory minimum.

I believe the district court misinterpreted the statute. K.S.A. 2018 Supp. 21-6620(c)(1)(B) required a minimum term equal to the "sentence established for a severity level 1 crime pursuant to the sentencing range." But there is no single established sentence for a severity level 1 crime. Generally, a sentencing judge imposes the mid-range sentence unless aggravating or mitigating factors

"insufficient to warrant a departure" indicate the high or low options should be imposed. K.S.A. 2020 Supp. 21-6804(e)(1). Thus, the most plausible interpretation of the language requiring the court to impose a "sentence established for a severity level 1 crime" is as a directive for the sentencing court to use its discretion to select one of the three sentencing options as if it were sentencing an on-grid crime. K.S.A. 2020 Supp. 21-6620(c)(1)(B).

Another detail confirms my reading of the statute. A criminal history score of "A" places a defendant convicted of a level 1 felony in a sentencing grid box with two options that are greater than 600 months—620 months and 653 months for the middle and high range sentences. K.S.A. 2020 Supp. 21-6804(a). Under an interpretation of K.S.A. 2020 Supp. 21-6620(c)(1)(B) requiring a sentencing court to impose a minimum that is greater than 600 months, the court that encounters this scenario faces a problem: two possible sentences and no guidance on which to select. My reading of the statute does not create such a problem. Under my interpretation, the court would use its discretion to impose one of the three possible sentences in the grid box as a mandatory minimum regardless of how many options over 600 months exist.

The parties have suggested it would be absurd to read (c)(1)(B) to give the judge discretion to impose a mandatory minimum of less than 600 months (586 or 554 in this case) because the provision functions as a sentence enhancer when a defendant facing a hard 50 sentence has a serious criminal history. But (c)(1)(B) does more than require a different (potentially lower) mandatory minimum than the hard 50—it eliminates the court's discretionary authority to depart to the hard 25 for substantial and compelling reasons. In this way, even if it allows the judge to impose a mandatory minimum of 554 months—rather than 600 months under the general sentencing provision—it removes the defendant's opportunity to present mitigating circumstances to justify a substantially lower mandatory minimum. Given this detail, it is not absurd to interpret the provision to allow the court discretion to choose any of the grid sentences as a mandatory minimum.

In sum, the sentencing court interpreted the applicable sentencing statute to mandate a sentence of life without possibility of

parole for 618 months. But as I interpret the statute, the court should have considered aggravating and mitigating factors to choose a mandatory minimum of 618, 586, or 554 months. This could make a difference of over 5 years in the length of Gulley's sentence. Because the court imposed Gulley's sentence without any consideration of these factors, the sentence fails to conform to the applicable statutory provisions and is, consequently, illegal. See K.S.A. 2020 Supp. 22-3504(c)(1) (sentence that does not conform to applicable statutory provision is illegal sentence).

Gulley has challenged the length of his sentence as unconstitutional. Before we answer that question, we should start with a legal sentence. Thus, I would remand the case to the district court for a resentencing hearing on whether the middle, high, or low grid box sentence is appropriate as a mandatory minimum in Gulley's case.

WALL, J., joins in the foregoing concurring and dissenting opinion.

* * *

STANDRIDGE, J., dissenting: The majority finds Gulley, a 15-year-old juvenile offender, is not entitled under the Eighth Amendment to have a sentencing court consider his diminished culpability and heightened capacity for change before imposing a sentence of life without the possibility of parole for 618 months. In denying Gulley the opportunity to have a court consider his youth and attendant circumstances before sentencing, the majority draws an indefensible line in the sand by holding—without exception—that if a sentence imposed on a juvenile offers even a glimmer of the chance at release before death, it can never be the functional equivalent of life without the possibility of parole. According to the majority, its decision is grounded in United States Supreme Court precedent holding

- a sentence of life without any chance of parole is analogous to a death sentence, and
- a sentence of life with the opportunity for parole "offers 'hope of restoration' because it provides an opportunity for release within an offender's lifetime." *State v. Gulley*, 315 Kan. 86, 102, 505 P.3d 354 (2022) (citing *Miller v. Alabama*, 567 U.S. 460, 474-75, 132 S. Ct. 2455, 183 L. Ed. 2d 407 [2012];

Graham v. Florida, 560 U.S. 48, 69-70, 130 S. Ct. 2011, 176 L. Ed. 2d 825 [2010]).

First, the majority misreads the analysis and the holdings in the United States Supreme Court cases cited. Second, the majority's holding is too broad because it will apply to even those sentences that do not "offer[] hope of restoration" or "provide[] an opportunity for release within an offender's lifetime." For these reasons, and others, I respectfully dissent. I would find Gulley is entitled under the Eighth Amendment to have a sentencing court consider his diminished culpability and heightened capacity for change before a sentence for his murder conviction is imposed because (1) *Miller* applies to sentences that are the functional equivalent of life without parole; (2) the sentence of life without the possibility of parole for 618 months imposed here is the functional equivalent of life without parole; and (3) the statutory sentencing scheme under which Gulley was sentenced is mandatory.

ANALYSIS

On appeal, Gulley claims the statute under which he was sentenced, K.S.A. 2018 Supp. 21-6620(c)(1)(B), violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution as categorically applied to juvenile offenders. Specifically, Gulley claims the statute precludes the district court from considering the juvenile offender's youth and individual attendant characteristics as a part of the sentencing process as contemplated by *Miller*, 567 U.S. 460. Relevant here, Gulley makes these arguments to support his claim:

1. The 618-month sentence imposed under K.S.A. 2018 Supp. 21-6620(c)(1)(B) as a result of his premeditated first-degree murder conviction is unconstitutional under *Miller* because it is the functional equivalent of a sentence of life without the possibility of parole (LWOP).

2. K.S.A. 2020 Supp. 21-6620(c)(1)(B) is mandatory and does not provide the sentencing court with any discretion to consider a juvenile's youth or attendant circumstances in sentencing as required by *Miller*.

As noted, the majority unequivocally rejects Gulley's first argument without any real consideration of its merits by holding *Miller* is inapplicable to sentences that offer any chance of parole. The majority does not address Gulley's second argument. After

giving an overview of the applicable law on the issues presented, I will discuss both of Gulley's arguments.

Relevant United States Supreme Court law on juvenile sentencing

Although the majority's holding appears to be grounded in *Jones v. Mississippi*, 593 U.S. __, 141 S. Ct. 1307, 209 L. Ed. 2d 390 (2021), the controlling case here is *Miller*, 567 U.S. at 474. The *Miller* Court held the Eighth Amendment prohibits sentencing courts from treating children like adults when imposing LWOP sentences. 567 U.S. at 474 ("[I]mposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."). Sentencing courts must "take into account how children are different [from adults], and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 567 U.S. at 480. Critical to the outcome in *Jones*, however, *Miller* also held the Eighth Amendment allows a LWOP sentence for a juvenile offender if the sentence is not mandatory, meaning the sentencer has discretion to impose a lesser punishment. 567 U.S. at 483. In so holding, the *Miller* Court clarified its "decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* [*v. Simmons*, 543 U.S. 551, 560-61, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)] or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." 567 U.S. at 483. So, under *Miller*, a process that allows the sentencer to impose a lesser punishment after considering an offender's youth and attendant characteristics necessarily is discretionary and does not violate the Eighth Amendment.

In *Montgomery v. Louisiana*, 577 U.S. 190, 194, 206, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), the Court determined *Miller* applied retroactively on collateral review. But in its opinion, the *Montgomery* Court appeared to walk back from the statement in *Miller* that there is no categorical bar to LWOP sentences for a class of juvenile offenders. The *Montgomery* Court emphasized "*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." 577 U.S. at 209. Drawing that line "rendered

life without parole an unconstitutional penalty for . . . juvenile offenders whose crimes reflect the transient immaturity of youth." *Montgomery*, 577 U.S. at 208 ("Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'") (quoting *Miller*, 567 U.S. at 479-80).

In the wake of *Montgomery*, courts across the country split on whether the Eighth Amendment required a sentencing court to make an express determination that a particular juvenile offender is irreparably corrupt before imposing or reimposing a LWOP sentence. Compare, e.g., *Malvo v. Mathena*, 893 F.3d 265, 275 (4th Cir. 2018) (finding an express determination of corruption or permanent incorrigibility prerequisite to imposing LWOP), *Commonwealth v. Batts*, 640 Pa. 401, 472, 163 A.3d 410 (2017) (creating rebuttable presumption against sentencing a juvenile to LWOP), and *Veal v. State*, 298 Ga. 691, 698-99, 784 S.E.2d 403 (2016) (finding trial court needed to make express findings of fact when imposing juvenile offender LWOP), with, e.g., *United States v. Sparks*, 941 F.3d 748, 755-56 (5th Cir. 2019) (finding the trial court need not expressly consider defendant's youth or attendant circumstances if it analyzed federal sentencing factors), *People v. Skinner*, 502 Mich. 89, 97, 917 N.W.2d 292 (2018) ("No such explicit finding is required."), and *State v. Ramos*, 187 Wash. 2d 420, 450, 387 P.3d 650 (2017) ("[Defendant] has not shown that this particular explicit finding is required as a matter of federal constitutional law.").

The United States Supreme Court recently resolved this split in *Jones*. There, a jury convicted Jones of murder for killing his grandfather. Jones was 15 years old when he committed the crime. Under Mississippi law at the time, the sentence for murder was mandatory LWOP. The sentencing court imposed that sentence, which was affirmed on direct appeal. Jones moved for post-conviction relief, arguing his mandatory LWOP sentence violated the Eighth Amendment prohibition against cruel and unusual punishment. While his habeas motion was pending, the Court decided *Miller*, so the Mississippi Supreme Court ordered a new sentencing hearing for the sentencing judge to consider Jones' youth and

attendant circumstances before selecting an appropriate sentence. Although the judge acknowledged at resentencing that he had discretion under *Miller* to impose a sentence less than life without parole, the judge decided life without parole remained the proper sentence. Jones again appealed his sentence, arguing the holdings in *Miller* and the then-recently decided *Montgomery* require more than just a discretionary sentencing procedure. According to Jones, the sentencer must make a factual finding on the record that a juvenile offender convicted of murder is permanently incorrigible before sentencing the offender to LWOP. The Mississippi Court of Appeals rejected Jones' argument.

The United States Supreme Court granted Jones' petition for certiorari on this issue "[i]n light of disagreement in state and federal courts about how to interpret *Miller* and *Montgomery*." *Jones*, 141 S. Ct. at 1313. In rejecting Jones' argument, the Court:

- Reaffirmed its holding in *Miller* that a juvenile homicide offender may be sentenced to life without parole, but only if the sentence is not mandatory and the sentencer has discretion to consider the mitigating qualities of youth and impose a lesser punishment. *Jones*, 141 S. Ct. at 1321-23.

- Reaffirmed its holding in *Montgomery* that *Miller* applies retroactively on collateral review. *Jones*, 141 S. Ct. at 1321-23.

- Held that if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily will consider the defendant's youth, especially if defense counsel advances an argument based on the defendant's youth. *Jones*, 141 S. Ct. at 1319.

- Held that the sentencer is

    - not required to make a factual finding of permanent incorrigibility; and

    - not required to provide an on-the-record explanation with an "implicit finding" of permanent incorrigibility. *Jones*, 141 S. Ct. at 1319-22.

- Held the resentencing in Jones' case complied with *Miller* and *Montgomery* because the sentencer had discretion to impose a sentence less than life without parole because of Jones' youth and attendant circumstances. *Jones*, 141 S. Ct. at 1311.

Relevant Kansas Supreme Court law on juvenile sentencing

This court recently applied *Jones* to deny relief to a juvenile homicide offender in *Williams v. State*, 314 Kan. 466, 471-72, 500

P.3d 1182 (2021). In *Williams*, a jury convicted the 14-year-old defendant of two counts of premeditated first-degree murder for crimes he committed in 1999. The default sentence for premeditated first-degree murder at the time was a hard 25. K.S.A. 1999 Supp. 22-3717(b)(1) (an inmate sentenced to imprisonment for premeditated first-degree murder shall be eligible for parole after serving 25 years of confinement, without deduction of any good time credits). Nevertheless, K.S.A. 1999 Supp. 21-4635 compelled the court to determine whether the defendant should serve a hard 50 sentence instead of the default hard 25 sentence. The statute required the sentencing court to consider an exclusive set of statutory aggravating circumstances as well as any mitigating circumstances in deciding whether to impose a hard 25 or a hard 50 sentence. See K.S.A. 1999 Supp. 21-4635(b). If the sentencing court found aggravated circumstances existed and they were not outweighed by mitigating circumstances, then the statute required the court to impose the hard 50 sentence. After hearing the arguments of counsel on aggravating and mitigating circumstances and the statements of various individuals supporting Williams, the court imposed concurrent hard 50 sentences for the first-degree murder convictions.

Soon after the United States Supreme Court in *Montgomery* determined *Miller* was retroactive, Williams filed a habeas motion categorically challenging the constitutionality of his hard 50 sentence as applied to juvenile offenders. Williams argued because his hard 50 sentence is the practical equivalent of a life sentence without parole and was imposed under a mandatory sentencing scheme, *Miller* required resentencing so the court could consider his youth and attendant characteristics before resentencing him. The district court denied relief. But a panel of the Court of Appeals reversed, holding

- the constitutional protections afforded under *Miller* are triggered regardless of whether the sentencing scheme is mandatory or discretionary.
- Williams' hard 50 sentence is the functional equivalent of a sentence of life without parole for purposes of the constitutional protections in *Miller*.
- Williams was deprived of the constitutional guarantees afforded under *Miller* because the sentencing court failed to appropriately consider Williams'

> youth and attendant characteristics before exercising its discretion to impose the hard 50 sentence. *Williams v. State*, 58 Kan. App. 2d 947, 983-84, 476 P.3d 805 (2020), *rev'd* 314 Kan. 466, 500 P.3d 1182 (2021).

The State filed a petition for review with this court.

The United States Supreme Court issued its decision in *Jones* after Williams filed his petition for review but before oral argument. On review, this court found the sentencing court had discretion to choose between a hard 25 and a hard 50 sentence by weighing aggravating and mitigating circumstances, including Williams' youth and attendant circumstances. Finding *Jones* to be dispositive on the issue, this court reversed the panel's holding that the constitutional protections afforded under *Miller* apply to a discretionary sentencing scheme. Citing *Jones*, this court held the sentencing court's ability to exercise discretion necessarily meant the sentencing court exercised that discretion. *Williams*, 314 Kan. at 472 (citing *Jones*, 141 S. Ct. at 1319).

Finally, this court relied on *Jones* to hold the sentencing court was not required to state explicitly on the record that it considered Williams' youth and found him to be permanently incorrigible. *Williams*, 314 Kan. at 470-73 (citing *Jones*, 141 S. Ct. at 1322). Given its finding on this issue, the *Williams* court did not reach the issue of whether a term-of-years sentence could be the functional equivalent of a LWOP sentence under *Miller*. *Williams*, 314 Kan. at 473 ("Even if we were to assume that *Miller* applies to the functional equivalent of life without parole and that the hard 50 is such an equivalent, Williams' sentencing satisfied *Miller*.").

1. Miller *applies to Gulley's sentence of life in prison without the possibility of parole for 618 months*

Although acknowledging the punishment at issue in *Miller* was a sentence of life without parole and not a lengthy term of years, Gulley claims the rule in *Miller* is triggered here because his sentence of life in prison without the possibility of parole for 618 months is the functional equivalent of a sentence of life without parole. The majority disagrees, holding the *Miller* rule does not apply because Gulley is eligible for parole on his life sentence after serving a term of 618 months in prison. I disagree with the majority's conclusion. For clarity purposes, I divide my analysis

into two parts. First, I point out the flaws in the majority's expansive conclusion which deprives a juvenile of Eighth Amendment protections upon a technical, late-in-life chance at parole. Then, I set forth my reasons for concluding Gulley's sentence of life in prison without the possibility of parole for 618 months is the functional equivalent of a sentence of life without parole and, consequently, unconstitutional unless a court first considers his youth and attendant characteristics.

a. *Term of years as the functional equivalent of life without parole*

In *Graham, Miller*, and *Montgomery*, the United States Supreme Court placed constitutional limits on sentences that may be imposed on children. *Graham* held children convicted of nonhomicide offenses cannot be sentenced to life without parole and must have a "realistic" and "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 560 U.S. at 75. *Miller* and *Montgomery* require the states to provide a juvenile convicted of homicide with a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation except in the rarest of instances where the child is found to "exhibit[ ] such irretrievable depravity that rehabilitation is impossible." *Montgomery*, 577 U.S. at 208 (citing *Miller*, 567 U.S. at 479). One could not reasonably argue under these holdings that a sentence fixed for a term of 100 years provides a meaningful opportunity for release, even though it is not characterized as a sentence of life without parole. So, at some point on the sentencing spectrum, a lengthy fixed sentence equates to a fixed life sentence without parole. A contrary conclusion lacks support in reason and practice because it necessarily allows a sentencer to circumvent the Eighth Amendment prohibition against cruel and unusual punishment simply by expressing the sentence in the form of a lengthy term of numerical years rather than labeling for what it is: a life sentence without parole.

This necessarily includes sentences that technically offer a chance at parole late in a juvenile's life. *Graham*'s discussion regarding the absence of any legitimate penological justification for LWOP is just as persuasive when considering whether the rule in

Miller is triggered for a lengthy juvenile sentence expressed in a term of years. See *Graham*, 560 U.S. at 71. The Supreme Court considered whether any theory of penal sanction could provide an adequate justification for sentencing a juvenile nonhomicide offender to life without parole and found none. *Graham*, 560 U.S. at 71 ("With respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation []—provides an adequate justification.").

The *Graham* test, when applied to a lengthy term-of-years sentence before parole eligibility, yields the same conclusion. The *Graham* Court's reasoning regarding retribution is equally applicable to a lengthy term-of-years sentence as it is to one labeled as "life." Sentences must directly relate to the personal culpability of the offender, which is diminished in the case of a juvenile offender. 560 U.S. at 71-72. In terms of deterrence, "'the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.'" 560 U.S. at 72. Regardless of what the punishment is, children are "less likely to take a possible punishment into consideration when making decisions," especially "when that punishment is rarely imposed." 560 U.S. at 72. There is no reason to believe a juvenile would be deterred from a crime depending on whether the sentence was life without parole or a lengthy number of years that is the functional equivalent of life without parole. Finally, there is no difference in terms of rehabilitation or incapacitation between two sentences that would both incarcerate the defendant for the functional equivalent of the defendant's life. Neither type of sentence contemplates the defendant returning to society for a time period functionally equivalent to a term of life—either as a reformed citizen or as a potential threat.

Most courts considering the issue focus not on the label attached to a sentence but on whether imposing the sentence would violate the principles *Miller* and *Graham* sought to bring about. See *Williams v. United States*, 205 A.3d 837, 844 (D.C. 2019) ("[N]umerous courts have understood *Miller* [and *Graham*] to apply not only to sentences that literally impose imprisonment for life without the possibility of parole, but also to lengthy term-of-

years sentences [for one offense or for multiple offenses in the aggregate] that amount to 'de facto' life without parole because they foreclose the defendant's release from prison for all or virtually all of his expected remaining life span."); *Henry v. State*, 175 So. 3d 675, 680 (Fla. 2015); *State v. Shanahan*, 165 Idaho 343, 349-50, 445 P.3d 152 ("However, we have since applied *Miller* to non-mandatory sentences of life without the possibility of parole for juvenile homicide offenders."), *cert. denied* 140 S. Ct. 545 (2019); *People v. Reyes*, 63 N.E.3d 884, 888 (Ill. 2016) ("A mandatory term-of-years sentence that cannot be served in one lifetime has the same practical effect on a juvenile defendant's life as would an actual mandatory sentence of life without parole—in either situation, the juvenile will die in prison."); *State v. Null*, 836 N.W.2d 41, 70-71 (Iowa 2013) (finding *Miller* applicable to juvenile's lengthy term-of-years sentence); *Commonwealth v. Brown*, 466 Mass. 676, 691 n.11, 1 N.E.3d 259 (2013) ("a constitutional sentencing scheme for juvenile homicide defendants must . . . avoid imposing on juvenile defendants any term so lengthy that it could be seen as the functional equivalent of a sentence of life without parole"); *State v. Zuber*, 227 N.J. 422, 448, 152 A.3d 197 (2017) ("[W]e find that the lengthy term-of-years sentences imposed on the juveniles in these cases are sufficient to trigger the protections of *Miller* under the Federal and State Constitutions."); *Ira v. Janecka*, 419 P.3d 161, 167 (N.M. 2018) (applying *Roper*, *Graham*, and *Miller* to juvenile term-of-years sentences); *State v. Moore*, 149 Ohio St. 3d 557, 572-73, 76 N.E.3d 1127 (2016) (applying *Graham* principles to nonhomicide juvenile offender's term-of-years sentence); *White v. Premo*, 365 Or. 1, 12-13, 443 P.3d 597 (2019) (juvenile lengthy term-of-years sentence was functional equivalent to LWOP under *Miller*); *Commonwealth v. Foust*, 180 A.3d 416, 438 (Pa. Super. Ct. 2018) (applying *Miller* broadly to analyze individual sentences—and not the aggregate—to determine if trial court imposed functional equivalent to LWOP sentence); *Ramos*, 187 Wash. 2d at 438 ("*Miller*'s reasoning clearly shows that it applies to any juvenile homicide offender who might be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilita-

tion."); *Bear Cloud v. State*, 334 P.3d 132, 144 (Wyo. 2014) (finding process from *Graham* and *Miller* must be applied to "entire sentencing package"); see also *Budder v. Addison*, 851 F.3d 1047, 1059-60 (10th Cir. 2017) (applying *Graham*'s categorical holding to juvenile with no "realistic opportunity for release"); *McKinley v. Butler*, 809 F.3d 908, 914 (7th Cir. 2016) ("[*Miller*'s] concern that courts should consider in sentencing that 'children are different' extends to discretionary life sentences and *de facto* life sentences"); *United States v. Jefferson*, 816 F.3d 1016, 1020-21 (8th Cir. 2016) (although required to weigh statutory sentencing factors "as informed by" *Miller*'s Eighth Amendment jurisprudence, appellate court found no merit to defendant's substantive unreasonableness contention because sentencing court made individualized sentencing decision that took full account of distinctive attributes of youth); *Moore v. Biter*, 725 F.3d 1184, 1187, 1193-94 (9th Cir. 2013) (applying *Graham* to LWOP in context of juvenile who was ineligible for parole until he served 127 years and 2 months of sentence); *People v. Caballero*, 55 Cal. 4th 262, 268-69, 145 Cal. Rptr. 3d 286, 282 P.3d 291 (2012) ("*Graham*'s analysis does not focus on the precise sentence meted out. Instead . . . it holds that a state must provide a juvenile offender 'with some realistic opportunity to obtain release' from prison during his or her expected lifetime."); *State v. Riley*, 315 Conn. 637, 660-63, 110 A.3d 1205 (2015) (Defendant was entitled to a new hearing that "gave mitigating weight to the defendant's youth and its hallmark features when considering whether to impose the functional equivalent to [LWOP]" because sentencing court characterized defendant's presentence report as "'pretty unremarkable'" despite "facts in the presentence report that might reflect immaturity, impetuosity, and failure to appreciate risks and consequences."); *Parker v. State*, 119 So. 3d 987, 999 (Miss. 2013) (requiring a trial court to consider the *Miller* factors before entering a sentence of "'life imprisonment with eligibility for parole notwithstanding the present provisions'" of Mississippi's parole eligibility statute); *Steilman v. Michael*, 389 Mont. 512, 519-20, 407 P.3d 313 (2017) (concluding that trial courts must consider mitigating characteristics of youth from *Miller* in juvenile cases regardless of whether a life sentence was discretionary); *State v. Finley*, 427 S.C. 419,

426, 831 S.E.2d 158 (Ct. App. 2019) (interpreting two of South Carolina's Supreme Court cases as establishing "'affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered'"), *reh. denied* August 22, 2019.

I note that, in applying the rule in *Miller*, some of these courts did not ultimately conclude the term of years to which the offender was sentenced rose to the level of cruel and unusual punishment under the Eighth Amendment. But critical to the question presented here—whether a sentence expressed as a term of years can ever be equivalent to a sentence of life without parole—all the courts applied the legal principles announced in *Graham* and *Miller* to a term-of-years sentence. In constitutional terms, these courts both explicitly and implicitly agreed the substantive protections afforded to juveniles in the mandatory life without parole context should similarly flow to juveniles who are sentenced to a term of years that is the functional equivalent of a sentence of life without parole. It stands to reason that, at least for the vast majority of juvenile offenders who are not considered irredeemable, imposition of a sentence for a lengthy term of years that is the functional equivalent of life without parole is an Eighth Amendment violation under both *Graham* and *Miller*.

I am persuaded a sentence expressed as a lengthy term of years that fails to provide an opportunity for release until late in a juvenile's life triggers the Eighth Amendment protections announced in *Miller*. Nevertheless, I acknowledge there is a split of authority among the states and the federal circuits on the issue. See *Sparks*, 941 F.3d at 754 ("[A] term-of-years sentence cannot be characterized as a *de facto* life sentence."), *cert. denied* 140 S. Ct. 1281 (2020); *Bunch v. Smith*, 685 F.3d 546, 550-51 (6th Cir. 2012) ("While [defendant] claims that his sentence runs afoul of *Graham*, that case did not clearly establish that consecutive, fixed-term sentences for juveniles who commit multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole."); *State v. Ali*, 895 N.W.2d 237, 247-48 (Minn. 2017) (holding that *Miller* and *Montgomery* did not apply in case when juvenile offender who was convicted of murdering multiple victims was sentenced to a third consecutive life

sentence); *Mason v. State*, 235 So. 3d 129, 134-35 (Miss. App. 2017) (finding juvenile offender was not entitled to *Miller/Montgomery* hearing because he would be released at 57 years of age and had a life expectancy of 70 to 71 years of age—in this case the court also relied on the offender not having offered a life expectancy table into evidence in his post-conviction relief motion); *State v. Zimmerman*, 63 N.E.3d 641, 644, 647-48 (Ohio Ct. App. 2016) (declining to extend *Miller* to situation where juvenile was sentenced to life in prison with parole eligibility after 28 years); *Lewis v. State*, 428 S.W.3d 860, 863-65 (Tex. Crim. App. 2014) (limiting the application of *Miller* to mandatory LWOP cases for juvenile defenders and not applying it to cases in which parole is possible at some time); *Vasquez v. Commonwealth*, 291 Va. 232, 241-43, 781 S.E.2d 920 (2016) (declining to extend *Graham*'s prohibition on LWOP to aggregate non-life sentences that exceed the normal life spans of juvenile defenders); *State v. Gutierrez*, No. 33,354, 2013 WL 6230078, at *1-2 (N.M. 2013) (unpublished opinion) (finding *Miller* did not apply when parole was possible); *Grooms v. State*, No. E2014-01228-CCA-R3-HC, 2015 WL 1396474, at *4 (Tenn. Crim. App. 2015) (unpublished opinion) (finding *Miller* did not apply when parole was possible); *State v. Williams*, No. 2012AP2399, 2013 WL 6418971, at *2-3 (Wis. Ct. App. 2013) (unpublished opinion) (finding *Miller* did not apply when parole was possible).

While acknowledging the split in authority, I find the conclusion in these cases and in the majority's opinion today—that *Miller* categorically does not apply to any sentence that technically offers a chance at parole—contradicts the reasoning of *Roper*, *Graham*, and *Miller*. The Supreme Court repeatedly emphasized the lessened culpability of juvenile offenders, the difficulty in determining which juvenile offender is one of the very few that is irredeemable, and the importance of a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75. In fact, the fundamental premise underlying the Court's decisions in both *Graham* and *Miller* is the recognition that juveniles are more amenable to rehabilitation than adults because they are less mature and are not fully developed, they lack the same culpability as an adult, and they have transient behavior.

Those variances do not vanish simply because the sentence is for a lengthy term of years instead of life without parole. The constitutional framework upon which the Court in *Graham* and *Miller* constructed its holdings reflects much more is at stake in juvenile sentencing than merely making sure that parole is possible. A juvenile offender sentenced to a lengthy term of years that is the functional equivalent of life without parole should not be worse off than a juvenile offender sentenced to life in prison without parole who has the benefit of an individualized hearing under *Miller*. Accordingly, I would hold the constitutional protections afforded under *Miller* are triggered when a juvenile offender convicted of premeditated first-degree murder is subject to a lengthy term-of-year sentence that is the functional equivalent of a sentence of life without parole.

b. *Gulley's sentence of life in prison without the possibility of parole for 618 months is the functional equivalent of life without parole*

In this case, Gulley must serve a minimum of 618 months (51 1/2 years) in prison for his murder conviction before he can be considered for release. My research reveals no state high court has found a single sentence in excess of 50 years for a single homicide provides a juvenile with a meaningful opportunity for release. See *People v. Contreras*, 4 Cal. 5th 349, 369, 229 Cal. Rptr. 3d 249, 411 P.3d 445 (2018) (same for 50-year-to-life sentence); *Casiano v. Commissioner of Correction*, 317 Conn. 52, 73, 79-80, 115 A.3d 1031 (2015) (same for 50-year sentence); *Null*, 836 N.W.2d at 71 (same for 75-year sentence with parole eligibility after 52.5 years); *Zuber*, 227 N.J. at 428, 448 (110-year sentence with parole eligibility after 55 years and 75-year sentence with parole eligibility after 68 years and 3 months "is the practical equivalent of life without parole"); *White*, 365 Or. at 15 (same for nearly 67-year sentence); *Bear Cloud*, 334 P.3d at 136, 141-42 (same for 45-year-to-life sentence). In finding a juvenile defendant's 50-year sentence to be equivalent to life without parole for purposes of applying *Miller*, the Connecticut Supreme Court relied on *Miller* and *Graham* to construe the concept of life more broadly than biological survival; specifically, it found the United States Supreme

Court "implicitly endorsed the notion that an individual is effectively incarcerated for 'life' if he [or she] will have no opportunity to truly reenter society or have any meaningful life outside of prison." *Casiano*, 317 Conn. at 78.

Judge Richard Posner has observed a sobering reality that supports the conclusion that a hard 50 sentence is the functional equivalent of life without parole. In a dissenting opinion, he points out the "average life expectancy of an inmate sentenced to life in prison is 58 years; for African-Americans . . . the average life expectancy is 56; and for juveniles sentenced to life the average is 50 1/2 years." *Kelly v. Brown*, 851 F.3d 686, 688 (7th Cir. 2017) (Posner, J., dissenting); see also *Contreras*, 4 Cal. 5th at 362 (studies show "incarceration accelerates the aging process and results in life expectancies substantially shorter than estimates for the general population"). Thus, to the average juvenile, a 50-year sentence might mean release shortly after the national retirement age, but for the average inmate serving their entire life in prison, a 50-year sentence means death in prison.

A hard 50 sentence presents the same constitutional dangers that a life without parole sentence generates and with which the Court was concerned in *Graham* and then in *Miller*. As I explained above, in *Graham*, the Court illuminated the problems with life-without-parole sentences: "no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." 560 U.S. at 79. It also observed that these sentences offer no incentive for a juvenile's growth and development. 560 U.S. at 79. A hard 50 sentence shares these characteristics, especially in light of the lower life expectancy of juvenile offenders and inmates. Even imposed on the youngest possible offender—a 14-year-old—a hard 50 sentence means no chance at release until the juvenile's mid-60s.

The Supreme Court of California made similar observations when ruling a 50-year sentence and a 58-year sentence were the functional equivalents of LWOP for two 16-year-old offenders. The court pointed out that "*Graham* spoke of the chance to rejoin society in qualitative terms—'the rehabilitative ideal', 560 U.S. at 74—that contemplate a sufficient period to achieve reintegration

as a productive and respected member of the citizenry." *Contreras*, 4 Cal. 5th at 368 (quoting *Graham*'s emphasis on "the 'chance for reconciliation with society'" 560 U.S. at 79, "'the right to reenter the community,'" 560 U.S. at 74, "and the opportunity to reclaim one's 'value and place in society,'" 560 U.S. at 74). It reasoned that "[c]onfinement with no possibility of release until age 66 or age 74 seems unlikely to allow for the reintegration that *Graham* contemplates." *Contreras*, 4 Cal. 5th at 368.

The *Contreras* court continued, writing that "*Graham* made clear that a juvenile offender's prospect of rehabilitation is not simply a matter of outgrowing the transient qualities of youth; it also depends on the incentives and opportunities available to the juvenile going forward." *Contreras*, 4 Cal. 5th at 368. The court opined that a 50-year sentence offered no incentive for a juvenile to grow. It then reasoned that the 50-year sentence bore "an attenuated relationship to legitimate penological goals under the reasoning of *Graham*" because, while "less harsh than LWOP," it was "still 'an especially harsh punishment for a juvenile'" who has "'diminished moral culpability,'" and "limited ability to consider consequences when making decisions." *Contreras*, 4 Cal. 5th at 369. Furthermore, "a judgment that a juvenile offender will be incorrigible for the next 50 years is no less 'questionable' than a judgment that the juvenile offender will be incorrigible 'forever.'" *Contreras*, 4 Cal. 5th at 369 (quoting *Graham*, 560 U.S. at 72-73).

In line with this analysis, that of many other courts, and my own, I would conclude Gulley's sentence of life in prison without the possibility of parole for 618 months is the functional equivalent of life without parole for purposes of applying the rule in *Miller*.

2. *Mandatory sentencing scheme*

In overruling *Williams*, this court held that *Miller* applies to only mandatory sentencing schemes. Here, the majority does not consider whether Gulley's sentence was mandatory, presumably because it concluded *Miller* did not apply for other reasons. I address this issue now.

As a preliminary matter, I note the facts presented and the applicable law in this case are distinguishable from those in *Williams*. Instead of the hard 50 sentencing statute, K.S.A. 2020 Supp. 21-6620 and K.S.A. 2020 Supp. 21-6623 are the relevant sentencing statutes for first-degree premeditated murder, which is Gulley's primary crime of conviction.

- K.S.A. 2020 Supp. 21-6620(c)(1)(A) requires the district court to sentence a defendant convicted of premeditated murder to the sentence in K.S.A. 2020 Supp. 21-6623. K.S.A. 2020 Supp. 21-6623 provides for life imprisonment without the possibility of parole for 50 years (hard 50) unless, as provided in K.S.A. 2020 Supp. 21-6620(c)(2)(A), there are substantial and compelling reasons to depart to life imprisonment without the possibility of parole for 25 years (hard 25).
- K.S.A. 2020 Supp. 21-6620(c)(1)(B) provides an exception to subsection (c)(1)(A) if a defendant's criminal history would place defendant in a sentencing grid block where the sentencing range exceeds 600 months, and the court imposes the sentence for a severity level 1 crime.
- If the (c)(1)(B) exception applies, then the district court has no discretion to depart to the hard 25, regardless of whether substantial and compelling circumstances exist. Instead, the court must sentence the defendant to life with a mandatory minimum equal to "the sentence established for a severity level 1 crime pursuant to the sentencing range" and "[n]o other sentence shall be permitted." K.S.A. 2020 Supp. 21-6620(c)(1)(B).

When Gulley was sentenced, his criminal history was a "B." Premeditated first-degree murder, the crime of conviction relevant here, is a severity level 1 crime. Based on his criminal history and the severity level of the crime, Gulley's sentence fell into a grid box providing for 554 months as the low sentence, 586 as the midrange sentence, and 618 months as the high sentence. Subsection (c)(1)(B) applies because the sentencing range in the applicable grid block exceeded 600 months, even though the mid or lower options did not. See K.S.A. 2020 Supp. 21-6620(c)(1)(B) (applies when the "sentencing range" exceeds 600). There are no grid blocks in which all available sentences are over 600 months, so subsection (c)(1)(B) necessarily applies even if some of the sentencing options within the grid box are less than 600 months; otherwise, it is meaningless.

Under the facts here, K.S.A. 2020 Supp. 21-6620(c)(1)(B) gave the judge discretion to impose a mandatory minimum of less

than 600 months. Specifically, the judge could have reduced Gulley's sentence from 618 months to either 586 or 554 months. But the primary effect of subsection (c)(1)(B) is not to provide a little wiggle room above and below the hard 50 sentence. Instead, its primary effect is *to eliminate the court's discretionary authority to depart to the hard 25 for substantial and compelling reasons*. So even if the court is allowed to impose a mandatory minimum of 554 months—rather than 600 months under the general sentencing provision—the court has absolutely no discretion to consider mitigating circumstances that may justify a much lower mandatory minimum.

Although the court had discretion under K.S.A. 2020 Supp. 21-6620(c)(1)(B) to impose a lesser sentence within the grid box than it did—down to life without parole for 554 months (46 years and 2 months)—the sentencing scheme is still mandatory as to the 554 months, which is only 4 years less than a hard 50 sentence. A four-year reduction on Gulley's sentence would not change my analysis above, and, consequently, I would conclude the sentencing court was required to consider Gulley's youth and attendant characteristics before sentencing pursuant to this scheme.

No. 122,773

STATE OF KANSAS, *Appellee*, v. DUSTIN TYLER SMITH, *Appellant*.

(505 P.3d 350)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Motion to Withdraw Plea—Time Limited by Statute.* The allowable time to file a motion to withdraw plea is limited by K.S.A. 2020 Supp. 22-3210(e).

2. SAME—*Motion to Withdraw Plea—Excusable Neglect Required to Be Shown if Time Limitation has Passed.* Before the court can consider the merits of a motion to withdraw plea once the statutory time limitation has passed, the defendant must make an additional, affirmative showing of excusable neglect as to why his motion is late.

3. SAME—*Motion to Withdraw Plea—Case-by-Case Basis to Establish Excusable Neglect.* Excusable neglect must be established on a case-by-case basis; neglect is not excusable unless there is some justification for an error beyond mere carelessness or ignorance of the law on the part of the litigant or his attorney.

Appeal from McPherson District Court; JOE DICKINSON and JOHN B. KLENDA, judges. Opinion filed March 4, 2022. Affirmed.

David L. Miller, of Wichita, and *Jacob A. Crane,* of Jacob A. Crane Law, LLC, of Wichita, were on the briefs for appellant.

Michael J. Duenes, assistant solicitor general, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

WILSON, J.: This is an appeal by Dustin Tyler Smith of the district court's denial of his motion to withdraw plea filed roughly seven years after he was convicted of first-degree murder on a plea of no contest. The district court, without an evidentiary hearing, ruled that Smith's motion to withdraw plea was late and that he had failed to make an affirmative showing of excusable neglect to extend the time to file the motion. Smith now requests that this court send his case back to the district court to have an evidentiary hearing to determine excusable neglect. We affirm the district court.

FACTUAL AND PROCEDURAL BACKGROUND

1. Preliminary matter concerning the record on appeal

We first address the unusual record on appeal. There is no transcript of Smith's plea hearing or sentencing hearing before the district court. While this case was already pending before this court, Smith filed a motion for a stay of his brief due date and requested a remand to the district court to recreate the record of the plea hearing and sentencing hearing pursuant to Supreme Court Rule 3.04 (2019 Kan. S. Ct. R. 23). We granted the motion and remanded the case to the district court for further proceedings to complete the record but retained jurisdiction over the appeal.

On October 29, 2020, Smith filed a status report with this court which stated that a joint affidavit recreating the necessary records had been filed with the district court on October 9, 2020. The report was filed after Smith's deadline to object to or amend the affidavit had expired, indicating at least passive acquiescence to the recreated record. That affidavit is included in the record on appeal.

This court issued an order noting Smith's status report and stating that the "affidavit should now be a part of the record on appeal. See Rule 3.04(a) (obligating clerk of the district court to include in record on appeal any settled and approved statement entered under that rule)."

In his brief and reply brief, Smith (now represented by different appellate counsel) argues that the recreated record does not comply with the rules because it was not served on all parties, and it was not "settled and approved" by the district court. But the certificate of service filed with the affidavit shows that it *was* served on all parties. And this court's order—and the plain language of the rule—indicates an understanding that it was settled and approved prior to being included in the record. Smith offers no evidence to the contrary.

Smith's argument is not persuasive. The affidavit is held to be a valid part of the record, carrying the same weight as would an official transcript of the plea and sentencing hearings.

2. The plea

On March 5, 2012, Smith entered a plea of no contest to first-degree murder. After an extended discussion with Smith and his

attorney, the district court accepted Smith's plea and found Smith guilty based on that plea.

At Smith's sentencing on May 7, 2012, the district court imposed a sentence of life in prison without the possibility of parole for a minimum of 20 years. The district court advised Smith regarding his right to appeal and his obligation to register as an offender.

3. The motion to withdraw plea

On July 1, 2019, Smith filed a pro se motion to withdraw plea pursuant to K.S.A. 2019 Supp. 22-3210. On January 31, 2020, the district court held a non-evidentiary hearing on the motion to withdraw. Using only the available record and the docket notes of the district court judge who presided over the plea hearing and sentencing, the court found that Smith had not made an affirmative showing of excusable neglect—a prerequisite for accepting his late motion to withdraw plea—and denied his motion. It is from that denial that Smith now appeals.

ANALYSIS

1. Standard of review

When a motion to withdraw plea is summarily denied by the district court without an evidentiary hearing, this court applies a de novo review. This is because the appellate court has all the same access to the records, files, and motion as the district court. So, like the district court, it must determine whether the records, files, and defendant's motion conclusively show that he is entitled to no relief. *State v. Moses*, 296 Kan. 1126, 1127-28, 297 P.3d 1174 (2013). In this case, we are further aided by the completion of the recreated record, a benefit the district court did not have.

2. Timeliness of the motion

Smith must affirmatively show that his motion to withdraw plea is timely before we will consider the motion's merits. A late filing is timely only if the delay results from excusable neglect. K.S.A. 2020 Supp. 22-3210(e); *State v. Davis*, 313 Kan. 244, 247-48, 485 P.3d 174 (2021) (excusable neglect must be established

for late filing so as to extend the time limitation, before merits of request are considered).

Pursuant to K.S.A. 2020 Supp. 22-3210(e)(1), a post-sentence motion to withdraw plea must be filed no more than one year after the latest of two specifically delineated events. The first event is either the date of the final order on direct appeal or the date appellate jurisdiction terminates, whichever is later. There was no direct appeal here, so the first event was the date appellate jurisdiction terminated. When there is no appeal, appellate jurisdiction terminates 14 days after sentencing. See K.S.A. 2020 Supp. 22-3608(c). Smith was sentenced on May 7, 2012, so appellate jurisdiction terminated on or about May 21, 2012.

The second event—which addresses petitions for United States Supreme Court review—does not apply. Thus, Smith's deadline to file a motion to withdraw plea was May 21, 2013. Smith filed his motion on July 1, 2019. On its face, Smith's motion is late.

There is an exception to this "one-year rule." The exception allows the one-year time limit to be extended if Smith can show that his delay in filing was due to excusable neglect. K.S.A. 2020 Supp. 22-3210(e)(2). That means Smith must affirmatively establish excusable neglect for failing to file his motion to set aside plea during the six-year interim between the statutory deadline and filing date, or else his motion to set aside plea is out of time and procedurally barred—regardless of the merits. *Davis*, 313 Kan. at 248.

3. Excusable neglect

Excusable neglect resists clear definition and must be determined on a case-by-case basis. *State v. Hill*, 311 Kan. 872, 878, 467 P.3d 473 (2020). First in the civil context—and again in criminal contexts—this court has noted that excusable neglect "implies something more than the unintentional inadvertence or neglect common to all who share the ordinary frailties of mankind." *Montez v. Tonkawa Vill. Apartments*, 215 Kan. 59, 65, 523 P.2d 351 (1974); *State v. Davisson*, 303 Kan. 1062, 1069, 370 P.3d 423 (2016); *Hill*, 311 Kan. at 878; *State v. Ellington*, 314 Kan. 260,

262, 496 P.3d 536 (2021). Excusable neglect requires some justification for an error beyond mere carelessness or ignorance of the law on the part of the litigant or his attorney. *Davisson*, 303 Kan. at 1069.

Most of Smith's motion before the district court—and his brief before this court—is spent arguing the substantive merits of his motion, which would require a showing of manifest injustice, rather than asserting a basis for the prerequired excusable neglect for filing a late motion. See *Davis,* 313 Kan. at 248. He attempts to tie the two requirements together by stating "[t]he same issues . . . that support manifest injustice are also applicable here to support a finding of excusable neglect." But excusable neglect for missing the time limitation and manifest injustice if not allowed to withdraw his plea are different standards. Establishing manifest injustice does not necessarily establish an excuse for neglecting to file by the statutory deadline and vice versa.

> "Excusable neglect is a procedural standard that permits a defendant to seek to withdraw a plea out of time. Manifest injustice is the substantive standard used to determine whether a motion to withdraw a plea should be granted or denied. The procedural timeliness fork-in-the-road comes first along this particular analytical path. In other words, if a motion to withdraw a plea is filed outside the one-year time limitation, courts must decide whether a defendant has shown excusable neglect before reaching the question of whether manifest injustice requires that a defendant be permitted to withdraw a plea." *Davis*, 313 Kan. at 248.

In summary, each of Smith's claims must first be considered through the narrow procedural lens of "excusable neglect." Only if Smith establishes such excusable neglect, and thus makes his motion timely filed, will we proceed to consider the motion's substantive merits.

Smith's claims all roughly fit under three categories: his mental competency, his trial counsel's tactics and performance, and his right to appeal.

a. Mental capacity/competency

First, Smith states that he should be allowed to withdraw his plea because his attorney was ineffective in that he failed to "conduct a thorough investigation into [Smith]'s mental disease or defect." He claims that had counsel done so, there is a reasonable

probability that Smith would have been found incompetent and would not have pled no contest. Aside from the questionable correlation between those things and a succeeding span of seven years with no motion, Smith's assertion does not stand the test of the record. His claim is in *direct* contradiction to the fact that a motion to determine competency was filed by trial counsel. It was filed *after* an evaluation by a defense psychologist. It is clear that Smith's trial counsel *did* independently investigate Smith's mental health and competency to stand trial. Moreover, the record is clear that based on evidence which included two evaluations, Smith was found by the court to be competent at the time of his plea.

More to the point, however, Smith does not show what his alleged incompetency prior to entering the plea has to do with the succeeding span of seven years with no motion. Even if Smith could show that he was not competent at the time of the plea, it does not automatically show excusable neglect. While he does concede that at "some point" his mental health improved to the point of competency, he does not give a specific date or a specific change in his treatment. That is not enough to affirmatively show excusable neglect.

b. Trial counsel performance

Smith makes additional claims that trial counsel was ineffective and pressured him to accept a plea deal. This has nothing to do with excusable neglect for not filing his motion earlier and simply argues the merits of his motion. Therefore, we are procedurally barred from addressing it.

c. Right to appeal

The last umbrella under which Smith hopes to find excusable neglect is his right to appeal. He claims that trial counsel deprived him of his opportunity to appeal and his opportunity to withdraw his plea by failing to inform him of those rights and time limitations.

This claim is directly contradicted by the record. The record shows that trial counsel discussed Smith's right to appeal and how a plea would waive that right as evidenced by the signed advice form regarding pleas and negotiations that counsel reviewed with

Smith. Further, the district court itself advised Smith about his right to appeal. Smith has not shown how this establishes excusable neglect for a delayed filing.

CONCLUSION

Smith's motion was not filed within the one-year statutory time limit, and he has not shown excusable neglect for his failure to do so, such that the time limit might be extended and his motion considered timely. Instead, he has attempted to form excusable neglect from his substantive arguments about manifest injustice. This he cannot do. Smith's motion to withdraw plea is untimely.

Affirmed.

No. 122,925

STATE OF KANSAS, *Appellee*, v. BRIAN C. SHIELDS, *Appellant.*

(504 P.3d 1061)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Motion to Withdraw Plea on Showing of Manifest Injustice—Three Factors.* K.S.A. 2020 Supp. 22-3210(d)(2) permits a district court to allow a defendant to withdraw a plea and set aside the judgment of conviction on a showing of manifest injustice. When assessing whether manifest injustice exists, courts generally consider three nonexclusive factors: (a) whether the defendant was represented by competent counsel; (b) whether the defendant was misled, coerced, mistreated, or unfairly taken advantage of; and (c) whether the plea was fairly and understandingly made.

2. SAME—*Postsentence Motion to Withdraw Plea—Burden on Movant to Prove Error—Appellate Review.* Appellate courts review a district court's decision to deny a postsentencing motion to withdraw a plea for an abuse of discretion. On appeal, the movant bears the burden to prove the district court's error.

3. SAME—*Postsentence Motion to Withdraw Plea—Ineffective Assistance of Counsel Allegation—Constitutional Test.* When a postsentence motion to withdraw a plea alleges ineffective assistance of counsel, the constitutional test for ineffective assistance must be met to establish manifest injustice. That test asks: (a) whether the attorney's performance fell below an objective standard of reasonableness; and (b) whether there is a reasonable probability that, but for the attorney's error, the result of the proceeding would have been different.

Appeal from Neosho District Court; DARYL D. AHLQUIST, judge. Opinion filed March 4, 2022. Affirmed.

Forrest A. Lowry, of Ottawa, was on the brief for appellant.

No appearance by appellee.

The opinion of the court was delivered by

BILES, J.: Brian C. Shields appeals the district court's denial of his postsentencing motion to withdraw his no contest plea to first-degree felony murder. He argues he did not fairly and knowingly enter the plea because his attorney provided ineffective representation by not giving him enough time to review the plea agreement and by withholding discovery materials. After an evi-

dentiary hearing, the court found Shields failed to show the statutorily required manifest injustice. See K.S.A. 2020 Supp. 22-3210(d)(2). We affirm.

We hold Shields has not met his burden to establish the district court abused its discretion. See *State v. Hutto*, 313 Kan. 741, 745, 490 P.3d 43, 47 (2021). His arguments rely on his version of the conflicting evidence, and appellate courts cannot reweigh that evidence. See *State v. Johnson*, 307 Kan. 436, 443, 410 P.3d 913 (2018). The district court's decision is supported by substantial competent evidence that includes the plea agreement he executed, his own statements at the plea hearing, and the testimony received from Shields and his trial counsel at the plea withdrawal hearing.

FACTUAL AND PROCEDURAL BACKGROUND

The State charged Shields with first-degree felony murder with two underlying felony crimes: aggravated arson and aggravated burglary. It alleged Shields and his then-girlfriend entered a Chanute home in 2013 to retrieve items they believed had been stolen from the girlfriend. Shields lit a homemade explosive that set a mattress on fire and burned the house down. Weeks later, those clearing the debris found Cristy Wiles' body. An autopsy concluded she died from smoke inhalation. Shields at first pled not guilty.

Shields' plea agreement

On the day of the pretrial conference, and just a few days before trial, the parties resolved the pending case and an unrelated drug prosecution. The agreement was for Shields to plead no contest to one count of first-degree felony murder, with a joint recommendation for a life sentence with possibility of parole after 20 years. In the drug case, Shields would plead no contest to one count of possession of methamphetamine with intent to distribute, with a recommended 51-month prison sentence consecutive to the hard 20 murder sentence. The State also agreed to recommend to other prosecutors against new charges being filed at the state and federal levels in Kansas and Missouri relating to his absence from community corrections and the actions he was pleading guilty to. The State further agreed to dismiss a pending motion to revoke

Shields' assignment to community corrections. This concession would allow Shields to receive credit for time served there against the murder and drug sentences.

Shields executed a written plea agreement setting out these terms. It included a "Certificate of Counsel" signed by Shields' attorney, Kerry Holyoak, and the Neosho County Attorney. The signed agreement includes the following affirmations by Shields:

- "I have reviewed the [complaints]. I have reviewed the sentencing guidelines for [the drug distribution case] and the possible sentences for the off-grid offense for [the murder case]. I have discussed at length with my lawyer the evidence against me before deciding how to enter my pleas herein. I fully understand the charges brought against me. I also understand the possible penalties for my conviction in each case."
- "I have reviewed the investigation reports and witness statements for each case and have told my lawyer all the facts and circumstances regarding the charges brought against me and have submitted to a contested preliminary hearing for both cases and have reviewed the transcript for the same. I believe that my lawyer is fully informed on all such matters."
- "My lawyer has counseled with and advised me on the nature of each charge, on all lesser included charges with possible penalties, and on all possible defenses that I might have."
- "I have had enough time to confer with my lawyer and believe that he has done all that anyone could do under the circumstances to counsel and assist me. I AM SATISFIED WITH THE ADVICE AND HELP HE HAS GIVEN ME."

When the parties presented the court with their agreement, Holyoak described its terms and Shields agreed this description matched his understanding. Shields acknowledged signing the written plea agreement and told the court he had all the time he believed necessary to discuss it with his attorney. Holyoak agreed, noting he corresponded with Shields, sent him copies of the preliminary hearing transcript and discovery, met with him at the jail "on several occasions," and reviewed possible defenses and discovery to reach the decision to enter this plea. Shields told the court he was satisfied with Holyoak's representation and was "well aware" of the circumstances and the agreement's terms.

The court found Shields able to make a knowing and intelligent waiver of his rights. It reviewed with him the rights relinquished by the plea. Shields again agreed he understood and made the plea decision freely, voluntarily, and with his counsel's advice. The State then recited its factual basis for the pled-to charges, and

Holyoak agreed there was a reasonable likelihood of conviction at trial. Shields pled no contest to first-degree felony murder and possession of methamphetamine with intent to distribute.

The court again solicited Shields' acknowledgment that these pleas were made freely, knowingly, voluntarily, and with counsel's advice. Shields denied any promises or coercion influenced him to enter the pleas and recognized the sentencing recommendations were not binding. The court accepted the pleas and found him guilty of both offenses.

At sentencing, the court followed the plea agreement and sentenced Shields to a hard 20 sentence for the murder conviction and a consecutive 51 months' imprisonment for the drug conviction. Shields filed a short-lived notice of appeal, but it was dismissed and the mandate issued.

Shields' effort to withdraw his pleas

In a letter postmarked about 11 months after the appellate mandate, Shields asked the district court for a new trial. The court construed this as a motion to withdraw plea and appointed new counsel, who was the first in a string of attorneys appointed for Shields who later withdrew. It was not until almost three years later that a formal plea withdrawal motion was filed on Shields' behalf.

During that interim, this court indefinitely suspended Holyoak from the practice of law for misconduct unrelated to Shields' case, mainly from Holyoak's tactics in negotiating the sale of his own mineral rights with a prospective purchaser, and his nonlawyer wife's participation in his law practice. See *In re Holyoak*, 304 Kan. 644, 372 P.3d 1205 (2016). Seizing on this, the plea withdrawal motion alleged Holyoak "failed to provide and review with [him] available discovery, and deceived and misled [him] . . . by statements made to [him] and assertions in the plea petition drafted thereby which Mr. Holyoak requested Defendant sign." Shields claimed Holyoak did not provide him with discovery including "inconsistent exculpatory statements" by the former girlfriend; "video and DVD/CD statements by all State witnesses; all photos; the toxicology report and portions of the autopsy report, and evidence of false statements by" several State witnesses.

Shields also alleged Holyoak misled him by falsely claiming he had shared all discovery. He asserted he did not "review and know or understand all the [S]tate's evidence and all terms of the plea agreement or consequences of the plea.

The State moved to dismiss the motion as untimely. A new attorney was appointed for Shields, who filed a response to the State's motion and a "Second Amended Motion to Withdraw Plea and For Trial," which alleged manifest injustice arose because:

"a. Defendant's trial attorney, Kerry D. Holyoak, introduced his wife as an attorney, when she was in fact not an attorney.

"b. Defendant was told that Mr. Holyoak's wife was an experienced international attorney and had previously worked in Hong Kong.

"c. Defendant was counseled at the Neosho County Jail by Kerry Holyoak's wife in matters regarding his legal defense.

"d. Defendant's trial attorney has been indefinitely suspended from the practice of law for conduct in other matters that was occurring at the same time as defendant's representation.

"e. Defendant's attorney engaged in the same tactics and conduct described in the suspension order in *In re Holyoak*, Docket No. 114[,]836, namely, to wit:

i. Defendant's [*sic*] wife represented herself as an attorney and was not licensed or supervised by Mr. Holyoak. . . .

ii. Defendant's attorney engaged in 'fraud and misrepresentation' regarding the nature and quality of the evidence against Defendant by withholding specific portions of discovery to have defendant plead to the charges. . . .

"f. Defendant's decision to plea was materially influenced by the unqualified counsel of a non-licensed attorney.

"g. Defendant was never provided a complete copy of the discovery and was unable to make a qualified decision regarding the quality of evidence that was to be presented against him.

"h. Defendant was misled by his attorney as to the quality and nature of the testimony of co-defendant . . . [Shields' former girlfriend] by his attorney.

"i. Defendant was led to believe by his attorney that his decision to plead in his case would materially impact and mitigate charges against his mother[.]

"j. Defendant was never appropriately counseled as to the definition and effect of concurrent and consecutive sentences by his attorney."

The State did not pursue its argument for dismissal. The court conducted an evidentiary hearing on the motion to withdraw plea at which both Shields and Holyoak testified.

Shields said he met Holyoak and his wife at the jail shortly after Holyoak was appointed. During that visit, he claimed he mostly reviewed things with Holyoak's wife. According to Shields, Holyoak's wife told him: she would be helping with the case; she used to be a trial attorney in Hong Kong; all the witness statements were hearsay that should be excluded; and if the former girlfriend did not change her initial statement that Shields was not involved in the crime, the Holyoaks did not see grounds to charge him with anything. He said this was the only time he met with Holyoak except for a few brief visits before court dates.

Later, Shields said, attorney Holyoak told him the former girlfriend changed her statement, and he recommended a plea deal. Shields testified he never saw her revised statement. On cross-examination, Shields admitted that what he alleged Holyoak's wife told him did not have "anything to do with why I entered my plea."

As for the plea agreement, Shields said: Holyoak told him he would draft it and they would review it together, but instead Holyoak gave it to him outside the courtroom and he did "not [have] even five minutes to look it over . . . it wasn't really even gone over with me." Shields also testified: he did not understand everything in the agreement, though he acknowledged he had said otherwise at the plea colloquy; he did not know then there was discovery he had not seen, which "left some spots out that I would have asked questions to"; and that "I wasn't aware that I would have to go in front of a parole board in order to get parole, or else I never would have took the plea to begin with." Shields alleged Holyoak did not explain the difference between concurrent and consecutive sentences.

Overall, Shields said he did not feel Holyoak did a good job for him. He felt like "it was rushed," and that "Holyoak wasn't really trying to look through anything." He said he did not receive all the discovery and had not seen the items identified in his motions.

Holyoak testified he believed he met with Shields at the jail several times and at the courthouse before and after court hearings.

He recalled bringing his wife to the jail on a Saturday to prepare for trial. At the time, she was his paralegal and assistant. He denied telling Shields she was a lawyer, though he admitted she told Shields she had been a paralegal doing trial preparation for a British law firm in Hong Kong. He said he brought her along because of the discovery volume. He said his wife would not have been able to influence Shields to take a plea bargain from what he observed.

Holyoak also said that after the former girlfriend decided to testify against Shields he watched the video of her statement with Shields at the courthouse in Erie. Holyoak said her statement, which he assessed as "fairly believable," was part of what persuaded him to recommend the plea. He said he "had gone over all the . . . other witness statements, police reports, photographs, all of it with him. And then we sat and listened to that and watched it."

Holyoak testified "it would not be accurate" to say he went over the plea agreement with Shields for only five minutes, but rather that they "went through things just point by point, line by line, document by document." He said Shields did not want some of the case materials at the jail because he did not trust other inmates, so he brought all the material with him and spent several hours going through it because Shields did not want to take it back to his cell. Holyoak also noted Shields had the chance to see and go over the autopsy report—an item Shields specifically claimed not to have seen in full. And finally, Holyoak said he recalled discussing the difference between concurrent and consecutive sentences with Shields.

The district court's denial of the plea withdrawal motion

After hearing the testimony, the court directed the parties to prepare competing findings of fact and conclusions of law, but ultimately did not adopt either party's proposals. In its written order, the court denied the motion after concluding Shields failed to show a manifest injustice.

On the allegations about Holyoak's wife, the court found Shields' decision was "not materially influenced by any legal advice allegedly given to him by Ms. Holyoak." On the remaining

claims, the court first recounted Shields' assertions of inadequate time to consult with Holyoak and inadequate understanding of the plea agreement's terms. Then, the court summarized Shields' and Holyoak's conflicting testimony about whether evidence was withheld from Shields; whether he was misled about the content of the former girlfriend's testimony; and whether the difference between concurrent and consecutive sentences was explained to him. It noted Shields did not rebut Holyoak's testimony that Shields requested discovery not be sent to the jail or his testimony that he watched the former girlfriend's interview with Holyoak at the courthouse. Otherwise, the court did not make more detailed findings resolving specific facts in favor of one witness account or the other.

But after making these observations, the court found that at the time of his plea, Shields had "extensive experience with the criminal justice system," and that he "received a favorable plea bargain." Then, in a section designated "conclusion," the court wrote,

> "The testimony presented in this matter are very much polar opposites. The movant complains that Mr. Holyoak did little of anything right and spent little time in his defense. Mr. Holyoak, on the other hand, presents himself as a competent and diligent attorney who did everything right in the defense of his client. The truth is probably somewhere between the two extremes. This court has reason to question the complete veracity of both the defendant and his counsel. That said, after an objective review of the testimony, available transcripts, and documentation, the Court finds:
>
> 1. That the defendant was represented by competent counsel who had been actively practicing law, including criminal law, for over 20 years.
>
> 2. That the evidence presented does not establish that the defendant was misled, coerced, mistreated, or unfairly taken advantage of.
>
> 3. That the pleas entered by the defendant were fairly and understandably [*sic*] made and with knowledge of the consequences of his pleas.
>
> 4. Additionally, the current issues weren't raised in the defendant's direct appeal; the defendant had extensive prior experience in the criminal justice system, and the defendant received at least a marginally favorable plea agreement."

Shields appealed. The State did not timely file a response brief, although it obtained several extensions of time to do so. We

denied the State's motion to file a brief out of time after this appeal was set on the court's summary calendar.

Jurisdiction is proper. See K.S.A. 2020 Supp. 22-3601(b)(3) (listing criminal cases permitted to be taken directly to Supreme Court, including life sentence and off-grid crime conviction); K.S.A. 60-2101(b) (Supreme Court jurisdiction over direct appeals governed by K.S.A. 2020 Supp. 22-3601).

ANALYSIS

Shields argues the district court erred by denying his plea withdrawal motion, claiming: (1) he did not have adequate time to review the plea agreement, and (2) he did not have the chance to review all the evidence against him before entering the plea. But these contentions go against the district court's factual findings that are supported by substantial competent evidence that we cannot reweigh. *State v. Johnson*, 307 Kan. 436, 443, 410 P.3d 913 (2018). Shields essentially asks this court to believe his side of his story.

Standard of review

A district court's decision to deny a postsentencing plea withdrawal motion is reviewed for an abuse of discretion. *Hutto*, 313 Kan. at 745. A district court abuses its discretion when its decision is based on an error of law or fact or unreasonable. Appellate courts give deference to the trial court's findings of fact. *Johnson*, 307 Kan. at 443.

Discussion

A court after sentencing may set aside the judgment of conviction and permit a defendant to withdraw a plea to correct manifest injustice. K.S.A. 2020 Supp. 22-3210(d)(2). When assessing whether manifest injustice has been shown, courts generally consider three factors gleaned from *State v. Edgar*, 281 Kan. 30, 127 P.3d 986 (2006): "'(1) whether the defendant was represented by competent counsel; (2) whether the defendant was misled, coerced, mistreated, or unfairly taken advantage of; and (3) whether the plea was fairly and understandingly made.'" *Johnson*, 307 Kan. at 443. A district court may consider other relevant factors,

and the defendant need not show that all the factors apply in his favor. *Johnson*, 307 Kan. at 443. Inherent in the manifest injustice requirement is that the context of the plea agreement "was obviously unfair or shocking to the conscience." *Hutto*, 313 Kan. at 745.

In this appeal, Shields intermingles the three *Edgar* factors to argue Holyoak was ineffective and misled him to the extent his plea was not fairly and understandingly made. He asserts the court erred in giving "too much deference to Mr. Holyoak's testimony" and in seemingly "ignor[ing] most of defendant's testimony." But while Shields' testimony supports these factual arguments, Holyoak's testimony refutes them. And the court found the plea was "fairly and understand[ing]ly made with knowledge of the consequences," after considering all the arguments and evidence.

"'The question of whether a plea is understandingly made must be weighed in light of certain constitutional and statutory requirements which attach to a defendant's plea. United States constitutional due process requirements relating to pleas of guilty or nolo contendere were imposed upon the States in *Boykin v. Alabama*, 395 U.S. 238, 242-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). To be constitutionally valid, guilty pleas and their resulting waiver of rights "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."' [Citation omitted.]" *State v. Adams*, 311 Kan. 569, 575, 465 P.3d 176 (2020).

The record contains substantial competent evidence that Shields understood the plea agreement's terms and knew its consequences before he entered into it. Shields affirmed this at the plea hearing. And Holyoak refuted Shields' later claim that they only spent five minutes reviewing the agreement. Shields also executed the agreement, which plainly stated the recommended life sentence would entail only a possibility for parole after 20 years and contained an express representation that Shields understood the possible penalties for the pled-to offenses.

Shields' representations at the plea colloquy alone provide adequate basis for the district court's conclusion. See *State v. Green*, 283 Kan. 531, 548, 153 P.3d 1216 (2007) (noting defendant's articulate colloquy at the plea hearing showed that her plea was fairly and understandingly made). And faced with his new claim that these representations were false, the district court's resolution given the conflicting testimony necessarily incorporates what is

"tantamount to a credibility determination" that an appellate court is "ill-suited to question," even though the district court did not make explicit findings about how much time Holyoak spent reviewing the agreement with Shields. See *Johnson*, 307 Kan. at 445.

Shields' second claim asserts Holyoak was ineffective in failing to provide him all the State's evidence, including his former girlfriend's revised statement implicating him in the felony murder.

> "'When a postsentence motion to withdraw a plea alleges ineffective assistance of counsel, the constitutional test for ineffective assistance must be met to establish manifest injustice.' That test asks: '(1) whether the attorney's performance fell below an objective standard of reasonableness and (2) whether there is a reasonable probability that, but for the attorney's errors, the result of the proceeding would have been different.' There is a 'strong presumption' that counsel provided '"adequate assistance"' and '"made all significant decisions in the exercise of reasonable professional judgment."' Prejudice means 'a reasonable probability that, but for the deficient performance, the defendant would have insisted on going to trial instead of entering the plea.' A reasonable probability is a '"probability sufficient to undermine confidence in the outcome."' [Citations omitted.]" *Johnson*, 307 Kan. at 447.

The district court found Shields "was represented by competent counsel" and that Shields' evidence failed to establish "he was misled, coerced, mistreated, or unfairly taken advantage of." Holyoak's representation at the plea hearing and his testimony that he reviewed all the discovery with Shields supplies substantial competent evidence to support the district court's decision that Holyoak was not ineffective in the manner Shields alleged. See *State v. Dinkel*, 314 Kan. 146, 148, 495 P.3d 402 (2021) (noting appellate courts use a mixed standard of review on ineffective assistance of counsel claims, considering whether substantial competent evidence supports the court's factual findings and reviewing the conclusions of law de novo); *State v. Jones*, 306 Kan. 948, 959-60, 398 P.3d 856 (2017) (necessary findings presumed absent objection). And while Shields asserts generically that an attorney who fails to share all discovery with a criminal defendant could fall below the objective standard of reasonableness, he does not cite evidence to show how his outcome with his attorney would have been different but for this alleged deficiency.

At its core, Shields' claim is simply that the district court failed to give greater weight to his testimony, and that contention is outside our scope of appellate review. Shields has not shown the court erred as matter of law, based its decision on unsupported facts, or that its decision was otherwise unreasonable. We hold Shields fails to establish any abuse of discretion in denying the plea withdrawal motion.

Affirmed.

No. 124,397

In the Matter of MICHAEL M. SPIEGEL, *Respondent*.

(504 P.3d 1057)

ORIGINAL PROCEEDING IN DISCIPLINE

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

Original proceeding in discipline. Opinion filed March 4, 2022. One-year suspension.

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.

Michael M. Spiegel, respondent, argued the cause pro se.

PER CURIAM: This is an attorney discipline proceeding against Michael M. Spiegel, of Blue Springs, Missouri. Spiegel received his license to practice law in Kansas on March 7, 2002. Spiegel also is a licensed attorney in Missouri, admitted in 2000.

On July 7, 2021, the Disciplinary Administrator's office filed a formal complaint against Spiegel alleging violations of the Kansas Rules of Professional Conduct. The complaint was filed after Spiegel advised the Disciplinary Administrator's office of a decision by the Missouri Supreme Court to indefinitely suspend his license to practice law, effective March 17, 2020. The Missouri Supreme Court based its decision on a Missouri disciplinary hearing panel's finding that Spiegel violated Missouri Rules of Professional Conduct by engaging in a sexual relationship with a client. The panel determined respondent violated MRPC 4-1.7(a) (conflict of interest–current clients), MRPC 4-1.8(j) (conflict of interest–prohibited transactions), and MRPC 4-8.4(d) (misconduct).

Spiegel filed a timely answer to the formal complaint and cooperated with the investigation. On September 14, 2021, the parties entered into a summary submission agreement under Supreme Court Rule 223 (2021 Kan. S. Ct. R. 273). In the summary submission agreement, the Disciplinary Administrator and Spiegel

stipulate and agree that Spiegel violated the following Kansas Rules of Professional Conduct:

- KRPC 1.7(a)(2) (2021 Kan. S. Ct. R. 336) (conflict of interest: current clients);
- KRPC 1.8(k) (2021 Kan. S. Ct. R. 346) (conflict of interest: current clients: specific rules); and
- KRPC 8.4(d) (2021 Kan. S. Ct. R. 427) (misconduct).

Before us, the parties jointly recommend a one-year suspension from the practice of law. The parties also recommend Spiegel undergo a reinstatement hearing under Supreme Court Rule 232 (2021 Kan. S. Ct. R. 287).

FACTUAL AND PROCEDURAL BACKGROUND

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

"1. *Findings of Fact*. Petitioner and Respondent stipulate and agree to the facts, legal conclusions, and that Respondent engaged in the misconduct, all as alleged in the Formal Complaint filed on July 7, 2021, as follows:

. . . .

"5. On June 8, 2020, the Office of the Disciplinary Administrator received a letter from Respondent in which he self-reported receipt of discipline in the form of a suspension in Missouri ('Complaint').

"6. In addition to the Complaint the Respondent provided a March 17 Order of the Supreme Court of Missouri in Case No. SC98155, certified by the Clerk of the Supreme Court of Missouri ('Order'). The Order suspended Respondent's Missouri license indefinitely and required a period of six months from the date of the Order before a petition for reinstatement would be entertained. The Order imposed other requirements.

"7. Respondent also provided an undated Information filed by the Missouri Chief Disciplinary Counsel which, Respondent said, underlies the suspension. He closed by providing contact information.

"8. The Order references acceptance of the Missouri Hearing Panel Decision and finds that Respondent violated Rules

4-1.7(a), 4-1.8(j), and 4-8.4(d).

"9. Rules 4-1.7(a), 4-1.8(j), and 4-8.4(d) are part of the Missouri Supreme Court Rules addressing professional conduct.

"10. The Order specifies Rule 4-1.7(a) was violated 'in that, by representing a client with whom he was having sexual relations, there was a significant risk the representation would be materially limited by his personal interests and, thereby, resulted in a concurrent conflict of interest that did not come within the exception set out in Rule 4-1.7(b).'

"11. The Missouri Rule 4-1.7(a) violation equates to a violation of Kansas Rule of Professional Conduct ('KRPC') 1.7(a)(2) which, as it applies here, says that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest, which exists if there is a substantial risk that the representation will be materially limited by a personal interest of the lawyer.

"12. The Order specifies Rule 4-1.8(j) was violated 'by having sexual relations with a client when no consensual sexual relationship existed between them when the lawyer-client relationship commenced.'

"13. The Missouri Rule 4-1.8(j) violation equates to a violation of KRPC 1.8(k), which says: 'A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.'

"14. The Order specifies Rule 4-8.4(d) was violated 'in that he engaged in conduct prejudicial to the administration of justice by having sexual relations with his client during the pendency of the attorney-client relationship.'

"15. The Missouri Rule 4-8.4(d) violation equates to a violation of KRPC 8.4(d), which says that it is professional misconduct for a lawyer to 'engage in conduct that is prejudicial to the administration of justice.'

"16. Pursuant to Kansas Supreme Court Rule 221(c)(2), the Missouri Supreme Court's discipline of the Respondent for violating its rules is prima facie evidence of the commission of the conduct that formed the basis of the violation and raises a rebuttable presumption of the validity of the finding of misconduct. The Respondent has the burden to disprove the finding in a disciplinary proceeding.

"17. In addition to the foregoing authority for a finding of misconduct in Kansas, the evidence that supported the Missouri Supreme Court's determination of violations of its rules in its Order likewise supports violations of the KRPC identified in this Formal Complaint.

"18. Respondent was informed by a January 25, 2021 letter that the Review Committee for the Kansas Board for the Discipline of Attorneys had directed the Disciplinary Administrator's Office to institute formal charges.

"*Conclusions of Law*. Petitioner and Respondent stipulate and agree that Respondent violated the following Supreme Court Rules and Kansas Rules of Professional Conduct: KRPC 1.7(a)(2) Conflict of Interest: Current Clients, KRPC 1.8(k), Conflict of Interest: Current Clients: Specific Rules, and KRPC 8.4(d) Misconduct.

. . . .

"2. *Recommendation for Discipline*. Petitioner and Respondent jointly recommend that the respondent be suspended from practice for one year. They further recommend that Respondent be required to undergo a reinstatement hearing pursuant to Rule 232 (2021 Kan. S. Ct. R. 287) prior to reinstatement of Respondent's license to practice law.

"3. *Additional Statements and Stipulations*.

"A. Petitioner and Respondent hereby waive the disciplinary hearing.

"B. Petitioner and Respondent agree that no exceptions to the findings of fact and conclusions of law will be taken.

"C. Respondent understands and agrees that pursuant to Rule 223(f) (2021 Kan. S. Ct. R. 273), 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.

"D. Respondent also understands and agrees that after entering into this Summary Submission Agreement Respondent will be required to appear before the Kansas Supreme Court for oral argument under Rule 228(i) (2021 Kan. S. Ct. R. 273).

"E. Petitioner and Respondent agree that the exchange and execution of copies of this Agreement by electronic transmission shall constitute effective execution and delivery of this Agreement and that copies may be used in lieu of the original and the signatures shall be deemed to be original signatures."

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) (2021 Kan. S. Ct. R. 276) (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 Spiegel with adequate notice of the formal complaint. The Disciplinary Administrator also provided Spiegel with adequate notice of the hearing before the panel, but he waived that hearing after entering into the summary submission agreement. Under Rule 223, 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 contents of the record, findings of fact, 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;

(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) (2021 Kan. S. Ct. R. 273).

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 Supreme Court Rule 228(g)(1) (2021 Kan. S. Ct. R. 282) ("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. See Rule 223 (2021 Kan. S. Ct. R. 273). The current version of Rule 223 also requires the summary submission to include any applicable aggravating and mitigating factors. See Rule 223 (2022 Kan. S. Ct. R. at 277). At oral argument, the attorney representing the Office of the Disciplinary Administrator recited those factors:

> Aggravating Factors: selfish motive, duration and pattern of misconduct, vulnerability of victim, and substantial experience in the practice of law. See ABA Standards for Imposing Lawyer Sanctions, § 9.2
>
> Mitigating Factors: absence of a prior disciplinary record, cooperation in disciplinary proceedings, good character and reputation in the community, and imposition of other penalties or sanctions in another jurisdiction for the same offense. See ABA Standards for Imposing Lawyer Sanctions, § 9.3.

Respondent orally stipulated to the existence of both the aggravating and mitigating factors set forth by the Office of the Disciplinary Administrator attorney. The summary submission and the parties' stipulations before us establish by clear and convincing evidence the charged conduct violated KRPC 1.7(a)(2), 1.8(k), and 8.4(d). We adopt the findings and conclusions set forth by the parties in the summary submission and at oral argument.

The remaining issue is deciding the appropriate discipline. The parties jointly recommend a one-year suspension of Spiegel's law license and that Spiegel undergo a reinstatement hearing under Supreme Court Rule 232 before any reinstatement. An agreement to proceed by summary submission is advisory only and does not prevent us from imposing discipline greater or lesser than the parties' recommendation. Rule 223(f). After full consideration, we hold a one-year suspension with a required reinstatement hearing is an appropriate sanction. As a condition of reinstatement, Spiegel must show his Missouri law license is active.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Michael M. Spiegel 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 violations of KRPC 1.7(a)(2), 1.8(k), and 8.4(d).

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 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.

No. 124,849

SCOTT SCHWAB, Kansas Secretary of State, in His Official Capacity, and MICHAEL ABBOTT, Wyandotte County Election Commissioner, in His Official Capacity, *Petitioners*, v. The Honorable BILL KLAPPER, in His Official Capacity as a District Court Judge, Twenty-Ninth Judicial District, and The Honorable MARK SIMPSON, in His Official Capacity as a District Court Judge, Seventh Judicial District, *Respondents*.

(505 P.3d 345)

SYLLABUS BY THE COURT

1. JURISDICTION—*Kansas Supreme Court has Concurrent Discretionary Jurisdiction over Original Actions Filed in Mandamus or Quo Warranto—Factors for Consideration.* This court has concurrent discretionary jurisdiction over original actions filed in either mandamus or quo warranto. Factors we will consider when deciding whether to exercise discretionary jurisdiction include: whether the case presents issues of significant public concern or matters of statewide importance; whether the petition presents purely legal questions or requires extensive fact-finding; or whether there is a need for an expeditious ruling.

2. SAME—*Court's Exercise of Discretionary Jurisdiction—Determination if Action Lies in Mandamus or Quo Warranto—Question of Law.* Once a court decides to exercise its discretionary jurisdiction, it next must determine whether the particular action (or each particular claim within the particular action) lies in mandamus or lies in quo warranto (or both or neither). This is a question of law. When deciding whether a particular action lies in mandamus or quo warranto, a court must consider the limited scope and nature of mandamus or quo warranto actions in conjunction with the relief sought by the petitioner. If the action does not lie, the petition for mandamus or quo warranto relief must be denied.

3. SAME—*Court's Exercise of Discretionary Jurisdiction—Following Determination of Type of Action Court Rules on Merits of Claim.* After a court has decided to exercise its discretionary jurisdiction and has determined that the particular action lies in either mandamus or quo warranto, then the court will consider and rule on the merits of the claim.

4. COURTS—*Original Action Compelling Dismissal of Pending Case—Mandamus or Quo Warranto Not Applicable If Adequate Remedy on Appeal.* An original action seeking to compel a district court to dismiss a pending case when there is an adequate remedy on appeal does not lie in either mandamus or quo warranto.

Original action in mandamus and quo warranto. Opinion filed March 4, 2022. Mandamus and quo warranto denied.

Brant M. Laue, solicitor general, *Kurtis K. Wiard*, assistant solicitor general, *Shannon Grammel*, deputy solicitor general, *Dwight R. Carswell*, deputy solicitor general, *Jeffrey A. Chanay*, chief deputy attorney general, and *Derek Schmidt*, attorney general, were on the briefs for petitioners.

No briefs filed by respondents.

The opinion of the court was delivered by

STEGALL, J.: On February 14, 2022, two lawsuits seeking declaratory and injunctive relief were filed in the Wyandotte County District Court. The suits named as defendants Kansas Secretary of State Scott Schwab and Wyandotte County Election Commissioner Michael Abbott. The complaints ask the district court to rule that the congressional reapportionment map known as "Ad Astra 2" and contained in Senate Bill 355 (2022) violates the Kansas Constitution. Specifically, plaintiffs allege Ad Astra 2 is deliberately designed to elect Republicans to Congress at the expense of Democrats. In addition to the partisan gerrymander allegations, the plaintiffs also allege the Legislature racially gerrymandered the districts to intentionally dilute the minority vote. On March 1, a third lawsuit based on these same facts was filed in Douglas County District Court against Scott Schwab and Douglas County Clerk Jamie Shew. The plaintiffs in these three lawsuits claim violations of Article 5, section 1 of the Kansas Constitution and of sections 1, 2, 3, 11, and 20 of the Kansas Constitution Bill of Rights.

On February 18, 2022, the Kansas Attorney General, on behalf of Schwab and Abbott, filed in this court a petition for mandamus and quo warranto relief seeking dismissal of the two lawsuits pending before respondent, Wyandotte County District Court Judge Bill Klapper. The Attorney General subsequently filed an amended petition on March 3, 2022, adding the Douglas County action and seeking dismissal of the lawsuit pending before the respondent, Douglas County District Judge Mark Simpson.

DISCUSSION

This court has original jurisdiction in proceedings in mandamus and quo warranto as provided by Article 3, section 3 of the Kansas Constitution. "This jurisdiction is plenary and may be exercised to control the actions of inferior courts over which the Supreme Court has superintendent authority." *State ex rel. Stephan*

v. O'Keefe, 235 Kan. 1022, 1024-25, 686 P.2d 171 (1984). Our original jurisdiction is discretionary and concurrent with that of lower courts. *Ambrosier v. Brownback*, 304 Kan. 907, 909, 375 P.3d 1007 (2016).

Determining whether to exercise discretionary jurisdiction is the first duty of a court when considering a petition in mandamus or quo warranto. In exercising our discretion to accept jurisdiction over such claims, we consider several factors, including: whether the case presents issues of significant public concern or matters of statewide importance; whether the petition presents purely legal questions or requires extensive fact-finding; or whether there is a need for an expeditious ruling. See, e.g., *Board of Johnson County Comm'rs v. Jordan*, 303 Kan. 844, 850, 370 P.3d 1170 (2016) (great public importance and concern); *Stephens v. Van Arsdale*, 227 Kan. 676, 682, 608 P.2d 972 (1980) (speedy adjudications of questions of law; matter of statewide concern); *Mobil Oil Corp. v. McHenry*, 200 Kan. 211, 239, 436 P.2d 982 (1968) (speedy adjudication to expedite official business).

The validity of a legislatively enacted congressional reapportionment scheme is a matter of great public concern and statewide importance. See generally *Harris v. Anderson*, 196 Kan. 450, 412 P.2d 457 (1966) (assessing the validity of a state House of Representatives redistricting scheme under this court's original jurisdiction). Indeed, "drawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 416, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006).

And we recognize these questions warrant a speedy resolution. Time is of the essence in resolving the issues presented in this case as the 2022 election cycle is fast approaching. The candidate filing deadline for the primary election is June 1, 2022. See K.S.A. 2020 Supp. 25-205. The primary election is scheduled for August 2, 2022. K.S.A. 25-203(a). And the general election will be held on November 8, 2022. K.S.A. 2020 Supp. 25-101(a). Expeditious confirmation of congressional district lines benefits candidates seeking to run in congressional districts, state officials re-

sponsible for administering congressional elections in those districts, and constituents who need to know the congressional district in which they will reside.

But we also recognize the plaintiffs have made claims in the pending district court actions that may require fact-finding by the lower court. This can weigh against the discretionary exercise of jurisdiction See *Oberhelman v. Larimer*, 110 Kan. 587, 590, 204 P. 687 (1922) ("The defendants request that, if their motion to quash be denied, they be allowed time in which to answer. This indicates that questions of fact would be presented. This court is not as well equipped to try questions of fact as the district court. The remedy by mandamus in this court is not as complete as the remedy provided by law in matters of this kind.").

Considering all these factors together, we conclude that exercising our discretionary jurisdiction over this petition is in the interests of all concerned.

Having decided to exercise our discretionary jurisdiction, we turn to the second question we must address—have the petitioners properly stated a claim for relief under either mandamus or quo warranto? In the past, we have often framed this second question as asking whether an action in the nature of either quo warranto or mandamus "lies" to grant the petitioner the relief sought. See, e.g., *Lauber v. Firemen's Relief Assn. of Salina*, 195 Kan. 126, 129, 402 P.2d 817 (1965) ("Mandamus lies only to enforce a right in a clear-cut case."); *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 656, 367 P.3d 282 (2016) ("[Q]uo warranto generally will not lie when another plain and adequate remedy exists."); *Stephens v. Van Arsdale*, 227 Kan. 676, 682, 608 P.2d 972 (1980) ("Mandamus will not lie to compel a public officer to perform an unauthorized act."); *Bank Commissioner v. Stewart*, 113 Kan. 402, 404, 214 P. 429 (1923) ("Mandamus will lie to compel an officer of a corporation to deliver all books, papers, documents, and property to his successor in office, or to the corporation when the officer has ceased to act as such.").

Whether a particular action lies in either mandamus or quo warranto is a question of law. See *State ex rel. Slusher v. City of Leavenworth*, 285 Kan. 438, 443, 172 P.3d 1154 (2007). Where the relief sought is not of the kind available in an action for quo

warranto or mandamus, the action is said not to "lie." This is a legal determination and not subject to the discretion of this court.

We recognize our prior decisions may have caused confusion by blurring the distinction between these two questions—one discretionary question (whether to exercise jurisdiction) and one legal question (whether the petition states a valid claim for relief under our original jurisdiction). Today we state clearly that these are distinct inquiries. A court may choose to exercise its discretionary jurisdiction in an original action only to conclude—as a matter of law—that the specific petition before it does not lie in mandamus or quo warranto. And if an action does not lie in mandamus or quo warranto, the petition must be denied. This court does not have discretion to reach the merits of such a claim simply because the question presented is one of statewide importance, significant public concern, or there is a compelling need for an expeditious and authoritative ruling on an important legal question. Language in our prior decisions suggesting otherwise (or interpreted as suggesting otherwise) is expressly disapproved.Whether a particular action lies in either mandamus or quo warranto turns on the limited scope of the original actions in question—either quo warranto or mandamus—and on the type of relief sought in the petition. Mandamus is "a proceeding to compel some inferior court, tribunal, board, or some corporation or person to perform a specified duty, which duty results from the office, trust, or official station of the party to whom the order is directed, or from operation of law." K.S.A. 60-801. A "writ of mandamus seeks to enjoin an individual or to enforce the personal obligation of the individual to whom it is addressed," and "rests upon the averred and assumed fact that the respondent is not performing or has neglected or refused to perform an act or duty, the performance of which the petitioner is owed as a clear right." *O'Keefe*, 235 Kan. at 1024. "The writ will not ordinarily issue unless there has been a wrongful performance or actual default of duty." 235 Kan. at 1024. Moreover, mandamus relief does not lie if there is an adequate remedy at law. 235 Kan. at 1025.

For mandamus to lie in this case, petitioners must show that a mandatory, nondiscretionary duty requires Judge Klapper and Judge Simpson to dismiss the cases. No such mandatory duty exists,

and no clear legal duty has been violated. See *Lauber*, 195 Kan. at 129 ("[B]efore an order of mandamus may be issued it must be found that a clear legal right has been violated."). Lower courts consider questions of jurisdiction and justiciability all the time. The aggrieved party may appeal from such rulings as a matter of course. And here, Judges Klapper and Simpson have not even had the opportunity to rule. Petitioners' claim does not lie in mandamus.

Petitioners also seek quo warranto relief under K.S.A. 60-1202(1), which permits a quo warranto action to be brought in this court "[w]hen any person shall usurp, intrude into or unlawfully hold or exercise any public office." "An action in quo warranto demands that an individual or corporation show by what authority it has engaged in a challenged action." *Kelly v. Legislative Coordinating Council*, 311 Kan. 339, 344, 460 P.3d 832 (2020). Unlike mandamus, "a writ of quo warranto is not an order directing the defendant to perform or to cease performing a certain act; rather, it is an order directing the defendant to show by what authority he or she is acting." 55 C.J.S., Mandamus § 5.

For quo warranto relief to lie, petitioners must allege that Judge Klapper and Judge Simpson are exercising unlawfully asserted authority. But of course, even if either district judge issues an incorrect ruling, they would not be acting unlawfully. They would merely be in error, which can be readily remedied through a process of appellate review. Petitioners' claim does not lie in quo warranto.

In deciding as a matter of law that petitioners' claims do not lie in either mandamus or quo warranto, we emphasize that we do not reach, consider, or take any position on the merits of the underlying claims. We recognize that consideration of those claims may be properly before us in the ordinary course of an ordinary appeal at some time in the near future. To that end—and in view of the limited time available and the importance of the resolution of these questions—we encourage the parties in the pending district court litigation to work with the district courts to expeditiously resolve the legal questions and to present a timely appeal, should any party desire appellate review.

The amended petition in mandamus and quo warranto is denied.

No. 119,747

STATE OF KANSAS, *Appellee*, v. ROBERT E. MITCHELL, *Appellant*.

(505 P.3d 739)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Sentencing—Determination Whether Sentence Is Illegal—Appellate Review.* An appellate court exercises de novo review over the determination of whether a sentence is illegal within the meaning of K.S.A. 2020 Supp. 22-3504.

2. SAME—*Illegal Sentence Definition—Denial of Speedy Trial Claim Not Included.* The definition of an illegal sentence does not include a claim that a defendant was denied his or her statutory right to a speedy trial.

3. SAME—*Illegal Sentence Definition—Compliance with Statutory Allocution Requirements Claim Not Included.* The definition of an illegal sentence does not include a claim that a district court failed to comply with statutory allocution requirements.

4. SAME—*Improper Motion to Correct Illegal Sentence—Appellate Courts May Construe as K.S.A. 60-1507 Motion.* Appellate courts have discretion to construe an improper motion to correct an illegal sentence as a motion challenging a sentence under K.S.A. 60-1507.

5. HABEAS CORPUS—*K.S.A. 60-1507 Motions Time-Barred after One Year—Exception for Manifest Injustice.* K.S.A. 60-1507 motions are time-barred if filed more than one year after the case is final unless a movant can establish manifest injustice.

6. SAME—*Dismissal of Successive 60-1507 Motion as Abuse of Remedy—Exception for Exceptional Circumstances.* A second or successive K.S.A. 60-1507 motion may be dismissed as an abuse of remedy unless the defendant establishes exceptional circumstances for the subsequent motion. Exceptional circumstances are unusual events or intervening changes in the law that prevented the defendant from raising the issue in a preceding 60-1507 motion.

Appeal from Johnson District Court; TIMOTHY P. MCCARTHY, judge. Opinion filed March 11, 2022. Affirmed.

Brittany E. Lagemann, of Olathe, was on the brief for appellant.

Jacob M. Gontesky, assistant district attorney, *Stephen M. Howe*, district attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

ROSEN, J.: In 1988, a Johnson County jury convicted Robert E. Mitchell of aggravated burglary, aggravated kidnapping, rape, and two counts of aggravated sodomy. In the years following his convictions, Mitchell has unsuccessfully petitioned the courts for various forms of relief. Mitchell filed a pro se motion to correct an illegal sentence under K.S.A. 22-3504 which the district court summarily denied. Mitchell appeals, arguing that his sentence is illegal because he was denied his statutory right to a speedy trial and his right to allocution at sentencing. However, neither claim is properly before this court in a motion to correct an illegal sentence, and Mitchell does not allege that we should construe his motion as one challenging his sentence under K.S.A. 60-1507. But even if we did, Mitchell's motion is both untimely and successive. As a result, we affirm the district court.

Factual and Procedural Background

Mitchell was convicted of multiple crimes in 1988 for unlawfully entering the victim's house and sexually assaulting her. He was convicted of and sentenced to a term of life imprisonment for aggravated kidnapping; a term of 45 years to life in prison for each rape and aggravated sodomy count; and a term of 15-60 years in prison for aggravated burglary. The district court imposed a controlling prison sentence of a minimum of life plus 60 years and a maximum of two life sentences plus 60 years. We affirmed Mitchell's convictions and sentence on direct appeal. *State v. Mitchell*, No. 62,234, 784 P.2d 365 (Kan. 1989) (unpublished opinion).

Thereafter, Mitchell unsuccessfully sought relief through various postconviction motions. See, e.g., *State v. Mitchell*, 284 Kan. 374, 379, 162 P.3d 18 (2007) (affirming summary dismissal of motion to correct illegal sentence); *Mitchell v. McKune*, No. 109,285, 2014 WL 349584, at *6 (Kan. App. 2014) (unpublished opinion) (affirming denial of K.S.A. 60-1507 motion); *Mitchell v. State*, No. 87,218, 2002 WL 35657541, at *1 (Kan. App. 2002) (unpublished opinion) (affirming denial of K.S.A. 60-1507 motion).

We now consider the latest of Mitchell's pro se motions to correct an illegal sentence. In the motion, Mitchell alleged violations of his constitutional and statutory rights to a speedy trial and claimed that the district court had illegally sentenced him as a habitual offender and had improperly deprived him of his right to allocution at sentencing. Mitchell also argued that trial and appellate counsel were ineffective in failing to raise these issues.

Finding no need for the appointment of counsel or a preliminary hearing, the district court summarily denied Mitchell's motion. The court concluded that the issues raised in the motion had previously been rejected by multiple courts and that no exceptional circumstances justified reconsideration of these issues.

Mitchell filed this timely appeal. Jurisdiction is proper. See K.S.A. 2020 Supp. 22-3601(b)(3) (Supreme Court has jurisdiction over case in which life sentence is imposed); *State v. Sims*, 294 Kan. 821, 823-24, 280 P.3d 780 (2012) (Supreme Court has jurisdiction over motion to correct an illegal sentence filed in a case in which defendant received a life sentence).

Analysis

Whether a sentence is illegal is a question of law subject to de novo review. *State v. Sartin*, 310 Kan. 367, 369, 446 P.3d 1068 (2019). An illegal sentence is defined as:

(1) a sentence imposed by a court without jurisdiction; (2) a sentence that does not conform to the applicable statutory provision, either in character or the term of authorized punishment; or (3) a sentence that is ambiguous with respect to the time and manner in which it is to be served. K.S.A. 2020 Supp. 22-3504(c)(1); *State v. Hambright*, 310 Kan. 408, 411, 447 P.3d 972 (2019).

When a district court summarily denies a motion to correct an illegal sentence under K.S.A. 22-3504, this court exercises de novo review of that decision because we have access to the same documents as the district court. *State v. Alford*, 308 Kan. 1336, 1338, 429 P.3d 197 (2018). A K.S.A. 22-3504 motion may be summarily denied without the appointment of counsel when the motion, files, and records of the case conclusively show the defendant has no right to relief. *State v. Laughlin*, 310 Kan. 119, 121, 444 P.3d 910 (2019).

No illegality under K.S.A. 2020 Supp. 22-3504

At the outset, we note that Mitchell has abandoned his claims below that his constitutional speedy trial rights were violated and that he was illegally sentenced as a habitual offender. See *State v. Salary*, 309 Kan. 479, 481, 437 P.3d 953 (2019) (issues not briefed are deemed waived or abandoned). On appeal, Mitchell argues only that his sentence is illegal because he was deprived of his statutory right to a speedy trial and his right to allocution at sentencing.

But neither of Mitchell's arguments give rise to a claim of an illegal sentence under K.S.A. 2020 Supp. 22-3504. The illegal sentence statute is one of specific and limited application. *Alford*, 308 Kan. at 1338. Mitchell's assertions of a statutory speedy trial rights violation and the denial of his right to allocution do not involve claims that divest the district court of jurisdiction. Nor do they allege that his sentence did not conform to the applicable statutory provision or was ambiguous with respect to the time and manner in which it was to be served. See K.S.A. 2020 Supp. 22-3504(c)(1); *State v. Taylor*, 299 Kan. 5, 8, 319 P.3d 1256 (2014) (claim that defendant was denied his or her statutory right to speedy trial is not properly raised in motion to correct illegal sentence); *State v. Mebane*, 278 Kan. 131, Syl. ¶ 1, 91 P.3d 1175 (2004) ("The district court's failure to comply with the statutory allocution requirements does not make a defendant's sentence illegal.").

No relief under K.S.A. 2020 Supp. 60-1507

While appellate courts have discretion to construe an improper motion to correct an illegal sentence as a motion challenging the sentence under K.S.A. 60-1507, Mitchell makes no such request here. See *State v. Redding*, 310 Kan. 15, 19, 444 P.3d 989 (2019) (citing *State v. Harp*, 283 Kan. 740, 744-45, 156 P.3d 1268 [2007]). Indeed, in one of his filings below, Mitchell specifically asked the district court clerk to give the motion a criminal case number, rather than a civil one, and stated: "This is a K.S.A. § 22-3504 motion to correct an illegal sentence, not a K.S.A. § 60-1507 motion."

But even if we were to construe Mitchell's motion as one brought under K.S.A. 60-1507, he would not be entitled to relief because he cannot overcome certain procedural hurdles. K.S.A. 2020 Supp. 60-1507(f) requires the motion to be filed within one year of the case becoming final unless the movant can show manifest injustice. Mitchell clearly exceeded that time limit and provides no manifest injustice argument.

In addition, Mitchell's motion is successive in that he asserts claims that were decided, or which could have been decided, on direct appeal or in the multiple motions challenging his 1988 convictions and sentence he has filed since that time. In 2009, Mitchell petitioned for writ of habeas corpus alleging the same speedy trial issue he now raises. Construing the petition as one brought under K.S.A. 60-1507, the district court summarily denied it. After reviewing the merits of Mitchell's speedy trial argument, the Court of Appeals affirmed the district court, holding that "the motion, files, and records conclusively show that Mitchell's statutory right to a speedy trial was not violated." See *Mitchell*, 2014 WL 349584, at *6. Under the law-of-the-case doctrine, we generally do not reconsider issues that have been finally decided in prior appeals in the same case. *State v. Cheeks*, 313 Kan. 60, 66, 482 P.3d 1129 (2021); *State v. Parry*, 305 Kan. 1189, 1194-95, 390 P.3d 879 (2017) (litigants must proceed in accordance with mandates and legal rulings as established in previous appeals).

And under K.S.A. 2020 Supp. 60-1507(c), district courts need not consider more than one habeas motion seeking similar relief filed by the same prisoner. See Kansas Supreme Court Rule 183(d) (2022 Kan. S. Ct. R. at 242). Because a movant is presumed to have listed all grounds for relief in his or her initial K.S.A. 60-1507 motion, a prisoner must show exceptional circumstances to justify the filing of a successive motion. *Littlejohn v. State*, 310 Kan. 439, 446, 447 P.3d 375 (2019); see *State v. Trotter*, 296 Kan. 898, Syl. ¶ 2, 295 P.3d 1039 (2013). Exceptional circumstances include "unusual events or intervening changes in the law which prevent[ed] a movant from reasonably being able to raise all of the trial errors in the first postconviction proceeding." *State v. Kelly*, 291 Kan. 868, Syl. ¶ 2, 248 P.3d 1282 (2011).

In his appellate brief, Mitchell does not point to any changes in the law or unusual events that would justify the filing of a successive K.S.A. 60-1507 motion, effectively waiving this argument. See *Salary*, 309 Kan. at 481. In his motion to correct an illegal sentence, Mitchell suggested that ineffective assistance of trial and appellate counsel and inadequate access to the prison law library constituted exceptional circumstances that warranted the court's reconsideration of the issues raised in his motion.

Neither excuse rises to the level of exceptional circumstances that prevented Mitchell from raising these claims in his first K.S.A. 60-1507 motion. While an ineffective assistance of counsel claim may constitute an exceptional circumstance, any ineffectiveness relating to Mitchell's speedy trial rights and sentencing allocution occurred before he filed his first 60-1507 motion in 1996. See *Rowland v. State*, 289 Kan. 1076, 1087, 219 P.3d 1212 (2009) ("Ineffective assistance of counsel can qualify as an exceptional circumstance."). Thus, ineffective assistance of counsel at trial or on direct appeal was not an intervening event that would excuse Mitchell's failure to raise the issues in his first 60-1507 motion. Notably, Mitchell argued ineffective assistance of counsel in his first 60-1507 motion, albeit on different grounds. See *Mitchell*, 2002 WL 35657541, at *1. Mitchell also argued ineffective assistance of counsel relating to the speedy trial issue on appeal of his second 60-1507 motion, which the Court of Appeals rejected. See *Mitchell*, 2014 WL 349584, at *4-6. While Mitchell makes an additional argument here to include ineffectiveness relating to his allocution claim, he ultimately seeks successive consideration of the same issue. This is not an exceptional circumstance. See K.S.A. 2020 Supp. 60-1507(c) ("The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."); *Thuko v. State*, 310 Kan. 74, 84-85, 444 P.3d 927 (2019) (holding movant's failure to establish exceptional circumstances that prevented him from presenting all ineffective assistance of counsel arguments in first 60-1507 motion barred movant from "'piecemeal[ing] an issue of ineffective assistance of counsel to circumvent Supreme Court Rule 183[d]'").

And even if Mitchell was unable to access the prison law library as often as he would have liked, the record on appeal reflects that Mitchell never lacked access to the courts. Mitchell has filed numerous postconviction pleadings in the years since his convictions, raising both the speedy trial and allocution issues. Any suggestion that Mitchell was previously unaware of or unable to argue these issues until now is unpersuasive.

Conclusion

Mitchell's motion to correct an illegal sentence was not the appropriate vehicle for claiming a violation of his statutory speedy trial rights or a denial of his right to allocution. But even if we were to construe Mitchell's motion as one filed under K.S.A. 60-1507, we are bound by the law of the case as well as Mitchell's failure to prove the requisite exceptional circumstances that would excuse the filing of his successive motion, or the manifest injustice required to circumvent the one year time limitation on such motions. As a result, we affirm the district court's decision summarily denying Mitchell's motion.

Affirmed.

STANDRIDGE, J., not participating.

No. 121,888

DALE M.L. DENNEY, *Appellant*, v. JOE NORWOOD, *Appellee.*

(505 P.3d 730)

SYLLABUS BY THE COURT

1. HABEAS CORPUS—*Ordinary Rules of Civil Procedure Not Applicable to 60-1507 Proceedings.* Proceedings on a petition for writ of habeas corpus filed under K.S.A. 60-1501 are not subject to ordinary rules of civil procedure.

2. SAME—*Motion to Dismiss Habeas Corpus Petition—K.S.A. 60-212(b)(6) and K.S.A. 60-256 Not Applicable.* Courts should not apply K.S.A. 2020 Supp. 60-212(b)(6) or K.S.A. 2020 Supp. 60-256 when evaluating a motion to summarily dismiss a petition for habeas corpus under K.S.A. 60-1501.

3. SAME—*Habeas Corpus Procedures under Chapter 60, Article 15.* Chapter 60, Article 15 of Kansas Statutes Annotated sets out the procedures and standards applicable to the disposition of a petition for habeas corpus under K.S.A. 60-1501.

4. SAME—*K.S.A. 60-1501 Petition Provides Procedures for Challenging Mistreatment and Denial of Constitutional Rights.* The remedy K.S.A. 60-1501 provides is not limited to contesting the legality of confinement; a K.S.A. 60-1501 petition also provides a procedural means for challenging the mode and conditions of confinement where mistreatment and denial of constitutional rights are alleged.

5. SAME—*Adjudication of K.S.A. 60-1501 Petition—Courts Determine if Right to Relief from Petition and Exhibits.* Chapter 60, Article 15 of Kansas Statutes Annotated contemplates two possible paths to adjudicate a K.S.A. 60-1501 petition. First, when presented with the petition for a writ of habeas corpus, the court may determine from the face of the petition and any attached exhibits that the petitioner is entitled to no relief and deny the petition summarily. Second, the court may determine from the petition and attached exhibits that the petitioner may have a right to relief, in which case the court should issue a writ of habeas corpus, appoint counsel, order the respondent to file an answer, hold a hearing, and determine the cause.

6. SAME—*Adjudication of Habeas Corpus Petition—Two Types of Hearings—Non-evidentiary and Evidentiary Hearings*. K.S.A. 2020 Supp. 60-1503(a) does not specify the type of hearing required to adjudicate an inmate's habeas corpus petition—the judge is merely required to proceed in a summary way to hear and determine the cause. Yet the statutory scheme permits at least two types of hearings on the path to final resolution. First, K.S.A. 2020 Supp. 60-1505(a) expressly contemplates a non-evidentiary hearing, i.e., a preliminary habeas corpus hearing, focusing on the motion, files, and records of the case. If the court determines that the motion, files, and the records of the case conclusively show that the inmate is entitled to no relief, then the court shall dissolve the writ. If the court cannot determine from the motion, files, and records that petitioner is entitled to no relief, the district court may conduct an evidentiary hearing (either in addition to or in lieu of

the preliminary habeas corpus hearing) and make appropriate findings of fact and conclusions of law in support of its judgment.

7. SAME—*Summary Dismissal of K.S.A. 60-1501 Petition by District Court—Appellate Review.* When a district court summarily dismisses a K.S.A. 60-1501 petition based only on the motion, files, and records, appellate courts are in just as good a position as the district court to determine the merits. As a result, an appellate court's review is de novo.

8. SAME—*Dismissal of K.S.A. 60-1501 Petition after Evidentiary Hearing—Appellate Review.* When the district court dismisses a K.S.A. 60-1501 petition after holding an evidentiary hearing and making findings of facts and conclusions of law, appellate courts review the district court's factual findings for substantial competent evidence and the legal conclusions de novo.

9. SAME—*Allegation of Violation of Constitutional Rights—Burden of Proof on Inmate.* An inmate alleging a violation of constitutional rights in a habeas corpus proceeding carries the burden of proof.

Review of the judgment of the Court of Appeals in an unpublished opinion filed June 19, 2020. Appeal from Labette District Court; JEFFRY L. JACK, judge. Opinion filed March 11, 2022. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Lucas J. Nodine, of Nodine Legal, LLC, of Parsons, argued the cause and was on the brief for appellant.

Fred W. Phelps Jr., deputy chief legal counsel, Kansas Department of Corrections, argued the cause, and *Joni Cole*, legal counsel, El Dorado Correctional Facility, was on the brief for appellee.

The opinion of the court was delivered by

WALL, J.: This case requires us to clarify the legal and procedural framework governing the adjudication of petitions for writ of habeas corpus under K.S.A. 60-1501 et seq., a statutory scheme that enables inmates to challenge the mode or condition of their confinement.

Dale M.L. Denney, an inmate at El Dorado Correctional Facility, petitioned for writ of habeas corpus against Joe Norwood (Secretary), who was the Secretary of Corrections at the time. In his petition, Denney challenged the Kansas Department of Corrections' (KDOC) decision to classify and manage him as a sex offender. That classification affects an inmate's visitation rights and access to work and treatment programs, among other conditions and benefits.

Denney alleged that KDOC classified him as a sex offender based on its mistaken belief that Denney falls within the definition of an offender under the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 et seq. The Secretary filed an "Answer To Writ of Habeas Corpus And Motion To Dismiss," with supporting documentary evidence attached. In this consolidated filing, KDOC claimed it properly classified Denney as a sex offender under its internal policies, not KORA.

The district court granted the Secretary's motion and dissolved the writ of habeas corpus. Relying on evidence the Secretary attached to its filings, the district court found that Denney was properly classified as a sex offender under KDOC policy, rather than KORA. While at least one prison official had informed Denney that KDOC based its classification decision on KORA, the district court found the prison official's statement was simply mistaken and ultimately harmless.

A panel of the Court of Appeals affirmed the district court's ruling. The panel construed and analyzed the Secretary's motion as a motion to dismiss for failure to state a claim for relief under K.S.A. 2020 Supp. 60-212(b)(6). Under that standard, when matters outside the pleadings are presented in support of a motion to dismiss for failure to state a claim for relief, the district court must treat the motion as one for summary judgment under K.S.A. 2020 Supp. 60-256. See K.S.A. 2020 Supp. 60-212(d). The panel held that the documents attached to the Secretary's filings "should be deemed attachments to his answer" rather than "part of his motion to dismiss." *Denney v. Norwood*, No. 121,888, 2020 WL 3393773, at *3 (Kan. App. 2020) (unpublished opinion). So construed, the panel concluded that the district court did not have to convert the Secretary's motion to dismiss into a motion for summary judgment. Alternatively, the panel concluded that any error was harmless. 2020 WL 3393773, at *3-4.

The panel erred by analyzing the district court's ruling under K.S.A. 2020 Supp. 60-212. Habeas corpus proceedings are governed by Article 15 of Chapter 60 of the Kansas Statutes Annotated. Through these statutory provisions, the Legislature has created a self-contained scheme that sets forth the procedural and substantive rules governing the disposition of an inmate's request

for habeas corpus relief under K.S.A. 60-1501. As a result, habeas corpus proceedings are not subject to ordinary rules of civil procedure, and neither K.S.A. 2020 Supp. 60-212 nor K.S.A. 2020 Supp. 60-256 provide an appropriate legal framework for analyzing Denney's petition or the Secretary's motion to dismiss the same.

Even so, we affirm the panel's judgment, although on different grounds, because the record establishes that no cause for granting a writ exists and summary dismissal is proper under K.S.A. 2020 Supp. 60-1505. Thus, the district court did not abuse its discretion by summarily dismissing Denney's petition, and we affirm the judgment of the Court of Appeals.

FACTS AND PROCEDURAL BACKGROUND

Denney filed his K.S.A. 60-1501 petition while incarcerated at a satellite unit of El Dorado Correctional Facility in Oswego. He is serving sentences for 1993 convictions of aggravated sexual battery, aggravated criminal sodomy, and an aggravated weapons violation. He committed those offenses while on parole for 1988 convictions for aggravated burglary and rape. For his 1993 convictions, the district court sentenced Denney to life imprisonment with no chance of parole for 30 years for aggravated criminal sodomy and a consecutive controlling sentence of 6 to 20 years for the other convictions.

Denney's petition alleged that KDOC relied on KORA to classify and manage him as a sex offender within the prison. He attached several exhibits supporting that claim. An inmate-request form from March 2017 informed Denney that KDOC uses the "Offender Registration Requirements KSA - 22-4901" to manage inmates as sex offenders. A 2006 form showed that KDOC was managing Denney as a sex offender because it was "Determined By Statute." And a 2011 form stated that Denney was "Managed as a Sex Offender due to Statutory determination."

Denney argued that KDOC lacked authority to manage him under KORA because none of the definitions of "sex offender" under K.S.A. 2016 Supp. 22-4902(b) applied to him. Denney contended that his convictions did not qualify under K.S.A. 2016 Supp. 22-4902(b)(1), which defines a sex offender as somebody

convicted of a sexually violent crime on or after April 14, 1994. Because Denney was convicted of a sexually violent crime before April 14, 1994, he argued that KDOC's decision to classify and manage him as a sex offender within the prison violated his federal constitutional right to due process. He asked the district court to enter a declaratory judgment that KORA does not apply to him and further order KDOC to stop managing him as a sex offender altogether.

The district court reviewed Denney's petition and made an initial determination that he may have a right to relief. The court therefore issued a writ of habeas corpus and ordered the Secretary to file an answer within 20 days. See K.S.A. 2020 Supp. 60-1503(a) (directing judge to issue the writ and order an answer if judge finds the petitioner may have a right to relief). It also appointed counsel to represent Denney in the proceedings.

In his combined answer and motion to dismiss, the Secretary alleged that KDOC was managing Denney as a sex offender under section 11-115A of KDOC's Internal Management Policy Procedure (IMPP), not under KORA. Under that KDOC policy, inmates may be managed as sex offenders if they have "a current conviction for which s/he is incarcerated that is a sex offense." The Secretary attached the policy as an exhibit. He also attached a copy of Denney's entry on the Kansas Adult Supervised Population Electronic Repository, which showed that Denney was currently incarcerated for several sex offenses. The Secretary requested the district court dismiss Denney's petition.

Several months later, the district court held a hearing on Denney's petition. The court heard arguments from both counsel, and Denney was allowed to address the court. The court reviewed the petition, answer, and their attachments. It also reviewed a "trial brief" that Denney's court-appointed attorney had filed. No other evidence was admitted. Following the hearing, the district court dismissed Denney's K.S.A. 60-1501 petition. Denney moved for reconsideration, and the district court held another hearing on that motion. The district court denied Denney's motion for reconsideration, concluding "there is no actual difference in the management of a prisoner as a sex offender . . . under KORA or under the IMPP."

Denney appealed to the Court of Appeals and raised three arguments. First, Denney argued that KDOC had, in fact, classified and managed him as a sex offender under KORA, not IMPP. Second, Denney argued that IMPP 11-115A did not apply to him because KDOC did not comply with that policy's notice requirements. And third, Denney argued that he has a liberty interest in his classification as a sex offender within KDOC and that this issue required a remand to the district court for more fact-finding.

But before reaching those issues, the Court of Appeals noted a potential error with the district court's ruling. The panel noted that the Secretary had asked the district court to dismiss Denney's petition because Denney had "failed to state a claim upon which relief can be granted." Based on this language, the panel construed the Secretary's filing as a motion under K.S.A. 2020 Supp. 60-212(b)(6) to dismiss Denney's claims for failure to state a claim upon which relief can be granted. But the panel observed that "'[i]f, on a motion under subsection (b)(6) or (c), matters outside the pleadings are presented to and not excluded by the court, *the motion must be treated as one for summary judgment under K.S.A. 60-256, and amendments thereto*.'" 2020 WL 3393773, at *2.

Because the Secretary had asked the district court to dismiss Denney's petition and had attached several exhibits to his combined answer and motion—including KDOC's IMPP 11-115A, which the district court relied on to deny Denney's claims—the panel questioned whether the district court had considered matters outside the pleadings. If so, the panel noted the district court should have treated the Secretary's motion as a motion for summary judgment, not a motion to dismiss, and analyzed the motion under the legal standard in K.S.A. 2020 Supp. 60-256, not K.S.A. 2020 Supp. 60-212(b)(6).

The panel ultimately concluded that the district court had not considered matters outside the pleadings. Because the Secretary's filing was a motion to dismiss *and* an answer, the panel held that the exhibits "could also be considered part of [the Secretary's] response, rather than entirely related to his motion to dismiss." 2020 WL 3393773, at *3. And considered in that light, the panel found the exhibits were part of the pleadings. The panel therefore held that the Secretary's motion was properly one to dismiss for failure

to state a claim under K.S.A. 2020 Supp. 60-212(b)(6) and there was no requirement to convert the Secretary's motion to one for summary judgment. 2020 WL 3393773, at *3.

Under that framework, the panel rejected each of Denney's arguments and affirmed the district court's dismissal of Denney's K.S.A. 60-1501 petition. 2020 WL 3393773, at *7-8. We granted Denney's request for review. 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

Denney argues the panel erred by dismissing his claim under K.S.A. 2020 Supp. 60-212(b)(6) because that statute requires courts to accept the nonmoving party's well-pled allegations as true and resolve every factual dispute in favor of the nonmoving party. See *Steckline Communications, Inc. v. Journal Broadcast Group of KS, Inc.*, 305 Kan. 761, 767-68, 388 P.3d 84 (2017). If the panel had done so, Denney contends it would have concluded that the Secretary's reliance on KORA to classify and manage him as a sex offender violated his constitutional rights, warranting habeas relief. Denney requests a remand to the district court for an evidentiary hearing to determine whether KDOC was managing him under KORA or under KDOC's internal policies and whether any misclassification was harmless.

But, as we explain below, K.S.A. 2020 Supp. 60-212(b)(6) does not apply to Denney's petition or the Secretary's answer and motion. Instead, the issue is governed by the legal standards in Article 15 of K.S.A. Chapter 60. Under that framework, summary dismissal is proper because Denney failed to establish constitutional injury based on the record before us. As a result, we affirm the panel's decision as right for the wrong reasons.

I. K.S.A. 2020 Supp. 60-212(b)(6) and K.S.A. 2020 Supp. 60-256 Do Not Apply in Habeas Corpus Proceedings Brought Under K.S.A. 60-1501.

As noted, the panel began its analysis by deciding whether to construe the Secretary's motion as one to dismiss for failure to state a claim under K.S.A. 2020 Supp. 60-212(b)(6) or as one for summary judgment under K.S.A. 2020 Supp. 60-256. The panel ultimately construed the filing as a motion to dismiss under K.S.A. 60-212(b)(6). Alternatively, the panel concluded that if the district court erred by failing to construe the Secretary's motion as one for summary judgment, then such error was harmless.

The panel's approach to this issue is not unique. Citing our decision in *Sperry v. McKune*, 305 Kan. 469, 482-83, 384 P.3d 1003 (2016), several other Court of Appeals panels have applied K.S.A. 2020 Supp. 60-212(b)(6) and K.S.A. 2020 Supp. 60-256 on review of a district court's dismissal of an inmate's K.S.A. 60-1501 petition. See *Davis v. Schnurr*, No. 122,435, 2020 WL 7086177, at *3 (Kan. App. 2020) (unpublished opinion); *Jamerson v. Heimgartner*, No. 121,681, 2020 WL 4555793, at *4 (Kan. App. 2020) (unpublished opinion); *Rindt v. Schnurr*, No. 122,125, 2020 WL 3022865, at *5 (Kan. App. 2020) (unpublished opinion).

But neither our precedent nor the relevant statutory scheme supports this approach. We have long held that "[p]roceedings on a petition for writ of habeas corpus filed pursuant to K.S.A. 60-1501 are not subject to ordinary rules of civil procedure." *Bankes v. Simmons*, 265 Kan. 341, Syl. ¶ 1, 963 P.2d 412 (1998). And panels of the Court of Appeals have relied on this general rule to deny a party's right (under ordinary rules of civil procedure) to discovery and default judgment in habeas proceedings. See *White v. Shipman*, 54 Kan. App. 2d 84, 89, 396 P.3d 1250 (2017); *Mitchell v. McKune*, No. 109,285, 2014 WL 349584, at *3 (Kan. App. 2014). But see *Johnson v. Zmuda*, 59 Kan. App. 2d 360, 365, 481 P.3d 180 (2021) (holding that K.S.A. 60-611, which governs the transfer of cases filed in the wrong venue, applies in K.S.A. 60-1501 proceedings).

Moreover, *Sperry* lends no support to the proposition that K.S.A. 2020 Supp. 60-212(b)(6) or K.S.A. 2020 Supp. 60-256 apply in habeas proceedings commenced under K.S.A. 60-1501. In *Sperry*, the plaintiff inmate filed a civil lawsuit seeking money damages from prison officials. The defendants moved to dismiss the plaintiff's claims under K.S.A. 2015 Supp. 60-212(b)(6), arguing the plaintiff failed to exhaust administrative remedies. The defendants attached to their motion an affidavit from a prison official who said he had reviewed all available records and found no evidence that plaintiff had submitted a personal injury grievance. The district court granted the defendants' motion and dismissed plaintiff's claims. On review, we held that by filing this affidavit, "the KDOC defendants introduced matters outside the pleadings," which required the district court to treat the motion "'as one for summary judgment under K.S.A. 60-256.'" *Sperry*, 305 Kan. at 481.

The claims Sperry asserted and the relief he requested in that action make clear *Sperry* is inapposite. Sperry filed a lawsuit seeking civil monetary damages from the prison officials for injuries he allegedly sustained because of his exposure to asbestos and lead paint while incarcerated. His petition asserted causes of action under 42 U.S.C. § 1983 (2012) and other state law tort theories. Sperry did not request relief under K.S.A. 60-1501 et seq., or otherwise challenge the conditions of his confinement. In fact, the remedy Sperry sought (money damages) is unavailable in habeas corpus proceedings. *Foster v. Maynard*, 222 Kan. 506, 513, 565 P.2d 285 (1977) (habeas corpus is not an appropriate remedy for state prisoners seeking money damages). While K.S.A. 2015 Supp. 60-212 and 2015 Supp. K.S.A. 60-256 provided the proper framework for analyzing defendants' motion to dismiss plaintiff's civil tort claims, nothing in *Sperry* suggests the same framework applies to habeas corpus proceedings.

We therefore reiterate that proceedings under K.S.A. 60-1501 are not generally subject to the ordinary rules of civil procedure. Thus, when ruling on a respondent's motion to dismiss a K.S.A. 60-1501 petition, neither the failure-to-state-a-claim standard under K.S.A. 2020 Supp. 60-212(b)(6) nor the summary judgment standard under K.S.A. 2020 Supp. 60-256 apply. Instead, courts

should apply the legal framework the Legislature established in Article 15 of K.S.A. Chapter 60, which we set out in the following section.

II. The Legal Framework and Standard of Review for Motions to Dismiss a Petitioner's Habeas Corpus Petition Brought Under K.S.A. 60-1501

K.S.A. 60-1501 et seq. governs civil habeas corpus proceedings. The Act contemplates two types of habeas corpus petitions. First, in K.S.A. 2020 Supp. 60-1501 to K.S.A. 60-1506, the Legislature set out the procedures and standards governing a petition under K.S.A. 60-1501 for a writ of habeas corpus—a summons to bring a person before the court, often to determine whether the conditions of an inmate's incarceration are legal. See Black's Law Dictionary 854 (11th ed. 2019). Then, in K.S.A. 60-1507, the Legislature set out the procedures and standards for prisoners in custody to challenge the constitutionality of their conviction or sentence. While actions brought under K.S.A. 60-1501 and K.S.A. 60-1507 are both properly characterized as civil habeas corpus proceedings, they serve distinct purposes:

> "The distinction between K.S.A. 60-1501 and K.S.A. 60-1507 has generally been held to be that a 1507 petition is a procedure by which a prisoner may challenge his or her conviction or sentence, while a 1501 petition is a procedural means through which a prisoner may challenge the mode or conditions of his or her confinement, including administrative actions of the penal institution." *Safarik v. Bruce*, 20 Kan. App. 2d 61, 66-67, 883 P.2d 1211 (1994) (citing *State ex rel. Stephan v. Clark*, 243 Kan. 561, 568, 759 P.2d 119 [1988]; *Foster v. Maynard*, 222 Kan. 506, 513, 565 P.2d 285 [1977]; *Hamrick v. Hazelet*, 209 Kan. 383, 385, 497 P.2d 273 [1972]).

Based on this distinction, a K.S.A. 60-1507 motion must be filed in the sentencing court, while a K.S.A. 60-1501 petition must be filed in the county of confinement. See *Anderson v. Anderson*, 214 Kan. 387, 391, 520 P.2d 1239 (1974). Denney petitioned under K.S.A. 60-1501 to challenge the mode or condition of his confinement—specifically, challenging the respondents' decision to classify and manage him as a sex offender within the prison. We therefore limit the focus of our analysis to K.S.A. 2020 Supp. 60-1501 to K.S.A. 2020 Supp. 60-1506.

Under K.S.A. 2020 Supp. 60-1501(a), any person who is "detained, confined or restrained of liberty on any pretense whatsoever" may petition for a writ of habeas corpus in the district court of the county where the person is constrained. The K.S.A. 60-1501 petition must be verified and state: (1) the place of and person responsible for the confinement; (2) the reason for the confinement; and (3) why that confinement is wrongful. K.S.A. 60-1502.

Once an inmate files a K.S.A. 60-1501 petition, the statutory scheme requires the district court to promptly conduct an initial assessment of the petition to determine whether a writ of habeas corpus should issue. At this stage, the court must accept all well-pled factual allegations as true. *Hogue v. Bruce*, 279 Kan. 848, 850, 113 P.3d 234 (2005). To obtain a writ, the petition must allege "shocking and intolerable conduct or continuing mistreatment of a constitutional stature." *Johnson v. State*, 289 Kan. 642, 648, 215 P.3d 575 (2009). But if it is apparent from the petition and attached exhibits that the petitioner is entitled to no relief, then no cause for granting a writ exists and the court must dismiss the petition. K.S.A. 2020 Supp. 60-1503(a).

If, on the other hand, the court finds petitioner may have a right to relief—as it did in this case—the court must issue a writ of habeas corpus. K.S.A. 2020 Supp. 60-1503(a). If that happens, the court must appoint counsel to assist an indigent inmate. See K.S.A. 22-4506(a), (b) (providing that a district court must appoint counsel to an indigent inmate who files a habeas petition that presents substantial questions of law or triable issue of fact). When the court issues the writ, it must also order the respondent to file an answer. K.S.A. 2020 Supp. 60-1503(a). The answer must also be verified and state the reason and authority for the confinement. K.S.A. 60-1504(c). If the petitioner does not controvert the contents of the answer, the allegations are considered true unless the judge makes findings to the contrary based on the evidence. K.S.A. 60-1504(d).

After the court has issued a writ and respondents have filed an answer, the court must "proceed in a summary way to hear and determine" the petitioner's cause. K.S.A. 2020 Supp. 60-1505(a). The statutory scheme does not prescribe the type of hearing re-

quired, but it does make clear that the petitioner need not be present. K.S.A. 2020 Supp. 60-1505(a). If the petitioner is an inmate, then the district court can dismiss the writ if it finds "the motion and the files and records of the case conclusively show that the inmate is entitled to no relief." K.S.A. 2020 Supp. 60-1505(a).

When entering judgment, if the court determines that the restraint is not wrongful, then the writ shall be dissolved at the cost of the plaintiff. K.S.A. 2020 Supp. 60-1505(d). If the court determines the restraint is wrongful, the judgment must either release the person from the restraint or transfer custody "to some other person rightfully entitled" to impose the restraint. K.S.A. 2020 Supp. 60-1505(d). The court may also "make such other orders as justice and equity . . . may require." K.S.A. 2020 Supp. 60-1505(d).

Viewing these provisions together and in harmony, the statutory scheme contemplates several possible avenues for resolving K.S.A. 60-1501 petitions. First, when initially presented with the petition for a writ of habeas corpus, the court may determine from the face of the petition and any attached exhibits that the petitioner is entitled to no relief and deny the motion summarily without issuing a writ or ordering the respondents to file an answer. See K.S.A. 2020 Supp. 60-1503(a).

But if the court determines petitioner may have a right to relief, it issues a writ of habeas corpus, appoints counsel, orders the respondent to file an answer, conducts a hearing, and determines the cause. K.S.A. 2020 Supp. 60-1503(a); K.S.A. 2020 Supp. 60-1505(a); K.S.A. 22-4506(b). Again, once the court issues a writ, the statute does not specify the type of hearing required to adjudicate the habeas corpus petition—the statute merely requires the judge to proceed in a summary way to hear and determine the cause. Even so, the statutory scheme contemplates at least two types of hearings on the path to final resolution.

First, K.S.A. 2020 Supp. 60-1505(a) expressly contemplates a nonevidentiary hearing focusing on the motion, files, and records of the case. If the court determines that the motion, files, and the records of the case conclusively show that the inmate is entitled to no relief, then the court shall dissolve the writ. K.S.A. 2020 Supp. 60-1505(a). For ease of reference, we refer to this type of

nonevidentiary hearing as a "preliminary habeas corpus hearing" under K.S.A. 60-1501.

But if the court cannot determine from the motion, files, and records that petitioner is entitled to no relief, the district court may conduct an evidentiary hearing (either in addition to or in lieu of the preliminary habeas corpus hearing) and make appropriate findings of fact and conclusions of law in support of its judgment. The court's authority to conduct such an evidentiary hearing is implicit from the statutory scheme. See, e.g., K.S.A. 60-1504(d) (requiring court to accept contents of answer as true "except as to the extent that the judge *finds from the evidence* that the contents are not true" [emphasis added]).

Likewise, the appropriate standard of review varies depending on the path taken to resolve the K.S.A. 60-1501 petition. First, when a district court summarily dismisses a K.S.A. 60-1501 petition without issuing a writ under K.S.A. 2020 Supp. 60-1503(a), appellate courts are in just as good a position as the district court to determine whether it plainly appears from the face of the petition and any supporting exhibits that the plaintiff is entitled to no relief. Thus, an appellate court's review of a summary denial of a K.S.A. 60-1501 petition is de novo. See *Johnson,* 289 Kan. at 649 (holding that appellate courts review the summary dismissal of a K.S.A. 60-1501 petition de novo). The same is true after a judge issues a writ and the court determines (after a preliminary habeas corpus hearing) that "the motion and the files and records of the case conclusively show that the inmate is entitled to no relief." K.S.A. 2020 Supp. 60-1505(a). An appellate court is in just as good a position to consider the merits in that case, and its review is also de novo.

But when the district court conducts an evidentiary hearing and makes findings of facts and conclusions of law in support of its judgment, appellate courts review the district court's factual findings for substantial competent evidence and its legal conclusions de novo. *Rice v. State*, 278 Kan. 309, 320, 95 P.3d 994 (2004).

In short, the statutory provisions in K.S.A. 60-1501 et seq., reflect the Legislature's intent to create an independent legal

framework establishing the procedural and substantive rules applied in habeas corpus proceedings. This framework, rather than ordinary rules of civil procedure, governs both the court's initial adjudication of a prisoner's habeas corpus petition and an appellate court's review of that adjudication. Having established the proper legal framework and standards of review for an inmate's K.S.A. 60-1501 petition, we next apply this framework to Denney's claim.

III. Denney Has Not Shown a Constitutional Injury Based on the Record Before Us

Here, the district court considered Denney's petition and supporting exhibits and determined that he may have a right to relief. Thus, it issued a writ of habeas corpus, appointed Denney counsel, and ordered the Secretary to file an answer. It then held a preliminary habeas corpus hearing and determined that "the motion and the files and the records of the case conclusively show" that Denney was entitled to no relief under K.S.A. 60-1501. As determined above, we review the district court's dismissal in this situation de novo, meaning that we need not defer to its conclusions.

Although this case has required us to clarify the legal framework and standards governing K.S.A. 60-1501 proceedings, the merits of Denney's claim are relatively straightforward. Denney claims KDOC violated his due-process rights by managing him as a sex offender under KORA because he does not meet the definition of a sex offender under that statutory scheme. The Secretary claims KDOC is properly managing Denney as a sex offender under IMPP 11-115A and that this policy does not violate Denney's due-process rights.

We conclude that the district court properly dismissed Denney's petition because the motion, files, and records show he is entitled to no relief. Denney's petition and exhibits created a disputed question of fact whether KDOC relied on KORA or its IMPP 11-115A to classify and manage him as a sex offender. Yet in its answer, the Secretary alleged (and attached supporting documentation confirming) that inmates may be managed as sex offenders under IMPP 11-115A if they have "a current conviction for which s/he is incarcerated that is a sex offense." The Secretary

further alleged (and attached supporting documentation confirming) Denney is incarcerated for several sex offenses. Denney did not controvert these facts, and the district court was required to accept them as true. See K.S.A. 60-1504(d).

These facts establish that KDOC has lawful authority to manage Denney as a sex offender pursuant to its internal policy. And Denney conceded that KDOC's management of sex offenders under IMPP 11-115A does not violate due process. Thus, the pivotal question is whether KDOC's management of sex offenders under IMPP 11-115A differs from its management of Denney (or other inmates classified as a sex offender under KORA). If not, Denney cannot establish any constitutional injury warranting habeas relief because KDOC has a right to manage Denney as a sex offender under its policy.

In the motion, files, and records, Denney fails to articulate how his management differs from any other inmate lawfully managed as a sex offender under IMPP 11-115A. At oral argument before our court, Denney struggled to articulate any cognizable injury. Denney first argued that he never received notice of his rights, as contemplated under the IMPP 11-115A. But counsel conceded that Denney was not prejudiced by any lack of notice. He also argued that his management as a sex offender under KORA, rather than IMPP 11-115A, could potentially stigmatize him when he appears before the parole board down the road. Denney's speculation about this potential future injury does not implicate the due process clause. *Lile v. Simmons*, 143 F. Supp. 2d 1267, 1275 (D. Kan. 2001) (even if plaintiff had protected liberty interest in prison classification level, speculation about the effect of his classification on future parole decisions "is too speculative to implicate the due process clause").

Denney, as the inmate alleging a violation of his constitutional rights in a habeas proceeding, carries the burden of proof. *Sammons v. Simmons*, 267 Kan. 155, 158, 976 P.2d 505 (1999). He has not carried that burden based on the record before us. As a result, Denney's K.S.A. 60-1501 petition was properly dismissed after the preliminary habeas corpus hearing because the motion, files, and records in the case conclusively show that Denney is entitled to no relief.

Affirmed.

No. 123,419

STATE OF KANSAS, *Appellee*, v. DION JAMAL GREEN, *Appellant*.

(505 P.3d 377)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Sentencing—Consideration of Defendant's Statements in Earlier Proceedings by Court Allowed.* When deciding whether to impose consecutive or concurrent sentences, the sentencing court may consider statements made by the defendant in earlier proceedings as well as at the time of sentencing.

2. TRIAL—*Contemporaneous Objection Rule—Purpose.* One purpose of the contemporaneous objection rule is to give the district court the opportunity to make a ruling at the time that testimony is being introduced in light of the circumstances surrounding the presentation of that testimony.

Appeal from Geary District Court; STEVEN L. HORNBAKER, judge. Opinion filed March 11, 2022. Affirmed.

Debra J. Wilson, of Capital Appeals and Conflicts Office, argued the cause, and *Reid T. Nelson*, of the same office, was with her on the brief for appellant.

Kurtis K. Wiard, assistant solicitor general, argued the cause, and *Michael J. Duenes,* assistant solicitor general, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

ROSEN, J.: Dion Jamal Green appeals from the consecutive hard 25 sentences imposed consequent to his plea of guilty to two counts of felony first-degree murder. The facts leading to his sentence were stated at his plea hearing.

On December 25, 2018—Christmas Day—police were dispatched to an address in Junction City, where they found the body of Jenna Schafer, who had been shot in the head. Witnesses identified Green as the last person seen with Schafer at a party the previous night. Green initially denied responsibility for her death but later admitted he left the party with her with the intention of killing her; shortly thereafter, he shot her dead. He told police he did this because a certain Mashaun Baker, also known as "Sleaze," promised to pay him $1,000 to carry out the execution. An autopsy revealed that Schafer was four to eight weeks pregnant at the time of her death.

On January 7, 2019, the State charged Green with one count of premeditated capital murder "done pursuant to a contract or agreement" of Jenna Schafer and one count of premeditated capital murder, as set out in K.S.A. 2020 Supp. 21-5401 and K.S.A. 2020 Supp. 21-5419. On August 7, 2019, the State filed an amended complaint, charging Green with two counts of premeditated murder. Then, on June 4, 2020, the State filed a second amended complaint, charging Green with two counts of felony first-degree murder, with kidnapping as the underlying felony.

Green requested that he be allowed to plead guilty to the charges set out in the second amended complaint. Both the State and Green agreed to request presumptive hard 25 life sentences. The agreement left open for argument whether the sentences would run consecutive or concurrent. The plea agreement was eventually accepted by the district court judge.

On October 15, 2020, Green filed a motion to continue the sentencing hearing so that his mother could appear in person to speak on his behalf. In a written response, the State objected to the motion, arguing that sentencing had already been postponed at Green's personal request so that he could remain longer in Geary County near his family, and at his counsel's request, based on an unusually heavy capital homicide caseload. The State expressed its openness to remote electronic appearance by Green's mother. The court formally denied the motion from the bench during the sentencing proceedings, and Green's mother addressed the court virtually via Zoom. The court then imposed consecutive hard 25 sentences.

Green raises two issues to this court, both challenging the validity of the sentencing proceeding.

Green first argues on appeal that the district court abused its discretion when it imposed consecutive hard 25 life sentences because its decision was based on an error of fact. He contends substantial competent evidence did not support the factual determination that he committed the crimes in the hope of receiving financial compensation.

Deciding whether to impose concurrent or consecutive sentences generally lies within the trial court's discretion. *State v. Frecks*, 294 Kan. 738, 741, 280 P.3d 217 (2012). A court abuses its discretion if its action:

"(1) is arbitrary, fanciful, or unreasonable, i.e., if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, i.e., if the discretion is guided by an erroneous legal conclusion; or (3) is 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." *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011), *cert. denied* 565 U.S. 1221 (2012).

At sentencing, in countering Green's expressions of remorse, the prosecutor told the court: "There was no concern that he had murdered this girl in exchange for a thousand dollars, that he knew she had two children whom he left orphaned." Immediately before it imposed the sentence, the district court judge explained why he was imposing consecutive sentences instead of concurrent ones:

"Mr. Green, you know, I can look—I—I can look you right in the eye and say any—anybody that—that thinks a human life is worth a thousand dollars, and is willing to take that for someone to shoot somebody in the head does not deserve compassion from the Court. That's the Court's feeling in this case. And I don't—I'll—I'll try to make this short and as painless as possible. But simply does not deserve it, hasn't earned it.

. . . .

"... There is no worse thing that—that—murder for hire is heartless, for lack of a better word. And you say you have a heart. And I know you have—you have a drug problem, or you did. And probably always will be. You're an addict, and you always will be an addict. And if you were out of prison, I don't know that you wouldn't go back and start using again, and you will have the same I-don't-care attitude that you have told me here today that you had when this shooting occurred."

This was not a speculative, unsupported assertion.

During an initial interrogation, Green told police:

"Someone paid me, was going to pay me. Because they wanted her out of the way. I fucked up, man. All I care about was my girl. You know what I'm saying, we living paycheck-to-paycheck. You understand what I'm saying. That's why I did it. . . . I wanted her Christmas to be good. That's all I cared about, I was supposed to get paid today.

"Q: How much were you supposed to get paid?

"A: A thousand dollars."

During a break in the interrogation, Green was permitted to make a telephone call to his wife. That call was recorded, and it showed Green told his wife the crime was financially motivated:

"I took the opportunity regardless of who it was, the worst mistake of my life. All I'm saying was the outcome. And that's why I stayed up all night hoping to get paid.

. . . .

"[Y]ou would have had a good Christmas the way you wanted to do whatever you wanted to do, go out wherever you wanted to go or whatever the case may be. That was

my whole thing and that was my whole logic and I didn't give a fuck what I had to do to make that happen for you."

At the hearing on the plea agreement, Green told the judge—who was also the sentencing judge—that he killed Schafer "because I was paid to do it." The prosecutor summarized the evidence that would be produced at trial, which included Green's statement to police on interrogation "that he did this because he was paid by somebody named Mashaun Baker, also known as Sleaze, to commit the murder in exchange of $1,000." Green did not object to or disagree with this factual basis for his guilty plea.

At the plea hearing, the judge stated he was taking judicial notice of Green's interviews and the transcripts of the preliminary hearing. He also took notice of that evidence at the sentencing hearing. These materials clearly supported the premise that the primary motivation for his crime was Green's hope to obtain financial compensation so that he could provide a "good Christmas" for his family.

Green asserts that the State did not believe its own contract-killing theory, in part because it dropped its original capital murder charges and in part because it did not pursue charges against the supposed instigator of the murders. This is of no consequence. A defendant's statements, standing alone, may suffice to support factual conclusions consistent with those statements. See, e.g., *State v. Qualls*, 309 Kan. 553, 560, 439 P.3d 301 (2019); *State v. Qualls*, 297 Kan. 61, 70, 298 P.3d 311 (2013) *State v. Tahah*, 293 Kan. 267, 273, 262 P.3d 1045 (2011). Green repeatedly insisted he committed the crime in exchange for a promise of money, and, whatever action the State took with respect to amending the criminal complaint or to charging other possible defendants, the district court did not abuse its discretion in believing Green's claim.

Based on what the prosecutor argued at sentencing, what Green told the judge at the plea hearing, and what Green said at the interrogation and during the phone call to his wife, the district court judge had an ample factual basis for its statement at sentencing that Green committed the murder "for hire" and in exchange for a promise of $1,000.

Green next argues that he was denied constitutional due process because the district court refused to continue the sentencing hearing so that his mother could testify in person on his behalf.

K.S.A. 22-3401 allows a district court to grant a continuance of trial proceedings for "good cause." A court's refusal to grant such a continuance is reviewed on appeal for an abuse of discretion. *State v. Carter*, 284 Kan. 312, 318, 160 P.3d 457 (2007).

Green requested a continuance because his mother wanted to address the court at sentencing but did not want to travel from Maryland during the COVID pandemic. Green's motion for continuance, filed approximately two weeks before sentencing, explicitly allowed for a remote video appearance by his mother. In relevant part, the motion stated:

> "Dion Green, by and through counsel and pursuant to K.S.A. 60-240, moves this court to find good cause and continue the sentencing set for October 28, 2020. Further, if the court does not find good cause*, to alternatively arrange for remote viewing and a remote video statement*, on behalf of Mr. Green, by Mr. Green's non-biological mother, Dr. Lynne Holland.
>
> . . . .
>
> "Alternatively, if the Court believes that good cause is not met to continue the sentencing, or believes we will not have more certainty with the COVID-19 pandemic in December, *Mr. Green and his counsel would request that a system is set up to allow a video statement to the court, and remote viewing of the sentencing by Mr. Green's non-biological mother, Dr. Lynne Holland.*" (Emphases added.)

The State argues that this issue is not properly before this court because Green failed to raise a contemporaneous objection to holding his mother's statement by videoconference. The State makes a persuasive argument.

In his written motion for a continuance, Green stated that his mother would have difficulty traveling to Kansas and then back to Maryland because of restrictions related to the COVID pandemic. He asked as an alternative to a continuance that she be allowed to address the court remotely through electronic conferencing. The court denied the continuance but granted her alternative request. Neither Green—on his own or through counsel—nor the judge made any comment about the quality of the internet connection or their ability to understand her message. Now, on appeal, Green argues the quality of the transmission was so poor that he was denied the right to have a witness speak meaningfully on his behalf at sentencing.

In general, issues not raised before the district court may not be raised on appeal. See *State v. Kelly*, 298 Kan. 965, 971, 318 P.3d 987 (2014). Part of the purpose of the contemporaneous objection rule is to

give the district court the opportunity to make a ruling at the same time that testimony is being introduced. See, e.g., *State v. Ballou*, 310 Kan. 591, 612-13, 448 P.3d 479 (2019). In failing to place anything on the record relating to the quality of the transmission, Green made it impossible for the district court to make a judgment about how understandable the mother's statement was or to provide the relief Green now seeks on appeal. In the absence of any activity in the district court on this subject, this court is now left to guess whether the transmission problems impaired the ability of the district court to take into account his mother's testimony.

The request for a continuance was not made because of anticipated electronic transmission issues. It was made so that Green's mother could offer information mitigating against consecutive sentences. When, after the fact, Green argues the transmission was inadequate and the court should have granted the continuance a couple of weeks earlier, he makes an argument never presented to the district court. A party may not object to the introduction of testimony on one ground at trial and assert another ground on appeal. *State v. Garcia-Garcia*, 309 Kan. 801, 810, 441 P.3d 52 (2019). This is what Green seeks to do here.

The preservation problem goes beyond Green's failure to object at the time of sentencing. In general, a litigant may not invite an error and then complain of the error on appeal. *State v. Stewart*, 306 Kan. 237, 248, 393 P.3d 1031 (2017). Green asked for videoconferencing, which he received. To be sure, the internet connection was not perfect, but Green invited the error and neglected to raise any concerns about his rights at the time.

Because Green did not object to the video transmission of his mother's testimony at the time she presented it, his issue on appeal was not preserved for appeal. In fact, Green received what he requested in his motion, and this court is not in a better position than the trial court would have been to decide whether the transmission was adequate to convey the import of his mother's message. We therefore find no reversible error in the denial of the motion to continue.

The sentence imposed by the district court is affirmed.

No. 116,541

In the Matter of SCOTT M. MCFALL, *Respondent*.

(505 P.3d 744)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Six-month Suspension.*

Original proceeding in discipline. Opinion filed March 18, 2022. Six-month suspension.

Alice Walker, Deputy Disciplinary Administrator, argued the cause, and *Kimberly L. Knoll*, Deputy Disciplinary Administrator, and *Stanton A. Hazlett*, Disciplinary Administrator, were on the formal complaint for the petitioner.

Scott M. McFall, 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, Scott M. McFall, of Olathe, an attorney admitted to the practice of law in Kansas in 2008, that comes before us in an unusual procedural posture. This matter involves the initial filing of a formal complaint, a hearing and findings of a hearing panel in 2016, a transfer to disability inactive status just prior to the hearing before this court in 2017, and then a subsequent hearing and findings before the hearing panel in 2021. The following summarizes the history of this case before the court:

On May 2, 2016, the office of the Disciplinary Administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). Shortly thereafter, the respondent filed an answer to the complaint. A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on July 7, 2016, where the respondent appeared in person with counsel. The hearing panel determined the respondent violated KRPC 1.3 (2022 Kan. S. Ct. R. at 331) (diligence); 1.4(a) (2022 Kan. S. Ct. R. at 332) (communication); 8.4(c) (2022 Kan. S. Ct. R. at 434) (misconduct involving dishonesty or misrepresentation); and 8.4(d) (2022 Kan. S. Ct. R. at 434) (misconduct) and Supreme Court Rule 210(a) (2022 Kan. S. Ct. R. at 263) (formerly Rule 207[b]) (duties).

On September 20, 2016, this case was docketed with the Supreme Court. The respondent did not file any exceptions and the court scheduled the oral argument for January 23, 2017. Just prior to the oral argument, on January 17, 2017, through counsel, the respondent filed a petition to transfer his license to disability inactive status. The Disciplinary Administrator's office did not oppose the request.

On January 19, 2017, the Supreme Court stayed the proceedings of this attorney discipline case and took the following actions: (1) transferred the respondent to disability inactive status; (2) ordered the respondent to undergo any medical or psychological testing to determine whether he is incapacitated by reason of mental infirmity or illness; and (3) directed the parties to file the report of evaluation with the court under seal.

No action by the respondent or the Disciplinary Administrator's office was taken in this matter for the next three years.

As a result of this inactivity, on February 22, 2021, the Supreme Court directed each party to file a report explaining the status of this case and how the court should proceed in light of that status. The Disciplinary Administrator's office timely filed a status report. The respondent failed to respond to the court's status request.

The court ordered the respondent to appear before the court on May 25, 2021, to show cause why he failed to comply with the court's January 19, 2017 Order. Following that hearing, on June 10, 2021, the court removed the respondent from disability inactive status and temporarily suspended the respondent's license to practice law and ordered the office of the Disciplinary Administrator to resume the disciplinary proceedings.

A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on August 30, 2021, where the respondent appeared in person with counsel. Two of the three-member panel presided over the original hearing in 2016.

Upon conclusion of the August 2021 hearing, the panel wrote a supplemental hearing report which included additional findings of fact and conclusions of law, together with its recommendation to this court.

Below is the original 2016 Final Hearing Report followed by the 2021 Supplemental Hearing Report:

"*Findings of Fact*

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

"7. Scott M. McFall (hereinafter 'the respondent') is an attorney at law, Kansas attorney registration number 23814. His last registration address with the clerk of the appellate courts of Kansas is 104 East Poplar, Olathe, Kansas 66061. The Kansas Supreme Court admitted the respondent to the practice of law in the State of Kansas on September 26, 2008.

"*DA11905*

"8. On April 25, 2014, the respondent and the disciplinary administrator entered into an attorney diversion agreement. In the agreement, the respondent stipulated that he failed to file an appeal on behalf of a client convicted of first-degree murder. Additionally, the respondent admitted that he failed to properly communicate with his client. (The respondent's client filed a *pro se* motion for new counsel. The motion was granted and new counsel was appointed.)

"9. The respondent failed to comply with the terms and conditions of the diversion agreement. The disciplinary administrator notified the respondent that he was not in compliance with the agreement. The diversion agreement was extended to allow the respondent to comply. The respondent continued to fail to comply with the terms and conditions of the diversion agreement. Further, new complaints were received, including a complaint self-reported by the respondent. As a result, the diversion agreement was revoked.

"*DA12381*

"10. On June 22, 2015, N.J. filed a complaint with the disciplinary administrator's office. The disciplinary administrator forwarded the complaint to the respondent. The disciplinary administrator sent the respondent two letters, directing the respondent to provide a response to the complaint filed by N.J. The respondent failed to do so. Thereafter, the disciplinary administrator docketed the case for investigation. The respondent failed to respond to the investigator during the investigation of the case.

"*DA12416*

"11. On October 6, 2015, the Kansas Supreme Court issued an order suspending the respondent's license to practice law for failing to comply with the annual registration requirements.

"12. Following the issuance of the suspension order, on October 20, 2015, the respondent appeared in Johnson County District Court on three separate criminal matters. After the respondent appeared in court, the presiding judge learned that the respondent's license to practice law was suspended. The judge contacted the respondent and informed the respondent that his license to practice law had been suspended.

"13. On October 21, 2015, the respondent hand-delivered the required registration documents to the Clerk of the Appellate Courts.

"14. On October 28, 2015, the Kansas Supreme Court issued an order reinstating the respondent's license to practice law. That same day, the respondent self-reported his misconduct to the disciplinary administrator.

"15. The disciplinary administrator docketed the case for investigation. The respondent did not cooperate in the investigation. The investigator assigned to investigate the complaint requested that the respondent schedule an interview. The respondent failed to do so. Additionally, the investigator left telephone messages for the respondent. The respondent did not contact the investigator following the telephone messages.

"*DA12417*

"16. On October 26, 2015, C.M. filed a complaint against the respondent. The disciplinary administrator forwarded a copy of the complaint to the respondent and directed that the respondent forward a response to the complaint within 20 days. The respondent failed to do so.

"17. The disciplinary administrator docketed the case for investigation. The respondent did not cooperate in the investigation. The investigator assigned to investigate the complaint requested that the respondent contact the investigator and schedule an interview. The respondent failed to do so. Additionally, the investigator left telephone messages for the respondent. The respondent did not return the telephone calls.

"18. On February 18, 2016, Special Investigator Terry Morgan attempted to locate the respondent. Mr. Morgan went to the respondent's office and learned that he was in court. Mr. Morgan left his business card for the respondent with a message asking him to call. Mr. Morgan also went to the respondent's residence. Mr. Morgan also left a business card for the respondent at his residence, asking him to call. The respondent did not call Mr. Morgan.

"19. On February 22, 2016, Mr. Morgan sent the respondent an electronic mail message. On February 25, 2016, the respondent responded to Mr. Morgan's electronic mail message. The respondent confirmed that he had received the correspondence regarding the complaints. The respondent explained that he has been dealing with personal issues. The respondent confirmed that his registration address was correct. The respondent promised that he would provide responses to the complaints by February 29, 2016. The respondent failed to provide responses to the complaints.

"20. On March 1, 2016, Mr. Morgan sent the respondent an additional electronic mail message, asking about the responses to the complaints. The respondent failed to respond to Mr. Morgan's message. The respondent made no further contact with Mr. Morgan. The respondent did not provide responses to the complaints.

"*Conclusions of Law*

"21. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 1.3, KRPC 1.4, KRPC 5.5, KRPC 8.1, KRPC 8.4, and Kan. Sup. Ct. R. 207, as detailed below.

"KRPC 1.3

"22. Attorneys must act with reasonable diligence and promptness in representing their clients. See KRPC 1.3. The respondent failed to diligently and promptly represent his client in DA11905. The respondent failed to perfect an appeal. (Luckily, new counsel was appointed and the respondent's client did not lose his right to appeal.) Because the respondent failed to act with reasonable diligence and promptness in representing his client, the hearing panel concludes that the respondent violated KRPC 1.3.

"KRPC 1.4

"23. KRPC 1.4(a) provides that '[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.' *Id.* In DA11905, the respondent violated KRPC 1.4(a) when he failed to keep in contact with his client. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.4(a).

"KRPC 5.5

"24. KRPC 5.5(a) prohibits the unauthorized practice of law. After the Kansas Supreme Court suspended the respondent's license to practice law, the respondent continued to practice law. Specifically, in DA12416, the respondent appeared in district court on three separate matters following his suspension. As such, the hearing panel concludes that the respondent violated KRPC 5.5(a).

"KRPC 8.4(d) and KRPC 8.4(g)

"25. 'It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice . . . [and] engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.' KRPC 8.4. In DA12416, the respondent engaged in conduct that was prejudicial to the administration of justice and adversely reflects on this fitness to practice law when he continued to practice law after his license to do so was suspended. As such, the hearing panel concludes that the respondent violated KRPC 8.4(d) and KRPC 8.4(g).

"KRPC 8.1 and Kan. Sup. Ct. R. 207(b)

"26. Lawyers must cooperate in disciplinary investigations. KRPC 8.l(b) and Kan. Sup. Ct. R. 207(b) provide the requirements in this regard. '[A] lawyer in connection with a . . . disciplinary matter, shall not: . . . knowingly fail to respond to a lawful demand for information from [a] . . . disciplinary authority, . . .' KRPC 8.1(b).

'It shall be the duty of each member of the bar of this state to aid the Supreme Court, the Disciplinary Board, and the Disciplinary Administrator in investigations concerning complaints of misconduct, and to communicate to the Disciplinary Administrator any information he or she may have affecting such matters.' Kan. Sup. Ct. R. 207(b).

In DA12381, DA12416, and DA12417, the respondent knew that he was required to forward written responses to the initial complaints, schedule interviews, and otherwise cooperate in the disciplinary investigation, as he had been repeatedly instructed to do so in writing by the disciplinary administrator and the investigators. Because the respondent failed to cooperate in the disciplinary investigations, the hearing panel concludes that the respondent violated KRPC 8.1(b) and Kan. Sup. Ct. R. 207(b).

"*American Bar Association*
Standards for Imposing Lawyer Sanctions

"27. 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.

"28. *Duty Violated.* The respondent violated his duty to his client in DA11905 to provide diligent representation and adequate communication. Additionally, the respondent violated his duty to the profession to comply with the annual licensing requirements and cooperate in disciplinary investigations.

"29. *Mental State.* The respondent negligently and knowingly violated his duties.

30. *Injury.* As a result of the respondent's misconduct, the respondent's client in DA11905 suffered potential but no actual harm. Additionally, as a result of the respondent's other misconduct, the respondent likewise caused potential injury to the legal profession.

"Aggravating and Mitigating Factors

"31. 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:

"32. *A Pattern of Misconduct.* The respondent engaged in a pattern of misconduct by repeatedly failing to provide responses to the initial complaints and cooperate in the disciplinary investigations.

"33. *Multiple Offenses.* The respondent committed multiple rule violations. The respondent violated KRPC 1.3, KRPC 1.4, KRPC 5.5, KRPC 8.1, KRPC 8.4, and Kan. Sup. Ct. R. 207. Accordingly, the hearing panel concludes that the respondent committed multiple offenses.

"34. 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:

"35. *Absence of a Prior Disciplinary Record.* The respondent has not previously been disciplined.

"36. *Absence of a Dishonest or Selfish Motive.* The respondent's misconduct does not appear to have been motivated by dishonesty or selfishness.

"37. *Personal or Emotional Problems if Such Misfortunes Have Contributed to Violation of the Kansas Rules of Professional Conduct.* The respondent has had significant personal or emotional problems during the past five years.

a. In June, 2011, the respondent received a complaint from an employee working for his law firm that the respondent's partner, may have been taking inappropriate videos of his female employees. The respondent investigated the claims, filed a disciplinary complaint against his partner, and severed his ties with his partner. The difficulties with his law partner created a stressful work environment for an extended period of time.

b. Approximately a week after receiving the complaint from his employee, the respondent's second born son died as a result of Sudden Infant Death Syndrome.

c. Shortly after the birth of their third child, in 2013, in the respondent's wife unexpectedly sought and received a divorce.

d. A few years ago, the respondent learned that his oldest son, born in 2005, suffers from a neurological condition on the autistic spectrum.

e. The respondent suffers from depression and attention deficit disorder.

f. It is clear that the respondent's personal and emotional problems significantly contributed to his misconduct.

g. The respondent has recently begun to address his issues with depression and attention deficit disorder. The hearing panel is impressed with the respondent's start toward recovery. The hearing panel notes that the respondent recently entered into a KALAP monitoring agreement and is in compliance with the terms and conditions of the agreement. Additionally, the respondent has recently commenced mental health treatment. Finally, two days prior to the hearing, the respondent began medication to help him with this attention deficit disorder. While testifying under oath, the respondent promised to continue to comply with the KALAP agreement and the treatment recommendations. The hearing panel is hopeful that the respondent will stay the course as promised under oath and reap the benefits that KALAP, mental health treatment, and medication will provide to him.

"38. *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.* During the hearing, the respondent fully cooperated with the disciplinary process. Additionally, the respondent admitted the facts that gave rise to the violations.

"39. *Inexperience in the Practice of Law.* The Kansas Supreme Court ad-

mitted the respondent to the practice of law in 2008. Thus, the respondent is inexperienced in the practice of law.

"40. *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 Olathe, Kansas. The respondent also enjoys the respect of his peers and generally possesses a good character and reputation as evidenced by the testimony presented by the respondent as well as by the respondent's exhibits.

"41. *Remorse.* In his answer, the respondent expressed genuine remorse for having engaged in the misconduct.

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

"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.'

"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.'

"*Recommendation*

"43. The disciplinary administrator recommended that the respondent be suspended for 90 days. The disciplinary administrator also recommended that the respondent undergo a reinstatement hearing under Kan. Sup. Ct. R. 219. Counsel for the respondent recommended that the hearing panel informally admonish the respondent. Additionally, counsel for the respondent recognized the respondent's need to comply with ongoing treatment.

"44. This is a difficult case. The respondent's misconduct is directly tied to his personal difficulties. It seems harsh to suspend the respondent from the practice of law in this situation. However, because of the respondent's failure to cooperate in the disciplinary proceeding and because the respondent's treatment of his depression and attention deficit disorder commenced only within the week

prior to the hearing, it is incumbent upon the hearing panel to recommend suspension from the practice of law. Thus, the hearing panel recommends that the Court suspend the respondent's license for a period of 90 days and that the Court require the respondent to participate in a reinstatement hearing under Kan. Sup. Ct. R. 219 to establish that his difficulties have been properly addressed.

"45. As an aside, had the respondent complied with Kan. Sup. Ct. R. 218(g), developed a workable, substantial, and detailed plan of probation, and timely put the plan into place, the hearing panel would have strongly considered recommending that the Court place the respondent on probation.

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

2021 Supplemental Final Hearing Report

"*Findings of Fact*

"17. During the hearing, Mr. Hazlett called two witnesses to testify: William C. Delaney, special investigator with the disciplinary administrator's office, and the respondent.

"18. Mr. Delaney testified regarding the investigation he conducted following the Supreme Court's June 10, 2021, order. During the investigation, Mr. Delaney discovered two issues related to the respondent's financial situation.

"19. First, the respondent owed approximately $1,500 in back state income taxes. The respondent testified that he anticipated receiving a federal tax refund in excess of $3,000. He testified that the back state taxes would be satisfied with the federal tax refund.

"20. Second, the respondent failed to pay his student loans and a judgment in the amount of $6,700 was entered against him. The judgment remains unpaid. The respondent testified that he is in the process of making payment arrangements.

"21. The respondent testified about what he has been doing since the time his license was transferred to disability inactive status.

"22. Mr. Hazlett asked the respondent why he did not comply with the Supreme Court's order. The respondent testified that he simply neglected to do so. After he was released from treatment with Valley Hope, he did not review the order and do what he was required to do.

"23. The respondent testified that he is gainfully employed in a full-time position that generates a good salary. He testified that he now has a sufficient amount of income to meet his financial obligations.

"24. The respondent testified that during the time the disciplinary proceeding was pending, he had a problem with alcohol. The respondent successfully completed treatment at Valley Hope Rehabilitation Center. He testified that he

has been sober for four years. However, the respondent testified that he does not regularly attend AA meetings. The respondent testified that he is willing to resume attendance at AA meetings.

"25. The respondent testified that his family situation is much better than it was at the time of the original disciplinary hearing. He testified that he has a good working relationship with his ex-wife and her new husband. He testified that they are able to effectively co-parent the children.

"*Recommendation of the Disciplinary Administrator*

"26. The disciplinary administrator recommended that the respondent's license be suspended for a period of six months. The disciplinary administrator also recommended that the respondent undergo a reinstatement hearing, under Rule 232, prior to consideration of reinstatement.

"*Recommendation of the Respondent*

"27. The respondent joined in the disciplinary administrator's recommendation for a six month suspension and a reinstatement hearing.

"*Recommendation of the Hearing Panel*

"28. Based on the original final hearing report, the respondent's failure to comply with the Supreme Court's order to submit to an evaluation, as well as the testimony and the arguments presented at the hearing on August 30, 2021, the hearing panel recommends that the respondent's license to practice law be suspended for six months. The hearing panel further recommends that prior to consideration of reinstatement, the respondent undergo a reinstatement hearing, under Rule 232.

"29. Further, the hearing panel recommends that prior to filing a petition for reinstatement, the respondent resume regular attendance at AA meetings at a minimum of once per week and that the respondent undergo the evaluation as previously ordered by the Supreme Court."

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 both hearings before the panel and the hearings before this court. He did not file exceptions to either the initial hearing panel's final report or the supplemental final report.

With no exceptions before us, the panel's factual findings are deemed admitted. Supreme Court Rule 228(g)(1), (2) (2022 Kan. S. Ct. R. at 287). The facts before the hearing panel relating to the original hearing panel report from 2016 establish by clear and convincing evidence the charged misconduct in violation of KRPC 1.3 (diligence); 1.4(a) (communication); 8.4(c) (misconduct involving dishonesty or misrepresentation); 8.4(d) (misconduct that is prejudicial to the administration of justice); and Supreme Court Rule 210(a). The evidence also supports the panel's conclusions of law. Further, the findings from the subsequent hearing held on August 30, 2021, are supported by clear and convincing evidence. We, therefore, adopt the panel's findings and conclusions from both hearings.

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). The original 2016 hearing panel report recommended a 90-day suspension and a reinstatement hearing provided by then Rule 219. Now, based on the original 2016 final hearing report and the respondent's failure to comply with the Supreme Court's order to provide the court with an evaluation while on disability inactive status coupled with the testimony and arguments presented at the subsequent hearing on August 30, 2021, the hearing panel recommends that the respondent's license to practice law be suspended for a period of six months. The panel further recommends that the respondent undergo a reinstatement hearing under Rule 232 prior to consideration of reinstatement. The hearing panel also recommends that prior to filing a petition for reinstatement, the respondent resume at least weekly A.A. meetings and undergo an evaluation as previously ordered by this court.

Both the Disciplinary Administrator and the respondent agree and join the hearing panel's recommendation.

We also agree with the joint recommendation by all of the parties appearing before us. We find that the doubling of the original three-month suspension to six months is warranted by the findings contained in the Supplemental Hearing Report. This, coupled with the respondent's admitted misconduct in this case, compels enhancement of the initial 2016 joint 90-day suspension recommended by both the hearing panel and the Disciplinary Administrator.

We therefore adopt the agreed recommendation of a six-month suspension effective on the date of the filing of this opinion. Further, should the respondent seek reinstatement, he must undergo a reinstatement hearing under Supreme Court Rule 232 (2022 Kan. S. Ct. R. at 293). Prior to filing a petition for reinstatement, the respondent must also undergo an evaluation as previously ordered by this court and, at a minimum, attend weekly A.A. meetings or a similar treatment program as may be indicated by the subsequent ordered evaluation and as approved by the Disciplinary Administrator.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Scott M. McFall be suspended for six months from the practice of law in the state of Kansas, in accordance with Supreme Court Rule 225(a)(3) (2022 Kan. S. Ct. R. at 281) for violations of KRPC 1.3, 1.4(a), 8.4(c), 8.4(d), and Supreme Court Rule 210(a).

IT IS FURTHER ORDERED that the respondent shall comply with Supreme Court Rule 231 (2022 Kan. S. Ct. R. at 292).

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 the respondent and that this opinion be published in the official Kansas Reports.

No. 122,078

VICKI SCHMIDT, Kansas Insurance Commisioner, *Appellee/Cross-appellant*, v. TRADEMARK, INC., *Appellant/Cross-appellee*, *v.* DOROTEO BALLIN and BALLIN COMPANY, LLC, *Appellees.*

SYLLABUS BY THE COURT

1. STATUTES—*Interpretation by Courts—Appellate Review.* When a statute is plain and unambiguous, the court must give effect to the legislative intention as expressed in the statutory language. But if a statute's language is ambiguous, we will consult our canons of construction to resolve the ambiguity.

2. SAME—*Construction of Statutory Language.* Even statutory language that appears clear may be ambiguous when considered in the context of particular facts or another applicable statute.

3. COURTS—*Judicial Dictim Definition—Dictim Gives Weight to Decision.* Judicial dictum is an expression of opinion on a question directly involved in a particular case, argued by counsel, and deliberately ruled on by the court, although not necessary to a decision. While not binding as a decision, judicial dictum is entitled to greater weight than obiter dictum and should not be lightly disregarded.

4. SAME—*Judicial Dictim—Legislative Acquiescence to Persuasive Judicial Dictim.* As with legislative acquiescence to judicial precedent under the doctrine of stare decisis, legislative acquiescence to persuasive judicial dictum may support the decision to follow that dictum in future cases.

5. WORKERS COMPENSATION—*Involvement of Multiple Employers—Statutory Definitions of Employer are Ambiguous.* In a case where multiple potential employers are involved under K.S.A. 44-503(a)—i.e., a principal and a subcontractor—the term "employer" in K.S.A. 2020 Supp. 44-532a is ambiguous. In such a situation, the term "employer" in K.S.A. 2020 Supp. 44-532a(a) does not necessarily refer to the same entity as the term "employer" in K.S.A. 2020 Supp. 44-532a(b).

6. SAME—*Liability of Workers Compensation Fund Due to Employer's Failure to Pay—Separate Cause of Action by Statute.* If the Kansas Workers Compensation Fund is liable as a result of an immediate employer's failure to pay under K.S.A. 2020 Supp. 44-532a(a), it may assert a cause of action against the principal in a separate action under K.S.A. 2020 Supp. 44-532a(b).

7. ATTORNEY FEES—*Authorization of Attorney Fees by Statute Construed Strictly.* A statute authorizing the recovery of attorney fees must be clear and specific. Statutes authorizing such recovery are construed strictly. Where the plain language of a statute makes no mention of attorney fees, the recovery of such fees is not authorized.

Review of the judgment of the Court of Appeals in 60 Kan. App. 2d 206, 493 P.3d 958 (2021). Appeal from Sedgwick District Court; JEFFREY E. GOERING, judge. Opinion filed March 18, 2022. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

William L. Townsley III, of Fleeson, Gooing, Coulson & Kitch, LLC, of Wichita, argued the cause, and *Brian E. Vanorsby*, of the same firm, was with him on the briefs for appellant/cross-appellee.

John C. Nodgaard, of Arn, Mullins, Unruh, Kuhn & Wilson, LLP, of Wichita, argued the cause and was on the brief for appellee/cross-appellant.

The opinion of the court was delivered by

WILSON, J.: This appeal asks us to consider a question of statutory interpretation: specifically, what did the Legislature mean when it granted the Kansas Workers Compensation Fund a cause of action against "the employer" to recover amounts paid by the Fund for the benefit of an injured worker under K.S.A. 2020 Supp. 44-532a? After answering this question, we must further consider whether this same statute authorizes the Fund to recover attorney fees from an "employer" along with any amounts paid on an injured worker's behalf.

The lengthy procedural journey that precipitated this question began when Juan Medina was injured on the job and sought compensation from his direct employer, Doroteo Ballin and Ballin Company, LLC (collectively, Ballin), under the Kansas Workers Compensation Act (KWCA), K.S.A. 44-501 et seq. Because Ballin carried no workers compensation insurance, Medina impleaded the Kansas Workers Compensation Fund to obtain benefits. After an administrative law judge awarded compensation to Medina and the Fund had paid Medina benefits, the Fund filed the current collateral action under K.S.A. 2020 Supp. 44-532a against Trademark, Inc., the general contractor for whom Ballin was acting as a subcontractor at the time of Medina's injury. After the district court granted summary judgment to the Fund, Trademark

appealed. The Fund also cross-appealed the district court's denial of attorney fees.

A panel of the Kansas Court of Appeals first heard the appeal. The panel affirmed the district court on both issues, holding that the Fund could pursue an action against Trademark but that it could not recover attorney fees under K.S.A. 2020 Supp. 44-532a. *Schmidt v. Trademark,* 60 Kan. App. 2d 206, 221, 493 P.3d 958 (2021). On review, we consider both issues and affirm.

FACTS AND PROCEDURAL BACKGROUND

In December of 2016, Medina was injured in the course and scope of his employment with Ballin. Ballin was a subcontractor of Trademark, the general contractor on the project. Thus, Ballin was performing a part of the work Trademark was obligated under separate contract to perform. After his injury, Medina brought a workers compensation proceeding against Ballin for payment of medical treatment and other benefits; Trademark was not a party in this administrative proceeding.

Because Ballin lacked workers compensation insurance, the Fund was added as a party under K.S.A. 2016 Supp. 44-532a. The Fund attempted to implead Trademark but the administrative law judge (ALJ) rejected this effort. The ALJ ultimately ordered the Fund to pay benefits to Medina, which included $17,432.87 in compensation. The Fund also paid $5,022.37 in medical benefits and $1,804.73 in administrative costs, and expended thousands of dollars in attorney fees.

District Court Proceedings

The Fund filed the instant case for reimbursement against Trademark on December 27, 2018. The Fund filed a motion for summary judgment on March 7, 2019. Trademark responded to the Fund's motion and simultaneously moved for summary judgment on March 21, 2019.

In a Memorandum Decision filed June 17, 2019, the district court concluded that, because Medina was an employee of Ballin, and Ballin was a subcontractor of Trademark, the Fund was permitted to seek recovery from Trademark under K.S.A. 2016 Supp. 44-532a(b). But the district court concluded that the Fund could

not recover its claimed $8,053.95 in attorney fees from Trademark, citing the absence of any contractual or statutory provision permitting such recovery. The district court subsequently granted summary judgment in the Fund's favor as to everything except attorney fees.

Appellate Proceedings

Trademark appealed the district court's entry of summary judgment, while the Fund cross-appealed the district court's conclusion that it could not recover attorney fees. On appeal, the panel phrased the core question of Trademark's appeal this way: "Can the Fund only sue the employers mentioned in K.S.A. 2020 Supp. 44-532a(a)—that is, only the uninsured, insolvent, or vanished employers?" *Schmidt,* 60 Kan. App. 2d at 212. Relying largely on the reasoning of *Workers Comp. Fund v. Silicone Distrib., Inc.*, 248 Kan. 551, 809 P.2d 1199 (1991) (*Silicone*), the panel said, "No." *Schmidt,* 60 Kan. App. 2d at 218. In concluding that the Fund could seek to recover from Trademark, the panel found K.S.A. 44-503 ambiguous as to whether—as Trademark claimed—"ALL references to 'employer' in the Act must be substituted with the term 'principal' [i.e. Trademark] or none can be." 60 Kan. App. 2d at 218. The panel also rejected the Fund's argument that it could recover attorney fees from Trademark, concluding instead that there was no statutory authorization for such recovery. 60 Kan. App. 2d at 220-21.

Trademark petitioned this court for review, while the Fund conditionally cross-petitioned. This court granted review of both petitions on August 27, 2021. We have jurisdiction under K.S.A. 20-3018(b) (allowing 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

The lower courts correctly interpreted K.S.A. 2020 Supp. 44-532a.

Trademark raises a bifurcated challenge to the panel's determination that K.S.A. 2020 Supp. 44-532a authorizes the Fund to bring a cause of action against it to recover benefits paid to the

employee of its subcontractor, Ballin. First, Trademark argues that the plain language of K.S.A. 2020 Supp. 44-532a does not grant the Fund a cause of action against principals for the recovery of workers compensation benefits paid for the employees of subcontractors when the principals were not a party to the underlying workers compensation action. Second, it claims that even if K.S.A. 2020 Supp. 44-532a is interpreted to allow such a recovery, Trademark *itself* cannot be liable because the ALJ made no finding that Trademark was uninsured and insolvent. We address both arguments together.

Standard of Review

Trademark's challenge involves questions of statutory interpretation, which are subject to unlimited appellate review. *Redd v. Kansas Truck Ctr.*, 291 Kan. 176, 199, 239 P.3d 66 (2010).

"The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. The legislature is presumed to have expressed its intent through the language of the statutory scheme, and when a statute is plain and unambiguous, the court must give effect to the legislative intention as expressed in the statutory language.

"When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. [Citations omitted.]" *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

If, on the other hand, "a statute's language is ambiguous, we will consult our canons of construction to resolve the ambiguity." *Johnson v. U.S. Food Serv.*, 312 Kan. 597, 601, 478 P.3d 776 (2021). Even statutory language that appears clear may be ambiguous when considered in the context of particular facts or another applicable statute. E.g., *State v. Scheuerman,* 314 Kan. 583, 587, 502 P.3d 502 (2022); *McCullough v. Wilson*, 308 Kan. 1025, 1035, 426 P.3d 494 (2018).

Finally, the Legislature has also expressed its intent "that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act." K.S.A. 2020 Supp. 44-501b(a).

Discussion

Trademark argues K.S.A. 2020 Supp. 44-532a(a) and (b), read together, grant the Fund a cause of action to recoup amounts paid only against the "employer" that either lacked adequate workers compensation insurance or was otherwise unable to pay benefits to an injured worker under the KWCA—in this case, Ballin. Trademark acknowledges that the Kansas Supreme Court previously reached the opposite conclusion in *Silicone* but asserts that this was dicta and should be disregarded based on the plain language of K.S.A. 44-503 and K.S.A. 2020 Supp. 44-532a.

We begin with the language of both statutes. K.S.A. 44-503 addresses subcontractor and contractor responsibility for workers compensation benefits. In relevant part, it provides:

"(a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; and *where compensation is claimed from or proceedings are taken against the principal, then in the application of the workers compensation act, references to the principal shall be substituted for references to the employer*, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed. For the purposes of this subsection, a worker shall not include an individual who is a self-employed subcontractor.

. . . .

"(c) Nothing in this section shall be construed as preventing a worker from recovering compensation under the workers compensation act from the contractor instead of the principal.

. . . .

"(e) A principal contractor, when sued by a worker of a subcontractor, shall have the right to implead the subcontractor.

"(f) The principal contractor who pays compensation to a worker of a subcontractor shall have the right to recover over against the subcontractor in the action under the workers compensation act if the subcontractor has been impleaded." (Emphasis added.)

K.S.A. 2020 Supp. 44-532a, meanwhile, addresses situations where an "employer" carries insufficient workers compensation insurance:

"(a) If an employer has no insurance or has an insufficient self-insurance bond or letter of credit to secure the payment of compensation, as provided in subsection (b)(1) and (2) of K.S.A. 44-532, and amendments thereto, and such employer is financially unable to pay compensation to an injured worker as required by the workers compensation act, or such employer cannot be located and required to pay such compensation, the injured worker may apply to the director for an award of the compensation benefits, including medical compensation, to which such injured worker is entitled, to be paid from the workers compensation fund. Whenever a worker files an application under this section, the matter shall be assigned to an administrative law judge for hearing. If the administrative law judge is satisfied as to the existence of the conditions prescribed by this section, the administrative law judge may make an award, or modify an existing award, and prescribe the payments to be made from the workers compensation fund as provided in K.S.A. 44-569, and amendments thereto. The award shall be certified to the commissioner of insurance, and upon receipt thereof, the commissioner of insurance shall cause payment to be made to the worker in accordance therewith.

"(b) The commissioner of insurance, acting as administrator of the workers compensation fund, shall have a cause of action against the employer for recovery of any amounts paid from the workers compensation fund pursuant to this section. Such action shall be filed in the district court of the county in which the accident occurred or where the contract of employment was entered into."

Trademark contends that the plain language of these statutes makes the meaning of "employer" unambiguous. It reasons that Ballin employed Medina and Ballin has no insurance. The same word must mean the same thing, so the "employer" must be Ballin.

Certainly, that may be the case. But, in this context, must it be the case? Only if we can answer in the affirmative is the statute unambiguous. When we look to the definition of "employer," as defined elsewhere in the KWCA and in caselaw, it becomes apparent that "employer" might refer to more than one entity when viewed within the context of a contractor/subcontractor relationship.

The KWCA partially defines "employer" in K.S.A. 2020 Supp. 44-508(a), although this definition provides little guidance here. The KWCA further modifies that definition with K.S.A. 44-503(a)'s provision that references to "employer" for purposes of "the application of the workers compensation act" can mean either the immediate employer or the contractor/principal that hired the

employee's immediate employer. Some cases involving similar disputes refer to a general contractor as the "statutory employer" and the subcontractor as the "immediate employer." See *Robinett v. Haskell, Co.*, 270 Kan. 95, 98, 12 P.3d 411 (2000) ("The statute extends the application of the [KWCA] to certain individuals or entities who are not the immediate employers of the injured workers, but rather are 'statutory employers.'"). Another case refers to the contractor and subcontractors as "dual employers." *Duarte v. Debruce Grain, Inc.*, 276 Kan. 598, 607-08, 78 P.3d 428 (2003) ("Under 44-503[a], the principal and subcontractor are dual employers for purposes of the Workers Compensation Act."). To summarize, Trademark could be called an "employer," a "statutory employer," one of "dual employers," a contractor, or a principal. Ballin could be called an "employer," an "immediate employer," one of "dual employers," or a subcontractor.

Consequently, the KWCA's references to "employer" may be ambiguous where multiple potential "employers" are involved, as is the case here. Cf. *State v. Walker*, 280 Kan. 513, 523, 124 P.3d 39 (2005) ("Under these circumstances, we conclude that the construction of the statutory language is uncertain or ambiguous as applied to the facts of this case, where the severity level of the crime of conviction does not match the sentence to be imposed."); *Duarte,* 276 Kan. at 605 (despite the "maxim that the same word used repeatedly in a statutory provision or scheme must be given the same meaning throughout," not all references to "employer" in K.S.A. 44-504[d] carried the same meaning); *Johnson v. Kansas Emp. Sec. Bd. of Rev.*, 50 Kan. App. 2d 606, 611-12, 330 P.3d 1128 (2014) ("The ambiguity in K.S.A. 2013 Supp. 44-706[a] becomes apparent when applied to situations in which the claimant holds multiple jobs. . . . Since the statute is ambiguous when applied to this factual scenario, we may look beyond the statutory language to construe the legislature's intent."). Moreover, the Kansas Supreme Court has previously recognized the ambiguity of K.S.A. 44-532a—and the need to apply the rules of construction to it—when a question of subcontractor versus principal liability is at issue. *Silicone*, 248 Kan. at 560 ("The historical background, legislative history and language of the statute are inconclusive" as to whether K.S.A. 44-532a requires a worker to make a claim

against both a principal and a subcontractor before impleading the Fund).

We have little difficulty concluding that K.S.A. 44-503(a) applies here. Although Trademark contends that the terms "compensation" and "proceedings" in that subsection have very specific meanings within the context of a workers compensation case, a similar argument was rejected in *Duarte v. Debruce Grain, Inc.*:

> "Liberty asserts that the substitution of the principal for the employer pursuant to K.S.A. 44-503(a) is to occur only when workers compensation claims and proceedings are taken against the principal. . . . The plain language of the statute [K.S.A. 44-503(a)] provides for the substitution to be made 'in the application of the workers compensation act,' but does not limit proceedings taken against the principal to proceedings pursuant to the Act. A statute should not be read so as to add that which is not readily found in it. [Citation omitted.]" *Duarte*, 276 Kan. at 609.

While *Duarte* dealt with ancillary litigation "proceedings" regarding the subrogation of claims for compensation paid as part of the KWCA's "statutory web of reciprocal responsibilities," we see no reason its logic should not also apply to the Fund's attempt to recover benefits paid under K.S.A. 2020 Supp. 44-532a—another component of the KWCA's statutory "web." 276 Kan. at 609-10.

Thus, we find the term "employer" in K.S.A. 2020 Supp. 44-532a to be ambiguous as applied to the facts of the present case. To ascertain the Legislature's meaning, we must apply our canons of construction to assess whether "employer" in K.S.A. 2020 Supp. 44-532a(a) necessarily carries the same meaning as in subsection (b), as Trademark argues.

We begin by observing that, generally "[i]t is presumed that identical words used in different parts of the same statute are intended to have the same meaning throughout the act." *Berndt v. City of Ottawa*, 179 Kan. 749, 752, 298 P.2d 262 (1956). But in *Duarte*, the court construed multiple instances of the word "employer" in a different KWCA statute—K.S.A. 44-504(d)—to refer to different entities in order to prevent an "unreasonable result." *Duarte*, 276 Kan. at 607. In particular, the court reasoned that "[b]ecause DeBruce and LSI are dual employers under 44-503(a), there is no inconsistency in substituting either DeBruce or LSI for

the term employer in 44-504(d) as appropriate." 276 Kan. at 607. Thus, if the term "employer" is not necessarily given the same meaning even when used multiple times within the same subsection, it does not follow that it must also be given the same meaning within *different* subsections where such a construction would produce "unreasonable results."

The *Silicone* court also "questioned" the argument that "'employer' in K.S.A. 2020 Supp. 44-532a(a) and (b) must refer to the same entity." *Silicone*, 248 Kan. at 560. There, an injured worker attempted to obtain workers compensation benefits from her immediate employer, a subcontractor, but also named the subcontractor's principal and—believing the subcontractor to be insolvent or uninsured—impleaded the Fund. The principal was later dismissed "on the grounds that a claimant may not proceed against both the claimant's immediate employer and the claimant's statutory employer" under *Coble v. Williams*, 177 Kan. 743, 282 P.2d 425 (1955). 248 Kan. at 553. After an ALJ "found that attempts to include [the subcontractor] and recover payment appeared to be unsuccessful and that [the subcontractor] had no insurance," the ALJ "dismissed the Fund and indicated that [the worker] should pursue [the principal] under K.S.A. 44-503." 248 Kan. at 553. On review, the Director concluded the Fund was liable for the benefits to the worker under K.S.A. 44-532a. 248 Kan. at 554. The district court affirmed the Director's order following a petition for judicial review, concluding that an injured worker was not required to pursue a claim against a principal as a prerequisite to the Fund's liability under K.S.A. 44-532a.

On appeal, the court noted that the case "requires us to construe the statutes concerning liability of the Fund when an employer is either uninsured and insolvent or cannot be located and required to pay compensation." *Silicone*, 248 Kan. at 556. It then concluded that K.S.A. 44-532a provided an injured worker the "option" of obtaining relief from the Fund, rather than requiring the worker to exhaust claims against all possible employers first. 248 Kan. at 560. The court found "[t]he historical background, legislative history and language of" K.S.A. 44-532a to be "inconclusive" but reasoned that:

"The burden of exhausting remedies against all potential employers is not to be carried by the claimant alone. The claimant need only elect to assert a compensation claim against either the immediate or the statutory employer, as was done by [the worker]. If the employer from which compensation is sought is insolvent or cannot be located, the Fund may be impleaded. *If the Fund pays on a claim, it may assert a K.S.A. 44-532a(b) cause of action against either the insolvent or unlocated employer, or the solvent statutory employer (principal), or both*." (Emphasis added.) *Silicone*, 248 Kan. at 560.

The court then emphasized that "principal" could be substituted for "employer" in K.S.A. 44-532a by virtue of K.S.A. 44-503(a). 248 Kan. at 560. But the court disagreed with the Fund's then-stated position—which mirrors Trademark's current argument—that the term "employer" refers to the same entity in both subsection (a) and (b) of K.S.A. 44-532a when multiple potential employers are involved. 248 Kan. at 560-61. The court reasoned that, "[i]f the Fund is liable as a result of an immediate employer's failure to pay, it may assert a cause of action against the principal in a separate action under K.S.A. 44-532a(b)." 248 Kan. at 561. This point was even emphasized in *Silicone*'s syllabus. 248 Kan. at 551, Syl. ¶ 3.

Trademark suggests that *Silicone*'s commentary is dicta and should be disregarded on the basis of more recent caselaw that places greater focus on the plain language of the KWCA. As we have discussed, an appeal to the plain language of the statute provides no help here, as *Silicone* itself also concluded. *Silicone*, 248 Kan. at 560. Consequently, *Silicone*'s decision to apply the canons of construction—along with its actual application of those canons—remains sound. Moreover, while we agree that *Silicone*'s comments regarding K.S.A. 44-532a were dicta, it appears to us that they are more properly characterized as judicial dicta, rather than obiter dicta. The distinction is significant:

"Judicial dictum is an expression of opinion on a question directly involved in a particular case, argued by counsel, and deliberately ruled on by the court, although not necessary to a decision. While not binding as a decision, judicial dictum is entitled to greater weight than obiter dictum and should not be lightly disregarded." *Jamerson v. Heimgartner*, 304 Kan. 678, 686, 372 P.3d 1236 (2016).

The liability of the principal—or the Fund's ability to pursue an action to recover workers compensation payments from it—was not directly at issue in *Silicone*. But the Fund clearly argued about the interpretation of "employer" in K.S.A. 2020 Supp. 44-532a before the

court, prompting the court to opine on the subject. Thus, while *Silicone*'s pronouncement that the Fund "may assert a K.S.A. 44-532a(b) cause of action against either the insolvent or unlocated employer, or the solvent statutory employer (principal), or both" (and similar comments) was not binding precedent, we consider these remarks to be persuasive judicial dicta. *Silicone*, 248 Kan. at 560.

While adherence to judicial dictum is not squarely within the boundaries of the doctrine of stare decisis, it is at least adjacent to it. Cf. *In re Estate of Lentz*, 312 Kan. 490, 506, 476 P.3d 1151 (2020) (Luckert, C.J., concurring) ("The concept that a court consider jurisdiction as an antecedent to a merits determination has a practical impact in a system driven by stare decisis principles because even dicta or obiter dictum 'should not be lightly disregarded' by lower courts."). And as with stare decisis, we cannot ignore the Legislature's apparent acquiescence to the *Silicone* court's pronouncement over the past 30 years: despite several amendments to K.S.A. 44-532a and K.S.A. 44-503 since 1991, the Legislature has done nothing to repudiate *Silicone*'s interpretation. See *State v. Gross*, 308 Kan. 1, 15, 417 P.3d 1049 (2018) (finding legislative acquiescence when the Legislature amended other aspects of a statute in the intervening 27 years following an earlier court's interpretation of a statute but did not legislatively overrule that interpretation). This consideration is not undermined by the fact that *Silicone*'s comments on the subject were dicta. *State v. Cheever*, 306 Kan. 760, 783, 402 P.3d 1126 (2017) (recognizing the construction given to a statute in a prior case as dicta, but observing that the Legislature never expressed any disagreement with such dicta over 15 years), *abrogated on other grounds by State v. Boothby*, 310 Kan. 619, 448 P.3d 416 (2019).

We further conclude that *Silicone*'s construction of K.S.A. 44-532a comports with the policies of the KWCA in general. See K.S.A. 44-503(a) ("Where any person [in this section referred to as principal] undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person [in this section referred to as the contractor] for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would

have been liable to pay if that worker had been immediately employed by the principal[.]"). The interpretation of the statute promoted by Trademark, thus, appears to open the door to the "danger of an employer evading liability under the Act" by disincentivizing principals to ensure that their subcontractors are insured in the first place. *Duarte*, 276 Kan. at 608-09.

Consequently, we choose to affirm *Silicone*'s dicta concluding that "employer" in K.S.A. 44-532a(a) need not necessarily refer to the same "employer" in K.S.A. 44-532a(b) when multiple potential employers—specifically, a principal and a subcontractor, as set out in K.S.A. 44-503(a)—are involved. Thus, the fact that the ALJ made no finding that Trademark was insolvent or uninsured under K.S.A. 2016 Supp. 44-532a(a) is immaterial to the Fund's ability to seek recompense from Trademark under K.S.A. 2016 Supp. 44-532a(b), so long as the ALJ made those findings as to Ballin, Trademark's subcontractor—which it did. In other words, when the district court applied K.S.A. 2016 Supp. 44-532a(a) as to Ballin, it did not err in applying K.S.A. 2016 Supp. 44-532a(b) to Trademark. We thus affirm both the district court and the Court of Appeals panel on this issue.

The lower courts correctly concluded that K.S.A. 2016 Supp. 44-532a did not authorize the recovery of attorney fees by the Fund.

The Fund raises a single issue for our consideration: under the plain language of K.S.A. 2020 Supp. 44-532a(b), can it recover attorney fees as part of its cause of action against an employer? We conclude that it cannot.

Standard of Review

"Generally, a Kansas court may not award attorney fees unless authorized by statute or party agreement. Whether a court may award attorney fees is a question of law subject to an appellate court's unlimited review. If a court lawfully awards fees, the amount awarded is reviewed for abuse of discretion. [Citations omitted.]" *Rinehart v. Morton Bldgs., Inc.*, 297 Kan. 926, 942, 305 P.3d 622 (2013).

A statute authorizing the recovery of attorney fees must be "clear and specific." *Idbeis v. Wichita Surgical Specialists, P.A.*, 285 Kan. 485, 488, 173 P.3d 642 (2007). On the basis of this rule, "statutory provisions allowing fees are typically construed strictly." *Idbeis*, 285 Kan. at 489.

Discussion

The Fund claims that the plain language of the phrase "any amounts paid from the workers compensation fund pursuant to this section" includes attorney fees because the need for the Fund to hire counsel and incur such costs "is a direct and foreseeable consequence of the employer's failure to follow the law." Both the panel and the district court rejected this argument on the basis "that no statute or contractual provision allowed the recovery of attorney fees in this case." See *Schmidt,* 60 Kan. App. 2d at 219-21. We agree.

The plain language of K.S.A. 2020 Supp. 44-532a(b) makes no mention of fees or litigation costs, let alone attorney fees. Thus, it is not sufficiently "clear and specific" to permit the recovery of such fees. Further, a strict construction of the provision supports the panel's reasoning that the amounts recoverable in an action under K.S.A. 2020 Supp. 44-532a(b) are explicitly limited to those paid "pursuant to this section"—i.e., "an award of the compensation benefits, including medical compensation, to which such injured worker is entitled" as set forth in subsection (a). *Schmidt*, 60 Kan. App. 2d at 220. The Fund's only rejoinder is that K.S.A. 2020 Supp. 44-532a(b) "is plain and unambiguous"—an assertion that turns on its head the presumption that only a plain and unambiguous authorization of the recovery of attorney fees will *permit* such recovery. In other words, we agree that K.S.A. 2020 Supp. 44-532a(b) is plain and unambiguous on this issue—but only insofar as it makes no mention of attorney fees, thus precluding their recovery. The panel and the district court rightly rejected the Fund's attempt to recover them.

CONCLUSION

We affirm the decisions of the Court of Appeals panel and the district court on both questions presented.

* * *

STEGALL, J., concurring: This is a simple case resolved by the plain language of K.S.A. 44-503(a). No one disputes that Trademark is a principal under that section. No one disputes that this is an action "where compensation is claimed from or proceedings are taken against the principal." K.S.A. 44-503(a). Thus, any

reference to "employer" in "the application of the workers compensation act" "shall be substituted" with a reference to the principal. K.S.A. 44-503(a).

The purpose of this statutory substitution scheme is clear and straightforward. The Legislature intended that a principal "be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal." K.S.A. 44-503(a). And the easiest way to accomplish this is to "substitute" the word principal for the word "employer" whenever the recovery is being sought against the principal. That is precisely the circumstance presented by this case. There is no ambiguity in the statutory scheme.

Indeed, this is what we previously held in *Silicone*: "If the Workers Compensation Fund is liable for payment of an award under K.S.A. 44-532a(a) because an immediate employer is financially unable to pay or cannot be located, the Fund shall have a cause of action against the principal or statutory employer under K.S.A. 44-532a(b)." *Workers Comp. Fund v. Silicone Distrib., Inc.*, 248 Kan. 551, Syl. ¶ 3, 809 P.2d 1199 (1991). I see no need to treat this syllabus paragraph as dicta and would not do so.

In light of the plain language of the statutory scheme and our prior precedent on this very point, I concur with the outcome reached by the majority. Though I do not take such a circuitous path to arrive at this result.

MODIFIED OPINION[1]

No. 123,302

STATE OF KANSAS, *Appellee*, v. BRANDON T. EVANS, *Appellant*.

SYLLABUS BY THE COURT

1. ATTORNEY AND CLIENT—*Claim of Violation of Sixth Amendment Right to Effective Assistance of Counsel—Analyzed under* Strickland v. Washington—*Two-Part Test.* Claims alleging a violation of the Sixth Amendment right to effective assistance of counsel are analyzed under the well-established, two-part test established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, the defendant must demonstrate trial counsel's performance was deficient. To establish deficiency, the defendant must demonstrate counsel's representation fell below an objective standard of reasonableness when considering the totality of the circumstances. When scrutinizing counsel's performance, courts must afford a high level of deference and make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. If the defendant establishes counsel's deficient performance, the court determines whether there is a reasonable probability that but for counsel's deficient performance, the outcome of the trial would have been different. A reasonable probability is one sufficient to undermine confidence in the trial's outcome.

2. SAME—*Claim of Ineffective Assistance of Counsel—Appellate Review.* When a district court conducts an evidentiary hearing and makes findings of fact and conclusions of law in ruling on a claim of ineffective assistance of counsel, the appellate court reviews the district court's factual findings for substantial competent evidence and determines whether those findings support the district court's legal conclusions. Appellate courts do not reweigh evidence, pass on the credibility of witnesses, or resolve conflicts in the evidence. When evaluating the district court's legal conclusions, the appellate court applies a de novo review standard.

Appeal from Sedgwick District Court; ERIC WILLIAMS, judge. Original opinion filed February 25, 2022. Modified opinion filed March 18, 2022. Affirmed.

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

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[1]**REPORTER'S NOTE**: Opinion No. 123,302 was modified by the Supreme Court on March 18, 2022, in response to a joint motion for rehearing or modification.

Lance J. Gillett, 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

STANDRIDGE, J.: In 2018, a jury convicted Brandon T. Evans of first-degree murder, aggravated battery, and criminal possession of a weapon. He filed a posttrial motion alleging his trial counsel was ineffective for several reasons. The district court denied Evans' motion after a hearing. On appeal, Evans argues his convictions should be reversed, his sentence should be vacated, and he should be granted a new trial and a new pretrial immunity hearing because his trial counsel was ineffective by (1) coercing Evans and Evans' witnesses to change their testimony about the events leading up to the murder and (2) disregarding the firearm expert's testimony regarding the functionality of the victim's gun. But the record shows counsel did not disregard the expert's testimony or coerce Evans or his witnesses to change their testimony. We affirm.

FACTS

The State charged Evans with first-degree premeditated murder in the shooting death of Isaac J. Lewis, aggravated battery of A.G., and criminal possession of a weapon as a convicted felon. These charges stemmed from an incident that occurred at a private after-hours club in Wichita.

The night of the shooting, Evans, his brothers Justin Arrington and Kennell Evans, and Tanesha Thomas went to an after-hours club previously known as Daiquiris. Surveillance footage of the club's main entrance/exit shows the group arriving shortly after 1 a.m., getting patted down by club security, and being allowed to enter without issue. While there were few people at the club when the group arrived, it became packed and loud as the night progressed. Daiquiris had video cameras recording the club's main entrance/exit, but there were no video cameras inside the club.

The victim, Lewis, arrived at Daiquiris just a few minutes before 3 a.m. Surveillance footage of the club's entrance shows security screened Lewis and turned him away. He reappeared at the

door at 3:06 a.m. Lewis handed the guard something—the same guard that earlier turned him away—and the guard allowed Lewis to enter. About five minutes later, Lewis left Daiquiris through the same door he entered. The video then shows Evans running up behind Lewis and shooting Lewis in the back twice: once in the neck and once in the lower left back as Lewis fell forward. The first bullet exited Lewis' neck and hit another customer, A.G., in her upper left arm, splintering her humerus. The second bullet traveled through Lewis' liver and lodged in his heart. After Lewis fell to the ground, the video shows Evans firing another shot at Lewis before fleeing the scene on foot. That third shot hit the concrete next to Lewis, causing the bullet to fragment and leave minor abrasions on Lewis' abdomen.

Officer Joshua Rounkles responded to the shooting and helped another officer triage Lewis' wounds. As Officer Rounkles was treating Lewis, he discovered a loaded black Ruger LCP .380 caliber handgun on the ground underneath Lewis' buttocks. He also found two spent .40 caliber shell casings near Lewis. Officer Rounkles collected the gun and the casings and handed them to another nearby officer. Medical personnel pronounced Lewis dead at the scene. The coroner later determined the cause of Lewis' death was multiple gunshot wounds, and the manner of death was a homicide.

Meanwhile, Officer Aric St. Vrain chased Evans on foot after another customer identified him as the possible shooter and described what Evans was wearing. Officer Philip Berger was not on scene at the time of the shooting, but immediately after he arrived, he helped Officer St. Vrain chase Evans. Both officers saw that Evans had a gun in his hand as he was running away from them. After running a short distance away from the club, Evans disappeared behind a building but then reappeared to surrender himself to the officers. While arresting Evans, the officers noticed Evans no longer had a gun and began searching for it. Officer St. Vrain and another officer later climbed onto the roof of the building Evans disappeared behind and discovered a silver and black Ruger .40 caliber Smith & Wesson handgun.

Evans admitted to shooting Lewis but consistently maintained he did so in self-defense and in defense of his family members who were

present at Daiquiris that night. Evans' trial counsel, Quentin Pittman, pursued both theories. A week before trial, Pittman filed a motion for immunity from prosecution based on these theories. The motion alleged Lewis threatened to immediately harm Evans and Evans' family members, Lewis brandished a firearm while making these threats, Evans warned Lewis he would shoot Lewis if Lewis did not stop threatening them, Lewis said he would kill Evans and Evans' family, and Evans shot and killed Lewis in self-defense and in defense of his family. Evans claimed he should be immune from prosecution based on Kansas' stand-your-ground law because he sincerely believed deadly force was necessary to defend himself and his family and because a reasonable person in the same situation would have perceived deadly force was necessary.

The district court held a hearing on the motion. Evans took the stand and testified about his confrontation with Lewis inside Daiquiris on the night of the shooting—an exchange not caught on camera. Evans said he, his brothers, and Thomas arrived at the club around 1 a.m. A couple hours later, he was at the bar trying to buy a drink when Lewis approached him in "an aggressive manner." Lewis bumped into Evans a couple times at the bar to try and get Evans' attention. When Evans turned to face Lewis, Lewis pulled up his shirt to reveal a gun and told Evans he believed Evans had something to do with Lewis' cousin being shot. Lewis said he was going to kill Evans and Evans' family that night. Lewis then turned around and walked away.

Evans went to find his brothers. He told them they had to leave because Lewis had a gun. As he and his brothers were heading toward the main exit, Lewis confronted Evans again. Evans testified Lewis pulled out his gun, said he would kill Evans and "all [Evans'] friends," and then turned around and headed for the main exit, saying he was going to kill "that motherfucker outside." Evans explained that he texted his cousin earlier that night to come to Daiquiris to pick him up. Evans believed his cousin was outside in the parking lot waiting for him, and when Lewis said he was going to kill someone outside, Evans believed Lewis was talking about Evans' cousin. Evans testified he was not sure if Lewis still had the gun in his hand as he was leaving, but Evans quickly grabbed a gun off another unknown customer, followed Lewis to the main exit, and shot Lewis from behind.

On cross-examination, Evans admitted several key points. First, he said he did not attempt to get help from any of the security guards inside the club after Lewis threatened him the first time. He admitted he did not know if his cousin was outside or not—he only had received a text message before the shooting that his cousin was on his way to Daiquiris. Evans acknowledged several people were around when Lewis pulled out his gun, but no one tried wrestling the gun away from Lewis, and no one ran to security to alert them Lewis had a gun. Evans conceded Lewis did not fire his gun at any point. Finally, Evans admitted he intended to kill Lewis when he shot Lewis.

Evans did not call any additional witnesses at the hearing. In denying Evans' motion for immunity from prosecution, the district court found:

> "Looking at all the facts that we have before us, the victim was leaving the club when he was shot. His back was turned to the defendant, the victim was shot directly two times, and fragments hit him from the third shot upon—after he was already on the ground.
>
> "Weighing all the credibility of the witnesses, we have—other than the defendant's statement himself, we have no corroborating evidence as to any threats that were made to the defendant or his family. Other than, again, the defendant's statements.
>
> "There were never any reported threats made to the bar staff or law enforcement pursuant to Detective [Michelle] Palmer[, the lead detective,] who reviewed all discovery and reports in this matter.
>
> "Whether they were inside or outside security staff, no one reported that to the point that it made it in any reports from law enforcement at any time before or after these events.
>
> "The Court makes a finding, based upon all this information, again, the victim was leaving the premises, had his back turned, did not appear to be making any threats at the time that this occurred. The Court makes a finding that there was no imminent threat to the defendant, or anyone else at the time that the victim was shot in the back of the head.
>
> "Further, the victim and the defendant passed by where the money was taken, passed by where the bar was, there was security just steps—we don't know whether there was security inside to a point that he could have talked to someone but right outside that door there we know there was security, and he did not choose to tell anybody else or seek help at the time he acted and shot the victim at that point.
>
> "With that being said, again, there was no imminent threat to the defendant by the victim at this point in time."

The case proceeded to jury trial the following week. Relevant to this appeal, the State called a firearms expert, Roger Michels, to examine both Lewis' and Evans' guns. Michels performed a function test on Lewis' gun. He testified:

> "So as received, I had immense difficulty in actuating the slide, so the metal top portion, it was very difficult to pull back. Upon getting it to pull back, it would get stuck in that fully forward position and I would have to kind of hit the back of it to get it to close. There was also an issue with the trigger as received whereas when I pulled on the trigger, it was just going back. It wasn't engaging in anything. With that specific type of firearm, that trigger has a bar connected to it that actually connects to the hammer, which is what causes—which that hammer, when you pull the trigger, when you pull that trigger, that hammer is pulled rearwards and then is released forwards. When I was pulling the trigger that was not happening because that bar was stuck in the lower position and it wasn't engaging. . . .
>
> . . . .
>
> "We then continued and took the slide off of the firearm to try to diagnose the issue and upon—and all we could tell there's just a lot of dirt and material buildup. Upon putting that slide back on the firearm, it returned to functioning normal."

Michels also testified that he matched the .40 caliber shell casings found near Lewis' body to the gun Evans used.

During the defense's case in chief, Evans called his two brothers and a security guard from Daiquiris to testify on his behalf. Arrington testified he was at the bar with Evans and witnessed the altercation between Lewis and Evans. He overheard Lewis tell Evans that Evans was going to die that night just like "[Evans'] dead mother." Arrington said Evans blew it off. But then Arrington said he saw Lewis pull out a gun like he was going to point it at Evans, put the gun away, and then pull the gun out again. Arrington testified Lewis then walked away, and Evans went to get a security guard and look for their other brother. Arrington clarified he did not witness the shooting, and when he heard the gunshots, he ran out of the club. As he ran out the main exit, he saw Lewis lying on the floor outside the door.

Kennell Evans testified he was near the dance floor—approximately 7 to 8 feet away from the bar—when he saw the altercation between Evans and Lewis. He said he saw Lewis "rush[]" Evans with his firearm out. Kennell could see the firearm and he heard Lewis yell at Evans that he was going to kill Evans. Then Kennell saw Evans walk toward him. Kennell said Evans was "fearful" and "in a panic mode." Evans told Kennell they had to leave. When they headed for the main exit, Kennell said Lewis was blocking the door so they could not leave. He said Lewis had the gun in his hand as he was walking out of Daiquiris.

Evans took the stand in his defense. His trial testimony was the same as his testimony from the immunity hearing with a couple of exceptions.

The jury returned a guilty verdict on all three counts. The district court set the matter for sentencing and ordered a presentence investigation report. Before sentencing, Evans filed a series of pro se motions alleging Pittman was ineffective as trial counsel. The district court agreed to consider two of the claims: (1) Pittman was deficient by coercing Evans and Evans' witnesses to change their stories and by withholding exculpatory evidence about Lewis' gun misfiring, and (2) Pittman was allegedly deficient by failing to request a competency hearing for Evans. The court appointed Steven Wagle to represent Evans on his motion. Wagle filed a separate motion alleging ineffective assistance of counsel and incorporating Evans' pro se motions.

The district court held an evidentiary hearing to consider Evans' claim of constitutionally ineffective legal representation by trial counsel. See *State v. Reed*, 302 Kan. 227, 235-36, 352 P.3d 530 (2015) (recognizing district court's subject matter jurisdiction to consider such posttrial claims of ineffective assistance of counsel).

After hearing the evidence, the court held Pittman did not coerce Evans and other witnesses to change their stories or withhold exculpatory evidence about Lewis' gun misfiring. The court then sentenced Evans to life without the possibility of parole for 618 months as to the first-degree murder charge. It further ordered Evans to serve an additional 171 consecutive months on the remaining counts.

This is Evans' direct appeal. We have authority to hear his appeal under K.S.A. 2020 Supp. 22-3601(b)(4) because Evans was convicted of first-degree murder, an off-grid person felony. We also have jurisdiction under K.S.A. 2020 Supp. 22-3601(b)(3) because he was sentenced to life in prison without parole for a minimum of 618 months.

ANALYSIS

Appellant challenges only the denial of his posttrial motion alleging ineffective assistance of his trial counsel. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. *State v. Betancourt*, 301 Kan. 282, 306, 342 P.3d 916 (2015). In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme

Court established a two-part test to determine whether a defendant's right to effective assistance of counsel was violated. First, the defendant must demonstrate trial counsel's performance was deficient. 301 Kan. at 306. To establish deficiency, the defendant must demonstrate counsel's representation fell below an objective standard of reasonableness when considering the totality of the circumstances. When scrutinizing counsel's performance, courts must afford a high level of deference and make every effort to "'eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *State v. Cheatham*, 296 Kan. 417, 431-32, 292 P.3d 318 (2013) (quoting *Bledsoe v. State*, 283 Kan. 81, 90, 150 P.3d 868 [2007]).

If the defendant establishes counsel's deficient performance, the court determines whether there is a reasonable probability that but for counsel's deficient performance, the outcome of the trial would have been different. *Betancourt*, 301 Kan. at 306; *Cheatham*, 296 Kan. at 432. A reasonable probability is one sufficient to undermine confidence in the trial's outcome. 296 Kan. at 432.

We apply a bifurcated standard in reviewing the district court's decision on Evans' ineffective assistance of counsel claims following the evidentiary hearing. We review the district court's factual findings for substantial competent evidence and determine whether those findings support the district court's legal conclusions. "'Substantial competent evidence is that which possesses both relevance and substance and which furnishes a substantial basis in fact from which the issues can reasonably be resolved.'" *State v. Sanders*, 310 Kan. 279, 294, 445 P.3d 1144 (2019). Appellate courts do not "'reweigh evidence, pass on the credibility of witnesses, or resolve conflicts in the evidence.'" 310 Kan. at 294. When evaluating the district court's legal conclusions, we apply a de novo review standard. *State v. Harris*, 310 Kan. 1026, 1045, 453 P.3d 1172 (2019); *Betancourt*, 301 Kan. at 306.

Evans raises two interrelated ineffective assistance of counsel claims: (1) Pittman disregarded the firearm expert's testimony regarding the functionality of Lewis' gun; and (2) Pittman coerced Evans and Evans' witnesses to change their original stories that Lewis pointed the gun at Evans and pulled the trigger, but Lewis' gun misfired. The State maintains Evans failed to preserve his first claim. But because Evans

raises the expert testimony issue as part of his coercion argument, we find it properly preserved.

1. *Pittman did not coerce testimony*

We begin our discussion with Evans' coercion claim. At the evidentiary hearing, Evans first called Pittman to testify. Pittman explained when he first met Evans, Evans said that Lewis fired his gun twice inside the bar, causing Evans to chase after Lewis and shoot him. Based on the surveillance video evidence, Pittman said he knew this was not true. Pittman played the video footage for Evans, which showed Lewis did not fire first and no one inside the club reacted to gunfire until after Evans shot Lewis. Pittman told Evans if he testified at trial that Lewis fired his gun twice inside the bar, the jury would not believe him because the video evidence contradicted this version of events. Once Pittman confronted Evans with this video footage, Evans changed his story: Lewis came in, brandished his gun to Evans, and threatened Evans. This was the version Evans testified to at the immunity hearing and at trial.

Pittman also spoke with Evans' brothers. One brother said Lewis fired shots at Evans in the bar. Pittman advised the brother his account did not align with Evans' version of events and contradicted the video evidence. Pittman said he was not coercing Evans or the witnesses to lie or change their stories—he was encouraging them to tell the truth based on what the evidence showed.

On cross-examination, Pittman testified he would have been reluctant to put Evans on the stand to testify Lewis fired his gun twice inside the bar when he knew Evans' original story contradicted the video footage. But Pittman said if Evans had insisted Lewis fired his gun twice inside the bar, Pittman would have continued down that road. Pittman noted, however, that Evans changed his story when Pittman presented him with the contrary video evidence.

On redirect examination, Pittman admitted Evans told him Lewis' gun misfired. But Pittman explained Evans told him this in conjunction with Evans' original story that Lewis actually fired the gun two times.

Evans also testified. He denied he ever told Pittman that Lewis actually fired the gun two times. Evans testified the only story he gave Pittman was that Lewis pulled the trigger, but the gun did not fire, which is why Lewis turned around to leave the club. Evans claims

Pittman told him if he stuck to this story, the trial judge would not give him a self-defense instruction. Evans also testified his brothers signed affidavits stating Pittman insisted they change their stories, but those affidavits were not in his possession due to an issue with the mail.

At the end of the hearing, the district court rejected Evans' claim that Pittman provided constitutionally deficient performance based on coercion:

> "It's not coercion to tell the witnesses to tell the truth, and [the] Court makes that finding. The witnesse[s'] testimony or counsel's testimony today was when he met with those witnesses, that's what he told them. They need to tell the truth moving forward, and to which they did. Not changing the story because of the facts changing, they were changing the report to purport with the truth and what the evidence showed.
>
> "So the Court finds that these witnesses were not coerced. They were simply told to tell the truth, to which they did. The Court makes a finding that this interaction with witnesses was not ineffective assistance of counsel."

Within its decision, the court implicitly found Pittman's testimony more credible than Evans' testimony. Appellate courts do not reweigh evidence, reassess witness credibility, or resolve conflicting evidence. *Sanders*, 310 Kan. at 294.

Our review of the transcript of the evidentiary hearing on Evans' motion alleging Pittman provided ineffective assistance establishes the district court's findings are supported by substantial competent evidence. Specifically, Pittman testified (1) Evans initially told Pittman that Lewis actually fired his gun twice and, at some point, the gun misfired; (2) Pittman presented the video to Evans, which showed Lewis did not fire first and no one inside the club reacted to gunfire until after Evans shot Lewis; (3) Pittman encouraged Evans to tell the truth; and (4) Evans changed his story and testified Lewis brandished his gun and threatened Evans, causing Evans to shoot him. Based on the factual finding, supported by substantial competent evidence, that Pittman did not coerce testimony, we affirm the district court's legal conclusion that Pittman's performance was not deficient.

2. *Pittman did not disregard the firearm expert's testimony regarding non-functionality of the gun*

The State called a firearms expert, Roger Michels, to examine both Lewis' and Evans' guns. Michels testified the .380 gun recovered from

Lewis' body did not function when Michels initially examined it. Michels explained there were two problems with the .380 gun: (1) the trigger did not engage with the hammer, so it could not fire; and (2) the gun was dirty, causing the slide to stick in the open position when pulled back. After cleaning and reassembling the firearm, Michels said it functioned normally.

Evans claims Pittman provided deficient performance by disregarding Michels' testimony regarding the non-functionality of Lewis' gun. But Evans concedes Pittman specifically addressed Michels' testimony during closing argument:

> "[Defense counsel:] My client is confronted by Lewis. Lewis has a gun. Lewis has shown him the gun. This is seen by a security guard employed at the club. Lewis escalates the situation. Lewis isn't retreating. Lewis isn't running away. Lewis is going to the parking lot to make good on his threat. He's going to shoot [] Quinn and then he's going to get my client and the rest of his family. Before Lewis can do that, does Brandon shoot him? Of course he does, and under the circumstances, that shooting was justified. Because the harm, the danger, and the gun were all real and they were imminent and Brandon's actions were necessary.
>
> "*But we also heard this, right, Isaac didn't get a shot off. He could have taken him out right then and there. No, he couldn't; right? I don't know if you were paying attention to Mr. Michels titillating information that he gave us earlier this morning, but remember this, unbeknownst to Brandon, what? Isaac couldn't get a shot off; right? His gun wouldn't fire. Roger Michels had to take it apart, had to take the slide off, and put it back on. After he took care of that, it would shoot. It wouldn't shoot before. So the fact that Isaac Lewis didn't fire at my client, who knows, maybe he tried to and that gun wasn't fireable. You heard it from their witness, their expert from the KBI. It wouldn't shoot.*" (Emphasis added.)

Substantial competent evidence supports a finding that Pittman did not disregard Michels' testimony that the .380 gun was nonfunctional when first examined; rather, Pittman specifically presented Michels' testimony to the jury without overemphasizing it in a manner detrimental to the theories of self-defense. We find no deficiency in Pittman's performance on this claim.

Affirmed.

No. 123,570

STATE OF KANSAS, *Appellee*, v. NOAH J. GLEASON, *Appellant.*

(505 P.3d 753)

SYLLABUS BY THE COURT

1. CIVIL PROCEDURE—*Motion Under K.S.A. 60-260(b)(4) Not Procedure for Criminal Defendant to Set Aside Conviction or Sentence*. K.S.A. 2020 Supp. 60-260(b)(4), which allows a court to set aside a judgment as void, does not provide a procedure for criminal defendants to obtain postconviction relief from their conviction or sentence.

2. SAME—*Illegal Sentence under K.S.A. 2020 Supp. 22-3504.* A sentence is illegal under K.S.A. 2020 Supp. 22-3504 when (1) it is imposed by a court without jurisdiction; (2) it does not conform to the applicable statutory provisions, either in character or the term of punishment; or (3) it is ambiguous about the time and manner in which it is to be served.

3. JURISDICTION—*Existence of Jurisdiction—Appellate Review*. Whether jurisdiction exists is a question of law over which this court's review is unlimited.

4. CRIMINAL LAW—*Summary Denial of Motion to Correct Illegal Sentence—Appellate Review.* When a district court summarily denies a motion to correct an illegal sentence, an appellate court's review is unlimited because it has the same access to the motion, records, and files as the district court.

5. JURISDICTION—*Subject Matter Jurisdiction of District Courts Derived from Kansas Constitution and Kansas Statutes.* A district court's subject matter jurisdiction derives from the Kansas Constitution and Kansas statutes. Article 3 of the Kansas Constitution provides that the district courts shall have such jurisdiction in their respective districts as may be provided by law. In turn, K.S.A. 20-301 vests district courts with general original jurisdiction of all matters, both civil and criminal, unless otherwise provided by law. And K.S.A. 22-2601 gives district courts exclusive jurisdiction to try all cases of felony and other criminal cases arising under the statutes of the state of Kansas.

6. JURISDICTION—*Bar of Statute of Limitations an Affirmative Defense—Can Be Waived by Defendant*. The bar of a statute of limitations is not a jurisdictional bar—it is an affirmative defense that can be waived if not pled by the defendant.

Appeal from Jefferson District Court; GUNNAR A. SUNDBY, judge. Opinion filed March 18, 2022. Affirmed.

Gary L. Conwell, of Conwell Law, LLC, of Topeka, was on the brief for appellant, and *Noah J. Gleason*, appellant pro se, was on a supplemental brief.

Kristafer R. Ailslieger, deputy solicitor general, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

WALL, J.: Noah J. Gleason, who is serving a life sentence for first-degree felony murder, appeals the district court's denial of his motion to set aside a void judgment under K.S.A. 2020 Supp. 60-260(b)(4) and his motion to correct an illegal sentence under K.S.A. 2020 Supp. 22-3504. Gleason argues that his sentence is void and illegal because the State at first charged him with an offense outside the statute of limitations. Gleason believes this untimely filing deprived the district court of jurisdiction over all later proceedings.

Gleason's argument is not legally sound. First, his reliance on K.S.A. 2020 Supp. 60-260(b)(4) is misplaced. This civil statute permits a court to set aside a void judgment, but it does not allow a criminal defendant to collaterally attack a conviction or sentence. See *State v. Kingsley*, 299 Kan. 896, 899, 326 P.3d 1083 (2014). Second, Gleason's sentence is not illegal under K.S.A. 2020 Supp. 22-3504 because the district court had jurisdiction over the entire case. Although the statute of limitations had expired when the State initially charged Gleason with conspiracy to commit aggravated robbery, the statute of limitations is an affirmative defense—it does not deprive a court of jurisdiction. See *State v. Sitlington*, 291 Kan. 458, Syl. ¶ 2, 241 P.3d 1003 (2010). The State later amended its charges and Gleason was convicted of felony murder, which has no statute of limitations. See *State v. Garcia*, 285 Kan. 1, 21, 169 P.3d 1069 (2007). As a result, we affirm the denial of Gleason's motions.

FACTS AND PROCEDURAL BACKGROUND

There are two kinds of first-degree murder in Kansas. First, a person can commit the offense by killing someone intentionally and with premeditation. Second, a person can commit the offense by killing a person while committing, attempting to commit, or

fleeing from certain felonies the Legislature has designated as "inherently dangerous." See K.S.A. 2020 Supp. 21-5402. This second kind of first-degree murder is known as a felony murder.

A jury convicted Gleason of felony murder following a 1999 home invasion in rural Jefferson County during which the homeowner was shot and killed. We affirmed that conviction on direct appeal. See *State v. Gleason*, 277 Kan. 624, 625, 88 P.3d 218 (2004). The facts underlying Gleason's conviction are more fully set out in that decision, but those facts are not pertinent to the disposition of this appeal.

Since his conviction, Gleason has filed several postconviction actions in state and federal court, all without success. See *Gleason v. State*, No. 111,363, 2015 WL 4094247, at *1-2 (Kan. App. 2015) (unpublished opinion) (detailing Gleason's postconviction challenges). Gleason's most recent challenge—which is the subject of this appeal—consists of two motions filed in June 2019. One is a motion under K.S.A. 2020 Supp. 60-260 to set aside a void judgment. The other is a motion under K.S.A. 2020 Supp. 22-3504 to correct an illegal sentence.

Gleason's arguments in each motion were based on the timing of the murder and the State's filing of the initial and amended complaints. Law enforcement found the rural Jefferson County homeowner dead on his kitchen floor in October 1999. But it was not until two and a half years later, in April 2002, that Gleason and two others were arrested and charged in the case. The State at first charged Gleason with conspiracy to commit aggravated robbery. About a week later, the State amended that complaint to charge Gleason with felony murder and conspiracy to commit burglary, instead of aggravated robbery. About two weeks later, the State amended the complaint a second time to add a charge of intimidation of a witness. Although the record before us does not clearly establish why, only the count of felony murder was submitted to the jury.

According to Gleason, this timeline showed that his sentence was void and illegal because the district court had never obtained jurisdiction over his criminal case. Though Gleason never raised the issue at trial, his motions asserted that the two-year statute of

limitations applicable to a conspiracy-to-commit-aggravated-robbery charge had expired when the State filed the first complaint in April 2002. As a result, Gleason argued, all later proceedings—including the amended charge of felony murder—were void for lack of jurisdiction.

After the district court denied Gleason's motions, he appealed directly to our court. Jurisdiction is proper under K.S.A. 2020 Supp. 22-3601(b)(3) (appeal must be taken directly to Supreme Court when the maximum sentence of life imprisonment has been imposed).

ANALYSIS

On appeal, Gleason has raised seven issues across a brief prepared by his counsel and a brief that he prepared without the help of a lawyer. Those issues boil down to the following arguments. First, the original complaint charging Gleason with conspiracy to commit aggravated robbery was void because it was filed outside the two-year statute of limitations. Second, because the complaint was void, the district court lacked jurisdiction to ever try him, and the amended complaints never conferred jurisdiction. And third, because the district court lacked jurisdiction, his conviction should be reversed.

As we have noted, Gleason filed one of his motions under K.S.A. 2020 Supp. 60-260(b)(4), a civil statute that allows a court to set aside a judgment as void. But we have held that K.S.A. 60-260(b)(4) "'does not provide a procedure for a criminal defendant to obtain postconviction relief from his or her conviction or sentence,'" which is what Gleason seeks here. *Kingsley*, 299 Kan. at 899. As a result, the district court did not err by denying Gleason's motion to set aside a void judgment under that statute.

Gleason's other motion, which raised the same challenges to jurisdiction, was a motion under K.S.A. 2020 Supp. 22-3504 to correct an illegal sentence. A sentence is illegal under that statute when (1) it is imposed by a court without jurisdiction; (2) it does not conform to the applicable statutory provisions, either in character or the term of punishment; or (3) it is ambiguous about the time and manner in which it is to be served. K.S.A. 2020 Supp.

22-3504(c)(1). Gleason claims only that the district court lacked jurisdiction.

Whether jurisdiction exists is a question of law over which this court's review is unlimited. That means we need not defer to the district court's conclusions. *State v. Smith*, 304 Kan. 916, 919, 377 P.3d 414 (2016). Moreover, when a district court summarily denies a motion to correct an illegal sentence—as it did here—our review is unlimited because we have the same access to the motion, records, and files as the district court. *State v. Alford*, 308 Kan. 1336, 1338, 429 P.3d 197 (2018).

The district court correctly held that it had jurisdiction over Gleason's case. A district court's subject matter jurisdiction derives from "the Kansas Constitution and Kansas statutes." *In re Marriage of Williams*, 307 Kan. 960, 967-68, 417 P.3d 1033 (2018). Article 3 of the Kansas Constitution provides that "[t]he district courts shall have such jurisdiction in their respective districts as may be provided by law." Kan. Const., art. 3, § 6(b). From the earliest days of statehood, K.S.A. 20-301 (or a predecessor provision) has vested district courts with "general original jurisdiction of all matters, both civil and criminal, unless otherwise provided by law." See *State v. Dunn*, 304 Kan. 773, 789, 375 P.3d 332 (2016). And K.S.A. 22-2601 has given district courts "exclusive jurisdiction to try all cases of felony and other criminal cases arising under the statutes of the state of Kansas." See 304 Kan. at 789-90 (recognizing this statutory provision or predecessor provision has been effective since 1868). Based on this authority, the district court had jurisdiction over the State's prosecution of Gleason.

Although Gleason is correct that the original complaint charged a crime outside the statute of limitations, this fact did not deprive the district court of jurisdiction over the proceedings. The bar of a statute of limitations is not a jurisdictional bar—it is "an affirmative defense that can be waived" if not pled by the defendant. *Sitlington*, 291 Kan. 458, Syl. ¶ 2; see *State v. Valdiviezo-Martinez*, 313 Kan. 614, 624, 486 P.3d 1256 (2021) (precedent establishes "the statute of limitations is not jurisdictional"). Gleason waived the statute of limitations defense by failing to raise it at trial. *Sitlington*, 291 Kan. at 463. Even if he had raised

the defense at trial, the district court retained jurisdiction because the State amended the complaint to charge first-degree felony murder, which has no statute of limitations. See K.S.A. 2020 Supp. 21-5107(a) (providing that a prosecution for murder may be commenced at any time). The jury convicted Gleason of that crime, not the crime the State first charged outside the statute of limitations period.

Gleason has suggested that a "void" complaint cannot be amended, and that all later proceedings are rendered void. But he provides no authority for that assertion. Because the statute of limitations is not a jurisdictional bar, the complaint was never "void" and Gleason's sentence is not illegal under K.S.A. 2020 Supp. 22-3504.

The judgment of the district court denying Gleason's motions is affirmed.

No. 114,395

THOMAS J. DRENNAN JR., *Appellant,* v. STATE OF KANSAS, *Appellee.*

SYLLABUS BY THE COURT

CRIMINAL LAW—Alleyne v. United States *a Substantive Change in Law--Not Extension of* Apprendi. *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), was a substantive change in the law, not merely an extension of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

Appeal from Sedgwick District Court; JAMES R. FLEETWOOD, judge. Opinion filed March 25, 2022. Affirmed.

Wendie C. Miller, of Kechi, and *Roger L. Falk*, of Law Office of Roger L. Falk, P.A., of Wichita, were on the briefs for appellant.

Matt J. Maloney, assistant district attorney, *Lesley A. Isherwood*, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, were on the briefs for appellee.

The opinion of the court was delivered by

STEGALL, J.: In 2003, a jury convicted Thomas J. Drennan Jr. of the first-degree murder of his girlfriend. The trial court sentenced Drennan to a hard 50 life sentence, and we affirmed both Drennan's conviction and sentence in 2004. *State v. Drennan*, 278 Kan. 704, 101 P.3d 1218 (2004). In the years since, Drennan has filed multiple collateral attacks on his sentence and conviction. Two of those attacks—Drennan's third K.S.A. 60-1507 motion and his K.S.A. 22-3504 motion—are the subject of this action. In those motions, Drennan alleges that his hard 50 sentence is both unconstitutional and illegal, and must be set aside. His 60-1507 motion argues that his sentence was unconstitutional when it was pronounced under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and that this court's failure to subsequently correct his sentence violates K.S.A. 2020 Supp. 21-6628(c) (formerly K.S.A. 21-4639). For similar reasons he also claims his sentence is illegal. But because Drennan's 60-1507 motion is untimely and successive—and his sentence is not illegal—we affirm the district court's denial of each motion.

FACTS

On the morning of August 19, 2002, Drennan strangled his girlfriend Shelbree Wilson to death with an electrical fan cord inside of her home. The details of the crime are recited at length in our earlier decision affirming Drennan's conviction. *Drennan*, 278 Kan. at 708-11. As the facts are not relevant to the instant action, they are not repeated here.

In 2005, Drennan filed his first 60-1507 motion alleging ineffective assistance of counsel. That motion was denied. *Drennan v. State*, No. 102,090, 2010 WL 4393915 (Kan. App. 2010) (unpublished opinion). In 2011, Drennan filed a second 60-1507 motion alleging ineffective assistance of counsel in pursuing his first 60-1507 motion. This motion was also denied. *Drennan v. State*, 108,756, 2013 WL 6726181 (Kan. App. 2013) (unpublished opinion). Drennan's petition for review from the denial of his second motion was likewise denied. *Drennan v. State*, 301 Kan. 1045 (2015).

While Drennan's petition for review was pending, he filed a third 60-1507 motion, proceeding pro se, alleging that his sentence was unconstitutional and illegal. In addition, he filed a separate 22-3504 motion to correct an illegal sentence. The district court denied both Drennan's 60-1507 motion and his 22-3504 motion. Drennan appealed. See *State v. Pennington*, 288 Kan. 599, 205 P.3d 741 (2009) (jurisdiction over motion to correct illegal sentence appeal lies with court that had jurisdiction to hear original appeal).

DISCUSSION

The issues in this case concern questions of statutory interpretation and constitutional law, all of which are subject to unlimited review. *State v. Appleby*, 313 Kan. 352, 354, 485 P.3d 1148 (2021). Drennan has presented two distinct challenges to his sentence using two procedural mechanisms: (1) proceeding under K.S.A. 60-1507, he claims his sentence is unconstitutional because, according to Drennan, his hard 50 sentence was unconstitutional when pronounced based on *Apprendi*; and (2) proceeding under K.S.A. 22-3504, he claims his sentence is illegal because, assuming his sentence was unconstitutional under *Apprendi*, it is now in violation of K.S.A. 2020 Supp. 21-6628(c)

(formerly K.S.A. 21-4639). The district court ruled that Drennan's motions were procedurally barred as untimely and successive.

K.S.A. 60-1507 grants a court jurisdiction to consider a collateral attack on an unconstitutional sentence. *Appleby*, 313 Kan. at 356. A movant must typically file this motion within the first year following the conclusion of a direct appeal, and successive motions are not generally permitted. Limited exceptions apply if the movant can demonstrate exceptional circumstances or if the court finds it necessary to lift the procedural bar to prevent manifest injustice. K.S.A. 2020 Supp. 60-1507(c), (f); 313 Kan. at 356-57.

Drennan filed his third 60-1507 motion more than nine years after the conclusion of his final appeal and after he had filed two previous 60-1507 motions. He first claimed that his motion was timely because he filed his third motion while his second motion was pending before this court on a petition for review. However, as the Court of Appeals explained when denying Drennan's second motion as untimely, the statute's plain language does not allow an extension of time for a "collateral attack of a collateral attack." *Drennan*, 2013 WL 6726181, at *5.

Drennan cites to *Rowell v. State*, 60 Kan. App. 2d 235, 490 P.3d 78 (2021), to argue this particular type of collateral attack is an exception. In *Rowell*, the Court of Appeals allowed for an extension of the one-year time limitation on a second 60-1507 motion to permit the defendant to challenge the effectiveness of his counsel for his first 60-1507 motion. 60 Kan. App. 2d at 237-41. However, *Rowell* is factually inapplicable, given that Drennan's third 60-1507 motion attacks a wholly unique issue (unconstitutional sentence) having nothing to do with his second 60-1507 motion (ineffective assistance of counsel).

Alternatively, Drennan argues that we should allow his untimely third motion to avoid a manifest injustice. But we have already addressed this issue in *Kirtdoll v. State*, 306 Kan. 335, 341, 393 P.3d 1053 (2017). "[F]or 60-1507 motions to be considered hereafter, *Alleyne*'s prospective-only change in the law cannot provide the exceptional circumstances that would justify a successive 60-1507 motion or the manifest injustice necessary to excuse the untimeliness of a 60-1507 motion." *Appleby*, 313 Kan. at 357 (quoting *Kirtdoll*, 306 Kan. at 341).

Finally, Drennan claims that because he filed his 60-1507 motion pro se, we should interpret it by its substance and not its form. See *State*

v. Coleman, 312 Kan. 114, 120, 472 P.3d 85 (2020). In doing so, Drennan argues that we should construe his motion as one under K.S.A. 2020 Supp. 22-3504(a), which, by its own terms, may be filed at "any time." But Drennan also filed a motion under K.S.A. 22-3504, and we reach the merits of that motion below. Whether his 60-1507 motion ought to be construed as one under K.S.A. 22-3504 is therefore a moot question. Accordingly, we affirm the district court's denial of Drennan's 60-1507 motion for being untimely and successive.

A motion to correct an illegal sentence filed under K.S.A. 22-3504 can be heard at any time, so we will consider the merits of Drennan's illegal sentence claim. K.S.A. 2020 Supp. 22-3504(a). The legality of a sentence is determined at the time it is pronounced. *State v. Murdock*, 309 Kan. 585, Syl., 439 P.3d 307 (2019). "Illegal sentence" means a sentence that is:

"Imposed by a court without jurisdiction; that does not conform to the applicable statutory provision, either in character or punishment; or that is ambiguous with respect to the time and manner in which it is to be served at the time it is pronounced. *A sentence is not an 'illegal sentence' because of a change in the law that occurs after the sentence is pronounced*." (Emphasis added.) K.S.A. 2020 Supp. 22-3504(c)(1).

Drennan argues that his hard 50 sentence is illegal and has been since it was pronounced in 2003 under *Apprendi*, *Alleyne*, and *Soto*. See *Apprendi*, 530 U.S. 466; *Alleyne v. United States*, 570 U.S. 99, 116-17, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013); *State v. Soto*, 299 Kan. 102, Syl. ¶ 9, 322 P.3d 334 (2014). Drennan reasons that his sentence was unconstitutional when pronounced and must therefore be modified under K.S.A. 2020 Supp. 21-6628(c) (formerly K.S.A. 21-4639). If it is not modified, Drennan reasons, it must therefore be illegal.

We have recently summarized the caselaw that serves as the basis for Drennan's argument:

"*Coleman* began with a discussion of *Apprendi*, 530 U.S. 466. In *Apprendi*, the United States Supreme Court held that any fact other than the existence of a prior conviction 'that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' 530 U.S. at 490. That holding applied explicitly only to the determination of statutory *maximum* sentences and, that same year, this court declined to extend the *Apprendi* rule to findings made by a district court judge before imposing a mandatory minimum . . . . See *State v. Conley*, 270 Kan. 18, 11 P.3d 1147 (2000) (relying on *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 [1986]).

"Two years later, the United States Supreme Court walked the line between *Apprendi* and *McMillan* by characterizing a judge's finding that a defendant possessed, brandished, or discharged a firearm during the commission of an offense as a judicial sentencing factor rather than an element of the crime. *Harris v. United States*, 536 U.S. 545, 556, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002). And that year, the Supreme Court held unconstitutional Arizona's capital sentencing statutes that allowed a judge to find and balance mitigating circumstances in determining whether to impose a death sentence. *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

"Ten years later, the United States Supreme Court overruled *Harris* in *Alleyne*. The Court found 'no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum.' *Alleyne*, 570 U.S. at 116. Thus, the Court held that any fact that increases the minimum sentence must 'be submitted to the jury and found beyond a reasonable doubt.' 570 U.S. at 116.

"This court extended *Alleyne* to Kansas' hard 50 sentencing statutes (hard 40 for crimes committed before July 1, 1999) in *Soto*, 299 Kan. at 122-24. We later held the rule of law declared in *Alleyne* cannot be applied retroactively to invalidate a sentence that was final before the date of the *Alleyne* decision. *Kirtdoll v. State*, 306 Kan. 335, Syl. ¶ 1, 393 P.3d 1053 (2017)." *State v. Trotter*, 313 Kan. 365, 367-68, 485 P.3d 649 (2021).

Drennan tries to distinguish his argument from our *Kirtdoll* precedent by arguing that *Alleyne* is merely an extension of *Apprendi*, rendering his hard 50 sentence illegal when pronounced. This is not the law. Chief Justice Luckert recently wrote separately to expressly reject this argument, and we adopted that language in our recent decision *State v. Bedford*, 314 Kan. 596, 599-600, 502 P.3d 107 (2022).

"[Defendant] makes an argument that could avoid or change the *Kirtdoll* holding, however. He contends his request for relief is based not on *Alleyne* but on *Apprendi*, which the United States Supreme Court decided before he was sentenced. He asserts we need not apply *Alleyne* retroactively to provide him relief.

"His argument requires a conclusion that *Alleyne* was a mere extension of *Apprendi*. But, as discussed in *Coleman*, it was not. See *Coleman*, 312 Kan. at 117-19. The United States Supreme Court itself, after deciding *Apprendi*, affirmed a sentence that imposed a mandatory minimum based on judicial fact-finding—exactly the circumstance here. *Harris v. United States*, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002). *Harris* remained the law until the Court overturned it in *Alleyne*. See *Alleyne*, 570 U.S. at 116. Had *Harris* merely been an extension of *Apprendi*, the Court could have simply distinguished it in *Alleyne*. Instead, it overruled the holding and thus changed the law. [Defendant's] argument is thus unpersuasive." *Appleby*, 313 Kan. at 363-64 (Luckert, C.J., concurring).

We agree. Drennan's argument that *Alleyne* simply extended *Apprendi* overlooks the fact that *Alleyne* not only extended *Apprendi*, but expressly overruled post-*Apprendi* contrary precedent in doing so.

Given this, Drennan's sentence was not unconstitutional when pronounced. In *Alleyne*, the United States Supreme Court changed the law after Drennan had been sentenced.

Moreover, our caselaw makes it clear that K.S.A. 2020 Supp. 21-6628(c) does not apply to sentences which were lawful under *Apprendi* but which may violate the subsequent change in law announced in *Alleyne*. As we explained in *Coleman*:

> "[K.S.A. 2019 Supp. 21-6628(c)] is a fail-safe provision. By its clear and unequivocal language it applies only when the term of imprisonment or the statute authorizing the term of imprisonment are found to be unconstitutional. Neither circumstance has occurred.
>
> "The statute under which the district court in Coleman's case found the existence of aggravating factors necessary to impose a hard 40 life sentence, K.S.A. 21-4635, was not a statute authorizing his hard 40 life sentence. Instead, it was part of the procedural framework by which the enhanced sentence was determined. His hard 40 life sentence was authorized by virtue of his commission of premeditated first-degree murder, an offense qualifying for such sentence under Kansas law.
>
> "And regarding Coleman's term of imprisonment itself, *Kansas' hard 40 and hard 50 sentences have never been determined to be categorically unconstitutional.* This court continues to uphold such sentences in appropriate cases. And such sentences continue to be imposed in qualifying cases in Kansas. [Citations omitted.]" (Emphasis added.) 312 Kan. at 124.

In other words, "'a sentence imposed in violation of *Alleyne* does not fall within the definition of an "illegal sentence" that may be addressed by K.S.A. 22-3504.'" *Appleby*, 313 Kan. at 361 (Luckert, C.J., concurring) (quoting *Coleman*, 312 Kan. at 120). We continue to uphold *Coleman* and reject arguments that this analysis disregards the plain language of K.S.A. 2020 Supp. 21-6628(c). See *Trotter*, 313 Kan. at 370-71; *State v. Johnson*, 313 Kan. 339, 344-45, 486 P.3d 544 (2021); *Appleby*, 313 Kan. at 357-58; *State v. Hill*, 313 Kan. 1010, 1017, 492 P.3d 1190 (2021). Accordingly, we affirm the district court's denial of Drennan's motion to correct an illegal sentence under 22-3504.

Affirmed.

No. 122,565

In the Matter of F. WILLIAM CULLINS, District Judge, *Respondent*.

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ORDER OF FULL REINSTATEMENT OF JUDICIAL DUTIES

JUDGES—*Disciplinary Proceeding—Order of Full Reinstatement.*

On February 26, 2021, the court suspended F. William Cullins from his judicial duties in the state of Kansas for one year in accordance with Supreme Court Rule 620(f) (2021 Kan. S. Ct. R. at 536). *In re Cullins*, 312 Kan. 798, 481 P.3d 774 (2021).

On June 14, 2021, the court conditionally stayed the suspension and restored Judge Cullins' judicial duties for the remainder of the suspension period as long as Judge Cullins complied with his plan for training and counseling (the Plan). The court further ordered Allyson Christman, the then Director of Personnel and now Chief Human Resource Officer, in the Office of Judicial Administration, to monitor Judge Cullins' compliance with the Plan. Finally, the court ordered that Judge Cullins would remain subject to the terms and conditions of the Plan until the court formally discharged him upon his demonstration of his successful compliance with the Plan's terms in a motion to lift the suspension. *In re Cullins*, 313 Kan. 658, 487 P.3d 374 (2021).

Judge Cullins now moves the court to lift the suspension and formally discharge him from the terms of the Plan. In support, Judge Cullins submitted his and Christman's declarations of his successful completion of the terms of the Plan. No one voiced an objection.

The court has considered and grants Judge Cullins' motion to lift the suspension and fully and unconditionally discharges Judge Cullins from the terms and conditions of the Plan.

The court further directs that this order be published in the official Kansas Reports.

Dated this 31st day of March 2022.